Nos. S168047/S168066/S168078

In The

Supreme Court of the State of California

KAREN L. STRAUSS, et al., Petitioners

v.

MARK B. HORTON, et al., State Registrar of Vital Statistics, etc.,
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, et al., State Registrar of Vital Statistics, etc.,
Respondents;
DENNIS HOLLINGSWORTH, et al., Interveners.

BRIEF OF *AMICI CURIAE* JOHN EMMANUEL DOMINE, BRADLEY ERIC AOUIZERAT, BETSY JO LEVINE, AND LISA LYNN BRAND IN SUPPORT OF PETITIONERS

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, the Law Offices of Stephan C. Volker, representing John Emmanuel Domine, Bradley Eric Aouizerat, Betsy Jo Levine and Lisa Lynn Brand (hereinafter "Amici"), requests leave to file the attached Amici Curiae Brief in Support of Petitioners on January 15, 2009, prior to the deadline for submission of such briefs. Amici seek leave to address the questions of whether Proposition 8: (1) violates the California Constitution's equal protection clause, (2) is an improperly enacted revision of the Constitution, (3) violates the separation of powers doctrine under the California Constitution, and (4) if Proposition 8 is deemed constitutional, it can be applied retroactively.

Amici are vitally interested in, and would benefit from, this Court's decision that Proposition 8 is unconstitutional and therefore invalid. Unless Proposition 8 is prohibited from implementation, Amici will be denied the fundamental inalienable rights to marriage and equal protection under the law.

Amici John Emmanuel Domine and Bradley Eric Aouizerat are residents of the State of California, and have been married in the state on three occasions. Mr. Domine and Mr. Aouizerat were first married on August 1, 2003, then again on February 13, 2004, and again on November 4, 2008. They have been in a committed, loving relationship for 11 years.

If Proposition 8 is not overturned, Mr. Domine and Mr. Aouizerat will be denied their inalienable, fundamental right to marriage. Furthermore, the marriage that they validly entered into on November 4, 2008 may be voided, depriving them of their due process rights and substantially impairing their marriage contract.

Betsy Jo Levine and Lisa Lynn Brand are residents of the State of California and were legally married on November 4, 2008. Ms. Levine and Ms. Brand have been in a committed relationship for over 20 years and have resided together since August 1988. If Proposition 8 is not overturned, Ms. Levine and Ms. Brand will be denied their inalienable, fundamental right to marriage. Furthermore, the marriage that they validly entered into on November 4, 2008 may be voided, depriving them of their due process rights and substantially impairing their marriage contract.

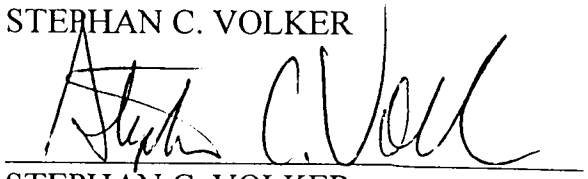
Proposition 8, if enacted, will have a wide range of short- and long-term effects on California citizens. Amici seek this Court's clarification that Proposition 8 is unconstitutional, and therefore cannot be enacted. Because of their personal commitment as gay and lesbian couples to the hallowed vows of marriage that Proposition 8 rends asunder, Amici are uniquely qualified to assist the Court in addressing the validity of Proposition 8 and its impacts on gay and lesbian citizens of California.

Counsel for Amici is familiar with the questions involved in the case and the scope of their presentation. Counsel for Amici believes that additional arguments are needed concerning the equal protection of same-sex couples, the designation of Proposition 8 as a revision rather than an amendment, the violation of the separation of powers doctrine of the California Constitution, and the effects of Proposition 8 on legally married same-sex couples. Accordingly, the undersigned respectfully requests leave to file the attached Amici Curiae Brief.

Dated: January 15, 2009

Respectfully submitted,

LAW OFFICES OF
STEPHAN C. VOLKER



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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In deciding to address the constitutionality of Proposition 8, this Court agreed to address the issues of whether Proposition 8 (1) constitutes an impermissible revision of the Constitution, (2) violates the separation of powers doctrine, and (3) if found constitutional, operates retroactively to strip marital rights from same-sex couples already legally married in California. Amici Curiae John Emmanuel Domine, Bradley Eric Aouzerat, Betsy Jo Levine and Lisa Lynn Brand (hereinafter "Amici") respectfully request that this Court also address the central – but largely ignored – issue of equal protection.

Amici demonstrate below that Proposition 8 is an invalid revision, violates the separation of powers doctrine, should not apply retroactively and most importantly, violates the equal protection clause.

Proposition 8 clearly violates the equal protection clause. The language of Proposition 8 states that "only marriage between a man and a woman is valid or recognized in California." Although stated in the affirmative, Proposition 8 takes away the fundamental right of same-sex couples to marry. This Court has previously determined that sexual orientation is a suspect class, and that the right to marry is fundamental and inalienable. By denying same-sex couples the right to marry, Proposition 8

denies gays and lesbians equal protection under the law. This denial of equal protection is a clear-cut violation of the California Constitution.

Proposition 8 is an invalid revision of the Constitution. To be considered a revision, a constitutional enactment must substantially alter the purpose of the Constitution either quantitatively or qualitatively. Proposition 8 substantially alters the basic governmental plan. It denies equal protection, a fundamental right under the basic governmental plan. Proposition 8 denies citizens of California the fundamental right to marry, another element of the basic governmental plan. Finally, Proposition 8 also limits the role of the Judiciary, and the authority held by the Judiciary is central to the basic governmental plan. Because of the substantial effects Proposition 8 has on the basic governmental plan, it is qualitatively a revision, not an amendment.

Proposition 8 violates the separation of powers doctrine, which plays a central role in the California Constitution, and therefore must be declared unconstitutional. By attempting to improperly revise the Constitution, Proposition 8 also attempts to circumvent the guarantee of equal protection by avoiding the test of strict scrutiny. Furthermore, Proposition 8 attempts to re-adjudicate the issues that were already decided in *In re Marriage Cases* (2008) 43 Cal.4th 757 (hereinafter "*Marriage Cases*"), which in turn

violates the doctrine of *res judicata*. Lastly, Proposition 8 violates the separation of powers doctrine by abrogating the core function of both the Judiciary and the Legislature.

Proposition 8, even if determined to be constitutional, should not affect the rights of same-sex couples already legally married in California prior its enactment. Supporters of Proposition 8 believe that the initiative should take effect retroactively. In order for a law to apply retroactively there must clear and express language indicating the desire to do so. In the instant case, nothing in the initiative or the voting materials indicates a retroactive application of Proposition 8. To apply Proposition 8 retroactively without a clear voter intention to do so would ignore the will of the voters, who enacted the legislation as a prospective measure. Additionally, retroactive application of Proposition 8 would violate both the due process clause by denying same-sex couples the property rights they have already gained from marriage, and the contracts clause by nullifying a valid marital contract entered into legally, which the parties do not wish to nullify. Thus, Proposition 8 cannot be applied retroactively.

II. STATEMENT OF FACTS

Amici adopt and incorporate the Statement of Procedural History submitted by the Attorney General in his Answer Brief. Attorney General's

Answer Brief in Response to Petition for Extraordinary Relief, December 19, 2008, pp. 6 - 9 (hereinafter "AG Answer Brief").

III. ARGUMENT

A. PROPOSITION 8 SHOULD BE INVALIDATED BECAUSE IT DENIES FUNDAMENTAL RIGHTS TO A SUSPECT CLASS WITHOUT A COMPELLING STATE INTEREST.

1. The Equal Protection Clause Is Central to the Purpose of the California Constitution and the Initiative Process Cannot Be Used to Circumvent the Guarantees of Equal Protection.

The California Constitution specifically guarantees that "[a]ll people are by nature free" and "may not be . . . denied equal protection of the laws." Cal. Const., Art I, §§ 1, 7. These guarantees are central to the constitutional framework in California. All statutory enactments, whether enacted by the legislature or by the will of the people, are subject to the equal protection clause. *Marriage Cases, supra,* 43 Cal.4th at 852. Equal protection is an integral part of our Constitution and "'the central aim of our entire judicial system.'" *In re Sade C.* (1996) 13 Cal.4th 952, 966, quoting *Griffin v. Illinois* (1956) 351 U.S. 12, 17.

The purpose of the California Declaration of Rights, which includes the equal protection clause, "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be

applied by the courts." *Id.*, quoting *West Virginia State Bd. Of Education v. Barnette* (1943) 319 U.S. 624, 638.

This Court's statements regarding the purpose of the equal protection clause make it apparent that equal protection cannot be ignored, even when the will of the majority is to enact a law that violates equal protection. In that case, the courts must enforce the equal protection rights of the impacted group despite any contrary purpose of the proposed law. Therefore, although the supporters of Proposition 8 will argue that by approving the initiative the will of the people is evidently in favor of the Proposition, the courts must nonetheless apply the equal protection clause to the proposed Proposition to assure its conformance to this constitutional requirement.

The people of the State of California have held equal protection in the highest regard since the inception of the Constitution, and therefore, a single purported amendment or revision to the Constitution cannot act as a barrier to an ideal as essential to the framework of the State constitutional system as equal protection.

2. The California Constitution Protects a Number of Rights That Are So Important to Individual Liberties That These Rights Are Deemed Inalienable.

Article I section 1 of the California Constitution affirms that all people have inherent and inalienable rights that cannot be rightfully taken

from them. See *Ex Parte Newman* (1858) 9 Cal. 502, 511. These rights include, but are not limited to "defending life and liberty, [and] acquiring, possessing, and protecting property . . . happiness, and privacy." Cal. Const., Art. I § 1. These inalienable rights were not created by the Constitution, but rather, existed prior to its creation; Article I section 1 helped define and protect them. *See Ex Parte Newman, supra,* 9 Cal. at 611 (holding that the formation of laws requires individuals to give up some rights that they previously enjoyed, and guarantees those same individuals other rights which they also previously enjoyed); *Ex Parte Quarg* (1906) 149 Cal. 79 (noting that individuals have certain rights even before they enter into society and only those rights that are essential to the exercise of police power can be taken away; the rest are retained as individual liberties); *Meachum v. Fano* (1976) 427 U.S. 215 (noting that law "is not the source of liberty" but rather, that liberty, like other inalienable rights, was enjoyed by individuals prior to the creation of law.)

The rights that are deemed inalienable under the Constitution are deemed so because these rights, unlike those surrendered when entering a society or an organization, cannot be taken away from the individual for the good of the people. *Ex Parte Newman, supra*, 9 Cal. at 511. These rights are so important to protecting the individual that they are deemed

inalienable. In fact, the preamble of the Constitution declares the purpose of the Constitution to be "to secure and perpetuate" the clauses enacted in the Constitution, meaning that the purpose of the Constitution is to protect those inalienable rights outlined in Article I section 1. Cal. Const., Preamble.

3. Over Time the Equal Protection Doctrine Has Been Expanded to Include the Protection of Groups or Liberties Previously Not Included Due to the Changing Nature of Society.

"[H]istory alone is not invariably an appropriate guide for determining the meaning and scope" of the "fundamental constitutional rights embodied in the California Constitution." *Marriage Cases, supra*, 43 Cal.4th at 781. The courts' interpretation of what constitutes a fundamental right has matured as our society has evolved.

Today's understanding of what fundamental rights are protected, and who can invoke the power of the judiciary to protect them, includes individuals and rights not previously considered. In *Perez v. Sharp* (1948) 32 Cal.2d 711, this Court recognized the fundamental right to marry and declared that the ban on interracial marriage violated that right. In *Griswold v. Connecticut* (1965) 381 U.S. 749 the Supreme Court held that the right to contraceptives was a fundamental liberty and could not be denied. Societal views on many controversial issues have advanced over

time, and the law must be updated to reflect those advances.

History has shown that neither the law nor the will of the people is static. For example, although the rights to life, liberty, and happiness were established by the United States in 1776, slavery was not abolished until 1865. The right to vote is another example of how the law has evolved to provide women and minorities with the same rights as white men. Over time, the fundamental constitutional rights embodied in the California Constitution have been expanded to include those rights and those groups not previously recognized under the law. Today, it is understood that equal protection must be provided to all citizens absent a compelling state interest to do otherwise.

Although the marriage of same-sex couples is not an issue that was contemplated by the courts prior to *Marriage Cases*, history has shown us that the law adjusts over time to remedy inequalities such as discrimination against same-sex marriage.

4. Proposition 8 Should Be Invalidated Because It Violates the Equal Protection Doctrine.

The equal protection doctrine under the California Constitution guarantees that no person may be denied equal protection under the law. In determining if Proposition 8 violates the equal protection clause one must first determine what class of people is being affected and whether the right

the class members are being denied is fundamental or not. If the group affected is determined to be a protected, or "suspect," class and the right is determined to be fundamental, as is the case here, the law in question is subject to strict scrutiny. In the instant case, sexual orientation is a suspect classification and the right to marry is fundamental to all individuals, thereby subjecting Proposition 8 to a strict scrutiny analysis by the Court. In order to pass the Court's strict scrutiny test, the supporters of Proposition 8 must show that Proposition 8 is necessary to serve a compelling state interest. As shown below, they cannot do so.

a. Same-Sex Couples Are a Suspect Class and Therefore Subject to Strict Scrutiny.

This Court clearly determined in *Marriage Cases, supra,* 43 Cal.4th at 839, that laws restricting marriage to opposite-sex couples "must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation." Therefore, the Court held that "sexual orientation should be viewed as a suspect classification . . . and that statutes that treat persons differently because of their sexual orientation should be subject to strict scrutiny". *Id.* at 840-841. This Court looked at three factors outlined by the Court of Appeal to determine if sexual orientation is a suspect classification: (1) relation to the individuals' ability to perform, (2) the stigma associated with that trait, and (3) immutability of the trait. *Id.* at

841. Clearly, the trait in question here is sexual orientation. This Court determined that "sexual orientation is a characteristic (1) that bears no relation to a person's ability to perform or contribute to society and (2) that is associated with a stigma of inferiority and second-class citizenship." *Id.*, internal citation omitted. Additionally, this Court held that immutability, although a factor, is not required[1] and "[b]ecause a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment." *Id.* at 842. Based on a combination of the three factors outlined above, this Court made a final determination that sexual orientation is a suspect classification.

The determination by the highest Court in the state that sexual orientation is a suspect classification is applicable to constitutional amendments as well as statutes. For all purposes regarding equal protection, sexual orientation is a suspect classification and all laws denying a fundamental right to members of the suspect class must be subject to strict scrutiny.

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[1]Religion and alienage are both treated as suspect classifications even though neither is immutable. *Marriage Cases, supra,* 43 Cal.4th at 841 - 842, citing *Williams v. Kappilow & Son, Inc.* (1980) 105 Cal.App.3d 156, 161-162; *Raffaelli v Committee of Bar Examiners* (1972) 7 Cal.3d 288, 292.

b. Marriage is a Fundamental Right Under the California Constitution.

In *Perez, supra,* 32 Cal.2d at 714, the Court determined that marriage is a fundamental right in the State of California. "Marriage is thus something more than a civil contract subject to regulation by the state; *it is a fundamental right of free men.*" *Id.*, emphasis added. This Court affirmed this tenet in *Marriage Cases, supra,* 43 Cal.4th at 809, by noting that "past California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to all persons." This Court has clearly established the right to marry as a fundamental right to be protected by the equal protection clause of the Constitution. As shown above, this right has not always been protected for all classes of citizens, but over time its application has been expanded to include interracial marriages, *Perez, supra,* 32 Cal.2d, and gay and lesbian marriages, *Marriage Cases, supra,* 43 Cal.4th. The right to marry is guaranteed to all and therefore encompassed within the inalienable right to "privacy" in Article I section 1 of the Constitution.

c. Same-Sex Couples Are Being Denied the Fundamental Right to Marry.

Proposition 8 states: "Only marriage between a man and a woman is valid or recognized in California." Although the text of the Proposition

words the change in the affirmative, on its face Proposition 8 denies – through use of the *exclusionary* term "only" – the right to marry to same-sex couples.

Supporters of Proposition 8 argue that same-sex couples are not denied the right to marry because they are still afforded the opportunity to enter into domestic partnerships. Domestic partnerships are neither the equivalent of marriage nor do they afford the parties the same rights as a marriage contract. In *Marriage Cases, supra,* 43 Cal.4th at 783, this Court held that "assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of 'marriage' exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect." In addition to the lack of dignity and respect afforded to same-sex relationships, domestic partners do not receive the same rights as married couples. One of the most important distinctions between the two categories is that the rights of married couples are recognized outside of California, while the rights of domestic partners often are not. Other differences exist between the two including habitation and age requirements.

Most importantly however, is the respect and dignity afforded the title of marriage. This Court held that although the rights of domestic

partners include "*most* of the substantive elements embodied in the constitutional right to marry, the current California statutes nonetheless must be viewed as potentially impinging upon a same-sex couple's constitutional right to marry." *Id.* (emphasis added). Amici do not seek to rid California of the domestic partnership designation, as that right provides a non-discriminatory alternative relationship to the elderly.[2] However, it is the goal of the Amici to ensure that all people, homosexuals and heterosexuals alike, are granted the right to marry.

Same-sex couples are being denied the right to marry and the existence of domestic partnerships does not mitigate this fact. Because same-sex couples are a suspect classification being denied the fundamental right to marry, Proposition 8 must be necessary to promote a compelling state interest in order for it to comply with the equal protection clause of the Constitution. Here, the state has no compelling interest for which Proposition 8 is necessary.

d. The State of California Possesses No Compelling Interest for Which the Promotion of Proposition 8 Is Necessary.

This Court ruled in *Marriage Cases*, after careful consideration, that

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[2]The *right* of the elderly to enter into domestic partnerships does not have the discriminatory effect of the *requirement* that gays and lesbians can *only* enter into such a relationship.

denying same-sex couples the right to marry is not necessary to the promotion of any compelling state interest. *Id.*, 43 Cal.4th at 854. This Court explained that such a deprivation, now codified in Proposition 8, is "not necessary to preserve the rights and benefits of marriage currently enjoyed by opposite sex couples . . . [nor will it] alter the substantive nature of the legal institution of marriage . . . [nor will it] impinge upon the religious freedom of any religious organization, official, or any other person." *Id.* The proponents of Proposition 8 offer only one other interest that they claim is a compelling state interest for which Proposition 8 is necessary: to protect children from learning about same-sex marriage in school. Even if this were a compelling state interest, which it is not, Proposition 8 is not necessary to achieve this objective.

Even with the passage of Proposition 8, teachers are in a position to either include same-sex marriage in the classroom discussion, or not. Strauss Petitioners explain in their Reply Brief, "[b]ecause there is no basis for the notion that Proposition 8 would prevent schools from teaching about marriage between individuals of the same sex, it cannot be considered a legitimate state interest in the measure." Strauss Corrected Reply in Support of Petition for Extraordinary Relief, January 7, 2009, pp. 60 - 61 (hereinafter "Strauss Reply Brief"). Proposition 8 does not address what

can and cannot be discussed in the classroom,[3] and schools could still choose to teach about the history of same-sex marriage and such marriages as they legally exist.[4] Even if keeping children away from information regarding same-sex marriage were a compelling state interest, there is no basis for the belief that Proposition 8 would accomplish this goal. Based upon this Court's ruling in *Marriage Cases*, it is evident that Proposition 8 is not necessary to serve any compelling state interest.

e. Proposition 8 Violates the Equal Protection Clause of the California Constitution and Therefore Should Be Invalidated.

As shown above, a proposed law violates the equal protection clause when it discriminates against a suspect class by denying its members a fundamental right, and is not necessary to the promotion of a compelling state interest. Because same-sex couples are a suspect class who are being denied the fundamental right to marry, Proposition 8 is subject to strict scrutiny, meaning its proponents must show it is necessary to promote a compelling state interest. There is no compelling state interest warranting

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[3]The Attorney General's Answer Brief likewise recognizes that Proposition 8 does not "address what can or cannot be taught about marriage in the public school system." AG Answer Brief, p. 26, footnote 8.

[4]Same-sex marriage is legal in both Massachusetts and Connecticut and is recognized in New York. Additionally, numerous countries have legalized same-sex marriage including Canada and Spain.

denial of same-sex marriage, as this Court ruled in *Marriage Cases*. Even if there were a compelling state interest, Proposition 8 would not be necessary to promote that interest.

Therefore, Proposition 8 violates the equal protection clause of the California Constitution.

B. PROPOSITION 8 IS A REVISION OF THE CALIFORNIA CONSTITUTION AND WAS THEREFORE IMPROPERLY ENACTED.

1. Constitutional Revisions Differ From Constitutional Amendments and Require Different Procedures for Incorporating the Proposed Constitutional Enactment Into the Constitution.

The California Constitution outlines the process for changing the Constitution and in doing so differentiates between a revision and an amendment and provides procedures to enact each. Cal. Const., Art. XVIII §§ 1-4. "The very term 'constitution' implies an instrument of permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of like permanent and abiding nature." *Livermore v. Waite* (1894) 102 Cal. 113, 118. Therefore, it is clear that changes to the Constitution cannot be enacted on a whim, but rather, must follow strict guidelines in order to preserve the purpose of the Constitution as a whole.

"The differentiation required [between revision and amendment] is not merely between two words; more accurately it is between two procedures and between their respective fields of application." *McFadden v. Jordan* (1948) 32 Cal.2d 330, 347. A revision, as contemplated in the California Constitution and explained by this Court, is a change to the Constitution that would "substantially alter the purpose and . . . attain objectives clearly beyond the lines of the Constitution as now cast." *Id.* at 350. A revision substantially alters the basic governmental plan as expressed through the Constitution. *Id.* at 348; *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 223 (hereinafter "Amador Valley") ("even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision"). An amendment, on the other hand, "implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." *Livermore, supra,* 102 Cal. at 118 - 119. A revision, as compared to an amendment, is much farther reaching in that it must affect the basic governmental plan, whether qualitative or quantitative. See *Amador Valley, supra,* 22 Cal.3d at 223 (noting that an analysis of "whether a particular constitutional enactment is a revision or an

amendment must be both quantitative and qualitative in nature.") "Whether an initiative constitutes an amendment or revision to the Constitution does not necessarily depend on the number of constitutional provisions it affects, but on the nature of the changes it makes." *California Assn. Of Retail Tobacconists v. State of California* (2003) 109 Cal.App.4th 792, 834.

The distinction between a revision and an amendment is an important one because each constitutional enactment must follow different procedures for its approval. "[A]lthough the voters may accomplish an amendment by the initiative process, a constitutional revision may be adopted only after the convening of a constitutional convention and popular ratification or by legislative submission to the people." *Amador Valley*, *supra*, 22 Cal.3d at 221; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349; *McFadden*, *supra*, 32 Cal.2d at 333 - 334; Cal. Const., Art. XVIII §§ 1-4. A revision, as noted above, has far-reaching effects and therefore must include a greater level of discussion and debate prior to enactment in order to protect the basic tenets of the Constitution and the protections for individuals embedded therein. *Legislature v. Eu* (1991) 54 Cal.3d 492, 506; *Raven, supra,* 52 Cal.3d at 349 - 350. Whether a constitutional enactment is a revision or an amendment is a difficult question, and therefore "[e]ach situation involving the question of amendment, as contrasted with revision,

of the Constitution must, we think, be resolved upon its own facts." *McFadden, supra,* 32 Cal.2d at 348.

2. Proposition 8 Constitutes a Revision to the California Constitution Because It Substantially Alters the Basic Governmental Plan and the Purpose of the Constitution.

As shown above, a constitutional enactment is considered a revision when it would "substantially alter the purpose and . . . attain objectives clearly beyond the lines of the Constitution as now cast," thereby altering the basic governmental plan. *McFadden, supra,* 32 Cal2d at 350. As this Court has explained, "Our prior decisions have made it clear that to find such 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." *Eu, supra,* 54 Cal.3d at 510.

Proposition 8 does precisely that. It alters the basic governmental plan because it discriminates against an entire class of people, denying them the fundamental right to marry. It deprives their members of one of the most central protections of the California Constitution, equal protection under the law. And, it undermines the venerable and vital role of the judiciary as the ultimate defender of the rights of the minority. Consistent with this Court's definition of "revision" in *Eu*, the changes to the basic

governmental plan wrought by Proposition 8 appear on the face of the provision and are not speculative. Proposition 8 is a revision rather than an amendment and therefore was improperly enacted by initiative.

a. Marriage Rights Have Historically Been Considered Constitutional Rights, Even Prior to *In Re Marriage Cases*.

Marriage is a fundamental right under the California Constitution, and had been deemed such even before this Court so ruled in *Marriage Cases*. *Perez*, *supra*, 32 Cal.2d at 714. No less than 60 years ago, this Court affirmed in *Perez* that marriage is a fundamental right that could not then, and cannot now, be denied to interracial couples. Since the holding in *Perez*, the status of marriage as a fundamental right has been repeatedly reaffirmed. In 1972 the Constitution was amended to add privacy as an inalienable right under Article I section 1. Subsequent court decisions noted that the inalienable right of privacy includes the fundamental right to marry. *See Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 161. Then, in 1985, this Court held that the "right to marriage and procreation [were] recognized as fundamental, constitutionally protected interests." *Id.* Following that ruling, other courts have held that the Constitution imposes limits on the government's ability to create law limiting the "selection of one's spouse." *Ortiz v. Los Angeles Police Relief Ass'n* (2002) 98

Cal.App.4th 1288, 1302 - 1303. Based on the Constitution itself, and the pertinent case law, it is evident that California considers marriage a fundamental inalienable right.

b. The Protection and Promotion of Marriage Is Part of the Basic Governmental Plan.

The right to marry has been a basic tenet of the governmental plan since before this Court first recognized it as a fundamental right in *Perez, supra*, 32 Cal.2d 711, in 1948. In *Marriage Cases*, this Court specifically acknowledged the importance of marriage to the foundation of our society and to the individual. Marriage is part of the basic governmental plan because of the role it plays in society. "Society, of course, has an overriding interest in the welfare of children, and the role marriage plays in facilitating a stable family setting in which children may be raised by two loving parents unquestionably furthers the welfare of children and society." *Marriage Cases, supra,* 43 Cal.4th at 815. This Court recognized the pivotal role of marriage as the building block, or basic unit, of today's society. *Id.*, citing *Baker v. Baker* (1859) 13 Cal. 87, 94 ("The public is interested in the marriage relation and the maintenance of its integrity, as it is the foundation of the social system"); *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 968 ("the family provides the foundation upon which our society is built and through which its most cherished values are best

transmitted.") Marriage is considered "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." *Elden v. Sheldon* (1988) 46 Cal.3d 267, 275 (quoting *Nieto v. City of Los Angeles* (1982) 138 Cal.App.3d 464, 470 - 471). The importance of marriage in society and to the individual is so great that marriage is a central part of the basic governmental plan.

c. Proposition 8 Denies a Minority Class of People the Right to Marry and Therefore Undermines the Basic Governmental Plan.

Proposition 8 makes it impossible for same-sex couples to marry.[5] The central role of marriage in the basic governmental plan is weakened when one class of citizens is denied access to such a fundamental right. Because same-sex couples are denied the right to marry under Proposition 8, the consequent weakening of marriage's crucial role in society undermines the basic governmental plan. Therefore Proposition 8 amounts to a revision rather than an amendment of the Constitution.

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[5]Although domestic partnerships would not be outlawed, such relationships do not constitute marriage, nor do they create a "separate but equal" classification. Domestic partnerships do not guarantee the same rights as marriage, and neither the dignity nor the respect afforded to marriage is accorded to domestic partnerships. *See* discussion of domestic partnership rights and how they relate to marital rights in section III(A)(3)(c): *Same-Sex Couples Are Being Denied The Fundamental Right To Marry.*

d. The Protection and Promotion of Equal Protection Is Part of the Basic Governmental Plan.

One of the most important principles of California constitutional law is equal protection. "Equal protection of the law . . . is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all the least deserving as well as the most virtuous." *Agnew v. Superior Court In and For Los Angeles County* (1953) 118 Cal.App.2d 230, 234. Codified in Article I section 7 of the California Constitution, the right to equal protection extends its reach to all other laws. As this Court held in *In re Sade C., supra,* 13 Cal.4th at 966, equal protection is "the central aim of our entire judicial system."

With a role so central to the function of society, equal protection is clearly part of the basic governmental plan. All laws, including those proposed by the legislature and those proposed by the people, must be balanced against the equal protection clause in order to protect all individuals. The California government could not, and would not, serve its ultimate goal of preserving the rights of citizens and protecting society as a whole if the principle of equal protection were eviscerated. Without equal protection the basic plan of government unravels, making equal protection a central component of the plan.

e. Proposition 8 Denies a Group of People Equal Protection Under the Law and Therefore Undermines the Basic Governmental Plan.

In *Marriage Cases* this Court held that laws that deny a suspect class of citizens, same-sex couples, the right to marry violate equal protection. 43 Cal.4th at 854. By depriving same-sex couples the right to marry, Proposition 8 likewise violates equal protection and thereby undermines the basic governmental plan. Here, the violation of equal protection creates an irreconcilable conflict between Proposition 8 and the equal protection clause. When equal protection is violated through a constitutional enactment, the provisions of the Constitution are pitted against each other, weakening both the Constitution itself and the basic governmental plan. An initiative such as Proposition 8 that selectively denies a minority group a fundamental right is thus a revision of our constitutional system and our basic governmental plan. Such a profound alteration of the Constitution cannot be achieved by a mere popular vote. If it could, no minority would ever be secure in its rights.

f. The Protection and Promotion of the Role of the Judiciary Is Part of the Basic Governmental Plan.

The basic governmental plan of California seeks to promote and protect the role of the judiciary. A key element of the constitutional system is the separation of powers and the role that each branch plays in that

system.[6] The judiciary acts as the protector and interpreter of the Constitution, and that role is central to our governmental scheme. This Court held that "the most fundamental [protection] lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights." *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141. The role of the judiciary is central to our basic governmental plan, and as such, when a constitutional enactment undermines that role, such an enactment is a revision, not an amendment.

g. Proposition 8 Undermines the Role of the Judiciary and Therefore Undermines the Basic Governmental Plan.

Proposition 8 undermines the role of the judiciary and therefore undermines the basic governmental plan, rendering Proposition 8 a revision rather than an amendment. Any constitutional enactment that removes authority from the judiciary and places that authority with another branch of government is a revision, regardless of the quantitative effect of that enactment. *Amador Valley, supra,* 22 Cal.3d at 223. ("[A]n enactment which purported to vest all judicial power in the Legislature would amount to revision without regard either to the length or complexity of the

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[6]The role of the judiciary is further explained in section C below, that Proposition 8 violates the separation of powers doctrine.

measure.") This Court is the final arbiter of constitutional interpretations. *Sands v. Morongo Unified Sch. Dist.* (1991) 53 Cal.3d 863, 902 - 903. As such, this Court's holding in *Marriage Cases* that the Constitution protects the right of same-sex couples to marry is the ultimate determinant of the issue. But if Proposition 8 is upheld, this role of the courts as the final judge of the Constitution's protections will be subverted. Proposition 8 would overturn the Court's interpretation of the equal protection clause and its holding that marriage as an inalienable right, preventing the Court from performing its core function of guaranteeing equal protection to all.[7]

Proposition 8's evisceration of this Court's historic and essential role as the protector of our constitutional rights is no different than a law defining the right to vote as a right held only by whites, or by men, or by landowners. Just like these examples of laws that would abolish fundamental rights of minority groups by defining them into oblivion, so too Proposition 8 is a revision to the Constitution because it guts the judiciary's paramount power to define and defend minority rights. By arrogating authority from the courts, it upends the delicate checks and balances of our governmental plan. As in *Raven, supra,* 52 Cal.3d at 353,

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[7]See the discussion in section C below on Proposition 8's emasculation of the courts' role in the constitutional system.

Proposition 8 "not only unduly restricts judicial power, but does so in a way which severely limits the independent force and effect of the California Constitution." Therefore, Proposition 8 is a revision and as such was improperly enacted.

3. Proposition 8 Is Not an Amendment and Therefore Is a Revision.

It is thus clear that Proposition 8 is a "revision." Conversely, it can be shown that Proposition 8 is not a mere "amendment." If Proposition 8 is not an amendment, the only other possibility is that it is a revision. An amendment "implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." *Livermore, supra,* 102 Cal. at 118 - 119.

Proposition 8 does not fall within the definition of amendment. Although Proposition 8 is an addition or change, it does not effect an improvement to the Constitution. To the contrary, Proposition 8 conflicts with and thus harms the equal protection clause, the separation of powers doctrine, and the right to privacy under the Constitution. Additionally, Proposition 8 does not better carry out the purpose of the Constitution. The fundamental purposes of the Constitution *advance* the protections described above. Because Proposition 8 *undermines* those protections, it is not an amendment. Therefore, Proposition 8 is an invalid revision.

4. The Cases Relied Upon By the Attorney General in Determining What Constitutes a Revision Are Distinguishable From the Instant Case.

In his brief, the Attorney General relies on numerous cases to support his argument that Proposition 8 is an amendment rather than a revision. But the decisions on which he relies are clearly distinguishable from instant case.

The first case that the Attorney General cites is *Amador Valley, supra,* 22 Cal.3d 208, in which this Court sought to determine if a limit to the real property tax rate was an amendment or a revision. The Court held that the proposition was an amendment because it did not cause a loss of home rule or a loss of the republican form of government. *Amador Valley* however, unlike the instant case, did not affect "preexisting constitutional provisions," 22 Cal.3d at 225, nor did it impact a fundamental right or a suspect class. Here, by contrast, Proposition 8 changes the fundamentals of the Constitution by denying a suspect class an inalienable right. In *Amador Valley* there was no fundamental right being denied anyone. Unlike the initiative in *Amador Valley*, Proposition 8 is a revision.

The second case cited by the Attorney General is *People v. Frierson* (1979) 25 Cal.3d 142. In *Frierson*, the Court had to determine if a constitutional enactment to declare that the death penalty is not cruel and

unusual punishment under the California Constitution, was an amendment or a revision. The Court determined that the enactment was an amendment because the role of the Court was not affected, unlike the evisceration of this Court's ability to protect the marriage rights of same-sex couples under Proposition 8. Following the holding in *Frierson* the courts still had the authority to invalidate a death penalty, whereas, if Proposition 8 is allowed to remain in the Constitution, the courts will be stripped of their ability to safeguard the rights of same-sex couples. Therefore, the amendment in *Frierson* is easily distinguishable from the Proposition 8 revision.

The Attorney General next relies on *Brosnahan v. Brown* (1982) 32 Cal.3d 236. In *Brosnahan* the petitioners sought to invalidate "The Victims' Bill of Rights" as an improperly enacted constitutional revision. This Court held that the proposition was an amendment because it did not change the basic governmental plan. But "The Victims' Bill of Rights" did not take away a fundamental right granted under another provision of the California Constitution. Proposition 8, by contrast, does exactly that.

The Attorney General also relies on *In re Lance W.* (1985) 37 Cal.3d 873, in which an initiative attempted to add a section to the Constitution allowing all relevant evidence to be presented in a criminal proceeding. The Court determined that the initiative was valid because it was an

amendment rather than a revision, reasoning that the proposition did not effect a sweeping change in the Constitution. But unlike the gay and lesbian couples whose fundamental rights are destroyed by Proposition 8, the individuals potentially affected by the constitutional enactment in *In re Lance W.* were not a suspect class. Instead, they were mere criminal defendants. Proposition 8 targets same-sex couples, a suspect class of individuals and the only class of individuals denied the rights to marriage. If marriage rights were denied to all people alike, *In re Lance W.* would be controlling, but that is not the case. Therefore, Proposition 8 is a revision unlike the proposition in *In re Lance W.*

In *Eu, supra,* 54 Cal.3d 492, another case cited by the Attorney General, the Court determined that the constitutional enactment in question was an amendment, not a revision. The provision challenged in *Eu* involved term limits on legislators and restricted their pension rights. The Court held that there was no change to the basic governmental plan of California and that the changes asserted were "largely speculative." Here, unlike *Eu*, there *is* a limitation on an inalienable fundamental right, and Proposition 8 also imposes limitations of the court's role in protecting the Constitution. The changes that are effected by Proposition 8 alter the basic governmental plan and are not speculative. Thus Proposition 8 is a

revision, unlike the amendment in *Eu.*

The Attorney General also relies on *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016 ("*Professional Engineers*"), in which the Court deemed Proposition 35 to be an amendment because it did not "usurp the Legislature's plenary authority to regulate private contracting by public agencies in a global sense, but simply permit[ted] public agencies to enter into contracts with private entities" for specific services. *Id.* at 1047. Additionally, in *Professional Engineers*, the Legislature retained the ability to make some amendments to the new law. *Professional Engineers* is completely unlike the challenge here presented to Proposition 8. Proposition 8 involves the protection of individuals and minorities, fundamental inalienable rights, and the role of the judiciary. Under Proposition 8, the Legislature is prevented from making any changes that would affect the right to marry. Therefore, Proposition 8 is easily distinguished from *Professional Engineers*.

Another case on which the Attorney General relies is *Bowens v. Superior Court* (1991) 1 Cal.4th 36, in which the Court held Proposition 115 to be a valid amendment that abrogated the earlier case of *Hawkins v. Superior Court* (1978) 22 Cal.3d 584. In *Hawkins* the Court held that an accused person could not be denied a preliminary hearing; however

Proposition 115 overturned that ruling, holding that a criminal defendant was no longer entitled to a preliminary hearing. In *Bowens*, which contemplated the role of Proposition 115, the Court found that the enactment was an amendment because no fundamental inalienable rights were abrogated. Additionally, in *Hawkins* the Court specifically noted that the "Legislature may prescribe other appropriate procedures" to remedy the situation. *Hawkins, supra*, 22 Cal.3d at 593 - 594. *Hawkins* and *Bowens* are clearly distinguished from the challenge to Proposition 8 because this initiative destroys same-sex couples' fundamental inalienable right to marriage and prohibits the Legislature from restoring that right.

The Attorney General also relies on one case that held that a proposed initiative was a constitutional revision. The Attorney General attempted to distinguish that case from Proposition 8, but the case is clearly applicable. In *Raven, supra,* 52 Cal.3d 336, the Court determined that the "Crime Victims Justice Reform Act" was a revision improperly enacted by initiative. The Attorney General argues that the *Raven* case is distinguishable because the provisions of the proposition challenged there were severable, and only one provision was considered a revision. This is a distinction without a difference. Here, the severability of provisions is not an issue. Like the provision that was deemed a revision in the *Raven* case,

Proposition 8 attempts to preempt this Court from performing its primary function of interpreting the California Constitution. Therefore, Proposition 8, like the *Raven* provision, is an invalid constitutional revision.

Thus, cases cited by the Attorney General, although correct statements of law, are clearly distinguishable with the exception of *Raven*, which fully applies here. *Raven* demonstrates that Proposition 8 is an invalid revision rather than a properly enacted amendment.

5. The Cases From Other Jurisdictions Relied Upon by the Interveners in Determining What Constitutes A Revision Are Distinguishable From the Instant Case.

In their opposition brief filed on December 19, 2008, Interveners urge this Court to rely on cases from Oregon and Alaska to determine whether Proposition 8 is a revision or an amendment. These cases are not persuasive because those states had not previously recognized sexual orientation as a suspect classification nor previously granted same-sex couples the right to marry. Amici also adopt and incorporate the rebuttal argument submitted by the Strauss Petitioners in their Reply Brief. Strauss Reply Brief, pp. 29 - 33.

Interveners also urge this Court to rely on one case in which the Massachusetts Supreme Court held that the initiative process was the appropriate procedure to enact a constitutional amendment which limited

marriage to one man and one woman. *Albano v. Attorney Gen eral* (2002) 437 Mass. 156. However, unlike California, the Massachusetts Constitution does not differentiate between revision and amendment. Under Massachusetts law, certain measures not appropriate for adoption by initiative are listed under M.G.L.A. Const.Amend. Art. 48. The challenged initiative did not fall within that Article. Hence *Albano* is distinguishable on its face. Additionally, Massachusetts has not determined whether sexual orientation is a suspect classification, as the courts have done in California, thereby further distinguishing *Albano* from the Proposition 8 challenge.

Thus, the foreign jurisdiction cases relied upon by Interveners are readily distinguishable. Under California law, Proposition 8 is a revision that was improperly enacted.

C. PROPOSITION 8 VIOLATES THE SEPARATION OF POWERS DOCTRINE.

1. The Separation of Powers Doctrine Plays An Important and Central Role In the California Constitution.

The idea of checks and balances, and the inherent separation of powers required to maintain those checks and balances, is one of the basic tenets of our democratic system of governance. Only by separating governmental powers and granting each of three separate branches the ability to keep the other branches in line can the people be sure that no one

branch of government will run rampant with power. *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297. The judicial branch of government, and this Court specifically, have a unique and powerful role to play by ensuring that "[a] person may not be . . . denied equal protection of the laws," and "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." Cal. Const., Art. I § 7, subds. (a)-(b).

Interveners, however, assert that "[t]he separation of powers doctrine begins with the recognition that in California '[a]ll political power is inherent in the people.' (Cal. Const., Art. I, § 1.)" Intervener's Opposition Brief, December 19, 2008, p. 30 (hereinafter "Interveners Opp. Brief"). While it cannot be denied that the Constitution does preserve the people's political power, it does so *subject to* Article I, section 1's declaration that "[a]ll 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.

After the Preamble, this is the first clause of the Constitution. Enshrining this declaration of the people's individual rights in the Constitution's first clause leaves no doubt that equality and preservation of

individual rights are the central and primary tenets of the Constitution. All people are free and have inalienable rights. Yes, political power resides in the people, but the Constitution does not give the people the right to violate an individual's freedoms and inalienable rights.

2. The Separation of Powers Doctrine Is Violated When the Legislative Branch Uses Its Authority to Circumvent a Constitutional Protection Guaranteed by the Supreme Court.

By attempting to amend the Constitution through Proposition 8, the bare majority of voters who supported Proposition 8 attempted to legislate. If the California Legislature had attempted to do what Proposition 8 attempts to do, they would have been barred by the holding in *Marriage Cases*. Even had *Marriage Cases* not already been decided, the actions of the Legislature would still have to stand the test of the equal protection clause: in order to deny gays and lesbians the right to marry, the proponents would have had to show that the state had a compelling interest in denying gays and lesbians, a suspect class, the fundamental right to marry. As this Court held in *Marriage Cases*, under this standard "the state bears a heavy burden of justification." 43 Cal.4th at 847.

Proponents of Proposition 8 would not have been able to pass the Constitutional safeguard of strict scrutiny. Therefore they attempted to find a way around the test. By disguising Proposition 8 as an amendment, the

proponents have attempted to circumvent the very test that *Marriage Cases* has already said cannot be passed.

In his Answer Brief, the Attorney General cites *Professional Engineers, supra,* 40 Cal.4th 1016, to support his argument that Proposition 8 is not a constitutional revision and that Proposition 8 does not violate the separation of powers because "the settling of policy with respect to private contracting is a legislative matter and, therefore, a proper subject for the electorate to exercise its legislative power authority through initiative, which is what the electorate has done." AG Answer Brief, p. 61 citing *Professional Engineers*, *supra,* 40 Cal.4th at 1045.

Professional Engineers, however, is easily distinguished from the present case. The initiative passed in *Professional Engineers* "removed a constitutional restriction on the ability of governmental entities to contract with private firms for architectural and engineering services on public works projects." *Professional Engineers, supra,* 40 Cal.4th at 1023. In *Professional Engineers,* the plaintiffs alleged that allowing Caltrans to contract with private entities without implementing legislation violated the separation of powers doctrine by diverting "a legislative function, regulation of private contracting, to an executive agency." *Id.* at 1044. The Court, however, held that the people had properly exercised their initiative

power because, as quoted above by the Attorney General, "policy with respect to private contracting is a legislative matter" and therefore, a proper subject for initiative. *Id.* at 1045.

Unlike the initiative that was upheld in *Professional Engineers*, Proposition 8 does more than simply allow governmental entities to contract with private firms. Proposition 8 strips a protected class of individuals of the fundamental right to marry. Unlike the government's contractual powers, the subject matter of Proposition 8 is, and should be, subject to strict scrutiny under California's equal protection clause. By passing Proposition 8 off as a constitutional amendment, the proponents of Proposition 8 have improperly attempted to circumvent the necessary constitutional safeguards that protect the fundamental values that this Country – and this State – are based upon.

3. Proposition 8 Violates the Separation of Powers Doctrine Because It Re-Adjudicates An Issue That Has Already Been Settled by the Court, Thus Violating *Res Judicata*.

"Res judicata applies if: (1) the issues decided in the prior adjudication were identical to the issues raised in the present action, (2) the prior proceeding resulted in a final judgment on the merits, and (3) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication." *See Citizens for Open Access to Sand and Tide, Inc.*

v. Seadrift Ass'n (1998) 60 Cal.App.4th 1053 ("*Seadrift*"). "[T]he Legislature cannot 'interpret[]' a statute" and "cannot 'readjud icat[e]' or otherwise 'disregard' judgments that are already 'final.'" *People v. Bunn* (2002) 27 Cal.4th 1, 17.

Proposition 8 violates the doctrine of *res judicata* by attempting to re-adjudicate the issues that were decided in *Marriage Cases*. In *Marriage Cases*, this Court held that: "(1) the right to marry is so integral to an individual's liberty and personal autonomy that it cannot be abrogated by the Legislature or by the electorate through the statutory initiative process, (2) that statutory definitions which restrict marriage to opposite sex couples treat persons differently on the basis of sexual orientation, (3) that sexual orientation is a suspect classification, and (4) that there is no compelling state interest in distinguishing between same-sex couples and opposite-sex couples in terms of eligibility to marry." *Marriage Cases*, *supra,* 43 Cal.4th at 781-785; *see also*, Reply Brief of the Tyler-Olson Petitioners Regarding Issues Specified in the Supreme Court's Order Filed November 19, 2008, January 5, 2009, pp. 30-31 (hereinafter "Tyler-Olson Reply Brief").

Proposition 8 cannot stand in the face of these fundamental principles of constitutional law. Proposition 8 denies gays and lesbians their fundamental right to marry, mimicking the laws this Court ruled

unconstitutional in *Marriage Cases.* Proposition 8, if allowed to amend the Constitution, will create a statutory definition of marriage that excludes gays and lesbians, a distinction directly based on their sexual orientation. Such disparate treatment is subject to strict scrutiny under the equal protection clause because *Marriage Cases* held that sexual orientation is a suspect class. As this Court ruled in *Marriage Cases*, a statutory definition of marriage that treats people differently based on their sexual orientation fails the strict scrutiny test because there is no compelling state interest in basing the right to marry on sexual orientation.

Proposition 8 attempts to re-adjudicate these same issues by amending the Constitution in a way that ignores the decision handed down in *Marriage Cases*. These issues adjudicated in *Marriage Cases* were clearly adjudicated on the merits, and the current respondents are in privity with those bound by *Marriage Cases.*

Privity applies if a party's interests are so similar to another party's interests that "the latter was the former's virtual representative in the earlier action." *Seadrift, supra,* 60 Cal.App.4th at 1070. In *Marriage Cases* the respondents consisted of the State of California (*See City and County of San Francisco v. State of California* (Super. Ct. S.F. City & County, No. CGC-04-429539), representatives of the State of California, like Bill Lockyer,

State Treasurer (*See Woo v. Lockyer* (Super. Ct. S.F. City & County, No. CPF-04-504038), and cities within the State of California (*see Tyler v. County of Los Angeles* (Super.Ct.L.A.County, No. BS-088506). In the present case, the parties against whom this suit is being brought are either the same party involved in *Marriage Cases,* as in the case of the State of California, or are in privity with the respondents in *Marriage Cases.* In the present action, Mark B. Horton, the State Registrar of Vital Statistics, and Dennis Hollingsworth, a California State Senator, are named as respondents. As representatives of the State of California, Horton and Hollingsworth are in privity with Bill Lockyer, since their interests (to uphold the California Constitution) are the same, making Bill Lockyer the "virtual representative" of Horton and Hollingsworth.

Furthermore, the Attorney General's Answer Brief acknowledges the applicability of *Mandel v. Myers* where the Court said that "while the Legislature enjoys very broad governmental power under our constitutional framework, it does not possess the authority to review or to readjudicate final court judgment on a case by case basis." AG Answer Brief at p. 59, citing *Mandel v. Myers* (1981) 29 Cal. 3d 531, 549. The Attorney General admits that "an initiative measure that purported to set aside a court judgment in the manner disallowed by *Mandel* might be deemed a constitutional revision." *Id.* at p. 60. However, the Attorney General fails

to see the similarities between the initiative that was struck down in *Mandel* and Proposition 8.

In *Mandel*, the Legislative Analyst improperly "reevaluated . . . the merits of the attorney fee award that had been fully litigated and resolved in the prior judicial proceedings." *Mandel, supra,* 29 Cal.3d at 538. Furthermore, the Court found that "the action of the legislative committee in question may well have been based simply upon the committee's own reassessment of the validity of plaintiff's underlying attorney fee claim." *Id.* at 546. By performing such a reassessment, the Legislature violated the "fundamental separation of powers doctrine embodied in *Article III, section 3 of the California Constitution* [which] forbids any such legislative usurpation of traditional judicial authority." *Id.* at 547. The Court elaborated by pointing out that "[o]ur Constitution assigns the resolution of such specific controversies to the judicial branch of government (*Cal. Const., Art. VI, § 1*) and provides the Legislature with no authority to set itself above the judiciary by discarding the outcome or readjudicating the merits of particular judicial proceedings." *Id.*

By passing Proposition 8, the voters of California stepped into the shoes of this Court and unconstitutionally reevaluated the merits of *Marriage Cases*, which had been fully adjudicated on the merits. Just as the Legislative Analyst in *Mandel* overstepped his authority by reassessing the

merits of the attorney's fee award in that case, so too does Proposition 8 overstep the boundaries of the separation of powers and the judicial doctrine of *res judicata.*

4. Proposition 8 Violates the Separation of Powers Doctrine Because It Prevents the Judiciary From Accomplishing Its Core Function of Guaranteeing Equal Protection Under the Law.

The separation of powers doctrine is violated "when the actions of a branch of government defeat or materially impair the inherent functions of another branch." *In re Rosenkrantz* (2002) 29 Cal.4th 616, 662. Furthermore, as this Court has explained,

> The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. (See Cal. Const., arts. IV, I and VI; The Federalist, Nos. 47, 48 (1788).) Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether or individual or minority, from obliteration by the majority.

Bixby, supra, 4 Cal.3d at 141. By depriving gays and lesbians of their fundamental right to marry, Proposition 8 likewise strips this Court of its power to ensure that *all* citizens receive equal treatment under the laws.

Each of the three branches of government has certain duties and responsibilities. Proposition 8 unjustifiably steps on the toes of the judicial

branch and prevents it from performing what is easily the Court's most important duty: ensuring equal protection of the law. It is true that the separation of powers doctrine does not command "a hermetic sealing off of the three branches of government from one another." *Buckley v. Valeo* (1976) 424 U.S. 1, 121. However, the doctrine exists "to protect any one branch against the overreaching of any other branch. [Citations]" *Bixby, supra,* 4 Cal.3d at 141.

Proposition 8 violates the separation of powers doctrine by overreaching the boundaries of the legislative branch and usurping the powers of the judicial branch. "[T]he legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." *Brydonjack v. State Bar* (1929) 208 Cal. 439, 444. By attempting to deprive gays and lesbians of their fundamental right to marry, Proposition 8 defeats the core constitutional function of the Court: to ensure equal protection under the law.

The Attorney General's Answer Brief misstates the relevance of *The Superior Court of Mendocino v. County of Mendocino* (1996) 13 Cal.4th 45 (hereinafter *"Mendocino"*). The Attorney General analogizes Proposition 8 to Government Code section 68108, which was upheld as not violating the

separation of powers doctrine in *Mendocino.* Section 68108 authorized counties to declare unpaid furlough days for county courts and offices. *Id.* at 60-61. The Mendocino Superior Court challenged this law as unconstitutional for violating the separation of powers doctrine. *Id.* at 59. This Court, however, held that the Legislature's action in passing the law did not "inevitably threaten the integrity or independence of the judicial process" or intrude upon "the judge's decision making process or the independence of the judicial role." *Id.* at 65. Furthermore, the Court also found that historically, the California Constitution "confirms the Legislature's general authority to act in this area." *Id.* at 63.

The Attorney General mistakenly states that Proposition 8 "does not purport to 'defeat or materially impair' the Court's ability to fulfill its constitutional duties." AG Answer Brief, p. 59. Proposition 8, however, bears no similarities to the conflict in *Mendocino*, where the Legislature was properly attempting to balance the county budget by declaring unpaid furlough days. Here, Proposition 8 completely defeats this Court's ability to fulfill its constitutional duty to ensure equal protection under the laws.

Interveners assert that Proposition 8 does not violate the separation of powers doctrine because the primary role of the judiciary is to "expound the law." Interveners' Opp. Brief, p. 32. Interveners go on at length about

the unremarkable and undisputed proposition that courts interpret the law, but do not make the law. Interveners' Opp. Brief, pp. 32-35. Of course, courts do not play the role of legislature, as such would clearly violate the separation of powers.

The Court does, however, have the duty to "interrogate the Constitution itself and report its responses . . . ." Interveners' Opp. Brief, p. 33, quoting *Bourland v. Hildreth* (1864) 26 Cal. 161, 180. In the case of Proposition 8 petitioners are not asking the Court to write any law, but merely to run Proposition 8 through the necessary constitutional rigors and report back to the people on the results.

Interveners next assert that the "separation of powers principles compel courts to effectuate the purpose of enactments [and] . . . [not inquire] into the 'wisdom' of underlying policy choices []." Interveners' Opp. Brief, p. 34, citing *Bunn, supra,* 27 Cal.4th at 16-17. While it is true that when interpreting a law a court cannot base its decision on the reasoning underlying the law, courts do not serve the simple purpose of rubber-stamping the will of the people, as Interveners would have this Court believe. The Court must keep its peripheral vision on the Constitution to ensure Proposition 8's conformity therewith.

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5. Proposition 8 Violates the Separation of Powers Doctrine Because It Prevents the Legislature From Exercising Its Authority to Revise the California Constitution.

The People of California have vested authority to revise the California Constitution initially in the Legislature. Cal. Const., Art XVIII, §§ 2-3; *Raven, supra*, 52 Cal.3d at 349. By purporting to "amend" the Constitution, while in fact revising it, Proposition 8 attempts to allow the voters to unconstitutionally usurp the revision power. The initiative process does not allow for the necessary "formality, discussion, and deliberation" required for a constitutional revision, and that is why the People of California have reserved the power to revise the Constitution exclusively in the Legislature. *Eu, supra,* 54 Cal.3d at 506; *Raven, supra,* 53 Cal.3d at 530.

Furthermore, by arrogating the Legislature's exclusive power to revise the Constitution, Proposition 8 abrogates the formal debate, informed deliberation and super-majority vote that would otherwise be required for a revision to pass the Legislature. Cal. Const., Art. XVIII; *Raven, supra,* 52 Cal.3d at 349.

D. PROPOSITION 8 DOES NOT APPLY RETROACTIVELY.

Interveners would have this Court believe that since "the Legislature has full control of the subject of marriage and may fix the conditions under

which the marital status may be created or terminated, as well as the effect of an attempted creation of that status," Proposition 8 applies retroactively. Interveners' Opp. Brief, p. 36, quoting *McClure v. Laura Alpha Donovan* (1949) 33 Cal.3d 717, 728. Their conclusion, however, does not follow from their premise. Of course the Legislature has the power to amend or enact new laws. But that power does not extend to retroactive application of Proposition 8 here, for three reasons: (1) the language Proposition 8 did not expressly declare a retroactive intent, (2) retroactive application would violate the due process clause, and (3) retroactive application would violate the contracts clause.

1. Without Clear and Express Language Indicating That Legislation Is To Be Applied Retroactively, It Must Be Applied Prospectively Only.

"It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." *Aetna Casualty & Surety Co. v. Industrial Accident Com.* (1947) 30 Cal.3d 388, 393. Furthermore, "legislative provision[s] are presumed to operate prospectively, and . . . should be so interpreted 'unless express language or clear and unavoidable implication negatives the presumption.'" *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208, quoting *Glavinich v. Commonwealth Land Title Ins. Co.*

(1948) 163 Cal.App.3d 263, 272. Lastly, "[i]nitiative measures are subject to the same rules and canons of statutory construction as ordinary legislative enactments." *Rosasco v. Commission on Judicial Performance* (2000) 82 Cal.App.4th 315, 323.

Without such clarity of legislative intent or express language, neither statutes nor initiatives can be applied retroactively. Since Proposition 8 contained no such express language, it cannot be applied retroactively.

2. There Is No Clear Indication or Express Language that Proposition 8 Was Intended to Apply Retroactively; Therefore It Must Only Apply Prospectively.

The wording of Proposition 8 is simple, and does not contain any language, either express or implied, that it was intended to operate retroactively. After its passage, section 7.5 was added to Article I of the California Constitution, stating "[o]nly marriage between a man and a woman is valid or recognized in California." (Ballot Pamp., Gen. Elec. (Nov. 4, 2008), Official Title and Summary for Proposition 8). Even if Proposition 8 contained some ambiguous language as to its retroactivity, ambiguity would not overcome the presumption that statutes (and initiatives) are to be applied prospectively. *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 843.

As the Attorney General pointed out, "Proposition 8 may not be

construed as declaring existing law prior to the November 2008 election." AG Answer Brief, p. 65. Before the November 2008 election, the law of the land was (and still is) the decision that was reasoned and handed down by this Court in *Marriage Cases*. If the Legislature does not agree with the Court's interpretation, the Legislature (or, in this case, the people through the initiative power) can – subject to the separation of powers doctrine and other constitutional protections – amend the statute. "But if it does so, it *changes* the law; it does not merely state what the law always was." *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 470. This holding, along with the rules of statutory interpretation outlined above, clarify that *Marriage Cases* states the pre-election law, and that if Proposition 8 can withstand the array of constitutional challenges brought against it, it is only valid prospectively, from November 5, 2008 forward.

Furthermore, without unambiguous language regarding an intended retroactive effect, the voters were denied their right to be fully informed before making their choices at the ballot box. From reading the text of the proposed amendment and the accompanying ballot materials, a knowledgeable voter had no way to know that Proposition 8 would not only be used to stop gay marriage in the future, but also to strip those already married of their rights. Like the proposition at issue in *Evangelatos*, the

drafters here likewise failed to include any clear language demonstrating an unambiguous intent that Proposition 8 apply retroactively. Without such language, the drafters must have realized that the statute "would not be applied retroactively." *Evangelatos*, *supra*, 44 Cal.3d at 1211.

The proponents of Proposition 8 bear the burden of proving that the meaning of the Proposition is "so clear that it could sustain only [an] interpretation" supporting retroactivity. *Myers, supra,* 28 Cal.4th at 841. Petitioners, Amici, and the Attorney General all agree that Proposition 8 was written to achieve only a purely prospective application. Since the language of Proposition 8 is at best vague as to retroactivity, it must only be applied, if at all, prospectively.

Interveners flip flop on the issue of clear language. First Interveners state that the text is clear, and although Interveners repeatedly assert this claim, they fail to support it. Interveners' Opp. Brief, pp. 37-41. Interveners then attempt to bolster their argument by referring to "other indicia" including the "ballot pamphlet, the context of the initiative, the object in view, the concern at issue, the history of legislation upon the same subject, public policy, and contemporaneous construction." Interveners' Opp. Brief, p. 38, citing *In re Marriage of Petropoulus* (2001) 91 Cal.App.4th 161, 171 (hereinafter "*Petropoulus*"). But if the language of

Proposition 8 were truly clear, then such bolstering would not be necessary. In *Petropoulus* the court stated that to interpret a statute, the court must first look at its words. *Id.* If the words are silent, then the court can look into the factors listed above. *Id.* However, the *Petropoulus* Court also held that "[a]bsent a sufficiently clear indication of legislative intent . . . courts will apply 'the almost universal rule that statutes are addressed to the future, not to the past.'" *Id.*, quoting *Evangelatos, supra,* 44 Cal.3d at 1226.

Interveners next assert that Proposition 8 should be applied retroactively on the grounds it merely furthers "long-standing public policy in the Constitution." Interveners' Opp. Brief, p. 39. In support of this assertion, Interveners refer to the fact that California has always recognized marriage as between a man and a woman, and therefore Proposition 8 is not a change, but merely the status quo. While this may be true, Interveners ignore the fact that this Court's ruling in *Marriage Cases* declared the former statutory regime *invalid and unconstitutional.* Indeed, the entire purpose of Proposition 8 was to *undo* the new status quo that this Court's ruling established. Proposition 8 sought to *change*, not *maintain*, that status quo.

Interveners also assert that the "legislative history reveals the voters' unambiguous intent to enshrine the traditional definition of marriage in the

Constitution itself." Interveners' Opp. Brief, p. 39. First of all, Interveners cite no legislative history that supports this claim. Further, even had Interveners discussed Proposition 8's ambiguous history, such a discussion would not pass the test under *Petropoulus*, which calls for "a sufficiently clear indication of legislative *intent*." *Petropoulus, supra,* 91 Cal.App.4th at 171, italics added. Lastly, even had the voters intended to "enshrine the traditional definition of marriage in the Constitution," such an intent does not equal an intent to apply such definition *retroactively*.

Finally, Interveners claim that their argument relies on "other indicia of the electorate's understanding and intent." Interveners' Opp. Brief, p. 39. However, Interveners are merely referring back to the ballot materials for Proposition 8, which like the text of Proposition 8 contain no clear language evidencing a retroactive intent. The Official Title and Summary of Proposition 8 states that Proposition 8 will "eliminate the right of same-sex couples to marry in California." Interveners' Opp. Brief, p. 39, quoting Voter Information Guide, Gen. Elec. (Nov. 4, 2008) official title and summary of Prop. 8, p. 54. Interveners assert that this language clarifies an intent that Proposition 8 apply retroactively. However, saying that Proposition 8 works to "eliminate the right" can also be interpreted to indicate that the right to enter into same-sex marriages is eliminated *after*

November 5, 2008, which indicates a prospective intent. Again, since the language of Proposition 8 and its supporting materials are at best ambiguous, Proposition 8 cannot be applied retroactively.

3. Proposition 8 Must Be Harmonized With Conflicting Constitutional Provisions, Which Require That Proposition 8 Not Be Applied Retroactively.

If somehow, Proposition 8 is found to withstand the constitutional challenges brought against it, its retroactive application would conflict with other longstanding constitutional rights and principles. Such conflict between provisions of the Constitution is not allowed: "[a]n established rule of statutory construction requires us to avoid 'constitutional infirmit[ies].'" *Myers, supra,* 28 Cal.4th at 846. If Proposition 8 is upheld, the only way to avoid the creation of constitutional infirmities is to apply Proposition 8 prospectively, and not retroactively.

a. Retroactive Application of Proposition 8 Would Violate the Due Process Clause and Therefore, in the Interest of Harmonization, Proposition 8 Cannot Be Applied Retroactively.

"Retrospective legislation . . . may not be applied where such application impairs a vested property right without due process of law." *In re Marriage of Fabian* (1986) 40 Cal.3d 440, 447. Furthermore, Article I, section 7 of the California Constitution states that "[a] person may not be deprived of life, liberty, or property without due process of law or denied

equal protection of the laws." However, courts have recognized that "[v]ested rights are not immutable; the state, exercising its police power, may 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. But no such "necessity" exists here.

(1) Those Same-Sex Couples Who Are Already Legally Married in California Enjoy Vested Property and Liberty Interests.

Black's Law Dictionary defines "vested" as "[h]aving become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute." *Id.*, 8th ed. (2004). In the context of constitutional guarantees, a vested right is one that is "proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice." *Miller v. McKenna* (1944) 23 Cal.2d 774, 783. Under both of these definitions, the gay and lesbian couples who were married after the Court's decision in *Marriage Cases* and before November 5, 2008 have a vested right to remain married because their marriages have been completed (meaning the ceremonies have been performed and the appropriate documents have been filed) and the couples have an absolute right to the future enjoyment of their marriages. Furthermore, before

Proposition 8, these marriages were unquestionably proper for the state to recognize and protect.

(2) Retroactive Application of Proposition 8 Would Deprive These Couples of Their Aforementioned Vested Rights Without Due Process of the Law.

If Proposition 8 were applied retroactively, the couples who were married pursuant to the holding in *Marriage Cases* would be deprived of their vested right to enjoy and continue their marriages without being given any process of law, least of all due process. If Proposition 8 were to be applied retroactively, the same-sex couples who were enjoying the rights and benefits of being married would have those rights and benefits stripped from them in the blink of an eye.

(3) The State Has No Legitimate Interest in Depriving Gays and Lesbians of Their Vested Interests.

In order to determine if the application of a retroactive law will violate the due process clause, a court must consider "the significance of the state interest served by the law." *Id.* at 592. However, this Court has stated that "[i]n the interest of finality, uniformity and predictability, retroactivity of marital property statutes should be reserved for those rare instances when such disruption is necessary to promote a significantly important state interest." *In re Marriage of Fabian, supra,* 40 Cal.3d at 450.

Furthermore, in *Marriage Cases,* this Court unambiguously held that "the interest in retaining the traditional and well-established definition of marriage [] cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest." *Marriage Cases, supra*, 43 Cal.4th at 784 (italics in original). Even if Proposition 8 is found to properly amend the state Constitution, it does not create a new, compelling state interest that would justify retroactively terminating gay and lesbian marriages.

b. Retroactive Application of Proposition 8 Would Violate the Contracts Clause and Therefore, In the Interest of Harmonization, Proposition 8 Cannot Be Applied Retroactively.

Article I, section 9 of the California Constitution states that "[a] bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed." Similarly, the contracts clause of the United States Constitution prohibits states from passing "any Bill of Attainder, ex post facto Law, or law impairing the obligation of contracts." U.S. Constitution, Art. 1, sec. 10. Both of these clauses prevent the substantial impairment of private contracts. A law that substantially impairs private contracts can only survive if it serves an important and legitimate public interest and the law is both reasonable and narrowly tailored to promote that interest.

In attempting to retroactively nullify a whole class of pre-existing, valid, contractual marriages, Proposition 8 runs smack into unyielding constitutional proscriptions. In the most similar case on point, a New York court held that the statutory abolishment of common-law marriage must only be applied prospectively in order to avoid violating the federal contracts clause. *Cavanaugh v. Valentine* (1943) 41 N.Y.S.2d 896, 898. "As marriage is a contract protected against impairment of its obligations by the United States Constitution the prohibitory legislative action referred to above affected only those common law marriages attempted following the placing of the legislative ban upon them." *Id.*, internal citation omitted. Since the California Constitution's contracts clause bears such stark similarities to the Federal Constitution's contracts clause, there is no reason why *Cavanaugh* should not apply in the present case to restrict Proposition 8 to prospective application in order to avoid violating the contracts clause of the California Constitution.

(1) Those Same-Sex Couples Who Are Already Legally Married in California Have Entered Into A Valid Contract.

Marriage is at least partially a contract. Family Code section 300(a) defines marriage as "a personal relation arising out of a civil contract . . . ." Applying Proposition 8 retroactively would substantially impair the existing

marriage contracts, without any significant or legitimate public purpose. *Hall v. Butte Home Health, Inc.* (1997) 60 Cal.App.4th 308, 320; *Hellinger v. Farmers Group, Inc.* (2001) 91 Cal.App.4th 1049, 1064.

Unlike the situation in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 (hereinafter "*Lockyer*") where same-sex marriages were nullified because they were not in compliance with the law at the time, the marriages at stake here were entered into lawfully pursuant to this Court's ruling in *Marriage Cases,* making the marriages at stake in the present case valid contracts. *Lockyer, supra,* 33 Cal.4th at 1113.

(2) Retroactive Application of Proposition 8 Would Nullify Valid Marriage Contracts Causing Their Substantial Impairment and Consequently Violating Article 1 Section 9 of the California Constitution.

If Proposition 8 were to be applied retroactively the gay and lesbian couples who were legally married pursuant to the holding in *Marriage Cases* would have their marriages pulled out from under them. When a couple is legally married the state is obligated to grant them certain rights and privileges and to respect their exercise of those entitlements. If Proposition 8 is applied retroactively, the State of California will no longer be obligated to treat those couples as married, and to grant them the rights and privileges of married couples. Such an about face in law certainly

impairs the obligations arising out of the marital contracts at issue.

(3) The State Has No Significant or Legitimate Purpose in Nullifying These Contracts.

As discussed above, in *Marriage Cases* this Court unambiguously held that "the interest in retaining the traditional and well-established definition of marriage [] cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest." *Marriage Cases*, *supra*, 43 Cal.4th at 784 (italics in original). Even if Proposition 8 were found to properly amend the state Constitution, it does not create a new, compelling state interest that would justify retroactively terminating gay and lesbian marriages. If the state has no compelling or necessary interest in maintaining the traditional definition of marriage, which is cited as the reason behind Proposition 8, then the state surely has no significant or legitimate interest in *undoing* marriages that do not conform to that definition.

IV. CONCLUSION

Amici respectfully request that this Court grant Amici's application to file this Amici Curiae Brief. We respectfully urge the Court to grant petitioners' requests for relief and rule that Proposition 8 is a violation of the equal protection clause, an invalid revision of the Constitution, and a violation of the separation of powers doctrine, and is therefore

unconstitutional and invalid. Additionally, we request that all marriages of same-sex couples legally entered into before November 5, 2008 remain valid and intact, as even if Proposition 8 is upheld, it should not apply retroactively.

Dated: January 15, 2009

Respectfully submitted,

LAW OFFICES OF
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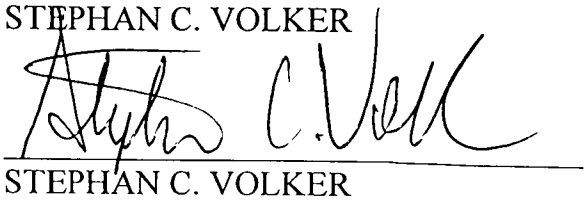

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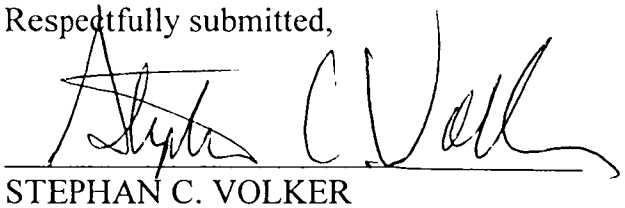
In accordance with Rule 29.1(c)(l), California Rules of Court, I certify that the **BRIEF OF *AMICI CURIAE* JOHN EMMANUEL DOMINE, BRADLEY ERIC AOUIZERAT, BETSY JO LEVINE, AND LISA LYNN BRAND IN SUPPORT OF PETITIONERS** is in at least 13-point proportional type and contains 13,248 words.

Dated: January 15, 2009

Respectfully submitted,



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I am a citizen of the United States of America; I am over the age of 18 years and not a party to within entitled action. My business address is 436 14th Street, Suite 1300, Oakland, California 94612. On January 15, 2009, I served the document entitled

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I hereby certify under penalty of perjury that the foregoing is true and correct.

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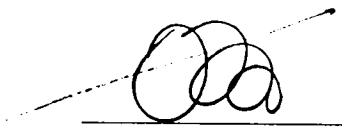

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