IN THE SUPREME COURT OF CALIFORNIA

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

PROPOSITION 8 OFFICIAL PROPONENTS etc., et al., Intervenors.

Case No. S168047

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

PROPOSITION 8 OFFICIAL PROPONENTS etc., et al., Intervenors.

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CITY AND COUNTY OF SAN FRANCISCO, et al., Petitioners,
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APPLICATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS; *AMICUS CURIAE* BRIEF OF THE CONSTITUTIONAL LAW CENTER OF THE MONTEREY COLLEGE OF LAW IN SUPPORT OF PETITIONERS

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATIONS

I, Amy M. Larson, certify that:

The length of the attached Answer to Petition for Review complies with the requirements of California Rules of Court, Rule 8.504, subdivision (d)(1), and Rule 8.520, subdivisions (b)(1) and (c)(1), and is 13505 words in length according to the word-processing program used to prepare this brief.

Dated: January 15, 2009

Amy M. Larson, Esquire
Professor of Law
CONSTITUTIONAL LAW CENTER OF THE MONTEREY COLLEGE OF LAW

Amicus Curiae in Support of Petitioners

APPLICATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to California Rules of Court, Rule 8.520, subdivision (f), the Constitutional Law Center of the Monterey College of Law ["Constitutional Law Center"] hereby requests leave to file a brief as *amicus curiae* in support of Petitioners in these three original proceedings in this Court challenging Proposition 8, November 4, 2008 General Election, now embodied at California Constitution, Article I, section 7.5 ["Proposition 8"].

This *amicus curiae* briefing is offered to provide the Court additional and scholarly analysis of the central issues posed by the Court to the parties. Constitutional Law Center submits this brief to aid the Court in its expedited review of the far-reaching and important constitutional issues presented by these cases. The Constitutional Law Center is familiar with the issues in this case and has reviewed all briefs, judicial notice requests, and orders filed in this Court in these matters. The Constitutional Law Center submitted a letter in support of the petitions on November 17, 2008, before this Court issued its order to show cause to the Respondents.

The Constitutional Law Center is directed by adjunct professors of constitutional law and appellate advocacy, and other faculty, who are also attorneys, seasoned in constitutional law,

appellate practice, legal writing and analysis, and moot court training. The undersigned professors of the Constitutional Law Center have played a role in the development of constitutional, civil rights and public-interest jurisprudence and have an interest in the continuing vitality and development of those important laws and policies. The Law Center provides opportunity for qualified law students to gain practical education in constitutional law litigation by working with faculty in the drafting of scholarly motions, writs, and briefs, particularly amicus curiae briefs, in California appellate courts. The law school was founded in 1972 and is accredited by the State Bar of California. The law school is comprised of a student body diverse in its ethnic, gender, age and sexual orientation make-up. The law school's students come primarily from Monterey, Santa Cruz, and Santa Clara counties.

The law school has a long-standing tradition of clinical programs and education for its law students, and currently offers an array of clinical education opportunities in the Monterey, Santa Cruz and San Benito County areas, including a Small Claims Advisory Clinic, internships in various government and public-interest law offices (for example, the District Attorney, County Counsel, Public Defender, Legal Service for Seniors, Legal Aid Society, California Rural Legal Assistance, and the ACLU of Monterey County) and judicial extern placements. The law school also operates the Mandell-Gisnet Center for Conflict Management,

which promotes public policy dialogues in the Central Coast region, offers community training and continuing education for attorneys in the fields of negotiation, mediation, and conflict resolution, and provides law students with hands-on experience in conflict management and resolution.

Constitutional Law Center, under the supervision of law professors, selects pending cases of constitutional significance, such as this matter, and seeks amicus curiae status to assist appellate courts in resolving important constitutional, rule of law, civil rights and civil liberties issues. Qualified law students receive clinical legal education units for their work at the Law Center.

Professors and students have devoted substantial clinical time in the preparation of the initial letter brief in support of the various petitions for this Court's review of Proposition 8, and have likewise committed significant time to legal research efforts and the writing of the proposed *amicus curiae* brief which accompanies this application.

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For these reasons, the Constitutional Law Center of the Monterey College of Law requests this Court grant it leave to file this brief as *amicus curie* in support of Petitioners in the three cases.

Dated: January 14, 2009

Respectfully submitted,

CONSTITUTIONAL LAW CENTER OF THE MONTEREY COLLEGE OF LAW

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AMICUS CURIAE BRIEF OF THE CONSTITUTIONAL LAW CENTER OF THE MONTEREY COLLEGE OF LAW IN SUPPORT OF PETITIONERS

I.

INTRODUCTION

In the *Marriage Cases*, this Court declared the language identical to that in Proposition 8 unconstitutional under the California Constitution's right to privacy, liberty, expression, association, autonomy, due process and equal protection (Art. I, §§ 1, 2, 7). The Court's decision is based on the ground that State law requirements limiting State-recognized marriage rights to opposite-sex partners and denying them to same-sex partners solely on the basis of sexual orientation denied the fundamental right of marriage to and equal protection of the laws to gay and lesbian persons and same-sex couples based on the suspect classification of sexual orientation. (*In re Marriage Cases* ["*Marriage Cases*"] (2008) 43 Cal.4th 757, 781-782, 787, 809-810, 817, 844.)[1]

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[1] In Proposition 22, passed at the March 2000 primary election, a section was added to the Family Code (§ 308.5) stating language identical to that passed in Proposition 8 in this past November 2008 general election: "Only marriage between a man and a woman is valid or recognized in California." (See *Marriage Cases*, *supra*, 43 Cal.4th at p. 796; Respondent[s'] [Attorney General's and State of California's] Request for Judicial Notice in Support of Answer Brief to Petitions for Writ of Mandate ["State's Jud. Not. Req."], Exhibit 14 [November 4, 2008 Ballot Pamphlet, p. 128 [text of Constitutional provision to be added by Proposition 8].)

The Constitutional Law Center submits that Proposition 8 attempts to remove from this Court its judicial authority to fully ensure and enforce the Constitutional guarantee of equal protection under the California Constitution, violating the separation of powers and reducing the balance of power held by the judiciary as a co-equal branch of this State's governmental plan. Proposition 8, by amendment through simply a majority vote of the people without also two-thirds approval of both houses of the Legislature[2], substantially altered California's "preexisting constitutional scheme" (*Raven v. Deukmejian* ["*Raven*"] (1990) 52 Cal.3d 336, 354), and purports to remove fundamental rights of a particular suspect classification of Californians -- the right to marry and the guarantee of equal protection of the laws. Proposition 8 encroaches on the essential function of the judicial branch to review and determine equal protection rights (*see Katzberg v. Regents of Univ. of Cal.* (2002) 29 Cal.4th 300, 331). Indeed, the fundamental right this Proposition inappropriately seeks to restrict, the right to marry, is among our *inalienable* rights, which inheres in several other inalienable Constitutional rights -- the rights of privacy, liberty, expression, association, autonomy and due process. (*See Marriage Cases*, *supra*, 43 Cal.4th 757, 781-782,

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[2] When this brief refers to the problem of approval of such a substantial change in the Constitution by "simply a majority vote" of the people, the error of this lies in the failure to have advance consideration by the Legislature and approval by two-thirds of the members of both houses. (See Cal. Const., Art. XVIII, §§ 1-2.)

802, 809-810, 814-815 ["the right to marry . . . is of fundamental significance both to society and to the individual"], 817, 819, fn. 41, 822-823, 839-844, *inter alia*; Cal. Const., Art. I, §§ 1, 7, subd. (a).)

It is no answer to suggest, as Intervenors do, that same-sex couples have only had the right to marry for nine or ten months, so their right to marry is not fundamental, or important enough to warrant protection from the will of a majority of the people who voted on an initiative amendment. That argument is circular; it will always be the case that fundamental rights needing enforcement will have been previously-denied and newly-acknowledged.

> "[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights."

(*Marriage Cases*, *supra*, 43 Cal.4th at p. 824, *quoting Hernandez v. Robles* (2006) 7 N.Y.3d 338, 821 N.Y.S.2d 770, 855 N.E.2d 1, 23, dis. opn. of Kaye, C.J.) Although the proponents of Proposition 8 say they only wish to return marriage to its "traditional" or "historic" conception, "history alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 781.)

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The question raised in these pending cases challenging Proposition 8 is, at its core, basic: May a majority of the people, without prior deliberation and approval of the proposed Constitutional change by two-thirds vote of both houses of the Legislature, take away a fundamental right of some, but not all, Californians, based on solely a suspect classification?

That is what this initiative would do, if allowed to stand. The people of the State of California have, by passing Proposition 8, attempted to write invidious discrimination -- as is discriminatory treatment based on a suspect classification -- into the California Constitution. If the courts do not exercise their judicial power at this time to invalidate that initiative amendment to the Constitution, the California courts will lose permanently the right to prevent that discrimination hereafter.

While the initiative currently at issue is aimed at one particular classification of persons entitled to "strict" Constitutional protection and judicial "scrutiny" (*see Marriage Cases*, *supra*, 43 Cal.4th at p. 844), the essential question presented – whether merely a majority of voters may, without first obtaining two-thirds approval of the full Legislature be permitted to eliminate fundamental, constitutionally-protected rights (particularly when based upon a suspect classification) -- has implications for all people in California. If Proposition 8 is permitted to take effect,

what is to distinguish and prevent other attempts to eliminate by simply a majority popular vote any fundamental, constitutional right of others, particularly those of suspect classifications entitled to equal protection? Just as pernicious, permitting the deprivation of rights for one historically-denigrated group diminishes all other members of a civil society.

Intervenors try to minimize the impact of Proposition 8 and its far-reaching, important effects.

There can be no doubt that the Proposition removes the fundamental right to marry of same-sex couples, preserving it for opposite-sex couples, thereby making gay and lesbian persons' entitlement to equal protection into an entitlement to *unequal* protection. In doing so, Proposition 8 removes the right of the judicial branch of this state to interpret and enforce the fundamental right to marry and to interpret and enforce the right to equal protection of the laws. And it does so in a way in which clearly removes the existing judicial role in understanding and analyzing these highly-favored and historically-important rights. (*see Marriage Cases*, *supra*, 43 Cal.4th at p. 784; *id.*, at pp. 781-782, 813-818.)

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II.

ISSUES PRESENTED

By order dated November 19, 2008, this Court ordered the parties to address the following issues:

(1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution?

(2) Does Proposition 8 violate the separation of powers doctrine under the California Constitution?

(3) If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?

This *amicus curiae* brief addresses the first two issues. It does not address the question of retroactive application of Proposition 8, as the clear law on the Proposition's prospective application has been fully and adequately briefed by the Petitioners and the Respondents; this *amicus* concurs and joins in those arguments. In addition to the first two issues identified by this Court, this brief also addresses the issue set forth at pages 75 through 90 of the Answer Brief filed by the Attorney General on December 19, 2008.

LEGAL ANALYSIS

III.

AS A CONSTITUTIONAL AMENDMENT BY INITIATIVE, PROPOSITION 8 MUST BE INVALIDATED BECAUSE IT WHOLLY ELIMINATES A FUNDAMENTAL RIGHT FROM CERTAIN CALIFORNIANS BASED ON A SUSPECT CLASSIFICATION, A CHANGE IN LAW WHICH MAY BE ACCOMPLISHED, IF AT ALL, ONLY BY THE PROCESS FOR CONSTITUTIONAL REVISION

A. Elimination of a Fundamental Right Cannot Be Accomplished by a Constitutional Amendment, If it May Be Permitted at All.

1. Proposition 8 Eliminates the Fundamental Right to Marry for a Certain Group of the People of this State.

The right to marry is a fundamental right. Moreover, this fundamental right, which Proposition 8 seeks to eliminate, is an inalienable right guaranteed to all persons in this State, which inheres in several other inalienable California Constitutional rights -- the rights of privacy, liberty, free expression, association, personal autonomy and due process.[3] (*See Marriage Cases*, *supra*, 43 Cal.4th at pp. 781-782, 787, 802, 809-810, 814-815 ["the right to marry . . . is of fundamental significance both *to society* and to the individual", emph. added], 817, 819, fn. 41, 822-823, 839-844, *inter alia*, *quoting Maynard v. Hill* (1888) 125 U.S. 190, 211; Cal. Const., Art. I, §§ 1 [inalienable liberty and privacy rights, which includes

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[3] Hereafter, this brief will refer to these rights as "marriage and liberty" rights, rather than repeating the constellation of inalienable and fundamental rights reduced by removing the right to marriage for a suspect class.

intimate association and personal autonomy], 2 [free expression and due process], 7, subd. (a) [equal protection].) It should be noted that this Court long ago stated, "[t]he word 'liberty' as used in the constitution . . . means . . . the right . . . to do such acts as he may judge best for his interest, no inconsistent with the equal rights of others . . . ." (*Ex Parte Drexel* (1905) 147 Cal. 763, 764.) That recognition of the inalienable liberty right, of which the right to marry is a part, is quite pertinent to the question of the validity of Proposition 8 as an initiative constitutional amendment.

> As past cases establish, the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own ... constitutes a vitally important attribute of *the fundamental interest in liberty and personal autonomy* that the California Constitution *secures to all persons for the benefit of both the individual and society*.

(*Marriage Cases*, *supra*, 43 Cal.4th at pp. 781-782.)

As such, the right may not be eliminated for a portion of the populace, but not its entirety, or, at the least, it may not be eliminated based on a suspect classification. (*See In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 810, 818.)

> [T]he basic *substantive* legal rights and attributes traditionally associated with marriage . . . are so

> integral to an individual's liberty and personal autonomy that they *may not be eliminated or abrogated* by the Legislature or *by the electorate through the statutory initiative process*.

(*Marriage Cases*, *supra*, 43 Cal.4th at p. 781, second and third emph. added.)

2. Elimination of the Fundamental Right to Marry Is, at Least, a Constitutional Revision Which Has in Proposition 8 Masqueraded as an Amendment.

a. A Comparison of Constitutional Changes Which Require the More-Deliberative Revision Process and Those Which May Be Accomplished By Amendment Demonstrate that The Changes Wrought by Proposition 8 Must Be Accomplished by a Revision.

This court has consistently retained the power to review initiatives against fundamental standards of constitutionality. In its constitutional role, this Court legitimately reviews the validity of Proposition 8:

> We do not consider or weigh the . . . social wisdom or general propriety of the initiative. Rather, our sole function is to evaluate [the initiative] legally in light of established constitutional standards.

(*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* ["*Amador Valley*"] (1978) 22 Cal.3d 208, 219.) The

Court's ability to review initiatives under the lens of constitutionality is critical to enforcing the constitution and providing clarity to governmental agencies and of great importance to Californians, which justifies the Court asserting original jurisdiction in this matter. (*Raven*, *supra*, 52 Cal.3d at p. 340.)

This court's jurisprudence has "reasoned that a constitutional amendment should be given a common-sense construction in accordance with the natural and ordinary meaning of its words, with a view toward fulfilling the apparent intent of the framers" and resolving doubts in favor of the vote. (*See*, e.g., *People v. Frierson* ["*Frierson*"] (1979) 25 Cal.3d 142, 186, analyzing *Amador Valley*, *supra*, 22 Cal.3d at p. 245, 248.) "[The] power of initiative must be *liberally construed* . . . to promote the democratic process," with doubts resolved in favor of the vote. (*Amador Valley*, *supra*, 22 Cal.3d at pp. 219-220, brackets in original and citations omitted; *Brosnahan v. Brown* ["*Brosnahan*"] (1982) 32 Cal.3d 236, 241.) The revisionary nature of a measure appear from the face of the measure or its indisputable effects. (*Legislature v. Eu* ["*Eu*"] (1991) 54 Cal.3d 492, 501, 510.)

The "formidable bulwark" of the process for revising the California Constitution (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 347) recognizes,

> "[t]he very term 'constitution' implies an instrument of a permanent *and abiding nature*" and "*indicate[s] the will of the people that the underlying principles upon which it [the State Constitution] rests*, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature."

(*Livermore v. Waite* ["*Livermore*"] (1894) 102 Cal. 113, 118, emph. added.) As observed by Roger Traynor, before he became Chief Justice of this State, if a Constitution "is to retain respect it must be free from popular whim and caprice which would make of it a mere statute." (Rachel A. Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California* (1993) 21 Hastings Const. L. Qtrly. 95, 98, fn. 19, *quoting* Roger Traynor, "Amending the United States Constitution" (1927) [unpublished Ph.D. thesis while at the University of California at Berkeley].) Protection of rights equally for historically-oppressed minorities is an important value of this society and exists as a limit on pure democracy, a limit on pure majority rule, a limit on the "tyranny of the majority," as de Tocqueville and Mill termed it. (Alexis de Tocqueville, *Democracy in America* (1835 [Reeve translation, 3d Am. ed., revised and corrected, 1839]), pp. 250-268, 267, fn. †; see also *id.*, at pp. 270-279 [also positing that the profession of the law serves to counterbalance the tyranny of the majority], *inter alia*; John Stuart Mill, *On Liberty* (1869), p. 6.)

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Livermore defined a proper amendment perhaps a bit more clearly: "'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 pp. 118-119, emph. added.) A revision, by negative implication, is everything else – most particularly, a "subtraction" or change "outside" the Constitution's provisions. (*See ibid.*) Thus, revisions are alterations to the State Constitution which work the opposite, a limitation or removal of underlying principles of the State Constitution which are permanent and abiding in nature. (*See ibid.*)

> The constitution itself has been framed [through a constitutional convention] by delegates chosen by the people . . . and has been afterwards ratified by a vote of the people, at a special election held for that purpose; and the provision in article [XVIII] that it can be revised only in the same manner . . . precludes the idea that it was the intention of the people, by the provision for amendments . . . to afford the means of effecting the same result [revision] which in the next section has been guarded with so much care and precision.

(*Livermore*, *supra*, 102 Cal. at p. 118.)

> "The very purpose of a [Declaration] of Rights was to withdraw certain subjects from the vicissitudes of

> political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

(*Marriage Cases*, *supra*, 43 Cal.4th, at p. 852, *quoting West Virginia State Bd. of Ed. v. Barnette* (1943) 319 U.S. 624, 638.)

As noted in *Raven*, it is not the quantity of the Constitution which is modified that dictates whether the modification is an amendment or a revision, but the *quality* of the alteration. (*See Raven*, *supra*, 52 Cal.3d at pp. 351-352.) Although *Raven* involved modification of numerous provisions and protections of the California Constitution, it was the qualitative nature of the alterations which doomed their adoption by initiative.

The initiative in *Raven* removed protections provided by the California Constitution, in matters of several criminal procedural protections, including the rights to *equal protection*, due process, counsel, confrontation of witnesses, fair and speedy trials, and freedom from self-incrimination, double jeopardy, unreasonable searches and seizures and cruel and unusual punishment, which prevented the courts of this State from applying the provisions of the State Constitution, which affords independent and sometimes

greater protections than does the federal Constitution. (*Raven*, *supra*, 52 Cal.3d at pp. 350-351.)

> "[T]he California Constitution is, and always has been, a document of independent force. Any other result would contradict ... the most fundamental principles of federalism ...."

(*People v. Brisendine* (1975) 13 Cal.3d 528, 549-550, *quoted in In re Lance W.* (1985) 37 Cal.3d 873, 904, dis. opn. of Mosk, J.; Cal. Const., Art. I, § 24; *see Raven*, *supra*, 52 Cal.3d at pp. 353-354, *citing People v. Longwell* (1975) 14 Cal.3d 943, 951, fn. 4 [a characteristic of the California Constitution which existed even prior to the addition of an express statement of this principle].)

This Court in *Raven* recognized that the changes effected a modification of the essential precepts of the Constitution. (*See Raven*, *supra*, 52 Cal.3d at pp. 353-354 [removing many *independent* state rights for a class of people, criminal defendants, although not a suspect class].) *Raven* also noted revisions are changes to the constitution which "would substantially alter the substance and integrity of the state Constitution . . . ." (*Raven*, *supra*, 52 Cal.3d at p. 352), or cause "far reaching changes in the nature of our basic governmental plan as to amount to a revision [of the Constitution] . . . ." (*Raven*, *supra*, 52 Cal.3d at p p. 352, 355, citations omitted; *see also Livermore*, *supra*, 102 Cal. at pp. 118-119

[revisions make changes in the "underlying principles" on which the Constitution rests].) As such, the people of the State were entitled to the additional protections of the requirements for adoption of revisions to the Constitution. (*See Amador Valley*, *supra*, 22 Cal.3d at p. 223). The additional processes required for revisions ensure enhanced thought and solemnity in making them. (*McFadden v. Jordan*, *supra*, 32 Cal.2d at p. 349; *Raven*, *supra*, 52 Cal.3d at pp. 349-350.)

The Attorney General states that *Brosnahan* upheld the removal of a fundamental right. (See Answer Brief in Response to Petition for Extraordinary Relief ["Ans. Brf."], pp. 40-41.) This statement is not correct, because it fails to recognize other provisions of the same Proposition. The initiative challenged in *Brosnahan* did not eliminate a criminal defendant's right to bail in all circumstances and under any conditions. (See *Brosnahan*, *supra*, 32 Cal.3d at p. 242.) The Attorney General does not note the addition by the same Proposition of a new bail provision (proposed Article I, section 28, subdivision (e)), which reinstated a right to release on a defendant's "own recognizance" pending trial and, if not, bail in the absence of enumerated conditions for denial of bail.[4] Accordingly, the right to bail was not eliminated. Indeed,

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[4] (See Art. I, § 12; 1982 Proposition 8, § 3, subd. (e) [which may be located in the 1982 Ballot Pamphlet, at p. 33, at: http://library.uchastings.edu/ballot_pdf/1982p.pdf].) Most of the provisions of (continued...)

Brosnahan itself characterizes the overall bail subjects of that Proposition as an "amendment". (See *Brosnahan*, *supra*, 32 Cal.3d 236 at pp. 254-255.)

A subsequent case challenged the validity of one of the provisions of the same Proposition upheld in its entirety as merely an amendment of the constitution in *Brosnahan*. *Lance W.* challenged as an invalid amendment the search and seizure portion of the constitutional changes, which affected the State's evidentiary exclusionary rule, requiring application of the narrower federal exclusionary standards. (*In re Lance W.* (1985) 37 Cal.3d 873, 879.) While *Lance W.* thus "affects" the right to freedom from unreasonable searches and seizures, that right and the exclusionary-rule remedy for it were not wholly removed, and not applied unequally.

Likewise, in *Frierson*, *supra*, 25 Cal.3d 142, while the initiative reinstated the death penalty in California, it did not

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[4] (...continued)
1982's Proposition 8 did not take effect, as Proposition 4 in the same election garnered a greater number of votes. Proposition 4 did not repeal the right to bail, but kept it in Article I, section 12, amending its provisions to expand the circumstances under which any particular criminal defendant's right to bail may be denied and setting forth additional considerations in setting the amount of bail. (*Brosnahan*, *supra*, 32 Cal.3d 236 at p. 255; see Art. I, § 12; 1982 Proposition 4 [which may be located in the 1982 Ballot Pamphlet, at p. 17, at: http://library.uchastings.edu/ballot_pdf/1982p.pdf .])

provide that the death penalty in all circumstances was not cruel and unusual punishment. (*Id.*, at pp. 184-186.) Rather, a criminal defendant's right to be free from cruel and unusual punishment continued to exist. What was effected by the initiative, in addition to reinstating the ability to impose the death penalty if appropriate circumstances were proven, was the *scope* of the freedom from cruel and unusual punishment in the context of the death penalty, limiting it to that recognized under the federal constitution – similar to the initiative's effect on the fundamental right at issue in *Lance W.* (*Id.*, at p. 187.)

Other types of constitutional changes that have been found to be valid amendments in some instances do not limit fundamental or inalienable rights or affect procedural rules or legislative matters, which do not "standing alone" or "in the aggregate" substantially alter the preexisting governmental framework. (*See Raven*, *supra*, 52 Cal.3d at p. 350; *Amador Valley*, *supra*, 22 Cal.3d at p. 228; see *id.*, at p. 224 [taxation]; *Brosnahan*, at p. 261 [safe schools, victims' rights, admissibility of evidence, impeachment evidence, sentence enhancement, restitution for crime]; *Tinsley v. Super. Ct.* (1983) 150 Cal.App.3d 90, 100, 109-110 [affirmative action and desegregation, found to be a remedy for deprivation of a fundamental right, neither wholly removed nor necessary to ensure the fundamental right].)

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It is doubtful that an initiative constitutional amendment could wholly remove a fundamental right or rights. Neither *Brosnahan*, *Lance W.*, nor *Frierson*, nor even *Raven*, for that matter, faced an initiative of that reach and scope.

Thus, in summary, the cases discussed herein show that a valid amendment does not wholly remove fundamental rights (*see Raven*, *supra*, 52 Cal.3d at p. 355), retains the full powers of the judicial branch to fully ensure fundamental rights and other constitutional rights (*see ibid.*), and makes improvements to and within the existing provisions of the constitution (*Livermore*, *supra*, 102 Cal. at pp. 118-119.) Changes which must be made by revision, on the other hand, are those which alter the underlying principles on which the State Constitution and society was based (*see ibid.*), making sweeping changes to the constitution (*see*, e.g., *Amador Valley*, *supra*, 22 Cal.3d at p. 229) or substantially altering the governmental framework of the social compact (*Raven*, *supra*, 52 Cal.3d at p. 341). Changes which remove or subtract from the constitution, making changes beyond the lines of the document, are revisions.

Proposition 8 is just such a fundamental modification of the California Constitution.

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b. Proposition 8 Seeks to Make Qualitative Changes to Our Societal Compact and, as an Initiative Amendment, Cannot Do So.

As an initial matter, while Proposition 8 has been presented as a discrete alteration of the California Constitution, it is not. The quantity of the Proposition's *express* changes to the constitution is small: a single provision has been added, and a short, simple one at that. The quantity of the *effects* of the Proposition are not few in the least. Qualitatively, the change and its undisputed effects are major. Its fourteen words alter the meaning of "equal protection" and the removal of a number of rights for the only class affected by the amendment. (See *ante*, at p. 11.)

Intervenors and Respondents do not dispute that Proposition 8 removes the fundamental right to marry of a protected class of persons who historically have been subject to disfavor and discrimination. Intervenors and Respondents do not dispute that Proposition 8 would treat this class unequally in the right to marry. Intervenors and Respondents do not dispute that the fundamental right to marry is a component of the inalienable rights of liberty and privacy, or that the fundamental right to marry also both derives from and ensures the rights of expression, due process and association. Intervenors and Respondents also do not dispute that no court of this State will, if Proposition 8 stands, be able to ensure to this class of California the "marriage and liberty rights", or those aspects of the class' right to equal protection of the laws.

They do not dispute that the judicial branch is vested with determining the scope of each of these rights and enforcing such rights, pursuant to the system of separation of powers and checks and balances in this State's republican form of government.

Thus, the fact that these effects will occur indisputably results (or "appears") from the brief language of Proposition 8. This satisfies the conception in *Eu* that the effects of the measure appear on the face of the measure. (*Eu*, *supra*, 54 Cal.3d at pp. 501, 510.)

What Intervenors and Respondents dispute is the qualitative nature and importance of these effects of Proposition 8. They dispute these changes to the constitutional, fundamental, inalienable rights of Californians in a suspect classification and the balance of governmental powers are "far-reaching", "substantial" or "sweeping". They dispute that the Proposition restricts the judiciary's powers, while in the same breath baldly stating Proposition 8 does in fact restrict those powers.. (See Intervener's Opposition Brief ["Int. Opp. Brief"], pp. 15-16, 24-26, 32-33, 35; Int. Opp. to Ans. Brf., pp. 18-19; see also discussion of separation of powers issue, *post*, at p. 41 & ff.) However, that this seemingly-simple change to the State Constitution is a revision attempted by an initiative amendment which does have these effects is demonstrated by its language and its undisputed meaning.

Proposition 8 is unlike the initiative at issue in *Frierson*, which reinstated the availability of the death penalty for certain crimes, stating that for such crimes the death penalty did not constitute cruel and unusual punishment under the California Constitution. Two distinctions are critical. First, the death penalty is equally applicable to all (assuming they are convicted of a qualifying offense); it was not made applicable to any particular group or class. (*See Frierson*, *supra*, 25 Cal.3d at p. 185.) In that sense, even the initiative found to be an invalid attempted revision in *Raven* does not wreak what Proposition 8 will. Proposition 8 does, expressly and intentionally, eliminate the right of one class to participate in an existing fundamental right, reserving it only to another class. And, second, as discussed in the subsequent section of this amicus letter brief, judicial review of application of the re-instituted death penalty was preserved, unlike in Proposition 8. (*See Frierson*, *supra*, 25 Cal.3d at p. 187; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.) As a result, the initiative in *Frierson* was valid, while Proposition 8 is not.

Because of the far-reaching effects of Proposition 8 – complete removal of the right to marry for a class of Californians thereby limiting their full participation in the fundamental and inalienable liberty and privacy rights, and the rights of association, free expression, personal autonomy and due process -- Proposition 8 substantially alters California's "preexisting constitutional

scheme". (*See Raven* 52 Cal.3d at p. 354.) It removes underlying principles on which this State and its constitution were founded, undermining their foundations. (*See Livermore*, *supra*, 102 Cal. at pp. 118-119.) Accordingly, Proposition 8 is an invalid revision.

B. Elimination of a Fundamental Right for Only Certain Californians Based on a Suspect Classification Denies That Class Equal Protection of the Laws, a Repeal of Constitutional Rights Which May Be Accomplished Only by Constitutional Revision, If at All.

1. The Fundamental Right to Marry Has Been Eliminated for a Group of Californians Due to Their Suspect Classification, Which Denies that Class of People Equal Protection of the Laws.

Proposition 8 is intended to prevent same-sex couples from marrying, and leave in place the right to marry for heterosexual people. That is clearly discriminatory. It removes the "marriage and liberty rights" for this historically-denigrated group on the basis of their membership in a suspect classification.

The ballot arguments in support of the initiative state that Proposition 8 limits same-sex couples to domestic partnership rights and other statutorily-created rights. (Exh. 14, pp. 56, 57, State's Jud. Not. Req.; see Int. Opp. Brf., pp. 16-17; accord, Ans. Brf., p. 26.) This Court has already held that such legal rights, while virtually the same as the legal rights and obligations of

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marriage, do not provide gay men and lesbian women with equal protection. (*Marriage Cases*, *supra*, at pp. 779, 847-856.)

Suspect classes' freedom from invidious discrimination is a fundamental right enforced through the equal protection clause. (*See Sail 'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17; *San Antonio School Dist.* (1973) 411 U.S. 1, 28; *U.S. v. Cruikshank* (1875) 92 U.S. [2 Otto] 542, 554-555 ["Equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle . . . ."].) Equal protection has been a "fundamental part" of the California Constitution since it was adopted. (*See* Stanley Mosk, *Raven and Revision* (1991) 25 U.C. Davis L. Rev. 1, 13.)

Pursuant to the California Constitution, abridgment or removal of equal rights based on a suspect classification of a historically disfavored or unpopular class is impermissible absent a compelling state interest. This Court has already determined that no compelling state interest exists to support the classification at issue here or the denial of the right to marry for that class. (*See Marriage Cases*, *supra*, 43 Cal.4th at pp. 843, 847, 855-856, *inter alia*.) The state interest offered in support of the new initiative has not changed simply because the identical text was created as a Constitutional provision instead of a statute. Thus, it is no more compelling than it was when this

discriminatory enactment was passed as a statute and invalidated by this Court in the *Marriage Cases*, *supra*, 43 Cal.4th 757. (*See id.*, at pp. 848-856.)

The United States Supreme Court also has recognized that an enactment as a state constitutional provision by the initiative process which removes equal protection for a particular class of people, subjecting them to discrimination and limited status, violates "our constitutional tradition" and "the rule of law". (*Romer v. Evans* (1997) 517 U.S. 620, 633.) Proposition 8 would, if validated, be just such a law. As in *Romer*, the fact discrimination is written into the State Constitution does not mean it does not violate the foundations of our constitutional theories. Passage and enforcement of such a law is anathema to the very principle of equal protection, a bedrock principle of this State and this Nation.

Such an alteration of the very definition of the concept of equality in this State's constitution may be accomplished, if at all, only by the solemn process for revisions.

2. Denial of Equal Protection for a Suspect Class Is a Fundamental Constitutional Change Which May Be Accomplished Only by Constitutional Revision, If at All.

Here, if the initiative is upheld, no court in California could ensure that same-sex couples have full equal protection or have

the fundamental right to marry. Same-sex couples would possess less-than-complete equal protection, being denied the fundamental right to marry, and additional fundamental rights, . In other words, these Californians would be entitled to *unequal* protection.

Proposition 8 defines the meaning of marriage in contravention of this Court's previous determination of what is required by the equal protection clause of California's Constitution. Thus, because this Court has found this particular suspect class has, coextensive with the rest of society, the fundamental right to marry, then the right to marry of members of the class may not be "eliminated or abrogated" by merely a majority vote on an initiative.

The right to equal protection exists to prevent continued persecution of groups historically mistreated and to prevent discrimination against the minority by the majority. The equal protection and suspect classification doctrines *exist* to counteract the animus of a majority. (*U.S. v. Carolene Products Co.* (1938) 304 U.S. 144, 152, fn. 4.)

California's equal protection right would be imperiled if the constitutional protection of unpopular minorities were subject to majority rule without the additional deliberative safeguards of

Legislative approval by two-thirds vote. Such a result would work an extreme, substantive change to our constitution's "underlying principles" (*Livermore*, *supra*, 102 Cal. at pp. 117-119) of equality to a magnitude never previously tolerated by this Court, and "would substantially alter the substance and integrity" of the state Constitution and the State's "preexisting constitutional scheme". (*Raven*, *supra*, 52 Cal.3d at pp. 352, 354.)

No modification of the California Constitution has been found to deny complete equal protection to a suspect class or to deny a portion of Californians fundamental, inalienable rights. Such instances of Propositions which have limited one or more constitutional rights have always been equally applicable to all Californians – even the change stricken down as a revision in *Raven*. (See *ante*, at pp. 13-30.) Thus, no California court has held valid an initiative constitutional amendment which wholly removed a fundamental right on a discriminatory basis.

The indisputable effects of Proposition 8 enumerated above (*ante*, at pp. 23-24) qualitatively alter foundational principles of the California Constitution, removing fundamental, inalienable rights and making equal protection of the laws unequal.

In short, the removal of this class' entitlement to equal protection in their fundamental right to marry (and their other

related rights), *if amenable at all to abrogation*, must be accomplished subject to the heightened standards of a revision pursuant to Article XVIII, required in sections 1 and 2. Revisions must satisfy the more deliberative process of representative or republican government, through the Legislature or a Constitutional Convention, followed by popular ratification. (*Raven*, *supra*, 52 Cal.3d at pp. 349-350.) Proposition 8 did not result from those revision procedures and, therefore, is invalid.

C. In Combination, the Elimination of the Right to Marry of a Portion of the Populace and the Denial of Equal Protection for A Suspect Class by Removing One of its Members' Fundamental Rights is a Revision.

We have discussed above the fundamental and deep nature of the abrogation of the fundamental right to marry and right to full equal protection for the suspect classification based on sexual orientation. Certainly, the abrogation of both these basic rights, and the concomitant impact on the "marriage and liberty rights" as we have delineated them earlier, is altogether a revision.

Proposition 8's removal of and impact on these rights is particularly troubling when the combined impacts are understood. Proposition 8's alteration of fundamental principles on which this State's Constitution and society were founded substantially alters the substance of California's Constitution. It makes far-reaching and sweeping changes in the preexisting constitutional scheme

and framework. (*Raven*, *supra*, 52 Cal.3d at pp. 352-355; *Eu*, *supra*, 54 Cal.3d at p. 541.)

Consequently, even if one of the impacts wrought by Proposition 8 alone is not considered so fundamental as to undermine the foundation of California's Constitution, their compounded effects does so. As such, Proposition 8 is an invalid revision of the State Constitution.

IV.

THE FUNDAMENTAL RIGHT TO MARRY IS, BY DEFINITION, INALIENABLE, AND, EVEN IF IT MAY BE ELIMINATED, AT THE LEAST A CONSTITUTIONAL REVISION AND A COMPELLING STATE INTEREST IS REQUIRED TO ACCOMPLISH SUCH A ABROGATION

Amicus agrees with the Respondents' recognition and analysis that Proposition 8 has improperly attempted to remove an inalienable right. We write to amplify some of the authority concerning the inalienable nature of the rights denied here and the historical explanation of the concept of "inalienable" rights.

A. The Fundamental Right to Marry Is an Inalienable Right.

The right to marry "has been recognized as one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution . . . ." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 781.) As reiterated by this Court very recently in the *Marriage*

Cases, the right to marry arises from other inalienable and fundamental Constitutional protections, including liberty and privacy. (*See*, e.g., *Marriage Cases*, *supra*, 43 Cal.4th at pp. 781, 787, 822-823, 839-844; *see Billings v. Hall* (1857) 7 Cal. 1, 6 [noting that the concept of the existence of inalienable rights "is as old as the Magna Charta" and is "necessary to the existence of civil liberty . . . ."].) As such, it may not be eliminated for a portion of the populace, but not all people, particularly if based on a suspect classification, at least without a compelling state interest or a constitutional revision. (*See In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 810, 818.)

Intervenors suggest that this State and this Nation have left behind the purportedly antiquated ideas of natural rights existing without the need to grant them by a Constitution. (Interveners' Response to Pages 75-90 of the Attorney General's Answer Brief ["Int. Opp. to Ans. Brf."], pp. 5-6.) The reality that people have considered such natural rights to exist since at least the Magna Carta – nearly 800 years ago (in 1225) – would seem to make them more certain, venerated, and protected, rather than less secure. It is not progress to "move beyond" the idea that human beings possess certain rights which cannot be taken away; it is regression.

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The proponents of Proposition 8 charge that permitting same-sex marriages impinges on the marriages of opposite-sex couples. This Court has found that the recognition of the right of same-sex couples to marry does not impact the marriage rights of opposite-sex partners. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 784.) It is only the views and interests of the adherents to Proposition 8 that are served by Proposition 8, and only the rights of gay and lesbian Californians which are affected by either the *Marriage Cases* decision or Proposition 8. The rights of the detractors of the *Marriage Cases* decision and the advocates of Proposition 8 are unaffected by Proposition 8. (*See Marriage Cases*, *supra*, 43 Cal.4th at p. 784.)

Discrimination against any group in our society based on arbitrary or irrational classifications is an affront to all people and our society.

The equal protection provision exists to prevent discrimination of historically-disfavored or -oppressed minorities by the majority. The equal protection of laws ensured by the California Constitution is a core example of a fundamental principle underpinning the Constitution and, indeed, our society, which should, therefore, be protected by sections 1 and 2 of Article XVIII, and particularly when equal protection of a suspect class is being removed as to the enjoyment of another fundamental right.

The initiative wholly removes from certain members of society (or even all members of society) a fundamental right. As discussed earlier (see *ante*, at pp. 11-13; *post*, at pp. 41-48), under no construction would the initiative leave same-sex couples with the right to marry.

B. Inalienable Rights, as Their Very Name Indicates, May Not Be Wholly Eliminated.

As an inalienable right, the right of same-sex couples to marry has existed all along. This is due to the very concept of inalienable rights, which exist without the need for law to declare them.

> " . . . *the rights of life and liberty were not granted by the constitution, but were natural and inalienable rights* and . . . the fourteenth amendment of the constitution, added nothing to the rights of [citizens] . . . but simply furnished an additional guaranty against any encroachment by the states upon fundamental rights which belong to *every* citizen as a member of society. . . . [T]hese fundamental rights of life and liberty*[are] not created by or dependent on the constitution* . . . .

(*Logan v. U.S.* (1892) 144 U.S. 263, 287, emph. added, *citing Cruikshank*, *supra*, 92 U.S. [2 Otto] at pp. 553, 554.) As the Supreme Court had earlier explained in *Cruikshank*,

> *The rights of life and personal liberty are natural rights of man*. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution was to protect *all* persons within their boundaries in the enjoyment of these "*unalienable rights with which they were endowed by their Creator*."

(*Cruikshank*, *supra*, 92 U.S. [2 Otto] at p. 553, emph. added; *see* Cal. Const., Preamble ["We, the People of the State of California, grateful to Almighty God for our freedom, in order to *secure and perpetuate its [freedom's] blessings*, do establish this Constitution.", emph. added].)

As this Court described, not long after California's statehood,

> For, it [the "legislative"] being but the joint power of every member of society, given up to that *person or assembly* which is the legislative, *it can be no more than those persons had in a state of nature* before they entered into society . . . . A man cannot subject himself to the arbitrary power of another, and *having in the state of nature no arbitrary power over the life, liberty*, or possession *of another*, *but only so much as the [natural] law gave him for the preservation of himself and the rest of mankind, this is all that he doth or can give to the commonwealth, and by it to the legislative power; so that the Legislature can have no*

> more than this. Their power, in the utmost bounds of it, is limited to the public good of the society. It is a power that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subject. Thus, *the law of nature stands as an eternal rule to all men, binding upon legislatures as well as others*. The fundamental law of nature being the preservation of mankind, no human sanction can be valid or good against it. . . . *[M]en would not quit the freedom of a state of nature, and tie themselves up under a government, were it not to preserve their lives, liberty, and fortunes, by stated rules of right and property. It cannot be supposed that they should intend, had they the power to do so, to give any one or more an absolute, arbitrary power over their persons and estates*. For this were to put themselves in a worse condition than *a state of nature, wherein they had the liberty to defend their rights against the injuries of others, and were upon equal terms* . . . .

(*Billings v. Hall*, *supra*, 7 Cal. at pp. 11-12.)

At base, eliminating the inalienable right of same-sex couples to marry based on their sexual orientation is no different than barring any other suspect class' right to marry or taking away some other fundamental or inalienable right from one or more suspect classifications but not all people. A long line of well-established authority exists demonstrating that such discriminatory removal of fundamental rights based upon suspect

classifications is impermissible. (*See Perez v. Sharp* (1948) 32 Cal.2d 711, 727, 731-732.)

C. Assuming Inalienable Rights Are Alienable, at Least a Compelling State Interest must Be Required to Do So, an Interest Which this Court Has Already Determined Does Not Exist.

For the inalienable, or "natural" rights, it is questionable whether such rights could be eliminated validly. Certainly, their elimination, in order not to be discriminatory, would have to be applied equally to all Californians or, perhaps, as the Attorney General suggests, a compelling state interest might be required.

Pursuant to the California Constitution, abridgment or removal of equal rights based on a suspect classification of a historically disfavored or unpopular class is impermissible absent a compelling state interest. (*See*, e.g., *Marriage Cases*, *supra*, 43 Cal.4th at pp. 784-783, 843-856; see, e.g., *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 299.)

As already determined very recently by this Court in the *Marriage Cases*, no compelling state interest exists to support denying the fundamental right to marry to same-sex couples. (*Id.*, at pp. 855-856; *see id.*, at pp. 847-856.)

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D. Even If this Court Determines No Compelling State Interest Is Required in Order to Remove an Inalienable Right, its Removal May Only Be Accomplished by the Process for a Constitutional Revision.

At the very least, such a change in the constitution as total abrogation of an inalienable right, particularly when applied based on a suspect classification, would be a substantial alteration in the underlying principles of the California Constitution and society. (*See Raven*, *supra*, 52 Cal.3d at pp. 352-355; *Livermore*, *supra*, 102 Cal. at pp. 118-119.)

Those qualitative changes require the revision process. As merely an initiative constitutional amendment, Proposition 8 is invalid.

V.

DENIAL OF EQUAL PROTECTION FOR A SUSPECT CLASS BY COMPLETELY ELIMINATING ONE OF THEIR FUNDAMENTAL RIGHTS VIOLATES SEPARATION OF POWERS

A. Introduction.

With just fourteen words, Proposition 8 revises Article 1 of the California Constitution (adding section 7.5) and, if permitted to stand, would qualitatively alter the balance of the California judiciary's power to act as the independent arbiter of rights guaranteed by equal protection clause, which also appears in the same Article. (Cal. Const. Art. I, § 7, subd. (a) ["(a) person may not

be . . . denied equal protection of the laws"].) More pointedly, in invalidating Family Code section 308.5 (the mirror image of Proposition 8), this Court held that sexual orientation is a suspect classification for purposes of the California Constitution's equal protection clause and that laws which treat persons differently because of their sexual orientation should be subjected to strict scrutiny. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 840-841, 843-847.) The Court held same-sex couples had a fundamental "right to marry" as guaranteed by the "marriage and liberty rights", and removing that right was not justified by compelling state interest. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 809-831, 855-856.)

According to Intervenors, the above historic principles of constitutional law have now been barred from California jurisprudence. They have been replaced by a new direction to the judiciary: only marriages "between a man and a woman" are valid. Neither the equal protection clause nor any other inalienable or fundamental right may protect this *suspect class* of same-sex couples in seeking to exercise the right to marry. What was once described by this Court as a "central aim of our entire judicial system," guaranteeing all persons in a constitutional democracy equal dignity and respect (*In re Sade C.* (1996) 13 Cal.4th 952, 966, citations omitted), and echoed in the *Marriage Cases* as "the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for

the benefit of both the individual and society" (*id.*, 43 Cal.4th at pp. 781-782) is, as the Intervenors will have it, trumped by Proposition 8 under "settled law and first principles of governmental theory . . . ." (Int. Opp. Brf., at p. 6.)

Intervenors argue that this amendment disturbs no core or structural policy of the government, or implicates any aspect of separation of powers and checks and balances. Rather, Intervenors claim the initiative minimally amends our Constitution, bringing clarity to the State's constitutional jurisprudence, presumably by reigning in four "activist" members of this Court, and restoring the traditional definition of marriage to its "historic roots." (Int. Opp. Brf., pp. 15-16, 19, 21, 25, 40; Int. Opp. to Ans. Brf., pp. 15-16.)[5]

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[5] Intervenors' benign characterization of Proposition 8 is startling. If California voters passed an initiative prohibiting interracial marriage, would Intervenors suggest the act legitimately restored the basic definition of marriage which existed prior to this Court's decision in *Perez v. Sharp*, *supra*, 32 Cal.2d 711, or the 1967 decision in *Loving v. Virginia* (1967) 388 U.S. 1?

Or, as Petitioners City and County of San Francisco, et al., ask: "If the voters enacted a measure providing that only males shall vote, would Intervenors contend that such measure merely 'restores the traditional definition of suffrage'? Would they argue it was not intended to deny a certain group inalienable rights?" (Reply of City and County of San Francisco, et al. ["SF Reply"], at p. 25, fn. 2.)

An examination of the proponents' voter guide on Proposition 8 offers insight into their motivation. (See State's Jud. Not. Req., Exh. 14 [excerpts of Official Voter Information Guide for November 4, 2008 General Election concerning Proposition 8].)

(continued...)

Intervenors continue: "[t]here has been no alteration whatever to [the structural] framework" of the basic government plan in California, nor is the power of the courts under the Constitution impaired. (Int. Opp. Brf. at pp. 5, 15, 24-24, 32-33, 35 ["(Proposition 8) simply makes a substantive change in the Constitution, which the judiciary is now free to interpret as it would any other constitutional provision."].) Intervenors' simply saying this does not make it so. Intervenors' statement that our courts are "free to interpret" the initiative in any way they see fit is nonsensical. Rather, in their view, the judiciary under Proposition 8 "no longer has a role in" ensuring equal rights to marry, but must unquestioningly bar marriages of a disfavored minority due to the new law. (See, e.g., Int. Opp. to Ans. Brf., pp. 14, 18-19; see

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[5] (...continued)
The following is from the published Arguments in Favor of Proposition 8: "Because four activist judges in San Francisco wrongly overturned the people's vote, we need to pass this measure as a constitutional amendment . . . . [¶¶] *It overturns the outrageous decision of four activist Supreme Court judges* who ignored the will of the people." (*Id.*, at p. 56, emph. in original.)

One commentator suggests, "[t]he greater visibility of judicial decisions respecting plebiscites is not the only factor that renders such cases high risk for an elected judiciary. Plebiscites pass as a result of well-organized -- and usually well-financed -- organizations behind them. These groups are in place to mount anti-retention campaigns should the judiciary thwart their efforts. . . ." (Eule, *Judicial Review of Direct Democracy* (1990) 99 Yale L.J. 1503, 1581-1585.) Indeed, "[s]ome opponents of gay marriage have said that if the court strikes down Proposition 8, they expect to see an effort to recall justices who vote against the measure." (Jessica Garrison and Maura Dolan, "Jerry Brown asks California Supreme Court to void gay-marriage ban", L. A. Times (Dec. 20, 2008), http://www.latimes.com/news/local/la-me-gay-marriage20-2008dec20,0,3542577,full.story .)

also *id.*, at p. 4.) Intervenors warn that "[n]o provision of the Declaration of Rights may be construed to trump the *plain meaning* of this new and fully operative" discriminatory definition of the inalienable, fundamental right to marry, and they flatly state, "[i]f Proposition 8 is a properly-enacted constitutional amendment . . . then the right to same-sex marriage no longer exists under the California Constitution." (Int. Opp. to Ans. Brf., p. 5, emph. added.) Contrary to Intervenors' claim that courts are "free to interpret" Proposition 8's provisions, the Proposition is an unambiguous statement neither requiring or admitting of any "interpretation. This Court in *Raven* predicted that, if initiative amendments are permitted to "*mandate*" the scope or construction of fundamental, constitutional rights, then the courts will be subject to "blind obedience." (*Raven*, *supra*, 53 Cal.3d at pp. 353-354, emph. in original.) We submit such citizen-legislated obeisance, especially in interpreting and enforcing fundamental, inalienable rights, curtails and *revises* the "very essence of" the judiciary's constitutional aegis. (*Raven*, *supra*, 53 Cal.3d at pp. 354-355 [a far-reaching change in our underlying principles and basic governmental plan, amounting to a revision].)

Unless the Court invalidates Proposition 8, the harsh reality for couples of the same sex is that they can no longer marry in this state: licenses for *these* couples only cannot be issued. No superior court could direct the exercise of the ministerial duty to

issue such a license, nor could any appellate court uphold the issuance of any such writ or order, even if a superior court dared to issue it. (See Int. Opp. Brf., pp. 34-35; Int. Opp. to Ans. Brf., pp. 3, 14, 18-19 ["the judiciary no longer has a *role* in determining the definition of marriage," emph. added].) In practical terms, Proposition 8, unlike any amendment which has come before this Court, would give the voters the power to override a court's protection of the constitutional rights a protected minority, and substitute virtually unchecked majoritarian will.

As Intervenors see it, the *Marriage Cases* is no longer controlling authority on any inferior court, at least not if the court is asked to *enforce* equal protection of the laws for members of *this* suspect class if any couple desires to exercise their "marriage and liberty rights". (*See Marriage Cases*, *supra*, 43 Cal.4th at pp. 801-808, 822-823, 830-831, 839-844.) As Intervenors repeatedly claim, the "will of the People" has constitutionally commanded that no court can recognize or validate a marriage in California unless it is "between a man and a women . . . ." (Prop. 8; Int. Opp. Brf., at pp. 6, 25 ["We the people govern, and judges and Justices – even of the state's highest Court – serve those to whom they are ultimately accountable."].) In other words, the concentration of power in determining what rights may be considered fundamental and constitutionally-protected for the suspect class stigmatized by the majority because of sexual orientation now rests solely with the

"will of [that same] majority" as a legislative voice through the initiative process.[6] (Int. Opp. Brf., at pp. 23; Int. Opp. to Ans. Brf., p. 19.) Intervenors assert that only the right to same-sex marriage has been rescinded and promise, in the future, other minority rights to equality will not be stripped away but will somehow be protected by the "considered judgment and good will of the people of this state.". (*Ibid.*; see *ibid.* ["(The people) are tolerant, moderate and deeply committed to protecting [other] minority rights."].) Intervenors sing a repeated anthem: "trust the will of the people;" no more fundamental rights will be taken away – just this one and only from gay and lesbian Californians.

Similarly, Intervenors argue Proposition 8 does not alter the judiciary's fundamental role in the constitutional plan -- apparently courts may still perform the function of saying what the applicable law is, but now must "interpret" the law under the new, controlling, bald definition of marriage inserted into the Constitution by Proposition 8. (Int. Opp. Brf., at pp. 24-25, 34-35,

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[6] The electorate may by initiative pass statutes or reject them (Cal. Const., art. II, § 8, subd. (a)), which right is coextensive with the power of the Legislature to enact statutes. (*Santa Clara Co. Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 253.) The voters are acting in a legislative capacity; although the power is generally delegated to the Legislature, it is also reserved to the people to exercise by initiative and referendum. (Cal. Const. Art. IV, § 1, Art. XVIII, §§ 1, 3; *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1045; *cf. Livermore*, *supra*, 102 Cal. at p. 117 [contrasting constitutional convention, which represents "entire sovereignty of the people," with amendment].)

38; accord, Ans. Brf., pp. 48-49.) According to Intervenors, this should be an easy and familiar task for courts: the Constitution "has now been changed by the . . . ultimate authority, the people" and the judiciary has no independent authority to second-guess "the higher law of the Constitution." (Int. Opp. Brf., at pp. 25, 35; see, e.g., Int. Opp. to Ans. Brf., pp. 3, 5-7, 14.) On the other hand, "the judiciary no longer has a *role* in determining the definition of marriage." (Int. Opp. to Ans. Brf., pp. 18-19, emph. added.].) Such reasoning, is "subversive of the very foundation purposes of our government [because it would] permit an initiative . . . to throw out of gear our entire legal mechanism." (*Wallace v. Zinman* (1927) 200 Cal. 585, 593.)

Further, Intervenors claim, even if the amendment *would* mandate unequal treatment by the courts of a disfavored minority by depriving its members of a fundamental, inalienable right, the Constitution "has now been changed by the . . . ultimate authority," the judiciary has no independent role to interpret *other* provisions of the Constitution, such as equal protection, due process and the Declaration of Rights, to decide the validity of Proposition 8. (See Int. Opp. Brf., at pp. 34-35; *id.*, at p. 5 [the law "commands judges -- as servants of the people -- to bow to the will of those whom they serve -- even if the substantive result of what the people have wrought in constitution-amending is deemed unenlightened . . ."]; Int. Opp. to Ans. Brf., pp. 14, 18-19.)

For the reasons we discuss below, Proposition 8 is invalid as a violation of separation of powers.

B. Removing the Role of the Judiciary in Interpreting and Enforcing State Constitutional Protections Abrogates a Core Structural Principle of the Constitution and Basic Governmental Plan.

Because the Legislature has no role in the process of initiative amendments to the State Constitution, judicial scrutiny "stands alone as the method for keeping the people's exercise of the initiative power with the bounds proscribed for it by the state constitution." (Owen Tipps, *Separation of Powers and the California Initiative* (2006) 36 Golden Gate Univ. L. Rev. 185, 199.)

This Court has observed:

> our past cases . . . uniformly establish that initiative measures adopted by the electorate are subject to the same constitutional limitations that apply to statutes adopted by the Legislature, and our courts have not hesitated to invalidate measures enacted through the initiative process when they run afoul of constitutional guarantees provided by either the federal or California Constitution.

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(*Marriage Cases*, *supra*, 43 Cal.4th at p. 851.)[7] Eighty-one years earlier, in *Wallace v. Zinman*, *supra*, 200 Cal. at p. 593, this Court taught:

> We do not recognize an initiative measure as having any greater strength or dignity than attaches to any other legislation . . . . It is only another system added to our plan of state government by a permissive amendment to the constitution, but it was at no time intended that such permissive legislation by direct vote should override the other safeguards of the constitution . . . .

(*See* Mosk, *Raven and Revision*, *supra*, 25 U.C. Davis Law. Rev. at pp. 1-2 ["[t]he proliferation of complicated initiative measures on every ballot, the carelessness – *or occasional iniquity* – with which some propositions are conceived and written has caused some second thoughts about the sanctity of a measure merely because it won a place on the ballot. . . . ", emph. added].)

The effect of the constitutional collision between this initiative and the independent vitality of the California courts to

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[7] See, for example, *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 533, 546, 553, 559, aff'd. *sub nom. Reitman v. Mulkey* (1967) 387 U.S. 369 [this Court invalidated, as violating federal equal protection principles, a state initiative that sought to overturn state laws prohibiting racial discrimination in housing, despite that the measure was adopted by an overwhelming margin of votes]; see generally *Marriage Cases*, *supra*, 43 Cal.4th at pp. 849-850, and cases cited therein.)

enforce equal protection of the law on behalf of a suspect class of minority citizens is at the core of the Court's question to the parties and amici: Does Proposition 8 Violate the Separation of Powers Doctrine Under the California Constitution?

Yes, it does.

First, Proposition 8 demands judicial enforcement of a new definition of marriage and the unequal application of the law to a protected class of Californians and, thus, affects the role and "inherent and implied powers [of the courts] to properly and effectively function as a separate department in the scheme of our state government." (*Brydonjack v. State Bar of California* (1929) 208 Cal. 439, 442 [explaining the role of the judiciary].) As such, Proposition 8, at the very least, effects a revision of the California Constitution because it alters the basic government scheme, and it circumvented legislative consideration, without the full deliberative process ensured by Article XVIII, sections 1 and 2. (*See Raven*, *supra*, 52 Cal.3d at pp. 349-350.) Second, the initiative eviscerates the separation of powers doctrine, as an enactment that "defeat[s] or materially impair[s] a court's exercise of its constitutional power or the fulfillment of its constitutional function.'" (*Case v. Lazben Financial Company* (2002) 99 Cal.App.4th 172, 184, internal quotation marks omitted, *quoting*

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Super. Ct. v. County of Mendocino (1996) 13 Cal.4th 45, 58-59; *Brydonjack v. State Bar*, *supra*, 208 Cal. at p. 444.)

The judicial branch fulfills its constitutional province and duty "'to say what the law is.'" (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 469, *quoting Marbury v. Madison* (1803) 5 U.S. 137, 177.) As Justice Chin echoed, "*interpreting* the law is a judicial function." (*McClung*, *supra*, 34 Cal.4th at pp. 470, 472, emph. in original; *Marbury v. Madison*, *supra*, 5 U.S. at p. 176 [interpreting and applying the constitution is "the very essence of judicial power"].) "The judiciary, from the very nature of its powers and means given it by the Constitution, must possess the right to construe the Constitution in the last resort . . . ." (*Raven*, *supra*, 52 Cal.3d at p. 354, *quoting Nougues v. Douglass* (1858) 7 Cal. 65, 69-70; *Katzberg v. Regents of Univ. of Cal.*, *supra*, 29 Cal.4th at p. 331.) In our governmental system, this Court is the final arbiter of the *meaning* of state constitutional provisions. (*Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 902-903.)

Further, this Court has observed that the qualitative impact of an initiative is not measured by how extensive its language is. Removing the Court's review of,

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> [e]ven a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision . . . . [A]n enactment which purported to vest all judicial power in the Legislature would amount to a revision without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change.

(*Amador Valley*, *supra*, 22 Cal.3d at p. 223.) This is especially true when the effect of the initiative "unduly restricts judicial power [and] does so in a way which severely limits the independent force and effect of the California Constitution." (*Raven*, *supra*, 52 Cal.3d at p. 353.) Intervenors misapprehend this Court's authority in deciding whether an enactment qualifies as a revision or an amendment. (See e.g., Int. Opp. Brf., at p. 6.) The Court need not defer to the vote of the people to test how far-reaching the changes of Proposition 8 are. Otherwise, it would have lacked the authority to rule Proposition 115 unconstitutional in *Raven*; indeed, if the vote of the people prevent the courts' determination of how fundamental the change is, the courts would have no power to determine whether or not an initiative is an amendment or a faulty revision.

Moreover, if Proposition 8 is upheld, it would quietly effect just what James Madison warned against: "[the] turbulence, violence, and abuse of power by the majority trampling on the

rights of the minority . . . ." (Madison, Speech at the Virginia Convention to Ratify the Federal Constitution (June 6, 1788); *see also* Madison, The Federalist, No. 10 (Rossiter ed. 2003) [when the ordinary political process cannot protect unpopular minorities from "the superior force of an interested and overbearing majority," the courts' enforcement of equal protection clause does].) In fact, 220 years after Madison's warning, this Court preserved this overarching principle when it determined that the equal protection clause prohibits State discrimination on the basis of sexual orientation, which extends to the fundamental right to marriage for same-sex couples. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 820-823, 840-843, 855-856.)

By a procedure requiring only a vote of the people, without also two-thirds approval by both houses of the Legislature, a single-sentence initiative would dictate that fundamental rights heretofore guaranteed to all may be withheld from a minority class of citizens. (*See Marriage Cases*, *supra*, 43 Cal.4th at pp. 781, 820, 824.) And, the case's precedential value would vanish from the landscape of California Constitutional law without the full deliberative debate and vote by two thirds of the both houses of the Legislature to either submit it to the voters for popular ratification or to a Constitutional Convention. (Cal Const., Art. XVIII, §§ 1-2; *Raven*, *supra*, 52 Cal.3d at pp. 349-350.)

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If Proposition 8 is upheld, it will alter the core function of the judiciary and undercut the fundamental separation of powers protection enshrined in the California Constitution. (See also, discussion, *post*, at pp. 59-65.) The Article III separation of powers clause defines the basic structure of California government. (Cal. Const., Art. III, § 3.) Any initiative that limits the judiciary's role in interpreting the Constitution necessarily alters the basic structure and must, at the very least, be deemed a revision. Intervenors say no such shift in the function of the courts has occurred, but they ignore their own writings (see Int. Opp. Brf., at pp. 15-16, 24-26, 32-33, 35; Int. Opp. to Ans. Brf., pp. 18-19), that of the ballot arguments supporting Proposition 8 (see Exh. 14, pp. 56, 57, State's Req. Jud. Not.), and that the operative effect of Proposition 8 is to remove the power of the judiciary to arbitrate when equal protection and inalienable rights of unpopular minorities have been violated.

As Justice Kennard wrote in her concurring opinion in the *Marriage Cases,* "the judiciary [is] 'the primary means' for enforcement of constitutional rights" and it "is an independent judiciary charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection," guarding against the "prejudices [which] may lead majoritarian institutions to deny fundamental freedoms to unpopular minorities groups." (*Marriage Cases*, *supra*,

43 Cal.4th at pp. 859-860, conc. opn. of Kennard, J., *quoting Davis v. Passman* (1979) 442 U.S. 228, 241) Proposition 8 impermissibly intrudes upon the "core zone" of the constitutionally proscribed powers and functions of the judiciary. A separation of powers infringement results. (*See Marine Forests Society v. California Coastal Commission* (2005) 36 Cal.4th 1, 45-46.)

As discussed, there is no effective judicial review of this discriminatory classification if it is allow to pass into law. Proposition 8 represents a "broad attack on state court authority," plain and simple. (*Raven*, *supra*, 52 Cal.3d at p. 355.) It prohibits California courts from interpreting a number of rights provided in the State Constitution and enforcing full equal protection for a disparaged class of Californians.

To Intervenors, Proposition 8 is clearly a valid amendment to the California Constitution which merely informs the judiciary of how it must apply the definition of marriage and curtails the power of the courts to protect same-sex couples from marriage discrimination. Intervenors do not recognize the diminishment of the *power* of the judiciary to perform the constitutional role of the courts, to ensure rights under the California Constitution, such as the "marriage and liberty rights" noted by this Court in the *Marriage Cases*. (*Id.*, 43 Cal.4th at pp. 781-782, 787, 802, 809-810, 814-815, 817, 819, fn. 41, 822-823, *inter alia*.) Intervenors make no

attempt to harmonize the undermining of the Article III separation of powers doctrine – a principle "enshrined in the Constitution and fundamental to the preservation of our civil liberties . . . " (*Solberg v. Super. Ct.* (1977) 19 Cal.3d 182, 191), with Article XVIII's and this Court's explanation of the difference between a revision and an amendment.[8] Nor can they.

Courts must zealously guard these rights, particularly against the animus of the majority. (*Bixby*, *supra*, 4 Cal.3d at p. 141; *see United States Steel Corp. v. Public Utilities Commission* (1981) 29 Cal.3d 603, 611-612 [principles of law imposed on minorities must also be imposed generally].) That is why when classifications are suspect and touch on fundamental interests "courts adopt 'an attitude of active and critical analysis, subjecting the classifications to strict scrutiny.'" (*Kasler v. Lockyer*

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[8] "[T]he reason that initiative legislation cannot accomplish a revision of the California Constitution is that the initiative power is a mere legislative power . . . . Despite the initiative's facial resemblance to the kind of direct act of self-governance that takes place in a convention, the people exercising their legislative power of initiative could no more vest judicial powers in the executive than could the legislature by passing a bill to that effect." (Karl Manheim, *A Structural Theory of the Initiative Power in California* (1998) 31 Loy. L. Rev. 1165, 1223.)

Moreover, "[c]hanges to the *spheres of action* of the three branches, and boundaries to their *powers* constitute revisions, and can only be accomplished by exertions of popular sovereignty in convention." (*Ibid.*, emph. added.) Such qualitative changes to the Constitution require more formality, discussion and deliberation; initiatives lack these additional institutional safeguards.

(2000) 23 Cal.4th 472, 480; *Marriage Cases*, *supra*, 43 Cal.4th at pp. 833-834.)

The *Marriage Cases* should not be hastily ushered out without the Legislature's two-thirds approval followed by approval of the majority of Californians. The constitutional law which this Court recognized is far too important to the structural integrity of the equal protection clause, cherished inalienable rights, and the independent vitality of the judiciary. This Court's holdings do not merely safeguard the rights of same-sex couples, but protects all Californians who may, for reasons not now apparent, find themselves facing the sharp end of the discrimination stick, held firmly by the majority and pointed directly at the fundamental rights of unpopular members of the minority.[9]

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[9] This Court is aware of its own legacy in protecting and restoring rights to disfavored minorities historically stigmatized by the majority. In each instance, often in the midst of substantial controversy, this Court exercised extraordinary judicial courage to determine whether there was a justifiable reason for unequal treatment of a protected class under the law. In doing so, the Court discharged "its gravest and most important responsibility under our constitutional form of government." *(Marriage Cases*, *supra*, 43 Cal.4th at pp. 859-860, conc. opn. by Kennard, J.) A few examples are illustrative: *Perez v. Sharp* (1948) 32 Cal.2d 711, 727, 731-732 (declaring anti-miscegenation laws unconstitutional); *Fujii v. California* (1952) 38 Cal.2d 718, 725-734 (declaring the California Alien Land Law violation of equal protection and unconstitutional); and *Sail 'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 19-20 (guaranteeing equal protection to women as a suspect class; striking down employment exclusionary statute). The *Marriage Cases* should not be overruled by the passage of Proposition 8, not without, at the very least, the benefit of the Legislature's deliberative process under Article XVIII.

If the constitutionalization of such discrimination and the alteration of the judiciary's role to interpret and enforce the Constitution and laws of this State is to be countenanced at all, then this Court must, at a minimum, enforce the requirements in Article XVIII for revising the Constitution. The Legislature must weigh in on such a substantial change to the "preexisting governmental plan." (*Raven*, *supra*, 52 Cal.3d at p. 355.) The so-called "will of the majority" voters does not remove this Court's power to engage in such judicial scrutiny. (*Ibid.*; *Separation of Powers and the California Initiative*, *supra*, 36 Golden Gate Univ. L. Rev. at p. 199; *Marriage Cases*, *supra*, 43 Cal.4th at p. 851.) Without such a fundamental check by the Legislature on the whim of the majority, the judicial branch will itself be stripped of its constitutional power and solemn role in California society.

C. Proposition 8 Violates Separation of Powers and May Not Stand.

Intervenors and the Attorney General argue that the current definition of marriage under Proposition 8, like the former statutory definition established in Proposition 22, are "*exempt[] from the constraints imposed by the California Constitution*, or that the separation-of-powers doctrine precludes a court from determining that constitutional question." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 849, emph. in original.)

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> On the contrary, under the constitutional theory of "checks and balances" that the separation of powers doctrine is intended to serve, a court has an *obligation* to enforce the limitations that the California Constitution imposes upon legislative measures, and a court would shirk the responsibility it owes to each member of the public were it to consider statutory provisions to be insulated from judicial review.

(*Marriage Cases*, *supra*, 43 Cal.4th at pp. 849-850, emph. in original and internal citations omitted.)

Historically, courts perform a vital role as guardian and interpreter of constitutional freedoms in our system of checks and balances. A "protection" most "fundamental" to our Constitutional system "lies in the power of the courts . . . in particular to preserve Constitutional rights, whether of individual or minority, from obliteration by the majority." (*Bixby*, *supra*, 4 Cal.3d at p. 141; *Johnson v. Goodyear Min. Co.* (1899) 127 Cal. 4, 7 [courts were created as "guardians of the people" to protect and preserve the "people's charter of rights"]; *Davis v. Passman*, *supra*, 442 U.S. at p. 241 [describing the judiciary as "the primary means" for enforcement of constitutional rights]; *Super. Ct. v. County of Mendocino*, *supra*, 13 Cal.4th at p. 52 [separation of powers has been explicit since the inception of our State, expressed in the 1849 Constitution].)

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Justice Kennard described this core function of the courts as the "gravest and most important responsibility under our constitutional form of government," and explained:

> Whether an unconstitutional denial of a fundamental right has occurred is not a matter to be decided by the executive or legislative branch, or by popular vote, but is instead an issue of constitutional law for resolution by the judicial branch of the state government.

(*Marriage Cases*, *supra*, 43 Cal.4th at pp. 859-860, conc. opn. of Kennard, J.) The United States Supreme Court echoed this sentiment by observing the "fundamental rights" embodied in our constitution "may not be submitted to vote" and the rights "depend on the outcome of no elections." (*West Virginia State Bd. of Ed. v. Barnette*, *supra*, 319 U.S. at p. 638.)

The California Constitution, Article III, section 3, embodies this hallmark of democracy, by providing that, "the powers of the government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (See Cal. Const., Art. IV, § 1 [legislative power]; Cal. Const., Art. V, § 1 [executive power]; Cal. Const., Art. VI, § 1 [judicial power]); *People v. Bunn* (2002) 27 Cal.4th 1, 14 [observing it is "well understood the branches share common boundaries and no sharp line

between their operations exists."].) The separation of powers doctrine,

> unquestionably places limits upon the actions of each branch with respect to the other branches. The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; *absent a constitutional prohibition*, the choice among competing policy considerations in enacting laws is a legislative function.

(*Super. Ct. v. County of Mendocino*, *supra*, 13 Cal.4th at p. 53, emph. added.)

Despite some interdependence, the Constitution vests each branch with certain "core" or "essential" functions that may not be usurped by another branch.. (*People v. Bunn*, *supra*, 27 Cal.4th at p. 14.) The question becomes whether, for example, an amendment or enactment creates either a "concentration of power in a single branch of government," or an "overreaching" by one branch against the others. (*Id.*, at p. 16, internal quotation marks omitted.)

Unlike the "core zone" of judicial powers that Proposition 8 seeks to usurp, this Court has upheld certain legislation affecting matters over which the judiciary has inherent power and control.

(*See*, e.g., *O'Brien v. Jones* (2000) 23 Cal.4th 40, 47-57 [statute changing the Supreme Court's authority to appoint State Bar Court judges]; *Super. Ct. v. County of Mendocino*, *supra*, 13 Cal.4th at pp. 58-66 [statute designating unpaid furlough days on which superior courts shall not be in session]; *Solberg v. Super. Ct.*, *supra*, 19 Cal.3d at pp. 191-204 [statute allowing trial judges to be peremptorily disqualified by litigants].) However,

> While the Legislature may adopt reasonable regulations that affect a court's inherent powers or functions, it may not constitutionally enact provisions that would defeat or materially impair a court's exercise of its constitutional power or the fulfillment of its constitutional function.

(*Case v. Lazben Financial Company*, *supra*, 99 Cal.App.4th at p. 184, internal quotation marks omitted, *quoting Super. Ct. v. County of Mendocino*, *supra*, 13 Cal.4th at pp. 58-59; *Brydonjack v. State Bar*, *supra*, 208 Cal. at p. 444.)

If Intervenors are correct, Proposition 8 intends and creates an unprecedented restraint of the court's authority to interpret and enforce the California Constitution's equality guarantees of minority rights. Moreover, the suggestion that the people someday may choose to repeal Proposition 8 does not eliminate the constitutional defects in the initiative as presently existing.

Indeed, under the initiative, the very branch of government which serves as a check on the overreaching of the majority would be left powerless in its assigned judicial role to guarantee the constitutional rights of full equal protection gay and lesbian persons in California.[10]

The shifting political, social or religious winds of the electorate should not constrain this Court's scrutiny of whether, from a "realistic and practical perspective" (*Marine Forests Society*, *supra*, 36 Cal.4th at p. 45), the initiative operates to defeat or "materially impair" the Court's exercise of its fundamental governmental power or historic function. (*Super. Ct. v. Mendocino*, *supra*, 13 Cal.4th at pp. 58-59.) As discussed, should same-sex couples seek protection under the state's now-existing marriage laws, courts would be mandated to refuse them equal protection and instead enforce the obvious import of Proposition 8: some couples are less equal than others. "It is not within our constitutional tradition to enact laws of this sort. . . . Equal protection of the laws is not achieved through indiscriminate imposition of equalities." (*Romer*, *supra*, 517 U.S. at p. 633, citations omitted.)

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[10] The Legislature's power to consider, debate and vote on constitutional revisions is also circumvented by Proposition 8, which means two of the three branches are removed from their role in the determination of these constitutional issues.

Before the passage of Proposition 8, this Court's decision in the *Marriage Cases* declared a definition of marriage which drew a distinction between opposite- and same-sex couples to be unconstitutional, under the provisions for equal protection, inalienable rights and the "marriage and liberty rights" outlined earlier. Rejecting the view that either the Legislature or the electorate by initiative can abrogate the fundamental rights of a protected class, the Court found no compelling state interest to make such distinctions among Californians who seek to marry. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 822-823, 839-844.) And it was quite rightly left to the judicial branch of our government to *enforce* these protections as the final arbiter of the California Constitution's guarantees of equality, privacy and liberty. (*See Marriage Cases*, *supra*, 43 Cal.4th at pp. 839-858; *id.*, at pp. 859-860, conc. opn. of Kennard, J.)

Proposition 8, no matter how packaged, whether calling for the restoration of "historic" or "traditional" marriage, or delivered as stern rebuke to so-called "activist judges," simply cannot be viewed as anything other than an attack on the judicial power and function. When commenting on the "constitutional obligation" of the courts to engage in the "ceaseless struggle to preserve the independence of the judiciary," former Court member, Justice Janice Brown (now a U. S. Court of Appeals Circuit judge), aptly observed:

> "James Madison said of the separation of powers that it was a 'political maxim.' (Madison, The Federalist No. 47 (Kramnick ed. 1987), p. 302) He meant, I think, that while the phrase itself is a formula, or an aspiration, its success as an operative principle depends upon the skill with which the political game is played out among the departments of government. *The preservation of a viable constitutional government is not a task for wimps*. We cannot . . . simply defer to a violation of the Constitution. The struggle for judicial supremacy – not primacy, but supremacy – within the courts' constitutional domain is unending. . . ."

(*O'Brien v. Jones*, *supra*, 23 Cal.4th at 81, dis. opn. by Brown, J., emph. added)

For the reasons stated above, and advanced by Petitioners, this Supreme Court should find that Proposition 8 is invalid under the doctrine of separation of powers.

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VI.

CONCLUSION

Proposition 8 is not valid as a simple amendment to the California Constitution.

The Proposition wholly eliminates an inalienable and fundamental rights from a group of people traditionally subject to disfavor and discrimination, based on a suspect classification. In addition, the Proposition prevents the judicial branch from exercising its power to ensure such rights are not eliminated and to ensure equal protection of the laws. These are changes to the California Constitution which are far-reaching, remove fundamental rights, and materially alter the underlying principles and balance of powers in the framework of California's system of governance.

As a result, whether passed as an amendment or through the revision process, the short provision set forth in Proposition 8 cannot validly be written into the California Constitution.

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For the reasons set forth in this brief, the briefs of the Petitioners, and at pages 75 through 90 of the State's Answer Brief, Proposition 8 should be invalidated.

Dated: January 14, 2009

Respectfully submitted,

CONSTITUTIONAL LAW CENTER
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PROOF OF SERVICE

I, Amy M. Larson, declare as follows:

I am a United States citizen, over 18 years; my business address as related to this matter is 100 Col. Durham Street, Seaside, California 93955; and I am not a party to the within action. On the date shown below I served a copy of:

APPLICATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS; *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

on the following parties, by placing true copies thereof in a sealed envelope addressed as indicated below, with postage fully prepaid thereon, in the United States Mail at Monterey, California, and/or, if and as so indicated below, by causing such document(s) to be hand delivered, sent by express mail or overnight delivery, or sent by facsimile transmission to each of the following parties at the address or facsimile telephone numbers set forth below:

Persons Served	***Counsel for:***
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ACLU FOUNDATION OF NORTHERN CALIFORNIA Alan L. Schlosser, Esq. Elizabeth O. Gill, Esq. 39 Drumm Street San Francisco, CA 94111	Petitioners (Cal. S. Ct. Case No. S168047), KAREN L. STRAUSS, RUTH BORENSTEIN, BRAD JACKLIN, DUSTIN HERGERT, EILEEN MA, SUYAPA PORTILLO, GERARDO MARIN, JAY THOMAS SIERRA NORTH, CELIA CARTER, DESMUND WU, JAMES TOLEN, and EQUALITY CALIFORNIA
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ACLU FOUNDATION OF SAN DIEGO AND IMPERIAL COUNTIES David Blair-Loy, Esq. Post Office Box 87131 San Diego, CA 92138-7131	Petitioners (Cal. S. Ct. Case No. S168047), KAREN L. STRAUSS, RUTH BORENSTEIN, BRAD JACKLIN, DUSTIN HERGERT, EILEEN MA, SUYAPA PORTILLO, GERARDO MARIN, JAY THOMAS SIERRA NORTH, CELIA CARTER, DESMUND WU, JAMES TOLEN, and EQUALITY CALIFORNIA

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Jerome B. Falk, Jr., Esq. Steven L. Mayer, Esq. Amy E. Margolin, Esq Amy L. Bomse, Esq. Adam Polakoff, Esq. HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN Three Embarcadero Center Seventh Floor San Francisco, CA 94111-4024	Petitioners (Cal. S. Ct. Case No. S168078), CITY AND COUNTY OF SAN FRANCISCO, HELEN ZIA, LIA SHIGEMURA, EDWARD SWANSON, PAUL HERMAN, ZOE DUNNING, PAM GREY, MARIAN MARTINO, JOANNA CUSENZA, BRADLEY AKIN, PAUL HILL, EMILY GRIFFEN, SAGE ANDERSON, SUWANNA KERDKAEW, and TINA M. YUN

Persons Served	*Counsel for:*
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Raymond G. Fortner, Jr., Esq. County Counsel Leela A. Kapur, Esq. Chief Deputy County Counsel Elizabeth M. Cortez, Esq. Assistant County Counsel Judy W. Whitehurst, Esq. Principal Deputy County Counsel 500 West Temple Street Kenneth Hahn Hall of Administration Room 658 Los Angeles, CA 90012-2713	Petitioner (Cal. S. Ct. Case No. S168078), THE COUNTY OF LOS ANGELES

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Persons Served	*Counsel for:*
Richard E. Winnie, Esq. County Counsel Brian E. Washington, Esq. Assistant County Counsel Claude Kolm, Esq. Deputy County Counsel OFFICE OF COUNTY COUNSEL COUNTY OF ALAMEDA 1221 Oak Street Suite 450 Oakland, CA 94612-4226	Petitioner (Cal. S. Ct. Case No. S168078), COUNTY OF ALAMEDA
Patrick K. Faulkner, Esq. County Counsel Sheila Shah Lichtblau, Esq. Deputy County Counsel 3501 Civic Center Drive Room 275 San Rafael, CA 94903-4112	Petitioner (Cal. S. Ct. Case No. S168078), COUNTY OF MARIN
Michael P. Murphy, Esq. County Counsel Brenda B. Carlson, Esq. Chief Deputy County Counsel Glenn M. Levy, Esq. Deputy County Counsel 400 County Center Hall of Justice and Records Sixth Floor Redwood City, CA 94063-1662	Petitioner (Cal. S. Ct. Case No. S168078), COUNTY OF SAN MATEO
Dana McRae, Esq. County Counsel COUNTY OF SANTA CRUZ 701 Ocean Street Room 505 Santa Cruz, CA 95060-4014	Petitioner (Cal. S. Ct. Case No. S168078), COUNTY OF SANTA CRUZ
Harvey E. Levine, Esq. City Attorney Nellie R. Ancel, Esq. Senior Deputy City Attorney 3300 Capitol Avenue Fremont, CA 94538-1514	Petitioner (Cal. S. Ct. Case No. S168078), CITY OF FREMONT

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Persons Served	*Counsel for:*
RUTAN & TUCKER, LLP Philip D. Kohn, Esq. City Attorney CITY OF LAGUNA BEACH 611 Anton Boulevard Fourteenth Floor Costa Mesa, CA 92626-1931	Petitioner (Cal. S. Ct. Case No. S168078), CITY OF LAGUNA BEACH
John Russ, Esq. City Attorney Barbara Parker, Esq. Chief Assistant City Attorney OFFICE OF THE OAKLAND CITY ATTORNEY 1 Frank Ogawa Plaza City Hall Sixth Floor Oakland, CA 94612-1999	Petitioner (Cal. S. Ct. Case No. S168078), CITY OF OAKLAND
Michael J. Aguirre, Esq. City Attorney OFFICE OF THE CITY ATTORNEY CIVIL DIVISION CITY OF SAN DIEGO 1200 Third Avenue Suite 1620 San Diego, CA 92101-4178	Petitioner (Cal. S. Ct. Case No. S168078), CITY OF SAN DIEGO
ATCHISON, BARISONE, CONDOTTI & KOVACEVICH John G. Barisone, Esq. City Attorney CITY OF SANTA CRUZ 333 Church Street Santa Cruz, CA 95060-3867	Petitioner (Cal. S. Ct. Case No. S168078), CITY OF SANTA CRUZ
Marsha Jones, Moutrie, Esq. City Attorney Joseph Lawrence, Esq. Assistant City Attorney OFFICE OF THE CITY ATTORNEY CITY OF SANTA MONICA 1685 Main Street City Hall Third Floor Santa Monica, CA 90401-3295	Petitioner (Cal. S. Ct. Case No. S168078), CITY OF SANTA MONICA

Persons Served	*Counsel for:*
Lawrence W. McLaughlin, Esq. City Attorney CITY OF SEBASTOPOL 7120 Bodega Avenue Sebastopol, CA 95472-3700	Petitioner (Cal. S. Ct. Case No. S168078), CITY OF SEBASTOPOL
Gloria Allred, Esq. Michael Maroko, Esq. John S. West, Esq. ALLRED, MAROKO & GOLDBERG 6300 Wilshire Boulevard Suite 1500 Los Angeles, CA 90048	Petitioners (Cal. S. Ct. Case No. S168066), ROBIN TYLER, DIANE OLSON, CHERI SCHROEDER, and COTY RAFAELY
Edmund G. Brown, Jr., Esq. Attorney General James M. Humes, Esq. Chief Deputy Attorney General Manuel M. Mederios, Esq. State Solicitor General David S. Chaney, Esq. Chief Assistant Attorney General Christopher E. Krueger, Esq. Senior Assistant Attorney General Kimberly J. Graham, Esq. Deputy Attorney General Mark. R. Beckington, Esq. Deputy Attorney General STATE OF CALIFORNIA 1300 "I" Street, Suite 125 Post Office Box 944255 Sacramento, CA 94244-2550	Respondent, EDMUND G. BROWN, JR., in his official capacity as Attorney General for the State of California (Cal. S. Ct. Case Nos. S168047, 168078), and Respondent (Cal. S. Ct. Case No. 168066), STATE OF CALIFORNIA

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Persons Served	*Counsel for:*
Kenneth C. Mennemeier, Esq. Andrew W. Stroud, Esq. Kelcie M. Gosling, Esq. MENNEMEIER, GLASSMAN & STROUD LLP 980 9th Street Suite 1700 Sacramento, CA 95814-2736	Respondent, MARK B. HORTON, M.D., M.S.P.H., in his official capacity as State Registrar of Vital Statistics of the State of California and Director of the California Department of Public Health (Cal. S. Ct. Case No. S168047), and in his official capacity as State Registrar of Vital Statistics (Cal. S. Ct. Case No. 168078); and Respondent, LINETTE SCOTT, M.D., M.P.H., in her official capacity as Deputy Director of Health Information and Strategic Planning for the California Department of Public Health (Cal. S. Ct. Case Nos. S168047, 168078)
Kenneth W. Starr, Esq. 24569 Via De Casa Malibu, CA 90265-3205	Intervenors (Cal. S. Ct. Case Nos. S168047, S168066, 168078), PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON; and "PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL"

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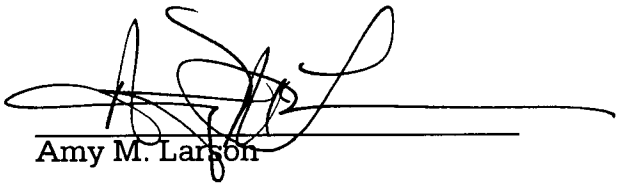
Persons Served	***Counsel for:***
Andrew P. Pugno, Esq. LAW OFFICES OF ANDREW P. PUGNO 101 Parkshore Drive Suite 100 Folsom, CA 95630-4726	Intervenors (Cal. S. Ct. Case Nos. S168047, S168066, 168078), PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON; and "PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL"

I declare under penalty of perjury under the laws of the State of California that each of the foregoing statements is true and correct, and that this declaration was executed on January 15, 2009, at Monterey, California.



Amy M. Larson