S168047 / S168066 / S168078

In the Supreme Court of the State of California

En Banc

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

ROBIN TYLER, *et al.*, Petitioners,
v.
THE STATE OF CALIFORNIA, *et al.*,
Respondents;
DENNIS HOLLINGSWORTH, *et al.*, Intervenors.

CITY AND COUNTY OF SAN FRANCISCO, et al., Petitioners,
v.
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APPLICATION BY AMICUS CURIAE PROFESSORS OF LAW FOR PERMISSION TO FILE AMICUS BRIEF; AMICUS CURIAE BRIEF BY PROFESSORS OF LAW OPPOSING THE PETITIONS REGARDING ISSUE NUMBER THREE AND REGARDING THE ISSUE SET FORTH ON PAGES 75-90 OF THE ANSWER BRIEF FILED BY THE ATTORNEY GENERAL

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case Name:	KAREN L STRAUSS *et al.*, Petitioners, *v.* MARK B. HORTON, as State Registrar of Vital Statistics, etc., *et al.*, Respondents; DENNIS HOLUNGSWORTH *et al.*, Interveners.	Supreme Court Case No.: S168047
Case Name:	ROBIN TYLER *et al.*, Petitioners, *v.* THE STATE OF CALIFORNIA, *et al.*, Respondents; DENNIS HOLLINGSWORTH, *et al.*, Interveners.	Supreme Court Case No.: S168066
Case Name:	CITY AND COUNTY OF SAN FRANCISCO, et al., Petitioners, *v.* MARK B. HORTON, as State Registrar of Vital Statistics, etc., *et al.*, Respondents; DENNIS HOLLINGSWORTH, *et al.*, Interveners.	Supreme Court Case No.: S168078

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS
(California Rules of Court, Rule 8.208)

(Check One) INITIAL CERTIFICATE ☑ SUPPLEMENTAL CERTIFICATE ☐

Please check the applicable box:

☑ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208(d).

☐ Interested entities or persons are listed below:

Full Name of Interested Entity or Party	Party *(Check One)*	Non-Party *(Check One)*	Nature of Interest *(Explain)*
_____	[ ]	[ ]	_____
_____	[ ]	[ ]	_____

The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in Rule 8.208(d)(2).

Attorney Submitting Form

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Amicus Curiae
Professors of Law

Stephen Kent Ehat
(Signature of Attorney Submitting Form)

January 14, 2009
(Date)

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APPLICATION BY AMICUS CURIAE PROFESSORS OF LAW FOR PERMISSION TO FILE AMICUS BRIEF

Pursuant to subdivision (f)(1) of Rule 8.520 of the California Rules of Court, application is hereby made to the Honorable Ronald M. George, Chief Justice of the Supreme Court of the State of California, for permission to file an amicus curiae brief in the three above-captioned cases. This application and filing is made pursuant to the Order of the Court dated

November 20, 2008, providing that in order to avoid the unnecessary filing of multiple identical copies of amicus applications and briefs, the court will consider any amicus curiae filing in S168047, S168066, or S168078, in connection with its consideration and resolution of each of these matters.

STATEMENT OF AMICUS CURIAE

Pursuant to subdivision (f)(3) of Rule 8.520, the applicants **(1)** state as follows what their interest is and **(2)** explain as follows how the proposed amicus brief will assist the court in deciding the matter.

1. STATEMENT OF INTEREST OF AMICUS CURIAE PROFESSORS OF LAW

These Amicus Curiae Professors of Law have particular expertise concerning constitutional law and family law in the United States. The names of the Amicus Curiae Professors of Law making this application and serving and filing this brief are: (1) **Lynn D. Wardle**, the Bruce C. Hafen Professor of Law at the J. Reuben Clark Law School, and President (2000-02), Secretary-General (1994-2000), and Executive Council (1991-94, 2002-present) of the International Society of Family Law; (2) **Jane Adolphe**, Associate Professor of Law, Ave Maria School of Law, Ann Arbor, Michigan, and President, Center for Law and Justice International; (3) **A. Scott Loveless**, Ph.D, family studies and adjunct faculty at the J. Reuben Clark Law School at Brigham Young University (BYU), Provo,

Utah, Former Acting Managing Director of the World Family Policy Center; (4) **John Eidsmoe**, Oak Brook College of Law and Government Policy, Fresno, California, and Professor of Law Emeritus, Faulkner University School of Law; (5) **Richard Wilkins**, the Robert W. Barker Professor of Law, J. Reuben Clark Law School, Brigham Young University (On Leave); Managing Director, Doha International Institute for Family Studies and Development; former Managing Director, World Family Policy Center at Brigham Young University; and (6) **Scott T. FitzGibbon**, professor of law, Boston College Law School, Boston, Massachusetts, member of American Law Institute and of the International Society of Family Law.

Please note that none of the institutions mentioned above, be it the law schools and universities at which the Amicus Curiae Professors of Law teach or the representative professional, academic, or societal affiliations that they enjoy, are responsible for this application or the amicus brief set forth below. The views expressed in this application and in the amicus brief set forth below are the views of the Amicus Curiae Professors of Law themselves and not necessarily of the schools, sponsoring institutions, or entities with which the professors are associated.

Pursuant to subdivision (f)(4), these Amicus Curiae Professors of Law state that no party and no counsel for a party in the three above-

captioned pending cases, or any related cases, either authored the proposed amicus brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No other person or entity has made a monetary contribution intended to fund the preparation or submission of the brief.

These Amicus Curiae Professors of Law have an interest in these three cases because the cases pose the likelihood of a significant, major impact on constitutional principles both inside and outside of California, both on a state-law level and insofar as the laws and policies of the State of California impact principles of federalism among the several States. Because of the expertise of these Amicus Curiae Professors of Law in matters germane to these cases, they believe that their participation in the briefing will help this court with its consideration and resolution of one of the three issues raised by the Court and of the new issue raised by the Attorney General of the State of California.

Specifically, these Amicus Curiae Professors of Law believe **(1)** that the third issue posed by this Court in its Order dated November 19, 2008, has not been properly addressed either by the parties or by the interveners in the three above-captioned cases, and **(2)** that the new issue raised by the Attorney General has neither been adequately presented by the Attorney General nor properly addressed in the responses filed thereto.

2. STATEMENT OF HOW THE PROPOSED AMICUS BRIEF WILL ASSIST THE COURT IN DECIDING THE MATTERS

A. THE COURT'S THIRD ISSUE

The third issue posed by this Court in its November 19, 2008 Order states: "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?" As to this issue, these Amicus Curiae Professors of Law believe that the briefs filed on this issue are inadequate and fail to acknowledge and analyze how it is that the recently passed California constitutional amendment (Proposition 8) providing that "[o]nly marriage between a man and a woman is valid or recognized in California" (the "Amendment") does not render retroactively void any same-sex marriages contracted in California between the effective date of the ruling of the California Supreme Court legalizing such marriages (the "Ruling") and the effective date of the Amendment ("the interim period"). These Amicus Curiae Professors of Law believe that such marriages ("Interim Same-Sex Marriages") were valid until the effective date of the Amendment, and as a matter of fact and of law the validity of such marriages during that interim period remains fully intact and unimpaired by the Amendment.

However, the Amendment has rendered such Interim Same-Sex Marriages invalid prospectively (after the date of the Amendment). These

Amicus Curiae Professors of Law believe that result is supported by the plain language of the Amendment itself and applicable interpretive standards, consistent with the general presumption of prospective application when positive law is enacted, suggested by the availability of putative marriage rights for parties to Interim Same-Sex Marriages, and required by respect for the constitutional right of the State to change marriage laws including constitutional provisions relating to marriage.

The accompanying brief, set forth below, addresses this issue in a manner that these Amicus Curiae Professors of Law believe will aid the court in its consideration and resolution thereof.

B. THE ATTORNEY GENERAL'S NEW ISSUE

In his Answer Brief in Response to Petition for Extraordinary Relief, filed on December 19, 2008 in each of the three above-captioned cases, the Attorney General of the State of California argues that "Proposition 8 should be invalidated even if it is deemed to amend the Constitution because it abrogates fundamental rights protected by Article I without a compelling interest." These Amicus Curiae Professors of Law believe that the Attorney General's creative theory for invalidation of Proposition 8 is without any support in constitutional text or precedent, and contradicts basic democratic constitutional theory, both constitutional principles of the State of California as well as national and extra-national constitutional

jurisprudence.

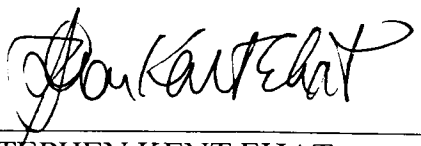
The accompanying brief, set forth below, also addresses this issue in a manner that these Amicus Curiae Professors of Law believe will aid the court in its consideration and resolution thereof.

PRAYER

Wherefore, these Amicus Curiae Professors of Law respectfully request that the Court grant them permission to file the accompanying Amicus Curiae brief to address the third issue posed by this Court in its Order dated November 19, 2008, and the new issue raised by the Attorney General on pages 75-90 of his Answer Brief in Response to Petition for Extraordinary Relief, filed on December 19, 2008.

Dated: January 14, 2009.

Respectfully submitted,



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Pursuant to subdivision (f) of Rule 8.520 of the California Rules of Court, these Professors of Constitutional Law and Family Law (Amicus Curiae Professors of Law) submit this amicus curiae brief to urge the Supreme Court of the State of California to deny the original proceeding petitions filed against Article 1, Section 7.5 of the California Constitution (Proposition 8) on the merits. This brief addresses the third issue posed by

this Court in its Order dated November 19, 2008, and the new issue raised by the Attorney General on pages 75-90 of his Answer Brief in Response to Petition for Extraordinary Relief, filed on December 19, 2008.

SUMMARY OF ARGUMENT

1. Regarding The Court's Third Issue, Namely, the Effect, If Any, of Proposition 8 On the Marriages of Same-Sex Couples Performed Before the Adoption of the Proposition

The plain language of Proposition 8 is simple and straightforward. Its fourteen words do not invalidate interim same-sex from the date of their solemnization but do serve to invalidate and bar legal recognition of any same-sex marriages after the effective date of the Amendment. This is so for the following five reasons: **(1)** words in initiative-adopted amendments should be given their plain and ordinary meaning; **(2)** use of the verb "is" and the adjective "only" in the language of the Amendment indicates that the Amendment does not apply to make void *ab initio* Interim Same-Sex Marriages, but that the Amendment applies prospectively to bar recognition of Interim Same-Sex Marriage as having any present validity or legal recognition after the effective date of the Amendment; **(3)** absence of the term "void" from the language of the Amendment indicates that Interim Same-Sex Marriages, even if valid from the time of their solemnization to the effective date of the Amendment, are not valid after the effective date of

the Amendment; **(4)** in contrast to the abolition by the states of common law marriage and of slavery (before the Civil War), absence of the phrase "contracted after" from the language of the Amendment indicates that Interim Same-Sex Marriages, even if valid from the time of their solemnization to the effective date of the amendment, are not valid after the effective date of the Amendment; and **(e)** the presumption of interpretation of positive law favors interpreting the Amendment as rendering Interim Same-Sex Marriages prospectively invalid, but not retroactively void. In all of this discussion, these Amicus Curiae Professors of Law do not contest the validity of marriages performed during the interim period; whether they are or are not valid is a point addressed by the first and second questions posed by the Court in its November 19, 2008 Order, argued by others. Here, we simply assume for the sake of argument that Interim Same-Sex Marriages are valid during the interim period. Here we deal with the question of the validity and recognition of the Interim Same-Sex Marriages after the effective date of the Amendment. We do not at all think it proper for the Court to retroactively invalidate the Interim Same-Sex Marriages; we do not contest that the Interim Same-Sex Marriages are valid during the interim period.

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Furthermore, California precedent, policies, doctrines, and practical prudence preclude invalidating Interim Same-Sex Marriages retroactively from the date of their solemnization but also preclude giving them any legal validity or recognition after the effective date of the Amendment. This is so for the following four reasons: **(1)** the recent California Supreme Court decision in *In re Marriage Cases* recognized and rejected the double standard position of recognizing some same-sex marriages but not others; **(2)** public policy does not require that the Amendment be interpreted as rendering Interim Same-Sex Marriages retroactively void, but does require invalidation and nonrecognition of them after the effective date of the Amendment; **(3)** recognition of incidents of marriage for same-sex couples would not be inconsistent with precedent or with the Amendment; and **(4)** treatment of Interim Same-Sex Marriages as putative marriages would be consistent with precedent and with the Amendment.

And finally, invalidating Interim Same-Sex Marriages prospectively from the effective date of the Amendment does not violate constitutional rights. The Amendment invalidates Interim Same-Sex Marriages by a decision of the sovereign, the people of California acting as and through the state.

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2. Regarding the New Issue Raised by the Attorney General on Pages 75-90 of His Answer Brief in Response to Petition for Extraordinary Relief, Filed on December 19, 2008

The attorney general's creative new theory of invalidity of Proposition 8 is meritless. The theory asserted by the Attorney General that the sovereign people of a state, who form and constitute the polity, who created the constitution of the state, and who retain sovereignty under the republican form of government they have created, lack the power to amend the constitution so as to define marriage as the union only of a man and a woman has no grounding in any credible concept of constitutional law. Indeed, it defies basic principles of American and California constitutional law, and is inconsistent with the national and global realities of marriage amendments to American state and many other national constitutions.

ARGUMENT

I. INTRODUCTION

The recently passed California constitutional amendment (Proposition 8) providing that "[o]nly marriage between a man and a woman is valid or recognized in California" (the "Amendment") does not render retroactively void any same-sex marriages contracted in California between the June 16, 2008 effective date of the May 15, 2008 ruling of the California Supreme Court legalizing such marriages and the November 5,

2008 effective date of the Amendment ("the interim period"). Such marriages ("Interim Same-Sex Marriages") may be assumed, for purposes of argument here, to be valid for all intents and purposes, but their arguable validity as marriages during the interim period, we argue, continues only until the effective date of the Amendment, and as a matter of fact and of law any validity of such marriages *during that interim period* remains fully intact and unimpaired by the Amendment, but, as we will also argue below, the Amendment has rendered such Interim Same-Sex Marriages invalid *prospectively* (after the date of the Amendment). That result is supported by the plain language of the Amendment itself and applicable interpretive standards, consistent with the general presumption of prospective application when positive law is enacted, suggested by the availability of putative marriage rights for parties to Interim Same-Sex Marriages, and required by respect for the constitutional right of the State to change marriage laws including constitutional provisions relating to marriage.

The Attorney General's creative theory for invalidation of Proposition 8 is without any support in constitutional text or precedent, and contradicts basic democratic constitutional theory.

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II. THE PLAIN LANGUAGE OF THE SIMPLE, FOURTEEN-WORD AMENDMENT DOES NOT INVALIDATE INTERIM SAME-SEX MARRIAGES FROM THE DATE OF THEIR SOLEMNIZATION BUT DOES INVALIDATE AND BAR LEGAL RECOGNITION OF ANY SAME-SEX MARRIAGES AFTER THE EFFECTIVE DATE OF THE AMENDMENT

A. WORDS IN INITIATIVE-ADOPTED AMENDMENTS SHOULD BE GIVEN THEIR PLAIN AND ORDINARY MEANING

The standard of interpretation of constitutional amendments adopted in California by voter initiative is clear:

> When interpreting a voter initiative, courts give the words their ordinary meaning, viewed in light of the context of the overall statutory scheme and purpose. (*Robert L. v. Superior Court* (2003) 30 Cal. 4th 894, 900-901, 135 Cal. Rptr.2d 30, 69 P.3d 951.) If the terms are unambiguous, we presume the voters meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana* (2001) 25 Cal. 4th 268, 272, 105 Cal. Rptr. 2d 457, 19 P. 3d 1196.) " 'When the language is ambiguous, "we refer to other indicia of the voters" intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citation.]" (*People v. Rizo* (2000) 22 Cal. 4th 681, 685, 94 Cal. Rptr.2d 375, 996 P.2d 27.)

Consulting Engineers and Land Surveyors of California v. California Dept. of Transp. (Cal. App. 3 Dist. 3d 2008) 167 Cal. App. 4th 1457, 1463, 84 Cal. Rptr. 3d 900, 904.

In this case, the simple language of the fourteen-word Amendment is clear and unambiguous. It bars any legal recognition of any same-sex marriages after the Amendment is effective but it does not require or suggest in any way invalidation of same-sex marriages retroactively covering the interim period.

B. USE OF THE VERB "IS" AND THE ADJECTIVE "ONLY" IN THE LANGUAGE OF THE AMENDMENT INDICATES THAT THE AMENDMENT DOES NOT APPLY TO MAKE VOID *AB INITIO* INTERIM SAME-SEX MARRIAGES, BUT THAT THE AMENDMENT APPLIES PROSPECTIVELY TO BAR RECOGNITION OF INTERIM SAME-SEX MARRIAGE AS HAVING ANY PRESENT VALIDITY OR LEGAL RECOGNITION AFTER THE EFFECTIVE DATE OF THE AMENDMENT

For purposes of determining the validity and recognition of Interim Same-Sex Marriages, the critical language of the Amendment is "is valid or recognized . . . ." The only verb used in this amendment is the word "is", which is present tense of the verb "to be," not past tense.[1] It provides that no same-sex marriage is currently (*i.e.*, once the Amendment becomes

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[1] Oxford English Dictionary Online available at http://dictionary.oed.com/cgi/entry/50121597?query_type=word&querywor d=is&first=1&max_to_show=10&sort_type=alpha&result_place=4&search _id=UQiR-tmdQup-6185&hilite=50121597 (seen 10 January 2009).

effective) valid or recognized in California. It speaks to the present, not the past. The language of the Amendment cannot reasonably be read to deny that Interim Same-Sex Marriages properly entered into in California during a time when such marriages were valid never were valid or legally recognized. They were valid for the interim period and the Amendment does not retroactively negate their validity during that interim period.

However, the present tense "is" unequivocally means that after the effective date of the Amendment, any non-male-female forms of marriage (including the marriage of any same-sex couple) is no longer valid or recognized in California. Regardless of their validity or recognition in another time or place, they are in present California not valid and not recognized.[2]

That meaning is underscored by the first word of the Amendment, which declares that "only" male-female marriages are valid and recognized in California. The word "only," means "alone; solitary" and "sole, lone."[3] "Only" leaves no room for recognition of any same-sex marriages. This

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[2] *See Aetna Cas. & Sur. Co. v. Industrial Acc. Commission* (1947) 30 Cal. 2d 388, 391 (cited 46 times for the statement that "A 'retrospective law' is one affecting rights, obligations, acts, transactions and conditions performed or existing prior to adoption of the statute").

[3] Oxford English Dictionary Online available at http://dictionary.oed.com/cgi/entry/00332024?query_type=word&querywor d=only&first=1&max_to_show=10&sort_type=alpha&result_place=2&sear ch_id=UQiR-xWOSQU-6203&hilite=00332024 (seen 10 January 2009).

court emphasized the importance of the same word ("only") in the antecedent statute, Calif. Fam. Code § 308.5 (enacted by Proposition 22 in 2000), in rejecting an interpretation that would allow same-sex marriages to be valid if contracted in California, but not valid if contracted in another jurisdiction. *See In re Marriage Cases* (2008) 43 Cal. 4th 757, 796, 183 P. 2d 384, 410. Unless the language of the Amendment is judicially erased, revised or rewritten, the plain language of the Amendment bars, after its effective date, legal validity and recognition of any same-sex marriage, whenever and wherever entered.

C. ABSENCE OF THE TERM "VOID" FROM THE LANGUAGE OF THE AMENDMENT INDICATES THAT INTERIM SAME-SEX MARRIAGES, EVEN IF VALID FROM THE TIME OF THEIR SOLEMNIZATION TO THE EFFECTIVE DATE OF THE AMENDMENT, ARE NOT VALID AFTER THE EFFECTIVE DATE OF THE AMENDMENT

Settled marriage validity and voidness principles also reject the retroactive invalidation of Interim Same-Sex Marriages during the interim period. However, those principles support invalidation of such Interim Same-Sex Marriages from the effective date of the Amendment.

The language of the Amendment may be as important for what it does not say as for what it says. If the Amendment had stated that same-sex marriages are "void" or (even more clearly) "void *ab initio*," retroactive nullification would be effected; the court might have to declare that they

never had been valid. But the retroactive invalidating terms "void" or "void *ab initio*" are noticeably absent from the language of the Amendment.

"Void" is a term commonly used in marriage law statutes throughout America. It generally connotes "void *ab initio*" and a void marriage generally is distinguished from one that is merely "voidable." *See generally* I Contemporary Family Law § 2:01 (Lynn D. Wardle, Christopher L. Blakesley & Jacqueline Y. Parker, eds. 1988); *id.* vol. II, § 16:01-16:08. The annulment of a marriage as "void" (*ab initio*) results in the retroactive invalidation of the marriage, making it void from its inception, void retroactively as well as prospectively, as though no marriage ever existed. Homer H. Clark, *The Law of Domestic Relations in the United States* 127 (2d ed. 1988). By contrast, particularly in the case of voidable (not void) defects, annulment only declares the marriage invalid or nullified from the date of the decree. II Contemporary Family Law, *supra*, § 16:08.

The late, distinguished California law professor Albert Ehrenzweig, the Walter Perry Johnson Professor of Law at the University of California, Berkeley, identified three types of annulment: declaratory, constitutive, and prospective. Albert A. Ehrenzweig, *A Treatise on the Conflict of Laws* 300-301 (1962). In a "declaratory" annulment the court merely articulates and states a legal fact—that there never was a valid marriage; in principle, no judicial proceeding ever need be brought because, as a matter of existential

legal fact, there never was or ever had been a valid marriage; the parties could have entered subsequently into other marriages without impediment (and if the later marriage had been challenged, the court could "declare" the fact of the nonexistence of a prior marriage, but such a declaration was not necessary to annul the prior marriage; it was a nullity *ab initio*). In a "constitutive" annulment, until the declaration of annulment, the marriage is deemed a valid marriage until the decree of annulment, but upon the declaration of annulment, the validity of the former marriage is repudiated and the marriage is declared void *ab initio*. It retroactively invalidates the marriage. "But if an action for constitutive annulment is not brought, the voidable marriage continues and is valid for all purposes." *Id.* The third type of annulment, a rather recent innovation in 1962 when Professor Ehrenzweig was writing, is an "evolved . . . hybrid institution of an annulment effective as of the time of the decree." Ehrenzweig, *supra* at 301. It results from the fact that the two older forms of annulment were found to be "unworkable and productive of endless confusion." Ehrenzweig, *supra* at 301. This modern prospective annulment makes the marriage void only from the date of the annulment forward; it "dissolve[s] the marriage *ex nunc* like a divorce." Ehrenzweig, *supra* at 301. Prospective annulment is applied most often when the marriage defect renders the marriage "voidable" but not absolutely "void." *See, e.g.*, I

Contemporary Family Law § 2:45; II Contemporary Family Law § 16:08 (underage marriage discussed).

The Amendment in this instance effectuates prospective invalidation of Interim Same-Sex Marriages, not retroactive nullification of them. Nothing in the language or policy underlying the Amendment suggests an intent or need to make the Interim Same-Sex Marriages retroactively void during the interim period, and that result would be inconsistent with the present-focus of the Amendment. By the same token, recognition of the Interim Same-Sex Marriages or any other same-sex marriages *after* the adoption of the Amendment is inconsistent with that same present-focus and policy. The language of the Amendment lacks any retroactive "voiding" language, but it clearly provides that any marriage not "between a man and a woman" is prospectively not valid or recognizable, after the effective date of the Amendment.

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D. IN CONTRAST TO THE ABOLITION BY THE STATES OF COMMON LAW MARRIAGE AND OF SLAVERY (BEFORE THE CIVIL WAR), ABSENCE OF THE PHRASE "CONTRACTED AFTER" FROM THE LANGUAGE OF THE AMENDMENT INDICATES THAT INTERIM SAME-SEX MARRIAGES, EVEN IF VALID FROM THE TIME OF THEIR SOLEMNIZATION TO THE EFFECTIVE DATE OF THE AMENDMENT, ARE NOT VALID AFTER THE EFFECTIVE DATE OF THE AMENDMENT

The contrast between language used to abolish common law marriage from being contracted but not to invalidate existing common law marriages underscores the fact that the Amendment precludes giving legal validity or recognition to Interim Same-Sex Marriages after the effective date of the Amendment. Today, only nine states and the District of Columbia reportedly continue to permit common law marriage, while five other states (Georgia, Idaho, Ohio, Oklahoma, and Pennsylvania) have recently prospectively prohibited common law marriages by statutes that specify a date after which a newly contracted common law marriage will not be valid. *See, e.g.*, Pennsylvania Statutes, §1103: "No common-law marriage *contracted after* January 1, 2005 shall be valid." *See generally* Alternatives to Marriage Project Fact Sheet, Common Law Marriage, at http://www.unmarried.org/commonlaw.pdf (last seen January 13, 2009) (emphasis added).[4]

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[4] An intermediate court of appeals in Pennsylvania initially prospectively abolished common law marriage in 2003. *PNC Bank Corp. v.*

Thus, Professor Mark Strasser has noted that the abolition of common law marriage did not create problems of retroactive or retrospective application because it was generally done by positive law (statutes) that applied (usually by express language) prospectively only, grand-fathering the validity of existing common law marriages.

> Consider, for example, the statutes specifying that common law marriages would not be recognized. Statutes would indicate that such marriages would no longer be recognized if "contracted" after a certain date. Such unions would not be retroactively nullified, despite the strong public policy of having such marriages celebrated in accord with state requirements. Further, there would be no worry about desolemnizing common law marriages, since such marriages had not been solemnized in the first place. Nonetheless, perhaps out of a desire to be fair and perhaps out of a fear of the implications of retroactively invalidating such marriages, the denial of the recognition to common law marriages was prospective only.

Mark Strasser, *Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Justice*, 29

W.C.A.B. (Stamos) (Cmwlth Ct. Pa. 2003) 831 A. d 1269.

Rutgers L.J. 271, 309 (1998); *see also id.* at n. 252 (citing statutes abolishing common law marriage in Alaska, Florida, Georgia, Illinois, Michigan, Mississippi and South Dakota, each specifying a date of prospective application).[5]

So, too, with the abolition of slavery, which, like the abolition of common law marriage, contrasts dramatically with the Amendment. The contrast between language used to abolish slavery but not to invalidate then-existing slave status, underscores the fact that the Amendment precludes giving legal validity or recognition to Interim Same-Sex Marriages after the effective date of the Amendment. The abolition of slavery by the states before the Civil War and the adoption of the Thirteenth Amendment reflected the application of a gradual-emancipation-with-"grand-fathering" approach to slavery similar to that employed in the abolition of common law marriage. That is, most northern states abolished slavery prospectively but did not emancipate existing slaves in the jurisdiction for a period of time. As to non-residents, they also applied the same "gradual emancipation" anti-slavery policy by not liberating slaves that were just

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[5] California outlawed common law in 1895. *See* Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 Wm. & Mary J. Women & L. 483, 848-86 (2007) ("common-law marriage was abolished in California after a spate of lawsuits involving prominent and wealthy California men who had relationships with younger women. In each case, the woman claimed to be married and the man denied a marriage existed." *Id.* at 486).

temporarily in the jurisdiction.[6] Since lingering slavery was internally allowed temporarily after adoption of the abolitionist laws for residents during the period of gradual emancipation (during the "grandfather" period when creation of new slavery relations in the jurisdiction was not permitted, but old slave-relations were protected and continued to be recognized), such states did not believe that immediate emancipation for slaves brought into the jurisdiction temporarily was required to protect local policy. Refusal to emancipate the slaves of temporary visitors was, in fact, an application to non-residents of the same internal, domestic policy or privilege that applied internally to residents.[7]

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[6] *See, e.g.*, Paul Finkelman, *An Imperfect Union, Slavery, Federalism and Comity* 71–76 (1981) (describing New York gradual emancipation laws); *id.* at 76–77 (describing New Jersey gradual emancipation); *id.* at 77–79 (describing gradual emancipation in New Hampshire, Vermont, and Maine, where there are few cases and less evidence of comity); *id.* at 79–82 (describing gradual emancipation in Rhode Island, Massachusetts, and Connecticut); *id.* at 82–98 (describing gradual emancipation in Northwest Ordinance territories of Ohio, Michigan, Indiana, and Illinois).

[7] See, e.g., Paul Finkelman, *Dred Scott v. Sandford, A Brief History with Documents 17-21* (1997) (describing the gradual replacement of the "sojourner" rule not emancipating slaves temporarily in a free state with the rule of immediate emancipation of slavers temporarily in the free states that helped to provoke the Civil War). *See also Robert Cover, Justice Accused, Antislavery and the Judicial Process* 97 (1975) (discussing southern states which like the North recognized emancipation by residence in free states before the Northern states abandoned the "sojourner" rule).

By contrast, the Thirteenth Amendment (like Proposition 8 herein) did not merely abolish slavery "after" a certain date to implement gradual emancipation, but after the effective date of that Amendment that form of so-called "domestic relationship" (slavery) was not longer valid or recognized anywhere in the United States.

The similar histories of the abolition of common law marriage and of slavery show that when lawmakers desire to allow recognition for a "domestic relationship" that existed prior to the adoption of the amendment or law abolishing such relationships, they have done so by clear language. The absence of such language in the Amendment in this case shows that such was not the intent.

Finally, the history of the abolition of slavery by the states before the Civil War suggests the profound danger if this Court allows the Interim Same-Sex Marriages to be valid or recognized after the adoption of the Amendment. That is, it creates an exception for internal same-sex marriages that opens a loophole for foreign same-sex marriages to claim recognition as well on the ground that since recognition in California of some same-sex marriages is not against public policy, recognition of some foreign same-sex marriage (from a sister state, such as Massachusetts or Connecticut, or from a contiguous neighbor, such as Canada, or from historic allies such as The Netherlands, or [most likely] involving California

citizens who enter same-sex marriages in other jurisdictions, etc.) also is permitted. In essence, it creates an exception that easily can swallow the rule and render the Amendment a dead letter.

The Amendment adopted in Proposition 8 contains no "contracted after" or "new marriages" or similar language. It does not say that same-sex marriages "contracted after" or "celebrated after" or "entered after" November 4, 2008, shall be invalid or void. Rather, it states that "[o]nly marriage between a man and a woman is valid or recognized in California." The absence of such common "grand-fathering" language, used widely in statutes intended to prevent the creation of new marriages of a particular type but not to invalidate existing marriages of that kind, underscores the intended meaning that after the effective date of the Amendment only marriage between a man and a woman is valid or recognized in the state, and former marriages of that kind no longer are or can be valid or recognized in the law in California.

E. THE PRESUMPTION OF INTERPRETATION OF POSITIVE LAW FAVORS INTERPRETING THE AMENDMENT AS RENDERING INTERIM SAME-SEX MARRIAGES PROSPECTIVELY INVALID, BUT NOT RETROACTIVELY VOID

The presumption when interpreting positive law including constitutional amendments and legislation is "the almost universal rule" that such positive enactments "are addressed to the future, not to the past."

Winfree v. North Pac. R.R. Co. (1913) 227 U.S. 296, 301. *See also Great N. R.R. Co. v. Sunburst Oil & Ref. Co.* (1932) 287 U.S. 358, 365 (discussing "the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning"). That prospective application presumption for positive law differs from the retrospective application presumption applicable to judicially-announced rules. William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 Cal. L. Rev. 613, 666 (1991) ("The traditional, but not iron-clad, rule has been that legislation only applies prospectively, whereas judicial interpretation of legislation applies retroactively."); *see generally* Mark Strasser, *Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Justice*, 29 Rutgers L.J. 271, 295-307 (1998).

In this case, the positive, written law is an amendment enacted by popular initiative following one of the most extensive, expensive political campaigns for a proposed amendment in the history of California (and American) elections. Nothing in the language of the Amendment suggests any intent to deviate from the prospective application that is the standard rule of interpretation of positive law.

III. TREATMENT OF INTERIM SAME-SEX MARRIAGES AS PUTATIVE MARRIAGES WOULD BE CONSISTENT WITH PRECEDENT AND WITH THE AMENDMENT

Those who have addressed the first two issues outlined by this Court's November 19, 2008 Order have dealt with the underlying question whether the institution of marriage was or was not changed by the passage of Proposition 8 so as to accommodate same-sex relationships. For purposes of this brief, we have assumed that question has been answered in the negative and we focus on presenting a meaningful, historically-based, precedent-founded, policy-supported rationale for an appropriate course of action for this Court to pursue, given the celebration in California, for about four and one-half months, of same-sex marriage recognition and validity. Those marriages were entered into by committed couples who in good faith relied upon the word of this Court in In re Marriage Cases when it chose not to stay the judgment. Those marriage expectations were overturned by the vote of the people in the November 2008 ballot. The people declared that "[o]nly marriage between a man and a woman is valid or recognized in California." In essence, the people changed (that is, "changed back," after an extremely short period) the legally recognized nature of the marriage relationship. One necessarily must address the question of what to do with Interim Same-Sex Marriages (which question is what is at the root of the third stated question in this Court's November 19 Order).

In our history as a nation, the people have effectuated other fundamental changes in marriage and in other controversial "domestic relationships" and made provision for the transition from the former scheme to the latter. Here, in the case of Interim Same-Sex Marriages, the former scheme was short-lived, yet transition must nonetheless be made.

The effect of the Amendment in denying legal validity of or recognition of same-sex marriages after Amendment does not preclude giving a formal status—a quasi-marital status—to such unions that were lawfully celebrated during the interim period in good faith and in reliance on the unfortunately hasty decision to make effective the May 15 decision of this court in *In re Marriage Cases, supra.* Those Interim Same-Sex Marriages may be deemed "putative marriages" or the equivalent.

Generally, a "putative marriage" is "[a] marriage contracted in good faith and in ignorance (on one or both sides) that impediments exist which render it unlawful." Black's Law Dictionary, 1402 (Rev. 4th ed. 1968).

> The putative marriage doctrine is a device developed to ameliorate or correct the injustice which would occur if civil effects were not allowed to flow to a party to a null marriage who believes in good faith that he or she is validly married. A putative marriage, therefore, is a marriage which is in reality null, but which allows the civil effects of a valid marriage to

> flow to the party or parties who contracted it in good faith. It is a marriage which has been solemnized in proper form and celebrated in good faith by one or both parties, but which, by reason of some legal infirmity, is either void or voidable.

Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 Tul. L. Rev. 1, 6 (1985). Thus, a putative marriage is not a valid marriage (as distinct from a "common law" marriage in states where common law marriage is allowed), but it is a relationship with incidents similar to and imitating those attendant to a valid marriage equitably recognized to parties who in good faith thought they had a valid celebrated marriage.

While putative marriage is primarily used in states with a civil law background, "[t]he classic putative marriage doctrine derives from canon law and has no Roman source." Blakesley, *supra*, at 7. English cases from the twelfth century, following canon principles, applied the putative marriage principle, and Bracton described it, though it was lost in English common law in later centuries. "Historically, the courts of many states in the United States [including many common law states] have recognized the putative marriage doctrine or an analogue thereof." Blakesley, *supra* at 13; *see also id.* at n. 46 (citing cases from many non-civil-law-heritage states). They have done so as a matter of equity and fairness. The Uniform Marriage and Divorce Act recommended putative marriage. Unif. Marriage

& Div. Act § 209, 9A U.L.A. 116 (1979). Even before California adopted its putative spouse statute, California courts had recognized "putative" or "de facto" marriages in cases in which the requirements of putative marriage were shown to exist, namely, a ceremonial marriage and good faith belief in its validity. *See Lazzarevich v. Lazzarevich* (Cal. App. 2d Dist. 1948) 88 Cal. App. 2d 708, 200 P. 2d 49 (allowing restitution of quasi-contractual recovery on equitable theories); *see also Sanguinetti v. Sanguinetti* (1937), 9 Cal. 2d 95, 100, 69 P. 2d 845, 848, 111 A.L.R. 342, *Schneider v. Schneider* (1920) 183 Cal. 335, 341, 191 P. 533, 11 A.L.R. 1386; *Feig v. Bank of Italy, etc. Ass'n* (1933) 218 Cal. 54, 58, 21 P. 2d 421, *Marsh v. Marsh* (1926) 79 Cal. App. 560, at page 565, 250 P. 411, 412. *See also* Blakesley, *supra*, at 7-12.

"In California, putative marriage has also been preserved in the law, although the cases refer to equity and fundamental fairness as their foundation, rather than to California's Spanish legal heritage." Blakesley, *supra* at 12, *citing* "*In re Marriage of Monti*, 135 Cal. App. 3d 50, 185 Cal. Rptr. 72 (1982); *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P. 2d 761 (1943); *Flanagan v. Capital Nat'l Bank*, 213 Cal. 664, 3 P.2d 307 (1931); *Coats v. Coats*, 160 Cal. 671, 675, 118 P. 441, 443 (1911); *In re Marriage of Recknor*, 138 Cal. App. 3d 539, 187 Cal. Rptr. 887 (1982); *Estate of Vargas*, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974); *Brown v. Brown*,

274 Cal. App. 2d 178, 79 Cal. Rptr. 257 (1969); *Sancha v. Arnold*, 114 Cal. App. 2d 772, 251 P.2d 67 (1952) (Even a good faith belief that a common-law marriage is valid in the state in which it was entered was sufficient for putative marriage in California); *Estate of Foy*, 109 Cal. App. 2d 329, 331, 240 P.2d 685, 686 (1952); *Lazzarevich v. Lazzarevich*, 88 Cal. App. 2d 708, 713, 200 P.2d 49, 52 (1948)." *Id.*

In a well-known federal case applying California law, the Fifth Circuit declared in *Spearman v. Spearman*, 482 F. 2d 1203, 1206 (5th Cir. 1973):

> A putative spouse is one whose marriage is legally invalid but who has engaged in (1) a marriage ceremony or a solemnization, on the (2) good faith belief in the validity of the marriage. According to *Estate of Foy*, 109 Cal. App.2d 329, 240 P.2d 685 (1952),
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> > [t]he term "putative marriage" is applied to a matrimonial union which has been solemnized in due form and good faith on the part of one or of both of the parties but which by reason of some legal infirmity is either void or voidable. The essential basis of such marriage is the belief that it is valid.

482 F. 2d at 1206. *See also Sousa v. Freitas*, 10 Cal. App. 3d 660, 665-666,

89 Cal. Rptr. 485, 489 (1970).

The California Family Code (since 1969) provides that if a party in good faith entered into a marriage that is void or voidable the court can give the party "putative spouse" status, divide property as "quasi-marital property," and order support for the putative spouse. Cal. Fam. Code §§ 2251-2254. *See also* Cal. Civ. Proc. Code § 377.60(b) (wrongful death); Calif. Labor Code § 3503 (worker's compensation); Cal. Prob. Code § 6400 (intestate succession), etc. While the California statutory putative spouse doctrine is not the pure civilian putative spouse doctrine (because it relies on principles of equity, not substantive right, and "quasi-marital" property, rather than true community property), nevertheless the California statute and "case law give precisely the same relief to the putative spouse that the classic doctrine provides." Blakesley, *supra* at 32-33. The putative spouse statute allows the court to "declare the parties to an invalid marriage to have the status of a putative spouse," Cal. Fam. Code § 2251.

In this instance, it seems appropriate for the California Supreme Court to rule as a matter of equity that the parties who entered into Interim Same-Sex Marriages in California before the passage of the Amendment enjoy the status of or a status equivalent to that of "putative spouses." The same-sex couples in this instance celebrated a proper marriage ceremony or solemnization, and did so in the good faith belief in the validity of their

marriage. Now that the law has changed and the Constitution of California has been amended to provide that only marriage between a man and a woman is valid and recognized in the state, abolishing same-sex marriage as a legal institution and status in California, it is proper to treat those Interim Same-Sex Marriages as "putative marriages" for all future purposes. That is, they are no longer valid marriages but they enjoy the same economic rights and benefits that a valid marriage would have provided the parties.

IV. CALIFORNIA PRECEDENT, POLICIES, DOCTRINES, AND PRACTICAL PRUDENCE PRECLUDE INVALIDATING INTERIM SAME-SEX MARRIAGES RETROACTIVELY FROM THE DATE OF THEIR SOLEMNIZATION BUT ALSO PRECLUDE GIVING THEM ANY LEGAL VALIDITY OR RECOGNITION AFTER THE EFFECTIVE DATE OF THE AMENDMENT

A. THE RECENT CALIFORNIA SUPREME COURT DECISION IN *IN RE MARRIAGE CASES* RECOGNIZED AND REJECTED THE DOUBLE STANDARD POSITION OF RECOGNIZING SOME SAME-SEX MARRIAGES BUT NOT OTHERS

In *In re Marriage Cases* (2008) 43 Cal. 4th 757, 183 P. 2d 384, this Court rejected the plaintiffs' interpretation of the marriage statute (Calif. Fam. Code § 308.5, adopted by ballot initiative as Proposition 22 in 2000) that would have created a double standard for same-sex marriage validity in California, allowing domestic same-sex marriages to be legal but prohibiting inter-jurisdictional recognition of same-sex marriages from sister states or from foreign jurisdictions. *Id.*, 43 Cal. 4th at 796, 183 P. 3d

at 410. Emphasizing the language of section 308.5 (identical to the language of this Amendment), and particularly the use of the term "only" to describe male-female marriages being valid and recognizable in California, the court declared that the language "cannot properly be interpreted to apply only to [same-sex] marriages performed outside of California" in that case. *Id.*, 43 Cal. 4th at 798, 183 P. 3d at 411. The statement applies precisely to the issue in this instance if one substitutes "performed during the interim period" for the last four words. The court continued: "Unlike [another marriage statute], section 308.5 itself contains no language indicating that the statute is directed at and applies only to marriages performed outside of California." *Id.* Again, that statement applies exactly to the issue in this instance if one substitutes "performed during the interim period." The court emphasized that the clarity of the language used underscored the likely understanding of the language as not allowing same-sex marriages to be legal in California regardless of *where* they were created in that case. Likewise, in this case the clarity of the language used underscored the likely understanding of the language as not allowing same-sex marriages to be legal in California regardless of *when* they were created.

In the earlier case, the court went on to emphasize the serious constitutional questions that would arise if same-sex marriages created in California were given legal effect there, but not same-sex marriages created

in other jurisdictions. *Id.*, 43 Cal. 4th at 800, 183 P. 3d at 412. In this instance, also, there could be potential constitutional issues which might be raised under other constitutional doctrines (such as equal protection).[8]

B. PUBLIC POLICY DOES NOT REQUIRE THAT THE AMENDMENT BE INTERPRETED AS RENDERING INTERIM SAME-SEX MARRIAGES RETROACTIVELY VOID, BUT DOES REQUIRE INVALIDATION AND NONRECOGNITION OF THEM AFTER THE EFFECTIVE DATE OF THE AMENDMENT

The fact that California lawmakers have legalized same-sex domestic partnerships and conferred upon those registered relationships effectively all of the same legal rights and benefits of marriage, while California voters have twice adopted the policy (first as a law in 2000 by Proposition 22, and now as a constitutional provision in 2008 by Proposition 8) that "[o]nly marriage between a man and a woman is valid or recognized in California," shows two things. First, it is clear that the policy of protecting the status and relationship of conjugal marriage as the sole and exclusive form of marriage is strong. Second, it is also clear that treating same-sex relationships as some form of legal, formal, valid and recognized non-marital domestic relationship with marriage-like legal benefits, effects, and

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[8] There also could be profound issues of practical application for administering for many decades a system of dual treatment of same-sex marriages for purposes of state taxes, benefits, etc., applicable to same-sex marriages from the brief, interim period but not applicable to other same-sex unions (such as non-registered domestic partners).

responsibilities does *not* offend public policy.

The focus of the Amendment is protection and preservation of the unique status of marriage itself, the meaning and definition of the basic unit of society, as distinct from relationships that are not "between a man and a woman." The Amendment does not repeal the Domestic Partners Act, Fam. Code § 297, et seq., which extends essentially all of the same legal incidents of marriage to same-sex couples. Thus, while continued recognition after the effective date of the Amendment of Interim Same-Sex Marriages as valid marriages would violate the express language and clear, strong public policy of the California Constitution, recognition of the rights and incidents normally considered "marital incidents" for Interim Same-Sex Marriages would not violate strong public policy in California.

C. RECOGNITION OF INCIDENTS OF MARRIAGE FOR SAME-SEX COUPLES WOULD NOT BE INCONSISTENT WITH PRECEDENT OR WITH THE AMENDMENT

A distinction exists between a state recognizing the validity of the marriage itself—conferring on a particular relationship the status of marriage—and recognizing or extending certain marital incidents to a particular relationship. It is possible for a marriage to be invalid but for at least some marital incidents to be recognized. *See* Russell J. Weintraub, *Commentary on the Conflict of Laws* 310 (5th ed. 2006). *See further*

Eugene F. Scoles, et al., *Conflict of Laws* 561 (4th ed. 2004).

The modern "classic" example of this is the California appellate court decision, *In re Dalip Sing Bir's Estate* (Cal. App. 3rd Dist. 1948) 83 Cal. App. 2d 256, 188 P. 2d 499 (decided the same year as *Perez v. Sharp* (1948) 32 Cal. 2d 711, 198 P. 2d 17. Mr. Bir, a native of India, died domiciled in California in 1945, and his estate was administered in California. Two Indian women who had lawfully entered into marriages with Mr. Bir in India fifty years earlier (when polygamous marriage was legal) petitioned to determine heirship and to share equally his estate. The trial court ruled that under California law, only the first Indian marriage would be valid, not the second, polygamous, marriage, and since the evidence did not reveal which of the two women was the first wife, their joint petition was dismissed. The Court of Appeals reversed, citing a number of American cases and authorities that (unlike the British rigid rule in effect in British India) reflected a policy that refusal to recognize the validity of polygamous marriage, *qua* marriage, did not compel rejection of all claims for incidents of marriage such as succession, inheritance, legitimacy, temporary residence, widow's allowance, etc., by polygamous spouses. The court held that the "public policy" exception to marriage recognition "would apply only if decedent had attempted to cohabit with his two wives in California. Where only the question of descent of property is

involved, 'public policy' is not affected." 83 Cal. App. 2d at 261, 188 P. 2d at 502.

Likewise, during the time that Mississippi and Louisiana had miscegenation laws forbidding inter-racial marriage, both states recognized the marital incidents of such forbidden marriages for the limited purposes of inheritance or succession. *See Miller v. Lucks* (Miss. 1948) 36 So. 2d 140; *Succession of Caballero v. Executor et al.* (1872) 24 La. Ann. Rep. 573, *cited in Bir's Estate*, 83 Cal. App. 2d at 260-261, 188 P. 2d at 501-02. *See further Loughran v. Loughran* (1934) 292 U.S. 216 (despite law forbidding marriage by adulterous divorced spouse, divorced adulterous woman who went elsewhere to marry her adulterous partner held able to recover both unpaid alimony and dowry money from former husband's estate, her current marriage notwithstanding).

The foregoing cases clearly indicate that the status of marriage and formal institutional identity of marriage may be separated and distinguished from marital incidents and benefits. That dichotomy seems consistent with the language of the Amendment which addresses solely "marriage" *qua* "marriage." It says nothing about particular marital benefits or legal incidents of marital status. Nothing in the text of the Amendment suggests that extending to same-sex couples legal incidents or benefits of marriage (as distinct from the status and institutional identity of marriage) is

prohibited after the effective date of the Amendment. The foregoing precedents support that reasonable interpretation of the Amendment.

V. INVALIDATING INTERIM SAME-SEX MARRIAGES PROSPECTIVELY FROM THE EFFECTIVE DATE OF THE AMENDMENT DOES NOT VIOLATE CONSTITUTIONAL RIGHTS

The people of California had no less power in November 2008 to invalidate same-sex marriages than they had power to validate them six months earlier. Marriage is not a mere bilateral contract between two spouses, but a trilateral contract among the spouses and the state. *Goodridge v. Dept. Pub. H.*, 798 N.E. 2d 941, 954 (Mass. 2003) ("In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State"). *See also* Stephen T. Black, *Same-Sex Marriage and Taxes*, 22 BYU J. Pub. L. 327, 340 (2007) ("Marriage is a particular arrangement belonging to three parties—the husband, the wife, and the state"), *citing In re Lindgren* (Sup. Ct. 1943) 43 N.Y.S. 2d 154, 170 ("There are three parties to every marriage contract—the two spouses and the state."), aff'd, 46 N.Y.S. 2d 224 (App. Div. 1943), aff'd, 55 N.E. 2d 849 (N.Y. 1944); *Gant v. Gant* (W. Va. 1985) 329 S.E. 2d 106, 114 ("[T]he state is a third party to any marriage contract"). The Amendment invalidates Interim Same-Sex Marriages by a decision of the sovereign, the people of California acting as and through the state.

Whether legal action resulting in deprivation of marital status on grounds or for reasons that, at the time the marriage was contracted, would not have supported such a loss of marital status violates the contracts clause or due process clause of the Constitution is a question that has been asked and answered clearly, most prominently when no-fault divorce laws were adopted. The answer is "no."

The adoption of no-fault divorce laws allowing unilateral no-fault divorce severely affected the marriages of many persons who had married for life, believing and relying upon divorce laws that provided that only if one spouse were guilty of serious violations of marital expectations (such as adultery, abandonment, serious abuse, etc.), or if that one spouse were guilty of such failings and the innocent other spouse wanted out of the marriage, would the other spouse be deprived of marital status and marital benefits. The subsequent adoption of unilateral no-fault laws or judicial doctrines meant that a person could simply "dump" a spouse for any reason (or no reason at all), including selfish reasons that would have not been grounds for terminating the marriage at the time the parties entered into the marriage contract. When their spouses filed for non-fault divorce, some disappointed spouses objected arguing that application of the new no-fault laws to their old pre-no-fault marriages was an unconstitutional impairment of their marriage contract, or an impermissible retroactive application of the

substantive law, or a deprivation of valued legal rights (marital status, etc.) without due process. Those objections by disappointed spouses objecting to no-fault divorce on constitutional grounds were uniformly unsuccessful. *See* Strasser, *supra*, at 29 Rutgers L.J. at 310 ("Divorce statutes were alleged to be unconstitutional, either because they violated the Contracts Clause or because they involved retroactive legislations which destroyed vested rights. Both claims were ultimately rejected. . . ."). No appellate court ever accepted or endorsed those objections. The power of the legislature over marriage and divorce regulation has been emphatically confirmed. *See, e.g., Maynard v. Hill* (1888) 125 U.S. 190 (legislative divorce approved); *Sosna v. Iowa* (1975) 419 U.S. 393, 404 (the "[r]egulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states"); *Barber v. Barber* (1859) 62 U.S. (21 How.) 582 (state control of divorce); *see also Elk Grove School Dist. v. Newdow* (2004) 542 U.S. 1, 12-17 (state control of regulation of domestic relations).

In *Dartmouth College v. Woodward* (1819) 4 Wheat 518, 629, Chief Justice John Marshall addressed an analogous "impairment of contracts clause" issue and declared, in *dicta*:

> The [Contracts Clause] of the constitution never has been understood to embrace other contracts, than those which

respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunals, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it, without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

Justice Story, concurring, added:

As to the case of the contract of marriage, which the argument supposes not to be within the reach of the prohibitory clause, because it is matter of civil institution, I profess not to feel the weight of the reason assigned for the exception. In a legal sense, all contracts, recognized as valid in any country, may be properly said to be matters of civil institution, since they obtain their obligation and construction *jure loci contractus* . . . . A general law, regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing the

> obligation of such a contract. (a) It may be the only effectual mode of enforcing the obligations of the contract on both sides . . . . Thus far the contract of marriage has been considered with reference to general laws regulating divorces upon breaches of that contract. *But if the argument means to assert, that the legislative power to dissolve such a contract, without such a breach on either side, against the wishes of the parties, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not entrench upon the prohibition of the constitution.*

Id. at 696.

Generally, the claim of unfair retroactive application of a law resulting in the deprivation of an individual's marital status has been rejected on the ground that the legislature has power to regulate marriage; people marry in the knowledge that the legislature has in the past exercised and currently still does exercise that power to change the terms, requirements and conditions of marriage (including the terms and conditions of termination of marriage), and the exercise of that power by the legislature does not deny due process because the parties were on prior notice that their legal marriage comes subject to legal regulation including

the possibility that the terms and conditions upon which marriage may be dissolved or terminated have been changed in the past and may also change in the future.

Among the leading cases to reject both the Contracts clause argument and the due-process-vested-rights argument was a decision by the California Court of Appeal, *In re Marriage of Walton* (Cal. App. 4th Dist. 1972) 28 Cal. App. 3d 108, 104 Cal. Rptr. 472. In that case, a couple was married in 1948, separated 21 years later, and on October 6, 1970, the husband filled a petition for no-fault divorce "on the ground of irreconcilable differences which have caused the irremediable breakdown of the marriage." Over the wife's objection the court granted the dissolution of marriage and entered an order that resolved the custody, support and property division issues. The wife appealed only from that portion of the judgment granting the divorce, arguing, *inter alia*, that:

> (1) Granting Husband's petition for dissolution of marriage on the ground of irreconcilable differences as specified in Civil Code, section 4506(1) is violative of article I, section 10 of the United States Constitution and article I, section 16 of the California Constitution prohibiting the enactment of any law impairing the obligations of contract;
>
> (2) Granting Husband's petition for dissolution of the

marriage on the ground of irreconcilable differences as specified in Civil Code, section 4506 subdivision (1) constitutes a retroactive application of law to Wife depriving her of a vested interest in her married status in violation of the due process of law guarantees contained in article I, section 13 of the California Constitution and the Fourteenth Amendment to the United States Constitution; and

(3) Granting Husband's petition for dissolution of the marriage on the ground of irreconcilable differences is violative of the constitutional guarantees of due process of law in that Civil Code, sections 4506(1) and 4507 are too vague and ambiguous to assure uniform application . . . .

28 Cal. App. 3d at 111, 104 Cal. Rptr. 475.

The court of appeals rejected all of these arguments. The impairment of contracts objection was brushed aside because "[m]arriage is much more than a civil contract; it is a relationship that may be created and terminated only with consent of the state and in which the state has a vital interest." 28 Cal. App. 3d at 112, 104 Cal. Rptr at 476.

When persons enter into a contract or transaction creating a relationship infused with a substantial public interest, subject to plenary control by the state, such contract or transaction is

> deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy, and such legislative amendments or enactments do not constitute an unconstitutional impairment of contractual obligations.

Id. Many other courts in many different jurisdictions have reached similar conclusions regarding similar claims.[9]

It also has been noted by various courts that considered whether the Impairment-of-Contracts Clause barred a divorce that the Contracts clause allows an exception to protect local sovereign interests.[10]

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[9] *See, e.g., Ryan v. Ryan* (Fla. 1973) 277 So. 2d 266, 273 (rejecting claim that it is "unconstitutional to apply the new [no-fault divorce] law to existing contracts of marriage entered into under the prior law which, it is claimed, was a part of that marriage contract"); *Noel v. Ewing* (1857) 9 Ind. 37, 49 ("[M]arriage is not technically a contract within the protection of the constitution of the United States ...."); *Fuqua v. Fuqua* (1958) 268 Ala. 127, 129 (stating that marriage "is not a contract whose obligation the Constitution protects."); *Raia v. Raia* (Ala. 1926) 108 So. 11 ("Marriage ... is not within the provisions of the impairment of the obligation of contracts"), *noted in Strasser, supra. See also Tolen v. Tolen* (Ind. 1831) 2 Blackf. 407, 408-09 (rejecting impairment of contracts by divorce law change); *Harding v. Alden* (1832) 9 Me. 140, 150 (rejecting impairment of contracts by divorce law change); *Hull v. Hull* (1848) 22 S.C. Eq. (2 Strob. Eq.) 174, 177 (rejecting impairment of contracts by divorce law change). *See further Desrochers v. Desrochers* (N.H. 1975) 347 A.2d 150; *Todd v. Kerr* (N.Y. App. Div. 1864) 42 Barb. 317, 318-19 (raising question).

[10] As one commentator summarized:

> When courts did consider the potential role of the Contracts

Mrs. Walton's claims of violation of due process by retroactive divestment of vested marital rights fared no better. *See In re Marriage of Walton, supra,* 28 Cal. App. 3d at 113-119, 104 Cal. Rptr. at 476-481. First, the court questioned whether a wife's interest in marriage constituted a property interest within the purview of the due process clause.

> In any event, in view of the state's vital interest in the institution of marriage . . . (*Maynard v. Hill, supra*, 125 U.S. at p. 205, 8 S.Ct. at p. 726, 31 L.Ed. at p. 657; *De Burgh v. De Burgh, supra*, 39 Cal. 2d at pp. 863-864, 250 P. 2d 598) and the state's plenary power to fix the conditions under which the

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> Clause [for recognition of out-of-state divorces in antebellum America] , they echoed the gloss on the Full Faith and Credit Clause suggested by Borden. The courts argued that the particular state interests involved in defining marital status demanded either modifying or declining to apply the Contracts Clause. A Kentucky court, for instance, argued that the marriage contract was a contract sui generis and a matter of such public concern as to place it beyond the regulations of "mere" commercial contracts. An Indiana court similarly noted the state interests involved in marriage contracts, then developed an interpretation of the Contracts Clause that clearly implicated concerns for state sovereignty:
>
> > [T]he states, in the fair exercise of their legislative powers, do not necessarily involve a violation of the obligation of contracts in passing general laws authorising divorces, if they do not, in the exercise of those powers, pass beyond the rights of their own citizens and act upon the rights of the citizens of other states . . . .
>
> Michael O'Hear, Note, *"Some of the Most Embarrassing Questions": Extraterritorial Divorces and the Problem of Jurisdiction Before Pennoyer*, 104 Yale L.J. 1507, 1524-25 (1995).

> marital status may be created or terminated (*Maynard v. Hill, supra*; *McClure on Behalf of Caruthers v. Donovan, supra*, 33 Cal. 2d at p. 728, 205 P.2d 17; *Estate of Gregorson, supra*, 160 Cal. at p. 24, 116 P. 60; *Morganti v. Morganti, supra*, 99 Cal. App. 2d at p. 515, 222 P. 2d 78), it is clear that Wife could have no vested interest in the state's maintaining in force the grounds for divorce that existed at the time of her marriage. Her interest, however it be classified, was subject to the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.

28 Cal. App. 3d at 113, 104 Cal. Rptr. at 476-477.

Finally, "[e]ven if Wife is said to have some constitutionally protected vested right, she has not been deprived thereof without due process of law." *Id.*, 28 Cal. App. 3d at 113, 104 Cal. Rptr. at 477. "'The constitutional question, on principle, therefore, would seem to be, not whether a vested right is impaired by a marital . . . law change, but whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment.'" *Id.* Other courts have

reached similar conclusions.[11]

The only difference between the cases of a spouse objecting to the dissolution of his or her marriage under new laws and grounds for divorce that did not exist when he or she contracted marriage, and the objection of two same-sex spouses who entered into same-sex marriages in the interim period in California is the number of spouses objecting to the application of the new law to invalidate or end the marriage. In the old no-fault divorce objection cases, only one of the spouses was objecting to the application of the new divorce law that resulted in the termination of the marriage for grounds that previously did not exist; in the current same-sex marriage situation, it is both spouses who object to the application of the new constitutional rule that deprives them of their marital status. The difference is only quantitative, not qualitative, and not analytically significant.

VI. THE ATTORNEY GENERAL'S CREATIVE NEW THEORY OF INVALIDITY OF PROPOSITION 8 IS MERITLESS

The question (and answer) posed by the Attorney General on pages 75-90 of his Answer Brief addresses the same underlying issue targeted by the Court in the first two questions enumerated in its November 19, 2008 Order. Whereas this Court's first two questions frame the issue in terms of procedural correctness for constitutional change—essentially asking "how"

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[11] *See, e.g., In re Marriage of Semmler* (Ill. 1985) 481 N.E. 2d 716, 720 (rejecting deprivation of marital status claim).

do the people change the text of the foundational document by which they govern themselves—the Attorney General aims directly at the underlying question of whether or not the people "can" change that foundational document once the Court has spoken. In posing that question, the Attorney General, in essence, side steps the Court's first two questions and, in the process of answering his own question, the Attorney General side steps constitutional jurisprudence and analysis.

The theory asserted by the Attorney General—that the sovereign people of a state, who form and constitute the polity, who created the constitution of the state, and who retain sovereignty under the republican form of government they have created, lack the power to amend the constitution so as to define marriage as the union only of a man and a woman—has no grounding in any credible concept of constitutional law, be it the Constitution of the State of California or the Constitution of the United States. Indeed, it defies basic principles of American and California constitutional law, and is inconsistent with the national and global realities of marriage amendments to American state and many other national constitutions.

The issue is not whether there are "inalienable rights" but whether when the sovereign people identify and define such rights this court can veto and overturn that determination. The question is "Who determines

what are 'inalienable rights.'" In this case the people have determined and declared (for the second time in less than nine years) that conjugal marriage between a man and a woman is a fundamental institution of such importance to society that it needs to be given constitutional protection against redefinition to include same-sex couples. The right of the people to enter and protect that institution, marriage so-defined, is a fundamental right which the people of California have emphatically protected by constitutional amendment, as has been done not only in California but in more than half of the States of our national union, and in more than thirty other nations around the world.

If the Attorney General is right in his presupposition that the Courts are to be trusted above the people in the role of defining what is and is not a "marriage," then he is leading the way to a dangerous future where even the relationships of same-sex couples are at risk, simply with a change in the personnel of the court. Even today, if the court were faced with the plea of a bi-sexual, who wants to marry her female lover and her female lover's husband, who is to say that a court could not declare unconstitutional those laws that prohibit polygamy in the face of the "fundamental right" of the bi-sexual woman not only to express her sexuality in a meaningful way but to receive the state's imprimatur of her relationship as a "marriage"? Change the personnel of the court and it is done.

The American constitutional system is based upon the foundational belief, articulated by Thomas Jefferson in the Declaration of Independence, that "Governments are instituted among Men deriving their just Powers from the Consent of the Governed . . . ." Declaration of Independence, para. 2 (1776) (emphasis added). *See also McKee v. Orange Unified School Dist.* (Cal. App. 4th Dist. 2003) 110 Cal. App. 4th 1310, 1316-1317 (quoting the just-powers passage from the Declaration of Independence and also quoting "President Lincoln's statement in the Gettysburg Address that our government is one 'of the people, by the people, for the people"). That is one of the principal antecedents for the Constitution of the United States of America's guarantee "to every State in th[e] Union [of] a Republican Form of Government . . . ." U.S. Consti., art. IV, Sec. 4.

The "republican" governments of the American states are founded on the principle of agency delegation. The people are sovereign and are the principals who have delegated certain powers to the agent-government they have created by the constitution they have adopted. The government and its branches and officers, including judicial officials, are only the agents of the people, and have only that power which the people gave them in and through the constitution's delegation of power. The constitution belongs to the people, not to the courts. The judiciary, like the other branches of government, cannot act in excess of the authority properly delegated to

them in the constitution. It cannot deprive the people of their power to create, define, and amend the constitution. "*The people of this State* do not yield their sovereignty to the agencies which serve them." *McKee, supra*, 110 Cal. App. 4th at 1316 (emphasis in the original).

The Attorney General's theory—that the people lack the power to amend the constitution they created in order to overturn the creation of a newly-minted constitutional right, such as a judicially-invented right to same-sex marriage, on the ground it merely has been labeled a "fundamental right" or "inalienable right"—gives much too little (constitutionally inadequate) respect to the principle of republican (self-) government and to our system of popular sovereignty, and far too much (constitutionally impermissible) credence to the power of legal sophistry and political rhetoric to magically cause constitutional rights of self-government to disappear, and to place judicial rights-inventions beyond the power of the people to reject them. The Attorney General's theory invites the Court to transform the government of a great American state from one of popular sovereignty—"In California, the people are sovereign, whose power may be exercised by initiative" (*Raven v. Deukmejian* (1990) 52 Cal. 3d 336, 341, 276 Cal. Rptr. 326)—into a judicial and political oligarchy; from a "government of the people, by the people, and for the people"—as Lincoln described American republicanism (*see generally* Abraham

Lincoln, Gettysburg Address, para. 3 (1863)), *see* http://www.whitehouse.gov/history/presidents/al16.html (seen 10 January 2009))—into a government of the court, by court, and for the court. *See Gilgert v. Stockton Port Dist.* (1936) 7 Cal. 2d 384, 390, 60 P.2d 847, 849 ("Where the sovereign power of the state ha[s] located the authority, there it must remain . . . until the Constitution itself is changed"); *see also Thomason v. Ruggles* (1886) 69 Cal. 465, 472, 11 P. 20, 24 (authority of government agencies is delegated authority and may be revoked by the people as sovereign by changing constitution).

Commenting on a hypothetical similar case (positing that an amendment is properly ratified that repeals the Twenty-Sixth Amendment and re-establishes 21 as the age for voting in Presidential elections, which is challenged in court by an 18-year-old aspiring voter) Professor Robert Post declared:

> I take this to be a paradigmatically easy case, meaning that any judge who would decide for the plaintiff could be said not quite to understand the practice of constitutional adjudication. . . . The judge might even consider the new constitutional amendment to be wrong-headed and anti-democratic. But she would nevertheless rule against the plaintiff on the ground that the new amendment reflects the popular will of the

> people as measured by the procedural standards [of the Constitution], and that the amendment is therefore properly enforceable as constitutional law. In such a case, popular sovereignty manifestly trumps constitutionalism.

Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 Cal. L. Rev. 429, 430-32 (1998). The same analysis applies in this case to compel rejection of the Attorney General's creative theory for invalidation of the Amendment.

Moreover, the Attorney General's theory defies the prevailing national understanding and dominant emerging trend in international understanding of constitutional law. Nationally, because of the push to legalize same-sex marriage and related social developments threatening marriage, the people in ***thirty*** American states have passed (by ballot approval) constitutional amendments defining marriage as the union of a man and a woman and banning same-sex marriage. *See* Lynn D. Wardle, *A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and the Tragedy of the Commons*, 22 J. Pub. L. 441, 445-46 n. 9 (2008).[12] And internationally, in comparative international constitutional

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[12] The article note lists twenty-seven states with marriage amendments as of summer 2008; on November 4, 2008 the people in three additional states (Arizona, California and Florida) ratified state marriage amendments, bringing the total number of states with marriage amendments to thirty.

law, the same trend is also seen. At least thirty-two national constitutions (of 191 sovereign nations recognized by the United Nations) have provisions that explicitly protect or define marriage as the union of man and woman. *Id.* Thus, the Attorney General's theory is utterly without any support in constitutional precedent or credible theory nationally or globally.

EPILOGUE

The above discussion, insofar as it addresses the third question posed by the Court's November 19, 2008 Order, assumes the legitimacy of what the Court did in *In re Marriage Cases*. Namely, we assume above that the Court was acting within its rightful powers to invalidate California Family Code § 308.5, enacted by Proposition 22 in 2000. We also assume that what the voters accomlished at the ballot box on November 4, 2008, in enshrining in the California Constitution the very same language previously used in former section 308.5, too, was legitimate. What we propose is a principled manner for the law to deal with the Interim Same-Sex Marriages created during the interim period between the June 16, 2008 effective date of the ruling in *In re Marriage Cases* and the November 5, 2008 effective date of the vote on Proposition 8.

Insofar as the above discussion addresses the question and argument posed on pages 75-90 of the Answer Brief filed by the Attorney General of the State of California, he assumes (and we, too, can assume) the legitimacy

of what this court did in *In re Marriage Cases*. However, the Attorney General rejects the legitimacy of what the people did at the ballot box.

In all of the above discussion, the underlying question can be restated as follows: "To what extent do the principles of the United States Supreme Court decision in *Marbury v. Madison* (1803) 5 U. S. (1 Cranch) 137, 177, 2 L. Ed. 60, inform this court when it fashions the jurisprudence of this State's constitution and laws?" No doubt, this court does not shy away from directly applying the principle—"It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule"—both to adjudication of disputes about the application of state statutes—*see, e.g., McClung v. Employment Development Dept.* (2004) 34 Cal. 4th 467, 20 Cal. Rptr. 428 ("This basic principle is at issue in this case" involving whether Cal. Gov't Code § 12940(j)(3) (amended 2000) applied to the case); and to adjudication of constitutional disputes—*see, e.g., Powers v. City of Richmond* (1995) 10 Cal. 4th 85, 114-115, 40 Cal. Rptr. 2d 839 ("Although courts should not fashion unnecessarily broad constitutional rules, courts must construe constitutional provisions when necessary to resolve issues properly presented. Recognizing that this court's role in the judicial system is to settle 'important questions of law' (Cal. Rules of Court, rule 29(a)), and that, in

the words of Chief Justice Marshall, it is 'emphatically . . . the *province and duty* of the judicial department . . . to say what the law is' (*Marbury v. Madison, supra*, 5 U.S. (1 Cranch) 137, 177 (2 L. Ed. 60, 73) [emphasis added by the *City of Richmond court*]), we have used established methods of constitutional interpretation to determine whether, as plaintiffs contend, the 'appellate jurisdiction' provision of our state Constitution confers on litigants a right of direct appeal from final judgments and orders in superior court actions, and we have concluded that it does not"); *Unzueta v. Ocean View School Dist.* (1992) 6 Cal. App. 4th 1689, 1698-1699 ("Since *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137 (2 L.Ed. 60) where Chief Justice Marshall said: 'It is emphatically the province and duty of the judicial department to say what the law is ....' (Id., at p. 177, 2 L.Ed. at p. 73), judges have been given the task of construing laws passed by voters or their representatives. It is too late in the day to deny this power. (7 Witkin, Summary of Cal. Law (9th ed. 1985) § 56, pp. 97-98)"); *see also In re Rosenkrantz* (2002) 29 Cal. 4th 616, 666, 128 Cal. Rptr. 2d 104 ("Contrary to the Governor's position, his decisions pursuant to article V, section 8(b), are not insulated from judicial review solely because the Governor, rather than an administrative agency within the executive branch, renders those decisions. (*Cf. Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 170, 2 L. Ed. 60 ('It is not by the office of the person to whom the writ is directed,

but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined'))").

But it should always be remembered that the judicial branch's traditional claim of final authority to resolve constitutional disputes is a claim of final authority *among the three branches of government.* At no time and in no place in California Constitutional jurisprudence or precedent have the people relinquished the powers that they, in the first instance, delegated to their government, whether it be the power they grant to the executive to enforce the laws, the power they grant to the legislative to enact and change the laws, or the power they grant to the judiciary to interpret the law. "[A] court can never afford to forget that the judiciary 'may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." Hamilton, The Federalist No. 78 (Willis ed. 1982) p. 394.

Said this Court in *McClung*, "Under fundamental principles of separation of powers, the legislative branch of government enacts laws. Subject to constitutional constraints, it may *change* the law. But *interpreting* the law is a judicial function. After the judiciary definitively and finally interprets a statute . . . the Legislature may amend the statute to say something different. But if it does so, it *changes* the law; it does not

merely state what the law always was." *McClung, supra*, 34 Cal. 4th at 470 (emphasis in original). If that be true, and it is, as a matter of California Supreme Court precedent, then it is also true that under fundamental principles of *delegation* of powers, the people are the ones who have *delegated* to the legislative branch of government the power to *enacts* laws. The people are the ones who, subject to constitutional constraints, have *delegated* to the Legislature the *non-exclusive* power to *change* the law. And the people are the ones who have delegated to the judiciary the power to *interpret* the law, rightly a judicial function. And it is the people who, after the judiciary definitively and finally interprets a statute, allow the Legislature, as their appointed delegates, to amend the statute to say something different, if they so choose. But in delegating that power, the people did not relinquish it. They retain that power. And if either the Legislature or the People *change* the law, the people nonetheless exercise a power that they always possess. And if the judiciary ventures from *interpreting* the law to *changing* the law, no less then than in any other instance, the people retain the power to *change* it, too. If the judiciary can state "what the law always was," so, too, can the people.

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As the United States Supreme Court has explained, "[i]n the performance of assigned constitutional duties *each branch* of the Government must initially interpret the Constitution, and the interpretation of its powers by *any branch* is due great respect from the others." *United States v. Nixon* (1974) 418 U.S. 683, 703, 41 L. Ed. 2d 1039, 94 S. Ct. 3090, italics added. Just as important as it is that *the other branches* acknowledge the court's role as "'ultimate interpreter of the Constitution'" (*id.*, at p. 704, *quoting Baker v. Carr* (1962) 369 U.S. 186, 211, 7 L. Ed. 2d 663, 82 S. Ct. 691), so, too, is it important that the court's themselves, along with the other branches of government, remember that they all are agents of the people, with the people themselves being the authors of the Constitution (the federal constitution begins with the phrase "We the people . . ." (Preamble) and the California Constitution begins with the words "All people . . ." (Art. I, Sec. 1)).

CONCLUSION

For the foregoing reasons, we urge this Court to hold, determine and declare that the Amendment invalidates Interim Same-Sex Marriages from and after the effective date of the Amendment.

We also respectfully request the Court to reject and repudiate the Attorney General's innovative theory for invalidating the Amendment because it has no grounding in constitutional text, doctrine, precedent, or

credible theory.

Dated: January 14, 2009.

Respectfully submitted,

STEPHEN KENT EHAT
Attorney for Amicus Curiae
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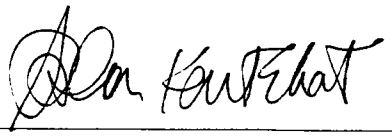
RULE 8.204(c)(1) CERTIFICATION OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the above AMICUS CURIAE BRIEF BY PROFESSORS OF CONSTITUTIONAL LAW AND FAMILY LAW REGARDING ISSUE NUMBER THREE AND REGARDING THE ISSUE SET FORTH ON PAGES 75-90 OF THE ANSWER BRIEF FILED BY THE ATTORNEY GENERAL, produced on a computer, is comprised of 12,368 words, including footnotes but excluding the Certificate of Interested Parties or Entities or Persons, the Table of Contents, the Table of Authorities, the Application by Amicus Curiae Professors of Law For Permission to File Amicus Brief, and this Rule 8.204(c)(1) Certification of Compliance, as calculated by the word-count feature in the word processor program used.

Dated: January 14, 2009.



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I declare that I am employed in the County of Utah, State of Utah. I am over the age of eighteen years and not a party to the within cause. My business address is 167 North 1150 East, Lindon, Utah 84042.

On January 14, 2009, I served the attached document entitled *Application by Amicus Curiae Professors of Law For Permission to File Amicus Brief; Amicus Curiae Brief by Professors of Law Opposing the Petitions Regarding Issue Number Three and Regarding the Issue Set Forth on Pages 75-90 of the Answer Brief Filed by the Attorney General* by placing a true copy thereof in a sealed envelope with shipping costs fully prepaid and causing it to be sent either by FedEx or United States Postal Service overnight delivery, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that this declaration is true and correct and that this declaration was executed on January 14, 2009 at Lindon, Utah.

STEPHEN KENT EHAT
Declarant


Signature