

S168047/S168066/S168078
IN THE SUPREME COURT OF CALIFORNIA

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

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

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

APPLICATION FOR LEAVE TO FILE *AMICI* BRIEF AND
PROPOSED BRIEF OF *AMICI CURIAE* SAN FRANCISCO
CHAMBER OF COMMERCE, GOOGLE, INC., H5, AND
LEVI STRAUSS & CO., IN SUPPORT OF PETITIONERS'
PETITIONS FOR EXTRAORDINARY RELIEF

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RECEIVED
JAN 15 2009
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COMMERCE, GOOGLE, INC., H5, AND LEVI STRAUSS & CO.**

**APPLICATION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF
PETITIONERS FOR EXTRAORDINARY RELIEF CHALLENGING
THE ENFORCEABILITY OF PROPOSITION 8 AND
STATEMENTS OF INTEREST OF *AMICI CURIAE***

Pursuant to California Rules of Court, Rule 8.520, subdivision (f), and this Court’s Order to Show Cause of November 19, 2008, *amici curiae* San Francisco Chamber of Commerce, Google, Inc., H5, and Levi Strauss & Co., (collectively “*Business Amici*”) hereby respectfully apply for leave to file an *amici curiae* brief in support of the Petitioners’ challenge to Proposition 8. The proposed *amici curiae* brief is attached to this application. The proposed *Business Amici* are familiar with the questions presented in these Petitions. They believe that there is a need for further argument, as discussed below.

STATEMENTS OF INTEREST

Amici have substantial interests in the outcome of this case.

Founded in 1850, San Francisco Chamber of Commerce (“Chamber”) is the oldest business organization in California, representing approximately 2,000 San Francisco businesses of all sizes. These businesses employ over 250,000 persons in San Francisco, representing half of the city’s workforce. Chamber has a long history of supporting workplace diversity and domestic partnerships. Over eleven years ago, when the City and County of San Francisco enacted the first domestic

partner benefits ordinance, Chamber was an early supporter of that ordinance. Chamber also joined in the *amici curiae* brief filed by Out & Equal Workplace Advocates and Levi Strauss & Co. in connection with this Court's consideration of the appeal that resulted in the *In re Marriage Cases* decision, (2008) 43 Cal.4th 757 (hereinafter "*Marriage Cases*").

Chamber supported the efforts to invalidate those portions of California statutes that purported to limit the benefits of marriage to only opposite-sex couples and supports the decision of this Court in *Marriage Cases* that those statutes unconstitutionally discriminated against gay¹ persons. Chamber believes ending marriage discrimination against same-sex couples enhances the ability of California businesses to recruit and retain talented employees and, further, enhances the state's reputation for respect and diversity, both of which are key to increased business development and economic growth.

By contrast, if California's initiative-amendment process may be used to take away fundamental rights selectively from minority groups as Proposition 8 attempts to do, the adverse effects on the business climate may be profound. Where California businesses have been able to recruit and retain top talent due in part to the state's reputation as a welcoming place of opportunity for all, Chamber fears the state will lose appeal if it is

¹ In keeping with the Court's nomenclature, in this Application and the attached brief we use the term "gay" with reference to an individual to relate to a lesbian woman, a gay man, or a bisexual person.

decided that equal protection guarantees may be removed by majority vote through the initiative process. Chamber seeks to participate in this litigation as an *amicus curiae* to provide information it believes will assist the court in consideration of this question.

Google Inc. (“Google”) is a public and profitable company focused on Internet search services. Named for the mathematical term “googol,” Google is widely recognized as the “world’s best search engine” because it is fast, accurate and easy to use. Google’s headquarters are in Mountain View, California. Google has five offices in five cities in California (Mountain View, San Francisco, San Bruno, Santa Monica, and Irvine), and several thousand California-based employees.

In September of last year, Google publicly opposed Proposition 8. Google did so based on the chilling and discriminatory effect of the proposition on many of Google’s employees. There are hundreds of Google employees in California who are affiliated with Google’s gay, lesbian, bisexual and transgender employee group. Google believes that all of its employees deserve fundamental civil rights, and that when employees are harmed, businesses suffer. Google is committed to preserving fundamental rights for every one of the people who work hard to make Google a success.

Levi Strauss & Co. (LS&CO.) was founded in San Francisco in 1853 by Levi Strauss and headquartered there ever since. LS&CO. is one of the

world's leading branded apparel companies, marketing its products in more than 110 countries worldwide. The company designs and markets jeans and jeans-related pants, casual and dress pants, shirts, jackets and related accessories for men, women and children under the Levi's® , Dockers® and Signature by Levi Strauss & Co.™ brands.

In addition to its San Francisco headquarters, LS&CO. operates a showroom in Los Angeles and 10 retail stores throughout California. LS&CO. employs more than 10,000 people worldwide with more than 1,700 employees currently residing in California, several of whom legally married their same-sex partners during the window of opportunity between June 16 and November 5, 2008.

LS&CO. has a long history of commitment to equality and social justice. Notably, in 1992, LS&CO. became the first Fortune 500 company to provide domestic-partnership health benefits to the unmarried partners of its employees – a practice that has been widely adopted by leading U.S. corporations today. More recently, LS&CO. filed an Amicus Brief with this court in *Marriage Cases* and led a coalition of businesses opposed to Proposition 8 in the November 2008 election.

Company policies and practices designed to support equal treatment for all employees have been in place at LS&CO. for several years. Because existing progressive workplace practices afforded employees in same-sex committed relationships numerous rights and benefits, LS&CO. did not

augment administrative practices or policies when this court ruled in 2008 that to deny same-sex couples the right to marry would be to deny them equal protection under the law. As such, LS&CO. will not likely suffer the same hardships associated with retroactive application that may affect other California businesses with different employment and business profiles. Even so, LS&CO. stands with the Chamber and other *Business Amici* in opposing retroactive application of Proposition 8 because it is committed to protecting the rights of all its employees, including the already-vested marriage rights of employees in legal, same-sex marriages.

H5 is a California corporation based in San Francisco. It has been in business since 1999 and employs more than 100 people in the state. H5 provides information retrieval and automated document review services to Fortune 500 companies and their outside counsel for their litigation, preservation, and compliance needs.

H5 is proud of its strong commitment to supporting a diverse workforce and firmly believes that every individual should be treated equally under the law. The company seeks to participate as an *amicus curiae* in support of Petitioners' challenge to Proposition 8 because it opposes the initiative's attempt to eliminate the fundamental right of marriage for one class of people, as well as any effort to nullify the more than 18,000 marriages that same-sex couples entered into legally prior to the passage of Proposition 8. Of the many reasons H5 chose to establish its

business in California, one of the most significant was the availability of a talented, diverse workforce. H5 believes that California's commitment to equal protection for all of its citizens is a key foundation for the company's ability to carry out its own commitment to diversity and equality. By mandating different treatment under the law, Proposition 8 – and the efforts to nullify the legally valid marriages of same-sex couples that occurred prior to its passage – threaten to have a chilling effect on these fundamental principles that H5 believes are central to the success of a thriving business.

In its November 19, 2008 Order, this Court requested briefing on three issues. The principle focus of this proposed *amici curiae* brief is on issue Number 3: “If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?”

Business Amici believe that the briefs filed herein on behalf of Petitioners, as well as the brief filed on behalf of Attorney General Edmund G. Brown Jr., address the third issue posed by this Court and convincingly demonstrate that any retroactive application of Proposition 8 to some marriages validly and legally solemnized in California before the passage of Proposition 8 would destroy vested rights of those married individuals that are guaranteed by the equal protection and due process clauses of the California Constitution.

In addition, *Business Amici* wish this Court to also consider the unwarranted and oppressive burdens that retroactive application of Proposition 8 could place upon the California business community which, in reliance upon the validity of same-sex marriages performed before the passage of Proposition 8, substantially modified their business practices and have undertaken obligations to the couples who validly and legally married before the passage of Proposition 8.

Business Amici wish to emphasize the potential adverse effects for the state as a whole, including the state's businesses, if Proposition 8 is deemed to be valid and California ceases to be seen as a place of opportunity for all, but rather as a place where vulnerable groups may lose fundamental rights by popular vote. *Business Amici* believe the types of potential harms to businesses and California's economy as a whole cast additional relevant light on all of the questions before the court.

Business Amici are familiar with the issues before the Court. *Business Amici* believe that further briefing is necessary to address the matters described above, which are not fully addressed in the parties' briefs and pleadings filed with the Court.

Thousands of gay individuals acting in reliance upon this Court's decision in *Marriage Cases* entered into marriages in California prior to the passage of Proposition 8. Individuals who entered into these marriages during that period were not the only ones who relied upon the *Marriage*

Cases ruling. Regardless of whether a business agreed with this Court's decision in *Marriage Cases* all businesses were obligated by the California Constitution to recognize these marriages and to offer spouses in these marriages the same "basic substantive legal rights traditionally associated with marriage..." (*Marriage Cases, supra* 43 Cal.4th at p. 781.) Acting in justifiable and good faith reliance upon this Court's decision in *Marriage Cases*, many businesses extended to legally married gay individuals all the legal status and benefits provided under California law for heterosexual married individuals and their spouses. As examples, many businesses:

- extended credit in reliance upon California's laws applicable to community property and the joint obligation of married persons for community debts;
- calculated and paid withholding amounts for California income tax purposes for gay married individuals;
- revised benefit plans to expressly include gay employees' lawful spouses;
- extended to same-sex spouses benefits under the California Continuation Benefits Replacement Act;
- in the case of mortgage holders, may have waived or been precluded from exercising their rights under "due on sale" clauses when married gay couples transferred mortgaged real property;

- took advantage of certain state tax reporting privileges based on married status where the business was owned by married gay couples;
- honored the State Disability Insurance and/or the California Family Rights Act by extending state mandated paid leave to married gay people;
- hired gay individuals to work in California because those individuals desired to be legally married, which was possible in California.

Some businesses are also justifiably concerned that if Proposition 8 is applied retroactively, then they may have to engage in undesirable activities expressly targeting their gay employees, which could involve invasion of their privacy rights and a need to seek reimbursement for health benefits provided to same-sex spouses and their children. Businesses may also have to deal with reduced employee productivity and desire to leave their employment and California if Proposition 8 were to be applied retroactively.

In short, retroactive application of Proposition 8 would not only work an injustice and deprivation of constitutionally-protected rights of those gay and lesbian couples who married before the passage of Proposition 8. Such a draconian interpretation may also require businesses to expend significant labor hours and administrative effort, and to incur

additional costs, and may threaten great disruption to the relations between their businesses and their employees. Moreover, requiring some companies to reverse course on their employee benefit policies could create a significant risk of employer liability for invasion of employees' privacy as well as other claims arising out of revoked benefits and privileges and tax liability for treating gay married individuals on an equal basis with heterosexual married individuals.

It is these business-focused issues to which *Business Amici* wish to draw the Court's attention primarily for its evaluation of its third question regarding the retroactive application of Proposition 8, but also for its evaluation of its first question regarding the validity, or not, of this initiative. The issues examined in this brief show how often one's marital status can matter in daily life. *Business Amici* believe this presentation helps to illuminate the nature of the change in California government that Proposition 8 would have caused if it is decided here that a group of citizens can be ejected by mere majority vote from the institution of marriage, or any important institution, or be deprived of other important rights, for being different in a legally irrelevant way. It would mean minorities no longer have meaningful shelter within the California Constitution. *Business Amici* do not believe any initiative measure can accomplish this result.

For the foregoing reasons, *Business Amici* respectfully request leave
to file the attached brief.

Dated: January 15, 2009

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INTRODUCTION AND SUMMARY OF ARGUMENT

Business Amici unequivocally endorse and join in the arguments and reasoning of Petitioners and of the Attorney General in urging this Court to declare invalid Proposition 8's unprecedented revision of the California Constitution. *Business Amici* also join in the arguments and logic advanced by Petitioners and the Attorney General demonstrating that even if Proposition 8 is found valid by this Court, which Amici thinks it should not, Proposition 8 may not be applied retroactively to in effect "annul" *ab initio* the marriages of thousands of same-sex couples entered into in justifiable reliance on this Court's decision in *Marriage Cases*.

The briefs of Petitioners and the Attorney General focus upon the constitutional infirmity of the unprecedented effort of Proposition 8 to single out a particular group of individuals based on a constitutionally "suspect classification" (*Marriage Cases, supra*, 43 Cal.4th at p. 842) in order to deprive all members of that group, *inter alia*, of the benefits of the equal protection clause of the Constitution, as clearly enunciated by this Court, and to eliminate the vested marital rights of those members of the group who entered into marriage in reliance upon this Court's decision.

Business Amici wish to present as a slightly different view that this Court ought to consider in determining whether Proposition 8 can be constitutionally applied retroactively even if it is prospectively constitutional, which *Business Amici* believe it is not. That view is the

view of California businesses that have followed the *Marriage Cases* decision, regardless of whether any individual business agreed with the decision. While some California businesses extended equal benefits and privileges to all of their employees, many other California businesses have made significant changes in the way they do business with respect to their employees, their debtors, or otherwise, to comply with the clear mandate of this Court's decision.

With this view foremost, this brief addresses the third question posed by this Court: "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?" *Business Amici* would broaden this question slightly to include the effect not only "on the marriages of same-sex couples" but also on businesses who have, consistent with the due process clause of the California Constitution, treated married gay people in all respects equal to married heterosexual people.

Business Amici agree with the analysis of Petitioners and the Attorney General that neither the text of Proposition 8's proposed amendment to the California Constitution nor any of the ballot materials presented to the people in connection with the vote on Proposition 8, unequivocally provided for the retroactive application of Proposition 8. Those arguments will be neither repeated nor paraphrased here.

What will be discussed herein is the substantial and serious negative impact upon those businesses who were obligated by this Court's *Marriage Cases* decision to recognize gay couples' marriages and to afford those married people the same "basic substantive and legal rights traditionally associated with marriage . . ." (*Marriage Cases, supra*, 43 Cal.4th at p. 781.) Not only did gay couples who entered into lawful marriages receive "vested rights" as a result of their valid marriages prior to passage of Proposition 8, but businesses also obtained certain vested rights as well as concurrent obligations as a result of recognizing those marriages.

Any retroactive application, in whole or in part, of Proposition 8, could severely disrupt and challenge those vested rights and put those obligations into disarray and confusion. Businesses must be able to plan and to make decisions and to take or avoid action based upon their understanding of the law, of their obligations, and of the rights of others, at the time that planning and decision making must be done. For those businesses that offer certain employment benefits only to employees who are married or in domestic partnerships, for example, such decisions include concerns relating to the extension of credit, the provision of employment benefits, the recruitment and retention of employees with a same-sex partner, and the performance of employer tax obligations with respect to employees.

As set forth in detail below, any retroactive application of Proposition 8 could significantly disrupt and harm such decisions and, potentially, subject businesses to unintended financial risk. Such unintended financial risks, as examples, could arise from credit decisions made in reliance on marital status, human resources decisions, and compliance with tax laws. Retroactive application of Proposition 8 might put those decisions into disarray and not only punish gay people who exercised their constitutional rights by marrying, but also punish businesses that employed those individuals or did business with them.

Separate from the profound harms that unavoidably would flow were the Court to conclude that equal protection guarantees may be eliminated by an initiative amendment, at least these negative, “unanticipated consequences” for vested marital rights would be avoided by a determination that Proposition 8 has no retroactive application whatsoever, that *all* marriages entered into in California before the passage of Proposition 8 remain in full force and effect, and that *all* the participants in those marriages (gay and heterosexual alike) retain *all* of the benefits and responsibilities that such status confers upon them under California law. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1218.)

This Brief does not purport to catalogue each and every negative consequence on businesses that a retroactive application of Proposition 8 may cause. No brief could. That is why this Court and the case law are so

justifiably concerned with “unanticipated consequences.” Today, we can not know or understand all of those consequences, but today, we do know and understand that some, and maybe many, very likely could occur.

Intervener’s suggestion that the myriad unanticipated consequences that retroactive application of Proposition 8 could impose not only on the gay people who married, but also on all of the businesses that employ them or otherwise deal with them, can be resolved by individual lawsuits on a case-by-case basis is, to be charitable, unworkable. (Intervener’s Opposition Brief at p. 41.) There need be no onslaught of multi-year, complex litigations foisted upon the people of California and the California courts. One decision by this Court, that Proposition 8 may not be applied retroactively in any manner, will avoid all of Intervener’s proposed litigation free for all.

I. Businesses Have a Vested Interest in the Certainty of the Marital Status of Individuals Lawfully Wed.

Businesses must be able to rely upon the power of the state to confer marital status upon a couple without fear that such status will subsequently be completely revoked by the state. If marriages validly formed prior to November 5, 2008, are held to be void, *ab initio*, many California businesses could suffer severe harm. Employers may be subject to contractual and legal liability as a direct result of the voiding of lawful marriages. Businesses that relied on the legal status of their customers

could be at risk of loss. The risks and uncertainties associated with a retroactive application of Proposition 8 assuredly would place an undue burden upon California businesses.

Some of those risks are described below.

A. **Employer Liability for Actions Taken in Reliance upon
Validity of Marriages.**

Retroactive application of Proposition 8 is fundamentally unfair and would cause severe harm to California businesses. Individuals and businesses must have the opportunity to know what the law is and to conform their conduct accordingly. Thousands of businesses, their owners, directors, officers and employees, and government officials, relied upon the marital status of thousands of individuals who entered into legal, valid marriages that Interveners now claim are void, *ab initio*. If the legal status of those individuals is voided retroactively, California businesses, their directors, officers and employees as well as the public will suffer devastating harm that was simply not contemplated by the language of Proposition 8 or properly put forth to the voters. The unintended consequences of retroactive application of Proposition 8 are so severe and far reaching that the express language of Proposition 8 cannot be interpreted to have contemplated such results.

Having conformed their conduct to this Court's *Marriage Cases* decision, government officials, private businesses, their owners, officers

and employees recognized valid marriages between same-sex couples, effecting many areas of our society and the daily operation of businesses, including (1) income taxes, (2) employment benefits, and (3) social welfare benefits. Newly married same-sex couples relied upon these and other benefits of marriage in making life-changing decisions regarding residency, employment, financial planning and family planning. Businesses likewise relied upon their legal status and the attendant rights and responsibilities legally protected by marriage. If Proposition 8 is applied retroactively, then those who rightfully conformed their conduct to the *Marriage Cases* decision, will incur liability for such conduct and face ongoing cost and expense to address the uncertainties of implementing the nullification of that status retroactively.

- 1. Employers, and their individual owners, officers and employees could be subject to liability, including civil penalties, for failure to pay and withhold income taxes.**

The legal status of marriage effects many areas of our tax code, including three important areas affecting many Californians: (1) the opportunity to pay and receive various forms of income exempt from taxation, (2) the opportunity to file joint income tax returns, and (3) the opportunity for families to receive public assistance. If thousands of marriages are voided, *ab initio*, then thousands of taxpayers and businesses,

including their owners, officers and employees, might face *personal* liability for taxes not properly withheld and paid.

(a) If marriages are nullified, businesses, and their owners, officers and employees might be subject to personal liability for failure to properly pay and withhold income taxes.

Marriage affects income taxation in many ways. For example, many types of income received by or for the benefit of spouses and children are exempt from income tax.² All income received by spouses and children who received such benefits (which in the case of health care and accidental death and disability benefits can be extraordinarily high), may become taxable and subject to interest and penalties for failure to properly report and pay.

Marital status also affects how employers withhold California income taxes. If marriages are nullified retroactively, employers will face significant uncertainty and financial harm as a result. For example, as a result of the exemptions from California income taxation for accident and health insurance benefits for the benefit of an employee's spouse and

² See, e.g., Rev. & Tax Code, §17131 (applying all federal exclusions from gross income including accident and health plan benefits for spouses); Rev. & Tax Code, § 17132.4 (taxation of death benefits received by families of deceased member of California National Guard, State Military Reserve, or Naval Militia); Rev. & Tax Code, §17140.5 (gross income from spouse of service member not domiciled in California).

children, employers do not withhold, nor report as income to the employee, such benefits as income for California income taxation purposes.

If Proposition 8 is applied retroactively, these benefits could constitute income to the employee for California income tax purposes and these employers might have had to report such benefits as income and might have had to withhold the corresponding California income tax. If Proposition 8 is applied retroactively, by failing to withhold in reliance on the legality and existence of same-sex couples' valid marriages, pursuant to Section 1733 of the Unemployment Insurance Code, these employers might be subject to penalties and interest on the underlying tax amount (as well as being responsible for any penalties and interest owed if the employees fail to pay the taxes). Furthermore, pursuant to section 1735 of the Unemployment Insurance Code, not only might the State hold the employer liable for the taxes it failed to withhold, but the State also might seek to impose liability on officers, majority shareholders, or any other person responsible for the failure to withhold, *plus any interest and penalties owed*. As a result, an unrelated individual in a company's accounting department, or the treasurer of a company, might be personally responsible for failing to withhold taxes on such benefits if Proposition 8 is applied retroactively.

The liability these individuals could face would be absolute. At least arguably, all the State would need to show is that the individual

intentionally failed to withhold, which could be true since he or she intentionally did not withhold because the employee was legally married. A retroactive application of Proposition 8 might not only affect the individuals who were married, but every employer that employed one of these individuals, as well as potentially thousands of third parties whose sole responsibility was to pay these employees.³

(b) If marriages are nullified, employers may be liable for under withholding as result of employees filing jointly as a married couple.

Beginning in January 2009, many married couples will file joint tax returns, including many same-sex couples who decided to marry, having not previously registered as domestic partners.⁴ As a result, some of these couples will pay less tax than if they had been required to file separately, while others will pay more tax.⁵ If those marriages later are deemed void,

³ Pursuant to section 1735 of the Unemployment Insurance Code, the State can assess liability on *any* individual who held responsibility over withholding taxes. The State can assess, jointly and severally, every individual at a company who had the authority to withhold and remit funds to the state.

⁴ Some gay and lesbian couples decided to marry for a mix of important personal reasons, having previously decided against registering as domestic partners because that lesser legal status was unappealing and/or confusing, because the lack of a shared residence rendered them ineligible, or for other reasons.

⁵ M.V Lee Badgett & R. Bradley Sears, *Putting Price on Equality? The Impact of Same=Sex Marriage on California's Budget*, 16 Stan. L. Pol'y. Rev. 197 (2005) at p.33.

ab initio, then married couples who paid less taxes than required if they had filed as unmarried individuals might face additional taxes, penalties, and interest for failing to properly pay taxes. If the affected employees do not pay those additional taxes, businesses that calculated withholding based on the employee being married might face claims of liability for under withholding.

While perhaps not a direct harm to their employers, couples who overpaid as a result of their marriages later being voided present another problem with retroactive application of Proposition 8. Those couples likely would be entitled to a refund if they amended their tax returns; however, fairly administering these refunds would be difficult if not impossible where one spouse may be required to pay more taxes if filing separately and the other spouse may be entitled to a refund if filing separately that is greater than the amount due the couple from the State of California. The administrative burdens of correcting such filings would be overwhelming for the Franchise Tax Board, together with some potential financial burdens for taxpayers.

(c) If marriages are nullified, employers will be damaged if employees are liable for returning public benefits properly received before this Court's ruling.

Marriage affects public benefits in many ways, and businesses have a strong interest in the integrity and reliability of such benefits. For example, married gay employees may have been required to take time off from work to care for a spouse or child and may have received temporary public disability benefits during such time.⁶ If married gay employees' marriages all are deemed void, *ab initio*, then such benefits might be required to be repaid by the employees and their families. The harm of retroactive application of Proposition 8 could be devastating for families and businesses alike. As stated by the Legislature in adopting these benefits, “[d]eveloping systems that help families adapt to the competing interests of work and home not only benefits workers, but also benefits employers by increasing worker productivity and reducing employee turnover.”⁷

⁶ Unemployment Ins. Code, §§ 3300, et seq.

⁷ Unemployment Ins. Code, §§ 3300, subd. (c).

2. If Marriages, Validly Entered Into Before the Passage of Proposition 8, are Deemed Void, Employers May Incur Administrative Costs and May Face Potential Litigation Over Administration of Benefit Plans.

When the *Marriage Cases* decision became final on June 14, 2008, many employers were faced with the task of determining the impact of the decision on employee benefit eligibility. In light of this decision, some California employers were compelled to review and revise their plans and policies to ensure compliance with California law. In many cases, employers undertook the burden of revising their plan documents to include a definition of the term “spouse” that clearly conveyed the employer’s changed intent with respect to spousal benefits.⁸ If gay employees’ marriages, validly entered into in California, are deemed void *ab initio*, some employers may incur the additional administrative costs of revising their plans once again. In addition, some employers may be subject to the expense and disruption associated with any litigation if benefits conferred upon same-sex spouses are withdrawn.

⁸ *Client Alert: The Recent California Decision Overruling the Ban on Same Sex Marriages and its Effect on Employee Benefit Plans*, LATHAM & WATKINS LLP, <http://www.lw.com/Resources.aspx?page=ClientAlertdetail&publication=2230>; Yana S. Johnson, *Effects of Same-Sex Marriage on Employee Benefits*, MORRISON & FOERSTER LLP, <http://www.mofo.com/news/updates/files/14724.html>.

**(a) Employers applied preference beneficiary
rules in reliance on marital status**

If same-sex marriages are deemed void retrospectively, employers may face competing claims for benefits paid to a same-sex spouse under plan preference beneficiary rules. Many employers include preference beneficiary rules in plan documents to determine who receives a participating employee's account balance or other death benefit in the event the employee fails to designate a beneficiary or the designated beneficiary dies before the participant.⁹ Most plans provide first priority to the participant's surviving spouse, followed by the participant's children, parents and siblings. If a plan administrator, in reliance on the Court's decision in *Marriage Cases*, interpreted a plan preference beneficiary provision to provide first priority to a gay participant's surviving spouse, a retrospective finding that the same-sex marriage is void, *ab initio*, may result in competing claimants for the death or survivor benefits of the employee spouse, who might argue the plan improperly paid the benefits to the surviving spouse. If competing claims result, employers will incur legal expenses to resolve the claim and might be subject to liability for having

⁹ Gouaux, *The Impact of Same-Sex Marriage on Employee Benefit Plans*, TRUCKER HUSS, APC, available at http://www.truckerhuss.com/articles/view_article.cgi?class=articles&article=_other_regulatory_matters/20080501_Impact_Same_S_Marriage.txt.

previously paid the benefit to an individual who has become a “former” spouse as the result of retroactive enforcement of Proposition 8.

(b) Cal-COBRA benefits are paid in reliance on marital status

If Proposition 8 is applied retroactively to void gay people’s existing marriages, employers will face confusion regarding payment of benefits to same-sex spouse beneficiaries under the California Continuation Benefits Replacement Act (“Cal-COBRA”). Cal-COBRA, which applies to small employers with 2-19 employees, allows qualified beneficiaries who experience a “qualifying event” that would otherwise exclude them from coverage, to elect continuation coverage for 36 months. (Health & Saf. Code, sec. 1366.27; Ins. Code, sec. 10128.50 et seq.) Gay spouses would be accorded the same rights to continuation of coverage as heterosexual spouses. For gay individuals who entered into marriages in California, who are not also registered as domestic partners, their eligibility for continuation coverage under Cal-COBRA would be cast into doubt if their marriages were deemed void and their employers would face an uncertain legal landscape regarding the provision of continuation coverage to them.

3. Retroactive Application of Proposition 8 Would Impose Significant Social and Economic Costs upon Employers and Employees.

Retroactive application of Proposition 8 would require significant labor hours and costs, cause great disruption to the relations between employees and employers, and potentially create significant risk of liability for invasions of privacy and other claims arising out of paid and revoked benefits and privileges. For example, retroactive application may impose upon California employers the challenge of finding coverage for individuals who, in reliance on the Court decision, terminated individual medical insurance coverage to avail themselves of coverage available through a spouse's employer, only to subsequently have the eligibility for such coverage retroactively rescinded.

Furthermore, retroactive application of Proposition 8 could impose upon California employers the obligation to inquire of their employees married between the effective date of the *Marriage Cases* decision (June 15) and November 5, regardless of whether their marital partner is of the same or a different sex.

Recall that California law strictly forbids employers from discriminating against individuals based on sexual orientation. (See, e.g., Gov't. Code, secs. 12920, 12926 subd.(q), and 12940 subd.(a).) Nevertheless, if Proposition 8 is deemed to have retroactive application, the

employers of each one of the over 18,000 couples who married between June 15 and November 5 may be forced to engage in activities that expressly target gay employees.

This may create a significant risk of liability to California employers for both discriminating against gay employees and invading their right to privacy. If a heterosexual couple is married, their marriage certificate is presumed valid, recorded at the county clerk's office, and no address is listed in the public records. Conversely, if a gay couple has wed, one or both of the spouses may have to report to their employer that because he or she is homosexual, that his or her marriage is now invalid, and any marital benefits previously granted may have to be modified or revoked.

Some employers might then only provide health benefits if the couple is registered as a domestic partnership. However, domestic partner registration requires that the couples share a home, entails a public filing, and reveals the couple's homosexual sexual orientation unless at least one of them is 62 or older. (See Family Code, sec. 297 (b)(5)(B).). No such residency requirements or potentially discomfiting disclosures of sensitive information are required for marriage. This construct potentially puts each employer in harms' way by raising the potential for privacy and other tort claims based on an asymmetrical requirement to make certain private information public or at least disclosed to the employer, where such information is not similarly required of heterosexual employees. At a

minimum, this additional level of interrogation would be at direct odds with the right to equal dignity and respect so clearly articulated in *Marriage Cases, supra*, 43 Cal.4th at pp. 702, 821-822, 855.

These hurdles create numerous financial and legal burdens on California businesses to ascertain, verify, modify or seek to restore privileges and benefits available only to married couples, in a time where the economy itself threatens to devastate countless businesses and jobs across the state.

It is certainly true that some California businesses extend equal employment benefits to their employees and their families regardless of whether those employees are married, in registered domestic partnerships, or simply cohabiting. For these companies some of the harms and problems regarding employment benefits that might be caused by retroactive application of Proposition 8 probably would be mitigated but not eliminated by their progressive human resources policies.

B. Other Business Risks Associated with Voiding Marriages.

1. Businesses that Extended Credit in Reliance upon Marital Status May Suffer Significant Harm if Proposition 8 is Applied Retroactively.

Many California businesses extend credit in reliance upon the married status of borrowers and consumers. Credit has been extended to individuals, couples and their families based upon the marital status of the

debtor or the debtor's family, including home loans, credit cards, student financial aid, car loans and many other consumer and business loans. Creditors rely upon the assets and liabilities of spouses when evaluating the credit worthiness of debtors and guarantors. If same-sex couples' marriages are nullified, then those businesses that extended credit to married, gay customers may suffer significant and immediate harm. Such harm likely would be magnified by the already catastrophic credit market.

Marital status affects creditor rights in many ways that have become central to established underwriting criteria for all types of creditors. If a creditor obtains a judgment against an individual spouse, the creditor may levy upon the community property of the judgment debtor's spouse,¹⁰ and if the credit was extended for the "necessaries of life," then the creditor may also levy upon the separate property of the non-debtor spouse.¹¹ This concept is extended to the trust of a deceased spouse, which can be allocated debt of a surviving spouse.¹² Further, married spouses are entitled to assert only one homestead exemption, collectively.¹³ Retroactive application of Proposition 8 might not only prohibit future collections but also invalidate any previous levy upon a non-debtor spouse's property or a

¹⁰ Fam. Code, §§ 910 subd. (a), and 913 subd. (a); Code Civ. Proc., § 695.020.

¹¹ Fam. Code, § 914.

¹² Prob. Code, § 19320.

¹³ Code Civ. Proc., § 703.110 subd. (a).

previous levy upon a couple's assets in excess of the homestead exemption, requiring creditors to pay damages to spouses whose property was wrongfully levied.¹⁴

When credit is extended to a spouse, or the child of a spouse guaranteed by the parent (common for student loans), then the income and assets of the non-debtor spouse is an important consideration to determine the credit worthiness of the debtor (or guarantor) because of the broad impact of the status of marriage. If Proposition 8 is applied retroactively, then creditors may be stuck with loans they would not have otherwise made and left unprotected under the law. Creditors, like all businesses, depend upon the ability to know what the law is and to conform their conduct accordingly. If Proposition 8 is applied retroactively in violation of this principle, then California businesses are likely to suffer immediate harm. Such consequences were not properly put before the voters, and if this Court applies Proposition 8 retroactively, then confusion will be imposed, which discourages commerce. In the future, businesses may be even more reluctant to extend credit in reliance upon the legal protections enjoyed by members of unpopular minority groups, recognizing that those protections might later be stripped away by majority vote. Amidst the worst credit crisis in our state's history, this Court should not create more obstacles to the availability of credit to Californians.

¹⁴ Code Civ. Proc., § 490.020 subd. (a), 490.060.

**2. Businesses that May Have Relied upon Probate
Code Rules May Suffer Harm if Proposition 8 is
Applied Retroactively.**

The rights and responsibilities afforded a married couple also continue when a spouse becomes legally incompetent or passes away.¹⁵

As with the other areas of law and business discussed in this brief, the rights, remedies and obligations afforded in the Probate Code not only affect a married couple. They also affect those who deal with a married couple or the survivor of a married couple, including doctors, hospitals, courts, mortuaries, creditors, and financial institutions all of whom often rely on Probate Code rules to govern their conduct with respect to a wide range of matters. A retroactive application of Proposition 8 would subject all of these organizations and individuals to uncertainty and potential lawsuits.

A few examples illustrate the likelihood of such harm.

Under Probate Code section 8461, a surviving spouse has priority to be appointed as the administrator of a decedent's estate when that estate is

¹⁵ Sadly, we are aware that at least one couple has suffered such a loss since marrying after June 16, 2008. On June 16, 2009, Del Martin and her partner of 55 years, Phyllis Lyon, were legally wed after judgment was given by this Court in their favor in *In re Marriage Cases*. Del Martin passed away on August 27, 2008. Gordon, *Lesbian rights pioneer Del Martin dies at 87*, San Francisco Chronicle, August 28, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/27/BAGI12JDIS.DTL&tsp=1>.

probated. If a surviving gay spouse was appointed pursuant to the section, and if the marriage then was deemed invalid, the appointment of the surviving gay spouse would be put in question impacting those businesses who had transacted, or were intending to transact, business with the surviving spouse as administrator.

Probate Code section 1812 lists the priority of individuals who may be appointed to serve as conservator of an individual (the “conservatee”) who lacks capacity. Not surprisingly, the first person to have priority for appointment is the spouse of the proposed conservatee. If these marriages are deemed invalid, then such businesses as financial institutions might be subject to potential liability for relying on the instructions of the appointed spouse.

Pursuant to Probate Code section 13500, et seq., a surviving spouse may petition a court requesting that the administration of a decedent’s estate through probate is not necessary because the property of the decedent passes to the surviving spouse. In other words, if an individual leaves all of his or her assets to his or her surviving spouse, a complete and comprehensive (and costly) probate can be avoided by merely filing this petition. If all gay couples’ marriages are deemed invalid, this truncated administration very likely would not be available to surviving gay spouses and these decedents’ estates would have to undergo a full probate thereby decreasing the value of the estates available to support the surviving

spouses and to pay the decedents' debts. Any financial institutions that had already instituted changes would have to reverse everything, and the estate would have to go through the time-consuming and expensive probate process; increasing the docket of an already overwhelmed probate court system.

Pursuant to Probate Code section 3080, if one spouse is under a conservatorship, any individual may bring a petition before the court to require the other spouse, who has management and control over the assets, to continue to provide for the support and maintenance of the conservatee. If these marriages are nullified, a business creditor of a gay conservatee might not have the right to rely upon the continued maintenance and support from the conservatee's spouse.

Pursuant to Probate Code section 3051, if one spouse lacks legal capacity, the other spouse has the right to manage and control community property, including the right to dispose of community property assets. In these circumstances, businesses rely on that authority granted to a spouse. When that authority is exercised by a gay or lesbian spouse, retroactive application of Proposition 8 would create great uncertainty and possibly leave creditors, employees, customers and purchasers of property open to attack.

3. Businesses Are at Risk if Employees Lose Disability Insurance and Other Entitlements as a Result of their Marriages Being Voided.

Another area of concern is with respect to state protections provided under State Disability Insurance (“SDI”) (Unemployment Insurance Code, sections 2625, et seq.) and the California Family Rights Act (“CFRA”) (Unemployment Insurance Code, sections 3300, et seq.). Under the CFRA, any individual covered by SDI may take time off from work to care for a seriously ill spouse. The CFRA covers an estimated 13 million California workers and most certainly most of the gay individuals who were married prior to November 5, 2008. Any couples who were or are currently receiving state-sanctioned paid leave, as well as the State and the businesses that employ these individuals, would be left in a very precarious and uncertain position if these marriages were nullified. So would their employers. Gay individuals might be forced to choose between returning to work and leaving their ill spouses that they love to fend for themselves, or quitting their jobs and questioning how they will pay their bills – all because they relied on state authorized rights which were available prior to November 5, 2008, and which should be available after that date. Furthermore, if the marriages are nullified, these individuals might even be required to refund to the State the value of the benefits received.

4. Businesses Have Relied on Rules Applicable to the Taxation of Small Businesses Owned by Spouses.

A retroactive application of Proposition 8 would not only affect gay employees who were married prior to November 5, 2008, but also gay employers and business owners who were married prior to November 5, 2008.

Because individuals who are married can file a single, joint state income tax return, they can treat certain businesses differently than those who are not married. As a general rule, a limited liability company (a “LLC”) which is owned by two individuals must be treated (and taxed) either as a partnership or as a corporation. This requires the LLC to file either a separate state tax return (FTB Form 568) or to elect to be taxed as a corporation and file a separate corporate tax return (FTB Form 100). However, if an LLC is owned solely by a married couple, that couple can treat the LLC as a disregarded entity and merely report any income and expenses directly on the couple’s joint state income tax return.¹⁶ This can

¹⁶ Rev. & Tax Code, § 17851 states that, for partnership taxation purposes, California law will, except in certain areas (unrelated to the issues presented in this brief), comply with federal taxation of partnerships. IRS Revenue Procedure 2002-69 states that married couples in community property states may treat a partnership which is owned solely by a married couple who file a joint tax return as a disregarded entity for tax purposes and may report all income and losses on the couple’s joint tax return. Because California law complies with federal law, married couples may also treat the partnership as a disregarded entity for California taxation

save the couple the added expense of filing additional tax returns and the associated accounting and legal expenses. If the marriages of these gay couples are nullified, not only might these couples need to file amended returns (and pay associated penalties and interest for failing to file the proper returns), but the added expense could force these companies to pass the added expense along to their customers or even to dissolve because running the business became cost-prohibitive – affecting not only the gay couple, and their customers, but also all their employees. In an already drastically weakened economy, this could be catastrophic in some cases.

II. Retroactive Application of Proposition 8 Will Be Detrimental to Individuals and Businesses Alike.

In addition to the direct harm to business that will be caused by a retroactive application of Proposition 8 (examples of which were discussed above), there are other threatened, detrimental consequences that are perhaps more indirect, but which are still of great concern to the business community. *Business Amici* recognize that some of these more indirect threatened harms implicate “social policy” arguments in favor of the recognition and validation of same-sex couple’s marriages. However, they are not presented here as “policy” arguments in support of same-sex couple’s equal marriage rights. Rather, the following part of this brief is

purposes. This is treatment is confirmed in the Franchise Tax Board’s Summary of Federal Income Taxation Changes 2007 Report.

meant to explicate some business concerns about future business injuries that may be caused by a retroactive application of Proposition 8, as well as other adverse effects on business that help to show why Proposition 8 is incompatible with core constitutional guarantees of equality, and thus should be recognized as an invalid constitutional revision pursued in violation of Article XVIII.

A. **Proposition 8 Should Not Be Applied Retroactively Because This Would Harm California Businesses' Ability to Retain Talented Employees.**

Retroactive application of Proposition 8 would harm California businesses' by diminishing their ability to retain talented employees in a highly competitive marketplace.

A survey conducted by Robert Half International in late 2008 revealed that, even in the current economy, employers are most worried about retaining good employees and bringing in new ones.¹⁷ Nearly two out of five (39%) of the 150 senior executives interviewed cited employee retention as their single greatest staffing challenge.¹⁸ According to Robert Half chairman and CEO Max Messmer, "[m]any firms are operating with

¹⁷ Robert Half Finance & Accounting, Press Release, *To Have and To Hold: Even in Current Economy, Employee Retention Top Concern, Survey Shows* (Dec. 17, 2008), available at <http://www.roberthalffinance.com/PressRoom?id=2381> (last visited Jan. 5, 2009).

¹⁸ *Ibid.*

lean teams in which every staff member plays a key role in the business, making retention a greater concern.”¹⁹ This is as true in California as it is anywhere. With employee attrition already a critical problem for many of our state’s businesses, changes in state law that very likely will make it more difficult to retain talented employees unavoidably will harm California businesses as well as society generally.

Recognizing that competition for talented employees is affected by a community’s perceived inclusiveness, *Business Amici* oppose retroactive application of Proposition 8 because it would give the impression that California does not welcome gay persons. This is bound to have a negative impact on California businesses’ ability to retain some of the country’s most skilled workers.

While the possible retroactive enforcement of Proposition 8 to invalidate thousands of legally performed marriages is without precedent, other experiences have taught us that such a result most likely would cause the loss of many valuable California employees. For example, since Michigan passed a constitutional amendment excluding same-sex couples from marriage in 2004, Michigan’s public employers—local governments, schools and universities—have had greater difficulty recruiting top

¹⁹ *Ibid.*

candidates.²⁰ The *Detroit News* reported in 2007 that a top scholar's withdrawal from consideration for an appointment as dean of arts and sciences at a state university was due in part to a "harsh social climate" resulting from the state's ban on marriage for same-sex couples.²¹ The article also reported that other professors at Michigan schools were actively looking for jobs elsewhere.²²

In recent years, business and government leaders in several other states have fought to avoid similar effects in their own states. For example, in 2007, strong opposition from Eli Lilly, WellPoint, Cummins, Emmis Communications, Dow AgroSciences and other companies helped defeat a proposed Indiana constitutional amendment banning marriage of same-sex couples.²³ Lilly representative Tony Murphy noted that "the amendment 'sends an unwelcoming signal to current and future employees making Indiana appear intolerant.'"²⁴ According to Mr. Murphy, "[g]iven the great lengths Lilly takes to attract and retain top talent from around the world,

²⁰ See, Huffstutter, *A Clash Over Gay Couples' Benefits*, The Los Angeles Times (July 8, 2007) p.19; Laura Berman, *State's Social Climate Is Its Next Foe*, The Detroit News (Mar. 24, 2007) p.3A.

²¹ Berman, *State's Social Climate Is Its Next Foe*, The Detroit News (Mar. 24, 2007) p. 3A.

²² *Ibid.* (noting that "Michigan's effectively becoming a laboratory for legal ways to drive out some of its smartest citizens—and to keep out others").

²³ See Ruthhart, *Same-sex Marriage Ban Collapses*, The Indianapolis Star (Apr. 4, 2007).

²⁴ *Ibid.*

[the company] oppose[s] any legislation that might impair our ability to offer competitive employee benefits or negatively impact our recruitment and retention.”²⁵

Business Amici fear that if Proposition 8 is retroactively applied, California businesses may well lose thousands of talented, diverse, and committed gay professionals whose marriages will have been invalidated—as well as their gay and heterosexual colleagues who demand a workplace that promotes diversity and equality. Many of these highly-skilled individuals will move to another state, perhaps Massachusetts, or country where same-sex couples’ marriages are recognized and respected, and they will take with them not only their talents but also their substantial financial contributions to our State’s economy.²⁶

²⁵ Schneider, *Lilly against marriage ban*, The Indianapolis Star (Mar. 28, 2007), as reprinted at <http://americansfortruth.com/news/eli-lilly-takes-sides-in-culture-war-opposes-indy-marriage-amendment.html> (last visited Jan. 5, 2009).

²⁶ Canelos, *Even in Wal-Mart World, Local Identity Runs Deep*, The Boston Globe (Feb. 1, 2005) p. A3 (quoting Vanity Fair’s columnist James Wolcott’s opinion that “Massachusetts’ granting of . . . marriage [to same-sex couples] might be an economic asset, since high salary jobs migrate to places that are most amenable to a range of lifestyles. Under that scenario, workers who come to Massachusetts would only reinforce the existing definition, making Massachusetts even more liberal and tolerant; the same pattern might occur in reverse in some other cities and states.”); see also *Same Sex Couples Flock to Gay Friendly Canada*, San Francisco Chronicle (Mar. 9, 2004) (interviewing several families who moved from California to Canada on account of Canada’s progressive laws).

The risk of losing top talent to Massachusetts where gay couples' marriages are recognized is particularly acute in the high technology industry. Massachusetts is home to "Route 128" which is a high-technology center often compared to Silicon Valley and competes with Silicon Valley for the top graduates of Massachusetts Institute of Technology, Harvard and Massachusetts' other fine universities.²⁷ The economic opportunities provided by Route 128, combined with Massachusetts' nondiscriminatory marriage rules, inevitably would draw talented, highly-educated workers away from California if Proposition 8 were applied retroactively to take away married gay employees' vested rights.²⁸ Putting that issue in the larger context, however, it is easy to envision the even greater negative implications for California businesses if Proposition 8 is upheld as a valid initiative, thereby confirming that any minority group may find itself targeted for elimination of fundamental

²⁷ See, Weisman, *Bloom Returns to the High-Tech Beltway*, The Boston Globe (May 14, 2004) (describing the recent resurgence in high-technology companies, including Internet and other technology start-ups, and healthcare and biotechnology firms, along Boston's Route 128); Weisman, *Many Jobs in Bay State Are Tied to Venture Capital, Survey Says*, The Boston Globe (Mar. 26, 2007) (noting Massachusetts ranked second after Silicon Valley in cumulative venture capital investment and that venture capitalists favor Massachusetts because "that's where the ideas are"); *Boston's Route 128: Complementing Silicon Valley*, Business Week (Aug. 25, 1997).

²⁸ *Ibid.* See generally, Florida & Gates, *Technology and Tolerance: the Importance of Diversity to High-Technology Growth*, The Brookings Institution's Center on Urban & Metropolitan Policy (2001)

rights. If the court accepts the notion that Article XVIII permits such initiatives, California certainly will see its reputation change and very likely will face a further-contracted pool of qualified job applicants, increased employee turnover and higher recruitment costs, all of which will make it increasingly difficult for California's businesses to retain some of their best employees.

B. The Harmful Psychological Impacts of Proposition 8's Retroactive Application Will Reduce Employee Productivity and Businesses' Bottom Lines.

Even if retroactive application of Proposition 8 were not to make it significantly more difficult for California businesses to retain talented workers, it may still psychologically harm many of those workers and reduce their productivity and the bottom lines of the businesses for which they work.

In the Robert Half International survey discussed above, productivity and employee morale were identified by 17 percent of respondents as the third and fourth greatest staffing concerns faced by the country's largest companies today.²⁹ *Business Amici*, who share those concerns, fear that retroactive application of Proposition 8 will cause psychological harm to gay employees whose marriages are invalidated, thereby decreasing their

²⁹ *Ibid.*

level of productivity and impacting the overall productivity and success of the companies for which they work.

According to Dr. Marshall Forstein, an associate professor of psychiatry at Harvard University Medical School and a Distinguished Fellow of the American Psychiatric Association, “[t]he socially sanctioned right of gay marriage which is qualitatively different than civil unions . . . has a positive impact on self-esteem, sense of being validated in the eyes of the community, and on the internalization of ideas of commitment and responsibility to others.”³⁰ Research indicates that gay employees will be healthier, more fulfilled by their jobs and less likely to leave their jobs if they continue to receive the full benefits of their legal marriages.³¹ On the other hand, if the intangible benefits associated with the institution of marriage are stripped away by Proposition 8, gay employees who had been married and who do not leave the state very likely will experience

³⁰ Testimony of Marshall Forstein, M.D., Associate Professor of Psychiatry, Harvard Medical School, before the New Jersey Civil Union Review Commission, April 16, 2008, pp. 66-67, 69.

³¹ See generally, Ellis & Riggle, *The Relation of Job Satisfaction and Degree of Openness About One’s Sexual Orientation for Lesbians and Gay Men* (1995) 30 *J. of Homosexuality* 75; Ragins & Cornwell, *We Are Family: The Influence of Gay Family-Friendly Policies on Gay, Lesbian and Bisexual Employees*, in *Sexual Orientation Discrimination: An International Perspective* (2008).

decreased job satisfaction and lower job performance, which will cause immeasurable losses to their employers.³²

Business Amici, as business leaders, “are not radical social engineers trying to define or redefine families. They respond to basic pocketbook needs and real marketplace challenges, such as competition and the need to attract and retain top workers.”³³ As was aptly explained by New York’s chief financial officer Bill Thompson, “[w]e just think about it as good business and good business sense If employees feel that they’re not open to be discriminated against . . . it makes everyone feel a little safer and a little more wanted. And then you have better and more productive employees.”³⁴ Proposition 8 in general, and its retroactive application in particular, do not make good business sense. The good-sense lesson is not just that confusion and costs will proliferate if Proposition 8 is deemed valid, but also that California’s marketplace overflows with creativity and dynamism thanks to the guarantee that everyone is welcome and equal and has the same basic rights. That structural guarantee protects *Business*

³² See generally, Waldo, *Working in a Majority Context: A Structural Model of Heterosexism as Minority Stress in the Workplace* (1999) 46 J. of Counseling Psychology 218.

³³ Witeck & Gates, *Same-Sex Marriage: What’s at Stake for Business?* (July 21, 2004), available at <http://www.urban.org/url.cfm?ID=900722> (last visited Jan. 5, 2009).

³⁴ *Companies confused over gay rights*, CNN (July 13, 2005), available at <http://edition.cnn.com/2005/BUSINESS/07/13/corporate.gayrights/index.html> (last visited Jan. 5, 2009).

Amici's most valuable asset – their talent pool – and it cannot be thwarted absent a constitutional revision.

C. Voiding Same-Sex Couples' Marriages Would Cause Unexpected Changes to Real Property Rights that Would Harm California's Businesses.

1. Real Property Taxes Would Increase as a Result of Voiding Marriages Retroactively.

Real property that is transferred between spouses either *inter vivos* or upon the death of a spouse, is exempt from property tax reassessment.³⁵ In the case of dwelling units, real property transferred between parent and child either *inter vivos* or upon the death of a parent, is also exempt from property tax reassessment.³⁶ The tax increase resulting from reassessment can be extraordinarily high, and in many instances, can force a family to lose their home.³⁷ Homeowners and businesses alike rely upon this exemption when making family planning and businesses decisions. Creditors can be harmed because the increased taxes create a lien on the

³⁵ Ca. Const., art. XIII A, §2 subd. (g); Rev. & Tax Code, §63.

³⁶ Rev. & Tax Code, §62 subds. (m) and (n).

³⁷ The California Legislature found in 2007: "Protection against reassessment of family owned real property and resulting increases in property taxes can be a critical bulwark against financial hardship and the loss of the family home or business when a family member dies or a family relationship ends in divorce or dissolution..." Section 1(e) of Chapter 555 of 2007, 2007-2008 Legislative Session. Stats. 2007, ch. 555, sec. 1(e) [SB 559, amending Rev. & Tax Code, §62].

property securing their loan, which in many cases may cause the loan-to-value ratios to exceed the qualifying standards of the lender. Retroactive application of Proposition 8 would unfairly penalize property owners, their families, and businesses.

2. Mortgage Holders Will Be at Risk of Loss as a Result of the Inter-Family Transfers of Real Property Made in Reliance on the Marital Status of Gay Couples.

Most creditors that loan money secured by real property include in the note and deed of trust a due-on-sale clause when property is transferred without their consent,³⁸ in part to maintain the appropriate credit worthiness of the borrower and the value of the security, which depends in part upon the taxes due each year that create a lien on the property superior to the creditor's lien. Lenders are required by law to permit transfers of residential property to a spouse without exercising the due-on-sale clause, and many married couples take advantage of this law when implementing their family planning or, in some cases, when distributing the assets of a deceased spouse.³⁹ Spouses can take title to all the property or with the original borrower as joint tenants, tenants in common, or as community

³⁸ Miller & Starr, Vol. 4, Chapter 10, §10:106.

³⁹ Civ. Code, §2924.6.

property with right of survivorship.⁴⁰ Lenders, however, benefit from the rights and responsibilities granted to and imposed upon spouses, which offsets the negative impact of the permitted transfers to spouses (see, *supra*, Section I.B.). Voiding the marriages retroactively would unfairly place those lenders at serious risk of financial harm.

Retroactive application of Proposition 8 would cause great uncertainty and instability in the real property markets. Lenders would face increasing risks of loss, and gay couples and surviving spouses would face foreclosure from the exercise of a due-on-sale clause, all as a result of reliance on marriages valid at the time of transfer. This would place an undue burden on lenders who are faced with this situation and would cause lenders to be more reluctant in the future to lend to Californians subject to an uncertain legal climate. The increased costs and uncertainty would make it even more difficult for anyone in California to obtain or refinance home loans in an already crippled home mortgage market.

The voters were not given adequate notice in the language of Proposition 8 to properly debate and consider the likely impacts of retroactive application on the real property rights of Californians. Amidst the worst home mortgage crises in our state's history, this Court should not read more into Proposition 8 and create more obstacles to purchasing or

⁴⁰ Civ. Code, §682.1.

holding onto a home. Further disrupting the housing and credit markets can only fuel the devastation of this sector of our economy.

III. Interveners' Proposal to Rely on a Multitude of Lawsuits to Redress the Unanticipated Consequences of Retroactive Application of Proposition 8 Is Unfair and Unworkable.

Interveners' cavalier suggestion that all of the unfair and unintended consequences of retroactive application of Proposition 8 were intended to be, and should be, handled by the California courts on a case-by-case basis⁴¹ ignores (1) the magnitude of the consequences and (2) the unfairness of requiring all those who relied upon the legal status of married individuals to incur the extraordinary emotional and financial cost of seeking redress before a court. The public was not given adequate notice in the language of Proposition 8 to fairly consider and debate these consequences when approving Proposition 8, and the plain language of Proposition 8 does not support such an interpretation.

First, retroactive application of Proposition 8 would impact not only the thousands of married gay couples but also the thousands of businesses, employers, and responsible individuals who relied upon the many rights and responsibilities the law grants and imposes upon all the spouses with whom they do business. If all those potentially affected by Proposition 8 were required to go to court to fairly implement this retroactive application,

⁴¹ Intervener's Opposition Brief at p. 41.

then thousands of cases would be required to be filed and tens of thousands of parties would be brought before the courts. The sheer magnitude of cases would be overwhelming to our legal justice system. Further, the time and cost to reach judgment would effectively prohibit any real, fair remedy to all those affected.

Second, gay Californians who lawfully married and others who relied upon that legal status should not be forced to incur the heavy burden of time, legal fees, costs and expenses to go to court to seek an uncertain ruling. There is no legitimate state interest expressed in Proposition 8 that justifies imposing such a heavy burden on gay Californians and those gay and straight Californians alike who respected this Court's decision protecting their right to marry. The negative impacts of retroactive application of Proposition 8 could be devastating to a businesses employing or servicing a high percentage of gay Californians, punishing those businesses, as examples only, (1) for complying with laws against discrimination based upon sexual orientation in the hiring of employees or providing goods and services, and (2) for complying with this Court's ruling in *Marriage Cases*.

Central to our legal system is the maxim that individuals should have the opportunity to know what the law is and to conform their conduct accordingly. Likewise, voters have a right to know when they read the plain language of an initiative whether the initiative seeks to upset and

make exception to this fundamental principle of our society, without having to make inferences or apply complicated rules of statutory construction. Had Proposition 8 done so, businesses could have fairly communicated their position prior to the election, and the result may have been much different.

As illustrated in this brief, retroactive application of Proposition 8 would have far-reaching negative impacts on not only gay married individuals, but also on the many California businesses that employ them and have done business with them by. These Californian citizens and businesses should not be left to the vagaries and possibly conflicting adjudications of a multitude of lengthy and costly lawsuits. Nor should the California courts be forced to shoulder such an unnecessary burden.

An obvious answer to this, *Business Amici* strongly suggest, is that Proposition 8 may not be applied retroactively because its text is silent about that possibility. Another answer, and one addressing the heart of the matter, is that Proposition 8 may not be applied at all because the text of Article XVIII does speak and forbids it.

CONCLUSION

In the event this Court were to find that Proposition 8 is valid, this Court should also find that the measure may not be applied retroactively in any manner and confirm the full, equal and continuing marital status of all

gay individuals who married pursuant to a valid California license before November 5, 2008. The foregoing examination of diverse potential harms were Proposition 8 to be given force also supports Petitioners' central argument that Proposition 8 attempts a type of constitutional change beyond the reach of the initiative power. Given the requirements of Article XVIII, the badge of invalidity does not attach to the thousands of duly solemnized marriages of gay and lesbian couples, but rather to Proposition 8 itself.

Dated: January 15, 2009

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to Rule 8.204(c) of the California Rules of Court, that the enclosed brief was produced using 13-point type, including footnotes, and contains approximately 10,692 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 15, 2009

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PROOF OF SERVICE

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within case; my business address is: Dewey & LeBoeuf LLP, One Embarcadero Center, Suite 400, San Francisco, CA 94111.

On January 15, 2009, I served the following document(s) described as:

APPLICATION FOR LEAVE TO FILE *AMICI* BRIEF AND PROPOSED BRIEF OF *AMICI CURIAE* SAN FRANCISCO CHAMBER OF COMMERCE, GOOGLE, INC., H5, AND LEVI STRAUSS & CO., IN SUPPORT OF PETITIONERS' PETITIONS FOR EXTRAORDINARY RELIEF

on the following interested parties in this action:

See attached Service List

(BY MAIL) by placing a true copy thereof in a sealed envelope with postage fully prepaid. I am readily familiar with the business practice of Dewey & LeBoeuf LLP for collection and processing of correspondence for mailing with the United States Postal Service, and the correspondence would be deposited with United States Postal Service that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 15, 2009 at San Francisco, California.



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