Case No. S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Petitioners,

vs.

MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,

Respondents,

DENNIS HOLLINGSWORTH, et al.

Interveners.

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INTRODUCTION

In their many briefs in support of the intervenors, amici curiae present a vision of the California Constitution that is remarkable both for its audacity and its consequences. Under their vision, anybody may propose an initiative amendment that strips away *any* fundamental right protected by the California Constitution from *any* class of people who need heightened constitutional protection (suspect class)[1] so long as *just eight percent of voters* sign a petition supporting that amendment. The proponent of that initiative amendment may present it for approval by the voters without engaging in any discussion or deliberation over its wording or wisdom. And if a bare majority of voters enacts the amendment, the judiciary is powerless to invalidate it.

Fortunately, this vision is not supported by the provisions of the California Constitution. Those provisions identify two types of changes to the Constitution – amendments and revisions – and establish separate procedures for making those changes. (See Cal. Const., art. II, § 8 and art. XVIII, § 3.) Amendments are changes that stay "within the lines of the original instrument." (*Livermore v. Waite* (1894) 102 Cal. 113, 118-119.) Because amendments simply "effect an improvement, or better carry out the purpose for which" the Constitution "was framed" (*ibid.*), they may be enacted with little or no deliberation. Thus, amendments may be enacted through the initiative process – in which the people exercise a limited power that is legislative in nature.

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[1] As in their reply, Petitioners City and County of San Francisco, et al. (CCSF Petitioners) refer in this brief to members of a group for which legislative classifications are suspect and thus subject to strict scrutiny in the shorthand as "suspect classes."

By contrast, revisions change the principles that underlie our Constitution – principles that were meant to be of a "permanent and abiding nature." (*Ibid.*) As such, they require the people's exercise of their full sovereign power. And unlike amendments, revisions must undergo a more formal and deliberative process before they may become part of our Constitution. Thus, revisions may not be enacted through the initiative process.

In creating this distinction, the framers entrusted the judiciary with the job of enforcing it. Because it is the ultimate arbiter of the meaning of our Constitution, this Court has an obligation to enforce the constitutional provisions prohibiting voters from revising the Constitution through the initiative process. Any failure to do so would flout the ultimate will of the people – who established this distinction and the limitations that go with it when they created our Constitution.

This Court should therefore invalidate Proposition 8 as an improperly-enacted revision of our Constitution. Proposition 8 creates a new constitutional rule that alters our basic structure of government by divesting the legislature and the judiciary of their constitutional duties to safeguard the fundamental rights of unpopular minority groups. For this reason alone, Proposition 8 revises – rather than amends – our Constitution.

But Proposition 8 is also a revision of the Constitution on a more fundamental level. By stripping a fundamental right away from a suspect class, Proposition 8 violates the Constitution's core commitment to basic human rights – including its commitment to protecting inalienable rights and equality. Such a violation should not be permitted without sufficient care and deliberation regardless of its structural implications.

Any other conclusion would make the stark vision of amici curiae a reality. Under that vision, the California Constitution would no longer have anything to say about the fundamental rights of unpopular minority groups. Instead, it would be an empty vessel that leaves the people of California solely dependent on the federal constitution to protect their fundamental rights. Indeed, a political majority would be free to use the initiative process to selectively strip away fundamental rights not just from lesbians and gay men, but from other disfavored groups like Muslims, Asians, and women. Unpopular minority groups who have long been persecuted by the majority could no longer rely on their own Constitution to protect their fundamental rights. The California Constitution does not allow this. And neither should this Court.[2]

I. BY INVALIDATING PROPOSITION 8, THE COURT WOULD NEITHER INFRINGE ON THE SOVEREIGN POWER OF THE PEOPLE NOR EXCEED THE SCOPE OF ITS CONSTITUTIONAL AUTHORITY.

Several amici curiae argue that the Court is powerless to invalidate Proposition 8. They assert that the initiative measure must be upheld because the voters exercised the sovereign power of the people when they enacted it. They further assert that this Court would exceed its constitutional authority if it invalidated Proposition 8 as an improperly-enacted revision. But these amici ignore the limitations that the people themselves placed on the exercise of their powers. In fact, the people, when they created the Constitution, carefully distinguished between the limited power that they exercise through the initiative process and the more

[2] As discussed in section III, Proposition 8 is not retroactive as amici curiae contend. And because Petitioners City and County of San Francisco, et al. (CCSF Petitioners) have nothing to add to the standing argument in their Reply, they do not discuss the issue here.

encompassing power that they exercise through the revision process. Just as importantly, the people gave the judiciary the power to ensure that this distinction was respected.

Thus, when the voters enact an initiative amendment, they are not exercising the sovereign power of the people; they are exercising a form of *legislative* power – which is far more limited in scope. By contrast, when voters enact a revision proposed by two-thirds of both houses of the Legislature or by a majority of delegates at a constitutional convention, they are exercising the sovereign power of the people. And when a dispute arises over whether a change to the Constitution has been accomplished through the constitutionally prescribed procedure, this Court has both the right and the duty to resolve that dispute. In enforcing the limits that the people imposed on themselves, this Court fulfills – rather than flouts – the will of the people.

A. When The Voters Amend The Constitution Through The Initiative Process, They Are Exercising A Form Of Legislative Power – And Not Their Sovereign Power.

Numerous amici curiae assert, with little or no support, that the voters exercised the sovereign power of the people when they enacted Proposition 8 through the initiative process.[3] Because the people, in the exercise of their sovereign power, may propose and approve of any change

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[3] (See, e.g., Brief of Amicus Curiae Issues4Life Foundation (Issues4Life Brief) at pp. 14-18; Brief of Amicus Curiae Fidelis Center for Law and Policy at pp. 3, 10; Brief of Amicus Curiae Steven Meiers (Meiers Brief) at p. 32; Brief of Amicus Curiae Campaign for California Families (CCF Brief) at pp. 11-17; Brief of Amici Curiae Advocates for Faith and Freedom, et al. (Advocates for Faith Brief) at p. 6; Brief of Amicus Curiae Family Research Council (FRC Brief) at pp. 2-19; Brief of Amicus Curiae Center for Constitution Jurisprudence (CCJ Brief) at pp. 5-7; see also Brief of Amicus Curiae California Catholic Conference (CCC Brief) at pp. 7-14 [arguing that the people, as a matter of policy, should decide whether same-sex couples can marry].)

to the Constitution that they want, these amici contend Proposition 8 must be valid. In so arguing, they misconstrue the nature of the initiative power. The voters only exercise the unreviewable sovereign power of the people when they *revise* the Constitution. By contrast, they exercise a form of legislative power when they *amend* the Constitution through the initiative process.[4] This distinction between the amendment and revision power – which has been a part of our Constitution since its inception – reflects a "real difference" and serves as a "formidable bulwark" against "improvident or hasty" changes to our Constitution. (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 347-348.)

The legislative nature of the initiative power is clear from our Constitution – which states that the initiative power is a reserved legislative power. (See Cal. Const, art. IV, § 1 ["The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum"].) Recent statements by this Court confirm this. (See *Professional Engineers in Cal. Government v. Kempton* (2007) 40 Cal.4th 1016, 1045 ["the electorate acting through its initiative power" is a "constitutionally empowered *legislative* entity," italics added].) (See Corrected Reply of City and City of San Francisco, et al. (CCSF Reply) at p. 18; see also Brief of Amicus Curiae Karl M. Manheim (Manheim Brief) at pp. 3-6.) Indeed, this Court made it clear over 100 years ago that the people exercise their sovereign power only when they *revise* the Constitution. (See *Livermore*, *supra*, 102 Cal. at p. 117

[4] One group of amici curiae acknowledge that the voters exercise a form of legislative power when they enact an initiative amendment. (See Advocates for Faith Brief at p. 7 ["The people's initiative power is an exercise of legislative-type power"].)

[contrasting constitutional convention – which represents the "entire sovereignty of the people" – with the amendment process].)

This conception of the people's exercise of their sovereign power as limited to revisions makes sense in light of the broad scope of that power. When acting in their sovereign capacity, the people are "freed from *any* limitations other than those contained in the constitution of the United States." (*Ibid.*, italics added.) To ensure that the people exercise their sovereign power responsibly, the framers of the California Constitution established the revision process – which demands "formality, discussion and deliberation." (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 350, citation omitted.) This process "is based on the principle that 'comprehensive changes' to the Constitution require more formality, discussion and deliberation than is available through the initiative process." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 506.) By establishing a more deliberative process for revisions, the framers recognized that "the tyranny of a changeable majority will soon drive honest men to seek refuge beneath the despotism of a single ruler." (*Ex Parte Wall* (1874) 48 Cal. 279, 314.) The Constitution therefore requires that the people exercise their sovereign power through the deliberative process of a constitutional convention (see Cal. Const., art. XVIII, § 2), or the Legislature (see Cal. Const., art. XVIII, § 1).

By contrast, the initiative process is " 'in essence *a legislative battering ram*' " that " 'permits very little balancing of interests or compromise.' " (*Amador Valley Joint Union High School Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 228, quoting Key & Crouch, the Initiative and the Referendum in California (1939) at p. 483, italics in original.) Because initiatives require far less deliberation than revisions,

our Constitution does not allow the people to exercise their sovereign power through the initiative process. (See *McFadden*, *supra*, 32 Cal.2d at p. 333 ["The initiative power reserved by the people by amendment to the Constitution in 1911 . . . applies only to the proposing and the adopting or rejecting of 'laws and amendments to the Constitution' and does not purport to extend to a constitutional revision"].) Instead, it carefully limits initiatives to " 'addition[s] or change[s] within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.' " (*Id.* at p. 350, quoting *Livermore*, *supra*, 102 Cal.3d at pp. 118-119.) Thus, the California Constitution makes it clear that voters exercise a form of legislative power when they enact a constitutional amendment through the initiative process.

Indeed, the California Constitution makes no apparent distinction between constitutional amendments and statutes enacted through the initiative process. (See Cal. Const., art. II, § 8(a) ["The initiative is the power of the electors to propose *statutes and amendments to the Constitution* and to adopt or reject them," italics added].) The only difference is that petitions to amend the Constitution must be signed by "8 percent . . . of the votes for all candidates for Governor at the last gubernatorial election" – instead of the "5 percent" required for petitions to enact a statute. (Cal. Const., art. II, § 8(b).) And before 1966, the procedure for enacting statutes and constitutional amendments by initiative was *identical*. (Grodin, J.R., et al. (1993) The California State Constitution: A Reference Guide, at p. 69.) Because voters act in a legislative capacity when they enact a statute through the initiative process (*Dwyer v. City Council of Berkeley* (1927) 200 Cal. 505, 513 ["By the enactment of initiative and referendum laws the people have simply

withdrawn from the legislative body and reserved to themselves the right to exercise a part of their inherent legislative power"]), they must do the same when they enact a constitutional amendment through that same process. Accordingly, Proposition 8 does not represent the exercise of any sovereign power.

As a result, Proposition 8 is subject to judicial review – just like all other exercises of legislative power. To conclude otherwise would render meaningless the distinction that our Constitution makes between "amendment" and "revision." (See Cal. Const., arts. II & XVIII.) If the power to amend the Constitution by initiative were deemed "sovereign," thereby insulating its exercise from judicial review, then there would be no point in creating two different procedures for changing the Constitution. Indeed, those procedures would be meaningless with no one to enforce them. There is nary a hint in any of the nine revision cases decided by this Court that the judiciary may not decide the question of whether a measure is a revision or amendment. That is because revisions represent the sovereign power, while amendments do not.

B. By Invalidating Proposition 8 As An Improperly-Enacted Revision, The Judiciary Fulfills Both Its Constitutional Role And The Will Of The People.

On a related note, several amici curiae contend that even if initiative amendments are subject to judicial review, this Court should not flout the will of the people as expressed in Proposition 8.[5] But the judiciary has a constitutional duty to enforce all provisions of the California Constitution –

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[5] (See, e.g., Issues4Life Brief at pp. 4-13; Amicus Curiae Brief of Professors of Law (Law Professors' Brief) at pp. 44-47; CCF Brief at pp. 8-11; Advocates for Faith Brief at pp. 11-12; CCJ Brief at pp. 32-37; Brief of Amici Curiae American Center for Law and Justice, et al. (ACLJ Brief) at pp. 18-19.)

including those that prohibit voters from revising the Constitution through the initiative process. Because Proposition 8 cannot become part of the California Constitution if it revises the Constitution, this Court would fulfill the people's ultimate will by invalidating Proposition 8.

All provisions of the California Constitution "constitute the ultimate expression of the people's will." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 852.) Provisions that limit voters' ability to amend the California Constitution by initiative therefore express the will of people. And provisions that impose specific procedural requirements before a revision may become a part of our Constitution do as well. (See, e.g., Cal. Const., art. II, § 8 & art. XVIII, § 3.) "Nothing becomes law simply and solely because men, who possess the legislative power will that it shall be, unless they express their determination to that effect *in the mode appointed by the instrument which invests them with power* . . . ." (*AFL-CIO v. Eu* (1984) 36 Cal.3d 687, 709, fn. 19, quoting *Mullan v. State* (1896) 114 Cal. 578, 585, italics added.)

By enforcing the constitutional provisions that limit voters' ability to amend the Constitution through the initiative process, this Court does not flout its constitutional authority. Rather, it fulfills its longstanding constitutional role as the ultimate arbiter of the meaning of the California Constitution. (See *Nougues v. Douglass* (1857) 7 Cal.3d 65, 70 [judiciary construes "the Constitution in the last resort . . . ."].) Indeed, the Court has a "personal obligation to exercise independent legal judgment in ascertaining the meaning and application of all "state constitutional provisions" (*Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 262) – including those provisions that "preserv[e] the integrity" of the initiative process (*Senate of the State of Cal. v. Jones* (1999) 21

Cal.4th 1142, 1157). And the Court " would shirk the responsibility it owes to each member of the public" if it failed to do so. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 849-850; see also Manheim Brief at pp. 9-14.)

Nonetheless, several amici assert that this Court would establish a judicial oligarchy if it invalidated Proposition 8 as an improperly-enacted revision. According to these amici, such a ruling would give the judiciary the power to trump the people's will by creating a new fundamental right or a new suspect class. (See, e.g., Advocates Brief at pp. 7-9; Law Professors' Brief at p. 45.) Such fear mongering, however, has no basis in reality. The people are still free to enact Proposition 8 or an analogue through the revision process. If, after careful deliberation, a majority of delegates at a constitutional convention or two-thirds of both houses of the Legislature decides that a measure denying a fundamental right to a suspect class should become part of the California Constitution and a majority of voters agrees, then the judiciary must bow to this exercise of sovereign power.[6]

In any event, the risk of a judicial oligarchy is overblown. A ruling by this Court invalidating Proposition 8 as an improperly-enacted revision would only preclude voters from defining a "fundamental constitutional right or interest in so narrow a fashion that the basic protections afforded by

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[6] In this respect, the process for amending the federal constitution is analogous to the revision process. Like a revision to the California Constitution, an amendment to the federal Constitution may only be proposed by "two-thirds of both houses" of Congress or when "the legislatures of two-thirds of the several states . . . call for a convention for proposing amendments." (U.S. Const., art. V.) In fact, the procedure for adopting an amendment to the federal constitution is even more onerous than the procedure for adopting a revision to the California Constitution because amendments to the federal constitution must be "ratified by the legislatures of *three-fourths* of the several states, or by conventions in *three-fourths* thereof." (*Ibid.*, italics added.) Thus, any attempt to analogize Proposition 8 to federal constitutional amendments that accorded greater protections to a suspect class actually further confirms that Proposition 8 is a revision. (See Issues4Life Brief at pp. 8, fn. 10, 14.)

the right are withheld from a class of persons - composed of individuals sharing a personal characteristic such as a particular sexual orientation - who historically have been denied the benefit of such rights." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 824.) In other words, initiative amendments may not redefine a fundamental right to exclude a suspect class that wishes to assert it. Such a ruling would place few, if any, real limits on the ability of voters to clarify or redefine a fundamental right. And none of the unsubstantiated fears of the amici should therefore prevent this Court from fulfilling the people's will by enforcing the limitations on initiative amendments imposed by the California Constitution.

II. UPHOLDING PROPOSITION 8 AS A VALID AMENDMENT WOULD REVISE THE CALIFORNIA CONSTITUTION AND EVISCERATE THE CORE PROTECTIONS PREVIOUSLY ENSHRINED IN THAT CONSTITUTION.

In an attempt to minimize the import of Proposition 8, amici curiae claim that it benignly restores the status quo by reinstating the traditional definition of marriage. According to these amici, Proposition 8 did not need to undergo the deliberative process required for revisions because it hardly changed the Constitution. But reinstating the traditional definition of marriage did not simply restore the status quo. It created a new constitutional rule that markedly diminishes the constitutional roles of the legislative and judicial branches and dramatically alters the balance of power between political majorities and unpopular minority groups. And even aside from these structural changes, Proposition 8 violates our Constitution's core commitment to protecting basic human rights.

Allowing a mere eight percent of voters – who simply sign a petition containing the language of the initiative amendment – to propose such a monumental change to our Constitution makes little sense. Fortunately, the

framers of our Constitution recognized this and established long ago that measures like Proposition 8 should go through the more formal and deliberative revision process before they may be presented to the voters for approval. Any other conclusion would subject unpopular minority groups to the whims of a majority that has historically persecuted them.

A. By Restoring The Traditional Definition Of Marriage, Proposition 8 Strips A Fundamental Right Away From A Suspect Class.

Numerous amici curiae contend Proposition 8 cannot be a revision because it merely restored the traditional definition of marriage.[7] According to these amici, Proposition 8 changed very little because the statutes that excluded same-sex couples from the civil institution of marriage had been invalidated for less than six months. But amici ignore this Court's decision in the *Marriage Cases* – which held that the traditional definition of marriage deprived a suspect class (lesbians and gay men) of a fundamental right (the right to marry). (See *Marriage Cases*, *supra*, 43 Cal.4th at pp. 784-785.) Thus, by reinstating that definition, Proposition 8 did not simply restore the status quo. It deprived a suspect class of a fundamental right.

Any suggestion to the contrary ignores the judiciary's role as the ultimate arbiter of the meaning of the California Constitution. (See Intervenors Brief at 6-7, quoting *Nougues*, *supra*, 7 Cal. at p. 70 ["judiciary . . . must possess the right to construe the Constitution in the last resort"]; see also *People v. Longwill* (1975) 14 Cal.3d 943, 951, fn. 4 ["in the area of

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[7] (See, e.g., Issues4Life Brief at p. 9; Brief of Amicus Curiae Catholic Answers (Catholic Answers Brief) at p. 2; Brief of Amicus Curiae National Organization for Marriage California at pp. 15-16; FRC Brief at p. 14; CCF Brief at pp. 18-19; Advocates for Faith Brief at p. 13; CCJ Brief at p. 13; ACLJ Brief at pp. 5, 8, 10; Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund (Eagle Forum Brief) at p. 12.)

fundamental civil liberties . . . we sit as a court of last resort"].) Once this Court performs that role, its construction becomes the final word on the meaning of the Constitution at the time of its decision. In the *Marriage Cases*, *supra*, 43 Cal.4th at pp. 784-785, this Court concluded that the traditional definition of marriage violated the liberty, privacy, and equal protection clauses of our Constitution by depriving a suspect class of a fundamental right.[8] Restoring that definition therefore strips away a fundamental right from a suspect class.

Although this Court did not hold that the marriage statutes deprived a suspect class of a fundamental right until May 2008, its holding established that those statutes were unconstitutional *from the date of their enactment.* "[T]he expansive and protective provisions of our constitutions, such as the due process clause, were drafted with the knowledge that 'times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.' " (*Marriage Cases*, *supra*, 43 Cal.4th at p. 854, quoting *Lawrence v. Texas* (2003) 539 U.S. 558, 579.) Indeed, nobody would argue that racial segregation was constitutionally permissible until the moment the United States Supreme Court proclaimed otherwise in 1954. Stripping away a fundamental right from a suspect class is therefore no less meaningful where, as here, the suspect class has only been able to enjoy that right for a short time due to the blindness of past generations.

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[8] Because the California Constitution makes the Court the ultimate arbiter of its meaning, the Court did not revise the Constitution when it held that the marriage statutes violated the liberty, privacy, and equal protection clauses of that Constitution.

B. By Stripping A Fundamental Right Away From A Suspect Class, Proposition 8 Revises The Constitution.

Although Proposition 8 strips away a fundamental right from a suspect class, several amici curiae contend that Proposition 8 has far too limited an impact to be a revision. According to these amici, Proposition 8 cannot be a revision because it affects "only one right of one group" (Meiers Brief at p. 31); "touches only one subject matter" (ACLJ Brief at p. 7); and has only a "negligible" "effect on equal protection guarantees of Californians" (Catholic Answers Brief at p. 4). But these amici miss the forest for the trees. Proposition 8 is a revision in two independent respects.

First, Proposition 8 creates a new constitutional rule that alters the basic structure of our government. This rule eviscerates the Legislature's critical role as a filter for the intemperate passions of the majority. (See CCSF Reply at pp. 36-42; see also Brief of Legislative Amici Curiae at pp. 7-19 [explaining that California Constitution has always required legislative approval of revisions].) This rule also irrevocably alters the distribution of power between majority and minority groups by allowing the voters to usurp the constitutional duty of the judiciary to safeguard the fundamental rights of suspect classes. (See CCSF Reply at pp. 21-35; see also Brief of Amici Curiae Asian Pacific American Legal Center (APALC Brief) at pp. 12-18.) In short, the new constitutional rule established by Proposition 8 would revise our Constitution by wresting the constitutional duty to safeguard the fundamental rights of unpopular minority groups from the legislature and judiciary, and placing it in the hands of a majority of the electorate. Such a dramatic change to our constitutional democracy may only be accomplished through the revision process.

Second, even putting aside the structural implications of Proposition 8 and its impact on future cases, the arguments presented by the Attorney

General establish that Proposition 8 is a revision because it violates our Constitution's core commitment to the protection of basic human rights. Rights that 'are so rooted in the traditions and conscience of our people as to be ranked fundamental" are inalienable under the California Constitution because they are essential to our society and way of life. (*Griswold v. Connecticut* (1965) 381 U.S. 479, 487 (conc. opn. of Goldberg, J.), internal quotations omitted; see also Cal. Const., art. I, § 1.) Similarly, the principle of equality is one of the underlying bases for our democratic system of governance and informs every provision in our Constitution. (See CCSF Reply at pp. 6-11.) Not surprisingly, this equality principle is closely linked to fundamental rights that are protected as inalienable under our Constitution. (See *id.* at pp. 12-13.) Indeed, the fundamental rights embodied in our liberty and privacy clauses cannot serve their critical function in our democratic society if they are denied to those minority groups in greatest need of protection. As such, Proposition 8 is a revision – and not an amendment – to our Constitution. (See CCSF Reply at pp. 36-42; Brief of Amici Curiae California Council of Churches, et al. (Council of Churches Brief) at pp. 14-19.)

Confronted with the actual import of Proposition 8, several amici argue that this Court has already approved of initiatives that amended our Constitution in a similar manner. These amici contend that this Court, in *Bowens v. Superior Court* (1991) 1 Cal.4th 36, and *People v. Frierson* (1979) 25 Cal.3d 142, upheld initiatives that deprived a minority group of its fundamental rights.[9] But neither *Bowens* nor *Frierson* involved an

[9] (See, e.g., Eagle Forum Brief at p. 12; Meiers Brief at pp. 26-28; FRC Brief at pp. 16-17; ACLJ Brief at pp. 11-12; CCJ Brief at pp. 17-18, 27-32.)

initiative amendment that stripped away a right constitutionally protected as inalienable – such as the right to privacy and liberty that the fundamental right to marry embodies – from a class of people like lesbians and gay men who need heightened constitutional protection because they have suffered " 'pernicious and sustained hostility' " and " 'immediate and severe opprobrium.' "[10] (*Marriage Cases*, *supra*, 43 Cal.4th at p. 841, citations omitted.)

This distinction is significant. Amici cannot seriously contend that this Court should have upheld the initiative in *Bowen* if that initiative had selectively deprived lesbians and gay men of the right to a postindictment preliminary hearing. Nor can amici seriously contend that this Court should have upheld the initiative in *Frierson* if that initiative had restored the death penalty only for lesbians and gay men.

These contentions cannot be seriously entertained because our system of democratic governance depends on the ability of the judiciary to protect the fundamental rights of suspect classes. Indeed,

> [t]he architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups, and that the most effective remedy for this form of oppression is an independent judiciary charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 860 (conc. opn., of Kennard, J.).)

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[10] Moreover, the initiative at issue in *Frierson* – which restored the death penalty for everybody – addressed the scope of the cruel and unusual punishment clause of the California Constitution. That clause – unlike the privacy, liberty, and equal protection clauses – largely reflects the views of the majority and imposes those views on all groups – including disfavored minority groups. (*Frierson*, *supra*, 25 Cal.3d at p. 187.)

The need for the Court to exercise this solemn responsibility is especially great here. The right to marry is fundamental because it is essential to our way of life. Marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." (*Zablocki v. Redhail* (1978) 434 U.S. 374, 384.) Thus, "the right to marry... is of fundamental significance both to society and to the individual." (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 814-815.) Because a "core element" of the right to marry is "*equal* dignity and respect" (*id.* at p. 831, italics added), the deprivation of that right from a suspect class violates the core principles that underlie our constitutional democracy. Before this Court countenances such a seismic shift in our system of governance, it should make sure that the procedures for revising the Constitution – which ensure sufficient discussion and deliberation – were followed. Because those procedures were not followed here, this Court should invalidate Proposition 8.

Otherwise, the Court will leave unpopular minority groups – who have been mercilessly persecuted based on characteristics that have no bearing on their ability perform or contribute to society – beholden to the whims of an intemperate majority. If, as amici contend, a bare majority of voters may deprive a suspect class of a fundamental right through the initiative process, then voters may propose and enact a constitutional amendment authorizing the segregation of Muslims or lesbians and gay men in public schools in order to prevent them from influencing other students. And a bare majority of voters could enshrine employment discrimination against lesbians and gay men in the California Constitution based solely on a petition signed by just eight percent of voters –

notwithstanding this Court's decision in *Gay Law Students Assn. v. Pacific Telephone & Telegraph Co.* (1979) 24 Cal.3d 458, 467.)

Amici suggest that these fears are overblown and that suspect classes should trust that voters will do the "right thing." (See, e.g., FRC Brief at pp. 18-19.) But history belies this suggestion. Certainly, the voters did not do the "right thing" when they passed an initiative amendment that authorized racial discrimination in housing. (See *Mulkey v. Reitman* (1966) 64 Cal.2d 529.) And history is replete with examples where a majority group sought to deprive an unpopular minority group of its fundamental rights. (See APALC Brief at p. 9 [citing numerous instances in California's history where a majority sought to deprive a disfavored minority of its fundamental rights].)

The blanket assurances of amici that no other fundamental rights would be repealed or narrowed for lesbians and gay men after Proposition 8 also provide scant comfort. As described by two amici, the misleading and demeaning tactics used by proponents of Proposition 8 hardly suggest that those proponents will limit their efforts to depriving lesbians and gay men of their right to marry. (See Brief of Amicus Curiae Marriage Equality USA (Marriage Equality Brief) at pp. 51-56; Brief of Amici Curiae City of Berkeley, et al. at pp. 26-27, 30-32.) And in light of the sustained campaign of anti-gay groups to use the initiative process to deny rights to lesbians and gay men, these assurances ring especially hollow. (See Marriage Equality Brief at pp. 17-39.)

Indeed, the history of the fight for equality in this country demonstrates the dramatic impact that Proposition 8 would have on our democratic system of governance, if upheld. As C. Edwin Baker, et al. explain, allowing a bare majority of voters to deprive a suspect class of its

fundamental rights would have drastically altered the path to equality for African-Americans and women (as well as for lesbians and gay men) by effectively taking "courts out of the business of protecting minorities." (Brief of Amici Curiae C. Edwin Baker, et al. at p. 13.)

Finally, the argument that the federal constitution still protects unpopular minority groups has no bearing here. The California Constitution is a document of independent force and provides that "[r]ights guaranteed by [the California] Constitution are not dependent on those guaranteed by the United States Constitution." (Cal. Const., art. I, § 24.) Moreover, this Court is "independently responsible" for safeguarding the rights and procedures guaranteed by the Constitution. (*Com. to Defend Reproductive Rights v.* Myers, *supra*, 29 Cal.3d at p. 261.) Thus, neither the people of California nor this Court have ever relied solely on the federal constitution to safeguard the fundamental rights of our most vulnerable citizens. And they have not done so for good reason. As the California Council of Churches, et al. explain: "History shows us that it would be a mistake for Californians to stake their equal protection rights on the United States Constitution alone." (Council of Churches Brief at p. 18; see also *id.* at pp. 18-19 [identifying numerous instances where the federal constitution failed to protect unpopular minority groups against invidious discrimination]; APALC Brief at pp. 10-12 [explaining why the federal constitution does not cure the problems created by Proposition 8].)

Constitutional changes that alter our basic structure of government or violate our Constitution's core commitment to the protection of basic human rights should not be made without careful thought and consideration. The framers of our Constitution recognized this and imposed a procedure – the revision process – to ensure that such changes

would only be made after sufficient deliberation. The framers also entrusted the judiciary, as the enforcers of our Constitution, with the job of ensuring that those procedures are followed before a bare majority alters any constitutional principles meant to be "permanent and abiding." (*Livermore*, *supra*, 102 Cal. at p. 118.) Because Proposition 8 strips a fundamental right away from a suspect class, it is a change to our Constitution that should only be made after sufficient deliberation. The initiative process – which allows *only* eight percent of the voters to propose an amendment to the Constitution – provides for virtually no deliberation. Accordingly, this Court should invalidate Proposition 8 as an improperly-enacted revision.

III. PROPOSITION 8 DOES NOT RETROACTIVELY INVALIDATE MARRIAGES FORMED BEFORE ITS ADOPTION.

As explained in the CCSF Reply, to determine whether Proposition 8 invalidates California marriages performed prior to its adoption, the Court must first decide whether applying the measure to those marriages constitutes retroactive application. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 230.) If the answer is "yes," then it must determine whether the voters intended retroactive application. (See *Myers v. Philip Morris Cos.* (2002) 28 Cal.4th 828, 840; *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 979.) As shown in the CCSF Reply, these are not close questions. Invalidating the legal consequences of existing marriage *is* retroactive in effect, yet neither the text of Proposition 8 nor extrinsic sources come anything close to "clear, strong and imperative" evidence that the voters intended the measure to apply to marriages already performed. (See *Yoshioka*, at p. 980, citation and

internal quotation marks omitted.) The amici curiae who contend otherwise misstate (and in some case, ignore) California law, or dodge the issue.

A. Invalidating Marriages Of Same-Sex Couples Performed Before The Election Would Involve Retroactive Application Of Proposition 8.

A law "has retrospective effect when it substantially changes the legal consequences of past events." (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472, citation and internal quotation marks omitted.) Therefore, "the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date." (*People v. Grant* (1999) 20 Cal.4th 150, 157, citation omitted.) None of the amici curiae contest our statement of the applicable law.[11]

Applying Proposition 8 to California marriages completed before November 5, 2008 would give it retroactive effect because it would substantially "change[] the legal consequences of past events." (*McClung*, *supra*, 34 Cal.4th at p. 472, citation and internal quotation marks omitted.) Already-married couples performed the last act necessary to become married before the law's effective date. Yet, under amici's interpretation, those California couples who took the steps required by law to become lawfully married before the election, and who on November 4, 2008, were

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[11]The Eagle Forum Education & Legal Defense Fund (Eagle Forum) cites *20th Century Insurance Co. v. Garamendi* (1994) 8 Cal.4th 216, 281-282, which coined the terms "primary" and "secondary retroactivity." (Eagle Forum Brief at p. 20.) The Eagle Forum claims that secondary retroactivity (when a law affects the future legal consequences of past conduct) is permissible. (*Ibid.*) But secondary retroactivity is only permissible if the electorate intended retroactive application. (See *Yoshioka*, *supra*, 58 Cal.App.4th at p. 980, fn.1.) Regardless of whether the retroactive effect of Proposition 8 is characterized as primary or secondary, Proposition 8 cannot be applied retroactively "absent a clear indication the voters" intended it to. (*Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 230.)

lawfully married, were *no longer married the very next day*. Mutual rights and obligations arising from their marriages – and that by law would continue for the rest of their lives unless the marriage was dissolved – were abruptly cancelled. These are property and other legal rights that had vested as a consequence of actions taken during the marriage: for example, funds and property accumulated during the marriage were stripped of their community property character. In short, the lawful consequences of acts taken and commitments made prior to November 5 were obliterated.

The Professors of Law (Law Professors) attempt to avoid some of these retroactive alterations of rights arising from prior acts by suggesting that putative marriage rights, or other equitable concepts such as "de facto marriage," might be available for couples who married before Proposition 8's effective date. (Law Professors' Brief at pp. 22-27.) Those equitable doctrines might well be applicable, but the fact that they would have to be invoked – by individual trips to the courthouse by thousands of once-married couples whose marital rights and obligations were fully defined and established as of November 4 – only underscores that applying Proposition 8 to lawfully entered marriages would give it retroactive effect. If Proposition 8 did not apply retroactively by extinguishing the legal *consequences* of these marriages, then there would be no need for resort to such principles for redress; in that case, all of these couples would enjoy conventional *marital* rights and owe *marital* obligations to one another arising from their marriages prior to the election.

Furthermore, whatever "remedy" that principles of equity might supply going forward, none can replace what perhaps would be the greatest loss were Proposition 8 applied to the many same-sex couples who got married before November 5, 2008. No longer would these individuals be

participants in "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 816, citation and internal quotation marks omitted.) And, perhaps most painfully, they would be stripped of official recognition that their families are equal in dignity and respect to the families of opposite-sex couples. (See *id.* at pp. 781, 844-847.) Contrary to what amici contend, these potential consequences are enormous. (Contra Eagle Forum Brief at p. 21 [Proposition 8 would not "substantially affect existing rights" of married couples].) Applying Proposition 8 to these couples – beginning from *any* point in time – would be retroactive.

The Eagle Forum also argues that applying Proposition 8 to extinguish marriages solemnized before its effective date does not constitute "*impermissible* retroactivity" [12] – because the couples in those marriages possessed no vested rights due to their lack of reasonable reliance on the then-existing state of the law.[13] (*Id.* at pp. 24-26.) Not so. The couples who married before Proposition 8's effective date exercised their

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[12] The Eagle Forum's reference to "impermissible retroactivity" appears to conflate, and thereby evade, two distinct questions: (1) does changing the consequences of past marriages constitute retroactive application; and (2) is it clear that the voters intended such retroactive application?

[13] The Eagle Forum additionally argues that applying Proposition 8 to extinguish marriages does not constitute "impermissible retroactivity" because Proposition 8 does not impose any liability. (Eagle Forum Brief at p. 21.) But California law does not require the imposition of liability for a law to be retroactive. (See, e.g., *Aetna Cas. & Sur. Co. v. Indus. Accident Com.* (1947) 30 Cal.2d 388, 391-92 [retroactive to apply law increasing workers' compensation benefits where law came into effect between time when worker was injured and declared permanently disabled because injury that is "basis of the right to be compensated for such disability" took place before law changed]; *Yoshioka*, *supra*, 58 Cal.App.4th at pp. 979-80 [retroactive to apply Proposition 213, which prohibited uninsured motorists from collecting noneconomic damages, to prevent uninsured motorist from seeking noneconomic relief in action concerning accident occurring pre-Proposition 213 because it would affect future legal consequences of past transaction].)

fundamental right to marry and accepted the consequences of governmental recognition. (See *Marriage Cases*, *supra*, 43 Cal.4th at p. 809.) Invalidating those marriages would take away the State's former "assurance to each member of the relationship that the government will enforce the mutual obligations between the partners (and to their children) that are an important aspect of the commitments upon which the relationship rests." (*Id.* at p. 820.) The official recognition of marriage is a fundamental aspect of the right to marry. (See *id.* at pp. 816-818.) Once those couples lawfully exercised their right to marry, their right to official recognition of their marriages was established and vested for the purpose of retroactivity doctrine. Proposition 8 would strip them of that vested right.

Moreover, the issue of whether applying Proposition 8 to prior same-sex marriages is retroactive does not turn on the concept of vested rights. While a law that takes away vested rights is retroactive, that is not the only type of law that is retroactive: "every statute, which takes away or impairs vested rights acquired under existing laws, *or creates a new obligation, imposes a new duty, or attaches a new disability*, in respect to transactions or considerations already past, must be deemed retrospective." (*Myers*, *supra*, 28 Cal.4th at p. 839, citation, internal quotation marks and brackets omitted; emphasis added.)

The Eagle Forum also argues that Proposition 8 "should qualify for the 'exception to the general rule that statues are not construed to apply retroactively,' which arises 'when the legislation merely clarifies existing law.' " (Eagle Forum Brief at p. 22, citations omitted; see also CCF Brief at p. 18 [similar].) That is a preposterous contention. There is no question

that Proposition 8 changed existing law – and did so dramatically.[14] On November 4, 2008, gay men and lesbians had a legal right to get married under California law (*Marriage Cases*, *supra*, 43 Cal.4th at p. 757) and thousands had done so. On November 5, 2008, Proposition 8 changed the law by providing that "only marriage between a man and a woman is valid or recognized in California." Not even its proponents have claimed that Proposition 8 "clarified" an uncertain legal rule. Applying Proposition 8 retroactively to these thousands of married couples would not "clarify" their marital status but obliterate it.

B. There Is No Clear Evidence That The Voters Intended Proposition 8 To Invalidate Marriages Lawfully Undertaken Before The Election.

New laws are presumed to "operate prospectively absent a clear indication the voters or the Legislature intended otherwise." (*Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 230.) To defeat this presumption, "the words used [must be] so clear, strong and imperative that no other meaning can be annexed to them . . . ." (*Yoshioka*, *supra*, 58 Cal.App.4th at p. 980, citation and internal quotation marks omitted.)

The text of Proposition 8 is devoid of any statement of retroactivity. Proposition 8 says nothing about its application to lawful marriages made before its enactment. (See CCSF Reply at p. 50.) And while the Law Professors stress that Proposition 8 used present tense words (Law Professors' Brief at pp. 7-8), the CCSF Petitioners showed that the same is true of other statutes that were held to be prospective (CCSF Reply at pp. 50-51). The Law Professors also stress the absence in the text of a

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[14] See *McClung*, *supra*, 34 Cal.4th at p. 470 ["After the judiciary definitively and finally interprets a statute . . . the Legislature may amend the statute to say something different[, b]ut if it does so, it *changes* the law; it does not merely state what the law always was"].

grandfather clause as evidence that Proposition 8 is intended to abrogate existing marriages of same-sex couples. (See Law Professors' Brief at p. 19.) This turns the presumption against retroactivity on its head; there was no need for the text to state that Proposition 8 does not apply to people already married before its effective date, because California law presumes that it does not.

Several amici attempt to draw an analogy between the language of Proposition 8 and the abolition of slavery under the Thirteenth Amendment. (See CCF Brief at pp. 19-20; Law Professors' Brief at pp. 16-18.) Whatever else might be said of this analogy, it is inapt. There is no question that the intent of the drafters of the Thirteenth Amendment, and those who ratified it, was to emancipate those few slaves who remained in servitude at the end of the Civil War, not just to prohibit new enslavements.[15] The Civil War was fought over the very issue of emancipation. (See, e.g., Emancipation Proclamation (1863) 12. Stat. 1268.)[16] The historical intent was so obvious, it was not even litigated.

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[15] As a historical matter, the Thirteenth Amendment played only a limited role in emancipation. (See Randall, J.G. & Donald, D. (1961) The Civil War and Reconstruction, at pp. 395-98.) By the time of its ratification, slavery only remained in Delaware (where there had never been more than a few hundred slaves at any time) and Kentucky (where most slaves had escaped or been freed by their owners). (*Ibid.*) Elsewhere slavery had been ended by voluntary state action (as in Maryland in 1864 and Missouri and Tennessee in 1865) or had been effectively destroyed by Lincoln's Emancipation Proclamation of January 1, 1863, and the subsequent Union military victories. (*Ibid.*)

[16] The National Legal Foundation (NLF) attempts to draw an analogy to the treatment of plural marriages sanctioned by the Mormon Church in the Territory of Utah before 1862, when Congress prohibited plural marriages. (See Brief of Amicus Curiae National Legal Foundation at pp. 8-11.) This analogy also is inapt. In the first place, as NLF concedes, no court addressed the issue of retroactivity as applied to pre-1862 plural marriages. (*Id.* at p. 9.) Moreover, *Riddle v. Riddle* (Utah 1903) 72 P. 1081, on which NLF primarily relies, noted that the common law – which did not recognize plural marriages – governed marriage in the Territory of Utah before 1862. (*Id.* at pp. 1083-84.) It accordingly held

The fact is, Proposition 8 lacks any explicit statement that it is intended to have retroactive effect. Other amici concede this. (See Eagle Forum Brief at p. 22 [the text of Proposition 8 "'lack[s] . . . a retroactivity clause"]; *id.* at p. 25 ["Proposition 8 did not have an express clause to address its application to existing same-sex marriages"].)

The ballot pamphlet's official descriptions of the measure did not discuss or imply retroactivity. Nor did the arguments of the proponents or opponents. Only a single word buried in the proponents' rebuttal argument even hinted at possible retroactive application. (See CCSF Reply at pp. 60-61.) As a result, there was no debate in the ballot arguments about the wisdom and fairness of retroactive application. The public also learned, well prior to voting, that the Attorney General did not believe that Proposition 8 would invalidate existing marriages. And articles in prominent publications about Proposition 8 cited respected legal scholars who said that Proposition 8 would not be retroactive or that the issue was in substantial doubt. Taken together, far from providing "very clear" evidence of the voters' intent that Proposition 8 be applied to people already married these sources strongly suggest that it would not.[17] The amici have nothing to say about this.

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that an 1861 plural marriage was invalid *ab initio* because it was not valid under the applicable *law at the time it was entered into*. (*Id.* at p. 1085.)

[17]The Eagle Forum claims that even if Proposition 8 is retroactive, the electorate may exercise the police power to enact a retroactive law. (Eagle Forum Brief at pp. 29-31.) That point evades the controlling issue: whether the electorate clearly intended to do so. Only if they did would the question of the constitutional validity of a retroactive application arise. Although other parties and amici have addressed that constitutional question, the CCSF Petitioners have found it unnecessary to address it because there is no evidence that the voters intended retroactive application of Proposition 8.

The Campaign For California Families (Campaign) emphasizes the statement in the Rebuttal to Argument Against that "Proposition 8 means that only marriage between a man and a woman will be valid or recognized in California, regardless of when or where performed." (CCF Brief at p. 18, quoting Voter Guide at p. 57.) But as the CCSF Petitioners noted in their Reply at pages 60 to 61, this single word "when" was the *only* temporal reference in any of the ballot materials. That single word, buried at the back of the 143 page ballot pamphlet, toward the end of a *rebuttal* argument, would not have informed even the most discerning reader that Proposition 8 would invalidate existing marriages. This obscure reference at the tail end of the rebuttal arguments does not make it " '*very clear* . . . that the [voters] must have intended a retroactive application.' " (*Myers*, *supra*, 28 Cal.4th at p. 841, citation omitted; emphasis in original.)

Finally, some amici argue that continued recognition of marriages of same-sex couples entered into in California would raise constitutional problems under the Privileges and Immunities Clause of Article IV, section 2 without recognition of lawful marriages of out-of-state same-sex couples. (CCF Brief at pp. 20-21; NLF Brief at pp. 2-5.) This federal constitutional argument has nothing to do with the state law issue of interpretation on which review was granted: whether Proposition 8 was intended by the voters to invalidate marriages consummated prior to its enactment in reliance on this Court's decision in the *Marriage Cases*.[18]

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[18]In their Reply, the CCSF Petitioners pointed out that applying Proposition 8 to an out-of-state couple lawfully married in some other jurisdiction who moved to California after Proposition 8 was enacted would not involve a retroactive application where the couple had acquired no rights, and assumed no obligations, under California law prior to the enactment of Proposition 8. But it is possible to construe Proposition 8 as respecting the validity of such a marriage too, which could be appropriate to the extent necessary to avoid a conflict with federal law.

The issue of whether California could constitutionally decline to recognize the validity of an out-of-state marriage lawfully contracted prior to Proposition 8's adoption is not presented in this case and should be addressed in a case brought by parties with a direct interest in that question. And if in some future case it is determined that the federal constitution requires recognition of pre-Proposition 8 marriages of same-sex couples, then the remedy would be for California to do so. (See *Supreme Court of Virginia v. Friedman* (1988) 487 U.S. 59, 70 [invalidating provision of Virginia Supreme Court rules denying bar admission to nonresidents as in violation of Privileges and Immunities Clause]; *Supreme Court of New Hampshire v. Piper* (1985) 470 U.S. 274, 288 [residency requirement for admission to New Hampshire Bar violated Privileges and Immunities Clause and could not be enforced].)

CONCLUSION

In enacting our Constitution, the framers sought to protect unpopular minority groups from unfair persecution by majority groups. They did so because they believed correctly that our democratic system of governance depended on the vigorous enforcement of those protections. Recognizing that an intemperate majority may seek to limit those protections, our framers established the revision process – which ensured that constitutional measures limiting those core protections would be subjected to sufficient discussion and deliberation. Our framers also entrusted the judiciary – the last bulwark against majority oppression – with the duty to enforce those constitutional provisions that establish a delberative process for revisions and limit the scope of initiative amendments to the Constitution.

This Court should exercise that duty here. Proposition 8, by stripping away a fundamental right from a suspect class, not only alters the

basic structure of our government, it also violates our Constitution's core commitment to basic human rights. As such, it is a revision and cannot be enacted through the initiative process. A ruling holding otherwise would leave unpopular minority groups subject to the whims of the majority and thereby threaten the foundation of our system of government.

Dated: January 21, 2009

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 10,507 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on January 21, 2009.

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PROOF OF SERVICE

I, MARTINA HASSETT, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza, 1390 Market Street, Seventh Floor, San Francisco, CA 94102.

On January 21, 2009, I served the following document(s):

CONSLLIDATED ANSWER OF PETITIONERS CITY AND COUNTY OF SAN FRANCISCO, ET AL TO AMICUS CURIAE BRIEFS IN SUPPORT OF INTERVENORS

on the following persons at the locations specified:

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

Executed January 21, 2009, at San Francisco, California.

Martina Hassett

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