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Case No. S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, et al.,

Petitioners,

v.

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

Respondents;

DENNIS HOLLINGSWORTH et al.,

Interveners.

SUPREME COURT
FILED

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I. INTRODUCTION

Interveners' amici contend that this case presents a conflict between the sovereignty of the people and equal protection. That asserted conflict does not, in fact, exist. Petitioners agree that the will of the people, as expressed in our State's Constitution, must prevail. But it was the people of California themselves who established the distinction between revisions and amendments in article XVIII of the California Constitution and who have "scrupulously preserved" it throughout California's history. (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 348 (*McFadden*).) By adopting the amendment-revision distinction, the people deliberately limited their power to alter this State's governing charter. Judicial enforcement of that limit is necessary to give that decision of the sovereign people its due respect.

Thus, contrary to the claims of Interveners' amici, when Petitioners assert that the electors may not use the initiative-amendment power to eliminate a fundamental right for a group selected on the basis of a suspect classification, Petitioners are not seeking to go outside the Constitution, invoke natural law, appeal to judicial activism, promote any particular social ideology, or thwart the expressed will of the people. Rather, Petitioners seek to enforce an express provision of our Constitution that reflects the people's considered decision to restrain the power of popular majorities where foundational constitutional principles are at stake.

The central principles in this Court's prior revision cases demonstrate that Proposition 8 is not a permissible amendment to the State's Constitution. Although no case has set forth the precise metes and bounds that distinguish an amendment from a revision, this Court's cases have made clear that measures that are consistent with the existing purpose

and structure of the Constitution are permissible amendments, while those that seek to alter its core precepts are not. By abrogating the fundamental principle of equality for a group defined by a suspect classification, Proposition 8 plainly falls into the category of a revision.

Upholding Proposition 8 would establish, under California law, that any fundamental right can be taken away from any minority by a simple majority of their fellow citizens. The constitutional guarantee of equal protection, which the people adopted to protect minorities from majoritarian discrimination, would be transformed into a conditional guarantee. No prior amendment has successfully accomplished such a dramatic change to our Constitution. In itself, the fact that no comparable amendment has been enacted in the over 150 years since statehood supports Petitioners' claim that Proposition 8 represents a serious revision of our Constitution, fundamentally different from the amendments this Court has upheld in the past. (See Amicus Curiae Brief (hereafter "ACB") of Cal. Teachers Assn. at pp. 16-22 [contrasting Proposition 8 with past amendments].)

The amicus curiae briefs submitted in defense of Proposition 8 endorse Interveners' radical vision of a constitutional structure in which the rights of minorities are utterly subservient to even temporary majority sentiment. In order to minimize the impact of Proposition 8 on our democratic system, Interveners' amici denigrate the importance of equality as a constitutional principle. Their contentions do not diminish the force of Petitioners' claims.

II. ARGUMENT

Most of the amici supporting Interveners do not address Petitioners' argument that stripping one group of a fundamental right based on a suspect

classification constitutes such a significant change to our system of constitutional governance that it can be done, if at all, only by revision. Nor do Interveners' amici offer their own alternative theory as to what constitutional changes, if any, would constitute a qualitative revision that cannot be enacted by initiative. Instead, Interveners' amici erroneously conflate the people's sovereign political power and the initiative power, ignore the centrality of equality as a constitutional principle and the judiciary's role in enforcing that principle, and disregard the unprecedented impact Proposition 8 would have on our Constitution. They also ignore the well-settled rule that an initiative will not be applied retroactively in the absence of unequivocal language demonstrating such an intent. Plainly, no such clear statement of retroactivity was included in either the text or the ballot materials of Proposition 8.

A. THE INITIATIVE-AMENDMENT POWER IS DISTINCT FROM, AND SUBORDINATE TO, THE PEOPLE'S FULL SOVEREIGN POWER.

As this Court has repeatedly acknowledged, "popular sovereignty" in the constitutional sense is a much broader power than that exercised by the electors in the initiative-amendment process. The distinction between amendments and revisions, which has existed as part of the California Constitution since its ratification, represents the considered decision of the people, acting in their full sovereign capacity. The people, as sovereign, designed a Constitution that requires certain constitutional changes to be enacted with more deliberation, and a greater degree of consensus, than the amendment process can provide. Thus, when this Court decides whether a particular constitutional change is within the scope of the initiative power,

it is not overriding the will of the people, but rather enforcing the will of the people as expressed in the words of article XVIII.

Interveners' amici err when they assert that Petitioners are urging the Court to elevate its own views of social policy or extra-constitutional principles above the people's sovereign will. Petitioners are simply asking the Court to enforce the constitutional boundaries the people have established in article XVIII, just as it did in *Raven v. Deukmejian* (1990) 52 Cal.3d 336 (*Raven*), *McFadden, supra,* 32 Cal.2d 330, and in other cases involving initiative constitutional amendments. The people's power to adopt amendments through the initiative process necessarily represents something less than the full organic sovereignty they exercise when assembled in a constitutional convention or when engaged in a revision of the Constitution. If that were not the case, the Constitution's express distinction between amendments and revisions would be mere surplusage, and the electors could undo the foundational principles of our government through a simple majority vote.[1]

Petitioners, along with every other party in this case, agree with the fundamental principle that all sovereignty ultimately derives from the people. (See Cal. Const., art. II, §1.) The people exercised that inherent sovereign power through the conventions that produced the 1849 and 1879

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[1] For a more detailed analysis of the distinction between the sovereign power exercised in constitutional conventions and revisions and the more limited power of initiative, Petitioners refer the Court to the amicus curiae brief of Professor Karl Manheim, who explains the role and limits of the initiative-amendment process within our constitutional system with uncommon clarity and eloquence. (See generally, ACB of Prof. Manheim; see also ACB of Profs. of State Const. Law at pp. 16-20; and ACB of Prof. C. Edwin Baker, et al. at pp. 14-16 (hereafter "ACB of Prof. Baker").)

Constitutions. By engaging in the solemn and deliberative process of constitution-making, the people agreed to bind both themselves and future generations to certain enduring principles, including the principles of equality and minority rights. The people can change those fundamental governing principles only through a constitutional convention or a revision proposed by the Legislature. As this Court observed: "the entire sovereignty of the people is represented in the convention. . . . If, upon its submission to the people, [the proposed Constitution] is adopted, it becomes the measure of authority for all the departments of government, the organic law of the state, to which every citizen must yield an acquiescent obedience." (*Livermore v. Waite* (1894) 102 Cal. 113, 117 (*Livermore*).)

At the same time, the drafters of the 1849 and 1879 Constitutions foresaw the wisdom of providing some method other than a convention for making more limited changes that would not involve significant alterations to the fundamental principles embodied in our plan of government. This second method of changing the Constitution — the amendment process — originally required a vote by the Legislature to propose such an amendment, which was then presented to the people. (*Ibid.*) From the beginning, the amendment power was understood as a limited power that represented less than the full measure of the people's sovereignty. That understanding has continued to define the permissible scope of an initiative amendment:

> The legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment. The constitution itself has been framed by delegates chosen by the people for

> that express purpose, and has been afterwards ratified by a vote of the people, at a special election held for that purpose, and the provision in article XVIII that it can be revised only in the same manner, and after the people have had an opportunity to express their will in reference thereto, precludes the idea that it was the intention of the people, by the provision for amendments authorized in the first section of this article, to afford the means of effecting the same result which in the next section has been guarded with so much care and precision . . . .

(*McFadden*, *supra*, 32 Cal.2d at p. 333 [quoting *Livermore*, *supra*, 102 Cal. at p. 118].)

In 1911, the process for adopting constitutional amendments was changed so that amendments could be proposed by popular initiative as well as by the Legislature.[2] (See Cal. Const., art. II, § 8.) There is no indication in the text or the legislative history of the 1911 amendment that, by reserving to themselves the power to propose constitutional amendments (a power that would then be shared by the Legislature and the electors), the people intended to eliminate the carefully drawn distinction between amendments and revisions.[3] To the contrary, the electorate expressly

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[2] The 1911 ballot pamphlet in favor of the amendment stated: "It is not intended and will not be a substitute for legislation, but will constitute that safeguard which the people should retain for themselves to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact; and to hold the legislature in check, and to veto or negative such measures as it may viciously or negligently enact." (Constitutional Amendment 22, in California Ballot Pamphlet, Special Election (Oct. 11, 1911) (hereinafter 1911 California Ballot Pamphlet) (Comments of Lee C. Gates, Senator, 34th District, and William C. Clark, Assemblyman, 50th District) [Exh. 5 to the Respondent Attorney General's RJN].)

[3] In fact, it is plain that the 1911 amendment could not have been intended to give voters unlimited power to make fundamental changes to

retained the distinction between amendments and revisions in the text of the Constitution. (See *McFadden*, *supra*, 32 Cal.2d at p. 331 [citing then-existing Cal. Const., art. XVIII, § 2].) Nor is there any indication that the people intended to change the principle, previously established in *Livermore*, that the power of amendment does not represent the full sovereign power of the people, but is a lesser power that is limited in scope. Indeed, in *McFadden*, this Court held that the scope of the people's power to propose and enact amendment is the same as that of the Legislature's power. "The initiative power reserved by the people by amendment to the Constitution in 1911 (art. IV, § 1) 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." (*McFadden*, *supra*, 32 Cal.2d at p. 333.) Because "[t]hat amendment was framed and adopted long after" the 1894 *Livermore* decision, it had to "be understood to have been drafted in the light of [that] decision." (*Id.* at pp. 333-334.)[4]

In 1962, the Constitution was amended again to establish, as an alternative to calling a constitutional convention, a process for submission of proposed constitutional revisions to the people following a vote of two-thirds of each house of the Legislature. (See Cal. Const., art. XVIII, §§ 1, 2.) Again, there is no indication that by adding this new procedure for

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the Constitution because "the creation of such a power [itself] would have required a revision." (ACB of Prof. Baker at p. 15.)

[4] See also Manheim & Howard, *A Stuctural Theory of the Initiative Power in California* (1998) 31 Loyola L.A. L. Rev. 1165, 1222 ["[A]ny initiative that would alter California's basic governmental structure — its essential plan for self-governance — cannot be accomplished by the legislative power of the initiative any more than it could be effectuated by the legislature alone."].

revision, the people intended to change the limited scope of constitutional amendments. Indeed, this Court continued to enforce the amendment-revision distinction just as it always had prior to 1962. (See, e.g., *Raven*, *supra*, 52 Cal.3d at p. 355.)

The language of the Constitution itself therefore demonstrates the fallacy inherent in the attempt by Interveners' amici to portray this case as a contest between the power of the people and the power of the courts. Were this Court to accept the erroneous contention that an initiative amendment represents an exercise of the people's unlimited sovereign power, then the distinction between amendment and revision would be rendered a nullity. But the Court must give meaning and effect to all provisions of the Constitution, including the language of article XVIII. (See *Otsuka v. Hite* (1966) 64 Cal.2d 596, 608.) That language establishes, as this Court's decision in *Raven* made plain, that the people have chosen to impose limits on their power to modify the Constitution by initiative amendment.[5]

Thus, contrary to the arguments of Interveners and their amici, by deciding whether Proposition 8 represents a constitutionally permissible amendment, the Court is not substituting its own judgment for that of the

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[5] This Court's decision in *Raven*, which struck down an initiative amendment as an improper revision, conclusively demonstrates that the electors do not have an unlimited sovereign power to modify the Constitution by initiative amendment. It is notable that a number of the Interveners' amicus briefs that describe Proposition 8 as an expression of the organic sovereignty of the people do not even cite, much less distinguish, *Raven*, the key case holding that article XVIII prohibits a qualitative revision from being adopted by voter initiative. (See, e.g., ACB of the California Catholic Conference, et al.; ACB of Family Research Council; ACB of Advocates for Faith and Freedom; ACB of the Fidelis Center for Law and Policy; ACB of Catholic Answers; and ACB of Pacific Justice Institute.)

voters concerning the wisdom of Proposition 8 as a matter of social policy. The Court is performing the function that the people have always assigned to it: interpreting the text of the Constitution to determine whether the change contemplated by Proposition 8 lawfully may be adopted by an initiative amendment.

B. PROPOSITION 8 WOULD FUNDAMENTALLY ALTER THE CONSTITUTION'S STRUCTURAL BALANCE BETWEEN MAJORITY RULE AND EQUAL PROTECTION.

Interveners' amici do not rebut Petitioners' central claim that Proposition 8 must be deemed a revision because of its extraordinary impact on the structural role of equality as a constitutional principle and on the judiciary's role in enforcing that principle. The amendment-revision distinction is part of an overarching constitutional structure that jealously guards both majority rule and minority rights: the two pillars of our democracy. The electors can amend the California Constitution by a simple majority vote; however, by prohibiting amendments that seek to change our Constitution's fundamental principles, the people have deliberately created a procedural safeguard that protects the Constitution's careful balance between "the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other." (Ely, Democracy and Distrust (1980) pp. 86-87; see also ACB of Asian Pacific American Legal Center, et al. at p. 7.)

Since the founding of our national and state governments, it has been well-established that the protection of unpopular minorities from systematic oppression by majorities is a structural element crucial to the very survival

of democracy.[6] Encouraging ratification of the new federal Constitution, Madison lamented "unstable" governments in which "measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." (The Federalist No. 10 (Rossiter ed. 2003) p. 72.) The conception of equality as a central structural safeguard of constitutional democracy found its most famous modern expression in *United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152-153, fn. 4, which emphasized that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." The drafters of the California Constitution likewise recognized the crucial importance of the equality guarantee for the viability of our constitutional system, and they enshrined that principle in the very first words of the first article: "*All people* are by nature free and independent, and have inalienable rights." (Cal. Const., art. I, § 1, italics added; see also ACB of Amici Concerned with Gender Equality at pp. 12-14.)

The central role of equality as a foundational principle of our democracy is inextricably tied to the judiciary's role as the branch of government primarily charged with enforcing that principle. Despite disagreements about many other aspects of judicial review and the role of the courts, leading constitutional scholars and political theorists from a broad spectrum of philosophical and political perspectives have endorsed

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[6] See ACB of Profs. of State Const. Law at pp. 3-12; ACB of Amici Concerned with Gender Equity at pp. 12-14; ACB of Asian Pacific American Legal Center, et al. at pp. 4-6.

the premise that courts must enforce equality to protect the integrity of the democratic process. (See, e.g., Ely, Democracy and Distrust, *supra*, at pp. 73-104; Choper, Judicial Review and the National Political Process (1980) pp. 60-170; *Cruzan v. Director, Mo. Dept. of Health* (1990) 497 U.S. 261, 300 (conc. opn. of Scalia, J.); Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)* (1991) 105 Harv. L.Rev. 77, 91, 118-119; Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv. L.Rev. 1, 40, 42; O'Connor, The Majesty of the Law (2003) p. 259 ["[J]ust as our system recognizes that the will of the people is the best law, it also acknowledges that there can be no liberty where the majority is free to tyrannize the minority."]; Rawls, A Theory of Justice (1971) pp. 221-228.)

The judiciary is uniquely suited to that role. Because both the legislative and the executive branch are, by design, beholden to electoral majorities, they cannot be expected to root out every instance of invidious discrimination against minorities. (See *In re Marriage Cases* (2008) 43 Cal.4th 757, 860 (conc. opn. of Kennard, J.) (*Marriage Cases*); Ely, Democracy and Distrust, *supra*, at p. 103.) Still less can electors exercising their initiative power be charged with the ultimate responsibility for restraining majority mistreatment of minorities, for they *are* the very majority that at times must be restrained. But as the only non-political branch, the courts are well-suited to "exercise[] a unique and definitive power . . . to interpret the equality guarantee in the state Constitution and deploy judicially made levels of review to enforce that core requirement of our constitutional democracy." (ACB of Prof. Manheim at p. 24; see also ACB of Amici Concerned with Gender Equality at p. 23; ACB of Asian Pacific American Legal Center, et al. at pp. 12-13 [describing enforcement

of equal protection as perhaps the most core judicial function]; ACB of Const. and Civil Rights Law Profs. at pp. 18-26.)[7]

Interveners' amici ignore the crucial structural role of the equality principle in our constitutional system and focus myopically on majority rule, as though it were the sole organizing principle of our governmental plan.[8] In fact, however, the California Constitution is equally founded upon "[an] animating and organizing principle of equality, both in a deep historical sense, dating to 1849, and in a broad textual sense, with equality provisions appearing throughout the Constitution." (ACB of Profs. of State Const. Law at pp. 12-13; see also ACB of Cal. Council of Churches, et al. at pp. 4-5; ACB of Amici Concerned with Gender Equality at pp. 12-22; ACB of Const. and Civil Rights Law Profs. at pp. 11-18.) Proposition 8, which seeks to inscribe discrimination based on a suspect classification into our Constitution, would upset the critical balance between those two fundamental constitutional principles by eliminating an essential check on majority rule. The impact of that shift would be far reaching. "There is an enormous structural difference between a constitution that allows a bare majority to take fundamental rights away from suspect classes and one that does not." (ACB of Prof. Baker, et al. at p. 12.)

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[7] Were Interveners' amici correct that the voters by mere initiative could constitutionalize discrimination against a minority group in response to judicial recognition of the group's right to equality, then it would become dangerous for any Californian to turn to this Court in the first place for vindication of their right to equal protection. (See ACB of Baker, et al at p. 12.)

[8] See, e.g., ACB of Family Research Council; ACB of the Cal. Catholic Conference, et al. at pp. 7-14; ACB of Campaign for Cal. Families at pp. 8-11; ACB of Advocates for Faith and Freedom at pp. 7-11; ACB of Stephen Meiers at p. 50, fn. 21 (hereafter "ACB of Meiers").

The efforts of Interveners' amici to minimize the impact of Proposition 8 on California's constitutional scheme are unavailing. For example, many amici supporting Interveners contend that Proposition 8 merely seeks to "restore" the "traditional definition" of marriage and therefore does not establish a suspect classification or eliminate fundamental constitutional rights. But this Court rejected that erroneous "definitional" argument in *In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 850-851.

Interveners' amici provide no principled distinction — nor could they, as none exists — between Proposition 8 and other initiatives that would selectively eliminate the fundamental rights of other minorities based on race, sex, or other suspect classifications. Instead, Interveners' amici merely echo Interveners' contention that such selective deprivations of fundamental rights are unlikely to occur. (See, e.g., ACB of Meiers at p. 21; Interveners' Opp. Br. at p. 23.) But as Petitioners' amici have shown, throughout California's history, majorities have frequently enacted measures that selectively disadvantage unpopular groups. (See ACB of Anti-Defamation League at pp. 11-14; accord ACB of Asian Pacific American Legal Center, et al. at p. 20.) It is for that very reason that civil rights and women's rights organizations, labor unions, and religious groups have filed amicus curiae briefs urging this Court to protect their right to equal protection under the California Constitution by invalidating Proposition 8.[9]

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[9] See, e.g., ACB of Asian Pacific American Legal Center, et al.; ACB of Anti-Defamation League, et al.; ACB of Amici Concerned with Gender Equality; ACB of Cal. Federation of Labor, et al.; ACB of Cal. Teachers Assn.; ACB of Cal. Council of Churches, et al.

Interveners and their amici would convert the Constitution's guarantee of equal protection from an enduring and fundamental principle of our state government into something more akin to a statute or a mere advisory provision, subject to change or elimination based on the current preferences of the electoral majority. But without the safeguard of equal protection, our Constitution as it has existed for 160 years would be transformed into a fundamentally different form of government: a system of pure majority rule.[10] While Interveners' amici may prefer such a pure majoritarian system, one thing is clear: that is not the system of government established in the California Constitutions of 1849 and 1879. The people might have the sovereign political power to establish such an unlimited majoritarian system if they deem it wise. But they cannot do so by a mere amendment.

C. THE UNPRECEDENTED NATURE OF PROPOSITION 8 AS A CONSTITUTIONAL MEASURE FURTHER SUPPORTS THE CONCLUSION THAT IT IS A REVISION.

Interveners' amici suggest that, because this Court has rejected a number of challenges to amendments under article XVIII in prior cases, it must do so here. (See, e.g., ACB of American Center for Law & Justice at pp. 4-18; ACB of Meiers at pp. 9-38.) In California's 160-year history, however, the Court has considered the revision-amendment distinction only

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[10] If the California Constitution is to continue as an independent source of protection for minorities, it is no consolation to observe that the federal Constitution may protect some rights in some instances. (See Petrs.' Corr. Reply at pp. 27-29; see also ACB of Profs. of State Const. Law at pp. 7-12.)

ten times.[11] In three of those ten cases, the Court found that the challenged amendments were invalid. (*Raven*, *supra*, 52 Cal.3d 336; *McFadden*, *supra*, 32 Cal.2d 330; *Livermore*, *supra*, 102 Cal. 113.) To the extent, therefore, that Interveners' amici contend that the Court essentially has given proponents of initiative amendments a blank check, they are manifestly incorrect. As this Court explained in *McFadden*, "[e]ach situation involving the question of amendment, as contrasted with revision, of the Constitution must, we think, be resolved upon its own facts." (32 Cal.2d at p. 348.)

This Court's careful scrutiny of that question is especially important here because Proposition 8 seeks to make an unprecedented change to the California Constitution. For the first time, the Constitution would be altered by initiative to remove an existing fundamental constitutional right only from the members of a minority group defined by a suspect classification. The very novelty of that change is reason enough to subject this initiative to careful review. (See, e.g., ACB of Cal. Teachers Assn. at pp. 9-22 [distinguishing Proposition 8 from other initiative measures]; cf. *Romer v. Evans* (1996) 517 U.S. 620, 633 ["The absence of precedent for [a measure] is itself instructive; 'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'"] [quoting from *Louisville Gas*

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[11] *Professional Engineers in Cal. Gov. v. Kempton* (2007) 40 Cal.4th 1016; *Bowens v. Superior Court* (1991) 1 Cal.4th 36; *Legislature v. Eu* (1991) 54 Cal.3d 492; *Raven*, *supra*, 52 Cal.3d 336; *In re Lance W.* (1985) 37 Cal.3d 873; *Brosnahan v. Brown* (1982) 32 Cal.3d 236; *People v. Frierson* (1979) 25 Cal.3d 142 (*Frierson*); *Amador Valley Joint Union High School v. State Bd. of Equalization* (1978) 22 Cal.3d 208 (*Amador Valley*); *McFadden*, *supra*, 32 Cal.2d 330; *Livermore*, *supra*, 102 Cal. 113.

& Electric Co. v. Coleman (1928) 277 U.S. 32, 37-38].) Although no prior case has considered whether a measure like Proposition 8 is an amendment or a revision, the principles underlying the Court's past decisions applying that distinction clearly illustrate why Proposition 8 must be regarded as a fundamental change to our constitutional plan.

In past cases applying the amendment-revision distinction, an important factor has been whether a proposed amendment "involves a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational powers of its branches." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 509 (*Eu*).) In making that assessment, this Court has considered whether a measure is consistent with past practice and history relating to the traditional powers of the three branches. For example, the Court emphasized in *Legislature v. Eu* that a measure imposing budget and term limits on the Legislature did not diminish or delegate any "legislative power" or change "the relationship between the three governmental branches, and their respective powers." (*Ibid.*) In *Amador Valley* the Court found that Proposition 13's imposition of tax limitations on localities was consistent with "preexisting constitutional limitations" giving the Legislature significant authority over local tax rates. Accordingly, the Court held that the measure did not substantially alter the existing constitutional principle of home rule. (22 Cal.3d at pp. 225-226.) Likewise, in *Professional Engineers in Cal. Gov. v. Kempton* (2007) 40 Cal.4th 1016 (*Kempton*), the Court concluded that Proposition 35 did not involve "a shift of policymaking powers from the legislative branch to executive branch agencies," but rather simply accomplished by initiative "what . . . the Legislature could also have chosen to do in its own time." (*Id.* at pp. 1044-1045.) In contrast here, there are no

"preexisting constitutional limitations" authorizing the discriminatory elimination of fundamental rights from same-sex couples or any other group defined by a suspect classification. (*Amador Valley*, *supra*, 22 Cal.3d at p. 225.) To the contrary, this Court already has held that both the Legislature's and the electors' enactment of measures barring same-sex couples from marriage violated numerous state constitutional guarantees, including the right to liberty, privacy, and equal protection. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 818-823, 831-856.)

In re Lance W. (1985) 37 Cal.3d 873 similarly held that the initiative in that case, affecting a rule of evidence in criminal cases, made no "sweeping change" in our Constitution's structure or even "the scope of substantive [constitutional] rights." (*Id.* at pp. 892, 887.) Rather, the measure simply prescribed a rule of evidence and eliminated a specific remedy, both of which are matters that traditionally fall within the purview of the legislative power. (*Id.* at p. 892.) Similarly, while the initiative in *Frierson* overturned the holding of *People v. Anderson* (1972) 6 Cal.3d 628 in order to reinstate the death penalty, it did not remove the courts' longstanding responsibility to ensure that the application of the death penalty in any particular case did not involve cruel or unusual punishment or violate other constitutional guarantees. (*Frierson*, *supra*, 25 Cal.3d at p. 187; see also *People v. Superior Court of Santa Clara County* (1982) 31 Cal.3d 797, 801-809 [clarifying that even after *Frierson*, Court must review particular death sentences for constitutionality].)

By contrast, in *Raven*, *supra*, 52 Cal.3d 336, this Court concluded that the initiative invalidated in that case would have altered a longstanding principle of state constitutional jurisprudence and represented an unprecedented incursion on the independence of state courts. In particular,

it would have required California courts to defer to the United States Supreme Court precedent regarding the interpretation of state constitutional provisions "for the first time in California's history." (*Raven*, *supra*, 52 Cal.3d at p. 354.) Likewise, the constitutional change wrought by Proposition 8 — the elimination of a fundamental right for a protected group — would be unprecedented in this State's history and would substantially alter the foundational powers of California's courts. (See ACB of Cal. Teachers Assn. at pp. 9-22; ACB of Asian Pacific American Legal Center, et al. at pp. 12-16; ACB of Amici Concerned with Gender Equality at pp. 22-24; ACB of Prof. Manheim at pp. 22-27.)

Contrary to the contentions of Intervener's amici, first principles that underlie the "real difference" between amendments and revisions reflected in these cases strongly support the conclusion that Proposition 8 is a revision. (*McFadden*, *supra*, 32 Cal.2d at p. 347.) Article XVIII requires revisions to follow a more rigorous process because the Constitution is intended to be a document of "permanent and abiding nature," and because far-reaching changes to the core principles of that document should not be quickly or easily made. (*Amador Valley*, *supra*, 22 Cal.3d at p. 222; see also ACB of Prof. Manheim at pp. 6-8.)[12] As the Attorney General has stressed, certain fundamental constitutional principles — including the foundational guarantees set forth as "inalienable" in Article I, section 1 — have long been considered to have a particularly central and abiding

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[12] See also ACB of Legislative Amici in Support of Petitioners Strauss, et al. at pp. 7-15 [describing how the prohibition against revising the Constitution by simple majority vote has been maintained throughout all other changes to the Constitution].

status.[13] (See ACB of the League of Women Voters of Cal. at pp. 5-8; ACB of Profs. Eskridge and Cain at pp. 18-19; ACB of Const. and Civil Rights Law Profs. at pp. 7-8.)

Because Proposition 8 not only strikes directly at the heart of those core fundamental rights, but also selectively targets a particular group, it presents a paradigmatic situation in which the participation of the Legislature as well as the electors is crucial.[14] Although the majority might be less inclined to limit or abrogate rights if a proposed change affected all the people, including themselves, that check is absent when a minority is targeted. But the situation presented by Proposition 8 is even more profoundly troubling for our constitutional system. Here, Proposition 8 seeks to withdraw an inalienable right not just from any minority, but from

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[13] The Attorney General does not couch his position in terms of the revision-amendment distinction; however, his argument underscores Petitioners' claim that the selective deprivation of an inalienable right is a particularly serious and egregious change to our Constitution, and one that could be made, if at all, only by revision. (Cf. ACB of Beverly Hills Bar Assn. at pp. 19-21.)

[14] A number of Interveners' amici argue that, because the Court previously has ruled that the electors can amend the Constitution to limit the scope of a fundamental right, Proposition 8 is not a revision. (See, e.g., ACB of Campaign for Cal. Families at pp. 15-16; ACB of Center for Const. Justice at pp. 26-32; ACB of Fam. Research Council at pp. 17-18; ACB of Eagle Forum Educ. and Legal Defense Fund at p. 12 (hereafter "ACB of Eagle Forum"); ACB of American Center for Law & Justice at pp. 10-12.) But Petitioners do not dispute that fundamental rights can be limited by an amendment. Rather, Petitioners contend that the amendment process cannot be used to eliminate fundamental rights only for a particular group defined by a suspect classification. Petitioners also agree with the Attorney General that selective abrogation of the inalienable rights protected in article I, section 1 — generally deemed to constitute bedrock guarantees of our Constitution — is a particularly destabilizing and far-reaching change to our constitutional system.

a group defined by a suspect classification, as to whom there has been a history of unjustifiable discrimination and for whom the courts have a special responsibility to guard against majority overreaching. This sort of discrimination should trigger particularly careful consideration under the revision-amendment analysis. (See ACB of Profs. Eskridge and Cain at pp. 12-19.)

Contrary to the claims of a number of Interveners' amici, *Frierson*, *supra*, 25 Cal.3d 142 is not to the contrary. (Cf., e.g., ACB of Campaign for Cal. Families at pp. 15-16; ACB of Meiers, passim; ACB of Center for Const. Justice at pp. 17-18.) The initiative at issue in *Frierson* reinstated the death penalty for anyone convicted of a qualifying crime; it did not single out defendants of a particular race, sex, religion, or sexual orientation. Voters changed the law in a way that was equally applicable to all people, including themselves.[15] Likewise, none of the other cases relied on by Interveners' amici involved the selective deprivation of a fundamental right from a historically disfavored minority. For example, the initiative in *Bowens v. Superior Court* (1991) 1 Cal.4th 36 did not remove the right to a post-indictment preliminary hearing only from a particular group, such as Latinos, women, or gay people. (*Id.* at p. 42 [noting that the measure "does not single out a suspect class"].) By contrast, Proposition 8 changes the law only as to gay people, depriving them and no one else of a precious fundamental right.

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[15] Moreover, *Frierson* is inapposite here inasmuch as it involved a right (to be free of "cruel and unusual punishment") that, perhaps uniquely, depends upon public consensus about the acceptability of particular forms of punishment. See, e.g., *People v. Anderson* (1972) 6 Cal.3d. 628, 645, 648, 650-51.

In a manner virtually unprecedented in our state's history, Proposition 8 seeks to eliminate an inalienable fundamental right only from a single group on the basis of a suspect classification. This dangerous innovation goes to the very heart of why the people of California have wisely chosen to limit their power to alter central precepts of their Constitution through the initiative process. The very novelty of Proposition 8 in this regard supports Petitioners' position that the initiative exceeds the constitutional boundaries of a permissible amendment.

D. PROPOSITION 8 VIOLATES THE SEPARATION OF POWERS.

Proposition 8 violates the separation of powers doctrine because it is a legislative act that "defeat[s]" and "materially impair[s]" (*Brydonjack v. State Bar* (1929) 208 Cal. 439, 444) one of the judiciary's core constitutional functions — protecting fundamental rights of a minority group "from obliteration by the majority" (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141) — and such a measure is beyond the scope of the initiative-amendment power. Even apart from the revision analysis Petitioners already have set forth as a basis for Proposition 8's invalidity, Proposition 8 is not a cognizable amendment because it goes beyond the people's amendment power by impermissibly diminishing the courts' role in enforcing equality under the California Constitution.

Although Interveners' amici make numerous arguments under the heading or in the name of separation of powers,[16] none of the amici offers

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[16] Several amici erroneously claim that this Court would itself violate the separation of powers if it were to determine that Proposition 8 is a revision. (ACB of Advocates for Faith and Freedom at pp. 11-12; ACB of Center for Const. Jurisprudence at pp. 33-37; ACB of Campaign for Cal. Families at pp. 5-11.) It is a core duty of the courts to review legislative

any argument or case authority that calls into question Petitioners' central separation-of-powers point that Proposition 8, if held to be valid, would seriously diminish the judiciary's role in our government structure — giving effect to the equality guarantee that is at the heart of the California Constitution.

In contrast, amici supporting Petitioners have provided this Court with important arguments buttressing Petitioners' contention that Proposition 8 violates the separation of powers by impermissibly disabling courts from carrying out their core judicial function of guaranteeing equal treatment under the law. In particular, the following amicus curiae briefs support the conclusion that Proposition 8 is beyond the initiative amendment power for separation-of-powers reasons: the brief of Professor Manheim at pages 3-9; the brief of the Constitutional and Civil Rights Law Professors at pages 18-34; and the brief of the Constitutional Law Center of the Monterey College of Law at pages 47-64.

The principal argument made by Interveners' amici is the fallacious claim that the electorate's power to change the California Constitution by initiative is a complete, sovereign, "political" power not subject to article III, section 3's delineation of the separation of the powers of "government." (See, e.g., ACB of Meiers at pp. 51-52; ACB of Fidelis Center for Law and Policy at p. 10; cf. ACB of Margie Reilly at p. 5; ACB of Nat'l Org. for Marriage at p. 13.) That argument is incorrect. The initiative-amendment

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enactments, including initiative amendments, in light of constitutional requirements, including the amendment-revision distinction. (See ACB of Prof. Manheim at pp. 9-20; see also, e.g., *Raven*, *supra*, 52 Cal.3d at p. 354; *McFadden*, *supra*, 32 Cal.2d at pp. 350-351.) A court does not contravene the separation of powers by fulfilling this constitutional responsibility.

power is an exercise of governmental power, and this Court has expressly held that it is a "legislative" act for purposes of separation of powers analysis. (See *Kempton*, *supra*, 40 Cal.4th at pp. 1045, 1047; see also Petrs.' Corr. Reply Br. at p. 20, fn. 7; ACB of Advocates for Faith and Freedom at p. 7 ["[T]he people's initiative power is an exercise of legislative-type power"].) The efforts of Interveners' amici to avoid the obvious point that the initiative amendment power is a power of "government" under article III, section 3 — and, in particular, a legislative power — fail. As amicus curiae Professor Manheim explains, the initiative power is a reserved, legislative power that does not encompass all of the people's sovereign "political" power. (See ACB of Prof. Manheim at pp. 3-9.)

This Court has addressed numerous separation of powers challenges to legislative acts that allegedly defeat or impair the judiciary's exercise of functions that the judicial powers clause of article VI commits to the courts.[17] In those cases, the Court has asked the same question and applied the same standard set forth in *Brydonjack*: Does the legislative act "merely

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[17] See, e.g., *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105 [construing statutes as not limiting trial court's ability to reconsider orders on its own motion, so as to avoid "difficult constitutional questions" regarding separation of powers]; *Solberg v. Superior Court* (1977) 19 Cal.3d 182 [upholding legislative limit on courts' ability to examine the factual truth of allegations in affidavits of prejudice filed pursuant to Code Civ. Proc., § 170.6]; *Millholen v. Riley* (1930) 211 Cal. 29, 34 [in discussing compensation of court employees, acknowledging that "the legislature may at all times aid the courts and may even regulate their operation so long as their efficiency is not thereby impaired"]; *Brydonjack*, *supra*, 208 Cal. at p. 444 [finding that particular legislative limit on Supreme Court's ability to determine who may practice law did "not defeat or materially impair the exercise of" the judiciary's constitutional functions].

regulate" the judiciary's function in a reasonable manner, or does it "defeat or materially impair the exercise of those functions?" (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 59.)

This Court has approved the application of this standard not only when the separation of powers argument is that the challenged action is an impermissible appropriation or delegation of judicial power by or to some branch of government other than the courts, but also when a separation of powers challenge is based on the argument, such as the one Petitioners make here, that the measure at issue would disable the courts from exercising a particular function entirely, without purporting to assign the function to a different government branch. (E.g., *Le Francois supra*, at pp. 1101-1103.)

Application of the *Brydonjack* standard in this case leads to the conclusion that Proposition 8 violates the separation of powers doctrine. It is beyond dispute that among the judiciary's core constitutional functions is the obligation to protect individual and minority rights from infringement by the majority. Indeed, this Court has expressly confirmed this point in the context of a separation of powers challenge and has emphasized the centrality of this function to the judiciary's role. (See *Bixby*, *supra*, 4 Cal.3d at p. 141 ["probably the most fundamental" protection of the separation of powers doctrine "lies in the power of the courts . . . to preserve constitutional rights, whether of individual or minority, from obliteration by the majority"].)

Proposition 8 plainly "materially impairs" the courts' ability to protect the fundamental right of lesbians and gay men to marry; indeed, the impairment could not be more complete. Proposition 8 does not "merely regulate" the circumstances or manner in which the courts may perform

their function of protecting this fundamental right, or the remedies that courts may employ in cases of infringement. (Cf. *Brydonjack*, *supra*, 208 Cal. at p. 44 [noting that legislature may regulate "the mere procedure by which jurisdiction is to be exercised" without violating separation of powers]. Rather, Proposition 8 works a complete "defeat" of the courts' ability to exercise their function in protecting this right for same-sex couples, in all factual settings. For these reasons, this Court must conclude that Proposition 8 is invalid because it violates the constitutional guarantee of separation of powers.

E. INTERVENERS' AMICI CONFIRM THAT PROPOSITION 8 CANNOT BE APPLIED RETROACTIVELY.

Many of Interveners' amici insist, as do Interveners themselves, that Proposition 8 clearly invalidates the marriages entered into by same-sex couples in California before November 5, 2008. (See, e.g., ACB of Professors of Law in Support of Interveners at p. 8 (hereafter "ACB of Six Law Profs.").) Interveners' amici altogether fail, however, to provide any reasoned response to the arguments presented by these Petitioners, as well as by Petitioners the City of San Francisco, et al., by Respondent Attorney General Brown, and by Respondents Horton and Scott, *all* of whom agree that well-established legal principles preclude any retroactive application of Proposition 8.

Interveners' amici fail to recognize either the retroactive effects of applying Proposition 8 to existing marriages or the stringent standard required to establish that the voters understood and intended Proposition 8 to have those effects. Those amici have done nothing to refute the overwhelming authority presented by Petitioners establishing that

Proposition 8 does not meet that standard. Moreover, the divergent and irreconcilable positions taken by Interveners' amici regarding *how* Proposition 8 would affect existing marriages refute these amici's own contentions that the voters must have understood that Proposition 8 was meant to invalidate the existing marriages of same-sex couples.

In addition, Interveners' amici do not dispute that Proposition 8 must be harmonized, to the greatest extent possible, with the equal protection clause of the California Constitution, and with the privacy and due process clauses' protection of the fundamental right to marriage, or that applying this harmonization principle requires that any retroactive application of the initiative be barred. Although one of Interveners' amici attempts to respond to Petitioners' arguments regarding the potential conflicts with the due process clause's protection against impairment of vested rights and with the contracts clause, that response is without merit. Equally without merit is the contention of several of Interveners' amici that the continued recognition of the existing marriages of same-sex couples would violate the United States Constitution's privileges and immunities and/or equal protection clauses.

As further explained below, Interveners' amici fail to establish that Proposition 8 should or can be applied in any way to the approximately 18,000 marriages entered by same-sex couples in California before November 5, 2008.

1. Applying Proposition 8 To Invalidate Existing Marriages Constitutes A Retroactive Application Of The Law.

Several amicus briefs filed in support of Interveners assert that the application of Proposition 8 to existing marriages would not implicate

issues of retroactivity at all.[18] Even if some of the rights associated with marriage remained unaffected under their interpretation of Proposition 8, these amici fail to recognize that "the historic and highly respected designation of marriage" is itself a "core element" of the right to marry, which cannot be stripped from same-sex couples except through retroactive application of the law. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 831.)

Moreover, retroactivity problems cannot be avoided simply by arguing that Proposition 8 denies recognition to the marriages of same-sex couples only "after" its enactment. (ACB of Six Law Profs. at pp. 12-13.) That approach, which effectively would terminate approximately 18,000 marriages heretofore recognized under California law, would still be a retroactive application of the law. It would "affect[] rights, obligations, acts, transactions and conditions" of marriages that were "performed or exist[ed] prior to the adoption of [Proposition 8]" (*Aetna Casualty & Surety Co. v. Industrial Accidents Com.* (1947) 30 Cal.2d 388, 391) and apply "the new law of today to the [marriages] of yesterday" (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 928). As this Court has emphasized, changing "the *future* legal consequences of past transactions" — as ceasing to recognize previously solemnized marriages would do — constitutes what this Court has termed "[s]econdary retroactivity" (*20th Century Insurance Co. v. Garamendi* (1994) 8 Cal.4th 216, 281), which, like any form of

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[18] See, e.g., ACB of Campaign for Cal. Families at p. 19 [suggesting that the issue is not "whether a new law should be applied retroactively" but whether the "unions of other than one man and one woman . . . can be called 'marriages'"]; ACB of Six Law Profs. at p. 30 [suggesting that elimination of "marriage itself" but preservation of "marital incidents" would constitute only a "prospective" operation of the law].

retroactivity, cannot be accomplished absent clear indication of intent.[19] (See ACB of League of Women Voters of Cal. at pp. 8-10; ACB of Our Family Coalition, et al. at pp. 18-26; ACB of Professors of Family Law at pp. 9-14 (hereafter "Profs. Fam. Law").)

Because California law has such a strong presumption against retroactive application of laws, Proposition 8 cannot be so applied unless there is a "manifest," "unequivocal" indication that the electorate intended it to be applied retroactively. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207 [citation omitted] (*Evangelatos*).) As set forth in Petitioners' Reply Brief and as further explained below, there is no such manifest indication, and Interveners' amici have demonstrated none.

2. Neither The Text Nor The Ballot Materials Of Proposition 8 Provide Clarity About Retroactive Application.

Various amici supporting the Interveners contend that the text and ballot materials of Proposition 8 are sufficiently clear to warrant its application to invalidate previously solemnized marriages of same-sex couples. But Interveners' amici fail to acknowledge the stringent standard courts apply in considering the retroactive application of enactments. As Petitioners explained in their Reply Brief, it is insufficient for *indications* of retroactive application to appear in the "plain" or "ordinary" meaning of the

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[19] Eagle Forum conflates two separate questions: first, whether a measure is intended to apply retroactively; and second, whether such retroactive application — whether primary or secondary — is permissible. Eagle Forum's suggestion, therefore, that Proposition 8 may be applied to existing marriages because secondary retroactivity is permissible retroactivity (ACB of Eagle Forum at pp. 20-21), misses the entire point. The question here is whether voters clearly manifested an intent that Proposition 8 apply retroactively, not whether, if they had done so, such retroactive application would be permissible.

text, as amici contend. (Petrs.' Corr. Reply Br. at pp. 40-41, 44-46; cf. ACB of Six Law Profs. at p. 7; ACB of American Center for Law & Justice at pp. 21-22.) Instead, for a ballot measure to apply retroactively, the electorate's intent that the measure be retroactive must appear in "unequivocal and inflexible" terms (*Evangelatos*, *supra*, 44 Cal.3d at p. 1207) — in terms "so clear that it could sustain only [an] interpretation" that the initiative was meant to apply retroactively. (*Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal.4th 828, 841 (*Myers*); see Petrs.' Corr. Reply Br. at pp. 40, 44.)[20] Interveners' amici do not even attempt to meet — and could not meet if they tried — the high standards for overcoming this heavy presumption against retroactive application.

Instead, Interveners' amici focus on Proposition 8's use of the present tense verb "is," contending that this word "unequivocally" requires the application of Proposition 8 to invalidate existing marriages between same-sex couples. (ACB of Six Law Profs. at p. 9; ACB of American Center for Law & Justice at p. 21.) As Petitioners demonstrated in their Reply Brief (Petrs.' Corr. Reply Br. at pp. 45-46), this Court has addressed and rejected that very argument, holding that the use of simple present tense verbs does not evidence the kind of "'unequivocal and inflexible'" mandate that an initiative be applied retroactively. (*Evangelatos*, *supra*, 44 Cal.3d at p. 1207 [insufficient indication of intent of retroactive application where statute stated that "there shall be" liability] [citation omitted]; *see also Myers*, *supra*, 28 Cal.4th at p. 842-843 [same holding where statute stated that "there exists no statutory bar"]; cf. *In re Marriage of Bouquet*

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[20] See also ACB of League of Women Voters of Cal. at pp. 10-17; ACB of Our Family Coalition, et al. at pp. 6-17.

(1976) 16 Cal.3d 583 [stating that a statute which employed the simple present tense verb "are" did "little to reveal the Legislature's intent regarding the amendment's prospective or retroactive application"].) Interveners' amici fail to address this case law, and they point to no authority that would support their insistence that the word "is" is sufficient to overcome the strong presumption against the retroactive application of laws.[21]

As do the Interveners, Interveners' amici also cling to a single phrase included towards the end of the proponents' rebuttal section of Proposition 8's ballot arguments that stated that "only marriage between a man and a woman will be valid or recognized in California, regardless of when or where performed." (See ACB of American Center for Law & Justice at pp. 21-22.) In arguing that "a common-sense construction" (*id.* at p. 22) of this phrase supports retroactive application, these amici again fail to demonstrate, as they must, that the language is so clear that it could "sustain only one interpretation" — that the initiative was meant to apply retroactively. (*Myers*, *supra*, 28 Cal.4th at p. 841.) This one phrase, which is buried on page 57 of the ballot materials and which is the *only* part of the ballot materials that Interveners and amici could even argue touches on retroactivity, does not meet the required standard that the electorates' intent be shown by clear and unequivocal language. Rather, this phrase is in the *future* tense — indicating that it may address only marriages occurring after

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[21] The Six Law Professors additionally argue that the word "only" also requires retroactive application of Proposition 8, but the word "only" modifies only the word "marriage," limiting marriage to different-sex couples, and says nothing about the retroactive application of the Proposition. (ACB of Six Law Profs. at pp. 9-10.)

Proposition 8's passage — and it does not mention retroactivity or the marriages of same-sex couples that already existed by the time this ballot argument was written. (*See Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 229 [warning against inferring voter intent of retroactive operation "from 'vague phrases' ... [in] initiative measures and ballot pamphlets"] [citations omitted]; *see Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 981 [placing less weight on text "hidden in small print many pages back" in ballot pamphlet in considering electorate's reliance on text].)

Interveners' amici also argue erroneously that the mere absence of certain language makes the mandate for retroactive application plain. For example, the Six Law Professors point to other states' statutes prohibiting common law marriages, which included "grandfather" clauses that permitted existing common law marriages to remain intact despite the statutory prohibition of future common law marriages. (ACB of Six Law Profs. at pp. 14-19.)[22] But the lack of similar language in Proposition 8 hardly establishes that the voters intended Proposition 8 to apply retroactively. To the contrary, there is no reason to think that California voters would have had any idea about how other states' laws about common law marriage were written, let alone that the voters would have inferred anything at all from the absence from Proposition 8 of a phrase present in those other states' statutes.[23] Indeed, such an inference would

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[22] The inapt analogies Interveners' amici attempt to draw between the marriages of same-sex couples and slavery are baseless and too offensive to merit a substantive response.

[23] Nor can California voters reasonably be presumed to know the details of the federal government's treatment of polygamous marriages in 1862, the statutory language by which polygamous marriage was abolished,

reverse the presumption against retroactivity, requiring instead that the voters should be deemed to have intended retroactive application because of statements *not included* in Proposition 8.

Moreover, as the amicus brief of California Professors of Family Law explains, *California's* statute abolishing common law marriages *had no grandfather clause* expressly protecting existing common law marriages, and California courts nevertheless held that the statute *did not* apply retroactively to invalidate common law marriages entered prior to the effective date of the statute. (ACB of Profs. Fam. Law at pp. 26-27 [citing *Wells v. Allen* (1918) 38 Cal.App. 586, 589-590].) Thus, even in the extraordinarily unlikely event that California voters had complete knowledge of the historical wording of laws on common law marriage, as the Six Law Professors suggest they would have, those California voters likely would have assumed that the absence of a grandfather clause was *not* an indication that Proposition 8 would apply to existing marriages.

The argument of Interveners' amici about the absence of grandfather clauses underscores that the proponents of Proposition 8 never once mentioned existing marriages in the text of the Proposition or in any of the ballot materials, even though the proponents were well aware that thousands of marriages were being solemnized through the course of the campaign. The voters were provided with no information one way or the other about the effect of Proposition 8 on these marriages and, in the absence of such information, neither Interveners nor their amici can point to

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or whether that change in law was given retroactive effect. The National Legal Foundation's argument about those marriages (ACB of Nat'l Legal Found. at pp. 8-10) is irrelevant to determining whether California voters intended Proposition 8 to apply retroactively.

an "unequivocal and inflexible" indication of retroactivity, as is required here. (*Evangelatos*, *supra*, 44 Cal.3d at p. 1207.)

3. The Briefs of Interveners' Amici Demonstrate That Proposition 8 Is Ambiguous With Respect To Retroactivity And Therefore Cannot Be Applied To Existing Marriages.

The lack of clarity regarding the electorate's intent to apply Proposition 8 to existing marriages is further illustrated by the very briefs of Interveners' amici. Although Interveners' amici who address the issue of retroactivity all insist that Proposition 8 is unambiguous on the subject of existing marriages, their myriad and divergent understandings of the impact of Proposition 8 on existing marriages of same-sex couples actually demonstrate precisely the opposite. Consider:

- According to the Campaign for California Families, Proposition 8 declares that the marriages of same-sex couples are not, and never were, properly called "marriages." (ACB of Campaign for Cal. Families at pp. 18-19.) This suggests that same-sex couples with marriages solemnized prior to the election were never actually married, and that they never had any of the rights incident to marriage either.

- The Eagle Forum Education and Legal Defense Fund argues with itself, contending on the one hand that the prior marriage of a same-sex couple should be considered "void from the beginning" and "a legal nullity" (ACB of Eagle Forum at p. 18), and on the other hand that Proposition 8 effects only a change in "nomenclature" (apparently leaving previously married couples with at least the marriage-like rights provided under California's domestic partnership statutes) (*id.* at p. 21). The Eagle Forum also draws a distinction between parties and non-parties to *In re Marriage Cases*, arguing that the former are entitled to recognition of their marriages between solemnization and Election Day, but "cannot claim continued recognition of their same-sex marriages" (*id.* at p. 29), while the latter are entitled to no

recognition of their marriages because "*Marriage Cases* has lost its precedential value" (*id.* at p. 28).[24]

- The National Legal Foundation argues that some actions arising out of the marriages of same-sex couples may be "void" and others "voidable." (ACB of Nat'l Legal Found. at p. 10.)

- The American Center for Law & Justice, together with three Congressmen, assert that whereas "the 'marriages' of same-sex couples performed between June and November were (past tense) valid" during that period, Proposition 8 establishes that now "no subdivision of the state of California may (present tense) legally recognize those unions." (ACB of American Center for Law & Justice at p. 21.) The American Center for Law & Justice provides no further discussion of the effect of Proposition 8 on the various rights attendant to the marriage relationship, but appears to argue that previously married same-sex couples once had such rights but now do not.

- Six Law Professors argue that the Court should distinguish between "marital incidents," which survive Proposition 8, and "marriage itself," which they contend does not. (ACB of Six Law Prof. at p. 30.) They argue that the marriages of same-sex couples should be considered "valid for all intents and purposes" for the so-called "interim period" between the Court's decision in *In re Marriage Cases* and Election Day. (*Id.* at p. 6.) Thereafter, previously married same-sex couples should be deemed to have entered "putative marriages," meaning that they continue to "enjoy the same economic rights and benefits that a valid marriage would have provided the parties." (*Id.* at pp. 26-27.)

- Margie Reilly asserts that "the best thing to do would be to issue a mandate that all marriage certificates issued to same

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[24] Eagle Forum's lengthy discussion of res judicata (ACB of Eagle Forum at pp. 26-29) is entirely inapposite, because none of the groups of Petitioners, nor any of the Respondents, has relied for any argument on principles of res judicata.

> sex persons be traded in for a civil union certificate without cost to the couples affected." (ACB of Margie Reilly at p. 7.)

In sum, Interveners' amici, including six law professors, four non-profit organizations, three Congressmen, and one individual (collectively represented by six different sets of attorneys) have presented six fundamentally different approaches to the application of Proposition 8 to existing marriages. Clarity this is not. If even lawyers writing amicus briefs for the California Supreme Court in defense of Proposition 8 cannot agree as to whether and how the Proposition would apply retroactively to existing marriages, even when the question is posed directly to them, it is inconceivable that the voters would have had any kind of common understanding or intent on the subject, especially when "there is nothing to suggest that the electorate considered the issue of retroactivity at all." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1194.)

As the Court has explained, for a statute to apply retroactively, there must be a clear answer to "the further policy question of *how* retroactively the proposition should apply." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1217, emphasis in original.) Absent such an explanation, "a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective." (*Myers*, *supra*, 28 Cal.4th at p. 841 [quoting *INS v. St. Cyr* (2001) 533 U.S. 289, 320-321].) There is a good reason for this rule of construction: because the application of a new law "often entails . . . unanticipated consequences," it is not fair to upset the settled expectations of those who have relied upon existing laws unless "the electorate intended such consequences." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1218.) Stated differently, the presumption against retroactive application exists precisely to preclude new laws from upsetting settled expectations in

unintended ways. (*Ibid.*) As Interveners' amici demonstrate so effectively with their conflicting and confusing interpretations of the initiative and its effect on existing marriages, Proposition 8 is utterly ambiguous with respect to its impact on those marriages. It follows, therefore, that *any* application of Proposition 8 to existing marriages is bound to result in consequences that California voters did not intend, foresee, or even consider and that, therefore, Proposition 8 cannot be found to be retroactive in any way.

4. Proposition 8 Must Be Interpreted To Apply Only Prospectively To Avoid Conflicts With Several Constitutional Provisions.

Not only do Interveners' amici fail to establish that Proposition 8 must be read to apply retroactively, they also largely ignore the canon of construction requiring interpretation of constitutional provisions to avoid conflict with other constitutional provisions. (Petrs.' Corr. Reply Br. at pp. 52-70.) Importantly, none of Interveners' amici dispute the fact that retroactive application of Proposition 8 would conflict with the California Constitution's equal protection clause or the privacy and due process clauses' guarantee of the fundamental right to marriage. (*Id.* at pp. 53-55 [citing *Marriage Cases*, *supra*, 43 Cal.4th at pp. 818-823, 831-856].) Some of Interveners' amici do contend, however, that retroactive application of Proposition 8 would not conflict with (a) the California Constitution's due process clause's protection against the impairment of vested rights or (b) its contracts clause. (E.g., ACB of Six Law Profs. at p. 33 *et seq.*) But those arguments are easily refuted.

The Six Law Professors' brief, for example, devotes numerous pages to the observation that the "no fault" divorce laws of various states, which

changed the grounds on which the *parties* to a marriage could seek to terminate that marriage, have survived due process and contracts clause challenges. (See ACB of Six Law Profs. at pp. 34-43.) The Six Law Professors point specifically in this regard to *In re Marriage of Walton* (1972) 28 Cal.App.3d 108, which upheld the statutory adoption of "no fault" divorce in California in the face of a constitutional challenge. (*Id.* at p. 38.) However, as Petitioners explained in their Reply Brief (see Petrs.' Corr. Reply Br. at p. 57 fn. 22), the holding in *Walton* was based on the appellate court's conclusion that the change in law at issue "reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment" (*Walton, supra*, 28 Cal.App.3d at p. 113) — a basis that is not plausible here in light of this Court's rejection in *In re Marriage Cases* of *every* proffered justification for denying the fundamental right to marry to lesbians and gay men. (See generally Petrs.' Corr. Reply Br. at pp. 51-61.)

Petitioners also pointed out in their Reply Brief that none of the cases rejecting due process or contracts clause challenges to changes in laws regulating the marital relationship addressed changes as significant and foundational as the change to the 18,000 marriages that would be effected by any retroactive application of Proposition 8, against the will of both spouses. (Petrs.' Corr. Reply Br. at pp. 61, fn. 31, 57-58, fn. 22.) In response to this unassailable fact, the Six Law Professors' assert that the only difference between changes in divorce laws and Proposition 8 is the number of spouses objecting to the application of the new rule. (ACB of Six Law Profs. at p. 43 ["The difference is only quantitative, not qualitative, and not analytically significant."].) This response is simplistic, offensive, and meritless.

The legal, financial, and personal impacts that a retroactive application of Proposition 8 to existing marriages would have cannot adequately be dismissed as a simple matter of the "quantity" of objectors. (See, e.g., ACB of SF Chamber of Commerce, et al. at pp. 5-38 [describing effect retroactivity would have on businesses]; ACB of Children's Law Center at pp. 20-25 [describing impacts on children of same-sex couples].) *There is no case* — none cited by the Six Law Professors, and none of which Petitioners are aware — that suggests that a state may strip a class of married couples of their married status altogether, against the will of both spouses, unrestrained by due process or contracts clause concerns.[25] Because a retroactive application plainly would conflict with constitutional principles, including those established by the due process and contracts clauses, this Court must interpret Proposition 8 to avoid those conflicts.

5. The Continued Recognition Of The Existing Marriages Of Same-Sex Couples Raises No Conflict With Either The Federal Privileges And Immunities Clause Or The Federal Equal Protection Clause.

The Campaign for California Families, the Six Law Professors, and the National Legal Foundation suggest that continuing to recognize the existing marriages of same-sex California couples might somehow violate the privileges and immunities clause of the United States Constitution. (See ACB of Campaign for Cal. Families at pp. 20-21; ACB of Nat'l Legal Found. at pp. 2-6.) But, if this Court were to uphold Proposition 8 as a valid amendment, the Court should interpret Proposition 8 as not affecting

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[25] For an in-depth discussion of the contracts clause problems caused by retroactivity, see the amicus curiae brief of Billy DeFrank LGBT Community Center, et al.

recognition of *any* legal marriages of same-sex couples in existence as of November 4, 2008. Under such an interpretation, California would treat in-state and out-of-state marriages in precisely the same manner — recognizing as valid the marriage of any same-sex couple that had been legally solemnized as of November 4, 2008, regardless of where that solemnization took place or where the couple resided at the time of their marriage. The State's policies therefore would impose no "discriminatory restrictions in favor of state residents" that might violate the privileges and immunities clause. (*Hicklin v. Orbeck* (1978) 437 U.S. 518, 525.)[26] For the same reason, the National Legal Foundation's equal protection argument likewise has no merit.

III. CONCLUSION

In contrast to Interveners' amici, the amici supporting Petitioners provide this Court with an exceptional breadth of analysis that illuminates

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[26] Prior to November 5, 2008, California did not distinguish between same-sex couples married in California and those married elsewhere. There is no reason for California to begin treating those categories of couples differently now, and neither the text nor the ballot materials of Proposition 8 suggest that the electorate intended any such distinction. In *In re Marriage Cases*, this Court interpreted section 308.5 of the Fam. Code as "apply[ing] both to marriages performed in California and those performed in other jurisdictions," and it then found that statute to be unconstitutional in its entirety. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 797, 829.) Same-sex couples residing in California who had married elsewhere had every reason to rely upon that decision as having made their marriages valid in California. Such couples had no reason, for example, to consider obtaining a divorce so that they would be eligible to remarry in California. (Cf. Fam. Code, § 301 [providing that "unmarried" adults are "capable of consenting to and consummating marriage"].) In any event, as this Court recognized in *In re Marriage Cases*, treating out-of-state marriages differently from in-state marriages "would be difficult to square with governing federal constitutional precedents" interpreting the privileges and immunities clause. (*Id.* at p. 800.)

the unprecedented threat to fundamental constitutional principles at stake in this case.[27] The more than 40 amicus curiae briefs supporting Petitioners have been filed by leading civil rights and women's rights organizations, including the California State Conference of the NAACP, the NAACP Legal Defense and Educational Fund, the Mexican American Legal Defense and Educational Fund, the Asian Pacific American Legal Center, the Equal Justice Society, the Japanese American Citizens League, the Anti-Defamation League, Equal Rights Advocates, California Women Lawyers, the California Women's Law Center, the National Association of Women Lawyers, and the League of Women Voters of California.

Petitioners additionally are supported by 65 current and former California legislators, nine California local governments in addition to local governments who are Petitioners in related Case No. S168078, and more than three dozen bar associations, including the Los Angeles County Bar Association, the Mexican American Bar Association, and the Southern California Chinese Lawyers Association. The Association of Certified Family Law Specialists, the Northern California Chapter of the American Academy of Matrimonial Lawyers, and children's advocacy groups additionally filed briefs urging invalidation of Proposition 8.

Prominent legal scholars in California and across the country have also filed amicus briefs supporting and augmenting Petitioners' analysis. Those scholars include constitutional, political theory, and family law scholars from institutions including Stanford University, Harvard University, Yale University, the University of Pennsylvania, the University

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[27] For the Court's convenience, attached as Appendix A is a list of all amici that Petitioners were aware of at the time this brief was printed.

of California (Berkeley, Los Angeles, Hastings, Davis, and Irvine), the University of Southern California, Loyola, the University of San Francisco, Golden Gate University, Santa Clara University, Chapman University, Pepperdine University, and Rutgers. California businesses support Petitioners as well, including Google, Inc., Levi Strauss & Co., and the San Francisco Chamber of Commerce. They are joined by organized labor, including the California Federation of Labor, the California Teachers Association, and 52 other unions.

Many religious organizations and leaders also filed an amicus brief and related joinder application in support of Petitioners, including the California Council of Churches and nearly 900 religious organizations and individual faith leaders, from diverse traditions, to explain the threat that Proposition 8 poses to religious groups and individuals.

For the reasons explained above and in Petitioners' previous briefing, this Court should grant the Petition and declare that Proposition 8 is invalid.

Dated: January 21, 2009

Respectfully submitted,

SHANNON P. MINTER
CHRISTOPHER F. STOLL
MELANIE ROWEN
CATHERINE SAKIMURA
ILONA M. TURNER
SHIN-MING WONG
National Center for Lesbian Rights

GREGORY D. PHILLIPS
JAY M. FUJITANI
DAVID C. DINIELLI
MICHELLE FRIEDLAND
LIKA C. MIYAKE
MARK R. CONRAD
Munger, Tolles & Olson LLP

JON W. DAVIDSON
JENNIFER C. PIZER
TARA BORELLI
Lambda Legal Defense and
Education Fund, Inc.

ALAN L. SCHLOSSER
JAMES D. ESSEKS
ELIZABETH O. GILL
ACLU Foundation of Northern California

MARK ROSENBAUM
CLARE PASTORE
LORI RIFKIN
ACLU Foundation of Southern California

DAVID BLAIR-LOY
ACLU Foundation of San Diego and
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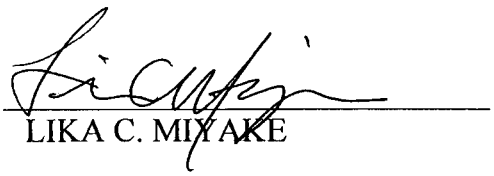
SHANNON P. MINTER

Attorneys for Petitioners Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmund Wu, James Tolen and Equality California

CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 8.204(c)(1)

Pursuant to California Rule of Court 8.204(c)(1), counsel for Petitioners hereby certifies that the number of words contained in this Petitioners' Answer To Briefs of Amici Curiae, including footnotes but excluding the Table of Contents, Table of Authorities, this Certificate and the attached Appendix A, is 11,864 words as calculated using the word count feature of the computer program used to prepare the brief.

By: 
LIKA C. MIYAKE

Appendix A

Amici Curiae in Support of Invalidating Proposition 8[1]

1. ***Alameda County Bar Assn., et al.,*** *Counsel: Lieff, Cabraser, Heimann & Bernstein, LLP*

Alameda County Bar Assn.; Bar Assn. of San Francisco; Los Angeles County Bar Assn.; Marin County Bar Assn.; Santa Clara County Bar Assn.; AIDS Legal Referral Panel; Asian American Bar Assn. of the Greater Bay Area; Asian American Justice Center; Asian Pacific American Bar Assn. of Los Angeles County; Bay Area Lawyers for Individual Freedom; California Employment Lawyers Assn.; California Rural Legal Assistance, Inc.; Central California Legal Services, Inc.; Charles Houston Bar Assn.; Consumer Attorneys of San Diego; East Bay La Raza Lawyers Assn.; Fred T. Korematsu Center for Law and Equality; Gay & Lesbian Advocates & Defenders; Impact Fund; Japanese American Bar Assn.s of Greater Los Angeles; Korean American Bar Assn. of Northern California; Korean American Bar Assn. of Southern California; Latina Lawyers Bar Assn.; Law Foundation of Silicon Valley; Lawyer's Club of San Francisco; Lawyers' Committee for Civil Rights of the San Francisco Bay Area; Legal Aid Society – Employment Law Center; Lesbian and Gay Lawyers Assn. of Los Angeles; Mexican American Bar Assn.; Minority Bar Coalition; National LGBT Bar Assn.; National Lawyers Guild San Francisco Bay Area Chapter; Public Justice; Queen's Bench Bar Assn. of San Francisco Bay Area; San Francisco Trial Lawyers Assn.; South Asian Bar Assn. of Northern California; South Asian Bar Assn. of San Diego; Tom Homann Law Assn.; Transgender Law Center

2. ***Reverend Dr. Frank M. Alton, et al.,*** *Counsel: Townsend & Townsend & Crew LLP*

Reverend Dr. Frank M. Alton; Immanuel Presbyterian Church; Netivot Shalom Synagogue; Reverend Dr. Jane Adams Spahr; Reverend Dr. John T. Norris; Reverend Dr. Glenda Hope; Rabbi David J. Cooper; Kehilla Community Synagogue; Reverend Laura Rose; Reverend Janet McCune Edwards, Ph.D.; Reverend Kathryn M. Schreiber; Reverend Susan A. Meeter, Mira Vista United Church of Christ; Nancy McKay; Rabbi Menachem Creditor; Reverend Dr. Paul Tellstrom; Irvine United Congregational Church; Covenant Network of Presbyterians; More Light Presbyterians

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[1] This Appendix lists briefs received by Petitioners as of the morning of January 21, 2009.

3. ***Amici Concerned with Gender Equality,*** *Counsel: Irell & Manella LLP*

Equal Rights Advocates; California Women's Law Center; Women Lawyers of Santa Cruz County; Lawyers Club of San Diego; Legal Momentum; National Assn. of Women Lawyers

4. ***Anti-Defamation League, et al.,*** *Counsel: Proskauer Rose LLP*

Anti-Defamation League; Asian Law Caucus; Americans United for Separation of Church and State; Japanese American Citizens League; Southern California Chinese Lawyers Assn.; Asian Pacific Islander Legal Outreach; Legal Aid Foundation of Los Angeles; Bet Tzedek Legal Services; Public Counsel; Orange County Asian Pacific Islander Community Alliance; National Senior Citizens Law Center; API Equality – LA; API Equality; API Parents and Friends of Lesbians and Gays (Los Angeles Chapter); Chicana Latina Foundation; American Jewish Committee; Barbara Jordan/Bayard Rustin Coalition; Asian Pacific Americans for Progress; BIENESTAR; Asian Law Alliance; National Asian Pacific American Women's Forum; Gay Vietnamese Alliance; South Asian Network; Chinese for Affirmative Action; Gay Asian Pacific Alliance; Gay Asian Pacific Support Network; Korean Resource Center; Asian Communities for Reproductive Justice; And Marriage for All; Korean Community Center of the East Bay; Advocacy Coalition of Tulare County for Women and Girls; Asian & Pacific Islander Wellness Center; Filipinos for Affirmative Action, Inc.; National Korean American Service & Education Consortium; Asian & Pacific Islander Family Pride; Ô-Môi; Asian and Pacific Islander American Health Forum; Asian Pacific AIDS Intervention Team; Asian Pacific Policy & Planning Council; Philippine American Bar Assn.

5. ***Asian Pacific American Legal Center, et al.,*** *Counsel: Professor Tobias Barrington Wolff; Bingham McCutchen LLP*

Asian Pacific American Legal Center; California State Conference of the NAACP; Equal Justice Society; Mexican American Legal Defense and Educational Fund; NAACP Legal Defense and Educational Fund, Inc.

6. ***Assn. of Certified Family Law Specialists and American Academy of Matrimonial Lawyers, Northern Cal. Chapter,*** *Counsel: Leslie Ellen Shear, CFLS; Garrett C. Dailey, CFLS; Katherine E. Stoner, CFLS; Shane R. Ford, CFLS*

7. ***C. Edwin Baker, Robert A. Burt and Kermit Roosevelt III,*** *Counsel: Paul, Weiss, Rifkind, Wharton & Garrison LLP*

8. ***Beverly Hills Bar Assn., et al.,*** *Counsel: Greines, Martin, Stein & Richland LLP*

Beverly Hills Bar Assn.; California Women Lawyers; Women Lawyers Assn. of Los Angeles; Women Lawyers of Sacramento

9. ***Billy DeFrank LGBT Community Center, et al.,*** *Counsel: Paul, Hastings, Janofsky & Walker LLP*

Billy DeFrank LGBT Community Center; L.A. Gay and Lesbian Center; Pacific Pride Foundation; Sacramento Gay and Lesbian Center; San Diego Lesbian, Gay, Bisexual, Transgender Community Center; San Francisco LGBT Community Center; Santa Cruz County Lesbian, Gay, Bisexual and Transgender Community Center; The Center Orange County

10. ***California Council of Churches, et al.,*** *Counsel: Coughlin, Stoia, Geller, Rudman & Robbins LLP; Eisenberg and Hancock, LLP*

California Council of Churches; The Right Reverend Marc Handley Andrus, Episcopal Bishop of California; The Right Reverend J. John Bruno, Episcopal Bishop of Los Angeles; General Synod of the United Church of Christ; Northern California Nevada Conference of the United Church of Christ; Southern California Nevada Conference of the United Church of Christ; Progressive Jewish Alliance; Unitarian Universalist Assn. of Congregations; Unitarian Universalist Legislative Ministry California

Clergy United, Inc., et al., *Counsel: Winston & Strawn LLP* (filed application to join Amicus Curiae Brief of California Council of Churches, et al.)

Clergy United, Inc.; CyberSynagogue.org; DignityUSA; Evangelicals Concerned; Integrity USA; Metropolitan Community Church, Region 6; More Light Presbyterians, the National Lesbian, Gay, Bisexual and Transgender Equality Network, Presbyterian Church (USA); Muslims for Progressive Values; New Ways Ministry (Roman Catholic); Progressive Faith Foundation; The Association of United Pagans; The Gay and Lesbian Vaishnava Association; The Jewish Social Policy Action Network; The Rabbinical Assembly; The Union for Reform Judaism; California Faith for Equality; Council of Churches of Santa Clara County; Diocese of California American Catholic Church; Druid House of Danu; Friends Committee on Legislation of California; Integrity of Northern California; Interfaith Clergy Coalition; Jews for Marriage Equality; National Council of Jewish Women California; Pacific Association of Reform Rabbis; Progressive Christians Uniting; Unitarian Universalist Assn. – Pacific Central District; Unitarian Universalist Assn. – Pacific Southwest District; United Synagogue of Conservative Judaism/Pacific Southwest Region; **approximately 160 local faith organizations and leaders; approximately 700 faith leaders**

11. ***California Federation of Labor, AFL-CIO, et al.,*** *Counsel: Weinberg, Roger & Rosenfeld, P.C.*

California Federation of Labor, AFL-CIO; National Federation of Federal Employees; Screen Actors Guild; Unite Here!; Alameda Labor Council, AFL-CIO; Fresno-Madera-Tulare-Kings Counties Central Labor Council, AFL-CIO; Los Angeles County Federation of Labor, AFL-CIO; Sacramento Central Labor Council, AFL-CIO; San Mateo County Central Labor Council, AFL-CIO; San Francisco Labor Council, AFL-CIO; South Bay Labor Council, AFL-CIO; California Federation of Teachers, American Federation of Teachers, AFL-CIO; California Faculty Assn.; California Nurses Assn./National Nurses Organizing Committee; American Federation of State, County, and Municipal Employees, District Council 57, AFL-CIO; American Federation of State, County, and Municipal Employees, District Council 2019, AFL-CIO; American Federation of State, County, and Municipal Employees, District Council 2428, AFL-CIO; American Federation of State, County, and Municipal Employees, District Council 3299, AFL-CIO; American Federation of State, County, and Municipal Employees, District Council 3916, AFL-CIO; American Federation of Teachers, Local 6119, Compton Council of Classified Employees; American Federation of Teachers, Local 6157, San Jose/Evergreen Faculty Assn., AFL-CIO; El Camino College Federation of Teachers, Local 1388, California Federation of Teachers, American Federation of Teachers, AFL-CIO; United Educators of San Francisco, AFT/CFT Local 61, AFL-CIO, NEA/CTA; Univ. Council – American Federation of Teachers; Assn. of Flight Attendants-CWA; Assn. of Flight Attendants-CWA, Council 97; Assn. of Flight Attendants-CWA, Council 99; Communications Workers of America District 9, AFL-CIO; Communications Workers of America, Local 9000, AFL-CIO; Communications Workers of America, Local 9503, AFL-CIO; Communications Workers of America, Local 9505, AFL-CIO; Communications Workers of America, Local 9421, AFL-CIO; Communications Workers of America, Local 9575, AFL-CIO; District Council of Ironworkers of the State of California and Vicinity; Jewish Labor Committee Western Region; Maintenance Cooperation Trust Fund; National Federation of Federal Employees, Local 1450; Operative Plasterers' and Cement Masons' Local 300, AFL-CIO; Operative Plasterers' and Cement Masons' Local 400, AFL-CIO; Pride at Work, AFL-CIO; SEIU California State Council; SEIU Local 521; SEIU Local 721; SEIU Local 1000; SEIU Local 1021; SEIU Local 1877; SEIU United Healthcare Workers West; Teamsters Joint Council 7, International Brotherhood of Teamsters; Teamsters Local 853, International Brotherhood of Teamsters; United Food and Commercial Workers, Local 5; Unite Here Local 19; United Steel Workers, Local 5, Martinez, CA; Univ.

Professionals and Technical Employees, Communications Workers of America, Local 9119, AFL-CIO

12. ***California National Organization for Women, et al.,*** *Counsel: Steptoe & Johnson LLP*

California National Organization for Women; National Organization for Women; Feminist Majority Foundation

13. ***California Teachers Assn.,*** *Counsel: Altshuler Berzon LLP*

14. ***Individual Chapman Univ. Organizations, Faculty, Staff, and Students, Orange County Equality Coalition, and Other Orange County Community Members Including Legally Married Same-Sex Couples,*** *Counsel: Crowell & Moring LLP, et al.*

Chapman Univ. Organizations: Chapman Outlaw, Chapman Queer-Straight Alliance, Chapman Feminists, and Chapman SPEAK (Students for Peaceful Empowerment, Action, and Knowledge); **Chapman Univ. Individual Faculty and Staff Members:** Deepa Badrinarayana, Rimvydas Baltaduonis, Marisa Cianciarulo, M. Katherine Baird Darmer, Kurt Eggert, Kelly Graydon, Elizabeth MacDowell, Steven Krone, Francine Lipman, Lynn Mayer, Dale A. Merrill, Nancy Schultz, Suzanne Soohoo and Ronald Steiner; Sherri Maeda-Akau, Lisa Clark, Sandra L. Hague, Brian Scott Hamilton, Annie Knight, Mark Lawrence, AJ Place, Erin M. Pullin, Demisia Razo, Tara Riker, Christopher J. Roach, and Gloria Rogers; **Chapman Univ. Individual Law and Undergraduate Students:** Zara Ahmed, Sasha Anderson, Elliot Balsley, James E. Blalock, Claudia Brena, Anne L. Card, Tiffany Chang, Doug Clark, Kimberlee Cyphers, Alexa Hahn-Dunn, Linnea Esselstrom, Sara Gapasin, Ashley Ann Hanson, Cortney Johnson, Anais Keenon, Breanna Kenyon, Samantha Kohler, Timothy Lam, Craig Leets Jr., David Nungary, Michelle Pascucci, Kitty Porter, Regina Rivera, Brian Rouse, Angela Wilhite, Preston Whitehurst, Emily Wilkinson, and Lauren Jessica Wolf; **Orange County Equality Coalition**; **Legally Married Same-Sex Couples:** James Albright and Thomas J. Peterson, Karla Bland and Laura Kanter, Tiffany Chang and Lindsey Etheridge, John Dumas and James Nowick, Hung Y. Fan and Michael David Feldman, and Jeffrey L. Van Hoosear and Gregory T. McCollum; **Committed Same-Sex Couples and Lesbian or Gay Individuals**: Heather Ellis and Rosanne Faul, Sharon Nantell and Judy Gordon and Linda J. May; **Univ. of California, Irvine Law School Dean Erwin Chemerinsky**; **Univ. of California, Irvine Professors:** James D. Herbert, Cécile Whiting, Dean Inada, Emily Samuelsen Quinlan

15. ***Children's Law Center of Los Angeles, et al.,*** *Counsel: Farella Braun + Martel LLP*

Children's Law Center of Los Angeles; Family Equality Council; Gay, Lesbian, Bisexual, and Transgender Therapists Assn.; Human Rights Campaign; Human Rights Campaign Foundation; Kids in Common; Legal Services for Children; National Black Justice Coalition; National Center for Youth Law; National Gay and Lesbian Task Force Foundation; Parents, Families and Friends of Lesbians and Gays, Inc.; San Francisco Court Appointed Special Advocates

16. ***The City of Berkeley, et al.,*** *Counsel: West Hollywood City Attorney*

The City of Berkeley; City of Cloverdale; City of Davis; Town of Fairfax; County of Humboldt; City of Long Beach; City of Palm Springs; County of Sonoma; City of West Hollywood

17. ***Civil Rights Forum,*** *Counsel: Lawrence A. Organ*

18. ***Constitutional and Civil Rights Law Professors,*** *Counsel: Hastings Civil Justice Clinic; Morrison & Foerster LLP*

Christopher Edley, Jr., Berkeley Law, Univ. of California Berkeley; Herma Hill Kay, Berkeley Law, Univ. of California at Berkeley; Joan H. Hollinger, Berkeley Law, Univ. of California at Berkeley; Laurence H. Tribe, Harvard Law School; Pamela S. Karlan, Stanford Law School; Lawrence C. Marshall, Stanford Law School; Kevin R. Johnson, UC Davis School of Law, Univ. of California at Davis; Joseph Grodin, Univ. of California, Hastings College of the Law; Shauna I. Marshall, Univ. of California, Hastings College of the Law; Miye A. Goishi, Univ. of California, Hastings College of the Law; Elizabeth Hillman, Univ. of California, Hastings College of the Law; Donna M. Ryu, Univ. of California, Hastings College of the Law; Marci Seville, Golden Gate Univ. School of Law; Eric C. Christiansen, Golden Gate Univ. School of Law; Patricia A. Cain, Santa Clara Law, Santa Clara Univ.; Jean C. Love, Santa Clara Law, Santa Clara Univ.; Margaret M. Russell, Santa Clara Law, Santa Clara Univ.; Kenneth L. Karst, Univ. of California at Los Angeles, School of Law; Gerald P. Lopez, Univ. of California at Los Angeles, School of Law; Mary Dudziak, Univ. of Southern California Gould School of Law; Christine Chambers Goodman, Pepperdine Univ. School of Law

19. ***The Constitutional Law Center of the Monterey College of Law,*** *Counsel: Joel Franklin; Michael W. Stamp; Michelle A. Welsh; Amy M. Larson*

20. ***John Emmanuel Domine, et al.,*** *Counsel: Law Offices of Stephan C. Volker*

John Emmanuel Domine; Bradley Eric Aouizerat; Betsy Jo Levine; Lisa Lynn Brand

21. ***Professors William N. Eskridge, Jr. and Bruce E. Cain,*** *Counsel: Brune & Richard LLP*

22. ***Faith in America, Inc.,*** *Counsel: Dickstein Shapiro LLP*

23. ***Erin Figueroa, Morgan Oliveira and Christina Demuth,*** *Counsel: Hausfeld LLP; Zelle Hofmann, Voelbel & Mason LLP*

24. ***Human Rights Watch, et al.,*** *Counsel: Perkins Coie LLP*

Human Rights Watch; Human Rights Watch California Committee North; Human Rights Watch California Committee South; Scott Long; Elizabeth J. Marsh; Darian W. Swig; David J. Keller; Amy J. Rao; Martin N. Krasney; Joan R. Platt; Hava Manasse; Shari Leinwand; Sid Sheinberg

25. ***Jewish Family Service of Los Angeles,*** *Counsel: Phalen G. Hurewitz; Mary K. Lindsay*

26. ***League of Women Voters of California,*** *Counsel: Pillsbury Winthrop Shaw Pittman LLP*

27. ***Legislative Amici Curiae,*** *Counsel: Gibson, Dunn, & Crutcher LLP*

California Senate President Pro Tempore Darrell Steinberg; past Senate President Pro Tempore Don Perata; Speaker of the Assembly Karen Bass; Assembly Speaker Emeritus Fabian Nunez; **California State Senators:** Elaine Alquist, Ron Calderon, Gilbert Cedillo, Ellen Corbett, Mark DeSaulnier, Loni Hancock, Christine Kehoe, Sheila Kuehl, Mark Leno, Alan S. Lowenthal, Jenny Oropeza, Alex Padilla, Fran Pavley, Mark Ridley-Thomas, Gloria Romero, Joe Simitian, Patricia Wiggins, Lois Wolk; **California Assemblymembers:** Tom Ammiano, Jim Beall, Jr., Patty Berg, Marty Block, Bob Blumenfield, Julia Brownley, Anna M. Caballero, Charles Calderon, Wesley Chesbro, Joe Coto, Mike Davis, Kevin de Leon, Mike Eng, Noreen Evans, Mike Feuer, Warren T. Furutani, Felipe Fuentes, Mary Hayashi, Edward P. Hernandez, Jerry Hill, Jared Huffman, Dave Jones, Betty Karnette, Paul Krekorian, John Laird, Lloyd E. Levine, Sally J. Lieber, Ted Lieu, Fiona Ma, Gene Mullin, William Monning, John A. Pérez, V. Manuel Perez, Anthony J. Portantino, Curren Price, Ira Ruskin, Mary Salas, Lori Saldana, Nancy Skinner, Jose Solorio, Sandre R. Swanson, Tom Torlakson, Mariko Yamada

28. ***James T. Linford,*** *in pro. per.*

29. ***Log Cabin Republicans,*** *Counsel: White & Case LLP*

30. ***Love Honor Cherish,*** *Counsel: Bate, Peterson, Deacon, Zinn & Young LLP*

31. ***J. Rae Lovko and Jason E. Hasley,*** *in pro. per.*

32. ***Professor Karl M. Manheim,*** *Counsel: Chapman Popik & White LLP; Cooley Godward Kronish LLP*

33. ***Marriage Equality USA,*** *Counsel: Hoenninger Law; Shay Aaron Gilmore*

34. ***Steven Mattos, et al.,*** *Counsel: Dennis W. Chiu*

Steven Mattos; Amor Santiago; Harry Martin; Paul J. Dorian

35. ***Our Family Coalition and COLAGE,*** *Counsel: Sullivan & Cromwell LLP*

36. ***Pacific Yearly Meeting of the Religious Society of Friends, et al.,*** *Counsel: Bryan Cave LLP*

Pacific Yearly Meeting of the Religious Society of Friends; Santa Monica Monthly Meeting of the Religious Society of Friends; Orange Grove Monthly Meeting of the Religious Society of Friends; Claremont Monthly Meeting of the Religious Society of Friends

37. ***Professors of Family Law,*** *Counsel: Michael S. Wald and Courtney G. Joslin*

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38. ***Professors of State Constitutional Law,*** *Counsel: Raoul D. Kennedy; Elizabeth Harlan*

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39. ***Sacramento Lawyers for Equality of Gays and Lesbians (SacLEGAL),*** *Counsel: S. Michelle May*

40. ***San Francisco Chamber of Commerce, et al.,*** *Counsel: Greenberg Traurig, LLP; Dewey & LeBoeuf LLP; Jason H. Farber*

San Francisco Chamber of Commerce; Google, Inc.; H5; Levi Strauss & Co.

41. ***San Francisco La Raza Lawyers Assn.,*** *Counsel: Troy M. Yoshino and Gonzalo C. Martinez*

42. ***Archbishop Mark Steven Shirilau, Ph.D.,*** *in pro. per.*

43. ***Suspect Class Californians,*** *Counsel: Robert Lott*

Zakary Akin; Naomi Canchela; Terrence Fong; Jessica Hirshfelder; Adrienne Loo; Carolyn Lott; Quang Nguyen; Agata Opalach; Jeff Pilisuk; Shalini Ramachandran; Vidhya Ramachandran; Joseph Robinson; Lee Schneider; Nathan Wilcox

Amici Curiae in Support of Upholding Proposition 8

1. ***Advocates for Faith and Freedom, et al.,*** *Counsel: Advocates for Faith and Freedom*

Advocates for Faith and Freedom; California Family Council; California Republican Lawyers Assn.; Members of the California Senate and Assembly: Anthony Adams, Joel Anderson, Paul Cook, Sam Cook, Chuck Devore, Michael D. Duvall, Jean Fuller, Danny D. Gilmore, Curt Hagman, Diane L. Harkey, Kevin Jeffries, Steve Knight, Doug LaMalfa, Dan Logue, Jeff Miller, Brian Nestande, Jim Nielsen, George Runner, Cameron Smyth, Audra Strickland, Michael N. Villines

2. ***American Center for Law and Justice and Three Members of the United States Congress,*** *Counsel: Chavez-Ochoa Law Offices, Inc.*

American Center for Law and Justice; Members of the United States Congress Wally Herger, Dan Lungren, and George Radanovich

3. ***The California Catholic Conference, et al.,*** *Counsel: Sweeney & Greene; The Becket Fund for Religious Liberty*

The California Catholic Conference; The Seventh-Day Adventist Church State Council; The United States Conference of Catholic Bishops; The Union of Orthodox Jewish Congregations of America

4. ***Campaign for California Families,*** *Counsel: Liberty Counsel*
5. ***Catholic Answers,*** *Counsel: Law Offices of Charles S. LiMandri; Bopp, Coleson & Bostrom*
6. ***Center for Constitutional Jurisprudence,*** *Counsel: Center for Constitutional Jurisprudence*
7. ***The Church of the Messiah***
8. ***Eagle Forum Education & Legal Defense Fund,*** *Counsel: Lawrence J. Joseph*
9. ***Family Research Council,*** *Counsel: Alliance Defense Fund*
10. ***The Fidelis Center for Law and Policy,*** *Counsel: Angela C. Thompson and Patrick Gillen*
11. ***Issues4Life Foundation,*** *Counsel: Alexandra M. Snyder*
12. ***Kingdom of Heaven***
13. ***Michael J. McDermott,*** *in pro. per.*
14. ***Steven Meiers,*** *in pro. per.*
15. ***National Legal Foundation,*** *Counsel: Eric I. Gutierrez*
16. ***National Organization for Marriage California,*** *Counsel: Institute for Marriage and Public Policy; Marriage Law Foundation*
17. ***Pacific Justice Institute,*** *Counsel: Pacific Justice Institute*
18. ***Professors of Law,*** *Counsel: Stephen Kent Ehat*

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19. ***Margie Reilly,*** *Counsel: James Joseph Lynch Jr.*
20. ***Samuel Rodrigues,*** *in pro. per.*
21. ***Traditional Values Coalition Education and Legal Institute and United States Justice Foundation,*** *Counsel: United States Justice Foundation*

PROOF OF SERVICE BY MAIL

I, Lori A. Nichols, declare:

1. I am over the age of 18 and not a party to the within cause. I am employed by Munger, Tolles & Olson LLP in the County of San Francisco, State of California. My business address is 560 Mission Street, Twenty-Seventh Floor, San Francisco, California 94105-2907 of San Francisco, State of California.

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PETITIONERS' ANSWER TO BRIEFS OF AMICI CURIAE

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Lori A. Nichols

Lori A. Nichols

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