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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.

CORRECTED REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. QUESTION ONE: IS PROPOSITION 8 INVALID BECAUSE IT CONSTITUTES A REVISION OF, RATHER THAN AN AMENDMENT TO, THE CALIFORNIA CONSTITUTION? 3

A. PETITIONERS AND THE ATTORNEY GENERAL AGREE THAT PROPOSITION 8 IS INVALID BECAUSE IT SEEKS TO ELIMINATE AN INALIENABLE RIGHT BASED ON A SUSPECT CLASSIFICATION. 3

B. PROPOSITION 8 IS NOT A VALID AMENDMENT BECAUSE IT ABROGATES THE CORE STRUCTURAL PRINCIPLE THAT THE FUNDAMENTAL RIGHTS PROTECTED BY THE CALIFORNIA CONSTITUTION MUST BE PROVIDED EQUALLY TO ALL. 4

1. Equality Is An Essential Structural Principle Of The California Constitution. 5

2. Proposition 8 Is A Revision Under This Court's Precedents Because It Substantially Alters The Fundamental Constitutional Principle Of Equality. 10

3. Proposition 8's Impact On The Principle Of Equality Requires No Speculation. 17

4. Proposition 8 Strips The Courts Of Their Traditional Authority To Enforce Equality. 19

C. INTERVENERS' OTHER ARGUMENTS ARE WITHOUT MERIT. 23

1. This Court Has A Duty To Enforce Constitutional Limitations On The Initiative-Amendment Power. 23

2. Interveners Erroneously Contend That The Equal Protection Rights Of Historically Disfavored Minorities Depend Upon The "Considered Judgment And Good Will" Of The Majority. 25

3. The Scope Of The Federal Constitution Is Irrelevant To The Question Of Whether And How Voters May Amend The California Constitution And Does Not Determine The Measure Of State Constitutional Rights. 27

4. The Decisions From Other Jurisdictions On Which Interveners Rely Are Not Persuasive. 29

II. QUESTION TWO: DOES PROPOSITION 8 VIOLATE THE SEPARATION OF POWERS DOCTRINE UNDER THE CALIFORNIA CONSTITUTION? 33

A. PROPOSITION 8 VIOLATES THE SEPARATION OF POWERS DOCTRINE. 33

III. QUESTION THREE: IF PROPOSITION 8 IS NOT UNCONSTITUTIONAL, WHAT IS THE EFFECT, IF ANY, ON THE MARRIAGES OF SAME-SEX COUPLES PERFORMED BEFORE THE ADOPTION OF PROPOSITION 8? 38

A. BECAUSE THERE IS NO CLEAR INDICATION THAT THE VOTERS INTENDED PROPOSITION 8 TO BE RETROACTIVE, IT CANNOT BE APPLIED TO EXISTING MARRIAGES. 40

1. Applying Proposition 8 In Any Way To Couples Who Married Prior To The Election Would Constitute A Retroactive Operation Of The Law. 41

2. Proposition 8 Cannot Be Applied To Existing Marriages. 44

a. The Presumption Against Retroactive Application Of Proposition 8 Cannot Be Overcome Except By An Express Declaration Of Retroactivity Or A Clear And Unequivocal Expression Of Such Intent, And None Exists Here. 44

b. Proposition 8 Contains No Express Declaration Or Clear And Unequivocal Indication That The Electorate Intended It To Apply Retroactively. 45

B. THE REQUIREMENT THAT CONFLICTING CONSTITUTIONAL PROVISIONS BE HARMONIZED COMPELS THAT PROPOSITION 8 NOT BE APPLIED TO EXISTING MARRIAGES. 52

1. The Court Must Interpret Proposition 8 To Avoid Conflicts With Other Constitutional Provisions. 52

2. Proposition 8 Should Be Interpreted Not To Apply To Existing Marriages So As To Minimize Conflict With The Equal Protection Clause And With The Privacy And Due Process Clauses' Guarantee Of The Fundamental Right Of Marriage 53

a. Minimizing Conflict With The Equal Protection Clause 53

b. Minimizing Conflict With The Privacy And Due Process Clauses' Protection Of The Fundamental Right Of Marriage 54

3. Proposition 8 Should Be Interpreted Not To Apply To Existing Marriages So As To Avoid Conflict With Due Process Protections Against The Retroactive Impairment Of Vested Rights. 55

a. Married Same-Sex Couples Enjoy Vested Property And Liberty Interests Protected By The Due Process Clause. 56

b. Interpreting Proposition 8 To Apply To Existing Marriages Would Conflict With Due Process Rights Of Same-Sex Couples. 58

(1) The State Has No Significant Interest In Invalidating Existing Marriages Of Same-Sex Couples. 58

(2) Same-Sex Couples Have Entered Into Valid Marriages In Legitimate Reliance On Existing State Law. 63

(3) Applying Proposition 8 To Invalidate Existing Marriages Would Result In Severe Disruption And Hardship. 65

4. Proposition 8 Should Be Interpreted Not To Apply To Existing Marriages So As To Avoid Conflict With The Contracts Clause. 68

CONCLUSION 70

CERTIFICATE OF WORD COUNT PURSUANT TO RULE 8.204(c)(1) 72

TABLE OF AUTHORITIES

Federal Cases

Barron v. Baltimore (1833)
32 U.S. (7 Pet.) 243 28

Cruzan v. Director, Mo. Dept. of Health (1990)
497 U.S. 261 7

Davis v. Passman (1979)
442 U.S. 228 35

Energy Reserves Group, Inc. v. Kansas Power & Light (1983)
459 U.S. 400 68

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290 U.S. 398 68

I.N.S. v. St. Cyr (2001)
533 U.S. 289 40

Landgraf v. USI Film Products (1994)
511 U.S. 244 42

Lindh v. Murphy (1997)
521 U.S. 320 .... 40, 44

Loving v. Virginia (1967)
388 U.S. 1 .... 28, 29

Maynard v. Hill (1888)
125 U.S. 190 69

Romer v. Evans (1996)
517 U.S. 620 .... 30, 31, 36

United States v. Security Industrial Bank (1982)
459 U.S. 70 40

Wayte v. United States (1985)
470 U.S. 598 59

West Virginia State Board of Education v. Barnette (1943)
319 U.S. 624 .... 26, 34

State Cases

20th Century Insurance Co. v. Garamendi (1994)
8 Cal.4th 216 .... 43, 44

Addison v. Addison (1965)
62 Cal.2d 558 62

Aetna Casualty & Surety Co. v. Industrial Accident Com. (1947)
30 Cal.2d 388 .... 41, 42

Albano v. Attorney General (2002)
437 Mass. 156 33

Amador Valley Joint Union High School Dist. v. State Bd. of Equalization (1978)
22 Cal.3d 208 11

Baluyut v. Superior Ct. (1996)
12 Cal.4th 826 59

Bess v. Ulmer (Alaska 1999)
985 P.2d 979 32

Bixby v. Pierno (1971)
4 Cal.3d 130 .... 20, 35

Board of Supervisors v. Lonergan (1980)
27 Cal.3d 855 52

Bolen v. Woo (1979)
96 Cal.App.3d 944 50

Bowens v. Superior Court (1991)
1 Cal.4th 36 .... 14, 15

Brause v. Bureau of Vital Statistics
(Alaska Super. Ct. Feb. 27, 1998, No. 3AN-95-6562 CI)
1998 WL 88743 32

Brosnahan v. Brown (1982)
32 Cal.3d 236 .... 12, 17, 18

Butt v. California (1992)
4 Cal.4th 668 28

Carman v. Alvord (1982)
31 Cal.3d 318 53

Cavanaugh v. Valentine (1943)
41 N.Y.S.2d 896 69

Chambers v. Ormiston (R.I. 2007)
935 A.2d 956 66

City and County of San Francisco v. County of San Mateo (1995)
10 Cal.4th 554 52

City of Pasadena v. Stimson (1891)
91 Cal. 238 9

Committee to Defend Reproductive Rights v. Myers (1981)
29 Cal.3d 252 9

County of Los Angeles v. S. Cal. Tel. Co. (1948)
32 Cal.2d 378 9

Crawford v. Bd. Of Ed. (1980)
113 Cal.App.3d 633 17

Dept. of Corrections v. Workers' Comp. Appeals Bd. (1979)
23 Cal.3d 197 53

Dept. of Mental Hygiene v. Kirchner (1964)
60 Cal.2d 716 9

Evangelatos v. Superior Ct. (1988)
44 Cal.3d 1188 .... passim

Ex parte Jentzsch (1896)
112 Cal. 468 9

Fourth La Costa Condominium Owners Assn. v. Seith (2008)
159 Cal.App.4th 563 68

Gay Law Students Assn. v. Pacfic Tel. & Tel. Co. (1979)
24 Cal.3d 458 .... 28, 29, 41

Glavinich v. Commonwealth Land Title Insurance Co. (1984)
163 Cal.App.3d 263 51

Goodridge v. Dept. of Pub. Health (2003)
440 Mass. 309 33

Gurnee v. Superior Ct. (1881)
58 Cal. 88 40

Hall v. Butte Home Health, Inc. (1997)
60 Cal.App.4th 308 68

Hawkins v. Superior Court (1978)
22 Cal.3d 584 .... 14, 15

Hellinger v. Farmers Group, Inc. (2001)
91 Cal.App.4th 1049 68

Hi-Voltage Wire Works, Inc. v. City of San Jose (2000)
24 Cal.4th 537 16

Hodges v. Superior Ct. (1999)
21 Cal.4th 109 50

Hollman v. Warren (1948)
32 Cal.2d 351 9

Ikuta v. Ikuta (1950)
97 Cal.App.2d 787 69

In re Lance W. (1985)
37 Cal.3d 873 .... 12, 13

In re Marriage Cases (2008)
43 Cal.4th 757 .... passim

In re Marriage Cases
(Cal. Supreme Ct., June 4, 2008, No. S147999)
2008 Cal. LEXIS 6807 63

In re Marriage of Bouquet (1976)
16 Cal.3d 583 .... 52, 58, 62, 63, 68

In re Marriage of Buol (1985)
39 Cal.3d 751 .... 57, 69

In re Marriage of Fabian (1986)
41 Cal.3d 440 .... 57, 62, 63, 65

In re Marriage of Heikes (1995)
10 Cal.4th 1211 .... 57, 62

In re Marriage of Powers (1990)
218 Cal.App.3d 626 69

In re Marriage of Walton (1972)
28 Cal.App.3d 108 .... 57, 58, 69

In re Sade C. (1996)
13 Cal.4th 966 5

In re Thierry S. (1977)
19 Cal.3d 727 53

Legislature v. Eu (1991)
54 Cal.3d 492 .... 12, 17, 18

Livermore v. Waite (1894)
102 Cal. 113 .... 10, 11, 13

Lowe v. Keisling (1994)
130 Or.App. 1 .... 29, 30, 31

Macedo v. Macedo (1938)
29 Cal.App.2d 387 69

Mannheim v. Superior Ct. (1970)
3 Cal.3d 678 52

Martinez v. County of Monroe (N.Y. 2008)
50 A.D.3d 189 66

Martinez v. Kulongoski (2008)
220 Or.App. 142 31

Max Factor & Co. v. Kunsman (1936)
5 Cal.2d 446 7

McFadden v. Jordan (1948)
32 Cal.2d 330 .... 11, 23

Miller v. McKenna (1944)
23 Cal.2d 774 56

Molar v. Gates (1979)
98 Cal.App.3d 1 21

Morrison v. State Board of Education (1969)
1 Cal.3d 214 28

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64 Cal.2d 529 13

Myers v. Phillip Morris Cos., Inc. (2002)
28 Cal.4th 828 .... passim

People v. Dawson (1930)
210 Cal. 366 9

People v. Frierson (1979)
25 Cal.3d 142 .... 12, 13, 14

Perez v. Sharp (1948)
32 Cal.2d 711 28

Professional Engineers in Cal. Govt. v. Kempton (2007)
40 Cal.4th 1016 20

Raven v. Deukmejian (1990)
53 Cal.3d 336 .... passim

Rosasco v. Com. on Jud. Performance (2000)
82 Cal.App.4th 315 43

Sail'er Inn, Inc. v. Kirby (1971)
5 Cal.3d 1 .... 9, 28

San Francisco Fire Fighters Local 798 v. City and County of San Francisco (2006)
38 Cal.4th 653 16

Sands v. Morongo Unified School Dist. (1991)
53 Cal.3d 863 27

Serrano v. Priest (1971)
5 Cal.3d 584 .... 52, 54, 55

Serrano v. Priest (1976)
18 Cal.3d 728 .... 9, 16

Spreckels v. Spreckels (1897)
116 Cal. 339 69

State of California v. Jones (1999)
21 Cal.4th 1142 24

Stouman v. Reilly (1959)
37 Cal.2d 713 28

Succession of Yoist (La. 1913)
61 So. 384 46

Superior Ct. v. County of Mendocino (1996)
13 Cal.4th 45 34

Tanner v. Oregon Health Sciences University (1998)
157 Or.App. 502 .... 30, 31

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53 Cal.3d 282 52

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Constitutions, Statutes and Rules

Cal. Const., art II, § 8 20

Cal. Const., art. I, § 1 .... 8, 11

Cal. Const., art. I, § 2 8

Cal. Const., art. I, § 20 8

Cal. Const., art. I, § 22 8

Cal. Const., art. I, § 24 28

Cal. Const., art. I, § 31 16

Cal. Const., art. I, § 4 8

Cal. Const., art. I, § 6 8

Cal. Const., art. I, § 7 35

Cal. Const., art. I, § 8 8

Cal. Const., art. I, § 9 68

Cal. Const., art. III, § 3 37

Cal. Const., art. IV, § 16 8

Cal. Const., art. IX, § 9 8

Cal. Const., art. XIII, § 1 8

Cal. Const., art. XVI, § 8 16

Cal. Const., art. XVIII, § 1 25

Cal. Const., art. XVIII, § 2 25

Cal. Const., art. XVIII, § 3 25

Cal. Const., art. XVIII, § 4 25

Fam. Code, § 297.5 66

Fam. Code, § 7611 67

Fam. Code, § 7613 67

Fam. Code, §§ 2300-5616 49

Family Code § 308.5 53

Prob. Code, § 5601 65

Prob. Code, § 6122 66

Prob. Code, § 6178 66

Prob. Code, §§ 6400-6414 66

U.S. Const., 14th Amend. 35

INTRODUCTION

This case presents a vital issue of first impression under the California Constitution: Is it consistent with our constitutional structure for a simple majority of the state's voters to deprive a specific group of citizens, identified on the basis of a suspect classification, of a fundamental right through the initiative process? According to Interveners, who proposed Proposition 8, the answer to that question is *yes* and stems from an assertedly all but untrammeled power of voter initiatives to limit or even eliminate constitutional liberties, either generally or selectively, and regardless of the nature of the right at issue or the group singled out for disfavored treatment.

Petitioners and the Attorney General disagree with that contention, for reasons that proceed from a common, and fundamental, premise regarding the nature of our constitutional system. In the view of Petitioners and the Attorney General, California's Constitution protects certain "inalienable rights" – rights that are so central to our constitutional scheme that they may not be abrogated, particularly with respect to a suspect classification, in the absence of a compelling state interest.

Petitioners and the Attorney General also concur that, in the structure of our constitutional system, the principles of equality and liberty occupy a central, and preferred, position. Thus, Petitioners join the Attorney General's argument as to why Proposition 8 is invalid, but also contend that the Constitution's distinction between revisions and amendments provides a narrower constitutional basis for protecting those central interests: The selective withdrawal of a fundamental right from a historically disfavored minority necessarily involves such an assault upon the structure of the state's Constitution and its system of government that it

may be accomplished, if at all, only through the intentionally more deliberative and multi-tiered process of a constitutional revision.

Both Petitioners and the Attorney General recognize that our constitutional democracy does not rest exclusively upon majority rule, as Interveners would have it. Rather, it rests upon two fundamental pillars that can, and *must*, co-exist: on the one hand, respect for the rights of the majority to determine the content of this state's laws, including to a large extent its Constitution (and including the right to amend statutes or the Constitution through the initiative process); and, on the other hand, recognition that the majority cannot selectively deprive persons of fundamental and inalienable rights, either absent a compelling interest (as focused on by the Attorney General) or without the safeguards inherent in the process of constitutional revision (as Petitioners explain).

Far from constituting an assault upon the sovereignty of the people, as Interveners contend, the principle that Petitioners advocate in this case falls squarely within the settled distinction between simple amendments that come within the established principles and structure of the Constitution, and changes, such as Proposition 8, that are irreconcilably at odds with the central tenet of equality upon which our constitutional system is based. Indeed, if the notion of a "qualitative" revision of our Constitution has any meaning at all, it must encompass rescission of fundamental rights from a disfavored minority of the citizenry. It is no answer to that assertion to observe that Proposition 8 is terse or that it applies only to one right and to one group of people. If the relatively narrow limitation upon the initiative power advocated here by Petitioners is not accepted with respect to the right of gay men and lesbians to exercise the fundamental right to marry, then it must be rejected, as well, with respect to any other fundamental right constitutionally guaranteed to any other disfavored or vulnerable group. Such a result would require deference

well beyond what is due to the voters' exercise of their power of initiative. This Court has never embraced a vision of the authority to diminish constitutional liberty by a simple majority vote as sweeping as that demanded by Interveners. Their position should be firmly rejected and Proposition 8 should be declared invalid.

ARGUMENT

I. QUESTION ONE: IS PROPOSITION 8 INVALID BECAUSE IT CONSTITUTES A REVISION OF, RATHER THAN AN AMENDMENT TO, THE CALIFORNIA CONSTITUTION?

A. PETITIONERS AND THE ATTORNEY GENERAL AGREE THAT PROPOSITION 8 IS INVALID BECAUSE IT SEEKS TO ELIMINATE AN INALIENABLE RIGHT BASED ON A SUSPECT CLASSIFICATION.

Petitioners and the Attorney General urge the Court to reach its result in this case by somewhat different paths; however, both proceed from a shared assumption about the fundamental nature of our constitutional system – an assumption that stands in sharp and irreconcilable contrast with the view proffered by the Interveners. Both Petitioners and the Attorney General maintain that, although popular sovereignty is of course a foundational premise of our state's Constitution, the people in their sovereign capacity long ago established core constitutional principles that limit the prerogatives of majority rule, including the majority's exercise of the initiative power. As has been long recognized with respect to constitutional democracies, "[a] majority, held in restraint by constitutional checks, and limitation . . . is the only true sovereign of a free people." (Lincoln, *First Inaugural Address* in 4 Collected Works of Abraham Lincoln (M. Peterson edit., 1984) p. 268.)

The principles embraced by the Attorney General in his answer brief, although presented in a different doctrinal framework, underscore the importance of the amendment-revision distinction relied upon by Petitioners. Indeed, whether analyzed under the process-based requirements of article XVIII or under the alternative analysis advanced by the Attorney General, the same question lies at the heart of this case: whether "the initiative power could . . . have been intended to give voters an unfettered prerogative to amend the Constitution for the purpose of depriving a disfavored group of rights determined by the Supreme Court to be part of fundamental human liberty." (Atty. Gen. Br. at p. 76.) In either case, the response, and the basic principle that governs this case, are the same: The discriminatory elimination of a fundamental right from a group defined by a suspect classification is not a change to the California Constitution that can be accomplished by a simple majority vote of the people.

B. PROPOSITION 8 IS NOT A VALID AMENDMENT BECAUSE IT ABROGATES THE CORE STRUCTURAL PRINCIPLE THAT THE FUNDAMENTAL RIGHTS PROTECTED BY THE CALIFORNIA CONSTITUTION MUST BE PROVIDED EQUALLY TO ALL.

At its core, Interveners' position is that, under the initiative process, our state's Constitution reserves to the people virtually unlimited power over the content of California law, including the prerogative – should a majority of the state's voters so choose – to restrict or eliminate, for a minority of the population, rights deemed fundamental and inalienable by the California Constitution. Under the view advanced by Interveners, once a majority of voters has spoken, the state's judiciary has no more than a ceremonial role to play in considering even the most transparent and

egregious infringement of minority rights otherwise guaranteed by our state Constitution.

That is an untenable proposition that confounds the most basic notions of our constitutional democracy and is fraught with breathtaking implications for the right of individuals and disfavored groups to be protected against abuse by popular majorities and for the central and historic role of this state's judiciary in preventing such abuse. Interveners' view of our constitutional system can be, and must be, firmly rejected through the application of settled constitutional principles.

1. Equality Is An Essential Structural Principle Of The California Constitution.

Interveners contend that equal protection is no different from any other right protected by the California Constitution and may be limited or eliminated outright by an initiative-amendment. (Inter. Br. at p. 17.) Notwithstanding Interveners' argument, however, the constitutional principle of equality is far more than a "particular individual right." (Inter. Br. at p. 20.) It is a foundational principle of our constitutional democracy, which presumes that all persons are inherently entitled to equal dignity and respect, and it is a "central aim of our entire judicial system." (*In re Sade C.* (1996) 13 Cal.4th 952, 966 [internal citation omitted].) The premise of equal rights is as essential to our system of government as the premise that all political power ultimately resides in the people. Thus, while the majority generally has broad power to determine statutory and even to a large degree constitutional policy, individuals and historically disfavored minorities have no less right to be protected against a selective deprivation of "the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 781-782 (hereafter *Marriage Cases*).)

Stated in terms pertinent to the amendment-revision dichotomy, the equality principle is an indispensable foundation of the California Constitution and our basic governmental plan. An initiative measure that, by its express terms, subverts that principle by selectively depriving a historically disfavored group of a fundamental right is a structural revision of our constitutional system; it may not be accomplished through the initiative process. While this limited check upon the initiative power is likely to be narrow in operation and rarely implicated, its importance cannot be overstated. If a bare majority of this state's voters can deprive lesbians and gay men of the right to marry through an initiative-amendment, then no minority is legally protected against the selective deprivation of constitutionally protected rights in the same manner. (See Inter. Br. at p. 23 [stating that the only protection from "step-by-step elimination of state constitutional protections" should be the "considered judgment and good will of the people of this state"].)

It is a basic tenet of our constitutional tradition that, in order for our constitutional democracy to function, courts must have the authority to enforce the requirement of equality, including the power to prohibit discrimination against historically vulnerable minorities. "Indeed, it is hard to think of any principle of our Constitution, not even the separation of powers or federalism, that has been more resoundingly reaffirmed . . . than the antidiscrimination principle." (Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)* (1991) 105 Harv. L.Rev. 77, 118-119.) Even for those who believe that "by and large legislatures [or the people] are less dangerous than judges in defining and enforcing" fundamental rights, there is widespread agreement that there must be "one fundamental exception." (*Id.* at p. 91.) "When an identifiable social group has been consistently and significantly underrepresented or in other ways excluded from the legislative process,

traditional political process cannot be relied upon to protect that group. The courts must therefore step in to guard the group from unjustified selective treatment, that is, discrimination." (*Ibid.*) When a court enforces the guarantee of equality to prevent disparate treatment of historically targeted minorities, it is not merely protecting individual rights, but preserving the integrity and legitimacy of the democratic process itself.

As the Attorney General emphasizes, one of the most important functions of equality in our constitutional system is to ensure that all Californians have the same opportunity to exercise the fundamental inalienable rights identified in our state's charter that constitute the very essence of democratic freedom. As this Court has explained, our Constitution promises not "absolute liberty," but "equal liberty." (*Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, 458.) The constitutional requirement that fundamental liberties must be protected equally for all is critical precisely because "the government rarely takes a fundamental right away from all persons." (Nowak & Rotunda, Constitutional Law (6th ed. 2000) p. 439.) Therefore, in defining the scope of constitutional rights applicable to all people, such as the right to be free from cruel or unusual punishment or not to be subject to unreasonable searches and seizures, the people have broad power to amend the California Constitution to place limits on many of those rights or, in some instances, even to eliminate such rights altogether. But when they do so, the requirement of equal protection ensures that they must take into account the knowledge that any limitations or loss of rights must apply to themselves as well as others. In the words of Justice Scalia, "[o]ur salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." (*Cruzan v. Director, Mo. Dept. of Health* (1990) 497 U.S. 261, 300 (conc. opn. of Scalia, J.).)

This structural check provided by the requirement of equal protection disappears if the government or the voters are permitted to eliminate a fundamental right selectively, only for a particular group or class of people. An initiative purporting to eliminate the fundamental right to marry only for the members of an unpopular minority – whether Muslims, members of a particular race, or gay people – jeopardizes the very foundation of our Constitution and the democratic freedom it protects by eliminating a crucial limitation on majority power that only the equality principle can supply.

Interveners deny that equality has a special constitutional status and plays a unique role in our constitutional system. In fact, however, equal protection is and always has been a central animating principle of the California Constitution. It is not, as Interveners assert, merely a discrete right derived exclusively from the equal protection clause of article I, section 7, which was added to the Constitution in 1974. The first words of article 1, section 1, which always have been a part of our state Constitution, establish an express principle of equality: "*All people* are by nature free and independent, and have inalienable rights." (Cal. Const., art. I, § 1, italics added.)[1] Accordingly, when enforcing fundamental rights – whether the right to marriage, freedom of speech and religion, or reproductive autonomy – this Court has held that fundamental rights must apply equally to all Californians. (See, e.g., *Marriage Cases, supra*, 43 Cal.4th at p. 824;

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[1] Equality is also expressly guaranteed by numerous other provisions of the California Constitution. (See, e.g., Cal. Const., art. I, §§ 2, 4, 6, 7, 8, 20, 22, 24, 31, subd.(a); *id.* art. IV, § 16; *id.* art. IX, § 9, subd. (f); and *id.* art. XIII, § 1, subd. (a).)

Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal.3d 252, 284; *Ex parte Jentzsch* (1896) 112 Cal. 468, 471-472.)

Far from constituting a relatively recent development in California constitutional law, as Interveners erroneously suggest, the requirement of equal protection was a central feature of state constitutional case law long before the addition of an express equal protection clause to the California Constitution in 1974. (See *Serrano v. Priest* (1976) 18 Cal.3d 728, 776 (hereafter *Serrano*) [explaining that sections 11 and 21 of former article I were "commonly known as the equal protection of the laws provisions of our state Constitution" before the enactment of current article I, section 7].) Indeed, some of this Court's most important state equal protection decisions predated the enactment of current Article I, section 7. (See, e.g., *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1 (hereafter *Sail'er Inn*) [holding that sex-based classifications are subject to strict scrutiny under the California Constitution]; *Dept. of Mental Hygiene v. Kirchner* (1964) 60 Cal.2d 716 [holding that charging the cost of public benefits "is arbitrary and violates the basic constitutional guarantee of equal protection" under the California Constitution].)[2] Consistent with that body of case law, the legislative history of article I, section 7 makes clear that the drafters of that measure, as well as the California Constitution Revision Commission that proposed adding an express equal protection clause to the California Constitution in 1974, considered the measure to be a codification and

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[2] In addition to sections 11 and 21 of former article I, California courts also interpreted and applied former article IV, section 25 to require equal protection. (See, e.g., *County of Los Angeles v. S. Cal. Tel. Co.* (1948) 32 Cal.2d 378, 388-391; *Hollman v. Warren* (1948) 32 Cal.2d 351, 357; *People v. Dawson* (1930) 210 Cal. 366, 369-370; *City of Pasadena v. Stimson* (1891) 91 Cal. 238, 249-252.)

strengthening of a pre-existing right – not the introduction of a new right. (Voters Pamphlet, General Election (Nov. 5, 1974) Argument in Favor of Proposition 7, p. 28.)

2. Proposition 8 Is A Revision Under This Court's Precedents Because It Substantially Alters The Fundamental Constitutional Principle Of Equality.

Interveners deny that an initiative measure that substantially alters the principle of equality can constitute a constitutional revision. According to Interveners, Petitioners' "entire argument is based on an over-reading of a few words in the nineteenth century case of *Livermore v. Waite* (1894) 102 Cal. 113 (hereafter *Livermore*). (Inter. Br. at p. 18.) In fact, however, this Court has repeatedly affirmed *Livermore*'s seminal holding that an amendment cannot change "the underlying principles" of the Constitution, including in its most recent decision invalidating an initiative as an improper amendment, *Raven v. Deukmejian* (1990) 53 Cal.3d 336 (hereafter *Raven*).

In *Livermore*, this Court held that, while a "revision" of the Constitution contemplates a substantial alteration either of "the underlying principles upon which it rests" or the "substantial entirety of the instrument," "the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (*Livermore*, *supra*, 102 Cal. at pp. 117-119.)[3] Interveners have not rebutted Petitioners' showing that Proposition 8 directly *contradicts* the core purpose of the

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[3] See also Barber, On What the Constitution Means (1984) p. 43 ["In our everyday discourse we distinguish amendments from fundamental changes because the word amendment ordinarily signifies incremental improvements or corrections of a larger whole."].

existing California Constitution, which is (and always has been) to protect the fundamental rights and freedoms of "[a]ll people." (Cal. Const., art. I, § 1.) In a manner virtually unprecedented in the contemporary history of our state, Proposition 8 seeks to exclude a discrete class of Californians from an otherwise universal human right – "one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution" and "a basic civil or human right of all people" that "embodies fundamental interests of an individual that are protected from abrogation or elimination by the state." (*Marriage Cases, supra*, 43 Cal.4th at pp. 781 and 818.) By any reasonable measure, such a radical departure from the core principles of the California Constitution cannot be deemed a mere "amendment."

A half-century after its decision in *Livermore*, in *McFadden v. Jordan* (1948) 32 Cal.2d 330 (hereafter *McFadden*), this Court found that the 1911 amendment that established the initiative-amendment power "had been drafted in light of the *Livermore* decision" (*id.* at p. 334), and had "scrupulously preserved" the distinction between amendment and revision set forth in that decision. (*Id.* at p. 348.) The Court applied that distinction to invalidate an initiative that would have added numerous provisions to the state Constitution and repealed or substantially altered many existing provisions. (*Id.* at pp. 334-345.) The Court held that, rather than being a change "within the lines of the original instrument," the proposed initiative would have "substantially alter[ed] the purpose" of the existing Constitution "clearly beyond the lines of the Constitution as [then] cast." (*Id.* at p. 350, quoting *Livermore*, *supra*, 102 Cal. at pp. 118-119.)

In *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, this Court relied upon *Livermore*'s definition of the "fundamental distinction between revision and amendment" (*id.* at p. 222), to clarify that a *qualitative* revision may be accomplished "even by a relatively simple enactment" if it achieved "far-

reaching changes in the nature of [California's] basic governmental plan." (*Id.* at p. 223; accord, *People v. Frierson* (1979) 25 Cal.3d 142, 186-187 (plur. opn. of Richardson, J.) (hereafter *Frierson*); *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 260; *In re Lance W.* (1985) 37 Cal.3d 873; *Legislature v. Eu* (1991) 54 Cal.3d 492, 506.)

In *Raven*, this Court applied that holding to invalidate, as an impermissible qualitative revision, an initiative measure that would have tied certain rights of criminal defendants under the state Constitution to those provided under the federal Constitution. The Court held that the measure would have "directly contradict[ed]" a "fundamental principle of constitutional jurisprudence" – namely, that this Court is the ultimate arbiter of the meaning of the California Constitution and therefore is not bound in construing that Constitution by decisions of the United States Supreme Court construing analogous federal constitutional provisions. (*Raven*, *supra*, 52 Cal.3d 336 at pp. 354-355.) The challenged measure would have imposed "such an imperative [of deference to the federal Constitution] for the first time in California's history." (*Id.* at p. 355.) In this case, Proposition 8 would directly contradict a different, but no less fundamental principle of our state's constitutional jurisprudence: the requirement of equal protection. Moreover, just as the principle of constitutional independence in *Raven* had been incorporated into the "preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections" (*id.* at p. 354), the principle of equal protection is likewise part of the "preexisting constitutional scheme" long used by courts to protect disfavored minorities from government discrimination – especially with regard to the selective denial of fundamental rights. Thus, as *Raven* and prior decisions make clear, "revisions involve changes in the 'underlying

principles' on which the Constitution rests," (*Id.* at 355 [citing *Livermore*, *supra*, 102 Cal. at pp. 118-119]), and Proposition 8 meets that test.

Contrary to Interveners' argument, this Court's decision in *Frierson* does not undermine that conclusion. Unlike Proposition 8, which eliminates marriage only for gay and lesbian people, the initiative in *Frierson* did not purport to restore the death penalty only for a minority based on a suspect classification. Interveners attempt to rebut that critical distinction by noting that the death penalty has been alleged to be "disproportionately imposed on racial minorities and the poor." (Inter. Br. at p. 18.) Therefore, they argue, this Court's decision in *Frierson* was tantamount to holding that "equal protection rights validly may be removed from a vulnerable class." (*Id.* at p. 19.) That argument has no merit. The death penalty statutes at issue in *Frierson* were facially neutral, as were the underlying statutes defining capital crimes. (See *Frierson, supra,* 25 Cal.3d at pp. 151-152; *id.* at p. 184.) Moreover, in contrast to *Mulkey v. Reitman* (1966) 64 Cal.2d 529, where this Court found that an initiative that appeared to be racially neutral was in fact intended to discriminate based on race, this Court made no such finding in *Frierson*. The same analysis applies to *In re Lance W.* Proposition 8's denial of equality to gay and lesbian people is manifestly different than denying criminal defendants the same ability to "seek suppression of unlawfully obtained evidence on the same basis as parties to civil litigation." (*In re Lance W.*, *supra*, 37 Cal.3d at p. 885.) Any person may end up a criminal defendant and would be subject to that same restriction. But under Proposition 8, only lesbians and gay men will be denied the freedom to marry.[4]

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[4] Virtually all statutes create a "classification" of persons affected by the statute, but the need for heightened equal protection scrutiny arises only where the law targets an independently identifiable group that has been

Interveners also misleadingly assert that the initiative in *Frierson* "precluded a state constitutional challenge based on equal protection." (Inter. Br. at p. 13.) In fact, while the initiative may have precluded a *facial* challenge to the death penalty based on equal protection, this Court specifically held that the courts retained "broad powers of judicial review of death sentences to assure that each sentence has been properly and legally imposed and to safeguard against arbitrary or disproportionate treatment." (*Frierson, supra,* 25 Cal.3d at p. 187.) Indeed, there can be no doubt that this Court today retains full authority to invalidate a death sentence imposed because of a defendant's race, gender, religion, sexual orientation or any other suspect characteristic. In contrast to the initiative in *Frierson,* if permitted to stand, Proposition 8 would not permit gay and lesbian individuals or couples who wish to marry to allege that their exclusion from that right violates equal protection either in a particular case or as a general rule.

The Attorney General also is wrong to suggest that this Court's decisions in *Raven* and *Bowens v. Superior Court* mean that Proposition 8 amends rather than revises the Constitution. The people passed Proposition 115 partly in response to this Court's holding in *Hawkins v. Superior Court* (1978) 22 Cal.3d 584 that criminal defendants who were charged by information rather than by indictment, and who consequently did not receive the protections of a postindictment preliminary hearing, did not receive equal protection of the laws. (*Bowens v. Superior Court* (1991) 1

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subject to a history of discrimination based on a characteristic with no bearing on the group's ability to contribute or participate in society. (See *Marriage Cases, supra*, 43 Cal.4th at pp. 842-843 [discussing criteria for suspect classifications].)

Cal.4th 36, 44-46 (hereafter *Bowens*).) While this Court's decision in *Bowens* recognizes the change effected by this portion of Proposition 115 (*id.* at p. 39-44), and while *Raven* said in dicta that this portion of Proposition 115 did not effect a revision (*Raven, supra,* 52 Cal.3d at p. 350), the change brought about by Proposition 115 and discussed in *Bowens* and *Raven* is fundamentally different from that wrought by Proposition 8.

Unlike Proposition 8, neither Proposition 115, nor the holding in *Hawkins*, involved a suspect classification. (See *Bowens*, *supra*, 1 Cal.4th at p. 42 ["Clearly, the system of prosecution contemplated by article I, sections 14 and 14.1 of the California Constitution does not single out a suspect class within the meaning of [the federal equal protection] definition."].) Even after Proposition 115, prosecutors cannot charge all Asian defendants one way and all white defendants another way. If Proposition 115 *had* required prosecutors to draw suspect classifications – for example by charging all Christian defendants through indictment and all Muslim defendants through information – it would have worked the same kind of change to core principles of our governing plan that is presented by Proposition 8.

Accordingly, although "one may legitimately ask how the rule advocated by petitioners would be applied to [other] initiative measures" (Atty. Gen. Br. at pp. 51-53), the answer to that question is straightforward: Any measure that selectively withdraws a fundamental right only from the members of a group defined by a suspect classification is a revision. Neither the Interveners nor the Attorney General identify another initiative-amendment that falls within this definition. The Attorney General asks whether Proposition 98, which prescribed a formula establishing minimum funding requirements for public education, would be a revision under Petitioners' argument, given the "fundamental interest" in education under

the California Constitution. (See Cal. Const., art. XVI, § 8 [as amended by Proposition 98]; Atty. Gen. Br. at p. 52.) The answer to that question is no. Unlike Proposition 8, Proposition 98 did not implicate any constitutionally suspect class of citizens and, in any event, did not deny or limit a fundamental right. The Attorney General also asks, without suggesting a response, whether the provisions enacted by Proposition 98 could be amended or repealed by initiative amendment. (Atty. Gen. Br. at p. 52.) The answer is *yes* (assuming there were not some other constitutional problem with the amendment). The measure enacted by Proposition 98 merely sets forth a *manner* in which California helps to guarantee the fundamental right of education to all of its citizens, and there is no reason why the voters may not enact otherwise valid changes to that *manner* or completely repeal the provisions of Proposition 98, assuming that California were to continue to meet its constitutional obligation to make education available consistent with the requirements of equal protection. (See *Serrano*, *supra*, 18 Cal.3d at pp. 768-769 [recognizing that, subject to the constitutional requirements of equal protection, it is possible to change the manner in which the state satisfies the "fundamental [constitutional] interest in education"].)

Nor does Petitioners' argument implicate Proposition 209. (See Cal. Const., art. I, § 31.) This Court has found: "In approving Proposition 209, the voters intended [that measure], like the Civil Rights Act as originally construed, 'to achieve equality of [public employment, education, and contracting] opportunities' [citation] and to remove 'barriers [that] operate invidiously to discriminate on the basis of racial or other impermissible classification.'" (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 676 [quoting *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 561-562].) Proposition 209 may limit the manner in which the state can seek to *remedy*

certain equal protection violations; however, based on the authoritative construction of this Court, it does not deny any fundamental right based on a suspect classification. (*Ibid*; see also *Crawford v. Bd. Of Ed.* (1980) 113 Cal.App.3d 633, 652.)

Contrary to the Attorney General's suggestion, Petitioners' argument does not cast doubt upon the survival of Proposition 98 or 209, nor does it call into question the validity of all initiatives "affecting competing interests." (Atty. Gen. Br. at pp. 51-52.) Nor do Petitioners suggest that an initiative is a revision merely because it seeks to reverse a decision by this Court, or solely because it involves an important or fundamental right. (Atty. Gen. Br. at pp. 40-43, 48.) Instead, Petitioners advocate a limited principle based on the importance of equal protection in our constitutional framework: The electorate may not use the initiative-amendment process to strip a minority defined by a suspect classification of a fundamental constitutional right.

3. Proposition 8's Impact On The Principle Of Equality Requires No Speculation.

Contrary to the argument of Interveners, the impact of Proposition 8 on the California Constitution is apparent on the face of the measure. In prior cases, this Court has rejected challenges to initiatives where the asserted impact of a measure was based on factual speculation. For example, in *Legislature v. Eu*, *supra*, 54 Cal.3d 492, the petitioners speculated that an initiative imposing term and budget limits might result in "the eventual loss of experienced legislators," which might damage the "legislative process." (*Id.* at p. 509.) Concluding that "the future effects" of the measure posited by the petitioners were "dependent on a number of as yet unproved premises" (*id.* at p. 508), this Court rejected that challenge. (*Id.* at p. 512; see also *Brosnahan v. Brown*, *supra*, 32 Cal.3d 236 [finding that petitioners' predictions that a proposed "Victim's Bill of Rights" would

result in "judicial and educational chaos" were "wholly conjectural, based primarily upon essentially unpredictable fiscal or budgetary constraints"].)

That argument, however, does not pertain here, where the alteration of a core constitutional principle is present on the very face of the enactment in issue and where allowing the enactment to stand necessarily would establish a new rule of constitutional interpretation that transcends the facts of a particular case. Thus, what distinguishes this case from *Legislature v. Eu* and *Brosnahan v. Brown* is that upholding Proposition 8 would establish the precedent that, as a matter of state constitutional law, no legal barrier prevents initiative amendments from stripping away a fundamental right from the members of a group defined by a suspect classification.[5]

If Proposition 8 were allowed to stand, it may be that Californians would rest content with having barred gay and lesbian persons from the freedom to marry and would not seek to strip gay and lesbian persons of any additional rights, as Interveners speculate. (Inter. Br. at pp. 17, 23.) What is certain, however, and requires no speculation, is that gay and lesbian Californians would enjoy their remaining "rights" subject to the whim of a simple majority of the voters, rather than as a matter of secure guarantee under the California Constitution. The same would be true for

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[5] The Attorney General questions whether the conclusion that a measure is a revision should depend upon a court's previous conclusion that a right is fundamental or that certain forms of discrimination are suspect. (Atty. Gen. Br. at p. 45.) Petitioners do not contend that, for a measure to be considered a revision, a court must *previously* have held that the initiative deprives a group of a fundamental right based on a suspect classification. But when there already has been an authoritative construction of the very same language used in a particular measure, it is appropriate to consider that construction to determine whether the measure would effectuate a substantial alteration of our constitutional system on its face.

other historically disfavored minorities, who would no longer enjoy a secure right to equal liberty and equal citizenship under the California Constitution.

To hold that Proposition 8 can be enacted by a ballot initiative would be to authorize the death of equal protection by a thousand cuts. The question before this Court is not whether the elimination of the fundamental right to marry for gay and lesbian Californians, considered in isolation, undermines the entire principle of equal protection. To frame the question in such terms is to misunderstand the article XVIII inquiry. The issue before the Court, rather, is the broader structural question of whether it undermines the principle of equal protection to hold that any fundamental right can be selectively eliminated by simple ballot initiative from any historically disfavored minority group. It is not just the impact of Proposition 8 on a particular group, but the impact upon the California Constitution and all the people of California of allowing provisions like Proposition 8 to be enacted by ballot initiative that the Court must assess.

4. Proposition 8 Strips The Courts Of Their Traditional Authority To Enforce Equality.

Proposition 8 also must be deemed a revision because of the extent to which it strikes at the constitutional role of the judiciary.[6] It is quintessentially a judicial responsibility to ensure that the principle of equality is respected. (See *Marriage Cases*, *supra*, 43 Cal.4th at p. 860 ["it is the particular responsibility of the judiciary to enforce [the] guarantee[]" of equal protection] (conc. opn. of Kennard, J.).)

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[6] Petitioners explain in Section II below that Proposition 8 violates the separation of powers doctrine by preventing the judiciary from fulfilling its core constitutional function of enforcing equal protection.

This Court also has explained the link between the role of the judicial branch (within the system of checks and balances established by the separation of powers doctrine) and the protection of minority rights. In *Bixby v. Pierno* (1971) 4 Cal.3d 130, the Court said:

> The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate *and in particular to preserve constitutional rights whether of individual or minority, from obliteration by the majority.*

(*Id.* at 141, italics added.)[7]

Judicial enforcement of equal protection plays an important institutional role in our constitutional democracy by preventing political

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[7] In the separation of powers context, a voter initiative is a legislative power. When the voters enact an initiative amendment, they are not exercising their organic political sovereignty as they would in a constitutional convention or constitutional revision process. Rather, the initiative power is a species of legislative power – the power "to propose statutes and amendments to the Constitution and to adopt or reject them" (Cal. Const., art II, § 8, subd. (a).) Since the addition of the initiative power in 1911, this legislative authority to propose statutes and amendments has been shared by the Legislature and the electors. (See *Professional Engineers in Cal. Govt. v. Kempton* (2007) 40 Cal.4th 1016, 1045 [describing initiative constitutional amendment as embodying "a policy determination, made by a constitutionally empowered legislative entity, the electorate acting through its initiative power"]; Manheim, *A Structural Theory of the Initiative Power in California* (1998) 31 Loy. L.A. L. Rev. 1165, 1223 ["[T]he reason that initiative legislation cannot accomplish a revision of the California Constitution is that the initiative power is a mere legislative power, a constituent member of the broader, and more elemental political power. Despite the initiative's facial resemblance to the kind of direct act of self-governance that takes place in a convention, the people exercising their legislative power of initiative could no more vest judicial powers in the executive than could the legislature by passing a bill to that effect."].)

majorities from using the political process to discriminate against vulnerable minorities. When Legislators and voters must take into account that measures that burden or limit an important right must be imposed on themselves as well as others, they are more likely to be constrained by self-interest (or, in the case of legislators, the interests of their constituents) not to eliminate or diminish rights on which they (or those they care about) may depend. But, when the rights of only a discrete and historically disfavored minority are at stake, that built-in constraint does not exist. Legislators and voters alike may either disregard or overlook the impact of taking away the rights of people they see as different from themselves.[8] Accordingly, when majorities seek to eliminate rights only for a disfavored group, there is a heightened need for judicial vigilance to enforce the requirement of equality in order to check the potential abuse of majority power. (See, e.g., *Molar v. Gates* (1979) 98 Cal.App.3d 1 [courts must enforce equal protection in order to protect "the most fundamental interest of all, the interest in being treated by the organized society as a respected and participating member"] [internal quotations and citation omitted].)

Interveners contend that Proposition 8 effects no change in the role of the judiciary, because (they argue) the judiciary's role both before and after Proposition 8's enactment is to interpret the law in light of whatever

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[8] As this Court noted in *In re Marriage Cases*, it is by no means the case that discriminatory measures necessarily are rooted in animus or a desire to harm a particular group. To the contrary, "if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions." (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 853-854.)

that law (as enacted by the legislature or the people) may be. (See Inter. Br. at pp. 32-35.) That argument begs the question. Had the initiative at issue in *Raven* been upheld, one can readily imagine a future case in which a court in this state would be constrained to say: "Were we not bound by Proposition 115, we would find defendants' argument on this point persuasive. But the federal courts have interpreted the law differently and we are bound by Proposition 115 to take that interpretation as binding upon us in interpreting this provision of our state's law." Under Interveners' view, the state courts simply would be applying the law as given to them by the people in Proposition 115. However, Raven held that such a change in the substantive law worked such a fundamental change in their power of state courts that it could only be effectuated by a constitutional revision. Similarly, Proposition 8 imposes a different, but equally significant, limitation on the courts' constitutionally delegated authority to enforce equal protection.

Moreover, in assessing the impact of Proposition 8 on the power of the courts, it is immaterial that Proposition 8 did not "*expressly* . . . diminish the powers of the judicial system." (Atty. Gen. Br. at p. 48, italics added; see also Inter. Br. at p. 35.) The impact of Proposition 8 on judicial power is no less real simply because the drafters of the initiative did not make express reference to the courts or to equal protection, or because they couched Proposition 8 in the form of an affirmative grant of marriage only to heterosexual persons rather than as a denial of marriage to gay and lesbian persons. (Cf. *Marriage Cases*, *supra*, 43 Cal.4th at p. 850 ["The form in which a . . . prohibition on marriage is set forth does not justify different constitutional treatment"].)

Indeed, the central objective and result of Proposition 8 is to strip the judiciary of the power to enforce its declaration in *In re Marriage Cases* that the Constitution's equality guarantee, among other provisions, requires

that same-sex couples be permitted to marry. Consistent with this Court's observations regarding the central role of the judiciary in protecting the fundamental rights of disfavored minorities, there can be little doubt that Proposition 8 works a fundamental change in the constitutional authority and role of the courts. Such a change may be effected, if at all, only through a constitutional revision.

C. INTERVENERS' OTHER ARGUMENTS ARE WITHOUT MERIT.

1. This Court Has A Duty To Enforce Constitutional Limitations On The Initiative-Amendment Power.

Contrary to the argument of Interveners, voter initiatives have not been, and should not be, "judicially untouchable." The distinction between a revision and an amendment in article XVIII of the California Constitution represents the considered decision of the people of California that, despite the broad initiative power generally reserved for the people, certain fundamental changes to our Constitution can be enacted only through the more deliberative revision process. That distinction has been "a fixture of California constitutional law" for more than 150 years. (Grodin et al., The California State Constitution: A Reference Guide (1993) p. 18.) Despite many other changes to our Constitution, that distinction has been "scrupulously preserved" as a safeguard "against improvident or hasty (or any other) revision" by means other than those prescribed by the Constitution. (*McFadden*, *supra*, 32 Cal.2d at pp. 347-348.) Accordingly, this Court has recognized that article XVIII requires "constitutional 'revisions' to be accomplished by more formal procedures than are contemplated for mere constitutional 'amendments'" and has invalidated initiatives that violate that rule. (*Raven*, *supra*, 52 Cal.3d at p. 340; see also *McFadden*, *supra*, at p. 332.)

In *State of California v. Jones* (1999) 21 Cal.4th 1142, this Court rejected an argument similar to that made by Interveners here – namely, that, as a practical matter, an established limitation on the initiative power – in that case the single-subject rule set forth in Article III, section 8(d) – was "toothless." (*Id.* at p. 1158.) The Court rejected that position, cautioning that, although it had "sustained numerous initiative measures against a single-subject challenge, [the Court's] decisions emphatically have rejected any suggestion that initiative proponents are given blank checks" to disregard the limitations imposed by the single-subject rule. (*Id.* at p. 1157 [internal quotations and citations omitted].) The Court also rejected the notion that there is an inherent conflict between protecting the democratic process and enforcing constitutional limitations on the initiative power. Rather, the Court explained: The "proper application and enforcement of the single-subject rule is by no means inconsistent with the cherished and favored role that the initiative process occupies in our constitutional scheme, but on the contrary constitutes an integral safeguard against improper manipulation or abuse of that process." (*Id.* at p. 1158.)

The same principle applies here. There is no conflict between the deference owed to the initiative process and the longstanding prohibition against use of the amendment process to change the underlying principles of the Constitution. By enforcing that prohibition, this Court is not thwarting popular will; rather it is enforcing a limitation that the people have imposed upon themselves.[9]

This Court's careful enforcement of article XVIII in this case is warranted for an additional reason as well. In order for a revision proposed

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[9] See *Marriage Cases*, *supra*, 43 Cal.4th at p. 852 ["the provisions of the California Constitution itself constitute the ultimate expression of the people's will."].

by the Legislature to be enacted, it must pass through a number of checks involving both the Legislature and the people. Initially, a proposed revision must be approved by a two-thirds vote of both houses of the Legislature. (Cal. Const., art. XVIII, § 1.) Subsequently, it must be presented either to a constitutional convention (Cal. Const., art. XVIII, § 2) or to the electors and ratified by a majority of those voting in order to take effect. (Cal. Const., art. XVIII, § 4.) By contrast, the Legislature plays no role in the enactment of an initiative amendment, which takes effect automatically upon approval by a simple majority of the voters.[10] (Cal. Const., art. XVIII, § 3.) Because the Legislature has no voice or role in the initiative constitutional amendment process, judicial review "stands alone as a method for keeping the people's exercise of the initiative power within the bounds prescribed for it by the state constitution." (Tipps, *Separation of Powers and the California Initiative* (2006) 36 Golden Gate U. L. Rev. 185, 199.) The people of California have entrusted the courts with the responsibility of interpreting and applying those prescribed boundaries. Especially where an initiative amendment seeks to deprive a minority defined by a suspect classification of fundamental rights, it is essential that this Court fulfill its constitutional role.

2. Interveners Erroneously Contend That The Equal Protection Rights Of Historically Disfavored Minorities Depend Upon The "Considered Judgment And Good Will" Of The Majority.

Interveners provide no authority to justify the electoral rescission of fundamental rights *only as to a particular class of citizens based on a*

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[10] In this case, the improper enactment of Proposition 8 by initiative infringed upon the Legislature's constitutionally mandated role in the revision process. This Court should find Proposition 8 to be invalid for that reason as well.

suspect classification. In an effort to downplay the consequences of such an enactment, Interveners offer only an unfounded assertion that minority rights in California will somehow find adequate protection in the "considered judgment and good will of the people of this state." (Inter. Br. at 23.) But the rights of California minorities to equality under the law, particularly with respect to fundamental and inalienable rights, rest on the bedrock of our Constitution, not on the shifting sands of the ballot box. The Court must reject Interveners' argument if our Constitution is to maintain its position as a fundamental law that reflects enduring principles.

Not only does history rebut any notion that majorities can be relied upon, absent legal safeguards, to act fairly towards unpopular minorities,[11] but "goodwill" appears nowhere in our jurisprudence as a substitute for a resolute insistence upon the recognition of constitutional rights for all. In the words of Justice Jackson, the "fundamental rights" embodied in our constitution "may not be submitted to vote" and "depend on the outcome of no elections." (*West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 638.)

The strength of our Constitution ultimately resides in the ideals it cherishes and promotes. That measures like Proposition 8 have been rare in our state's history may well be the result of the power of our charter to help instill these values. But in any case, equal protection for historically disfavored minorities, enforced through robust judicial review, is not merely an historical anachronism or an abstract principle taught in law

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[11] One need only briefly consider not only the criminalization of same-sex intimacy and the exclusion of lesbian and gay people from many occupations, but also the history of the treatment of Chinese immigrants and, later, Japanese-Americans in California; the nation's treatment of Native Americans; Jim Crow laws; restrictions on women's employment; and the treatment of religious minorities across the world.

schools. Absent a revision of our Constitution, it is still a continuing and vital bulwark for the equal status of all citizens before the law.

3. The Scope Of The Federal Constitution Is Irrelevant To The Question Of Whether And How Voters May Amend The California Constitution And Does Not Determine The Measure Of State Constitutional Rights.

Interveners argue that Proposition 8's profound alteration to our state constitutional system may be disregarded because the federal Constitution will provide whatever "bulwark against the tyranny of the majority" may be needed. (Inter. Br. at p. 30.) At the outset, it should be noted that the potential availability of a federal remedy is irrelevant to the pure state law question presented here: whether Proposition 8 validly may be enacted by initiative. But, just as fundamentally, Interveners' suggested reliance on federal law fails to appreciate the central role played by the California Constitution and California's courts as independent guarantors of individual rights.

This Court has a long and proud history of interpreting the California Constitution to provide safeguards for Californians that do not depend on federal law. The Court has recognized that it is "independently responsible for safeguarding the rights of [California] citizens. State courts are, and should be, the first line of defense for individual liberties in the federal system." (*Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 906 [conc. opn. of Mosk, J.]; see also *ibid.* ["We are not a branch of the federal judiciary; we are a court created by the Constitution of California and we owe our primary obligation to that fundamental document. . . . State law and state constitutional principles should be our first, not our last, referent."].) Indeed, for most of our state's early history, before the Fourteenth Amendment was held to protect state citizens against actions by their governments, the California Constitution was the primary and often

exclusive source of protection for individual rights. (See *Raven*, *supra*, 52 Cal.3d at pp. 352-353; *Barron v. Baltimore* (1833) 32 U.S. (7 Pet.) 243; see also Grodin, *The California Supreme Court and State Constitutional Rights: the Early Years* (2004) 31 Hastings Const. L.Q. 141, 141-142.) Today, our Constitution expressly provides that its protections arise independently of federal law. (See Cal. Const., art. I, § 24 ["Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"].)

When appropriate, this Court has not hesitated to hold that the California Constitution provides greater insulation from state over-reaching than does the federal charter. (See, e.g., *Sail'er Inn*, *supra*, 5 Cal.3d at pp. 17-18 [holding that sex-based classifications are subject to strict scrutiny under the California equal protection clause]; *Butt v. California* (1992) 4 Cal.4th 668, 681-683 [reaffirming that California Constitution, unlike federal Constitution, requires strict equal protection scrutiny of classifications based on school district wealth].) In other instances, the Court has interpreted the California Constitution to protect individual rights years or decades before the United States Supreme Court eventually reached a similar conclusion under federal law. (Compare *Perez v. Sharp* (1948) 32 Cal.2d 711, with *Loving v. Virginia* (1967) 388 U.S. 1.)

Specifically with respect to gay and lesbian Californians, this Court has long been an independent voice requiring fair and equal treatment as a matter of state law, even when federal law lagged far behind. (See, e.g., *Stouman v. Reilly* (1959) 37 Cal.2d 713, 716 [holding that mere patronage of restaurant and bar by homosexuals was not sufficient to support suspension of liquor license based on injury to "public morals"]; *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 229 [holding that homosexual conduct does not in itself necessarily constitute immoral conduct or demonstrate unfitness to teach]; *Gay Law Students Assn. v.*

Pacfic Tel. & Tel. Co. (1979) 24 Cal.3d 458, 474-475 [holding that state equal protection guarantee prohibits public utility from arbitrarily excluding all gay men and lesbians from eligibility for employment].) This Court's independent interpretation of the state's Constitution and laws has long played an influential role in the development of the law throughout the nation, and its opinions are the most cited of any state high court in the country. (Dear & Jessen, *"Followed Rates" and Leading State Cases, 1940-2005* (2007) 41 U.C. Davis L. Rev. 683, 694.) Instead of deferring to the possibility that the federal Constitution may check the worst excesses of unrestrained majority rule, this Court must be vigilant to preserve the independent meaning of our state Constitution. To do otherwise would be to eviscerate the very notion of the California Constitution as an independent source of protection for citizens in our federal system.

4. The Decisions From Other Jurisdictions On Which Interveners Rely Are Not Persuasive.

Interveners urge this Court to rely on cases from Oregon and Alaska in which courts have held that initiatives similar to Proposition 8 were permissible constitutional amendments rather than revisions under their state's charters. (Inter. Br. at pp. 26-28.) Those cases are inapposite because, unlike in California, the high courts of Oregon and Alaska had never held that same-sex couples have a constitutional right to marry or that sexual orientation is a suspect classification. In addition, the reasoning in those cases is both unpersuasive and inconsistent with California law.

Neither of the two Oregon cases on which the Interveners rely provides meaningful guidance here. The first, *Lowe v. Keisling*, though decided less than a decade and a half ago, reflects an understanding of the rights of lesbian and gay persons that is eons away from current California law. (*Lowe v. Keisling* (1994) 130 Or.App. 1 (hereafter *Lowe*), review

dism. as moot (1995) 320 Or. 570.) In *Lowe*, the Oregon intermediate appellate court reversed a trial court ruling and permitted to be placed on a statewide ballot an ultimately unsuccessful proposed initiative that would have prohibited the "promotion of homosexuality" by the government and, in addition to prohibiting marriage by same-sex couples, would have provided that "[i]n the State of Oregon, including all political subdivisions and government units, minority status shall not apply to homosexuality; therefore, affirmative action, quotas, special class status or special classifications such as 'sexual orientation,' 'domestic partnerships' or similar designations shall not be established on the basis of homosexuality." (*Id.* at pp. 4-5.) Portions of that measure, of course, were eerily similar to Colorado's infamous Amendment Two, which was enacted by initiative and which the United States Supreme Court struck down in *Romer v. Evans* (*Romer v. Evans* (1996) 517 U.S. 620, 627, 633 (hereafter *Romer*) [describing "the change in legal status effected by this law" as "sweeping and comprehensive" and explaining that "[i]t is not within our constitutional tradition to enact laws of this sort"].)[12] In *Lowe*, decided two years before the U.S. Supreme Court's opinion in *Romer* and before any Oregon court had ever held that discrimination based on sexual orientation might be subject to heightened scrutiny under any provision of the state's constitution (see *Tanner v. Oregon Health Sciences University* (1998) 157 Or.App. 502, 524 (hereafter *Tanner*)), the Oregon intermediate appellate court was largely oblivious to the profundity and fundamental nature of the changes that the challenged initiative would have effected and simply declared, without real analysis, that the proposed measure would not

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[12] Petitioners do not cite *Romer* in order to raise a claim that Proposition 8 violates the federal equal protection clause, but only to underscore that *Lowe*'s reasoning was faulty.

constitute a revision. (*Lowe*, *supra*, 130 Or.App. at pp. 12-13.) The Oregon intermediate appellate court's outdated and conclusory determination in *Lowe* that the proposed measure in that case "would not result in the kind of fundamental change in the constitution that would constitute a revision" (*id.* at p. 13) is no more persuasive than the near-contemporaneous arguments of the state of Colorado in defense of the invalidated initiative in *Romer*. Moreover, the Oregon Supreme Court did not have occasion to rule on the merits of the revision argument because the voters' rejection of the initiative rendered the case moot before that state high court could decide the issue. (See *Lowe*, *supra*, 320 Or. at p. 572 [dismissing petition for review as moot because of the measure's failure, with three of seven justices dissenting on ground that intermediate appellate court opinion should be vacated].)

The more recent decision of the Oregon Court of Appeals in *Martinez v. Kulongoski* (2008) 220 Or.App. 142 (hereafter *Martinez*) is similarly unpersuasive because it relied heavily on *Lowe* to find that a ballot initiative placing in the Oregon constitution a prohibition of marriages between same-sex couples was not a revision. The Oregon Court of Appeals stated in that case: "Bluntly, if, as we held in *Lowe*, the proposed measure there was not a revision, Measure 36 cannot be a revision." (*Id.* at p. 155.) Although, at the time *Martinez* was decided – as noted above – a different panel of the same Oregon appeals court had held that sexual orientation is a suspect classification under the Oregon constitution (*Tanner*, *supra*, 157 Or.App. at p. 524), the *Martinez* court did not even cite to *Tanner*, but rather relied exclusively on *Lowe* to find that prohibiting same-sex couples from marrying was a less significant change than the one proposed by the (defeated) measure at issue in *Lowe*. (*Martinez*, at pp. 503-506.)

Nor is there any reason for this Court to find persuasive the cursory and unsupported determination of the Alaska Supreme Court that a ballot initiative to place a ban on marriage between same-sex couples in that state's constitution was an amendment, not a revision. (See *Bess v. Ulmer* (Alaska 1999) 985 P.2d 979.) The court's analysis of the marriage prohibition in that case consisted of two conclusory sentences. (See *id.* at p. 988 ["Under our hybrid analysis, this proposed ballot measure is sufficiently limited in both quantity and effect of change as to be a proper subject for a constitutional amendment. Few sections of the Constitution are directly affected, and nothing in the proposal will 'necessarily or inevitably alter the basic governmental framework' of the Constitution"] [internal footnotes and citations omitted].) Critically, no Alaska court has held sexual orientation classifications to be suspect. And, although an Alaska trial court had previously found that same-sex couples should be permitted to marry under the state's constitution (*Brause v. Bureau of Vital Statistics* (Alaska Super. Ct. Feb. 27, 1998, No. 3AN-95-6562 CI) 1998 WL 88743), no state appellate court had so held, and the Alaska Supreme Court did not even acknowledge the possibility that same-sex couples might previously have been entitled to marry under the Alaska constitution. (See *Bess v. Ulmer*, at p. 988.)

In California, by contrast, this Court expressly has recognized not only that discrimination on the basis of sexual orientation is constitutionally suspect, but that prohibiting same-sex couples from marrying violates fundamental protections of individual liberty guaranteed by our state's Constitution. (See *Marriage Cases*, *supra*, 43 Cal.4th at p. 850.) Because this Court is the nation's first state high court to declare that sexual orientation is a suspect classification, this is truly a case of first impression,

and the reasoning of other states' courts is no more persuasive here than it is binding.[13]

II. QUESTION TWO: DOES PROPOSITION 8 VIOLATE THE SEPARATION OF POWERS DOCTRINE UNDER THE CALIFORNIA CONSTITUTION?

A. PROPOSITION 8 VIOLATES THE SEPARATION OF POWERS DOCTRINE.

Equality is an essential foundation of our constitutional democracy, and California's existing form of government depends on both the existence of the equality principle and *the guarantee that it can be enforced.* As set forth in section I.B. above, if permitted to stand, Proposition 8 would deprive a minority group of fundamental constitutional liberties based solely on a suspect classification. Given the extraordinary changes Proposition 8 would make both to the core constitutional principle of equality and to the judicial role, Proposition 8 must be deemed a revision. In addition to failing to adhere to the revision process requirements of Article XVIII, however, Proposition 8 also is invalid for the related though distinct reason that mandating denial of equal protection of the laws based on a suspect classification and thereby preventing the judiciary from

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[13] Interveners also attempt to rely on *Albano v. Attorney General* (2002) 437 Mass. 156 (see Inter. Br. at pp. 27-28) in which, prior to its decision in *Goodridge v. Dept. of Pub. Health* (2003) 440 Mass. 309, the Massachusetts Supreme Judicial Court rejected a challenge to certification of an initiative that would have amended the Massachusetts constitution to prohibit marriage for same-sex couples. *Albano* has no relevance here, however, because the Massachusetts constitution does not distinguish between revisions and amendments. Moreover, the Massachusetts Supreme Judicial Court has not decided whether sexual orientation is a suspect classification under its charter. (See *Goodridge*, at p. 331.)

fulfilling one of its most important core functions of guaranteeing equal treatment violates the separation of powers doctrine under the California Constitution.

Like the guarantee of equal protection, the separation of powers doctrine is a foundational principle of the California Constitution and plays an essential, structural role in our democracy. The California Constitution has incorporated an explicit separation of powers provision since the inception of our state. (*Superior Ct. v. County of Mendocino* (1996) 13 Cal.4th 45, 52 [citing 1849 Constitution].) The current separation of powers clause, Article III, section 3 of the California Constitution, provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

There is an important connection between the separation of powers doctrine and the essential role that the guarantee of equal protection plays in our democracy by providing a structural check on the exercise of majority power. Although all branches of the government are charged with complying with the Constitution's equality principle, and although each branch of government may play an important role in enforcing the Constitution's guarantee of equal protection of the laws, *only the courts* have the ultimate authority to ensure that the laws are applied equally by requiring that the rest of the government comply with the Constitution's equality command. Equality is a "legal principle[] to be applied by the courts" (*West Virginia State Board of Education v. Barnette, supra,* 319 U.S. at p. 638), and enforcement of the Constitution's equality principle is a central aspect of the judicial function; indeed, it is the courts' "gravest and most important responsibility under our constitutional form of government." (*Marriage Cases*, supra, 43 Cal.4th at pp. 859-860 [conc. opn. of Kennard, J.].) As Justice Kennard has explained:

> There is a reason why the words "Equal Justice Under Law" are inscribed above the entrance to the courthouse of the United States Supreme Court. Both the federal and the state Constitutions guarantee to all the "equal protection of the laws" (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7), and it is the particular responsibility of the judiciary to enforce those guarantees. The architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups, and that the most effective remedy for this form of oppression is an independent judiciary charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection. (See *Davis v. Passman* (1979) 442 U.S. 228, 241, 99 S.Ct. 2264, 60 L.Ed.2d 846 [describing the judiciary as "the primary means" for enforcement of constitutional rights] . . . .)

(*Ibid.*; see also *Bixby v. Pierno, supra,* 4 Cal.3d at p. 141 [stating that "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 violates the separation of powers by altering the court's role as enforcer of equality. Proposition 8 does not just add a requirement of inequality to the Constitution, it also (and thereby) eviscerates the Court's function as guarantor of equality in the very circumstances where such a guarantee is most essential – where a bare majority takes a fundamental right away from a group selected on a suspect basis. Of course, the Court is assigned the task of enforcing all of the rights found in the constitution. But the Court guarantees equality not just because that term, like others, appears in the Constitution, but because enforcement of equality is one of the essential aspects of our form of government, one that the separation of powers is designed to protect. By requiring inequality and disabling the Court from doing anything about it, Proposition 8 fundamentally and impermissibly alters the Court's role among the branches of government.

The terms "legislative, executive, and judicial" in the delineation of "[t]he powers of state government" in article III, section 3, have substance. Given the importance of equality to our constitutional democracy and given the judiciary's unique ability to enforce the Constitution's equality mandate, it is apparent that the "judicial" power enumerated in Article, II, section 3 necessarily includes the authority to guarantee that the Constitution's core equality principle is provided effect.

If this Court permits Proposition 8 to stand in the California Constitution, then for same-sex couples who wish to marry, the state Constitution and California's courts will not be refuges from unequal treatment under the law, but will instead become enforcers of inequality. Under Proposition 8, in any case in which a same-sex couple were to seek equal treatment under the state's marriage laws, this state's courts would be required to refuse equal protection of the laws and instead enforce Proposition 8's imposition of inequality. Petitioners are aware of no voter-enacted initiative that has ever purported to accomplish any such thing in California. As the Supreme Court of the United States explained in the course of invalidating another state constitutional amendment that was enacted by initiative and that discriminated against gay and lesbian people:

> It is not within our constitutional tradition to enact laws of this sort. *Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.* "'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'"

(*Romer*, *supra*, 517 U.S. at p. 633, italics added [internal citation omitted].)

Proposition 8 would result in an unprecedented diminishment of the court's traditional authority to interpret and enforce the California Constitution's equality guarantees in order to protect minority rights. If permitted to stand, Proposition 8 would mean that, with respect to a right

that this Court has explained is inalienable under the state Constitution, the state's courts will not be able to provide equal treatment under state law to gay and lesbian Californians.

Because Proposition 8 does not purport to grant any branch other than the judicial branch power to enforce the Constitution's equality guarantee with respect to same-sex couples' rights to marriage, the exception clause of Article III, section 3 does not save Proposition 8 from invalidity as a violation of the separation of powers. (See Cal. Const., art. III, § 3 ["Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."].) Under a Constitution altered by Proposition 8, *no* branch of government will have the power to ensure equality for gay and lesbian Californians. Although Proposition 8 withdraws from the judicial branch the authority to enforce the requirement of equal protection with respect to same-sex couples who seek the right to marry, it does not transfer that power to another branch of government (for example, by authorizing the Legislature to determine whether same-sex couples can marry). It would be no answer to say that Proposition 8 transfers power to enforce equal protection for gay and lesbian Californians to the people, who may, if they wish, enact another measure to repeal Proposition 8. The possibility that the people may repeal an initiative always exists, but it does not eliminate the constitutional infirmities in the initiative.

Proposition 8 singles out lesbian and gay Californians in an attempt to exclude them not only from full equality, but also from the protection of the courts in enforcing the Constitution's equality guarantee. The separation-of-powers question that Proposition 8 poses is unprecedented. This Court should hold that, in light of the central role that equality plays in our constitutional democracy and the judiciary's central role in enforcing the Constitution's requirement of equality, the initiative power cannot be

used to enact a measure such as Proposition 8 that renders the judicial branch incapable of guaranteeing that the laws treat people equally.

III. QUESTION THREE: IF PROPOSITION 8 IS NOT UNCONSTITUTIONAL, WHAT IS THE EFFECT, IF ANY, ON THE MARRIAGES OF SAME-SEX COUPLES PERFORMED BEFORE THE ADOPTION OF PROPOSITION 8?

Most people believe that, when the rules change, those changes will affect only what happens in the future. Consistent with this common sense understanding, the canons of construction that guide constitutional interpretation include a strong presumption that an enactment applies only prospectively, not to past events or transactions, unless there is a clear expression of intent that the measure should apply retroactively. Proposition 8's ballot materials told voters that, if Proposition 8 passed, it would change the law by eliminating the right of same-sex couples to marry in California. If validly adopted, such a change in our state's law would have a dramatic impact on the rights of same-sex couples, given this Court's ruling in *In re Marriage Cases* that "the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own – and, if the family chooses, to raise children within that family – constitutes a vitally important attribute of the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 781.)

But voters were given no fair or clear warning that Proposition 8's dramatic change also would extinguish the vital rights of same-sex couples who married between the effective date of the Court's decision in *In re Marriage Cases* and the November election. The text of the measure said nothing about existing marriages and, even though same-sex couples

already were legally marrying in California when ballot arguments were submitted, the measure's proponents failed to inform voters unequivocally that those marriages also were on the chopping block.

Whether that was the result of political calculation or otherwise, this Court's long-standing jurisprudence establishes that the failure to drive home that those existing marriages might be affected means that Proposition 8's change cannot apply to those marriages. To rule otherwise would severely undermine policies going to the integrity and credibility of the electoral process. Construing Proposition 8 to apply to pre-existing marriages of same-sex couples would create needless conflicts with those married couples' rights to equal protection, due process, and privacy, and to their protected rights of contract. And for the more than 18,000 same-sex couples who reasonably believed that they would remain married unless they themselves chose not to be – and who took myriad actions in reliance on that belief – any construction of Proposition 8 that would limit the continued validity and recognition of their marriages would result in dashed expectations, much confusion, and potentially tragic consequences. Proposition 8's effort to change California's Constitution did not go that far. If the Court permits Proposition 8 to stand in any respect (which the Court should not do), the Court should construe Proposition 8 as having no effect on pre-existing marriages.[14]

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[14] If the Court agrees with Petitioners that Proposition 8 is not a valid amendment, then the Court will not need to reach any of the issues below concerning what effect, if any, Proposition 8 might have on marriages entered into by same-sex couples prior to November 5, 2008.

A. BECAUSE THERE IS NO CLEAR INDICATION THAT THE VOTERS INTENDED PROPOSITION 8 TO BE RETROACTIVE, IT CANNOT BE APPLIED TO EXISTING MARRIAGES.

As this Court emphasized well over a century ago, "[i]t is a well-settled rule of construction, applicable alike to constitutions and statutes, that they are to be considered prospective and not retrospective in their operation, unless a contrary intention clearly appears." (*Gurnee v. Super. Ct.* (1881) 58 Cal. 88, 91.) This established canon of interpretation applies to all measures, whether enacted by the legislature or the voters. (*Evangelatos v. Super. Ct.* (1988) 44 Cal.3d 1188, 1206-1209 (hereafter *Evangelatos*).)[15] Proposition 8 is thus presumed to operate only prospectively, absent an "'unequivocal and inflexible'" indication that the electorate intended it to be applied retroactively. (*Id.* at p. 1207 [citing *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79-80].) Any ambiguity about the electorate's intent must be resolved against retroactive application. (*Myers v. Phillip Morris Cos., Inc.* (2002) 28 Cal.4th 828, 841 (hereafter *Myers*) [citing *I.N.S. v. St. Cyr* (2001) 533 U.S. 289, 320 & fn. 45, and *Lindh v. Murphy* (1997) 521 U.S. 320, 328, fn. 4].)

An interpretation of Proposition 8 that would change the marital status of married same-sex couples, or that would limit, suspend, or eliminate any of the marital rights of couples who married prior to November 5th, would constitute a retroactive application of the initiative. Neither the text of Proposition 8 itself nor the ballot materials accompanying it demonstrate a "manifest intention" that Proposition 8

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[15] The presumption against retroactivity has been applied specifically to voter-approved ballot initiatives modifying the California Constitution. (*Rosasco v. Com. on Jud. Performance* (2000) 82 Cal.App.4th 315, 320-323 (hereafter *Rosasco*) [applying presumption against retroactivity and holding that initiative constitutional amendment was prospective only].)

should apply retroactively. (*Evangelatos*, *supra*, 44 Cal.3d at p. 1207.) Specifically, the proponents of Proposition 8 did not include in the language of the initiative a statement, for example, that "any marriages that same-sex couples may have entered in California before the adoption of this provision shall be of no effect hereafter" or anything else clearly indicating an intent that the initiative should apply to such marriages. Nor did they include any such statement in the ballot arguments accompanying the initiative, even though same-sex couples were already getting married at the time the ballot materials were drafted. Accordingly, even if Proposition 8 were a valid amendment (which it is not), the measure would need to be interpreted as applying only prospectively and as leaving intact the marital status and marital rights and obligations of couples who married prior to November 5th.[16] Notably, all of the state Respondents agree that this is the case.[17]

1. Applying Proposition 8 In Any Way To Couples Who Married Prior To The Election Would Constitute A Retroactive Operation Of The Law.

This Court has defined a retrospective law as one that "affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." (*Aetna Casualty & Surety Co. v. Industrial Accident Com.* (1947) 30 Cal.2d 388, 391 (hereafter *Aetna*).) An

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[16] Petitioner Equality California's membership includes many same-sex couples who married prior to November 5th. (See Kors Decl. ¶ 6, Petitioners' Motion for Judicial Notice In Support Of Petition For Writ, Appendix A at p. 54 (hereafter Petitioners' Appendix).) It therefore has standing to address the retroactivity of their marriages on their behalf. (See, e.g., *Gay Law Students Assn. v. Pacific Telephone & Telegraph Co.*, *supra*, 24 Cal.3d at 465.)

[17] See Atty. Gen. Br. at pp. 61-74; Mark B. Horton and Linette Scott's Return to Order to Show Cause at pp. 8-10.

application of Proposition 8 that would terminate the marital status or refuse to honor marriages existing as of November 4, 2008, "must be deemed retrospective" since it would "take[] away or impair[] vested rights acquired under existing laws . . . in respect to [a] transaction[] or consideration[] already past" – namely, the act of becoming married.[18] (*Myers*, *supra*, 28 Cal.4th at p. 839 [quoting *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 269].)

Interveners do not dispute that the marriages of same-sex couples existing as of November 4, 2008 were valid at the time. (See Inter. Br. at p. 35.) Yet they argue that Proposition 8 should be interpreted so as to terminate those marriages and to preclude the recognition of marriage-based rights and obligations *with regard to actions taken by or affecting married couples on or after November 5th.* (*Id.* at p. 36 [arguing that Proposition 8 affects the validity of those marriages "going forward"].) Such an interpretation would make Proposition 8 retroactive. As the Court of Appeal has stated, a new measure is retroactive if it would effect "a

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[18] The availability of domestic partnership is irrelevant to the issues presented here. First, not all same-sex couples who are married would be eligible for domestic partnership. (See *Marriage Cases*, *supra*, 43 Cal.4th at p. 805, fn. 24.) Second, consigning same-sex couples to domestic partnership would take away from them the equal dignity and respect that marriage provides. (*Id.* at p. 831.) Finally, the fact that same-sex couples would have to take affirmative steps to enter into a domestic partnership to *reacquire* many of the rights and obligations that had previously been conferred upon them through marriage is *itself* evidence that those marital rights would have been substantially affected. Thus, although domestic partnership may remain a (subordinate) option for some couples if Proposition 8 were given retroactive effect, there can be no plausible argument that its application to existing marriages would not substantially affect "rights, obligations, acts, transactions and conditions which [were] performed or exist[ed] prior to [its] adoption." (*Aetna*, *supra*, 30 Cal.2d at p. 391.)

substantive change in the *legal circumstances* in which an individual has already placed himself in direct and *reasonable* reliance on the previously existing state of the law." (*Rosasco*, *supra*, 82 Cal.App.4th at p. 322, emphasis in original.) Here, the interpretation of Proposition 8 urged by Interveners would preclude the ongoing recognition of marriages existing prior to November 5th and the various legal rights that have arisen and will arise since that date by virtue of those pre-existing marriages, and would thereby work "a substantive change in the legal circumstances" of those married couples. (*Ibid.*)

Interveners attempt to obfuscate the fact that their interpretation of Proposition 8 would have retroactive effect by scrupulously avoiding in their brief the use of the term "retroactive" and by suggesting that existing marriages of same-sex couples would not be "currently" valid or recognized but would not necessarily be "void." (Inter. Br. at pp. 37-40.) But Interveners' phrasing cannot negate that what they really now seek is the application of Proposition 8 so that, same-sex married couples will no longer have the marital rights and obligations or the married status they had on November 4th. This nullification of "the *future* legal consequences of past transactions" – in this case, the future legal consequences of previously solemnized marriages – would be a classic example of what this Court has described as "[s]econdary retroactivity." (*20th Century Insurance Co. v. Garamendi* (1994) 8 Cal.4th 216, 281 (hereafter *20th Century Insurance*).) Because this Court's decision in *20th Century Insurance* makes clear that the modification of the future legal consequences of past conduct constitutes retroactive operation of a law, any application of Proposition 8 that would deny future recognition of existing marriages – or future

acquisition of rights and obligations arising out of such marriages – would constitute a retroactive operation of the law.[19]

2. Proposition 8 Cannot Be Applied To Existing Marriages.

a. The Presumption Against Retroactive Application Of Proposition 8 Cannot Be Overcome Except By An Express Declaration Of Retroactivity Or A Clear And Unequivocal Expression Of Such Intent, And None Exists Here.

As discussed above, the presumption against retroactivity is neither flexible nor easily overcome. The proponents of Proposition 8 thus bear the heavy burden of showing that its retroactive application is required by "the unequivocal and inflexible import of [its] terms" (*Myers*, *supra*, 28 Cal.4th at p. 840), and that its meaning is "so clear that it could sustain only [an] interpretation" supporting retroactivity. (*Id.* at p. 841 [quoting *Lindh v. Murphy*, *supra*, 521 U.S. at p. 328, fn. 4].) If the Court finds that Proposition 8 is "ambiguous with respect to retroactive application," then it must construe the initiative "to be unambiguously prospective." (*Myers*, *supra*, 28 Cal.4th at p. 841.)

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[19] In contrast to this case, which presents the question whether the electorate intended Proposition 8 to operate retroactively, *20th Century Insurance* involved an initiative that was expressly intended to be applied retroactively, and thus the issue presented to the Court in that case was whether the intended retroactive application lawfully could be accomplished. (*20th Century Insurance*, *supra*, 8 Cal.4th at p. 240.)

b. Proposition 8 Contains No Express Declaration Or Clear And Unequivocal Indication That The Electorate Intended It To Apply Retroactively.

The fourteen words of Proposition 8 – "Only marriage between a man and a woman is valid or recognized in California" – do not say that the initiative should have retroactive effect. No form of the word "retroactive" or any expression of the concept of retroactivity is included in this "broad, general language." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1209, fn. 13.) The text is in fact silent concerning marriages entered into before November 5th.

Interveners claim that because "[t]here are no conditional clauses, exceptions, exemptions, or exclusions" included in the language of Proposition 8, it is "crystal" clear that the provision affects the 18,000 marriages entered into before November 5th. (Inter. Br. at p. 37.) But this Court has previously denied retroactive application to other similarly general, declarative texts, finding language that included no conditional clauses or exceptions to be too ambiguous to support retroactive application. For example, in *Myers*, this Court considered legislation rescinding a previous statutory grant to tobacco companies of immunity against certain product liability suits. The Court rejected the argument that the phrases "*there exists no statutory bar* to tobacco-related personal injury, wrongful death, or other tort claims against tobacco manufacturers . . . by California smokers or others *who have suffered or incurred injuries*" represented an "express legislative intent of retroactivity." (*Myers*, *supra*, 28 Cal.4th at pp. 842-843.) Similarly, in *Evangelatos*, this Court considered initiative language stating that, "[i]n any action for personal injury, property damage, or wrongful death . . . [e]ach defendant shall be liable only for [certain damages]." The Court held that the word "shall" did not require the statute to be given retroactive application, but was "intended

to reflect the mandatory nature of the provision." (*Evangelatos*, *supra*, 44 Cal.3d at pp. 1198, fn. 4, 1209, fn. 13.) The Court also held that the phrase "in any action" was insufficient to indicate an intent to apply the measure retroactively. (*Ibid.*; accord *Succession of Yoist* (La. 1913) 61 So. 384, 385 [holding that an antimiscegenation statute declaring "null and void" all marriages "between white persons and persons of color" would have "no retroactive effect as to marriages of that kind which had been previously consummated"].)

Moreover, any argument that the text of the initiative is meant to convey that it will invalidate *existing* marriages of same-sex couples is belied by the fact that the text is taken verbatim from a statute enacted in March 2000, years *before* any such marriages existed and more than eight years *before In re Marriage Cases*. The proponents of Proposition 8 chose to re-use that language despite the fact that *In re Marriage Cases* was pending at the time that they did so, so they must have known that it was possible that same-sex couples would marry before the November election. They thereby made a distinctly different strategic choice than the drafters of an unsuccessful proposed amendment to the Massachusetts Constitution that stated: "Persons of the same sex who married before the effective date of this Article shall be considered instead to have formed a civil union under section 3." (See http://www.mass.gov/legis/journal/jsj021104.htm, last visited January 2, 2009.)

Likewise, the official title and summary of Proposition 8, which says that the measure "[e]liminates [the] right of same-sex couples to marry," does not indicate that the initiative would have any effect at all on the rights, obligations, or status of couples who had already married. (See Petitioners' Appendix at p. 54.) Since they cannot point to any express language of retroactivity, Interveners are reduced to noting that the summary also states that the initiative "[p]rovides that only marriage

between a man and a woman is valid or recognized in California." (Inter. Br. at p. 39.) They then argue that this second statement would be redundant to the first unless it were interpreted to express a clear intent to apply Proposition 8 to existing marriages. (*Id.* at pp. 39-40.) However, this second sentence is itself ambiguous, because it does not explicitly address existing marriages. Further, the Attorney General who prepared this summary expressly rejects the interpretation proffered by the Interveners. (See Atty. Gen. Br. at pp. 65-71.) In short, the initiative's text and summary contain no guidance regarding retroactivity, much less the "unequivocal and inflexible statement of retroactivity that [the Court] requires." (*Myers*, *supra*, 28 Cal.4th at p. 843.)

The ballot materials that accompanied Proposition 8 are similarly devoid of the express, unequivocal language necessary for the initiative to apply retroactively. (See Petitioners' Appendix at pp. 55-57.) No form of the word "retroactive" or any similar word or concept appears anywhere in the ballot materials, and nothing in the "Argument in Favor of Proposition 8" expressly addresses the issue of retroactivity. For example, the proponents did not state, as the Interveners now assert, that the initiative "encompasses both pre-existing and later-created same sex . . . marriages . . . ." (Inter. Br. at 37), nor did they say anything else clearly indicating an intent to apply the measure to existing marriages. Indeed, presumably intentionally, they did not even mention anywhere in the ballot materials the same-sex couples with existing marriages.

In their argument and rebuttal, the proponents stated only that the measure would "restore the *definition* of marriage." (Petitioners' Appendix at pp. 56, 57.) Moreover, the proponents used only the future tense in their rebuttal arguments, indicating that "only marriage between a man and a woman *will* be valid or recognized in California, regardless of when or where performed." (*Id.* at p. 57, emphasis added.) Interveners now rely on

the phrase "regardless of when" to argue that Proposition 8 was intended to apply to existing marriages. (Inter. Br. at p. 40.) Yet not only was that phrase buried in the rebuttal argument in the ballot materials, but it is also ambiguous – it is at least as susceptible to the interpretation that marriages entered *after* Proposition 8's passage would not be valid or recognized, no matter when after Proposition 8 they were entered, as it is to the interpretation that existing marriages entered into *before* the passage of Proposition 8 would no longer be valid or recognized. The phrase is particularly ambiguous because it was not accompanied by any discussion about the possible impact of the proposition on existing marriages. It is certainly not the sort of express statement that unequivocally and inflexibly demands retroactive application. (See, e.g., *Evangelatos*, *supra*, 44 Cal.3d at pp. 1210-1211.)

In addition, Proposition 8 not only fails, as shown above, to provide any "reliable basis for determining how the electorate would have chosen to resolve . . . the broad threshold issue of whether the measure should be applied prospectively or retroactively," it also fails to answer "the further policy question of *how* retroactively the proposition should apply if it was to apply retroactively." (*Evangelatos*, *supra*, 44 Cal.3d at p.1217, emphasis in original.) If courts or public officials were to attempt to apply Proposition 8 retroactively, nothing in the initiative's language or ballot materials would indicate how they could or should do so, which is another strong reason for concluding that the measure cannot be considered retroactive. For example, the initiative and its ballot materials provide no indication of whether existing marriages should be treated as void *ab initio*, or, instead, whether state and local governments should continue to recognize a couple as having been married during the period prior to November 5th. Nor does Proposition 8 or the ballot pamphlet indicate whether retroactive application of Proposition 8 would eliminate all marital

rights; whether it somehow would provide domestic partnership rights or putative spouse rights in place of marital rights; or whether the effect of the initiative would depend on a future decision to be made by the married couples themselves, some of whom might choose to register for domestic partnerships if Proposition 8 were to be applied retroactively and some of whom might be ineligible to register or might choose not to do so because they consider such "second-class citizenship" unacceptable. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 855; see also Marin Decl. ¶ 7, Petitioners' Appendix at p. 36; Kors Decl. ¶ 9, Petitioners' Appendix at p. 55; North Decl. ¶¶ 7-8, Petitioners' Appendix at p. 39; Jacklin Decl. ¶¶ 6-7, 9, Petitioners' Appendix at pp. 15-16; Lawson Decl. ¶¶ 2, 7, Petitioners' Appendix at pp. 17-19; Llewellyn Decl. ¶ 7, Petitioners' Appendix at p. 22; Lyon Decl. ¶¶ 3-4, 7, 14, Petitioners' Appendix at pp. 24-26, 29.) Nor does Proposition 8 or its ballot materials indicate how termination of the pre-existing marriages would be effected, in contrast to the elaborate statutory scheme for dissolution of marriages. (Compare Fam. Code, §§ 2300-5616.)

In fact, Interveners *concede* that Proposition 8 does not establish a viable method for its retroactive application. (Inter. Br. at p. 41 ["To be sure, questions will arise about the status of legal rights and duties created by interim marriages."].) This obvious defect in the initiative *is itself a reason* why retroactive effect must be denied. As this Court has recognized, the presumption that a new law applies only prospectively is borne of a "recognition [of] the fact that retroactive application of a statute often entails . . . unanticipated consequences," and it "ensures that courts do not assume that the Legislature or the electorate intended such consequences unless such intent clearly appears." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1218.)

The proponents of Proposition 8 were not unaware that their initiative might raise these difficult questions regarding retroactive

application. To the contrary, as Interveners admit, the proponents placed the initiative on the ballot precisely because they recognized "the possibility that the *Marriages Cases* could result in Proposition 22 being invalidated," with the obvious consequence that many same-sex couples thereafter would marry. (Inter. Br. at p. 2.) Indeed, marriages of same-sex couples were already taking place when the proponents submitted their ballot arguments. The proponents had every opportunity to consider and to address the subject of retroactivity, and, if they had intended for the measure to apply to existing marriages of same-sex couples, they "could very easily have inserted such language in the [ballot materials]"; instead, they "chose not to do so." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1221 [quoting *Bolen v. Woo* (1979) 96 Cal.App.3d 944, 958-959]; see also *id.* at p. 1212.) To give the initiative retroactive effect anyway would be to impute to the voters an intent that there is no reason to believe they had. The people's initiative power would be undermined by such a judicial construction. The courts "may not properly interpret the measure in a way that the electorate did not contemplate"; a judicial construction of an initiative should be "not more and not less" than what the voters intended. (*Hodges v. Super. Ct.* (1999) 21 Cal.4th 109, 114.)

Interveners' argument that it was clear that the initiative was intended to apply retroactively is, of course, also belied by the myriad pre-election comments of public officials and press reports regarding the likely effect of the ballot measure, which asserted that Proposition 8 would *not* apply retroactively.[20] Although such public statements and reports are

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[20] See, e.g., Matier & Ross, *S.F. Boosts Weddings in Face of Prop. 8 Fears*, S.F. Chronicle (Oct. 19, 2008) p. B1 [describing large number of same-sex couples marrying in October, "prompted by state Attorney General Jerry Brown's assertion that even if Prop. 8 passes, same-sex marriages

obviously not binding authority with respect to the Court's interpretation of Proposition 8 and do not reflect a consensus that Proposition 8 would be applied prospectively only, they clearly at least reflect lack of clarity, meaning that the question must be resolved *against* retroactive application.[21] (*Myers, supra*, 28 Cal.4th at p. 841.)

In sum, neither the text of the initiative nor the accompanying ballot materials contain anything like the "express language or clear and unavoidable implication" of retroactivity that is required for the Court to find that the voters intended that Proposition 8 be applied retroactively. (*Evangelatos, supra*, 44 Cal.3d at p. 1208 [quoting *Glavinich v. Commonwealth Land Title Insurance Co.* (1984) 163 Cal.App.3d 263, 272].) In contrast to other cases where the Court found that legislative history or explicit findings indicated that the subject of retroactivity was considered by the enacting body, here there is "nothing in the election brochure materials which provide any comparable confirmation of an actual intention on the part of the drafters or electorate to apply the [proposition]

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performed before the election would still be valid"]; Egelko, *Prop. 8 Not Retroactive, Jerry Brown Says*, S.F. Chronicle (Aug. 4, 2008) p. B1 ["If voters approve a November ballot measure banning same-sex marriages in California, thousands of gay and lesbian weddings conducted since the state Supreme Court legalized the unions on May 15 will probably remain valid, Attorney General Jerry Brown said Monday."].

[21] See, e.g., Egelko, *If Prop. 8 Passes, What About Those Who Wed?*, S.F. Chronicle (Nov. 1, 2008) p. A1 [describing "the impact [of Prop 8] on as many as 16,000 gay and lesbian couples who have wed since June" as "less clear"]; Burger, *Prop 8: How Locals Want "Marriage" Defined*, The Bakersfield Californian (Oct. 4, 2008) [quoting law professors stating that "It's unclear whether Proposition 8 would eliminate same-sex marriages entered into between June 17 and Nov. 4" and that "there is significant uncertainty about the impacts of passage" but that "'[c]ourts usually don't apply" measures retroactively].

retroactively." (*Id.* at p. 1211 [distinguishing *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 588-591 (hereafter *Bouquet*), and *Mannheim v. Super. Ct.* (1970) 3 Cal.3d 678, 688-687].) Where, as here, both "the text of [the initiative] and the related ballot arguments are entirely silent on the question of retrospectivity," there is "no reason to depart from the ordinary rule of construction that new [measures] are intended to operate prospectively." (*Tapia v. Super. Ct.* (1991) 53 Cal.3d 282, 287.) Accordingly, the Court should hold that Proposition 8 cannot be given retroactive application and has no effect upon marriages of same-sex couples in existence prior to November 5, 2008.

B. THE REQUIREMENT THAT CONFLICTING CONSTITUTIONAL PROVISIONS BE HARMONIZED COMPELS THAT PROPOSITION 8 NOT BE APPLIED TO EXISTING MARRIAGES.

Proposition 8 also must be interpreted as not applying to existing marriages in order to minimize conflict with the equal protection, privacy, due process, and contract clauses of the California Constitution.

1. The Court Must Interpret Proposition 8 To Avoid Conflicts With Other Constitutional Provisions.

A well-established rule of constitutional construction requires this Court to interpret Proposition 8, if it is upheld, in a manner that harmonizes it with other constitutional provisions. (*City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563 (hereafter *San Francisco*) [courts are "constrained by [their] duty to harmonize various constitutional provisions"]; accord *Serrano v. Priest* (1971) 5 Cal.3d 584, 596.) In complying with its duty to harmonize constitutional provisions, a court first looks to whether any two constitutional provisions are potentially in conflict. (*Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 863.) Where "[s]ubstantial issues" of potential impairment or conflict appear,

courts must adopt a reasonable interpretation of the provisions that "avoids the constitutional issue inherent in a contrary construction." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 333 [citing *Dept. of Corrections v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 197, 207].) The law requires courts to interpret constitutional provisions to avoid such conflicts in order to "avoid the implied repeal of one provision by another" (*San Francisco*, *supra*, 10 Cal.4th at p. 563), and, even in the event of an "irreconcilable conflict," only permits implied repeals "to the extent of the conflict." (*In re Thierry S.* (1977) 19 Cal.3d 727, 744.) In other words, unless the intent to repeal earlier provisions is clear, courts must interpret constitutional amendments so as to minimize conflict with existing constitutional provisions.

2. Proposition 8 Should Be Interpreted Not To Apply To Existing Marriages So As To Minimize Conflict With The Equal Protection Clause And With The Privacy And Due Process Clauses' Guarantee Of The Fundamental Right Of Marriage.

a. Minimizing Conflict With The Equal Protection Clause.

The conflict between Proposition 8 and the equal protection clause is clear. This Court already determined that Family Code section 308.5, a statute adopted by initiative that had exactly the same text as Proposition 8, violated the equal protection clause. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 831-856.)

Interpreting Proposition 8 to apply to marriages entered by same-sex couples prior to November 5th is similarly at odds with California's equality guarantee. Specifically, interpreting Proposition 8 to apply to those marriages would cause couples in those marriages to be treated differently than different-sex couples married during that same period, based solely on the sexual orientation of the parties to the marriage.

Because, as the Court has held, treating same-sex couples unequally with regard to marriage violates the equal protection clause, an inextricable conflict between the mandates of the equal protection clause and Proposition 8 would result if Proposition 8 were applied retroactively.

Obviously, the conflict between Proposition 8 and the equal protection clause cannot be avoided with respect to persons who had not yet married by November 5th. As to them, Proposition 8 (if upheld), as the more recent and more explicit constitutional provision, is the law. But the conflict between Proposition 8 and the Constitution's equality guarantee that would be created by retroactive application to same-sex couples who already have married *can* be avoided – by construing Proposition 8 as not applying to existing marriages. Indeed, the "harmonization" principles discussed above *require* the Court to reach a reasonable interpretation of Proposition 8 that will minimize conflict with the equal protection clause, if and to the extent possible. (See *Serrano*, *supra*, 5 Cal.3d at p. 596.) Interpreting Proposition 8 in accordance with the strong presumption against retroactive application reconciles Proposition 8 and the equal protection clause to the extent possible.

b. Minimizing Conflict With The Privacy And Due Process Clauses' Protection Of The Fundamental Right Of Marriage.

There is also a clear conflict between Proposition 8 and the fundamental right to marry protected by the privacy clause and the due process clause. This Court has already held that the right to marry is a fundamental right of all Californians regardless of sexual orientation, which is guaranteed by the "substantive protections afforded by" the privacy clause and the due process clause. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 810, 818-819, 823.) The Court's discussion made clear that the fundamental right includes not only the right to enter into marriage, but the

right to *remain married* (see, e.g., *id.* at p. 817 [describing marriage as "afford[ing] official governmental sanction and sanctuary to the family unit, granting a parent the ability to afford his or her children the substantial benefits that flow from a stable two-parent family environment"]), and that it "includes a 'positive' right to have the state take at least some affirmative action to acknowledge and support the family unit" (*id.* at p. 819).

Those conclusions apply with equal force to same-sex couples that have already married. And, as with equal protection, although the conflict between Proposition 8 and the privacy and due process clauses with respect to persons who have not yet married cannot be avoided through any interpretive doctrine, the conflict that would result from retroactive application to same-sex couples who already have married can be avoided by reasonably construing the text of Proposition 8 as not applying to existing marriages. Again, the "harmonization" principles discussed above require the Court to adopt that interpretation in accordance with the strong presumption against retroactive application in order to minimize the conflict, to the extent possible. (See *Serrano*, *supra*, 5 Cal.3d at p. 596.)

3. Proposition 8 Should Be Interpreted Not To Apply To Existing Marriages So As To Avoid Conflict With Due Process Protections Against The Retroactive Impairment Of Vested Rights.

The marriage rights of already married couples are unquestionably significant enough to trigger the due process clause's protections against retroactive impairment of vested rights. If Proposition 8 were applied to existing marriages, it would eliminate the vested liberty and property-related marriage rights of same-sex couples who married in compliance with California law. Such retroactive application is forbidden by the California constitutional guarantee of due process because such retroactive application would not be justified by any legitimate state interest and would

cause severe disruption with respect to acts taken in reasonable reliance on this Court's decision in *In re Marriage Cases.* Because Proposition 8 can reasonably be interpreted not to apply to existing marriages, thereby avoiding this conflict with this aspect of the due process clause, this Court must interpret Proposition 8 to apply only prospectively for this reason as well.

a. Married Same-Sex Couples Enjoy Vested Property And Liberty Interests Protected By The Due Process Clause.

A "vested right, as that term is used in relation to constitutional guaranties, implies an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice." (*Miller v. McKenna* (1944) 23 Cal.2d 774, 783.) Under this definition, same-sex couples who married in accordance with this Court's decision in *In re Marriage Cases* before November 5th obtained vested rights to and resulting from their marriages.

In *In re Marriage Cases*, the Court held that the right to marry and to be married to the person of one's choice is a fundamental right protected by the due process and privacy clauses, and that the state must recognize that all individuals have that right, regardless of their sexual orientation. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 809, 820, 854.) The Court emphasized that "the core set of basic *substantive* legal rights and attributes traditionally associated with marriage . . . [is] . . . integral to an individual's liberty and personal autonomy." (*Id.* at p. 781, emphasis in original.)

Because these rights are of "central importance" in the lives of individuals in our society, they may not be taken away arbitrarily without injustice. As a result, same-sex couples who legally married before the passage of Proposition 8 became vested with a status as *married* couples that is protected under the California Constitution and with a package of

rights and attributes inextricably associated with that marital status protected by the guarantee of due process. (See, e.g., *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 451 (hereafter *Fabian*) [holding that due process prevented impairment of spouse's vested right to community property].)[22]

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[22] California courts have not previously confronted the question of whether an entire marital relationship can be nullified against the will of both spouses consistent with due process protections. While California courts have addressed state due process challenges to the retroactive application of laws to particular marital rights on many occasions, (see, e.g., *In re Marriage of Buol* (1985) 39 Cal.3d 751, 763-764 (hereafter *Buol*) [declining to apply law retroactively based on impairment of vested community property rights]; *Fabian, supra,* 41 Cal.3d at p. 451 [same]; *In re Marriage of Heikes* (1995) 10 Cal.4th 1211 (hereafter *Heikes*) [same]), those decisions largely have been confined to the impact such laws have on specific property or other rights arising from the marital relationship, rather than on the very essence of the marital relationship itself.

However, in *In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 113 (hereafter *Walton*), the Court of Appeal held that certain provisions of the Family Law Act, pursuant to which a husband filed a petition for divorce based upon irreconcilable differences, did not deprive his wife of a vested interest in her marital status without due process of law, even though such amendments were adopted after the couple entered into the marriage. The court concluded that, even if the wife's marital status was impaired by the change in law, such a change "reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment." (*Ibid.*) In dicta, the court also expressed skepticism as to whether the wife's marital status constituted "property" within the purview of the due process clause, since the wife "could have no vested interest in the state's maintaining in force the grounds for divorce that existed at the time of her marriage." (*Ibid.*) That dicta regarding whether there is a "property" interest in the status of marriage long predates and thus did not have the benefit of this Court's express holding in *In re Marriage Cases* that the right to marry and the right to be in a marriage implicate both due process protections and the protections afforded by the Constitution's privacy clause. (See *Marriage Cases*, *supra*, 43 Cal.4th at p. 810.)

b. Interpreting Proposition 8 To Apply To Existing Marriages Would Conflict With Due Process Rights Of Same-Sex Couples.

In analyzing whether the retroactive application of a law would impair a vested property interest in violation of due process, this Court considers "the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions." (*Bouquet*, *supra*, 16 Cal.3d at p. 592.) Examination of these factors leads to the inescapable conclusion that retroactive application of Proposition 8 to terminate the existing marriages and marriage rights of same-sex couples would conflict with California's due process guarantee.

(1) The State Has No Significant Interest In Invalidating Existing Marriages Of Same-Sex Couples.

The purpose of Proposition 8 is to discriminate on the basis of the suspect classification of sexual orientation – depriving those who are gay of the right to marry the person of their choice. That discriminatory purpose is plainly not even a legitimate state interest. The illegitimacy of that interest does not depend on any assumption that the voters who voted for Proposition 8 had a subjective desire to harm or punish gay people. As this

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The *Walton* dicta does not speak to the due process implications of an enactment that would terminate a marital relationship against the will of both spouses. Precedents upholding application of legislation changing the grounds or the procedures for divorce to marriages predating such legislation do not conflict with Petitioners' position that a couple's liberty and property interests would be impaired by termination of their marriage against both their wills by an enactment.

Court has held, impermissible discriminatory "intent need not be to 'punish' the [classified individuals] for [their] membership in a protected class or for [their] exercise of protected rights." (*Baluyut v. Super. Ct.* (1996) 12 Cal.4th 826, 833.) Even under a disparate impact standard, a litigant alleging a violation of equal protection simply must show that the government established the challenged classification "'at least in part' because of, 'not merely' in spite of, 'its adverse effects upon an identifiable group.'" (*Id.* at p. 837 [quoting *Wayte v. United States* (1985) 470 U.S. 598, 610].) Here, as its title makes clear, Proposition 8 takes the right to marry away from a class of people defined by their sexual orientation, and so undeniably has a discriminatory purpose. (See Petitioners' Appendix at p. 54 [Official Title and Summary: "[e]liminates [the] right of same-sex couples to marry"].)

This Court specifically held in *In re Marriage Cases* that there was no state interest or purpose that would justify depriving gay people of marriage rights.[23] That holding controls here, because, even if Proposition

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[23] For example, this Court dismissed the notion that "the exclusion of same-sex couples from the designation of marriage" is needed "to afford full protection to all of the rights and benefits that currently are enjoyed by married opposite-sex couples." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 784.) This Court explained that "permitting same-sex couples access to the designation of marriage will not deprive opposite-sex couples of any rights and will not alter the legal framework of the institution of marriage, because same-sex couples who choose to marry will be subject to the same obligations and duties that currently are imposed on married opposite-sex couples." (*Ibid.*) This Court also repudiated the idea "that because only a man and a woman can produce children biologically with one another, the constitutional right to marry" should be limited to different-sex couples, calling that "contention . . . fundamentally flawed for a number of reasons," including that "the constitutional right to marry never has been viewed as the sole preserve of individuals who are physically capable of having children." (*Id.* at pp. 825-826.) Similarly, this Court rejected the argument

8 validly amended the California Constitution to prohibit marriages between individuals of the same sex prospectively (which Petitioners dispute), it did *not* create any new state interest that would justify terminating same-sex couples' existing marriages. If, as this Court has held, there is no state interest that could justify preventing same-sex couples from marrying, then there certainly can be no state interest that could justify retroactively invalidating the legal marriages – and vested property and liberty interests – of same-sex couples. After all, interests that were not adequate to uphold Family Code section 308.5 do not suddenly become adequate simply by placement of the statutory language into the Constitution. (Cf. *Marriage Cases, supra*, 43 Cal.4th at pp. 852-853 ["the circumstance that the electorate voted in favor of retaining the traditional definition of marriage does not . . . demonstrate that the voters' objective represents a constitutionally compelling state interest for purposes of equal protection principles"].)

Indeed, Interveners do not even argue that significant state interests support the retroactive application of Proposition 8. Moreover, none of the arguments that Proposition 8's proponents offered in the ballot materials demonstrates that there is any such interest in treating existing marriages as invalid. The first ballot argument asserted that Proposition 8 "restores the definition of marriage to what the vast majority of California voters already approved and human history has understood marriage to be." (See Petitioners' Appendix at p. 56.) But the Court has already rejected the notion that "the interest in retaining a tradition that excludes an historically

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that "the religious freedom of any religious organization, official, or any other person" would be impacted by marriage between individuals of the same sex, because "no religion [would] be required to change its religious policies or practices with regard to same-sex couples." (*Id.* at pp. 854-855.)

disfavored minority group from a status that is extended to all others – even when the tradition is long-standing and widely shared" is an adequate reason to deny marriage to same-sex couples.[24] (*Marriage Cases*, *supra*, 43 Cal.4th at p. 854.) And, even if restoring the historical definition of marriage could be a significant state interest, retroactive application would not be necessary to achieve it.

The second rationale offered in the ballot materials – that Proposition 8 "overturns the [purportedly] outrageous decision of four [purportedly] activist Supreme Court judges who [purportedly] ignored the will of the people"[25] – similarly fails to express a significant state interest in retroactive application. The bare desire to overturn a Court decision is not in itself a legitimate state interest. Moreover, even applying Proposition 8 prospectively only, and thus disallowing future same-sex marriages, would effectively overturn a substantial portion of the Court's decision in *In re Marriage Cases*, rendering retroactive application unnecessary to the aim of overturning the Court's decision.[26]

Finally, the third ballot argument – that Proposition 8 would "protect[] our children from being taught in public schools that 'same-sex marriage' is the same as traditional marriage" – is based on false premises

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[24] As this Court explained, history has demonstrated "that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions." (*Id.* at pp. 843-844.)

[25] See Petitioners' Appendix at p. 56, italics removed.

[26] Indeed, Proposition 8 has no effect on this Court's holding in *In re Marriage Cases* that sexual orientation is a suspect classification. Accordingly, regardless of whether Proposition 8 is construed to apply to marriages entered into before the election, Proposition 8 will not completely overturn the Court's decision.

and so does not provide a significant state interest in retroactivity. (*Ibid.*) Proposition 8 does not address schools or school curriculum. Moreover, even if marriages between individuals of the same sex were not permitted in California, local schools still could choose to teach about such marriages as they exist in, for example, Massachusetts or Canada. Indeed, schools teaching about important political issues in California might choose to discuss *In re Marriage Cases*, Proposition 8, and the instant litigation, whether or not Proposition 8 is ultimately upheld. Because there is no basis for the notion that Proposition 8 would prevent schools from teaching about marriage between individuals of the same sex, it cannot be considered a legitimate state interest in the measure, let alone in its retroactive application.

Moreover, the lack of a legitimate interest in applying Proposition 8 to invalidate existing marriages or marriage rights makes this case wholly unlike those in which laws have been applied retroactively to correct an obvious injustice in pre-existing laws affecting marriage and divorce. For example, in *Bouquet*, the Court upheld the retroactive application of a statute to abrogate rights in marital property that derived from a "patently unfair former law," which had provided that money earned by a wife, but not a husband, while the spouses lived apart constituted separate property. (*Bouquet*, *supra*, 16 Cal.3d at p. 583.) There is no such unfairness to correct here. "Because the former law was not patently unfair" in permitting same-sex couples to marry, "retroactivity [is] not needed to effectuate the state's interest . . . ." (*Heikes*, *supra*, 10 Cal.4th at p. 1219; compare *Fabian*, *supra*, 41 Cal.3d at p. 449 ["absent patent unfairness in the former law, retroactivity . . . is wholly unnecessary"] with *Addison v. Addison* (1965) 62 Cal.2d 558, 567 (hereafter *Addison*) [retroactive application of statute appropriate "where the innocent party would otherwise be left unprotected"].)

(2) Same-Sex Couples Have Entered Into Valid Marriages In Legitimate Reliance On Existing State Law.

California courts have examined several factors in evaluating whether a party legitimately relied on a law that has subsequently been changed, including the clarity of the former law (*Fabian*, *supra*, 41 Cal.3d at p. 449), and the reasonableness and extent of the reliance (*Bouquet*, *supra*, 16 Cal.3d at p. 592). Under such analysis, the same-sex couples who entered into marriages following the disposition of *In re Marriage Cases* did so in legitimate reliance on California law.

In re Marriage Cases was as clear as any statement of the law could be about the right of same-sex couples to marry.[27] The Court clearly permitted marriages of same-sex couples to proceed *immediately* upon finality of the Court's decision by declining to grant a stay of the effectiveness of the decision, pending attempts to pass Proposition 8. (*In re Marriage Cases* (Cal. Supreme Ct., June 4, 2008, No. S147999) 2008 Cal. LEXIS 6807.) Same-sex couples reasonably relied on the Court's unambiguous actions by marrying and taking actions based on their marriages.

Unlike cases where reliance on prior law was seen by the courts as less justified because the prior law should have been recognized as unfair,[28]

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[27] This Court stated that "the language of [Section 300 of the Family Code] limiting the designation of marriage to a union 'between a man and a woman' . . . must be stricken from the statute, and that the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 857.)

[28] See, e.g., *Bouquet, supra,* 16 Cal.3d at p. 594, fn. 11 ["the unfairness of the former law [which had prohibited a wife from securing any interest in

here it was the prior exclusion of same-sex couples that the Court in *In re Marriage Cases* ruled was unfair. Given that the decision explained how denying same-sex couples the ability to marry could not be constitutionally justified, couples had every reason to believe that they were entitled to marry and to take actions predicated on their being married.[29]

The many thousands of same-sex couples who married in California after *In re Marriage Cases* was handed down relied on the Court's decision by asking their loved one to marry or by accepting their partner's marriage proposal; by securing and paying for marriage licenses; by planning and being part of ceremonies that were emotionally important to them and their families and friends (and that may have required financial sacrifice); and by telling others, including their children, that they were married. Many same-sex married couples undoubtedly have taken related actions which resulted in the compromise of rights they might otherwise have enjoyed, including, but not limited to, spouses using what was separate property to improve what they now believed to be community property; couples incurring financial or other legal obligations to third parties; couples not registering with the state as domestic partners; couples terminating individual medical insurance coverage to avail themselves of coverage available through a spouse's employer; and couples opting not to engage in non-parental

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property her husband had acquired in a common law state] also casts doubt upon the legitimacy of reliance upon it"].

[29] The fact that Proposition 8 was to be voted on in November did not make getting married and taking actions as a married couple in reliance on *In re Marriage Cases* unreasonable. There is always the possibility that a law will be changed, but that does not make reliance on the law as it exists less than reasonable. Reliance in this case was particularly justified since the text and ballot language failed to make manifest the possibility that Proposition 8 could affect marriages entered before the election.

adoption procedures. The extent of the reliance upon the former law by thousands of Californians is further evidence of the conflict that would arise with the due process clause if Proposition 8 were found to apply retroactively.

(3) Applying Proposition 8 To Invalidate Existing Marriages Would Result In Severe Disruption And Hardship.

Applying Proposition 8 to invalidate existing marriages of same-sex couples would result in severe disruption and hardship for these couples as a family unit and for the members of those couples as individuals. As this Court has explained, "[i]t is difficult to imagine greater disruption than retroactive application of an about-face in the law, which directly alters substantial property rights, to parties who are completely incapable of complying with the dictates of the new law." (*Fabian*, *supra*, 41 Cal.3d at p. 450.) In this case, depending on the scope of retroactivity that might be found to exist, what was community property might no longer be, leading to serious inequities. The same is true for community debts, which could adversely affect third parties who relied on the existence of marriages in making loans or extending credit. (See also, e.g., Prob. Code, § 5601 [presumption that dissolution or annulment of marriage severs joint tenancy].) In addition, same-sex couples who married but did not register as domestic partners because they were marrying might lose health plan coverage for the spouse of the one whose employer provided dependent benefits. An insurer might even demand recoupment of claims payments because the coverage was predicated on the couple being married (although the issue of whether any insurer would have a right to such recoupment is not presented here).

Retroactive application of Proposition 8 also would put into serious doubt any wills executed by same-sex couples during their marriages

because, under California's Probate Code, a bequest or appointment made to a spouse is nullified if the marriage is subsequently dissolved or annulled. (Prob. Code, §§ 6122, 6178.) Couples who had failed to execute wills, relying on their marriage to protect the survivor, likewise might find their expectations dashed due to the limitation of intestacy protections to spouses and domestic partners. (Prob. Code, §§ 6400-6414; Fam. Code, § 297.5.) Even if same-sex couples sought to regain various marital privileges and rights on at least a going-forward basis by entering domestic partnerships or executing new legal instruments after a ruling of retroactivity, they would incur additional financial burdens in order to do so.[30]

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[30] Numerous problems might also arise for married couples wishing to divorce. For instance, if a same-sex couple married in June 2008 and one of them decided in 2009 that he or she no longer wanted to be married to the other, he or she might not be able to get a divorce in California, based on an argument that obtaining a dissolution would violate Proposition 8 by "recognizing" that a marriage existed at the time of the dissolution. (See *Chambers v. Ormiston* (R.I. 2007) 935 A.2d 956, 962-963, 967 [refusing to allow couple married in Massachusetts to divorce in Rhode Island based on view that no jurisdiction existed to hear divorces of same-sex couples].) While it might be questioned why it should it matter if the couple cannot divorce in California if their marriage is no longer to be treated as valid here, there are multiple compelling reasons why it would be important for the couple to be able to divorce. All states have residency requirements to obtain a dissolution and, absent moving and waiting for residency to be established elsewhere, without a California dissolution, the couple likely would still be considered married if they traveled to a state such as Massachusetts or Connecticut or a country such as Canada that allows same-sex couples to marry or to a state such as New York that honors marriages same-sex couples entered in other states. (See *Martinez v. County of Monroe* (N.Y. 2008) 50 A.D.3d 189, 191-193.) If the one who did not want the divorce incurred financial obligations in that jurisdiction, a third party might try to enforce against the one who did. Further, without committing bigamy, the person who wanted the divorce also might be unable to marry someone else in a jurisdiction that permits same-sex

Retroactive application of Proposition 8 also could result in serious impairment of liberty, privacy, and parentage rights. An involuntary termination of marriage could wreak emotional havoc on couples who, in reliance on being married, made the commitment to mutual emotional support "that is an integral part of an officially recognized marriage relationship [and that] provides an individual with the ability to invest in and rely upon a loving relationship with another adult in a way that may be crucial to the individual's development as a person and achievement of his or her full potential." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 816.) In addition, a couple who relied on the spousal communication privilege might find shared confidences subject to discovery. Even the presumption of parentage given to married couples (Fam. Code, § 7611), could be called into doubt and the ability to establish parentage of a child conceived through alternative insemination methods (Fam. Code, § 7613, subd. (a)), might not be available or might be questioned. The possible loss of legal parentage likely would affect negatively many children's emotional well-being and might also affect their ability to receive child support, employer health care coverage, and public benefits.

Because there can be no question that "retroactive application . . . would [vastly] disrupt those [couples'] actions," unjustifiably destroying

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couples to marry. And, even if a divorce were permitted in California, there would be a thicket of problems, such as how spousal support would be determined or community property interests would be divided if the marriage was valid before the election but not thereafter. While the Interveners suggest that the Legislature could work this out (Inter. Br. at p. 42), the Legislature might not be able to agree on a proper resolution. The Interveners' alternative, of deciding such issues as they arise (*id.* at p. 41), would make it impossible for couples or third parties to plan and, with more than 18,000 same-sex couples who have married in California, would create a judicial nightmare.

vested rights, retroactive application of Proposition 8 would conflict with the due process clause. (*Bouquet*, *supra*, 16 Cal.3d at p. 592.) This Court should adopt the reasonable reading of Proposition 8 that avoids such conflicts and determine that it does not apply retroactively.

4. Proposition 8 Should Be Interpreted Not To Apply To Existing Marriages So As To Avoid Conflict With The Contracts Clause.

Retroactive application of Proposition 8 would also conflict with the contracts clause of the California Constitution. (See Cal. Const., art. I, § 9.) That provision forbids the passage of "law[s] impairing the obligation of contracts." (*Ibid.*) Marriage is, at least in part, a contract. (See Fam. Code § 300(a) ["Marriage is a personal relation arising out of a civil contract . . . ."].) Interpreting Proposition 8 to apply to existing marriages of same-sex couples would conflict with the contracts clause by causing the "substantial impairment" of those marriage contracts (*Hall v. Butte Home Health, Inc.* (1997) 60 Cal.App.4th 308, 320) without any "significant [or] legitimate public purpose." (*Hellinger v. Farmers Group, Inc.* (2001) 91 Cal.App.4th 1049, 1064 [quoting *Energy Reserves Group, Inc. v. Kansas Power & Light* (1983) 459 U.S. 400, 411].) While the state maintains the ability to define the legal incidents of marriage and the grounds for dissolution, it does not have the ability, consistent with the contracts clause, to terminate the entire marital contract for a class of individuals without the consent of either party. (See *Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 584 ["'The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them.'"] [quoting *Home Bldg. & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 431].)

The deprivation of settled rights that would be posed by the retroactive application of Proposition 8 appears to be without precedent in American history. No reported decision in this country has ever held that

the retroactive invalidation of an entire class of marriages is acceptable under the contracts clause, in California or elsewhere.[31] In what appears to be the only case to squarely address the issue, a court held that a statute abolishing common-law marriage must be read to apply prospectively only to avoid violating the federal contacts clause, so that common-law marriages in existence at the time of the statute's enactment would continue to be valid. (*Cavanaugh v. Valentine* (1943) 41 N.Y.S.2d 896, 898.) This Court should apply the same reasoning and interpret Proposition 8 to apply

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[31] Decisions have recognized that marriage contracts are unique in that each spouse's rights, duties, and obligations remain subject to the general laws of the state, which are subject to change. Accordingly, courts have rejected contracts clause challenges to the state's authority to modify the grounds for divorce (see, e.g., *Walton, supra,* 28 Cal.App.3d at p. 112; *Maynard v. Hill* (1888) 125 U.S. 190, 210 [holding that the federal contracts clause does not "restrict the general right of the legislature to legislate *on the subject of divorces*"], italics added) or to eliminate particular causes of action related to marriage (see, e.g., *Ikuta v. Ikuta* (1950) 97 Cal.App.2d 787, 790 [elimination of cause of action for alienation of affection].) None of these cases, however, addressed whether marriages can be categorically eliminated.

Several California appellate opinions have briefly touched on the application of the contracts clause to marriage but have not addressed the issue of whether a marriage can be entirely abrogated against the will of both spouses. (See *In re Marriage of Powers* (1990) 218 Cal.App.3d 626, 644 [retroactive application of statute affecting community property rights in pension benefits does not violate contracts clause because "the state . . . may impair [vested] rights when considered reasonably necessary to protect the health, safety, morals and general welfare of the people"] [quoting *Buol, supra*, 39 Cal.3d at p. 760]; *Macedo v. Macedo* (1938) 29 Cal.App.2d 387, 391 [statute validating otherwise void marriages does not violate contracts clause since it "confirms rather than impairs the contract"]; *Spreckels v. Spreckels* (1897) 116 Cal. 339, 349 [retroactive application of statute impaired vested separate property rights in violation of due process, mooting contracts clause challenge].)

prospectively only in order to avoid the conflict that would otherwise arise with the California Constitution's contracts clause.

CONCLUSION

For the reasons set forth above and in the Petitioners' Amended Petition for Extraordinary Relief and Memorandum of Points and Authorities in Support thereof, this Court should issue a writ of mandate as requested in the Amended Petition and issue an order declaring that Proposition 8 is null and void in its entirety.

Dated: January 6, 2009

Respectfully submitted,

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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 Corrected Reply in Support of Petition for Extraordinary Relief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 21,655 words as calculated using the word count feature of the computer program used to prepare the brief.

By:

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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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CORRECTED REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

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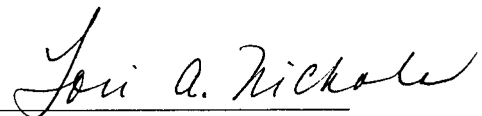

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