IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, et al.,	**Petitioners,**	
v.		S168047
MARK B. HORTON, State Registrar of Vital Statistics, etc., et al.,	**Respondents,**	
DENNIS HOLLINGSWORTH, et al.,	**Intervenor.**	
ROBIN TYLER et al.,	**Petitioners,**	
v.		S168066
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ATTORNEY GENERAL'S RESPONSE TO AMICUS CURIAE BRIEFS

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INTRODUCTION

Interveners' amici would turn California constitutionalism on its head. As these amici would have it, the Constitution's foundational guarantee of individual rights is no guarantee at all, and a small number of petitioners (amounting to eight percent of the voters) have the power—for any reason whatsoever—to put the fundamental rights of a minority group to a popular vote. Yet, the Constitution that the People agreed to, and the Constitution that the Attorney General is obligated to defend, is a constitution that secures to all California citizens the enjoyment of liberty except as may legitimately be restricted when public necessity dictates.

The initiative power is, indeed, an expression of the People's sovereignty, but it is not the only expression of that sovereignty, and more importantly, it is not the fullest expression of that sovereignty. The People express their *full* sovereignty when they act in convention to form or revise the foundational charter that will secure their rights as individuals. The People express a *lesser* scope of sovereignty in the initiative process. The Constitution itself makes clear that, when the People are exercising the power of initiative, they are not exercising the power of the full convention or the power of revision.

The People *acting in convention* exercise supreme power; the People *through the initiative* exercise a more limited power. Like legislative amendments, initiative amendments are subject to judicial review for compliance with the Constitution. Over a century ago, our Supreme Court struck down a constitutional amendment proposed by the Legislature because the Court deemed it to be substantively improper. The Supreme Court and other courts have repeatedly struck down initiative-amendments for non-compliance with the state Constitution's prohibition against voter-initiated revision of the Constitution and for violation of the Constitution's

single-subject rule. The Constitution has other express and judicially enforceable limitations on the enactment of initiative-amendments. And of course, the Supreme Court has struck down initiative-amendments for violating the United States Constitution. Judicial review of initiative-amendments is not revolutionary. It is fundamental to our governing constitutional structure. Unlike the circumstance when the People exercise their sovereignty in convention, the People—when they exercise the more limited sovereignty of the *initiative power*—are not the ultimate judges of constitutional validity.

If the People, authorized by eight percent of the voters, could abrogate the fundamental rights of minority groups simply by labeling their ballot measure an "amendment" rather than a "statute," then the Constitution would provide a very weak safeguard for the People's fundamental rights.

Proposition 8's validity must be measured against the standard—inalienable rights—enshrined as article I, section 1 by the People in convention. Inasmuch as Proposition 8 attempts to take away the right to marry from a class of persons determined by this Court to be entitled to enjoy that fundamental right like every other person, and for no compelling reason, the measure must be stricken.

ARGUMENT

A. Proposition 8 Is An Ultra Vires Amendment Because It Abrogates Fundamental Rights Protected By Article I, Section 1 Of The California Constitution Without A Compelling Justification.

Several of the intervenors' amici argue that this Court would be engaging in a constitutional revolution of some sort if it were to agree with the Attorney General and hold that Proposition 8 is unconstitutional as an abrogation of the inalienable rights set forth in article I, section 1 of our Constitution. They assert that acceptance of the Attorney General's argument would itself constitute a revision of the Constitution or would

violate the constitutional principle of separation of powers. But intervenors' amici misapprehend both the legal support for the Attorney General's position and the role of the judiciary in protecting constitutional rights.

1. The Text Of The Constitution Guarantees Liberty For All.

Our Constitution provides, "All people are by nature free and independent and have inalienable rights." (Cal. Const., art. I, § 1.) These rights include "enjoying and defending life and liberty, acquiring possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (*Ibid.*) Neither interveners nor their supporting amici have cited to any authority suggesting that the Legislature possessed the power in 1911 to nullify the Constitution's express guarantees of equality of liberty by allowing a small percentage of voters (eight percent for a direct initiative and five percent for an indirect initiative[1]) to submit the fundamental rights of individuals to a popular vote. The Legislature could not have effected such a profound change in the fundamental principal of California constitutionalism without returning to the convention for a revision. As certain of amici law professors explain, the 1911 amendment creating the initiative process "was intended to allow voters to bypass a foot-dragging legislature, not to oppress vulnerable groups or strip courts of their traditional role of protecting minority rights." (Brief of Professors C. Edwin Baker, Robert A. Burt, and Kermit Roosevelt III at p. 14.)

It is respondent's contention the Conventions never invested the Legislature with the power, by mere "amendment," to effect a surrender of individual rights to approval in a plebiscite unfettered by Article I, section 1 of the Constitution. If the Legislature never had the power, the people never

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1. See Respondent's Answer Brief at pp. 14-15 (explaining direct and indirect initiatives.)

acquired such a power. The voters' power by initiative-petition to amend the Constitution could not have included the power to "amend" away the Constitution's foundational guarantee of equal liberty for all without a demonstrable public necessity for doing so.

Proposition 8 is accordingly an unconstitutional amendment because, without a compelling justification, it denies a suspect class the right to marriage, which this Court has held to be "one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution" (*In re Marriage Cases* (2008) 43 Cal.4th 757, 781). On this point, the Attorney General enjoys the support of respected constitutional scholars and other amici.

Several amici-professors specializing in state constitutional law explain that equality provisions of many state constitutions, including the California Constitution, were influenced by section 1 of the Virginia Bill of Rights. Written by George Mason and adopted a month before the Declaration of Independence, the Virginia Bill of Rights was influenced more by the teachings of natural law "'rather than the dictates of the British constitution . . . .'" (Brief of Professors of State Constitutional Law Robert F. Williams et al., at p. 7, quoting Howard, *For the Common Benefit: Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker* (1968) 54 Va. L. Rev. 816, 823.) "[M]uch of the modern judicial doctrine of equality under state constitutions has its textual basis in provisions such as section 1 of the Virginia Bill of Rights." (*Id.* at p. 8.) Thus, while the words of Article I, section 1 reflect concepts derived from natural law, they are now incorporated into the positive law of this state. (Grodin et al., The California State Constitution: A Reference Guide (1993), at p. 38 [observing that "California courts have viewed [article I, section 1] from the outset as a positive protection against interference with

enumerated rights."].) As one scholar of modern constitutionalism has observed: "Behind these protections for individual liberty lies the definitional core of constitutionalism: the belief that each person should be free because he or she has inherent worth as a responsible, autonomous human being." (Murphy, *An Ordering of Constitutional* Values (1979) 53 S. Cal. L. Rev. 703, 749.)

The words articulated in article I, section 1 clearly establish that inalienable rights, like the right to marry, are rights that exist for "[*a*]*ll* people." (Cal. Const., art. I, § 1, emphasis added.) Bar-association amici point out: "No exception to article I, section 1, can exist without destroying the meaning of the words 'inalienable rights' and 'all people.' If anyone's 'inalienable rights' can be denied by majority vote, then there is no reason why all other 'inalienable rights' guaranteed to 'all people' by article I, section 1 are not equally up for grabs. . . . Rights that can be taken away from some are neither 'inalienable' nor universal." (Brief of Beverly Hills Bar Association, California Women Lawyers, Women Lawyers Association of Los Angeles, and Women Lawyers of Sacramento, at p. 20.)

Fortunately, our Constitution has never been interpreted to allow for withdrawal of rights from a class of persons without a demonstrable public need to do so. To the contrary, as a leading group of constitutional and civil rights scholars has explained, "[t]he equality principle is a pervasive value woven through the state Constitution, extending far beyond the equal protection clause of article I, section 7(a)." (Brief of Constitutional and Civil Rights Law Professors at p. 12.) This equality principle is found in many other parts of our Declaration of Rights, including section 1 of article I, and is supported in the holdings of this Court. (*Id.* at pp. 13-18.)[2/] By depriving

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2. The brief of amici Pacific Yearly Meeting of the Religious Society of Friends, et al., sets forth a further reason why Proposition 8 is

same-sex couples of the right to marry, Proposition 8 would "reneg[e] on this most basic textual and structural governmental commitment–the underlying principle of equality." (*Id.* at p. 18.) Because Proposition 8 violates this principle without a compelling reason, it may properly be stricken down. (Brief of League of Women Voters, at pp. 5-8 [arguing Proposition 8 is an unconstitutional amendment].)

2. The Judicial Power Lies To Review The Constitutional Sufficiency Of Initiative Constitutional Amendments.

Interveners' supporting amici raise various arguments against this Court's exercise of the judicial power to review the constitutional sufficiency of Proposition 8. Some of those amici argue that such an exercise of judicial power infringes on the people's sovereignty as expressed in the initiative power. Others argue that such an exercise would violate the separation of powers doctrine. And still others argue that this Court's prior jurisprudence compels subordination of the judicial power to the will of a majority of the voters. Some of interveners' amici contend that creation of the initiative power in 1911 conferred upon the people "unfettered" power to amend the Constitution in any way they wish. (See, e.g., Brief of Family Research

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inconsistent with the textual guarantees of our Constitution. This brief traces the requirement in article II, section 1 of the California Constitution, which provides that the people may alter or reform their government "when the public good may require," to a parallel provision of the Iowa Constitution. (Friends' Br. at pp. 7-8.) Amici then explain that "[t]he Iowans of 1846, who wrote the provision that set forth in article II, section 1 of the California Constitution, saw that . . . vague directives" contained in other state constitutions that simply allowed the legislature to decide which laws were good for the state "had led to unfair and despotic laws." (*Id.* at p. 11.) These amici then explain that the requirement that the phrase "when the public good may require" can be read, just as statutes provides for the "public good," to allow for only those laws that are not arbitrary or discriminatory. (*Id.* at p. 13.)

Council, at p. 2.) According to these amici, as long as a constitutional change constitutes an "amendment," it is immune from judicial review.

None of these propositions have merit.

The Constitution confers on the judiciary the sole and exclusive power to interpret the law. (Cal. Const., art. III, § 3; see also *Department of Social Services v. Superior Court* (1997) 58 Cal.App.4th 721, 738 [noting that it is a "judicial function . . . to declare law and determine rights"].) This judicial power cannot be exercised by any other branch of government—including the people. (Cal. Const., art. III, § 3 ["Persons charged with the exercise of one power may not exercise either of the others unless permitted by this Constitution."]; see also *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326 ["The judicial power is conferred upon the courts by the Constitution, and in absence of a constitutional provision, cannot be exercised by any other body."].)[3/] "The judiciary, from the very nature of its powers and the means given it by the

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3. If anything, judicial review of initiative-amendments to ensure compliance with the Constitution's guaranty of equal liberty *implements* the Constitution's mandate that the separate powers of government be exercised separately. As the Court observed in *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141:

> 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. [Citations.] 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. [Citations]. Because of its independence and long tenure, the judiciary can probably exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority.

Constitution, must possess the right to construe the Constitution in the last resort, in those cases not expressly, or by necessary implication, reserved to the other departments. It would be idle to make the Constitution the supreme law, and then require the judges to take the oath to support it, and after all that, require the Courts to take the legislative construction as correct." (*Nougues v. Douglass* (1857) 7 Cal. 65, 70.)

In asserting that the voters exercising the initiative power "sit above the judiciary" (Brief of Family Research Council, at p. 13), interveners' amici mistake the scope of the people's sovereignty that is expressed *in the initiative power* from the scope of the people's sovereignty that is expressed by the people *in convention*. Respondent concedes that the people "sit above the judiciary" when the people exercise their sovereignty *in convention*. (Brief of Prof. Karl M. Manheim, at pp. 3-5.) But when the voters are exercising only the limited *legislative* power reserved to them in article IV, section 1, they cannot insist on avoiding judicial review of their enactments.

The Constitution itself makes clear that the initiative power is but a limited expression of the people's sovereignty. Whereas the Constitutional Convention embodies the "*entire* sovereignty of the people" (*Livermore v. Waite* (1894) 102 Cal. 113, 117, italics added), the voters have reserved to themselves only an aspect of the *legislative* power. (Cal. Const., art. IV, § 1.) Indeed, the scope of even that reservation is smaller than is the scope of the power possessed by the Legislature. Unlike the Legislature, the people have no power—except at a constitutional convention—to propose revisions to the Constitution. (See Const., art. XVIII, §§ 1, 3.) The people are expressly precluded by article II, section 12 of the Constitution from enacting certain statutes—statutes that would name a private corporation to perform a particular function or a person to hold an office—that are within the power of the Legislature to enact on its own. (See *Calfarm Ins. Co. v. Deukmejian*

(1989) 48 Cal.3d 805, 835, fn. 29.) And, of course, voter-enacted amendments are not immune from judicial review to determine compliance with the Fourteenth Amendment. (See *Mulkey v. Reitman, supra,* 64 Cal.2d 529.) Put simply, the voters are not empowered *by the initiative process* to be the final judges of their own initiative measures.

And indeed, this Court has long exercised the judicial power to test the constitutional sufficiency of constitutional amendments. In *Livermore v. Waite* (1894) 102 Cal. 113, this Court rejected a purported constitutional amendment proposed by the Legislature for the reason that it did not suffice as an "amendment" within the Constitution's contemplation. The constitutional amendment at issue in *Livermore* would have moved the state capitol from Sacramento to San Jose "provided, that the state shall receive a donation of a site of not less than ten acres and one millions dollars before such removal shall be had." (*Id.* at p. 114.) The amendment also required prior approval of the new capitol site by the governor, the secretary of state and the attorney general before the move would become effective. (*Id.* at pp. 114-115.)

In considering a suit seeking to block a vote on this amendment, this Court acknowledged that the existing constitutional provision establishing the capitol in Sacramento "may be amended in the same manner as any other portion of that instrument." (*Id.* at p. 120.) But the Court also noted that the proposed amendment, if approved by the voters, would not have resulted in a move of the capitol to San Jose unless the land and money were donated and the site was approved by the state officials. (*Id.* at p. 123.) On this basis, the Court held that the amendment was ultra vires because it would become effective only upon contingencies that were outside the control of the people:

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> [F]or the purpose of determining the extent of the power conferred upon the legislature to propose amendments to the constitution, we must assume that it is only such amendments as may naturally and reasonably belong to the elements of the constitution. The amendment proposed substitutes for, or rather superadds to, the will of the people another will or judgment, without which its own will can have no effect, and which is therefore made the controlling judgment before the amendment can have any operative existence. As the proposed amendment is therefore only a proposition for the people to submit to some other individuals or body to determine whether there shall be a change of the seat of government, *we hold that it is not such an amendment as the legislature has been authorized to submit to their votes.*

(*Id.* at pp. 123-124 (emphasis added).)

The *Waite* decision has often been cited because of its discussion of the distinction between constitutional revisions and amendments. (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 350, quoting *Livermore v. Waite, supra*, 102 Cal. at pp. 118-119.) But it is also an example of a judicial decision holding that a constitutional change was substantively improper—even though the change itself was an amendment rather than a revision.

Interveners must necessarily concede that the Court has power to review initiative-amendments for compliance with the California Constitution; interveners urge this Court to declare Proposition 8 a constitutionally permissible amendment rather than constitutionally impermissible revision. And this Court and other courts have rendered similar judgments in the past. (See *McFadden v. Jordan* (1948) 32 Cal.2d 330, 334; *California Assn. of Retail Tobacconists v. State of California* (2003) 109 Cal.App.4th 792, 833.) The Court has also enforced the Constitution's mandate that initiative-amendments encompass only a single subject. (Cal. Const., art. II, § 8; *Perry v. Jordan* (1948) 34 Cal.2d 87, 90-

94.) And if the court lacked the power to enforce the Constitution against initiative amendments, the proscriptions of article II, section 12 would be meaningless. That provision expressly precludes adoption of any constitutional amendment "that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty." (Cal. Const., art. II, § 12.)

It is too late in the day to argue that the judicial power of the State does not lie to assess the constitutional compliance of initiative amendments.[4/] As in *Livermore v. Waite*, *supra,* if Proposition 8 is incompatible with the guarantees of article I, section 1–as respondent contends it to be–then it may be stricken as ultra vires, notwithstanding that the measure is not a "revision" of the Constitution.

Nor does this Court's decision in *People v. Frierson* (1979) 25 Cal.3d 142 (*Frierson*) compel a different conclusion. Various of interveners' supporting amici cite *Frierson* to support their contention that the people's will must be deferred to when it contradicts a court ruling.

Respondent does not dispute the voters' power by initiative to effectively reverse holdings of this Court on a purely prospective basis. But

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4. One group of amici supporting interveners suggests that this Court lacks authority to strike down an initiative constitutional amendment because there is no express constitutional provision allowing for such judicial review. (Brief of Center for Constitutional Jurisprudence at pp. 32-37.) But it cannot be questioned that this Court sits as the court of last resort when questions relating to the California Constitution's guarantees are at issue. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 354.) These amici argue that Proposition 8, as a later-enacted provision, should control over the rest of the Constitution. (Center for Constitutional Jurisprudence Br. at pp. 8-11.) Respondent respectfully suggests that, if this rule were absolute, then the single-subject rule and the revision-amendment rules in our Constitution would be nullities, because they are longstanding constitutional rules that are invariably used to judge the validity of later-enacted constitutional provisions.

respondent does dispute the power to do so in violation of the Constitution's guarantees of liberty and privacy to all Californians.

In *Frierson*, this Court upheld the constitutionality of Article I, section 27, which re-instituted the death penalty in California via an initiative amendment following the court's decision in *People v. Anderson* (1972) 6 Cal.3d 628. *Anderson* held that the death penalty violated our state's constitution ban on cruel or unusual punishment. The defendant in *Frierson* argued that the initiative amendment enacting Article I, section 27 amounted to a revision of the Constitution, and thus was invalid. (*Id.* at pp. 186-187.) This Court disagreed.

The amici's reliance on *Frierson* for the premise that the people have an *unfettered* power to enact constitutional amendments that are directly contrary to a court's holding is wide of the mark. Indeed, *Frierson* itself confirms that the voters' power is limited at least to the extent it is wielded in a manner that violates the federal Constitution. (See also *Mulkey v. Reitman,* (1966) 64 Cal.2d 529, affd. *sub. nom. Reitman v. Mulkey* (1967) 387 U.S. 369.)

Proposition 8 implicates questions far more serious than those that faced the Court in *Frierson*. The amendment in *Frierson* involved voter clarification of the "contemporary standard of decency" *(People v. Anderson, supra*, 6 Cal.3d at pp. 647-648), an evolving standard that is used to determine *whether* punishment is cruel or unusual. It is a standard that, by its nature, considers the body politic for its measure. Despite the voters' confirmation that execution for murder does not constitute cruel or unusual punishment within the meaning of the California Constitution, the ban against cruel or unusual punishment nevertheless remains as a constitutional safeguard *for all Californians* (Cal. Const., art. I, § 17); the Constitution's guarantee of *equal* liberty remains intact. Proposition 8, in contrast,

purports to redefine *the body politic* by defining a class of persons–without reference to public necessity–to be outside the Constitution's guarantee of the right to marry.

Therefore, although the circumstances giving rise to this case are unprecedented, the Attorney General's argument invokes both this Court's jurisprudence and the spirit and letter of article I, section 1 of the state Constitution. In order to ensure that our Constitution's promise of inalienable rights *for all* remains intact, this Court should strike down Proposition 8 as inconsistent with the core principles of that document.

B. Proposition 8 Does Not Retroactively Or Prospectively Invalidate Existing Marriages.

1. Applying Proposition 8 To Existing Marriages Would Constitute A Retroactive Application Of The Initiative.

Although they approach their arguments from somewhat different standpoints, several amici assert, in effect, that Proposition 8 should not be viewed as having a retroactive effect on existing same-sex marriages[5/] but merely as declaring that such marriages are not valid or recognized in California. Proceeding from this premise, these amici, not unlike interveners, then urge this Court to find that the existing marriages are no longer valid or recognized. In so doing, these amici beg the underlying question of whether applying Proposition 8 to existing marriages would be retroactive and whether the initiative was intended to have such an effect. Yet, applying Proposition 8 to existing marriages would plainly result in the

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5. Several amici have adopted the interveners' use of the phrase "interim marriages" to describe the marriages of same-sex couples entered into before the passage of Proposition 8. Rather than use such terminology, which assumes that the marriages are no longer valid, this brief will use the term "existing marriages" in referring to the pre-election marriages.

retrospective application of a presumptively prospective measure and do so in the absence of any evidence that voters intended such a harsh result.

To begin with, this Court should categorically reject the theory advanced by amici Campaign for California Families and Eagle Forum Education and Legal Defense Fund that Proposition 8 was merely declaratory of existing law concerning the definition of marriage and does not implicate the issue of retroactivity. (Brief of Campaign for California Families, at pp. 18-19; Brief of Eagle Forum Education and Legal Defense Fund, at pp. 22-24.) This assertion is contrary to well-settled authority. "When this court 'finally and definitively' interprets a statute, the legislature does not have the power to then state that a later amendment merely declared existing law." (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922.) A legislative amendment "*changes* the law; it does not merely state what the law always was." (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 470.) In *In re Marriage Cases*, this Court held that sections of the Family Code limiting marriage to opposite-sex couples violated the California Constitution. Regardless of the effect of Proposition 8, that decision remains the definitive interpretation of these provisions at the time it was issued. Significantly, neither interveners nor any other amici appear to join in the assertion that Proposition 8 merely declared existing law as if *In re Marriage Cases* had never been decided.

Eagle Forum cites no authority for its assertion that this rule binds the Legislature but not the voters when exercising their initiative power. (Brief of Eagle Forum, at p. 23.) To the contrary, initiatives are subject to "the same rules and cannons of statutory construction as ordinary legislative enactments." (*Rosasco v. Commission on Judicial Performance* (2000) 82 Cal.App.4th 315, 323.)

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Nor is there any merit to the assertion advanced by amicus curiae Professors of Law[6/] that Proposition 8, while not retroactively voiding existing marriages, renders these marriages prospectively invalid. (Brief of Professors of Law, at pp. 19-20.) The same holds for amicus Eagle Forum's closely related assertion that Proposition 8 is not retroactive on the ground that it "merely denies validity and recognition." (Brief of Eagle Form, at p. 21.) The difficulty with these arguments is that they would enforce Proposition 8 against existing marriages while side-stepping the fundamental question of whether this would amount to retroactive application of the measure.

"'A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.'" (*Aetna Cas. & Sur. Co. v. Industrial Acc. Com.* (1947) 30 Cal.2d 388, 391, quoting *American States W. S. Co. v. Johnson* (1939) 31 Cal.App.2d 606, 613.) Or as this Court more recently observed, "'[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.'" (*Myers v. Phillip Morris Cos.* (2002) 28 Cal.4th 828, 839, quoting *Landsgraf v. USI Film Products* (1994) 511 U.S. 244, 269.)

Here, prospectively invalidating thousands of marriages against the wishes of the married couples would affect acts that were "performed . . . prior" to passage of Proposition 8 and would "take[] away or impair[] vested rights" of couples who married under existing law. It makes no sense to suggest that marriages may be prospectively invalidated without affecting the

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6. Professors Lynn Wardle, Jane Adolphe, A. Scott Loveless, John Eidsmoe, Richard Wilkins, and Scott FitzGibbon.

pre-existing relationships between these couples. A marriage is not merely an isolated past event; it is an ongoing relationship entitled to dignity and respect. (*In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 814-815 [recognizing that "the right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice, and, as such, is of fundamental significance both to society and to the individual"].) Would any married couple agree that prospectively invalidating their relationship by fiat does anything other than undo their pre-existing, settled expectations? To ask the question is to answer it.

The significant harm that would be caused by invalidating thousands of existing marriages has been discussed by a number of amici who urge this Court to uphold the ongoing validity of these marriages. For example, the Professors of Family Law[7] have identified a wide range of rights and responsibilities that adhere to the institution of marriage. (Brief of Professors of Family Law, at pp. 16-18.) And, of course, marriage includes intangible benefits and alters the way individuals plan their lives and futures. (*Id.* at pp. 19-25.) It also materially changes their relationships with third persons and other family members. (*Ibid.*) Recognizing that marriage is built upon "an expectation of permanence subject only to voluntary dissolution," other amici have highlighted the retroactive effect of invalidating these settled expectations on a prospective basis. (Brief of Our Family Coalition, et. al., at pp. 4, 18-25.) Still others have focused on the potentially serious emotional harm faced by the children of couples whose marriages are prospectively invalidated by upsetting their settled family relationships—harm that would undoubtedly cause its own adverse impacts

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7. The Professors of Family Law brief has been submitted on behalf of 28 professors affiliated with California law schools. (Brief of Professors of Family Law, at pp. 1-3.)

on the couples themselves. (Brief of Children's Law Center of Los Angeles, et. al., at pp. 20-25.)

Further, serious concerns have been raised regarding the prospective adverse impact that would be caused to employers and employees alike if Proposition 8 were construed as invalidating existing marriages. (See generally, Brief of San Francisco Chamber of Commerce, et. al.) Regardless of the relative merits of any individual question that would be raised by widespread invalidation, these concerns highlight the significant burdens that invalidation would impose on all persons concerned. (See, e.g., *id.* at pp. 38-40.) These concerns and the others identified by amici demonstrate the wide range of retroactive effects that invalidation would entail.

This Court has drawn a distinction between "primary retroactivity" and "secondary retroactivity." (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 281.) "'"Primary" retroactivity' . . . obtains when regulations 'alter[] the *past* legal consequences of past actions.'" (*Ibid.*, quoting *American Min. Congress v. U.S.E.P.A.* (9th Cir. 1992) 965 F.2d 759, 769.) "'"Secondary" retroactivity' occurs when regulations 'affect[] the *future* legal consequences of past transactions.'" (*Ibid.*, quoting *National Medical Services, Inc. v. Sullivan* (9th Cir. 1992) 957 F.2d 664, 671.) Because the ongoing nature of the marriage relationship involves both past and future legal consequences, application of Proposition 8 to existing marriages would implicate both primary and secondary retroactivity.

It follows that amici opposed to the continued validity of existing same-sex marriages, like interveners, err in suggesting that retroactivity analysis can be avoided.

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2. Proposition 8 Does Not Expressly Or Clearly And Unequivocally Apply Retroactively To Existing Same-sex Marriages.

"Courts addressing retroactive application of initiatives generally follow a two-step analysis. . . . First, the court must determine whether the initiative has been retroactively applied. If so, the court must then decide if the people intended that the statute be so applied." (*Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 979.) Here, as discussed above, applying Proposition 8 to existing marriages would amount to a retroactive application. And no amici has persuasively supported the interveners' contention that Proposition 8 was intended to have this retroactive effect.

Like interveners, no amici appears to seriously argue that Proposition 8 *expressly* applies retroactively to existing marriages. The absence of such a provision "strongly supports prospective operation of the measure." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1209.) Indeed, the Professors of Law brief underscores the lack of express retroactivity by noting the lack of phrases in the measure that would suggest retroactivity. (Brief of Professors of Law, at pp., 10-19 [commenting on absence of terms "void" and "contracted after" in Proposition 8].) This brief, which frankly acknowledges that the measure's use of the terms "is" and "only" indicates prospective application, persuasively demonstrates that Proposition 8 cannot be interpreted on its face to have retroactive application. (*Id.* at pp. 8-10.) Similarly, amicus Eagle Forum concedes the "lack of a retroactivity clause" in Proposition 8. (Brief of Eagle Forum, at p. 22.)

When an initiative "does not expressly state that it will apply retroactively, [the court] must determine the electorate's intent." (*Yoshioka v. Superior Court*, *supra*, 58 Cal.App.4th at p. 980.) There must be a "clear and unavoidable implication [that] negatives the presumption" of prospective application. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d

1188, 1208.) But again like interveners, the amici struggle to draw from the text or the extrinsic materials an implication that Proposition 8 applies to existing marriages.

For example, amicus Campaign relies on a limited set of ambiguous phrases from the voter's guide in an effort to discern the voters' intent. (Brief of Campaign, at p. 18.) Contrary to Campaign's assumption, the phrase "restores the definition of marriage," used in the proponents' ballot pamphlet argument, does not support retroactive application because it could just as easily mean restoring that definition at the time of the election. (*Ibid.*) Indeed, given the historical context of the measure, this would be the most reasonable interpretation. (Respondent's Answer Brief, at pp. 61-75.) Nor does the use of the single word "when" in the phrase "regardless of when or where performed" in the proponents' ballot pamphlet rebuttal, even in context, convey retroactive application. (Brief of Campaign, at p. 18.) Read in conjunction with the measure itself, which is phrased in the present tense, this phrase at most implies present and future application, not retroactive application to past marriages. Certainly, these isolated phrases are not the "clear and unavoidable" expression of intent that must be shown to overcome the presumption of prospectiveness.

Amicus Eagle Forum, like Campaign, cites to the ambiguous use of the word "restore" in the proponent's ballot pamphlet argument. (Brief of Eagle Forum, at p. 23.) Eagle Forum also relies on the ballot pamphlet assertions that Proposition 8 "'overturns the flawed legal reasoning' of *Marriage Cases* and 'ensures that gay marriage can be legalized only through a vote of the people" as showing voter intent to invalidate existing marriages. (*Ibid.*) This language appears in the rebuttal to the opponents' argument. (See Respondent's Req. for Jud. Notice, at Exh. 14, p. 57.) But it

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does nothing to inform voters that a reversal of the legal effect of *In re Marriage Cases* would be applied retroactivity rather than prospectively.

Nor does the analogy to the Thirteenth Amendment of the United States Constitution offered by Campaign and the Professors of Law support an inference that Proposition 8 invalidates existing marriages. That amendment, of course, provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." There is nothing in the extrinsic materials to suggest that the drafters of Proposition 8 relied on the wording of the Thirteenth Amendment. Nor does Proposition 8 track the language of that Amendment.

Tellingly, none of the amici who have offered extended arguments in favor of applying Proposition 8 to existing marriages have responded directly to the arguments made by the Attorney General in prior briefing contesting an express or implied intent to apply the measure retroactively. (Respondent's Brief., at pp. 61-75.) Nor do these amici respond to the arguments made by petitioners on this issue in their reply briefs. (See Strauss Reply Brief, at pp. 38-70; CCSF Reply Brief, at pp. 43-66.)

Even more tellingly, these amici contradict one another and themselves in urging this Court to invalidate existing marriages. The Professors of Law treat existing marriages as retrospectively valid but prospectively invalid whereas the Campaign implies that they no longer entitled to any recognition at all. Eagle Forum falls somewhere in between, asserting that Proposition 8 declared existing law, but applies prospectively, not retroactively. These contradictory analyses underscore that a clear and unequivocal intent to apply Proposition 8 retroactively cannot be discerned from the text of that measure or from the extrinsic materials.

Thus, amici unwittingly point to a conclusion diametrically opposite from that urged in their briefs. Although amici assert that it applies to

invalidate existing marriages, Proposition 8 does not expressly provide for retroactive application of its terms to those marriage and the extrinsic materials do not support an inference that this was the voters' intent. Certainly, neither interveners nor amici have persuasively shown that the voters intended this result. But as discussed above, applying Proposition 8 to existing marriages would amount to a retroactive application of that measure. Since there is no evidence that retroactive application was intended by the voters, it follows that Proposition 8 may not be applied to existing marriages. These marriages must continue to be recognized as valid under California law.

3. Retroactive Application Of Proposition 8 Would Violate The Settled Expectations Of Persons Who Entered Into Same-sex Marriages.

Even if there were evidence of retrospective intent, a measure may not be applied retroactively if that would be "prohibited by state or federal constitutional provisions." (*Yoshioka v. Superior Court*, *supra*, 58 Cal.App.4th at p. 979.) "A retrospective law is invalid, . . . if it conflicts with certain constitutional protections, e.g., if it (a) is an ex post facto law . . . (b) impairs the *obligation of a contract* . . . or (c) deprives a person of a *vested right* or substantially impairs that right, thereby denying *due process*." (7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 623, at p. 1017-1018.) As demonstrated in the earlier brief submitted by the Attorney General, both vested rights and recognized contract interests would be infringed by retroactive application of Proposition 8. (Respondents Brief, at pp. 71-75.)

Other amici have expanded on these issues and agreed with the Attorney General as to the impact of Proposition 8 on existing marriages if it were to be applied retroactively. For example, the Professors of Family Law

have identified tangible and intangible rights and benefits of marriage that couples would stand to lose through retroactive application of the measure. (Brief of Professors of Family Law, at pp. 14-25.) Moreover, the Professors of Family Law analyze the factors identified by this Court (also cited in Respondent's Brief at p. 72) in determining whether retroactivity contravenes due process concerns. (*Id.* at pp. 28-37; see *In re Marriage of Bouquet* (1976) 15 Cal.3d 583, 592 [identifying six-factor analysis].) As argued in brief submitted by the Attorney General and as discussed in the Family Law Professors brief, these factors weigh against retroactive application—assuming that the measure is retroactive—in order to avoid due process violations.

These due process concerns are sufficient to establish that applying Proposition 8 to existing marriages would effect an improper retroactive invalidation. Like the Attorney General, other parties have raised the additional question of whether applying Proposition 8 to invalidate marriages that were not void ab initio would violate the contract clauses of the Federal or California Constitutions. (Brief of Billy DeFrank LGBT Community Center, et. al. [arguing that retroactive application of Proposition 8 would violate California contract clause].) But whether analyzed as a matter of due process or contract rights, invalidating the settled expectations of partners to existing, valid marriages by effectively voiding those marriages would be contrary to this Court's existing retroactivity law in matters involving settled marital expectations. (See, e.g., *In re Marriage of Fabian* (1986) 40 Cal.3d 440, 450 [reserving retroactivity of marital property statutes for "those rare instances when such disruption is necessary to promote a significantly important state interest."])

These concerns undercut the assertion of amicus Eagle Forum that Proposition 8 would not affect existing rights and obligations. (Brief of

Eagle Forum, at p. 21.) Contrary to the argument of Eagle Forum, it is insufficient to suggest that married persons may merely substitute "marriage-like rights" under California statutes (presumably domestic partnership laws) or enforce substantive rights in equity. (*Ibid.*) The same hold true for the "incidents of marriage" approach urged by the Professors of Law. (Brief of Professors of Family Law, at p. 18.) Eagle Forum also errs in asserting that the pendency of Proposition 8 prior to the November 2008 election deprived couples of settled expectations on the viability of same-sex marriages. (Brief of Eagle Forum, at p. 21.) This is another way of presenting the flawed assertion that Proposition 8 merely declared existing law. (See discussion, *infra*.)

Nor would application of the "putative spouse" doctrine advanced by the Professors of Law alleviate the due process concerns raised by retroactive invalidation. (Brief of Professors of Law, at pp. 21-27.) Under the putative spouse doctrine, an innocent party may be entitled to relief where a marriage is invalid due to some legal infirmity. (*Estate of DePasse* (2002) 97 Cal.App.4th 92, 107.) The doctrine is codified in the Family Code: "If a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall . . . [d]eclare the party or parties to have the status of a putative spouse." (Fam. Code, § 2251, subd. (a).) Yet, amicus fails to demonstrate that the putative spouse doctrine would convey the same benefits, dignity and respect as the institution of licensed marriage and downplays the harm caused couples required to obtain court declarations.

Indeed, the proposed putative spouse solution underscores the general failure of interveners or any amici to identify any means of protecting the interests of married couples if Proposition 8 is applied retroactively. Like

interveners' suggestion of legislative or judicial action, such recommendations would impose significant burdens on the couples and other parties and leave all concerned in legal limbo. (See Brief of Francisco Chamber of Commerce, et. al., at pp. 38-40.) Nor do they recognize the other benefits, tangible and intangible, provided by the marital relationship. (Brief of Professors of Family Law, at pp. 14-25.) Such suggestions merely underscore that retroactive application of Proposition 8 would invade the vested interests and settled expectations of persons who married in reliance on this Court's decision in *Marriage Cases*.

4. Applying Proposition 8 To Existing Marriages Would Lead To An Unprecedented Interference With Established Marital Relationships.

Despite the filing of dozens of briefs by petitioners, respondents, interveners and amici, it does not appear that any party has identified any prior decision in which a court retroactively applied a statute to invalidate marriages in the way interveners and some amici urge here. The action urged by these parties thus appears to be legally unprecedented.

The closest authority on point cited by petitioners and amici demonstrates that courts have protected the expectations of married parties in the face of statutes changing the types of marriages recognized by law. For example, the Professors of Family Law cite cases upholding the validity of common law marriages after the enactment of statutes abolishing the doctrine. (Brief of Professors of Family Law, at pp. 25-27.) Similar authority has been cited even in the context of antimiscegenation statutes. (*Id.* at pp. 27-28; Brief of Our Family Coalition, at p. 8 [citing cases addressing impact of statutes changing antimiscegenation and first-cousin marriage law].)

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Moreover, in the Nineteenth Century, courts facing an analogous issue involving "legislative divorces" generally elected to uphold existing marital relationships. At one time, "the granting of divorce by legislative decree was . . . considered appropriate in some states" and "had enjoyed wide acceptance." (Note, *Prospective Overruling and Retroactive Application in the Federal Courts* (1962) 71 Yale L.J. 907, 916 (*Prospective Overruling*).) Questions of retroactivity arose when the power to grant such divorces "was terminated by a judicial decision that the power had not existed in the legislature *ab initio*." (*Ibid.*) Generally, the courts chose to recognize the continuing legitimacy of legislative divorces to avoid upsetting the settled expectations of all persons concerned. (*Id.* at pp. 916-917.) As another observer noted, "The legislative divorce cases afford another early exception to the retroactive application of a court decision." (Traynor, *Quo Vadis: Prospective Overruling: a Question of Judicial Responsibility* (1999) 50 Hastings L. J. 771, 773.)

For example, in *Bingham v. Miller*, the Ohio Supreme Court invalidated legislative divorces as encroaching on the power of the judiciary under the state constitution. (*Bingham v. Miller* (1848) 17 Ohio 445.) But the Court chose not to treat the divorces as invalid to avoid harm to children and to subsequently contracted marriages. (*Id.* at p. 448-449.) "The effect of the decision was that while no more legislative divorces could be granted, those already granted would be respected, even though the legislature had lacked power to grant them." (*Prospective Overruling*, *supra*, 71 Yale L.J. at p. 917; accord: *Richeson v. Simmons* (1870) 47 Mo. 20; cf: *Winkles v. Powell* (1911) 173 Ala. 46, 55 So. 536.)

These decisions show that historically courts have chosen to respect settled expectations as to the existence of marital relationships by not applying decisions and statutes retroactively in the absence of a compelling

reason to do so. If Proposition 8 is upheld as valid, the same reasoning should apply here and the measure should not be applied to existing marriages.

5. Invalidating Existing Marriages In This Proceeding Would Deprive Affected Persons Of Due Process Of Law

If this Court is at all inclined to consider applying Proposition 8 retroactively, it should nonetheless decline the invitation. Since at tiny percentage of the thousands of persons married before the election are before this Court, it would be a fundamental denial of due process to declare the marriages invalid in this proceeding.

Unlike the situation in the *Lockyer* proceeding, these persons would be indispensable parties to any proceeding declaring the marriages invalid. (See *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1115.) Although the present proceeding, like *Lockyer*, has been framed as a pure question of law, the validity of the marriages under *Marriage Cases* is a fact that distinguishes this proceeding from that earlier decision. (*Ibid.*) In *Lockyer*, this Court noted that the same legal issue would be applicable in all proceedings. (*Ibid.*) But because the Court is considering the retroactive application of a measure to existing marriages entered into in good faith under existing law, rather than the effect on marriages that were licensed without authorization by city and county officials, it cannot be presumed that this would be true for all existing marriages.

It is well-settled that the right to due process includes "reasonable notice and an opportunity for hearing." (7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 640, p. 1041; see *Anderson v. Superior Court* (1989) 213 Cal.App.3d 1321, 1330 [deprivation of due process by lack of adequate and timely notice].) Here, regardless of this

Court's decision, couples impacted by application of Proposition 8 should be given the opportunity to present any arguments as may be warranted in future proceedings.

CONCLUSION

If allowed to remain in effect, Proposition 8 will make an unprecedented change to the California Constitution by taking away the fundamental rights of a vulnerable minority. The Attorney General urges this Court to strike this initiative down as an invalid amendment. Alternatively, if Proposition 8 is upheld, the Attorney General urges the Court to hold that the existing marriages of same-sex couples remain valid.

Dated: January 21, 2009

Respectfully submitted,

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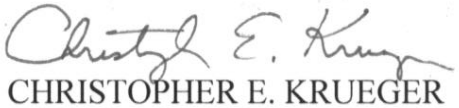

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CERTIFICATE OF COMPLIANCE

CALIFORNIA RULES OF COURT, RULE 8.504 SUBDIVISION (d) (1)

I hereby certify that:

Pursuant to California Rules of Court, Rule 8.504 subdivision (d) (1), in reliance upon the word count feature of the software used, I certify that **ATTORNEY GENERAL'S RESPONSE TO AMICUS CURIAE BRIEFS;** filed on January 21, 2009 used a 13 point Times New Roman font and contains 7,867 words, including footnotes.

Dated: January 21, 2009

CHRISTOPHER E. KRUEGER

DECLARATION OF SERVICE BY U.S. MAIL

Case Names: **Strauss, Karen L. et al. v. Mark B. Horton, et al.**
California Supreme Court Case No.: S168047
Tyler, Robyn, et al. v. State of California, et al.
California Supreme Court Case No.: S168066
City and County of San Francisco, et al. v. Mark B. Horton, et al.

Case No: **California Supreme Court Case No.: S168078**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On January 21, 2009, I served the attached **ATTORNEY GENERAL'S RESPONSE TO AMICUS CURIAE BRIEFS;** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at West Sacramento, California, addressed as follows:

PLEASE SEE THE ATTACHED SERVICE LIST.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 21, 2009, at Sacramento, California.

KIMBERLY GRAHAM
Declarant

K-Graham
Signature

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SERVICE LIST

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