

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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KAREN L. STRAUSS, et al., )  
)  
Petitioners, )  
v. )  
)  
MARK D. HORTON, State Registrar )  
of Vital Statistics, etc., et al., )  
)  
Respondents, )  
)  
DENNIS HOLLINGSWORTH, et al., )  
)  
Intervenors. )

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S168047

SUPREME COURT  
**FILED**

JAN 15 2009

Frederick K. Onrich Clerk

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Deputy

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**BRIEF AMICUS CURIAE OF AMERICAN CENTER  
FOR LAW AND JUSTICE AND THREE MEMBERS OF THE  
UNITED STATES CONGRESS  
IN SUPPORT OF THE CONSTITUTIONALITY OF  
PROPOSITION 8 AND INTERVENORS**

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JAN 15 2009

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**IN THE SUPREME COURT OF CALIFORNIA**

Case Name: *KAREN L. STRAUSS et al., Petitioners* Supreme Court S168047  
*MARK B. HORTON, as State Registrar* Case No:  
*of Vital Statistics, etc., et al.,*  
*Respondents; DENNIS HOLLINGSWORTH*  
*et al., Intervenors*

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 (Cal. Rules of Court, rule 8.208)

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Party Represented

Brian Chavez-Ochoa

Amicus American Center for Law & Justice and Three Members of the United States Congress

*Brian Chavez-Ochoa*  
 (Signature of Attorney Submitting Form)

\_\_\_\_\_  
 January 13, 2009  
 (Date)

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## APPLICATION AND INTEREST OF AMICI CURIAE

The American Center for Law and Justice (“ACLJ”) and United States Representatives Wally Herger, Dan Lungren and George Radanovich hereby make application to appear as *amici curiae* in the instant case. Amicus ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. The ACLJ has argued and participated as *amicus curiae* in numerous cases before the Supreme Court of the United States and other courts around the country in a variety of significant cases involving questions of constitutional law. Amici Herger, Lungren and Radanovich are members of the 111<sup>th</sup> United States Congress, elected by the people of California. Amicus Lungren is also a former Attorney General of the State of California. Regarding the definition of marriage, amici are committed to preserving the traditional institution of marriage as the union of one man and one woman.

While this brief includes arguments regarding each of the issues upon which this Court sought briefing in the instant case, it focuses primarily on one issue—whether Proposition 8 is an amendment to or a revision of the California Constitution. While Petitioners and others have raised alternative grounds upon which they assert Proposition 8 may be invalidated, amicus respectfully submits that (1) under controlling California precedent Proposition 8 is a valid amendment to—not a revision of—the California Constitution, and (2) this conclusion ends judicial scrutiny of the initiative measure. This brief further brings to the attention of the Court the crucial jurisdictional issue of the lack of standing of three of the named parties in related Case No. S168078, *City and County of San Francisco v. Horton*.

## ARGUMENT

### I. THE CITY AND COUNTY PETITIONERS LACK STANDING TO BRING THEIR CLAIMS.<sup>1</sup>

The City and County of San Francisco, the County of Santa Clara, and the City of Los Angeles lack standing in the instant case because they cannot show any cognizable harm to them from the passage of Proposition 8. “The purpose of the standing requirement [under California jurisprudence] is to ensure that the courts will decide only actual controversies between the parties with a sufficient interest in the subject matter of the suit to press their case with vigor.” *Common Cause of California v Bd. of Supervisors of Los Angeles County* (1989) 49 Cal. 3d 432, 439. “The fundamental issue of standing is that it focuses on the party seeking to get his complaint before a . . . court, and not on the issues he wishes to have adjudicated.” *Harman v. City & County of San Francisco* (1972) 7 Cal. 3d 150, 159. “One who invokes the judicial process does not have ‘standing’ if he or those whom he represents, does not have a real interest in the ultimate adjudication because the actor has neither suffered or is about to suffer . . . any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be reasonably presented.” *Bilafer v. Bilafer* (Ct. App. 2008) 161 Cal. App. 4th 363, 370.

California courts have previously held that subdivisions of the state lack standing to bring claims of a class to which they do not belong. *Community Television of So. Cal. v. County of Los Angeles* (1975) 44

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<sup>1</sup> The ACLJ notes that this issue is beyond the scope of those on which the Court requested briefing. Because it is a jurisdictional prerequisite to the Court’s hearing on the merits, however, and because these petitioners have not alleged any facts sufficient to demonstrate standing with regard to their current claims, presentation of this initial argument is crucial. The necessity that Petitioners demonstrate standing is all the more essential in cases, such as this one, in which a law is challenged *on its face*.

Cal.App.3d 990, 998. The City and County of San Francisco, the County of Santa Clara, the City of Los Angeles and the County of Los Angeles, as political subdivisions of the state, clearly have no sexual orientation and thus are not within the class of gay and lesbian persons whose rights they assert have been violated by Proposition 8. According to established California precedent, “[a]s . . . political subdivision[s] of the state and not being parties who belong to a class allegedly discriminated against they lack the standing to make such a challenge.” *Id.* (citing, *inter alia*, *Harman*, 7 Cal.3d 150). The argument of these Petitioners that their enforcement of Proposition 8 will violate the rights of their homosexual citizens underscores the reality that the rights at interest here are those of individuals, not the cities and counties themselves. Furthermore, the insistence of these Petitioners that their enforcement of Proposition 8 requires them to violate the rights of their citizens is entirely erroneous. If Proposition 8 is upheld as a valid amendment, the voters will have effectively affirmed the prohibition of same-sex marriage throughout California. By following this law no county would violate any other rights. All other provisions of the California Constitution would be read consistently with Proposition 8 thereby avoiding any conflict. The counties have no cognizable standing interest in this regard.

If, as these Petitioners suggest, the interests of individual citizens of these cities and counties are harmed by Proposition 8, they can certainly bring their own claims. *See Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1081 (instructing city officials that the proper means of setting up a test case is to actually deny “a same-sex couple’s request for a marriage license and advise[] *the couple* to challenge the denial in . . . court”) (emphasis added). Indeed, several citizens alleging

injury from the passage of Proposition 8 have already done so. The cities and counties are in no position to press these same claims.

Furthermore, although it is certain that some citizens of San Francisco, Santa Clara, and Los Angeles voted against Proposition 8, this does not provide these petitioners with a sufficient stake to challenge Proposition 8's validity. For it is just as certain that more citizens of these cities and counties voted in favor of Proposition 8. These political subdivisions should not be permitted to spend taxpayer dollars to represent the interests of one group of their citizens when those interests are in direct opposition to the interests of another group of their citizens. Actions of political subdivisions are authorized by express or implied votes, statutes, ordinances or constitutional provisions. Petitioners have cited no such legal authority empowering them to act in contravention to the will of their citizenry.

Lastly, San Francisco's claim of adverse financial impact is not a cognizable interest giving rise to standing such that this Petitioner may challenge the passage of Proposition 8. The mere fact that a constitutional amendment might negatively impact the revenues of the state or a subdivision thereof is not a harm to be redressed by the courts. Petitioner points to no provision of California law under which the will of the people or, more specifically, their initiative power, is limited by the potential financial impact of their decisions on the political subdivisions of the state. There is simply no live, adversarial dispute between the city and county Petitioners and the Defendants.

**II. THIS COURT'S PRECEDENTS SUPPORT THE CONCLUSION THAT PROPOSITION 8 IS AN AMENDMENT TO, NOT A REVISION OF, THE CALIFORNIA CONSTITUTION.**

Proposition 8 is a validly enacted amendment to a single provision of the California Constitution. Contrary to Petitioners' assertions, Proposition 8 does not create far reaching, sweeping, or profound changes in the state's constitutional scheme. Rather, it merely confirms the historically recognized scope of a single right recognized in the California Constitution—the right to marry—as encompassing only those unions “between a man and a woman,” nullifying the more expansive definition of that right enunciated by this Court in the *Marriage Cases* (2008) 43 Cal. 4th 757. As such, Proposition 8 does not rise to the level of a constitutional revision.

Article XVIII of the California Constitution distinguishes between amendments and revisions to that instrument. According to Sections 1 and 2 of the article, revisions to the constitution may be effected in two ways: (1) two-thirds of both houses of the legislature agree upon a proposed revision, and a majority of the voting citizens of California vote in favor of the revision; or (2) the legislature votes to call a constitutional convention which then enacts a revision. *See* CAL. CONST. art. XVIII §§ 1, 2, 4. Similarly, an amendment to the California Constitution may be effected in two ways. The first means of amending the constitution is identical to the first means of revising the constitution. The additional manner in which the constitution may be amended is through a voter initiative. *See* CAL. CONST. art. XVIII, §§ 1, 3, 4. In other words, an amendment to the California Constitution is valid if it is properly submitted to the voting citizens of California as a ballot proposition and a majority of those voting approve the amendment.

Thus, the distinction between a constitutional amendment on the one hand and a revision on the other is first a matter of procedure. Specifically, enactment of a revision requires a far more arduous process than does

enactment of an amendment. The reason for this, as this Court has explained, is that “the term ‘revision’ in section XVIII originally was intended to refer to a substantial alteration of the entire Constitution, rather than to a less extensive change in one or more of its provisions.” *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 222 (“*Amador Valley*”). As the *Amador Valley* Court acknowledged, prior decisions of this Court had likewise recognized that a revision is defined by “the ‘far reaching and multifarious substance of the measure’” or “the ‘substantial [curtailment]’ of governmental functions which it would cause.” *Id.* (quoting *McFadden v. Jordan* (1948) 32 Cal. 2d 330, 332, 345-346). Thus, the distinction is also one of substance. That is, to constitute a revision, an enactment must either be “so extensive in its provisions as to change directly the ‘substantial entirety’ of the Constitution by the deletion or alteration of numerous existing provisions,” or “accomplish . . . far reaching changes in the nature of our basic governmental plan . . . .” *Id.* at 223.

By contrast, a constitutional “‘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 v. Waite* (1894) 102 Cal. 113, 118-119. Importantly, even if an initiated enactment “will result in various substantial changes in the operation of the former system,” if it “adds nothing novel to the existing governmental framework of th[e] state,” it constitutes not a revision but an amendment. *Amador Valley*, 22 Cal. 3d at 228.

This Court’s precedents confirm that Proposition 8 qualifies as a valid amendment, rather than a revision, to the state constitution. In *McFadden v. Jordan*, this Court invalidated a proposition amid circumstances in which it was “overwhelmingly certain” that the measure

“would constitute a revision of the Constitution rather than an amendment.” 32 Cal. 2d at 349-50. The sweeping proposition sought to add a new article consisting of 12 separate sections, 208 subsections, and more than 21,000 words. *Id.* at 334. This Court found that “at least 15 of the 25 articles contained in our present Constitution would be either repealed in their entirety or substantially altered by the measure, a minimum of four . . . new topics would be treated, and the functions of both the legislative and the judicial branches . . . would be substantially curtailed.” *Id.* at 345. Though the *McFadden* measure proposed a single amendment, it was “obviously . . . multifarious,” covering a “wide” and “diverse range” of subject matters, from retirement pensions to healing arts to surface mining. *Id.* at 345-46.

Proposition 8, which adds only one sentence to the state constitution by insertion of a new section without deleting or altering any pre-existing provision, does not mirror or even approach the level of quantitative and qualitative concern presented by the measure in *McFadden*. Proposition 8 inserts only fourteen words affecting only one section, whereas the sweeping *McFadden* proposition sought to insert more than 21,000 words affecting at least 15 sections—altering, on its face, two-thirds of the existing 55,000 word, 25 section constitution. Further, unlike the *McFadden* proposition, the single amendment enacted by Proposition 8 is not “multifarious” in effect. In a narrow definitional manner, it touches only one subject matter: the institution of marriage.

More recently, in *Raven v. Deukmejian* (1990) 52 Cal. 3d 336, this Court struck down a portion of an initiative measure that sought to restrict and diminish a pre-existing, clearly expressed state constitutional provision. Titled the “Crime Victims Justice Reform Act,” the measure sought to amend various provisions of article I. Thus affecting “only one constitutional article,” the *Raven* initiative easily satisfied the quantitative

effect prong of the revision-amendment analysis. *Id.* at 351. This Court held, however, that one provision of the measure would have made structural changes to the way constitutional decisions were made by the California Supreme Court such that the measure effected a constitutional revision.

Specifically, the qualitatively overreaching provision sought to amend article I, section 24 of the constitution (adopted in 1974), which “provided in relevant part that ‘Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.’” *Id.* at 350. The proposed provision would have limited the state constitution such that it must be strictly construed according to the rights afforded by the federal constitution, nothing greater. *Id.* As such, the proposed provision would effectively “vest all judicial interpretative power, as to fundamental criminal defense rights, in the United States Supreme Court.” *Id.* at 352 (emphasis removed). Such a drastic transfer of power and wholesale diversion from the stated original purpose of the constitution would have been “devastating” from a qualitative standpoint. *See id.*

Proposition 8 is easily distinguishable from the provision struck down in *Raven* as a revision. Rather than restricting and diminishing a pre-existing, clearly expressed constitutional provision, Proposition 8 simply seeks to express a pre-existing constitutional definition in no uncertain terms. Proposition 8 involves no devastating transfer of power or wholesale diversion from the stated original purpose of the state constitution. Unlike the proposition in *Raven*, which significantly altered the status quo of a broad range of criminal rights as they had existed since enactment of the 1974 constitutional provision, Proposition 8 only clarifies what has been the status quo of marital rights under the California Constitution since its adoption in 1850. The California Constitution has never expressly defined

marriage as anything other than a union between a man and a woman. Nor does Proposition 8 alter in any way the California Constitution's distribution of power among the various branches of the state government. Thus, in contrast to the facts of *Raven*, there exists no constitutional precedent to support Petitioners' contention that Proposition 8 raises the "devastating" qualitative concerns that resulted in invalidation of the *Raven* initiative. In fact, Proposition 8 is analogous to the challenged amendment provisions upheld by the *Raven* Court, which affected only "isolated" rights but did not "substantially change [the] preexisting governmental framework." *Id.* at 350.

In contrast to *McFadden* and *Raven*, in *Amador Valley*, this Court upheld a proposition that amended the constitution by adding a new article that would substantially modify the California tax system. This Court upheld the measure on quantitative grounds where it contained about 400 words and was "limited to the single subject of taxation." 22 Cal. 3d at 224. On qualitative grounds, this Court affirmed the validity of the amendment even though it was "apparent" that the new article would "result in various substantial changes in the operation of the former system of taxation." *Id.* at 228 (emphasis added). This Court considered that the substantial changes "operate[d] functionally within a relatively narrow range to accomplish a new system of taxation." *Id.* Specifically, the article "change[d] the previous system of real property taxation and tax procedure by imposing important limitations upon the assessment and taxing powers of state and local governments." *Id.* at 218. The changes limited the tax rate on real property, restricted the assessed value of real property, limited the method of changing state taxes, and restricted local taxes. *Id.* at 220.

Despite opposition and concerns that the new tax system, modified by amendment, would "impose intolerable financial hardships and

administrative burdens in different forms and with varying intensity on public entities, programs, and services throughout California,” this Court honored its “solemn duty ‘to jealously guard’ the initiative power.” *Id.* at 248. Reasonably resolving any doubts in favor of the initiative measure, this Court concluded that the new article survived the revision challenge and constituted a valid amendment. *Id.*

Under the rationale and holding of *Amador Valley*, the validity of Proposition 8 as a constitutional amendment cannot be doubted. Proposition 8 is similarly limited to a single subject (marriage), yet contains a mere fourteen words as compared to 400. Further, Proposition 8 will not result in “substantial changes” to the operation of the former system of institutionalized marriage in California. In fact, Proposition 8 effectuates no “change” to the constitution whatsoever. The effect of Proposition 8, rather, is to restore the status quo of marriage between a man and a woman as it has existed in California since the constitution’s adoption in 1850, after only a brief judicially-mandated interruption following the *Marriage Cases*.

Petitioners contend that Proposition 8 constitutes a revision because it would effect a substantial change in the underlying principles of the basic governmental plan of the California Constitution by denying a fundamental right to a specified class of persons. Petitioners misunderstand the nature of this initiative. The voters of California, through the passage of Proposition 8, have simply clarified the substantive scope of that right. In this regard, the initiative at issue in the present case is no different from the initiative upheld as an amendment in *People v. Frierson* (1979) 25 Cal. 3d 142.

In *Frierson*, this Court held that a voter initiative approving a statutory scheme imposing the death penalty constituted an amendment rather than a revision. Importantly, this Court had previously held imposition of the death penalty “unconstitutional as constituting cruel or

unusual punishment under former article I, section 6 (present § 17) of the California Constitution.” *Id.* at 173 (citing *People v. Anderson* (1972) 6 Cal. 3d 628). As the *Frierson* Court acknowledged, “[o]n November 7 of the same year, the people responded by adopting, through initiative, a constitutional amendment . . . ‘in effect negating . . . [the] prior ruling . . . in *People v. Anderson* . . . that the death penalty violated the California Constitution.’” *Id.* at 173, 184. Recognizing the power of the people of California to overturn its decision in this manner, however, the court upheld the initiated enactment in *Frierson* as an amendment because it did not accomplish a result so “sweeping” as to constitute a revision.

The circumstances surrounding the passage of Proposition 8 are virtually identical to those involved in *Frierson*. In May of 2008, this Court concluded that the definition of the right to marry, as embodied in the Constitution of California at that time, included the right to marry another person of the same gender. *See In re Marriage Cases*, 43 Cal. 4th 757. Just a few months later, however, the people of California, exercising their constitutional power to initiate a constitutional amendment, negated that ruling by clarifying that the substantive scope of that right extends only to the union of two adults who are of opposite gender from one another, *i.e.*, a man and a woman. Proposition 8 does not change the purpose or function of the constitution’s original plan for marriage; it simply clarifies it. This clarification is precisely the type of enactment this Court has previously labeled an “amendment,” as it effects no sweeping or far reaching change in the constitutional scheme or governmental plan of the state but instead constitutes a “change within the lines of the original instrument as will . . . better carry out the purpose for which it was framed.” *Livermore*, 102 Cal. at 119.

Petitioners' response that the present situation is distinguishable from *Frierson* because the definition of marriage found in Proposition 8 discriminates against a suspect class of persons on the basis of their sexual identity further reveals their misunderstanding of this amendment. Just as the amendment in *Frierson*—reinstating the death penalty and clarifying, contrary to this Court's prior holding, that its imposition did not constitute the infliction of cruel or unusual punishment within the meaning of the California Constitution—applied equally to all citizens, so too does the definition of marriage embodied within Proposition 8. As a result of the passage of the amendment at issue in *Frierson*, no citizen of California sentenced to death could argue that imposition of that penalty violated his right under the California Constitution to be free from cruel or unusual punishment, see CAL. CONST. art. I § 17 (former art. I § 6), because a majority of voters agreed to exclude imposition of the death penalty from the definition of the term “cruel or unusual punishment.” To be sure, imposition of this particular definition of “cruel or unusual punishment” (so as to exclude the death penalty) affects some citizens differently from others. This fact, however, does not alter the nature of the enactment from a constitutional amendment to a revision.

Likewise, as a result of the passage of Proposition 8, no citizen of California may argue that non-recognition of a union with another person of the same gender violates his or her fundamental right to marry under the California Constitution because a majority of voters have agreed that the substantive scope of that right is limited to unions only between two adults of opposite gender from one another. In other words, the voting majority have clarified that the definition of marriage, as recognized by the California Constitution, includes only a union between a man and a

woman.<sup>2</sup> That this definition has a different impact on citizens wishing to enter into a union with an adult of the same gender, or with multiple adults of either gender, does not alter the reality that Proposition 8 effects nothing more than a clarification of the definition of a single right recognized in the California Constitution.

The issue here is not, as Petitioners characterize it, “whether voters can eliminate the fundamental right to marry only for a particular group, based on a classification this Court has held to be suspect under the California’s equal protection guarantee,” *see* Strauss Amended Petition for Extraordinary Relief at 30 (emphasis removed), but whether the voting citizens may clarify, as they have done through Proposition 8, the only definition of that right upon which a majority of voting citizens in the state of California have *ever* agreed. Under this Court’s precedents, Proposition 8 is therefore not a sweeping constitutional revision but rather a clarifying amendment to the constitution. *Accord Martinez v. Kulongoski* (2008) 220 Ore. App. 142 (holding, in light of substantially similar provisions of the Oregon Constitution, that a ballot proposition limiting the legal definition of marriage to include only unions between one man and one woman constituted an amendment rather than a revision to the state constitution); *Bess v. Ulmer* (1999 Ala.) 985 P.2d 979, 988 (holding, under the Alaska state constitution, that a nearly identical initiative measure defining marriage as existing “only between one man and one woman” was “sufficiently limited in both quantity and effect of change as to be a proper subject for a constitutional amendment” because “[f]ew sections of the

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<sup>2</sup> Again, in the 158-year history of the state of California, only for a few short months—and not as an expression of the will of the people but only as a result of the decision of four of this Court’s sitting justices—has marriage been legally defined in any other manner in this state.

Constitution are directly affected, and nothing in the proposal will ‘necessarily or inevitably alter the basic governmental framework’ of the Constitution”)(quoting *Brosnahan v. Brown* (1982) 32 Cal. 3d 236, 289).

For these reasons, Petitioners’ contention that a decision upholding the validity of Proposition 8 would undermine this Court’s ability to enforce the fundamental guarantees of the equal protection clause in such a way as to protect minorities from discriminatory action by the majority is entirely incorrect. Proposition 8 does not deprive any citizen of the fundamental right to marry and thus has no far-reaching effects on the judiciary’s interpretation and application of equal protection principles generally under the California Constitution. A provision that produces such a minimal alteration in the constitution properly constitutes an amendment and may be effected through a voter initiative.

The Attorney General argues at section III.D of his Answer Brief that Proposition 8 should be invalidated, even if it is found to be an amendment, because it abrogates fundamental rights protected by article I without a compelling interest. *See* Answer Brief in Resp. to Petition (filed Dec. 19, 2008) at 75-90. No case is cited for this proposition, and only a citation to Tribe’s Hornbook on Constitutional Law is later mentioned with regard to this theory virtually pulled out of thin air. Because it is clear that amendments can and have abolished or limited fundamental rights enumerated in the California Constitution in the past, the Attorney General had to throw in the qualifying language “without a compelling interest” to seek legitimacy for this theory. This position, however, is riddled with problems.

Who decides what rights are *inalienable*? The Attorney General suggests that those rights that antedate the California Constitution are *inalienable*, but that argument proves the Respondent’s case. The right to

marry that predates the constitution is defined as a union “between a man and a woman.” The idea that this right extends to same-sex partners has been equally pulled out of thin air only recently and has existed only as long as the period between this Court’s decision in the *Marriage Cases* and the passage of Proposition 8. No one can seriously argue that this definition of the right to marry predates the constitution. Thus, even by the Attorney General’s theory, the supposed “right” to marry a person of the same sex is not an *inalienable* right. Even if the Attorney General is correct that “the scope of liberty interests evolves over time as determined by the [United States] Supreme Court,” *id.* at 82, that body has never held that the scope of the right to marry extends to unions other than those between a man and a woman. Thus, while this Court’s *Marriage Cases* did “delineate[] the scope of the right to marry” under the California Constitution, *id.* at 84, the people have acted, through their reserved initiative power, to overturn that decision and clarify the definition of the right to marry within the state of California.

As noted, nothing in the California Constitution or the decisional law of this Court requires a duly enacted amendment to the California Constitution to pass a compelling interest test. The voters of the state merely need to pass it. Further, amicus agrees with the Attorney General that all rights not specifically granted to individuals in the constitution are retained by the people. That is one of the reasons the people have the right to amend the constitution. It is because the people retain these rights that they may grant or withhold them by the initiative process.

At page 90 of his brief the Attorney General goes even further with this theory to claim that when there is a conflict between an amendment of the constitution and a fundamental right protected by an existing provision of that instrument, strict scrutiny analysis is appropriate “in order that the power of the initiative may be harmonized with the ‘*inalienable*’ guarantees

of [the constitution].” Again, the constitution requires no such strict scrutiny. First, the Attorney General’s argument ignores the settled principle of construction that “specific provisions take precedence over general provisions.” *Mejia v. Reed* (2003) 31 Cal. 4th 657, 666. Proposition 8 undoubtedly provides a more specific statement of the nature of the right to marry than does article I, section 1, which makes no mention at all of the right to marry.

Moreover, as the Attorney General has stated, the right to marry is a fundamental right that predates the constitution. The People need to demonstrate no compelling interest or jump through any strict scrutiny hoops in order to justify their decision to return the scope of that right to the state in which it has existed from the beginning of the state’s history. This Court’s own precedents confirm that the scope of a fundamental right may be limited by the people, and no level of equal protection analysis, let alone strict scrutiny, is warranted.<sup>3</sup>

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<sup>3</sup> It is important to emphasize here, as Justice Baxter correctly noted in his dissenting opinion in the *Marriage Cases*, that this is not a situation involving “an insular and disfavored group” in need of “special constitutional protection” under equal protection principles. (2008) 43 Cal. 4th at 876. Homosexuals and lesbians have no defining characteristics from birth, like skin color, that would stigmatize them or set them apart within the culture. In short, homosexuals are not one of our society’s “discrete and insular minorities” in need of governmental protection. *United States v. Carolene Products Co.* (1938) 304 U.S. 144, 153, n.4. For, particularly in California, “in contemporary times . . . , the gay and lesbian community does not lack political power.” *Id.* (“In California, the political emergence of the gay and lesbian community is particularly apparent. In this state, the progress achieved through democratic means . . . demonstrates that, despite undeniable past injustice and discrimination, this group now ‘is obviously able to wield political power in defense of its interests’”). In fact, this political power was clearly demonstrated prior to the November 2008 election in which Proposition 8 appeared on the ballot. It is well known that the opponents of Proposition 8 raised as much money as its proponents.

For example, this Court has held that “the right[] to . . . avoidance of cruel and unusual punishment” is a “fundamental constitutional right[].” *Raven*, 52 Cal. 3d at 352. In *Frierson*, however, this Court upheld and enforced—as a valid constitutional amendment—the decision of a majority of voting citizens to limit the scope of that right by excluding imposition of the death penalty from the definition of cruel and unusual punishment. *See* 25 Cal. 3d at 187. There, the initiative measure at issue did not deprive anyone of the right to be free from cruel and unusual punishment. It merely clarified that the definition of this right did not encompass imposition of the death penalty. The dispositive issue was simply whether the measure constituted a valid amendment to the state constitution. *See also* *Bowens v. Superior Court* (1991) 1 Cal. 4th 36, 39 (upholding as a valid amendment a voter initiative that “was purposefully intended to abrogate the equal protection analysis underlying the substantive holding in [a previous California Supreme Court case]”); *In re Lance W.* (1985) 37 Cal. 3d 873, 891 (upholding an amendment affecting the fundamental right to be free from unreasonable search and seizure and further observing that “[t]he people could by amendment of the Constitution repeal [a section of the Declaration of Rights] in its entirety”); *Brosnahan v. Brown*, 32 Cal. 3d 236 (initiative affecting right to be free from unreasonable search and seizure upheld as an amendment).

In light of this Court’s prior case law, it is clear that Proposition 8, an initiative measure that merely defines the substantive scope of a single

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Such circumstances belie the notion that homosexuals are lacking in political clout. Homosexuals and lesbians have successfully competed with other groups within the culture and have shown a powerful influence in legislatures and courts. Petitioners and the Attorney General argue that homosexuals are like African Americans, deserving of special treatment, but offer no legal argument to support such treatment.

constitutional right, satisfies the requirements of a constitutional amendment. As such, this Court need not further scrutinize the measure but must give full effect to the stated will of the people.

### **III. PROPOSITION 8 DOES NOT VIOLATE THE SEPARATION OF POWERS UNDER THE CALIFORNIA CONSTITUTION.**

Petitioners bear a heavy burden of persuasion in challenging Proposition 8—a duly enacted constitutional amendment—in light of the great weight that the California Constitution affords to the will of the people. The separation of powers principle embodied within the California Constitution places the people in a preferred position, giving effect to the enduring American principle that Governments “deriv[e] their just powers from the consent of the governed.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). As this Court has recently explained:

The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900’s. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it “the duty of the courts to jealously guard this right of the people,” the courts have described the initiative and referendum as articulating “one of the most precious rights of our democratic process. [I]t has long been our judicial policy to apply a liberal construction to this power whenever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.”

*Indep. Energy Producers Ass’n v. McPherson* (2006) 38 Cal. 4th 1020, 1032 (quoting *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal. 3d 582, 591) (internal citations omitted).

This strong presumption in favor of the people’s authority to act applies in situations where, as here, a litigant claims that a ballot initiative

effected a revision to the California Constitution rather than an amendment. *See, e.g., Legislature v. Eu* (1991) 54 Cal. 3d 492, 512 (“Resolving, as we must, all doubts in favor of the initiative process, we conclude that nothing on the face of Proposition 140 effects a constitutional revision”); *Amador Valley*, 22 Cal. 3d at 248 (“Consistent with our own precedent, in our approach to the constitutional analysis of article XIII A if doubts reasonably can be resolved in favor of the use of the initiative, we should so resolve them”). Since “the initiative process itself adds an important element of direct, active, democratic contribution by the people,” *id.* at 228, the people’s initiative power “‘must be liberally construed . . . to promote the democratic process.’” *Id.* at 219 (quoting *San Diego Bldg. Contractors Ass’n v. City Council* (1974) 13 Cal. 3d 205, 210, n.3); *see also id.* at 248 (Bird, C.J., concurring and dissenting) (“Initiatives by their very nature are direct votes of the people and should be given great deference by our courts. Judges should liberally construe this power so that the will of the people is given full weight and authority”).

While the fact that the people have clearly expressed their will to alter the California Constitution through Proposition 8 does not entirely insulate that decision from judicial review, *see In re Marriage Cases*, 43 Cal. 4th at 852-53, it is also true that “judicial restraint and caution . . . should always apply, under separation of powers principles, before clear expressions of popular will on fundamental issues are overturned.” *Id.* at 869, n.9 (Baxter, J., concurring and dissenting). “The principle of judicial restraint is a covenant between judges and the people from whom their power derives. It protects the people against judicial overreaching.” *Id.* at 883 (Corrigan, J., concurring and dissenting). In other words, this Court’s longstanding practice of resolving any doubts in favor of the use of the initiative power is a means of recognizing that the people are the ultimate

source of the government's authority. As Thomas Jefferson famously stated, "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education." Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) (quoted by *Polec v. Northwest Airlines* (6th Cir. 1996) 86 F.3d 498, 533 n.22).

Through the passage of Proposition 8, the people of California have spoken clearly and unequivocally regarding the definition of marriage, and the amendment they approved took effect the day after it was enacted. *See* CAL. CONST. art. XVIII § 4. As discussed previously, the people's reserved power to express their will through an initiative or referendum is "one of the most precious rights of our democratic process." *Indep. Energy Producers Ass'n*, 38 Cal. 4th at 1032 (citation omitted). The exercise of this "precious right[]" to restore a legal principle that dates back to the founding of the State, *see In re Marriage Cases*, 43 Cal. 4th at 792 ("From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman"), in no way violates the separation of powers under the California Constitution. While Proposition 8 creates a change in the law as stated in this Court's opinion in the *Marriage Cases*, it in no way attempts to control the judiciary's interpretation of any law. Consequently, Proposition 8 is entirely consistent with the separation of powers principles embodied within the California Constitution. Under these principles, the California Supreme Court may not discard Proposition 8 absent a clear finding that it constitutes a revision of the constitution.

**IV. PROPOSITION 8 FORBIDS OFFICIAL RECOGNITION AS A “MARRIAGE,” IN THE STATE OF CALIFORNIA, OF ANY UNION THAT IS NOT BETWEEN A MAN AND A WOMAN.**

The language of Proposition 8 is unambiguous and must be given effect according to its terms. Proposition 8 clearly provides that “[o]nly marriage between a man and a woman is valid or recognized in California.” This language became effective as a provision of the California Constitution on November 5, 2008. Thus, while the “marriages” of same-sex couples performed between June and November were (past tense) valid at the time (under the California Supreme Court’s decision in the *Marriage Cases*), it is now clear on the face of the California Constitution that no subdivision of the state of California may (present tense) legally recognize those unions as “marriages.”

While the plain language of Proposition 8 is sufficient to resolve this issue, this Court has “previously held that the ballot arguments and analysis presented to the voters in connection with a particular measure ‘may be helpful in determining the probable meaning’ of constitutional amendments adopted by the initiative process.” *Frierson*, 25 Cal. 3d at 185 (quoting *Amador Valley*, 22 Cal. 3d at 245-46). The legislative analysis provided in connection with Proposition 8 states the intended effect of Proposition 8 as follows: “As a result [of Proposition 8], notwithstanding the California Supreme Court ruling of May 2008, marriage would be limited to individuals of the opposite sex . . . .” Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 4, 2008) p. 55. And if the foregoing is not clear enough, the rebuttal argument by the proponents of Proposition 8 expressly provides that passage of Proposition 8 “means that only marriage between a man and a woman will be valid or recognized in California, *regardless of when or where performed.*” *Id.* at p.

57 (emphasis added). Based on this language, there can be no doubt that the voting citizens of California intended Proposition 8 to prevent the state of California from legally recognizing as a “marriage” *any* union other than one between a man and a woman, including those “marriages” that took place between same-sex couples in the state of California between June and November 2008. Only when read in this manner can Proposition 8 “be given a common-sense construction in accordance with the natural and ordinary meaning of its words, with a view toward fulfilling the apparent intent of the framers.” *Frierson*, 25 Cal. 3d at 186.

### CONCLUSION

This Court should uphold Proposition 8 as a valid amendment to the California Constitution and order that it be given full effect in accordance with its intended meaning.

Dated: January 13, 2009

Respectfully submitted,



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## CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to California Rules of Court, Rule 8.204(c)(1), and in reliance upon the word count feature of Microsoft Word, that the foregoing **AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AND THREE MEMBERS OF UNITED STATES CONGRESS**, was prepared using 13-point Times New Roman font and contains 6,788 words, including footnotes but excluding the Table of Contents, Table of Authorities and Certificate of Compliance.

Dated: January 13, 2009

  
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