

**S168047 / S168066 / S168078**  
**IN THE SUPREME COURT OF CALIFORNIA**

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

SUPREME COURT  
**FILED**

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ROBIN TYLER et al., Petitioners,  
v.  
STATE OF CALIFORNIA et al., Respondents;  
DENNIS HOLLINGSWORTH et al., Interveners

JAN 15 2009  
Frederick K. Ohlrich Clerk

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CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners Deputy

v.  
MARK B. HORTON et al., as State Registrar of Vital Statistics, etc.,  
Respondents;  
DENNIS HOLLINGSWORTH et al., Interveners

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**APPLICATION TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE***  
**ARCHBISHOP MARK STEVEN SHIRILAU**  
**IN SUPPORT OF PETITIONERS AND OTHER PARTIES**  
**ARGUING IN FAVOR OF MARRIAGE EQUALITY AND**  
**IN OPPOSITION TO PROPOSITION 8'S ALLEGED VALIDITY**

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*Amicus Curiae in Propria Persona*

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## **APPLICATION TO FILE BRIEF OF *AMICUS CURIAE***

Pursuant to California Rule of Court 8.200(c), Archbishop Mark Steven Shirilau requests leave of this court to file the attached brief of *amicus curiae* in support of the petitioners and other parties arguing in favor of marriage equality. *Amicus* is a resident of California, a registered voter who voted against Proposition 8, and the chief ecclesiastical officer of The Ecumenical Catholic Church, a Christian denomination with local ministries in California as well as other locations in the United States and world. While all of the statements made within the *amicus* brief have the full support of the clergy and laity of the denomination, in accordance with Ecumenical Catholic canon law the archbishop is the sole person with authority to speak fully and completely for the denomination. As such, *amicus* addresses the court both on his personal behalf and on behalf of the Ecumenical Catholic Church.

### **GENERAL INTEREST OF *AMICUS CURIAE***

*Amicus* believes that same-sex marriage is theologically, sacramentally, liturgically, emotionally, and practically identical to different-sex marriage. In accordance with this belief, *amicus* believes that same-sex couples should be afforded the exact same fundamental right of access to civil marriage as are male-female couples.

*Amicus* believes that failure by the state to grant equal civil marriage opportunity to same-sex and different-sex couples violates his personal freedom of religion as a priest and the freedom for his Christian denomination to have its canons and ceremonies granted the same civil

stature as are the canons and ceremonies of some other denominations and religions.

*Amicus* is aware of an *amici curiae* brief to be filed jointly by several bishops, clergy, laity, and religious institutions that is likewise in support of marriage equality. *Amicus* is fully supportive of those individuals and institutions in their filing and, to the extent to which he is aware of the details, is in agreement with that filing. *Amicus* believes that he and his denomination have unique information to present to the court because (1) marriage equality is not only acceptable within the Ecumenical Catholic Church, but its acceptance is obligatory for all clergy and local parishes, (2) the sacramental equivalence of same-sex and different-sex marriage is explicitly proscribed within ECC canon law, and (3) *amicus* has celebrated and performed same-sex marriages for over twenty years. *Amicus* believes that by filing a separate brief he may focus on these salient points without detracting from the wider focus and general emphases of the multid denominational and interfaith brief.

Furthermore, it is imperative that the wide spectrum of religious support for marriage equality be shown to the fullest extent possible. The proponents of Proposition 8 received immense amounts of funding from the members of a few religious organizations at the encouragement of their leaders. The advertising, including much of the misleading advertising, supporting Proposition 8 carried overt or underlying religious overtones, including the historically inaccurate concept of “traditional marriage.” There is a general tendency in some of the media and the population at large to dichotomize “Christianity” with gay rights and marriage equality, and the proponents of Proposition 8 took advantage

of this misperception. It is thus vital that every religious voice speaking in favor of marriage equality be fully heard.

For all the reasons stated above, *Amicus* requests leave of the court to file the attached *amicus curiae* brief.

DATED: January 11, AD 2009

The Feast of the Baptism of Our Lord

A handwritten signature in black ink, reading "Mark S. Shirilau". The signature is written in a cursive style and is positioned above a horizontal line.

Most Rev. Mark S. Shirilau, Ph.D.

Archbishop and Primate

The Ecumenical Catholic Church

*Amicus in Propria Persona*

# **BRIEF OF *AMICUS CURIAE***

## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

### **A. Proposition 8’s Attempt to Revise the California Constitution Contradicts the Constitution’s Protection of Religious Freedom**

*Amicus* is chief pastor of The Ecumenical Catholic Church (ECC), a Christian denomination that requires its members and clergy to recognize the equivalence of same-sex and different-sex marriage. ECC canon law forbids discrimination based on several factors: “This church shall hold no regard for a person’s race, color, gender, sexual orientation or preference, nationality, or socioeconomic class” (Canon III, Article 5).<sup>1</sup> Furthermore, ECC canon law explicitly prohibits establishing differences between same-sex and different-sex marriage: “No distinction shall be made in this denomination or any of its constituent organizations or authorities between heterosexual and homosexual marriages.” (Canon XX, Article 14).

*Amicus* speaks both as an individual pastor who has performed same-sex marriages as well as a bishop who is responsible for guiding other clergy and laity in the doctrine and beliefs of the Ecumenical Catholic Church. As archbishop and chief ecclesiastical authority *Amicus* is also the one person who can categorically speak on behalf of the whole organization as a denomination with California, out-of-state, and foreign ministries and congregations, and this Brief of *Amicus Curiae* represents both the personal beliefs of the archbishop and the corporate statement of the church denomination.

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<sup>1</sup> The canon law of the Ecumenical Catholic Church is available on the denomination’s website at [www.ecchurch.org/canons.htm](http://www.ecchurch.org/canons.htm).

Furthermore, the validity of same-sex marriage is not a matter of debate within the Ecumenical Catholic Church. All clergy and laity are instructed in articles of faith prior to ordination or reception into membership. Many if not most specifically join the denomination because of its full, entire, unqualified, and undebated acceptance of equality of all persons before God and equal availability of all of the sacraments without discrimination based on gender or sexual orientation. When clergy are either ordained or received (after having been ordained in another denomination), they make several public statements as part of the liturgy, including, “The people of God’s Kingdom are those who are baptized and believe the Christian Faith. Age, race, color, mental capacity, gender, sexual preference or orientation, nationality, socioeconomic status, and other nonspiritual matters have no bearing on citizenship in God’s Kingdom.”<sup>2</sup>

Likewise, when lay people are confirmed or received into membership, they make several public statements after being asked detailed questions. One of the questions asks, “Do you believe that Baptism is properly administered to any person without regard to age, race, color, mental capacity, gender, sexual orientation or preferences, nationality, socioeconomic status, and other nonspiritual matters, and therefore that these matters have no bearing whatsoever on citizenship, rights, and duties in God’s Kingdom?” The candidates answer, “Yes, I so believe.”<sup>3</sup>

The California clergy unanimously support this public statement against Proposition 8 and, although we do not have a mechanism for determining such support, it is a reasonable assumption that support from the lay membership would also be unanimous.

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<sup>2</sup> *The Holy Eucharist and Other Sacramental Rites of the Ecumenical Catholic Church*, p. 327. (Healing Spirit Press, 1993.)

<sup>3</sup> *Op. cit.*, p. 255.

**B. The Alleged Section 7.5 Attempted to Be Inserted in Article 1 of the Constitution Is *Ipsa Facto* a False Statement**

The statement “Only marriage between a man and a woman is valid or recognized in California” is, *ipso facto*, a false statement. Validity of marriage is dependent upon a number of different factors and varies within context. The very fact that different religious organizations are appearing on both sides of this argument demonstrates that diversity.

The text of the attempted constitutional revision does not specify “civil marriage” and thereby makes a false statement regarding marriage in general. Furthermore, it does not specify recognition *by* California – that is, by the state government and its various subdivisions – but rather falsely says “in California.” No law or decree, even the state or federal constitutions, is capable of establishing how individuals or groups of individuals not directly part of the governmental system define terms.

**C. Proposition 8 Was In Fact an Improper Attempt to Revise the California Constitution**

There is no doubt that the text of the attempted revision is simple. However, scope and affect on the populace, not linguistic or legalistic simplicity, is the proper criterion by which to ascertain whether a constitutional change is an “amendment” or a “revision.” Proposed Section 7.5 of Article I contradicts the full body of the existing constitution, which this court has already determined to establish marriage equality. Furthermore, Section 7.5 contradicts the general purpose and flow of Article 1, which establishes rather than negates the rights of citizens.

**D. Proposition 8 Violates the Separation of Powers**

Dissatisfied that this court determined the same statement enacted into law by Proposition 22 to be unconstitutional, proponents of that law attempted to circumvent the legitimate authority of the Supreme Court by attempting to insert the unconstitutional law directly into the constitution. In passing Proposition 8, the people circumvented the duties of the legislature to control revisions to the constitution and also circumvented the separation of powers by attempting to make the judicial branch powerless in its responsibility to guarantee equal protection under the law.

**E. Proposition 8 Is Incapable of Altering Existing Marriages or Their Legal Recognition**

Section 10 of Article 1 of the United States Constitution prohibits any state from passing an *ex post facto* law. There is no logical way to view Proposition 8's application to pre-existing marriages other than to recognize it as *ex post facto*.

**F. The Attorney General is Correct in Asserting that Proposition 8 Abrogates Fundamental Rights**

While we disagree with the attorney general's conclusion that Proposition 8 is an "amendment" to the state constitution, we concur with his argument that it violates fundamental rights and therefore should be declared invalid. This argument, in fact, is part of the basis for our belief that the proposition represents an invalid revision, rather than an amendment, to the constitution. The semantics are less relevant than the

outcome, and we concur with all of the petitioners as well as the respondent attorney general that Proposition 8 is invalid, that Section 7.5 should be declared to have never been inserted into the state constitution, and that civil marriage equality should be returned to practice within California. The interveners' claims are erroneous and should be rejected.

## **II. RELIGIOUS FREEDOM**

### **A. The Ecumenical Catholic Church Teaches Marriage Equality**

The Ecumenical Catholic Church is a separate denomination within Christianity. It maintains itself within the confines of orthodox Christianity by strict adherence to the Faith handed down through the ages, specifically the Faith expressed by the Niceno-Constantinopolitan Creed (commonly called the "Nicene Creed") and the Apostles' Creed. This placement of the denomination within the Universal Christian Church is firmly and permanently entrenched by the denomination's canon law, which is essentially the constitution of the organization: "This organization shall be subject, first and foremost, to the creedal statements established by the Ecumenical Councils of the Universal Church, those being Nicaea, Constantinople, Ephesus, and Chalcedon." (Canon I, Article 5).

Although it has parishes throughout the United States and affiliated ministries in some foreign countries, the Ecumenical Catholic Church was founded in California and has served the people of the state of California for over twenty years. The parent organization is a California non-profit corporation (Corporation C1581615, March 10, 1987).

The purpose of the Ecumenical Catholic Church, as stated in its canon law, includes equality of all: "The primary purpose of this

organization is to worship the One True God – Father, Son, and Holy Spirit – and to be a part of God’s Kingdom, open to all people by faith without regard to race, color, gender, sexual orientation or preference, nationality, or socioeconomic status.” (Canon II, Article 1.) Although the purpose of the ECC, theoretically like that of all churches, is to worship God, the reason why it was created as a separate denominational entity was to provide a safe and secure home to all people, assuring them that the Christian sacraments would be available to them without regard to gender or sexual orientation, and not be subject to opinions of clergy or debates of assemblies and councils. Thus female ordination, ordination of married people, ordination of gay people, and same-sex marriage have *always* been practiced by the Ecumenical Catholic Church. The validity of these actions are not subjects of debate (as they are within most other Christian denominations), and no congregation, clergy person, diocese, bishop, or any other subsidiary or member of the denomination is allowed to discriminate in any manner with regard to gender or sexual orientation.

Marriage equality is coded within the canon law, as already detailed above.

Furthermore, the denomination teaches that marriage is a sacrament of commitment, akin to confirmation and ordination, that is ultimately derived from Baptism, the primary commitment in any Christian’s life. Confirmation is the sacrament through which God provides grace for *adult* ministry. Ordination is the sacrament through which God provides grace for *professional* ministry. Marriage is the sacrament through which God provides grace for *team* ministry.

Because of this high sacramental theology of marriage, derived from the primacy of Baptism, we believe that it is not only erroneous but arrogant to limit God and tell Him that He cannot use two men or two women just as well as He can use a male-female team to make

the world a better place. The *sacramental* purpose of marriage is not to produce children, not to sanction sex, not to provide financial stability, and not even for love and happiness. Rather, the sacramental purpose of marriage is to make the world a better place, through God's grace, by uniting a team of complementary individuals who can balance each other in their walk through life. To allow the marriage of two emotionally unbalanced people just because one is a man and one is a woman, while at the same time refusing the marriage of a well-balanced pair of men or pair of women, is an affront against God and dares to ascertain what He has chosen to do through the mysteries that cause two people to desire marriage to each other.

Interestingly, our high theology of marriage prohibits our clergy from performing the marriages of many couples who are eligible for civil marriage licenses. The marriage of a Christian to a Mormon, for example, would be forbidden because Mormons are not baptized into the Faith of the Apostles' Creed. Yet we certainly believe that it would be wrong for the state to impose our denomination's marriage rules onto all of its citizens.

Because of religious freedom, civil marriage regulations must always be more inclusive than those of the various religious bodies.

Likewise our denomination – like many religious organizations – has various premarital requirements, such as receiving counseling and generally convincing the clergy that the individuals are ready for marriage. If anyone were seriously interested in “protecting marriage,” he would be better off seeking legislation requiring premarital counseling than using legislation such as Proposition 8 to arbitrarily limit marriage to a particular subset of the population.

**B. The California Constitution Guarantees Religious Freedom**

The California Constitution states, “Free exercise and enjoyment of religion without discrimination or preference are guaranteed.” (Article 1, Section 4).

The only exceptions are “acts that are licentious or inconsistent with the peace and safety of the State.” *Licentious* is a vague term that has moral connotations, and some extreme individuals may consider same-sex marriage “licentious.” Interestingly we note, however, that the proponents of Proposition 8 have not attempted to make that point (though some of the misleading advertising for Proposition 8 tried to resonate with underlying antigay biases within the electorate). Sexual relations between consenting adults, including persons of the same sex, have been legal in California since 1975,<sup>4</sup> and the United States Supreme Court overturned “sodomy” laws throughout the nation in 2003 (*Lawrence v. Texas*, 539 US 558).

Furthermore, marriage is not dependent upon sex for its existence and is not primarily about sex, whether homosexual or heterosexual. Same-sex marriage therefore does not meet the criterion of “licentious” that would allow religious discrimination.

Likewise, no one can argue that same-sex marriage is “inconsistent with the peace and safety of the State.” There have now been thousands of same-sex marriages within California and none of them has threatened the peace and safety of the state. Furthermore, same-sex

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<sup>4</sup> *Statutes and Amendments to the Codes of California 1975*, page 131, ch 71, enacted May 12, 1975.

marriage is, if anything, *beneficial* to the economy and financial well being of both the state and its citizens.<sup>5</sup>

C. **Limiting Marriage to Different-Sex Couples Denies Our Religious Freedom**

Ecumenical Catholic beliefs about marriage are clear – the marriages of two men, two women, or a man and a woman are exactly equivalent. Our clergy perform both same-sex and different-sex marriages and use exactly the same liturgy. “The gender of the persons to be married is irrelevant. The church makes no distinction between heterosexual and homosexual marriages.”<sup>6</sup>

The discrimination comes immediately after the marriage ceremony. Different-sex couples have the option of presenting a single-page document to the priest, and the priest’s signature essentially grants them innumerable rights at both the federal and state level. Same-sex couples do not have this option. They may register as domestic partners, and while the domestic partnership law continues to expand the rights of the partners, it does not yet provide a fully equivalent set of benefits, and is incapable of doing so because the federal government does not have a domestic partnership category of relationships. (We realize that same-sex marriage is technically not recognized by the federal government even when legal within the states, but point out that this restriction has yet to be challenged in the United States Supreme Court, which we believe would have to strike down federal restrictions on same-sex marriage just as it

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<sup>5</sup> *Voter Information Guide, General Election (November 4, 2008)*. Analysis by the Legislative Analyst of Proposition 8. “Fiscal Affects”, p. 55

<sup>6</sup> *The Holy Eucharist and Other Sacramental Rites of the Ecumenical Catholic Church*, p. 286. (Healing Spirit Press, 1993.)

struck down equivalent restrictions on interracial marriage in 1967 in *Loving v. Virginia* [388 US 1].)

Furthermore, failure to recognize same-sex marriage discriminates against Ecumenical Catholic clergy who officiate at marriages. While all of our clergy may sign a marriage license, they can only officially validate domestic partnership paperwork if they are notaries public. (*Amicus* personally is a notary public and has notarized domestic partnership papers, but all ECC clergy are not notaries and there is no requirement – nor should there be – for them to be so.)

Most importantly, discrimination within the civil marriage system discriminates against the married couple. As discussed herein, we teach that same-sex marriage and different-sex marriage are *sacramentally* equivalent. We do not believe that *God* distinguishes between gay marriage, lesbian marriage, and straight marriage. Furthermore, we do not make such distinctions within our church. (A man could not, for example, leave his husband and marry a woman in the church just because he had never had a civil marriage and was free to marry her under civil law. The proposed marriage to a woman would violate canon law and be forbidden unless he divorced the man to whom he was already married.)<sup>7</sup>

Furthermore, we believe that it is possible for domestic partnership to be legally equivalent to civil marriage. For many reasons, including federal issues, it is *not* now equivalent. But we believe it is technically *possible* for federal and state laws to enact true equivalence.

What is impossible for either the state or the church is to create emotional equivalence and completely end discrimination unless the term *marriage* is used. We do our part by forbidding the term “holy union” or any other pseudonym other than “marriage” itself. The state must do the

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<sup>7</sup> ECC Canon Law, Canon XX, Art. 7.

same and use the proper term – marriage – if it is true to its constitutional mandate of non-discrimination.

As Christians we obviously believe that the sacramental benefits of marriage are the most important, and we are confident that the sacramental validity of our marriages, both same-sex and different-sex, has absolutely nothing to do with their standing within civil law.

Likewise, we believe that the legal benefits of marriage are not, but could be, mimicked with domestic partnership or civil union.

However, both of these academic arguments in theology and law miss what is probably the most important benefit to the couple themselves – the emotional benefit of getting married. *Amicus* has performed same-sex marriages for twenty-one years, notarized domestic partnership documents, and performed different-sex marriages. Not until this court's correct decision legislating marriage equality have the same-sex marriages carried the full emotional component implicit with different-sex marriage. It is not for lack of intellectual understanding of sacramental equivalence (which is taught to the couple during marriage counseling), but rather from missing the emotions that come from widespread public recognition of the marriage. Much as the church has tried, it appears as if only civil marriage is capable of initiating this sort of *public* recognition. Perhaps this is a derivative result of our democratic system where the state acts for and on behalf of the people, so state recognition of marriage conveys at a core emotional level the people's validation, just as the Church's rite conveys God's validation.

The importance of this emotional feeling of public acceptance is, at its core, the reason why the concept of same-sex marriage caught on as a wildfire. Just a few years ago the major gay rights advocates were more concerned with employment discrimination and domestic partnership. When the heterosexual mayor of San Francisco flung upon the marriage

door, the public and media responded and the gay community had an “aha” moment, realizing it had totally missed the vitally important emotional component that is conveyed *only* by the term “marriage.” Likewise, we in the Church can discuss theological equivalency, marital purpose, and baptismal derivations, but it is not until Jim and John go home and tell Aunt Mary “We’re getting married” that the emotions usually hit.

Take for example the Right Reverend Jack Isbell, the retired Ecumenical Catholic Bishop of Napa, and his husband the Reverend Nicholas Eyre. They were married in a church ceremony on January 3, 1981, in the Metropolitan Community Church of Honolulu. They have always considered this their wedding date, and so has the Ecumenical Catholic Church. When Nick Eyre was ordained to the priesthood on July 31, 1999, Jack had to give his consent as Nick’s husband, as is consistent with Ecumenical Catholic practice when a married person is ordained.<sup>8</sup> Jack and Nick have retired and since moved back to Hawaii. However, on August 30, 2008, Jack and Nick were married in a civil ceremony in Napa. The legal benefits of marriage had for the most part been worked out through their nearly 30 years of life together, and their civil marriage brings unclear legal benefits in Hawaii anyway. But they celebrated this day with great joy. It was an emotional victory. It was as if in the eyes of *society* they were married. God already knew it. The Church already knew it. They already knew it. But this was a new dimension. At long last the world seemed to have approved and blessed it!

*Only* the use of the proper term – marriage – can effect this equality. It is the state’s constitutional responsibility to enforce that.

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<sup>8</sup> *Holy Eucharist and Other Sacramental Rites*, p. 317

**D. Proposition 8 is Logically Incapable of Protecting Religious Freedom**

Denying a basic right to one subset of the population is not logically capable of protecting the right of a different subset of the population.

When one first logs on to [www.protectmarriage.com](http://www.protectmarriage.com), a four-minute cartoon about a straight couple and their gay couple next-door neighbors appears.<sup>9</sup> In the course of the cartoon, the straight couple decides to vote “yes” on Proposition 8 even though they remain good friends with their gay neighbors. Among the questions the straight couple ponders is “If Prop 8 were to fail, would their church be required to perform same-sex marriages?” Like everything else in the fictitious cartoon, the question is not answered but left open, implying a detrimental affect of Proposition 8’s failure (and further insinuating that this straight couple, whose best friends are a gay couple, would really care if their church did perform gay marriages rather than being among the growing number of “straight allies” who are moving most of the major denominations forward on the issue of marriage equality).<sup>10</sup>

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<sup>9</sup> This was true on January 3, 2009.

<sup>10</sup> The legislative bodies of The Episcopal Church, the Evangelical Lutheran Church in America, the United Methodist Church, the Presbyterian Church (USA), and other mainline Christian churches continue to debate issues such as same-sex marriage and the ordination of non-celibate gay clergy. The votes within the democratic processes are typically close and trend toward growing acceptance. The United Church of Christ has already reached majority approval on these subjects. The percent of bishops, clergy, and lay delegates supporting gay causes presumably far outnumbers the number of gay persons voting. The “project marriage” cartoon is therefore particularly offensive in its implication that the gay-friendly straight neighbors would somehow consider voting “yes” on Proposition 8 because they

The proponents of Proposition 8 ran ads that implied that it would protect religious freedom. For example, ProtectMarriage.com's television commercial "Have You Thought About It" has a black man in judicial robes ask, "[Have you thought about] what it means when gay marriage conflicts with our religious freedoms?"<sup>11</sup> The commercial does not provide an answer, but merely asking the question falsely implies that the legalization of gay marriage would inhibit religious freedom.

It has always been clear that no religious institution is required to perform same-sex marriages, just as they are not required to perform marriages of anyone just because the couple has obtained a civil marriage license. As we have already discussed, Ecumenical Catholic canon law forbids many marriages that are legally valid and recognized, including marriages between people who have not known each other for the six month minimum time period required by our canon law. Our clergy cannot perform a marriage for any couple who have not known each other at least six months. Our priests are also allowed to refuse marriage to any couple that the priest does not feel is ready for marriage. Holding a valid civil marriage license is *not* sufficient qualification for marriage in the eyes of the Church. This is true in the vast majority of religious institutions.

We cannot be sued for not performing marriages against our canon law. Roman Catholics cannot be sued for refusing to remarry divorced people, even though such couples are perfectly able to obtain valid civil marriage licenses and could be married by civil authorities.

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feared their church would be forced to conduct gay weddings. In reality, the couple as depicted probably would be among those who were pushing their denomination toward acceptance of gay marriage.

<sup>11</sup> As of January 3, 2009, the ad can still be viewed at <http://protectmarriage.com/video/view/9> or <http://www.youtube.com/watch?v=3YRQZwNfQ0o>.

The idea that somehow allowing gay marriage would negate the internal rules of religious organizations is just one of the many preposterous lies promulgated by the proponents of Proposition 8 in order to manipulate public opinion and stack the vote in their favor.

They have confused the issue by postulating a church that rents its space to the public for marriage ceremonies other than those of the church itself. If that situation were to actually exist, it would be a case of a church running a business – renting property – and not a case of a church performing religious rites. If a church is operating a business, the church should be required to follow the same nondiscrimination laws as anyone else. A white supremacist church should not be allowed to own an apartment building and refuse to rent to minorities, but nothing would force the clergy of that church to perform the marriage of an interracial couple. Likewise, if a church simply advertised its nave, social hall, or beachfront garden as being publicly available for other parties to perform weddings, it should not be able to discriminate. If that church did not believe in remarriage after divorce, but had a history of collecting rent from non-religious weddings, we agree that it could not discriminate against second marriages. But there is a simple answer to protect this church's religious freedom to not support second marriage – get out of the property rental business and concentrate on being a church.

Once again the Proposition 8 proponents distorted the truth and manipulated the public by citing a rare, irrelevant, out-of-state example (from New Jersey, a state that does not yet have gay marriage) by confusing a church's business enterprise with its religious practices.<sup>12</sup>

This court has already specifically addressed this issue in *In Re Marriage Cases*, “Finally, affording same-sex couples the opportunity

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<sup>12</sup> Michael Gardner, “Law Professors Enter Prop 8 Fray on Church's Tax-Exempt Status.” *San Diego Union-Tribune*, Oct 30, 2008.

to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.”<sup>13</sup>

In spite of being fully aware of this ruling’s clear and unequivocal preservation of religious freedom, the proponents of Proposition 8 knowingly ran a fear-based campaign playing upon the ignorance of the voters regarding the details of the court’s 121-page ruling.

#### **E. Historical Error Is Not a Valid Excuse**

Limiting marriage to male-female couples has *always* been a violation of the basic civil rights of same-sex couples and the religious freedom of religious institutions to establish their own sacramental practices. A new right was not granted by this court in May 2008, but rather a pre-existing right was recognized.

Likewise, the same rights exist in all states and nations, regardless of whether their courts, governments, and constitutions recognize them. The religious freedom of the Ecumenical Catholic Church has *always* been violated by laws limiting marriage to different-sex couples. The civil rights of same-sex couples have always been violated by those same laws. Proposition 22 did not establish discrimination, because the state unjustly limited marriage before that proposition was passed.

What is unique about Proposition 8, something that makes it especially vile and immoral, is that it turns back the clock of progress. This

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<sup>13</sup> *In Re Marriage Cases*, p. 117.

court has finally recognized that laws limiting civil marriage are wrong. They always have been wrong.

It is exactly parallel to slavery. Slavery did not become wrong as a result of the Civil War. Slavery always was wrong. It is simply that society progressed, and in that particular case it sadly took a tragic war to finally move us forward. The fact that slavery was legal in early America, the fact that it is legal or ignored in some parts of the world today, the fact that it is condoned in the Bible, and various other historic facts about slavery are irrelevant. This is because social awareness is progressive.

Scientific knowledge progresses even though reality does not change. The earth always revolved around the sun, even when the Church condemned Galileo for teaching that and even though the vast majority of the population agreed with the Church, not Galileo, on the subject. Social enlightenment progresses and evolves in the same way as scientific knowledge. History and “tradition” cannot correctly be used to hold back either scientific or social progress. Facts do not change because of popular votes. Stepping backward into either ignorance, bigotry, or discrimination is wrong. The sad reality that all people are not as enlightened is not an excuse to stay in the shadows. California has moved forward on the issue of marriage equality, both by vote of the legislature and by action of this court. It is now the duty of the court to not allow any power to set us backward.

Surely there were states, counties, and local governments that wanted to return to slavery after the Civil War ended. Surely if it had been up to the popular vote many places would have done so. We can no more justify a return to marriage discrimination than we can justify a return to slavery. Civil rights march ever onward, and it is all of our duties as moral agents of God to make that progress as smooth as possible.

**F. Proposition 8 Establishes a Religious Doctrine into Civil Law**

Limiting marriage to a male-female couple is essentially a religious doctrine. Anyone that doubts that can simply look at both the list of *amici curiae* in *In Re Marriage Cases* and the sources of funding for the proponents of the proposition.

We disagree with the conclusions and positions of the religious proponents of Proposition 8, but that does not mean that their primary interest in the subject is not religious. For example, Focus on the Family, one of the major funding sources of Proposition 8, presents its mission as “To cooperate with the Holy Spirit in sharing the Gospel of Jesus Christ with as many people as possible by nurturing and defending the God-ordained institution of the family and promoting biblical truths worldwide.”<sup>14</sup> We believe that “defending the family” gets in the way of “sharing the Gospel with as many people as possible.” But that is why our church differs from Jim Dobson’s organization. Both viewpoints are “religious,” and neither the court, nor the legislature, *nor the voters* should be allowed to determine which one of us is right.

Some religious organizations define marriage as being between a man and a woman. At the present it is even correct to say that “most” such organizations have either definitions or practices that include a heterosexual presumption about marriage. Just because those definitions or practices are shared by a majority of religious organizations does not mean either that (a) all religious organizations share that view, (b) all people within the organizations that have such views as part of their formal

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<sup>14</sup> Focus on the Family Website,  
[http://www.focusonthefamily.com/about\\_us.aspx](http://www.focusonthefamily.com/about_us.aspx).

theology agree with those statements or views,<sup>15</sup> or (c) that the statement “marriage is only between a man and a woman” is not at its very core a religious doctrinal statement.

Just last week this court issued a decision in the *Episcopal Church Cases* (S155094). The second paragraph of the decision states, “State courts must not decide questions of religious doctrine; those are for the church to resolve.” The statement is derived from the U.S. Constitution’s guarantee of religious freedom and various case decisions relating to that subject. The technical issue at stake in *Episcopal Church Cases* – the actual ownership of various church buildings – is not directly relevant to Proposition 8, though it is worth noting that the underlying issue in both situations has to do with the tension within the Christian Church and its various denominations relating to homosexuality.

In *Episcopal Church Cases* the court goes to great length to distance itself from church doctrine and to point out that the reason for the decision of the local parishes to leave the diocesan and national church bodies is not relevant. The court’s decision is based upon various property laws and legal relationships between the local, regional, and national church bodies, but is not based upon religious doctrine. The court’s decision with regard to the property would have been the same whether the local parish’s reasons were about homosexuality (as they were), true religious issues (such as the Deity of Christ), or simply because they thought the bishop was ugly. The reason was irrelevant, as this court painstakingly pointed out in order to be able to make a decision without impinging religious freedom.

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<sup>15</sup> We have already discussed how most of the major Christian denominations are gradually moving forward toward marriage equality within their internal policy-making systems, which implies that many people within the organizations disagree with the *status quo* regarding same-sex marriage.

With Proposition 8 there is no such luxury. The statement “marriage is only between a man and a woman” is itself a religious doctrine. Limitations on marriage based upon sexual orientation have no non-religious basis. Unlike property issues, which revolve around legal aspects of physical entities such as buildings, marriage is a concept and has no tangible existence outside what people give it.

Interestingly, since marriage is not a *core* doctrine – that is one’s beliefs about marriage do not define one’s religion as being Christian, Jewish, Buddhist, or whatever – the religious doctrines of marriage cut across religious boundaries. This may give it the appearance of not being a religious doctrine, but that is a false appearance.

The sensational fervor held by so many of the proponents of Proposition 8 demonstrates its religious connections. Theoretically no heterosexual is affected one way or the other by the existence of same-sex marriage or the lack thereof. At a purely rational level of self-interest, 85 to 90 percent of the population would not care one way or the other about Proposition 8 because it has no direct affect on them. Among the *opponents* of Proposition 8 there are altruistic motivations among the heterosexual population. “What’s good for me should be available to everyone.”

From where, however, do the motivations of the *proponents* of Proposition 8 come? For the most part they come from religious beliefs. It is not entirely clear why these people have such a strong desire to inscribe this particular religious belief into civil law, yet it clearly is being done, in spite of the fact that we all know that the state cannot preferentially support one religion over the other. The emotions behind the “yes on 8” campaign demonstrate its religious nature.

The fact that there are proponents of Proposition 8 among all the world’s major religions is not sufficient to make it legal to enshrine this

doctrine within civil law. That would be equivalent to arguing that the state could categorically state “There is one God” because Christians, Jews, and Muslims would all be in agreement. A majority vote among religious people still cannot warrant civil enshrinement of a religious doctrine.

Likewise, while the court’s discussion of “deciding questions of religious doctrine” in *Episcopal Church Cases* all revolved around what the *court* could and could not do, the basic statement applies to the legislative authorities – including the voting population – equally well. It is not only the courts that cannot decide questions of religious doctrine, it is the legislatures and the people as well.

Within the United States *no one* has the ability to decide religious doctrines for the whole population and enshrine them into civil law. The courts cannot do it. The legislatures or the congress cannot do it. A president, governor, or mayor cannot do it. *The people cannot do it.* It is a blanket statement. Civil authorities cannot “decide questions of religious doctrine.”

Proposition 8 is the people’s attempt to make such an illegal decision. “Marriage is only between a man and a woman” is a statement of religious doctrine – nothing more and nothing less.

There is no civil basis for so defining “marriage.” The state has no vested interest in limiting marriage to male-female couples. We have already noted that the legislative analyst pointed out that Proposition 8 could have a *negative* financial affect on the state.<sup>16</sup> If same-sex marriage were to be shown to have a negative financial impact on the state, then the same would necessarily be true of different-sex marriage. It does not seem possible to construct a truly civil-based analysis – devoid of religious or moralistic contexts – in which one could draw negative conclusions about

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<sup>16</sup> *Voter Information Guide*, p. 55.

same-sex marriage without drawing the same conclusions about different-sex marriage. In other words, the state's only logical conclusions within civil law are to allow marriage equally to any dyadic human adult unrelated couple or to do away with the concept of marriage altogether.<sup>17</sup>

The only basis for defining marriage as “between a man and a woman” is a religious basis, derived from the doctrinal positions of many religious institutions. The quantity of institutions that so define marriage is irrelevant (although it is worth noting that that quantity is in fact decreasing as more and more religious institutions recognize the importance of marriage equality). The history of that definition (whether real or perceived) is also irrelevant. After all, the Bible gives a far more consistent and ancient witness to monotheism than it does to heterosexual monogamy, but our constitution still precludes any court, legislature, or vote of the people from enshrining monotheism into civil law.

Proposition 8 is a vain attempt to enshrine a religious doctrine into the California Constitution. It is a vile attempt to do so because the particular religious doctrine that limits marriage to a male-female couple is outdated, narrow-minded, and contrary to the true purpose of marriage, which is to make the world a better place through the teamwork of two dedicated, loving people.

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<sup>17</sup> We use the term “dyadic human adult unrelated couple” to address the false analysis by some of the proponents of Proposition 8 that same-sex marriage is the gateway to polygamy, incest, or “marrying one’s dog.” It is obvious that the tax and other financial consequences of allowing polygamy are or could be far different and more complicated than simply giving male-male and female-female pairs the same tax and financial advantages as those given male-female pairs. The state’s interest in protecting children precludes child marriage and incest. The idea of giving marital benefits to dogs, cats, cars, or anything other than another human is simply silly and not truly worth comparative discussion, in spite of the fact that it was sometimes mentioned by anti-gay-marriage people.

### III. FALSE STATEMENT

#### A. Words Are Defined by Usage

A language is an evolving entity, and the meanings of words come from their usage within the language, not through proclamation. Even the dictionary does not proscribe the meanings of words, but rather describes the meanings and “gives information about their meanings, pronunciations, etymologies, inflected forms, etc.”<sup>18</sup>

Even words that have very specific scientific or technical meanings often have additional meanings that may even be improper in technical usage but are clear within the context. Consider, for example, the word *animal*. There is a scientific determination that ascertains whether a living organism is a member of the Kingdom Animalia, which clearly includes humans. Yet restaurants sometimes have signs that say “No Animals Allowed.” At a strict level this would be very poor for business, unless one expected plants and fungi to come in and buy food for themselves. But common usage – though be it scientifically erroneous – tells us that this means “non-human animal” rather than “animal” in the strictly correct sense. Thus usage gives the word *animal* a meaning additional to its strictly proper definition.

Definitions also change or expand with time as the language and the society speaking the language evolves. The third definition of “dictionary” given in the 1991 dictionary cited above is “a list of words used by a word-processing program to check spellings in text.” Surely the 1951 edition of the dictionary did not contain this additional definition, and there may be some strict grammarians or book publishers that at one time

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<sup>18</sup> From the definition of “dictionary” given in the *Random House Webster’s College Dictionary* (New York: Random House, 1991).

argued that the word processor's list was not a true "dictionary." They could argue, for example, that a word processor "dictionary" does not contain definitions, and therefore is not a dictionary at all. That argument fails because language is not *proscribed* by books or law, but rather is *described* as it evolves.

Neither the dictionary nor the constitution is capable of limiting the meaning of the term *marriage*. There are many meanings of the word, and it, perhaps more than most others, will continue to evolve with society over time, as it has for thousands of years.

## **B. The Constitution Only Speaks for the State**

The constitution cannot speak on behalf of all of the people and organizations within a state. It speaks only on behalf of the state and its own governmental subdivisions.

Say, for example, that a sentence was inserted into the constitution that said "Only a terrier is valid or recognized as a dog in California." This would appear to limit the issuance of dog licenses to terriers and would forbid issuing dog licenses to Dalmatians, retrievers, German shepherds, and other non-terriers. Just like limiting marriage licenses to different-sex couples, this would have a negative fiscal impact on the state and local governments and would appear financially foolish. It could also be called discrimination. The primary point of our example, however, is that it is in fact a *false* statement.

Even if the law were upheld as constitutional, it would still be false. The American Kennel Club, for example, has definitions of "dog" that disagree with the new definition in the hypothetical constitution. The AKC could hold a dog show, even one in California, in which a Dalmatian won best in show. This would involve recognizing a non-terrier as a "dog,"

even in California. Furthermore, in spite of the new licensing restrictions, people who owned non-terriers would probably continue to consider themselves dog-owners. The state would not recognize their pets as “dogs,” but no law is capable of preventing the individuals, or an organization such as the AKC, from recognizing these creatures as dogs.

Thus under this law the non-terriers may not be recognized as dogs by the state, but they *are* recognized as dogs in the state. The sentence “Only a terrier is valid or recognized as a dog in California” is, *ipso facto*, a false statement. Inserting it into the constitution thus makes a mockery of the constitution because it then would contain a statement that is categorically false.

**C. Alleged Section 7.5 Is *Ipsa Facto* False**

“Only marriage between a man and a woman is valid or recognized in California” is a false statement and cannot be made true. This statement is the exact linguistic parallel of the purposefully ridiculous “only a terrier is a dog” law just discussed.

Regardless of what the constitution says, there are millions of people within California that will continue to recognize marriages between same-sex couples as valid. The Ecumenical Catholic Church, and all of its clergy, are required by canon law to recognize same-sex marriages as valid if they meet the validity constraints of the canon law (which do not include the gender of the partners).

If Section 7.5 is allowed to be inserted into Article 1 of the California Constitution it will be a travesty because the constitution will then contain a sentence that is false and that cannot be made true.

Preventing such logical errors and linguistic travesties is perhaps one reason why revising the constitution is precluded from the powers of a simple majority vote.

#### **IV. REVISION NOT AMENDMENT**

##### **A. Consider the Rationale**

The petitioners, respondents, and interveners have spent exhaustive searches of case law to draw their opposite conclusions about whether Proposition 8 represents a “revision” or an “amendment” to the constitution. Lost in the midst of all that proof-texting is a cogent analysis of why there may be a difference between “amending” and “revising” the constitution. When one looks at such rationale, it becomes clear that Proposition 8 represents an improperly processed revision, not a simple amendment, to the constitution.

Clearly the intent of the distinction is to separate simple changes or modifications from those more substantial revisions that may alter the integrity of the constitution or the fabric of society.

Proposition 8 alters the fabric of society because, for the first time in American history, it writes discrimination into a constitution. Our nation, like perhaps all others, is full of discrimination in its past and continues to gradually erase discriminations inherited from our ancestors. Gradually society, through legislation, court decrees, constitutional amendments, and other legal processes, has expanded the reach of constitutions to erase discrimination. The Declaration of Independence’s “All men are created equal” has finally explicitly come to include women even though their inclusion is ambiguous in the actual text, not knowing

whether “men” was meant to be the generic term or the male-specific term. It has come to include persons of African descent, even though for nearly 100 years they were clearly excluded, in spite of there being no linguistic basis for excluding blacks from the term “men.”

In spite of the original writers’ lack of complete vision, the clear intent of both federal and state constitutions is to establish basic human rights. This is what separated the fledging United States of America from its European forebears. While we cannot claim that our constitutions’ writers envisioned the vast expanses of human rights that have ensued in the last two hundred years of enlightenment, it does seem safe to say that they would cringe at the thought of discrimination being inserted directly and specifically into a constitution.

**B. Simplicity Does Not An “Amendment” Make**

No one can argue that Proposition 8 was on its surface a simple statement, but the difference between “amendment” and “revision” cannot be defined by linguistic simplicity.

Section 1 of Article 1 of the California Constitution states “All people are by nature free and independent and have inalienable rights.” Changing “people” to “white males” is a very simple change. In fact, it is an even simpler change than Proposition 8, which tried to insert a whole section into the constitution.

If a proposition had been passed by 52% of the voters (or even 85% of the voters for that matter) that made this change, it is unlikely the court would consider it a simple “amendment” and allow the constitution to be so changed to protect only white males.

While the very thought of this hypothetical “white male” change to the constitution seems abhorrent today, it would not have been

held abhorrent in the not-so-distant past in different sections of the nation. In fact, it may well have passed by a far greater percentage of the voters than passed Proposition 8. The gut-level abhorrence that this “white male” idea promulgates amongst Californians today is a clear indicator of the evolution of equality in society and demonstrates the rationale as to why such a change would constitute a revision rather than an amendment to the constitution, even though it is linguistically simple, does not alter the form or format of the constitution, and does not directly affect the balance of power between the legislative, executive, and judicial branches of government.

**C. The Constitution Should be Logically Self-Consistent**

One reason for significant hurdles to revising the constitution is to maintain the document’s consistency with itself.

Changes involving large bodies of text or changes reorganizing major sections of the constitution could easily result in a logical inconsistency. This is one reason why a simple majority of the population – people who are not necessarily fluent in legal language – cannot revise the constitution.

However, it does not take major wording changes to make a document logically inconsistent. This court has already declared that the constitution guarantees marriage equality. *Proposition 8 does not remove one single word from the constitution.* It only adds one sentence. That sentence, by this court’s own declaration, is contradicted by the constitution. The sentence was declared unconstitutional when it appeared in the Family Code. Simply moving it into the constitution does not make it constitutional – it makes the constitution inconsistent with itself. This

cannot be allowed if the constitution is to maintain any sort of overall validity.

Another logical example can demonstrate this. Suppose that the present constitution says the people have the right to paint their property any color they wish. Now suppose that 52% of the voters pass a proposition that adds a new sentence to the constitution: "Houses may not be painted purple." The proposition made no other changes to the constitution.

This does not resolve the problem, it simply makes the constitution a joke. One section says "People can paint their property any color they wish." Another section says "Houses may not be painted purple." The newly added section is therefore not an amendment that adds something previously not addressed by the constitution. *It is a revision that attempts to change what the constitution had already said.* But it was poorly enacted because it created a contradiction. This is another reason why the greater scrutiny of passing the both houses of the legislature with a two-thirds majority and then being accepted by the voting population is needed for a revision to the constitution. Presumably in this more detailed process, carried out in part by the professionals in the legislature, and not simply the whims of the poorly-informed population, the logical discrepancy would have been discovered. Perhaps it would have been corrected. Perhaps the proposed revision would have died. But in any case, through the proper revision process the constitution would have emerged logically consistent with itself.

Such was not the case with Proposition 8. This revision, passed off as an amendment, destroys the logical integrity of the California Constitution.

**D. Issues of Far Less Importance Cannot be Passed by Simple Majority.**

In the same election that contained Proposition 8, the voters of Los Angeles County voted on Proposition R to increase the sales tax to support mass transit. News reports for several days reported uncertainty about its passage. There was no uncertainty regarding the fact that a majority of people clearly wanted it. The uncertainty was caused because it required a 2/3 majority vote simply because it increased a tax. The majority could not rule. If it had had the same support ratio as Proposition 8 it would have categorically failed. Even 66% would not be enough. It had to be 66.67%.

Surely writing discrimination into the state constitution is a far more crucial subject than raising a sales tax.

**E. The Revision Process Safeguards Against False Information.**

Although the proponents of Proposition 8 claim that it is simple and speaks for itself, their misleading advertising betrays their claim. Rather than focus on marriage itself, the “Yes on 8” ads focused on school instruction. One of their fliers falsely claimed, “State law requires teachers to instruct children as young as kindergartners about marriage.”<sup>19</sup> The website also states, “If the gay marriage ruling is not overturned, TEACHERS COULD BE REQUIRED to teach young children there is no difference between gay marriage and traditional marriage. [capitalization as

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<sup>19</sup> “Fact Sheet” from ProtectMarriage.com available as of January 3, 2009, at the website [http://www.protectmarriage.com/files/fact\\_sheet.pdf](http://www.protectmarriage.com/files/fact_sheet.pdf).

on website]”<sup>20</sup> In making these quotes, they cite Education Code §51890. The only reference to marriage in that code is subsection (a)(1)(D) which reads “Family health and child development, including the legal and financial aspects and responsibilities of marriage and parenthood.” The financial aspects and responsibilities of same-sex marriage are essentially the same as those of different-sex marriage, so there is no logical reason why this code would require any discussion of what sort of marriages were included.

Nonetheless, the proponents of Proposition 8 knew this was a trigger button. They incited fear, rather than rationality, by presenting partial truths to the general public. They never explained why it would be problematic if children were taught about gay marriage; they simply relied on illogical fears and presumptions to promulgate their fear-based agenda.

The proponents even misrepresented Your Honors. They were so bold as to state in the *Voters’ Guide* argument in favor of Proposition 8, “They [gay activists] have gone behind the back of voters and convinced four activist judges in San Francisco to redefine marriage for the rest of society.”<sup>21</sup> One wonders if the Supreme Court happened to have been located in Fresno or Anaheim if they would have bothered to name the city of its location.

The proponents came up with illogical slogans such as “protect marriage” and “restore traditional marriage.” “Protect marriage” is an illogical slogan because no marriage is denigrated by another person’s relationship or marriage. Furthermore, whether the Proposition 8 proponents like it or not, the definition of “marriage” is continuing to evolve with society, as it always has done.

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<sup>20</sup> “Ballot Arguments” found at

<http://www.protectmarriage.com/about/ballot-arguments>

<sup>21</sup> *Voters’ Guide*, “Argument in Favor of Proposition 8, p. 56

“Restore traditional marriage” is a fallacious slogan on two accounts. First of all, “traditional marriage” is not well defined, and if it were it probably would not be something most of us would want. The Bible is full of polygamy, and even up until modern times most marriages have been primarily based on financial and social advantages rather than love and romance. However, even if “traditional marriage” simply meant male-female marriage, Proposition 8 could not possibly “restore” it because it had never been taken away. The concept of “restoring traditional marriage” would only make sense if this court had declared that *only* same-sex marriage was valid.

The proponents just refused to say what Proposition 8 really did – eliminated basic human rights and discriminated against a specific subset of the population.

In spite of its simple language, the proponents simply could not stay on the subject. If they had wanted to avoid discussion of gay marriage in schools they should have written a proposition to amend the Education Code and, perhaps more importantly, they should not have spent millions of dollars making gay marriage the number one subject of conversation in the weeks leading up to the election. The hypocrisy of bombarding the airwaves at all times of the day with messages about not teaching children about gay marriage is simply astounding.

But all this false information had an impact, and 52.3% of the voters supported Proposition 8, with 7,001,048 voting “yes” and 6,401,482 voting “no,” a difference of 599,566 votes. So if just 300,000 people – less than 1% of the our state’s population – voted “yes” rather than “no” because they bought into even just one of the lies of the proposition’s proponents, then the lies were effective and discrimination was voted into our constitution based upon false statements.

This ability to sway the popular vote by misinformation that resonates with known irrational fears among the people is part of the rationale behind requiring the legislature to approve a constitutional revision by a 2/3 majority before it is submitted to the population for a vote.

**F. The Revision Process Safeguards Against Out-of-State Influence**

Literature from the Yes on 8 campaign indicates that major funding came from the American Family Association and Focus on the Family. The American Family Association is located in Mississippi and is the creation of Don Wildmon, an extreme radical minister who gained national fame by targeting television programs for censorship and boycott. Focus on the Family is a conservative organization located in Colorado that is the creation of James Dobson, a conservative psychologist. Although both organizations accept donations from people anywhere, including California, they are not true membership organizations, but rather are essentially dictatorships or at most oligarchies.

The (Mormon) Church of Jesus Christ of Latter-day Saints also played a significant role in the passing of Proposition 8. The Mormon religion was started in 1830 by a New York farmer and is now led by Thomas Monson, its prophet in Salt Lake City. The power and authority of the Mormon prophet would make a medieval pope envious.

We do not criticize these organizations for not being democratic. The Ecumenical Catholic Church itself is a hierarchy. We only point out that major funding for changing the constitution of our state came from organizations tightly controlled by radically conservative individuals in three different states. While they have supporters within California, the decision-making process and the control of organizational funds does not come from California.

For example, because Mormons believe that their president is a prophet with a direct and unique link to God,<sup>22</sup> they obey his directives with far greater diligence than is found in any other major religious organization. On June 20, 2008, the Mormon president issued a letter to be read at every Mormon church on June 29, 2008. The letter read in part, “We ask that you do all you can to support the proposed constitutional amendment by donating of your means and time to assure that marriage in California is legally defined as being between a man and a woman.”<sup>23</sup> Considering that this resident of Utah is “the only person on earth who receives revelation to guide the entire church,” the letter carried great weight.

The legislature is not immune from outside interests and influence by lobbyists. However, obtaining a 2/3 vote of both houses of the legislature is a much more difficult task than swaying just 300,000 voters in a state of over 30,000,000 people. This limitation from outside interests is another rationale for the more difficult requirements of a revision to the constitution.

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<sup>22</sup> The official LDS website states, “As members of The Church of Jesus Christ of Latter-day Saints, we are blessed to be led by living prophets—inspired men called to speak for the Lord, as did Moses, Isaiah, Peter, Paul, Nephi, Mormon, and other prophets of the scriptures. We sustain the President of the Church as prophet, seer, and revelator—the only person on the earth who receives revelation to guide the entire Church.”  
<http://www.lds.org/ldsorg/v/index.jsp?vgnextoid=bbd508f54922d010VgnVCM1000004d82620aRCRD&locale=0&index=16&sourceId=c6549c57af139010VgnVCM1000004d82620a>

<sup>23</sup> Thomas S. Monson, Henry B. Eyring, and Dieter Uchtdorf. Memorandum to General Authorities, Area Seventies, and the following in California: Stake and Mission Presidents; Bishops and Branch Presidents. “Preserving Traditional Marriage and Preserving Families.” (Salt Lake City: The Church of Jesus Christ of Latter-day Saints, June 20, 2008.)

Millions of dollars spent by hyper-conservative extremists outside of our state clearly had sufficient impact to push Proposition 8 into its narrow margin of victory. The constitution should not be at the mercy of who can gather the most money, which is another reason why Proposition 8 represents an improperly attempted revision, not a mere amendment.

**G. Proposition 8 Is a Revision, Not an Amendment, of the Constitution.**

California is the first state in which both the legislature and the supreme court have upheld marriage equality. This demonstrates the progress of equality and non-discrimination in our state.

Proposition 8 attempts to insert a categorically false statement into the constitution.

Proposition 8 attempts to write discrimination into the constitution.

Allowing Proposition 8's insertion of Section 7.5 into Article 1 makes the constitution logically inconsistent with itself.

The issue of Proposition 8 is far too important to be decided by a simple majority.

The 52.3% of the voters supporting Proposition 8 included a large number of persons directly influenced by misleading advertising and even out-right lies.

The 52.3% of the voters supporting Proposition 8 included a large number of persons directly influenced by millions of dollars spent by or upon the order of out-of-state organizations controlled by powerful, religiously motivated individuals.

For all of these reasons, Proposition 8 should have been submitted to the legislature as a proposed revision to the constitution, not attempted to be passed as a simple amendment.

## **V. VIOLATION OF SEPARATION OF POWERS**

### **A. The Petitioners Have Eloquentlly Stated the Violation**

In their petitions, the various petitioners have eloquently stated why Proposition 8 violates the separation of powers. Primarily, it removes from the judicial branch the ultimate responsibility of protecting the citizens under the law.

We are not a country of majority rule, where everything is up to whatever the majority wants. As we have discussed, the majority are not even capable of doing something as simple as raising a tax to build a mass transit system. It is the court's duty and responsibility to see that the constitution is not made meaningless by votes of the majority. In such a system all super-majority protections would become meaningless.

Consider, for example, that it may well have been easier to get a simple majority of voters within the state to pass an amendment to the constitution that said "A simple majority of voters in Los Angeles County may vote to raise their own tax to build their own mass transit system." Perhaps the proponents would spend large sums of money in Northern California explaining how its people would benefit from public transportation while visiting Los Angeles, but only the residents of L.A. County would really have to pay for it. If that constitutional amendment passed, then Proposition R would not have needed its 2/3 majority hurdle and could then have passed by a mere 52.3% (or even 50.01%).

We would hope everyone would agree that protecting civil rights is an even more important responsibility of the courts and constitution than is preventing tax increases.

This court declared Proposition 22's law to be unconstitutional. The radical activists behind Proposition 22 introduced a number of ballot measures to try to undo the court's ruling. One of them – Proposition 8 – qualified for the ballot and passed by a small majority. This proposition took the same unconstitutional law and attempted to circumvent judicial authority by inserting into the constitution.

We do not need to repeat the various arguments made by the petitioners as to why this is a violation of the separation of powers.

**B. The Interveners' Arguments Are Inconsistent and Self-Serving**

The progress of marriage equality is littered with audacious statements by the opponents attacking whichever branch of government moves forward. The California Legislature twice approved marriage equality laws prior to this court's declaration of marriage equality as a constitutional right. When the legislature approved those laws, the opponents of marriage equality cried out against the elected officials. For example, Benjamin Lopez of the so-called Traditional Values Coalition said regarding the 2007 law, "Twenty-one Democrats in the Senate took it upon themselves to redefine marriage."<sup>24</sup> It is the constitutional role of the Senate and Assembly to make laws and determine how technical terms apply within the state. But anti-marriage-equality people complain if they don't get their way.

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<sup>24</sup> Bob Unruh, "California Senate OKs 'Gay' Marriage." WorldNetDaily.com. Sep 8, 2007. ([http://www.wnd.com/news/article.asp?ARTICLE\\_ID=57538](http://www.wnd.com/news/article.asp?ARTICLE_ID=57538))

Likewise, when this court made its decision last May, the opponents of marriage equality spoke of “activist judges” and decried “legislation from the bench.”

The opponents of marriage equality cannot have it both ways. Rather than address real issues, they create smokescreens and sidestep reality. They accuse legislators of acting like judges and judges of acting like legislators. In reality, California is a state in which both the legislative and judicial branches have recognized the importance of marriage equality.

Another example of the hypocrisy of the interveners is shown in their response to the petition of San Francisco and other local governments. The interveners state, “the municipal petitioners have at most an ideological interest in this challenge, but that does not suffice.”<sup>25</sup> One wonders what sort of interest in the challenge the interveners have if it is not ideological. Again, they cannot have it both ways. They want to taunt their ideology, but try to prevent several local governments representing millions of people – by action of duly elected local officials – from presenting the ideological reasons why Proposition 8 is a serious violation of our constitution.

In weighing the opinions of the interveners, the court should always bear in mind their hypocrisy and their unabashed attempts to force their narrow ideology onto the entire state using whatever methodology they deem effective, regardless of its veracity.

This sort of behavior by a small, vocal, well-funded, ideologically motivated group of people – who receive no direct benefit from Proposition 8 – trying to force their version of religious doctrine onto all the states’ residents is why the constitution prevents a simple majority

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<sup>25</sup> Page 1 of “Intervenors’ Opposition Brief in Response to Second Amended Petition for Writ of Mandate of City and County of San Francisco, et al.”

from enacting a revision. This vengeful force of one group's desires detrimentally upon another group is exactly why Proposition 8 is an invalid revision, rather than a valid amendment, to the constitution.

Furthermore, the proponents of Proposition 8 cite their 52.3% victory, ignoring the fact that this victory cost them millions of dollars spent promulgating misleading and sometimes even outwardly false information. They also ignore the reality of progress within society. In March 2000 Proposition 22 passed by 61.4% of the vote. In just eight years, support for marriage discrimination dropped from 61.4% to 52.3% percent, or about 1 percentage point per year. If that social progress were to continue at the same rate – and there is no reason to think it will not – the majority of people would vote to overturn Proposition 8 in 2011. Interracial marriage, illegal in many states just 42 years ago and considered “disgusting” by many just 20 or 30 years ago, is now even commonly depicted in advertising. Our society evolves very quickly when it comes to social tolerance and understanding of marriage.

It is the court's duty to the constitution to see that it remains a stable document, not a pendulum that swings to and fro at the whims of a simple majority of the population. Proposition 8 attempted to circumvent that duty. The proponents of the proposition vociferously denounce the court for upholding its duty to the constitution and its stability because they know, in the long run, they will lose the war. Marriage equality, like racial equality, will soon become the norm within Western society.

## VI. EX POST FACTO LAW

### **A. Laws with Negative Retroactivity Cannot Be Made**

The audacity of the proponents of Proposition 8 continues to astound us. Did they not learn in high school civics that *ex post facto* laws are unconstitutional? What is it about that phrase that makes me remember it so vividly from nearly 40 years ago and them to have naively thought the rest of us just might forget it when it comes to marriage rights?

The U.S. Constitution is pretty clear, “No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts ...” (Art 1, Sec. 10, Clause 1).

The issue was given further definition 210 years ago by the United States Supreme Court in *Calder v. Bull* (3 U.S. 386 [1798]). In writing the majority opinion Justice Samuel Chase states:

An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. [Capitalization as in the text.]

Although the issue at stake in the case involved an act of the Connecticut State Legislature, the issue is not about the legislature itself, but about a state’s ability in general to pass any sort of law with these

illegal effects. Whether it was passed by a legislature, by an initiative, or even by a validly enacted constitutional revision involving both the legislature and electorate, it would still be invalid if it “destroys or impairs the lawful private contracts of citizens” or “takes property from A. and gives it to B.”

**B. Invalidating Existing Marriages Would Be Illegal**

According to the California Family Code §300(a), “Marriage is a personal relationship arising out of a civil contract.” From June 2008 until November 2008, many thousands of these private contracts were lawfully entered into by same-sex couples in California. To declare these marriages null and/or void would be to “destroy the lawful private contracts of citizens.”

Furthermore, marriage involves property rights. Although the exact details of the thousands of legally valid California same-sex marriages are not known, it is reasonable to assume that invalidating all of them would at least in some cases “take property from A. and give it to B.”

Letting Proposition 8 apply retroactively would violate two of Justice Chase’s four straightforward definitions of an illegal law.

## **VII. ATTORNEY GENERAL'S ADDITIONAL ARGUMENT**

### **A. The Attorney General is Correct in Claiming Proposition 8 Abrogates Fundamental Rights**

We have discussed at length how Proposition 8 abrogates fundamental rights, particularly the right to religious freedom. We have presented the proposition's violation of these basic rights in the context of demonstrating why the proposition was an invalid attempt to revise the constitution rather than a valid action of amending it. The destruction of basic rights is one of the potential issues that pushes a constitutional change up from an "amendment" to a "revision."

The attorney general's approach, letting it be considered an "amendment" but still being invalid because it abrogates basic rights, has the same ultimate result – Proposition 8 is unconstitutional and must be declared null and void. The path one takes to reach the same destination is less important than the fact that we arrive at the same destination. The integrity of the constitution and the rights of the people are upheld in either approach of declaring Proposition 8 null and void.

## **VIII. CONCLUSION**

Proposition 8 violates the religious freedom of the Ecumenical Catholic Church and the civil rights of millions of gay people who have or will desire to marry in California. It inserts a false statement into the California Constitution and also makes the constitution logically inconsistent with itself.

Because of its poignant clarity, we reiterate and concur with the conclusion by Gloria Allred *et al* in the Tyler-Olson Reply Brief, “Proposition 8 rips inalienable human rights out of the fabric of our constitution. In doing so, it improperly intrudes upon and ultimately undermines the role of the Supreme Court as the guardian of the constitution. This initiative is both an improper revision of the constitution and a brazen attempt to cut across the separation of powers that are constitutionally required in our state. For these reasons, Proposition 8 cannot stand.”<sup>26</sup>

We join with San Francisco and the host of cities and counties joining its filing and ask the court to “grant the writ and ensure that this dark moment in California’s history is short-lived.”<sup>27</sup>

DATED January 11, AD 2009

The Feast of the Baptism of Our Lord



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The Most Rev. Mark S. Shirilau, Ph.D.  
Archbishop and Primate  
The Ecumenical Catholic Church  
*Amicus Curiae in Propria Persona*

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<sup>26</sup> Gloria Allred. “Reply Brief of the Tyler-Olson Petitioners Regarding Issues Specified in the Supreme Court’s Order Filed November 19, 2008.” S168066. Page 33.

<sup>27</sup> Therese M. Stewart. “Reply of City and County of San Francisco, et al.” S168078. Page 84.

## **RULE 8.204(c)(1) CERTIFICATE**

The undersigned Amicus hereby certifies, pursuant to Rule 8.204(c)(1) of the California Rules of Court, that this Application to File Brief and Brief of *Amicus Curiae* uses a proportionally spaced Times New Roman 13-point typeface and that the text of the brief, including footnotes but excluding the cover, table of contents, table of authorities, and this certificate, totals 12,399 words, according to the word count provided by the word processing software used to prepare the brief.

DATED: January 12, 2009



Most Rev. Mark S. Shirilau, PhD  
*Amicus Curiae In Pro Per*

## PROOF OF SERVICE

I, Mario Arreola, declare:

(1) That I am over the age of eighteen years and that I am not a party to this action. My address is 8539 Barnwood Lane, Riverside, California 92508.

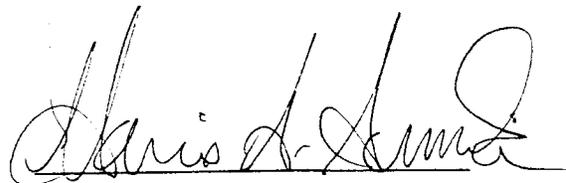
(2) On January 13, 2009, I served a true copy of the attached document entitled

**“Application to File Brief and Brief of *Amicus Curiae* Archbishop Mark Steven Shirilau In Support of Petitioners and Other Parties Arguing in Favor of Marriage Equality and in Opposition to Proposition 8’s Alleged Validity”**

by placing it in addressed sealed envelopes clearly labeled to identify the persons being served at the addresses set forth on the attached service list.

(3) I deposited the same at the United States Post Office, 4150 Chicago Avenue, Riverside, California, first class postage prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 13, 2009, at Riverside, California

A handwritten signature in black ink, appearing to read "Mario A. Arreola", written over a horizontal line.

Mario A. Arreola

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