SUPREME COURT
FILED

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Case No. S168047

IN THE SUPREME COURT
OF
THE STATE OF CALIFORNIA

KAREN L. STRAUSS, ET AL.,

PETITIONERS,

V.

MARK B. HORTON, AS STATE REGISTRAR OF VITAL STATISTICS, ET AL.,

RESPONDENTS;

DENNIS HOLLINGSWORTH, ET AL.,

INTERVENERS.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE PROFESSORS OF FAMILY LAW IN SUPPORT OF PETITIONERS

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Attorneys For:

AMICI CURIAE PROFESSORS OF FAMILY LAW

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APPLICATION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to California Rule of Court, Rule 8.520, Amici Curiae Professors of Family Law hereby respectfully apply for leave to file an amicus curiae brief in support of the Petitioners.

Amici are all professors who teach and write in the area of family law. Amici include the authors of major casebooks and treatises on family law, as well as other scholarly works related to the issues before this Court. Many of the Amici have played major roles in drafting California family law legislation and have participated as amici curiae in significant family law, adoption, and parentage cases decided by this Court.

As family law scholars, Amici have a substantial interest in the issue before this Court, which concerns a central aspect of family law, the status of marriage. Amici are extremely familiar with California family law history, legislation, case law, and policy as they apply to this case. Amici believe that their expertise and perspective as family law scholars can help the Court understand more fully the merits of petitioners' position and request for relief.

No party or counsel for any party authored the attached amicus brief in whole or in part. Additionally, no party, counsel for any party, or any other person or entity made any monetary contribution intended to fund the preparation or submission of the brief, other than the amici curiae or their counsel in this original writ proceeding.

Amici Curiae include:

- **Scott Altman**, Professor of Law and Associate Dean, University of Southern California Law Center;
- **R. Richard Banks**, Professor of Law, Stanford University;

- **Sarah Rigdon Bensinger,** Clinical Professor of Law, Loyola Law School, Los Angeles;
- **Grace Ganz Blumberg**, Professor of Law, University of California, Los Angeles School of Law;
- **Janet Bowermaster**, Professor of Law, California Western School of Law;
- **Carol S. Bruch,** Distinguished Professor Emerita, University of California, Davis School of Law;
- **Patricia A. Cain**, Inez Mabie Distinguished Professor of Law, Santa Clara University
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- **Jay Folberg,** Professor of Law Emeritus, University of San Francisco School of Law;
- **Deborah L. Forman**, Professor of Law and J. Allan Cook & Mary Schalling Cook Children's Law Scholar, Whittier Law School;
- **Joan H. Hollinger**, Lecturer-in-Residence and Director Child Advocacy Program, University of California, Berkeley School of Law (Boalt Hall);
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- **Michael S. Wald**, Jackson Eli Reynolds Professor of Law Emeritus, Stanford University;
- **D. Kelly Weisberg,** Professor of Law, Hastings College of the Law;
- **Lois Weithorn,** Professor of Law, Hastings College of the Law;
- **Michael Zamperini**, Professor of Law, Golden Gate University.

INTRODUCTION

In *In re Marriage Cases*, this Court held that the right to marry – the right that long has been held to be "at once *the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime*," (*In re Marriage Cases* (2008) 43 Cal.4th 757, 813 (internal quotations and citations omitted) (italics in original)), includes the right to marry a person of the same sex. "In light of the fundamental nature of the substantive rights embodied in the right to marry - and their central importance to an individual's opportunity to live a happy, meaningful, and satisfying life as a full member of society," this Court explained that, "the California Constitution properly must be interpreted to guarantee this basic civil right to *all* individuals and couples, without regard to their sexual orientation." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 820.) In its decision, this Court also held that "imposing differential treatment on the basis of sexual orientation should be viewed as constitutionally suspect under the California Constitution's equal protection clause." (*Id.* at p. 843.)

Amici agree with the parties who have argued that this Court should hold that the right to marry is a "basic, inalienable civil right[ ]" that cannot be taken away from a group that has been identified as a suspect class by a simple majority vote of the electorate. (*Id.* at p. 781.) Given the profound importance of the right at issue and the important role that the California Constitution plays with respect to protecting vulnerable minorities from the whims of the majority, Amici agree that a more deliberative and careful process is required before such a profound change can be made to the California Constitution. Although this Court has vigorously guarded the power of the people to amend the Constitution, the Court also has noted that there are limits to this power, especially when its exercise threatens to remove constitutionally protected rights from a vulnerable minority. As this Court stated in its decision in the *Marriage Cases*, "[t]he very purpose of a

Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (*Ibid.* at p. 852.)

Amici support but do not repeat those arguments in this brief. Rather, given the considerable legal history dealing with retroactivity questions in the context of marriage law, Amici – as family law scholars – write to share our expertise on the third question posed by the Court in its November 19, 2008 order. Specifically, this question asks: If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?[1] Amici submit that the only possible answer to this question is that Proposition 8 has no effect on these marriages.

The Petitioners and all of the State parties agree that Proposition 8 has no effect on the marriages of same-sex couples performed in California after this Court's decision in the *Marriage Cases* and before the adoption of Proposition 8. (See, e.g., AG Br. at pp. 60-74; Hollingworth Br. at pp. 6-10.) In contrast, only the Interveners[2] argue otherwise. In their Opposition Brief, Interveners assert that, as of Nov. 5, 2008, these 18,000 marriages became invalid and unrecognizable. (Inter. Br. at pp. 35-42.) This position flies in the face of well-established law and must be rejected.

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[1] Again, to be clear, by confining ourselves to Question 3, Amici do not intend to suggest that we believe that Proposition 8 is valid.

[2] The Interveners were the Official Proponents of Proposition 8. As appropriate to the context, Amici use both terms – Interveners and Proponents – to refer to them throughout the brief.

It is well established that, in the absence of clear and unambiguous intent to the contrary, state laws – including constitutional initiatives – apply only prospectively. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 230.) Here, neither the text of Proposition 8, the ballot materials, nor the public discourse about Proposition 8 provide evidence of the necessary clear and unambiguous intent to apply Proposition 8 retroactively. Accordingly, should this Court find that Proposition 8 is valid (a conclusion with which Amici disagree), this Court must conclude that Proposition 8 applies only prospectively.

As noted above, Interveners have asserted that on November 5, 2008, the existing 18,000 marriages between same-sex couples became invalid and unrecognizable. Although not characterized as such, what Interveners ask this Court to do is to apply Proposition 8 retroactively. A retroactive law is one that affects the legal consequences of past conduct. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206.) A conclusion that these 18,000 marriages are no longer valid or recognized, or that these marriages are affected in any way by the adoption of Proposition 8 would significantly alter the legal consequences of the parties' past conduct of entering into a valid marriage.

The strong presumption against retroactive application is based not only on constitutional concerns, but also on a policy decision that it is important to protect people's expectations and the decisions that they make in reliance on past law. These policy goals are of particular importance in the area of marriage and family law. Marriage automatically confers hundreds of important rights and responsibilities on the marital spouses. Concluding that these 18,000 marriages became invalid on November 5, 2008 would strip many of these couples of critical rights and protections. In addition to the loss of tangible rights and protections, if Proposition 8 were applied to invalidate or affect the existing marriages, these 36,000

individuals would lose the intangible benefits that were accorded to them based on their marital status. This Court has recognized that these intangible protections are a key element of the right to marry and are of constitutional significance. Because the relief Interveners seek in this case would profoundly affect the legal consequences of these 18,000 marriages it must be rejected by this Court.

Moreover, as discussed more herein, not only is the position of Interveners clearly inconsistent with established law, it is simply unprecedented. As far as Amici know, never before has a court applied a subsequent change in the qualifications for marriage to retroactively invalidate a marriage that was validly entered into before the effective date of that change in law. For example, even though California enacted a statute in 1895 requiring all marriages to be licensed and solemnized (thereby abolishing common law marriage), it like every other state to have considered the question, continued to treat as valid common law marriages that were entered into prior to 1895. California courts did so despite the fact that the 1895 amendment did not explicitly limit its application to marriages entered into in the future.

In addition, even assuming *arguendo* that there is clear and unambiguous evidence that the voters intended Proposition 8 to be applied retroactively, the Court would nonetheless have to determine whether such an application would raise constitutional concerns. Even an intended retroactive application may not be implemented if doing so constitutes an improper violation of vested property and liberty interests without due process of law. Applying Proposition 8 retroactively to invalidate or affect in any way the validity or effect of the marriages between same-sex couples entered into in California between June 16, 2008 and November 5, 2008 would violate this established principle and therefore is prohibited.

STATEMENT OF FACTS

On February 12, 2004, the City and County of San Francisco began performing marriages between persons of the same sex. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1071.) When this Court agreed on March 11, 2004 to accept an original writ petition challenging the actions of the City and County of San Francisco, it invited the filing of new lawsuits directly challenging the constitutionality of excluding same-sex couples from civil marriage. (*In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 785-786.) Shortly thereafter, two such lawsuits were filed. (*Id.* at pp. 785-786.) These two lawsuits were subsequently coordinated with four other lawsuits as the *Marriage Cases*. (*Id.* at p. 786.)

On May 15, 2008, this Court held in the *Marriage Cases* that excluding same-sex couples violated the fundamental right to marry and impermissibly discriminated on the basis of sexual orientation. (*Id.* at pp. 810-820; 840-844.) Consistent with the Court's decision, same-sex couples began marrying in California on June 16, 2008. (See, e.g., Jesse McKinley, *A landmark day in California as same-sex marriage begins to take hold*, N.Y. Times, A19, June 17, 2008.) Between June 16, 2008 and November 5, 2008 (the day Proposition 8 went into effect), an estimated 18,000 same-sex couples married in California. (Maura Dolan, *Justices will hear Prop. 8 challenges*, L.A. Times 1, Nov. 20, 2008.)

As noted in the Interveners' brief, "[a]nticipating the possibility that the Marriage Cases could result in" this Court ruling that the exclusion of same-sex couples from the right to marry was unconstitutional, in 2007 the Official Proponents of Proposition 8 began the legal process of proposing what eventually became known as Proposition 8. (Inter. Br. at p. 2.) On April 24, 2008, almost one month before this Court ruled in the *Marriage Cases*, the Official Proponents submitted completed petitions to the Secretary of State. (Inter. Br. at p. 2.) On June 2, 2008, the Secretary of

State officially qualified Proposition 8 for the November 2008 ballot. (*Id.* at p. 3.)

On November 4, 2008, the voters approved Proposition 8 by a margin of approximately 52% to 48%. (See, e.g., Jessica Garrison et al., *Attorney General Asks for Prop. 8 Invalidation*, L.A. Times, Dec. 20, 2008.) The next day, November 5, 2008, three petitions for a writ of mandate were filed with the California Supreme Court challenging the validity of Proposition 8.[3] On November 19, 2008, this Court accepted review of the three petitions.

ARGUMENT

I. Because there is no clear intent to apply Proposition 8 retroactively, it must be applied only prospectively.

There is a strong presumption that all legislation applies only prospectively. This presumption or default rule against applying legislation retroactively applies unless there is clear and manifest evidence that the voters intended otherwise. Here, neither the text of the initiative nor the ballot materials provided clear and manifest notice to people that Proposition 8 would be applied retroactively. Moreover, throughout the campaign, public officials assured voters that Proposition 8 would not apply retroactively. Accordingly, this Court should conclude that Proposition 8 must be applied only prospectively.

As noted above, there is a strong presumption that all legislation applies only prospectively. (*Evangelatos v. Superior Court* (1988) 44

[3] Eventually, three additional petitions were filed. (See, e.g., California Courts Website, Proposition 8 Cases, available at http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm.)

Cal.3d 1188, 1207.)[4] This principle is reflected in "innumerable decisions" of this Court and other California courts as well as in state statutory provisions. (*Id.* at pp. 1207-1208 [noting that California Civ. Proc. Code § 3 "reflects the common understanding that legislative provisions are presumed to operate prospectively, and that they should be so interpreted 'unless express language or clear and unavoidable implication negatives the presumption.'"].[5]) The presumption against retroactivity applies equally to constitutional provisions. (*Rosasco v. Comm'n on Judicial Performance* (2000) 82 Cal.App.4th 315, 321.)

In addition to being rooted in constitutional concerns, this strong presumption against retroactive application of law is also based on a reluctance to upset or disrupt considered decisions made in reliance on the law existing at the time the decision was made. While this policy concern applies to all contexts, as discussed in more detail below, the need to protect individual's "expectations based in prior law" is arguably at its pinnacle in the context of marriage and familial relationships. (*Carter v. Cal. Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922.)[6]

The default position – that all legislation applies only prospectively – applies unless there is a "clear indication the voters or the legislature

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[4] For a more detailed analysis of the presumption against retroactivity, see Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that was Valid at its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages* (2009) 60 Hastings Law Journal ___ (forthcoming).

[5] Cal. Civ. Proc. Code § 3 provides: "No part of it is retroactive, unless expressly so declared."

[6] As explained *infra*, the decision to enter into a civil marriage has a profound impact on nearly all aspects of an individual's life. Entering into a civil marriage entitles an individual to hundreds of important rights and obligations. Moreover, the decision has profound social, cultural, and emotional consequences for that individual, for third parties, and for the State.

intended otherwise." (*Californians for Disability Rights v. Mervyn's, LLC*, *supra,* 39 Cal.4th 223, 230.) In determining whether this "clear indication" exists, California courts "have been cautious not to infer the voters' or the Legislature's intent on the subject of prospective versus retrospective operation from 'vague phrases' and 'broad, general language' in statutes, initiative measures and ballot pamphlets." (*Californians for Disability Rights, LLC*, (2006) 39 Cal.4th at p. 229 (internal citations and quotations omitted); see also *Evangelatos*, *supra*, 44 Cal.3d at p. 1207 [stating that the evidence of intent necessary to overcome the strong presumption against retroactivity must be "unequivocal," "inflexible," and "manifest"].) Moreover, "[a]n established rule of statutory construction requires [the Court] to construe statutes to avoid constitutional infirmities." (*Myers v. Philips Morris Companies, Inc.* (2002) 28 Cal.4th 828, 847 [internal citations and quotations omitted].) Because applying statutes retroactively raises constitutional concerns, the Court should resolve any ambiguities with respect to intent in favor of a prospective-only application of the law. (*Ibid.*; see also *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 306.)

As discussed in more detail in the briefs of Petitioners, the text of Proposition 8 does not contain the necessary clear intent that it be applied retroactively. (See, e.g., Strauss Pet. Reply Br. at pp. 44-51; CCSF Pet. Reply Br. at pp. 50-54.) Proposition 8 provides: "Only marriage between a man and a woman is valid or recognized in California." (See, e.g., Cal. Sec. of State, Official Voter Information Guide (Nov. 4, 2008) Proposition 8, Text of Proposed Law, available at http://www.voterguide.sos.ca.gov/text-proposed-laws/text-of-proposed-laws.pdf#prop8.)[7] The text of Proposition contains no

[7] The fact that Proposition 8 is worded in the present tense is not the type of clear and express language necessary to meet the high threshold required to overcome the strong presumption against retroactivity. (See CCSF Pet. Reply Br. at p. 51 [analyzing prior legislature measures that were written in the present tense and noting that "the Court in each case

"express language" or "clear and unavoidable implication" that the voters intended it to be applied retroactively. (*Evangelatos*, *supra*, 44 Cal.3d at p. 1207 (internal quotation marks and citations omitted).) When the Proponents submitted the text of Proposition 8 to the Attorney General for preparation of the title and summary on May 25, 2007, the Proponents were well aware of the pending litigation challenging the then-existing statutory exclusion of same-sex couples from the right to marry.[8] Despite this knowledge, the Proponents did not include any language in Proposition 8 stating or explaining how Proposition 8 might affect the validity of marriages between same-sex couples if this Court held (as it eventually did) that same-sex couples must be permitted to marry.

Likewise, the official title and summary of Proposition 8 also does not contain the "unequivocal and inflexible statement of retroactivity that [the court] requires." (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 843; see also Strauss Pet. Reply Br. at pp. 44-51; CCSF Pet. Reply Br. at pp. 54-66.) Nothing in the ballot materials or arguments explicitly informed voters that, if passed, Proposition 8 would render invalid all of the marriages between same-sex couples entered into prior to Proposition 8's effective date.[9] In fact, the Proponents assured the voters

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found nothing in the text to overcome the 'strong presumption against retroactivity.'"].)

[8] As noted above in the State of Facts, the *Marriage Cases* litigation was initiated in 2004. The Proponents were well aware of this litigation as they participated in it.

[9] While there is one line from the ballot arguments in support of Proposition 8 that arguably references the possibility that Proposition might have some retroactive effect – indicating that only "marriage between a man and a woman will be valid or recognized in California, regardless of when or where performed" – this language is far from the type of "express language" that is required to overcome the strong presumption against retroactivity. As noted above, California courts "have been cautious not to infer the voters' or the Legislature's intent on the subject of prospective

that "Proposition 8 is simple and straightforward." (See, e.g., Cal. Sec. of State, Official Voter Information Guide (Nov. 4, 2008) Proposition 8, Arguments and Rebuttals, available at http://www.voterguide.sos.ca.gov/argu-rebut/argu-rebutt8.htm.) As Interveners concede, the retroactive invalidation of the 18,000 marriages definitely would not be simple and straightforward. (Inter. Opp. Br. at p. 41 ["To be sure, questions will arise about the status of legal rights and duties created by interim marriages."].)

Moreover, any claim that the voters intended to apply Proposition 8 retroactively is undermined by the repeated public statements by state and local officials, as well as by other legal experts that Proposition 8 likely would not have a retroactive effect.[10]

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versus retrospective operation from 'vague phrases' and 'broad, general language' in statutes, initiative measures and ballot pamphlets." (*Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 229 (internal citations and quotations omitted).) To overcome the strong presumption against retroactivity, the evidence of intent must be "unequivocal," "inflexible," and "manifest." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1207.)

[10] Both Attorney General Jerry Brown and San Francisco City Attorney Dennis Herrera assured people that marriages entered into prior to the effective date of Proposition 8 would continue to be valid and recognized. (See, e.g., Op-ed, *Rite of civil rights*, S.F. Chron. B6, June 17, 2008 ["'In the event [Proposition 8] was to pass, all the marriages that occur (between now and then) will be legal and enduring,' Herrera predicted Monday."]; Bob Egelko, *Prop. 8 not retroactive, Jerry Brown says*, S.F. Chron., Aug. 5, 2008.)

In addition, newspapers and other media sources repeatedly reported that "legal experts" predicted that Proposition 8 would not retroactively invalidate the marriages entered into prior to November 5, 2008. (See, e.g., Penni Crabtree, *Same-sex marriage, exchanging votes, and cash*, San Diego Union-Trib. A1, June 12, 2008 [reporting that "many experts" stated that "same-sex weddings that occur before the November vote would remain legal no matter what voters decide"]; Howard Mintz & Mary Anne Ostrom, *Gay couples can set the date, Supreme Court turns down request to put marriages on hold*, San Jose Merc. News 1A, June 5, 2008 ["Legal experts

Accordingly, assuming *arguendo* that Proposition 8 is valid,[11] this Court has no basis for concluding that the presumption against retroactive application has been overcome. The initiative has no express retroactivity provision; the ballot materials do not indicate that Proposition 8 would retroactively invalidate the thousands of marriages; and public comments by government authorities suggested that Proposition 8 would not apply retroactively.

II. Interpreting Proposition 8 as having any effect on the existing marriages would involve a retroactive and, therefore, prohibited application of Proposition 8.

Because neither the text of the initiative nor the extrinsic evidence reveals a clear intent that Proposition 8 be applied retroactively, it must be applied only prospectively. The next question is, with respect to the marriages between same-sex couples that were entered into in California between June 16, 2008 and November 5, 2008, what does it mean to apply Proposition 8 only prospectively?

The Interveners contend that, as of November 5, 2008, the estimated 18,000 marriages between same-sex couples that were entered into between June 16 and November 5, 2008, are no longer valid or recognized in the State of California. (See, e.g., Inter. Opp. Br. at p. 39 [stating that no "same-sex marriages" are "valid or recognized in California."].) While Interveners carefully avoid making any explicit reference to the rules that determine whether an initiative applies retroactively, Interveners' claim that the 18,000 existing marriages are no longer valid or recognizable is tantamount to a claim that Proposition 8 should be applied retroactively.

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say courts generally do not reach back in time and take away legal rights that were already in place."].)

[11] As noted above, Amici do not believe that Proposition 8 is valid.

"A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206, quoting *Aetna Casualty and Surety Co. v. Industrial Accident Commission* (1947) 30 Cal.2d 388, 391.) Stated another way, "retroactive application of a recently enacted law applies 'the new law of today to the conduct of yesterday.'" (*Rosasco v. Commission on Judicial Performance* (2000) 82 Cal.App.4th 315, 322 (internal citations and quotations omitted).) Here, it is absolutely clear that the position Interveners urge this Court to adopt – that on November 5, 2008, the 18,000 marriages suddenly became invalid and unrecognizable – would affect "rights, obligations, acts, transactions and conditions which [we]re performed or exist[ed] prior to the adoption" of Proposition 8.

To determine whether a particular application of a law is a retroactive or retrospective one, the question the Court must ask is: if applied, would "the law change[ ] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct[?]" (*Californians for Disability Rights, supra,* 39 Cal.4th 223, 231 (internal citations and quotations omitted).)

For at least some of the thousands of married same-sex couples, applying Proposition 8 to invalidate or affect in any way the 18,000 existing marriages would result in the loss of hundreds of important rights and responsibilities. Moreover, it would strip all 18,000 couples of their marital status and the dignity and respect that were conferred upon them by virtue of entering into and remaining in that legal status. It is clear that these intangible benefits of marriage are a core aspect of the fundamental right to marry and are of constitutional magnitude. Stripping couples of these tangible and intangible benefits and protections changes the legal consequences of their past conduct of entering into a valid marriage.

Accordingly, this Court should hold that Proposition 8 does not affect in any way the validity or rights or obligations associated with the marriages between same-sex couples entered into in California between June 16, 2008 and November 5, 2008.

A. Applying Proposition 8 to the existing marriages would result in the loss of hundreds of tangible rights and responsibilities.

Assuming the parties comply with the eligibility and procedural requirements, a marriage is entered into once the parties have obtained a marriage license and the marriage has been properly solemnized. Once these steps have occurred, the parties – previously single individuals – become married persons and automatically entitled to hundreds of rights and responsibilities "touching nearly every aspect of life and death." (*Goodridge v. Dep't of Public Health* (Mass. 2003) 440 Mass. 309, 323.)

These crucial legal rights and responsibilities include, but certainly are not limited to: the right to inherit without a will;[12] the right to sue for the wrongful death of a spouse;[13] vested community property rights with respect to property acquired during the relationship;[14] testimonial privileges;[15] the right to inherit without a will;[16] and presumptions that a child born to one of the spouses is the legal child of both spouses.[17] As this list indicates, many of the rights and protections that are extended to spouses better enable the parties to care for and support each other. Third

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[12] Cal. Prob. Code § 6401.

[13] Cal. Civ. Proc. Code § 377.60(a).

[14] Cal. Fam. Code § 751.

[15] Cal. Evid. Code §§ 970, 980.

[16] Cal. Probate Code § 6401.

[17] See, e.g., Cal. Fam. Code § 7540; Cal. Fam. Code § 7613(a).

parties, including employers and insurance providers, also extend additional rights and protections to married persons.

Many of the 36,000 same-sex spouses and their children already are receiving crucial benefits, either through the government or through private third parties, based on their marriages. For example, after getting married, some of these same-sex spouses began receiving health insurance through their spouse's employer based on their marital status, and some of the children that were born to these couples began receiving health insurance through their nonbiological parents because their nonbiological parents were presumed to be their legal parents by virtue of their parents' marriages. Unfortunately, some of these 36,000 individuals have died. Accordingly, there are now some surviving same-sex spouses in California, some of whom are receiving death benefits because they are surviving spouses; some of whom have inherited property by virtue of being a surviving spouse.

In addition to the rights and protections that some of the spouses currently are receiving, every one of these 36,000 spouses made important life decisions predicated on their marital status and the rights and protections that are accorded to spouses based on that status. For example, some of these spouses decided to leave their current employment after they got married in reliance on their right to be supported by their new spouse. Other spouses made the decision to begin pooling their assets based on the knowledge that, upon entrance into marriage, they began accruing community property rights. Some spouses incurred medical expenses for themselves or for their children because they had begun receiving medical insurance through their spouses' employers. Others made the decision not to hire an attorney to draft a will and other estate planning documents in reliance on their rights as married spouses.

It is simply undeniable that terminating access to these and hundreds of other important rights and responsibilities for the 18,000 same-sex couples who married in California prior to November 5, 2008 would change the legal consequences of their past conduct of entering into a valid marriage.[18]

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[18] It is true that some of the same-sex couples who married in California also are registered as domestic partners with the State. These couples – who are also registered domestic partners – still would be entitled to almost all of the state conferred tangible rights and protections of marriage even if their marriages were invalidated. This fact, however, does not change the conclusion that applying Proposition 8 to invalidate or affect in any way the existing marriages is a retroactive application of the measure.

As a preliminary matter, while some of the same-sex couples who married in California are also registered domestic partners, many of them are not. Some couples may have consciously chosen not to register because, although they desired the rights and protections that come with being registered, they felt (and this Court has agreed) that registering as domestic partners would mark them as being second class citizens. (See, e.g., *In re Marriage Cases*, *supra*, 43 Cal.4th at p. 846 ["particularly in light of the historic disparagement of and discrimination against gay persons, there is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships whereby the term 'marriage' is denied only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship."].) Other couples did not register because, while they were eligible to marry, they did not meet the requirements for registration. (See, e.g., *id.* at p. 805 n. 24 [noting that the parties must share a residence to register as domestic partners; there is no similar requirement for marriage].) If marriages of these couples were suddenly held to be invalid and unrecognizable, these couples would lose hundreds of important rights and responsibilities touching almost every aspect of their life and death.

Second, there are some tangible protections that are extended to married spouses that are not or may not be extended to registered domestic partners. One such protection is the right to have one's relationship recognized by other jurisdictions. There are jurisdictions that would recognize a marriage between two people of the same sex but might not recognize a registered domestic partnership. New York, for example, does

B. Applying Proposition 8 to the existing marriages would deprive these 18,000 couples of the constitutionally significant intangible benefits of marriage.

In addition to the loss of tangible benefits, if these marriages became invalid and unrecognizable on November 5, 2008, all of the couples (including those registered as domestic partners) would lose intangible rights, benefits and obligations arising out of the marriages that this Court has recognized as a key element of the marital relationship. Among other things, these 18,000 couples would be deprived of the dignity and respect they gained for their relationships by virtue of being in valid marriages. In the *Marriage Cases*, this Court made clear that a core element of the right to marry – a fundamental and inalienable constitutional right – is the right to have the government accord equal dignity and respect to their relationships. (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 793.)

Upon entrance into a valid marriage, one gains the knowledge that one is now tied legally and emotionally to another individual who is obligated to provide one with care and support. Because of the strong social and public conventions associated with marriage, entrance into a valid marriage confers upon the spouses a sense of stability and certainty

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recognize and respect marriages between same-sex couples entered into in other jurisdictions. (*Martinez v. County of Monroe* (N.Y. App. Ct. 2008) 850 N.Y.S.2d 740; see also Michael Gormley (AP), *New York to recognize out-of-state gay marriage*, ABC News Online, May 28, 2008.) At least one New York appellate court has declined, however, to recognize an out-of-state civil union. (*Langan v. St. Vincent's Hospital of New York* (N.Y. App. Ct. 2005) 802 N.Y.S.2d 476 [holding that civil union spouse lacked standing to sue for wrongful death as a surviving spouse].)

Moreover, as discussed in more detail herein, even for those couples who are also registered as domestic partners, holding that their marriages became invalid and unrecognizable on November 5, 2008 would strip them of the constitutionally significant intangible protections extended to them by virtue of being married.

that in turn shapes the decisions the parties make individually and collectively about their future. "The willingness to marry permits important legal and personal assumptions to arise about one's intentions." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 816 n. 38 (internal citation and quotations omitted).) Based on these assumptions, the individuals may make other life-altering decisions that they would not make in the absence of the marriage; decisions such choosing to leave one's current employment, to move to another city or state, or to have a child. As this Court explained, "[a] 'justifiable expectation ... that [the] relationship will continue indefinitely' permits parties to invest themselves in the relationship with a reasonable belief that the likelihood of future benefits warrants the attendant risks and inconveniences." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 816 n. 38, quoting Bruce C. Hafen, *Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests* (1983) 81 Mich. L. Rev. 462, 485-486.)

Not only does the status of being married profoundly affect how the parties interact with one another and decisions they make about their individual and collective futures, the act of marrying also transforms their extended family structures. At the moment that a person becomes married, he or she becomes a member of a family to which he or she previously was unrelated. These previously unrelated people suddenly interact with the spouses in ways that they did not before that transformative event of getting married. As this Court explained in its decision in the *Marriage Cases*, "[t]he opportunity of a couple to establish an officially recognized family of their own not only grants access to an extended family but also permits the couple to join the broader family social structure that is a significant feature of community life." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 817.) These new family members help support and nurture the spouses and their relationship. (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 817 ["Further,

entry into a formal, officially recognized family relationship provides an individual with the opportunity to become a part of one's partner's family, providing a wider and often critical network of economic and emotional security."].)

For many if not most same-sex couples, entrance into a registered domestic partnership did not have the same result. For example, in his declaration in the *Marriage Cases*, plaintiff Stuart Gaffney explained that even though his and his partner's families were supportive of their relationship, no member of either of their families had ever congratulated them for registering as domestic partners. (*In re Marriage Cases*, Gaffney declaration at ¶ 19, available at http://www.nclrights.org/site/DocServer/StuartGaffney_declaration.pdf?docID=1826.) Stuart did not think that his family members even knew what a domestic partnership was. (*Ibid.*) Noted author Andrew Sullivan recently wrote about how getting married suddenly transformed his relationship with his spouse's family. He explained: "They had always been welcoming and supportive. But now I was family." (Andrew Sullivan, *My Big Fat Straight Wedding*, The Atlantic, Sept. 2008, available at http://www.theatlantic.com/doc/200809/gay-marriage.) The enormous psychological bond that emanates from marriage transforms not only families' relationships with the spouses, it also affects the families' relationships with each other. These two previously unrelated families now have language to describe their connection to each other in a way that makes sense to them and to others. This was true for Petitioner Helen Zia. Helen explained that after her marriage to her partner of approximately fifteen years, "[o]ur parents, siblings and cousins began relating to each other as in-laws, not just acquaintances." (Zia Decl. ¶ 5.)

The social conventions and meanings associated with marriage also affect the way that the parties to the marriage interact with those around

them. As historian Nancy Cott has explained: "Marital status is just as important to one's standing in the community and state as it is to self-understanding. Radiating outward, the structure of marriage organizes community life and facilitates the government's grasp on the populace." (Nancy Cott (2000) Public Vows: A History of Marriage and the Nation 1.) For example, there is substantial research indicating that after the transformative event of getting married, others around the couple accord greater respect to their relationship, and this in turn works to provide greater support and encouragement for the parties individually and collectively. (See Linda Waite & Maggie Gallagher (2000) The Case for Marriage 18-23; Steven Nock, *Marriage as a Public Issue* (2005) 15 The Future of Children 13, 17-21.) The support and encouragement that the spouses receive from those around them contributes to the quality and the stability of the relationship. As Professor Elizabeth Scott has written "[m]arriage is an institution that has a clear social meaning and is regulated by a complex set of social norms that promote cooperation between the spouses – norms such as fidelity, loyalty, trust, reciprocity, and sharing. They are embodied in well-understood community expectations about appropriate marital behavior that are internalized by individuals entering marriage." (Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency* (2004) 2004 U. Chi. Legal F. 225, 221.)

If these 18,000 marriages were suddenly and abruptly held to be invalid and unrecognizable, these couples would lose the attendant social and cultural meanings and conventions associated with marriage, conventions that often are essential to the success and quality of the relationship, a relationship that is, again, one of the most profound and fulfilling that a person can make in a lifetime, and therefore is entitled to the highest level of constitutional protection.

The profound disruption and psychological harm would be felt not only by their spouses, but also by their children. The fact that their parents got married was and remains very important to many of the children of these couples. This is true for Liza and Katie, the twin six-year-old daughters of Petitioners Edward Swanson and Paul Herman. (Swanson Decl., ¶¶ 9-11.) After she learned that Proposition 8 was being voted on, Liza asked her parents: "They can't take your [marriage] away, right?" (Judith Warner, *What It Felt Like To Be Equal*, NYTimes blog, Nov. 13, 2008, available at http://warner.blogs.nytimes.com/2008/11/13/dark-side-of-the-vote/.) This was important to Liza because she thought that if her parents' marriage was invalidated, it would mean that her family would fall apart. (*Ibid.*) It would be difficult to overestimate the profound psychological harm that invalidating these marriages would cause to Liza, Katie and the many other children whose parents married in California between June and November of last year.

Moreover, even if these couples were still entitled to the tangible rights and protections associated with marriage, holding that their marriages are now invalid would result in forcing these 36,000 individuals – 36,000 individuals who just recently made one of the most profound decisions that an individual can make in a life time – to experience profound and significant difficulties and complications. As this Court recently explained in the *Marriage Cases*, "[w]hile it is true that this circumstance may change over time, it is difficult to deny that the unfamiliarity of the term 'domestic partnership' is likely, for a considerable period of time, to pose significant difficulties and complications for same-sex couples, and perhaps most poignantly for their children, that would not be presented if, like opposite-sex couples, same-sex couples were permitted access to the established and well-understood family relationship of marriage." (*In re Marriage Cases*,

supra, 43 Cal.4th at p. 846, citing N.J. Civil Union Review Com., First Interim Rep. (Feb. 19, 2008).)

As detailed in the report by the N.J. Civil Union Review Commission, same-sex couples in legal statuses other than marriages often face difficulties in getting recognition of their relationship by the government, by their employers, and by other third parties. Many of the people who testified before the New Jersey Commission reported that their employers refused to provide spousal health insurance benefits to the civil union spouses of employees. (*Id.* at p. 9.) Another "common theme" in the testimony was that civil union spouses had to explain "repeatedly to employers, doctors, nurses, insurers, teachers, soccer coaches, emergency room personnel and the children of civil union partners" what the status meant and what rights and protections they were entitled to as a civil union spouse. (*Ibid.* at p. 10.) Married couples are not forced to continually explain their relationship and defend their right to various protections.

The complexity and uncertainty surrounding recognition of domestic partnerships would impose harms not only on the adults who were once married, but also on their children. As this Court noted in the *Marriage Cases*, marriage provides a "ready and public means of establishing to others the legal basis of one's parental relationship to one's children." (*In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 817-818.) By contrast, although domestic partnership similarly provides a legal mechanism for establishing one's parentage to a child born into the relationship, the practical reality is that it simply does not provide the same "public means" of communicating to others – including hospital staff and school officials – one's parental relationship to one's children. While the parties to the domestic partnership eventually may be able to prove that they are the legal parents of children born into their relationship, many of these couples and their children will be forced to fight for the establishment and recognition

of that relationship, and they will be denied the much greater assurance that married spouses have that they will be recognized as their children's parents.

Taking the position that couples who previously had validly entered into the most socially productive and individually fulfilling relationships were no longer in a marriage that was valid or recognized by the State of California clearly would be changing the legal consequences of past conduct.

C. Retroactively invalidating previously valid marriages would be unprecedented.

As noted above, the Interveners assert (without reference to or discussion of the established rules regarding retroactivity) that the marriages entered into prior to the adoption of Proposition 8 should now be treated as invalid and should not be recognized by the State of California. Not only does this assertion fly in the face of established and well-settled law on retroactivity generally, as far as amici know, it is simply unprecedented either here in California or in any other state. Because of the profound impact retroactively invalidating a marriage would have on the spouses, on the status of their child or children, and on third parties with which the family interacts, as far as amici know, no court has ever held that a marriage validly entered into in one state was later rendered invalid and unrecognizable in that same state by a change in that state's laws regarding qualifications for marriage.

Assuming *arguendo* that it is valid, Proposition 8 would not be the first time that a state has restricted the qualifications for marriage. One other such example is the elimination of common law marriage. Historically, the majority of U.S. states permitted couples to enter into a

valid marriage without complying with the licensing and solemnization requirements. (See, e.g., Michael Grossberg (1985) Governing the Hearth: Law and the Family in the Nineteenth-Century America 73-102.) Over time, most of these states abolished common law marriage by enacting statutes that providing that, to enter into a valid marriage, the parties must comply with the licensing and solemnization requirements. (D. Kelly Weisberg & Susan Appleton (2006) Modern Family Law 224.) Because of the serious problems that would be raised by retroactively invalidating a previously valid marriage, in most instances, Legislatures explicitly added language to the new provisions making clear that the new requirements would apply only to new marriages entered into after the effective date of the amendment. (See, e.g., 23 Pa. Stat. & Cons. Stat. § 1103.)

In some jurisdictions, however, the statutory provisions abolishing common law marriage did not explicitly provide that the new restrictions would apply only to marriages entered into after the effective date of the amendment. California is such a state.[19] Despite the absence of any explicit prospective-only language, California courts held that the new requirement did not retroactively invalidate common law marriages that had been validly entered into prior to the adoption of the new law. For example, in *Wells v. Allen* (1918) 38 Cal.App. 586, 589-590, the court treated as valid a common law marriage that was entered into prior to the effective date of the 1895 statute abolishing common law marriage.

Like California's statute, New York's 1933 statute abolishing common law marriage also failed to include language explicitly addressing the impact of the new law on the validity of common law marriages entered

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[19] The 1895 statute abolishing common law marriage provided, in relevant part: "Marriage must be licensed, solemnized, authenticated, and recorded as provided in this article[.]" (former Cal. Civ. Code section 68.)

into prior to the effective date of the abolition statute.[20] All of the decisions addressing the validity of common law marriages entered into prior to the effective date of the statute nonetheless concluded that the new law had no effect on common law marriages entered into prior to the adoption of the provision. (See, e.g., *People v. Massaro* (N.Y. 1942) 288 N.Y. 211, 215 [noting that a common law marriage entered into prior to the adoption of the statute abolishing common law marriage "is just as valid as a solemnized marriage"]; *Cavanaugh v. Valentine* (N.Y. Sup. Ct. 1943) 41 N.Y.S.2d 896, 898 ["As marriage is a contract protected against impairment of its obligations by the United States Constitution (Art. 1, Sec. 10) the prohibitory legislative action referred to above affected only those common law marriages attempted following the placing of the legislative ban upon them. In other words common law marriages in existence on April 29, 1933, remained unaffected by the enactment which took effect on that date."].)

Similar questions arose when states passed statutes or constitutional provisions prohibiting marriages between white people and people of color. Again, courts considering this question concluded that these provisions had no effect on the validity or legal recognition of marriages entered into prior to the adoption of the measure. For example, in 1894, Louisiana passed a statute providing: "Marriages between white persons and persons of color are prohibited, and the celebration of such marriages is forbidden and such celebration carries with it no effect, and is null and void." (See *Succession of Yoist* (1913) 132 La. 309, 310.) Although, like Proposition 8, the provision was written in the present tense, the Louisiana Supreme Court

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[20] The 1933 provision provided that "no marriage shall be valid unless solemnized by" a list of enumerated people or by a "written contract with certain solemnity therein provided for." (*Andrews v. Andrews* (N.Y. Sup. Ct. 1937) 1 N.Y.S.2d 760, 761.) Notably, like Proposition 8, the statute was written in the present tense.

subsequently made clear that the provision "had no retroactive effect" as to such marriages that previously had been validly entered into. (*Ibid.*)

It is helpful to consider another analogous situation relating to age requirements for marriage. If for example, California changed the age of consent for marriage to nineteen, from the current age of eighteen, it is simply inconceivable that a court would conclude that that subsequent change in the eligibility requirements for marriage would retroactively invalidate or affect in any way a marriage that was validly entered into by an eighteen-year-old prior to the effective date of the statutory change.

What the Interveners urge this Court to do – to apply Proposition 8 retroactively to invalidate previously valid marriages – is unprecedented. Every day, people make life altering decisions based on the fact that they are in a marriage – a relationship that carries with it important legal and social protections. To retroactively strip this status away from thousands of individuals and their children is a radical proposal that should be rejected by this Court.

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III. Even assuming *arguendo* there was clear evidence of an intent to apply Proposition 8 retroactively (which there is not), doing so would raise serious constitutional concerns that should be avoided.

Assuming *arguendo* that there was clear evidence that the voters or the proponents intended that Proposition 8 should be applied retroactively (which there is not), this Court would have to attempt to harmonize Proposition 8 with other constitutional provisions. (*City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563 [courts are "constrained by [their] duty to harmonize various constitutional provisions"].) In so doing, the Court should interpret provisions of the Constitution to "avoid the implied repeal of one provision by another." (*City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563.) Applying these well-settled rules, it is clear that even if the voters evidenced a clear intent to apply Proposition 8 retroactively, doing so and affecting in any way the validity or effect of the marriages between same-sex couples entered into prior to the adoption of Proposition 8 would, among other things, violate due process by infringing or eliminating vested property and liberty interests.[21]

Even where it is clear that the voters or the legislature intended the law to be applied retroactively, the Constitution prohibits a court from applying the law retroactively if the law "deprives a person of a vested property right without due process of law ..." (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 756.) "[A] vested property right is one that is not subject to a condition precedent." (*In re Marriage of Hilke* (1992) 4 Cal.4th 215, 222, citing *In re Marriage of Buol* (1985) 39 Cal.3d 751, 757, fn. 6; *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 591, fn. 7.; see also *Miller v.*

[21] As discussed in more detail in the Strauss Petitioners' Reply Brief, applying Proposition 8 retroactively would also raise equal protection and contract clause concerns. (Strauss Pet. Reply Br. at p. 52-70.)

McKenna (1944) 23 Cal.2d 774, 783 [a "vested right as that term is used in relation to constitutional guaranties, implies an interest which it is proper for the state to recognize and protect and of which the individual may not be deprived arbitrarily without injustice."].)[22]

Innumerable vested individual rights and protections would be eliminated or infringed if these 18,000 marriages were treated as no longer valid or recognizable. For example, upon the date of marriage, the vast majority of these 36,000 spouses began to acquire community property rights.[23] This Court has clarified on many occasions that community property rights are vested property rights that cannot be infringed without due process. (See, e.g., *In re Marriage of Heikes* (1995) 10 Cal.4th 1211, 1219; *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 447-448.)[24] Among these 36,000 individuals who would be affected, there likely are many other

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[22] For a more detailed analysis of the constitutionality of applying laws – including laws related to marriage and community property – retroactively, see, e.g., Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that was Valid at its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages* (2009) 60 Hastings Law Journal ___ (forthcoming).

[23] In California, married spouses can opt out of community property rights by entering into a valid premarital agreement. (See, e.g., Cal. Fam. Code § 1612(a) [providing that married spouses can enter into a premarital agreement addressing, among other things, "[t]he rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located."].) It is likely that some of the 36,000 individuals who entered into a marriage with someone of the same sex in California between June and November 2008 entered into premarital agreements. It is also likely, however, that most of these individuals did not. (See, e.g., Allison A. Marston, Student Note, *Planning for Love: The Politics of Prenuptial Agreements* (1997) 49 Stan. L. Rev. 887, 891 [noting that only approximately 5% of married spouses enter into premarital agreements each year].)

[24] Married spouses each have "present, existing, and equal interests" in community property during the marriage. (Cal. Fam. Code § 751.)

vested rights that would be impaired if Interveners' position was adopted. For example, many of these individuals likely are now receiving health insurance benefits through their spouse's employer because the parties are now married. In addition, as noted above, some of these 36,000 individuals who married have since passed away. Some of the surviving spouses likely are receiving life insurance or other benefits by virtue of their status as surviving spouses. It is not only the spouses themselves who may have vested property interests; children of these couples also may have vested property interests that would be infringed if their parents' marriage was no longer treated as valid or recognized. As noted above, the marital presumptions would apply to any children born to these couples during or near the period of June through November 2008.[25] Some of these children likely are receiving various forms of government benefits through their nonbiological parents because their nonbiological parents are considered their legal parents under state law by virtue of the marital presumptions. These are all present, vested property interests. If this Court were to conclude that these marriages were no longer valid or recognized, these parties and their children might lose their eligibility to these vested rights.

Under established California case law, infringements of these individual property interests alone would require the Court to conclude that applying Proposition 8 retroactively to invalidate the existing marriages would violate due process. But the infringements of these individual property rights and protections pale in comparison to the much more fundamental effect of applying Proposition 8 retroactively to the existing

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[25] There are a number of different provisions of the Family Code that might be applicable. California Family Code section 7613(a) provides that a spouse who consents to his or her spouse's artificial insemination is treated in law as the legal parent of the resulting child. California Family Code section 7540 establishes a conclusion presumption that a spouse is the legal parent of a child born to the spouse's wife.

marriages. The much more profound impact of applying Proposition 8 retroactively would be the effect of stripping these 36,000 individuals of their marital status and the dignity and respect for their relationship that was and is conferred on the parties by virtue of their marriage.

As noted above, this Court has held that the right to marry is entitled to the highest level of constitutional protection. (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 847 [holding that the strict scrutiny standard of review was required].) This Court also held that "[o]ne of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 783.) Given that infringements of this core element of the right to marry are entitled to the highest level of constitutional, the right to be accorded equal dignity and respect is undoubtedly "an interest which it is proper for the state to recognize and protect and of which the individual may not be deprived arbitrarily without injustice." (*Miller v. McKenna* (1944) 23 Cal.2d 774, 783.) These couples gained access to this now-vested, core aspect of this fundamental right the moment that they married.

If retroactive impairment of a single, individual property interest that is conferred on a person by virtue of his or her marital status – such as the right to community property – raises due process concerns, then, without question, retroactive invalidation of the entire status – a status that not only establishes a person's right to hundreds of important rights and obligations, but also a status that entitles the spouses to equal dignity and respect by the

government as well as those around them – also raises significant due process concerns.[26]

Once the Court determines that retroactive application of the law would infringe vested property rights or liberty interests, the Court then must consider a number of factors to determine whether this infringement violates due process: "[1] the significance of the state interest served by the law, [2] the importance of the retroactive application of the law to the effectuation of that interest, [3] the extent of reliance upon the former law, [4] the legitimacy of that reliance, [5] the extent of actions taken on the basis of that reliance, and [6] the extent to which the retroactive application of the new law would disrupt those actions." (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592.)

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[26] While it is true that there is language in a prior decision from the Court of Appeal suggesting in *dicta* that individuals may not have a vested interest in their marital status, what the court was speaking of in that case differs dramatically from what is at issue here. (*In re Marriage of Walton* (1972) 28 Cal.App.3d 108.) In *Marriage of Walton*, the wife argued that applying changes in the procedural rules for exiting a marriage retroactively to her divorce proceeding violated her vested interest in her marital status. (*Id.* at p. 111.) The court rejected her claim. That conclusion does not suggest, however, that invalidating the marital status of 18,000 couples is constitutionally permissible.

The result in *Marriage of Walton* – holding that it is constitutionally permissible for the State to make incremental changes to the procedural rules governing marriages, and maybe even to make alterations to some of the individual rights and responsibilities associated with marriage – is necessary for the law to progress in a complex society. Individuals who marry cannot reasonably expect that all laws effective at the time they entered into their marriage will be forever frozen in time. By contrast, however, given the importance of marriage in our society to the individuals, to those around them, and to the State itself, individuals who marry *do* have a reasonable expectation that the State will not abruptly abrogate *their entire marital status* and all of the rights and responsibilities that are conferred on the parties by virtue of their marital status.

With respect to factors (1) and (2), related to the importance and fulfillment of the state interests at stake, it is helpful to review this Court's opinions addressing laws that retroactively infringed vested community property rights. A review of these cases reveals that this Court has concluded that laws that infringe vested community property rights cannot constitutionally be applied retroactively *unless* the law was intended to remedy a "rank injustice." (See, e.g., *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 448-449 [concluding that it would be unconstitutional to apply law retroactively because, unlike the laws in *Bouquet* and *Addison*, the law was not intended to cure a "rank injustice"]; see also *Addison v. Addison* (1965) 62 Cal.2d 558; see also *In re Marriage of Buol* (1985) 39 Cal.3d 751, 761 [same].) Applying these principles to this case, it is absolutely clear that applying retroactively Proposition 8 to affect in any the existing 18,000 marriages would violate due process.

Rather than attempting to cure a rank injustice, Proposition 8 is intended to do just the opposite. In the *Marriage Cases*, this Court remedied the then-existing rank injustice of excluding same-sex couples from marriage. (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 783 ["the current California statutes assign a different name for the official family relationship of same-sex couples as contrasted with the name for the official family relationship of opposite-sex couples raises constitutional concerns not only under the state constitutional right to marry, but also under the state constitutional equal protection clause."].) Proposition 8 was intended to overrule this Court's actions and return us to that of state-mandated discrimination. (See, e.g., Cal. Sec. of State, Official Voter Information Guide (Nov. 4, 2008) Proposition 8, Arguments and Rebuttals, available at http://www.voterguide.sos.ca.gov/argu-rebut/argu-rebutt8.htm ["*It overturns the outrageous decision of four activist Supreme Court judges* who ignored the will of the people." (emphasis in original)].)

With respect to factors (3), (4), and (5), it is clear that many individuals did rely upon the former law and that this reliance was legitimate. First, the number of people who relied on the prior law is great. It has been estimated that 18,000 same-sex couples -- 36,000 individuals -- married in California between June 16 and November 5, 2008. (Maura Dolan, *Justices will hear Prop. 8 challenges*, L.A. Times 1, Nov. 20, 2008.) And the extent of reliance by these 36,000 individuals is also great. In *Bouley v. Long Beach Memorial Medical Center*, the Court of Appeal explained that "[i]t is easy to see how an individual could have relied on ... community property laws. People may spend or save, marry or divorce, in reliance on those laws." (*Bouley v. Long Beach Memorial Medical Center* (2005) 127 Cal.App.4th 601, 610.) Here, the thousands of individuals relied not only on community property laws, but on the entire web of hundreds of rights and protections, as well as on the intangible status of being married. Moreover, in addition to relying on the tangible protections that are automatically conferred on married spouses, these couples also relied on the social, cultural, and spiritual aspects of the marital relationship. These couples made what has been described as one of "the most intimate and personal choices a person may make in a lifetime, [a] choice[ ] central to personal dignity and autonomy[.]." (*Lawrence v. Texas* (2003) 539 U.S. 558, 574 [internal quotations and citation omitted].) Based on this profound decision to intertwine their lives with another person, some of the future spouses likely decided to move from an established home and life, some left or changed their employment, some of these couples decided to have children.

Not only was the extent of reliance profound, the reliance also was reasonable. As noted above, as couples began marrying, legal experts, including the San Francisco City Attorney and the California Attorney General assured the public that it was likely that the marriages entered into

before the adoption of Proposition 8 would continue to be valid and recognized. (See, e.g., NPR, All Things Considered, *Gay Couples Tie the Knot at S.F. City Hall*, June 17, 2008 [quoting Attorney Dennis Herrera as stating: "And at the same time I'll note for you that there is no retroactivity provision that's in the ballot initiative. ... And I'm confident those marriages are going to endure."]; Bob Egelko, *Prop. 8 not retroactive, Jerry Brown says*, S.F. Chron., Aug. 5, 2008.) In published comments in the mainstream media, even the attorney for the Proponents/Interveners suggested that Proposition 8 would apply prospectively only. (See, e.g., Bill Ainsworth, *Same-sex unions made now likely to stay valid*, San Diego Union-Trib. A1, May 17, 2008 [quoting Andrew Pugno as stating: "I can't speak about [Proposition 8 and retroactivity] because it hasn't been addressed, but it is true that most of the time, initiatives are forward looking[.]"].) Moreover, never before has a valid marriage been retroactively invalidated by a subsequent change in the law. Under all of these circumstances, the actions taken in reliance on the old law was legitimate and reasonable.

Finally, with respect to the last factor, it is clear that a retroactive application of Proposition 8 to the existing marriage could cause profound disruption for those 18,000 couples, their children, their extended families, third parties, and for the government. Speaking only as to the very limited issue of the disruption cause by the retroactive application of a community property law, this Court explained in *Marriage of Fabian*:

> The disruptive effect of retroactive application of this type of statutory change is keenly felt in this area of the law. The net effect of retroactive legislation is that parties to marital dissolution actions cannot intelligently plan a settlement of their affairs nor even conclude their affairs with certainty after a trial based on then-applicable law. ... In the interest of finality, uniformity and predictability, retroactivity of marital property statutes should be reserved for those rare instances

> when such disruption is necessary to promote a significantly important state interest." (*In re Marriage of Fabian* (1986) 41 Cal.3d 440, 450 (internal quotations and citations omitted).)

As noted above, the impact on the parties' community property rights pale in comparison to the impact a retroactive application of Proposition 8 would have on many other aspects of these parties' lives, including their relationships to each other, the way they are treated by the government and by those around them, their legal relationships to children born during their marriage, their right to health insurance, and in hundreds of other ways.

Accordingly, even if there was clear evidence that the voters intended Proposition 8 to be applied retroactively (which there is not), doing so would raise serious due process concerns that mandate that this Court hold that Proposition 8 does not affect the 18,000 marriages between same-sex couples entered into in California between June 16, 2008 and November 5, 2008 in any way.

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CONCLUSION

For the reasons stated above, Amici urge this Court to hold that Proposition 8 has no effect on the marriages between same-sex couples entered into between June 16, 2008 and November 5, 2008.

Dated: January 13, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief Amicus Curiae has been prepared using proportionately spaced 13-point Times New Roman font. In reliance on the word count feature of the Microsoft Word for Windows software used to prepare this brief, I further certify that the total number of words of this brief is **11,266** words, exclusive of those materials not required to be counted.

I declare under penalty of perjury that this Certificate of compliance is true and correct and that this declaration was executed on January 13, 2009.

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PROOF OF SERVICE

I, the undersigned hereby declare:

I am over eighteen years of age and not a party to the above action. My business address is 559 Nathan Abbott Way, Stanford, CA 94305-8610.

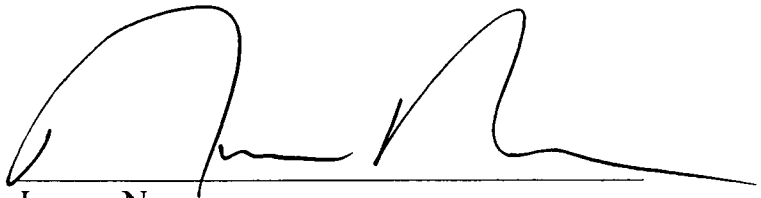
On the date set forth below, I caused to be served the following documents:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE PROFESSORS OF FAMILY LAW IN SUPPORT OF PETITIONERS

via First Class U.S. Mail, by placing one true and correct copy thereof in a properly addressed and sealed envelope in a pickup box routinely maintained by the United States Postal Service, in conformity with the usual business practices of the Stanford Law School, on the following interested parties:

[SEE ATTACHED SERVICE LIST]

I declare, under the penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on 15 January 2009 at Stanford, California.



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