

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.*

ROBIN TYLER et al., *Petitioners,*

v.

THE STATE OF CALIFORNIA et al., *Respondents,*

DENNIS HOLLINGSWORTH et al., *Interveners.*

CITY AND COUNTY OF SAN FRANCISCO et al., *Appellants,*

v.

MARK B. HORTON, as State Registrar of Vital Statistics, et al.,

Respondents,

DENNIS HOLLINGSWORTH et al., *Interveners.*

**APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE;
PROPOSED BRIEF OF AMICUS CURIAE**

STEVEN MATTOS, AMOR SANTIAGO, HARRY MARTIN, AND PAUL J. DORIAN

IN SUPPORT OF PETITIONERS AND APPELLANT

STRAUSS et al., TYLER et al., CITY AND COUNTY OF SAN FRANCISCO, et al.

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Case Nos. S168047, S168066, S168078

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**MOTION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE**

Pursuant to rule 8.200(c) of the California Rules of Court, Steven Mattos, Amor Santiago, Harry Martin, and Paul Dorian (collectively "*Amici*") respectfully seek leave to file the attached Brief of *Amicus Curiae* in Support of Petitioners and Appellants in the above-captioned matter.

Amici are familiar with the questions involved in the above-captioned case and the scope of their presentation, and believe that there is an urgent necessity to provide an additional dispositive argument, not presented by any of the parties or intervenors.

Amici presents this Court with the dispositive argument that *Proposition 8 is an unconstitutional establishment of religion, and hence, an unconstitutional modification under the first question presented by the Court.*

Amici are members of same-sex relationships, who are directly affected by the Court's determination of the constitutionality of Proposition 8. *Amici* have a passionate interest in ensuring that all potentially dispositive arguments are presented to the Court, so that it may fully and properly consider and resolve the above-captioned case.

INTERESTS OF AMICI CURIAE

Amici Steven Mattos is part of a same-sex couple that hoped to marry after the Court's decision in the *In Re Marriage*

Brief of *Amicus Curiae* Mattos, Santiago, Martin & Dorian
In Support of Petitioners and Appellants.

Cases (2008) 43 Cal. 4th 757, and is now prevented from marrying following the passage of Proposition 8 in California. *Amici* Mattos' partner is not named, because *Amici* Mattos' partner has a reasonable and rational fear of injury from his religious employer, if he visibly participates in this *Amicus Curiae* Brief with the main argument that Proposition 8 fails due its conflict with the Establishment Clause of the California Constitution. *Amici* Mattos is a resident of the County of Santa Clara, California.

Amici Amor Santiago and *Amici* Harry Martin are a same-sex couple that were legally married following this Court's decision in the *In Re Marriage Cases, supra*, and prior to the passage of Proposition 8, in the County of Santa Clara, California, where they reside.

Amici Paul Dorian is legally married to Dennis W. Chiu, attorney for *Amici* in this *Amicus Curiae* Brief, and were also married following the Court's decision in the *In Re Marriage Cases, supra*, and prior to the passage of Proposition 8, in the County of Santa Clara, California, where they reside. Dennis W. Chiu is not named as *Amici* herein, to avoid representing himself *in propria persona* before this Court. *Amici* Paul Dorian has signed a written waiver pursuant to the California Rules of Professional Conduct, waiving any and all conflicts of interest for Dennis W. Chiu to serve as his appellate counsel in the above-captioned matter.

Amici are in legal jeopardy with regard to their marriage rights. *Amici* Mattos is currently prohibited from marrying, and *Amici* Santiago, Martin, and Dorian are in jeopardy of having their marriages annulled by the above-captioned matter or suits

filed to annul all same-sex marriages in California, if the Court allows Proposition 8 to stand.

Pursuant to the California Rules of Court 8.200(c), we respectfully request leave of this Court to participate as *Amicus Curiae*, and to allow *Amici* to file the attached *Amicus Curiae* Brief and approve the Request for Judicial Notice filed currently herewith.

**PROPOSED BRIEF OF AMICUS CURIAE IN SUPPORT OF
PETITIONERS & APPELLANTS**

SUMMARY OF ARGUMENT

We submit our *Amicus Curiae* brief to this honorable Court to establish that Proposition 8, passed by voters in November 2008,¹ is an unconstitutional establishment of religion, thereby making it an unlawful revision to the California Constitution.²

The California Constitution states in pertinent part: "The Legislature shall make no law respecting an establishment of religion." (Cal. Const., art. I, §4) (hereinafter referred to as the "Establishment Clause"). However, Proposition 8 states, in pertinent part, "*Only marriage between a man and a woman is valid or recognized in California.*"³ Although Proposition 8's marriage definition has been referred to by proponents of Proposition 8 as the "traditional" definition of marriage,⁴ "traditional" is merely a secular word attempting to achieve religious aims. The limitation on marriage to only opposite-sex couples is solely based on religious

¹ Debra Bowen, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION November 26, 2008, p. 7 (certified December 13, 2008).

² Cal. Const., art XVIII, §§1-4.

³ CALIFORNIA GENERAL ELECTION * OFFICIAL VOTER GUIDE * NOVEMBER 4, 2008 (2008).

⁴ Jane Anderson, M.D., Robert Bolingbroke & Jeralee Smith, "Rebuttal to Argument Against Proposition 8." CALIFORNIA GENERAL ELECTION * OFFICIAL VOTER GUIDE * NOVEMBER 4, 2008 (2008) (stating "Proposition 8 is about traditional marriage; it is not an attack on gay relationships.").

dogma found in the Old Testament of The Holy Bible, under Genesis (2:24), and reiterated in the New Testament under the Gospels of Mathew (19:4-6) and Mark (10:6-9), and centuries of religious intervention.

The description of Proposition 8 as the protection of "traditional" marriage was a political tactic for religious organizations to obfuscate what in essence was a coup upon the Establishment Clause, and engage their religious followers in a subversive crusade to carve the definition of marriage solely based in religious dogma into the California Constitution and mandate upon all Californians, believers and non-believers alike, the definition of marriage as set forth by *The Holy Bible*. The addition of a religious definition to the California Constitution is untenable under the inalienable rights of all Californians to be free from state established religion under Article I, §4 of the state constitution.

Proposition 8's inestimable importance to religion was demonstrated in its proponent's campaign literature, religious leader letters urging parishioners to support the Yes on 8 campaign, and the bounty of campaign contributions from religious worshipers and groups to the Yes on 8 campaign. One pamphlet to clergy, paid for by the Yes on 8 campaign, instructs churches, when asking for monetary support for Yes on 8, to use plain, white envelopes (presumably untraceable back to the church), and suggests donation amounts of \$24 or \$99 that avoid California campaign finance disclosure requirements.

This *Amicus Curiae* brief does *not* challenge the right of religious organizations to advocate for public policy issues. However,

the right of religious organizations and their followers to carve religious dogma into the California Constitution that eliminates same-sex couples' right to marry is placed squarely before this Court.

Ultimately, this *Amicus* brief shall request that the Court resolve a single question: Does Proposition 8's definition of marriage, as only between a man and a woman, survive the legal tests regarding prohibition of state establishment of religion? *Amici* pray that this Court will find that Proposition 8's definition of marriage, if enshrined in our state constitution, would be the installation of religious dogma and an establishment of religion.

If this Court so finds, we submit that Proposition 8 is an unlawful amendment to and revision of the California Constitution's express prohibition against establishment of a state religion.

PROCEDURAL & FACTUAL BACKGROUND

I. PROCEDURAL BACKGROUND

In November 2008, this Court granted Petitioners and Appellant's request to decide several issues arising out of the passage of Proposition 8 in California. The Court consolidated the initial three cases regarding Proposition 8's constitutionality, and requested briefings on three issues, involving: (1) whether Proposition 8 was an unlawful revision of the California Constitution, (2) whether Proposition 8 was a violation of the separation-of-powers doctrine, and (3) what would be the effect on marriages completed prior to Proposition 8's passage. The Court also set amicus curiae briefs to be filed with the clerk on or before January 15, 2009. The Court also instructed that amicus curiae briefs need not be filed for each of the cases that were consolidated, and one brief shall be applied to all consolidated cases.

II. PROPOSITION 8: MARRIAGE SHALL ONLY BE BETWEEN A MAN & A WOMAN

Proposition 8 states in pertinent part:

*"Only marriage between a man and a woman is valid or recognized in California."*⁵

It was passed by a majority of California voters on or about No-

⁵ CALIFORNIA GENERAL ELECTION * OFFICIAL VOTER GUIDE * NOVEMBER 4, 2008.

vember 4, 2008,⁶ and the results were certified by the California Secretary of State on December 13, 2008.⁷

III. RELIGION & THE DEFINITION OF MARRIAGE

Amici are compelled to file this brief, because based on its reading of the record, the Court has not yet been briefed on the powerful influence on marriage throughout the history of western civilization. In fact, it can be said that modern marriage, including its definitions and traditions, would not be what it is today, but for the institution's usurpation by religious doctrine over history.

A. Biblical Scripture Defines Marriage Between One Man and One Woman.

In order to understand the basis of how marriage and religion are so intimately married, let us start at the beginning of the universe, according to scripture in The Holy Bible. "In the beginning God created the heaven and the earth." GENESIS, 1:1.⁸ On the fifth day of the world's creation, "God created man in his own image, in the image of God created he him; male and female created he them." GENESIS 1:27. In creating man, "God formed man

⁶ Debra Bowen, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION November 26, 2008, p. 7 (stating California voters cast 7,001,084 votes in favor of Proposition 8 (52.30%) and 6,401,482 votes against (47.70%)).

⁷ Debra Bowen, CERTIFICATE OF SECRETARY OF STATE, December 13, 2008.

⁸ All references to THE HOLY BIBLE shall be from the King James Version.

of the dust of the ground, and breathed into his nostrils the breath of life; and man became a living soul." GENESIS 2:7.

In creating a woman, "God caused a deep sleep to fall upon Adam and he slept: and he took one of his ribs, and closed up the flesh instead thereof; And the rib, which the LORD God had taken from man, made he a woman, and brought her unto the man. And Adam said, This is now bone of my bones, and flesh of my flesh: she shall be called Woman, because she was taken out of Man." GENESIS 2:21-23.

Immediately following the creation of Woman, God created marriage. "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." GENESIS 2:24. This chain of events is crucial to understanding how the Old Testament created in the original institution of marriage. In scripture, from the literal biblical beginning of the world, marriage was a cycle created by God to return Woman, created from the flesh of Man, back to the flesh of Man (as "one flesh") after marriage. Other than this religious mystical division of flesh and its reunion, there appears to be no other rational reason why marriage should be limited to opposite-sex couples.

The New Testament continues the Old Testament dogma of marriage by recording Christ's teachings on marriage as the same from the Book of Genesis. According to Apostles Matthew and Mark, Christ's response to questioning Pharisees: "Have ye not read, that he which made them at the beginning made them male and female, And said, For this cause shall a man leave father and mother, and shall cleave to his wife: and they twain

shall be one flesh? Wherefore they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder." MATTHEW 19:4-6; *see also* MARK 10:6-9.

Although the Old Testament does recognize polygamy, a different definition of marriage from Proposition 8, and it was practiced by such biblical luminaries as Abraham (GENESIS 16:3) and Solomon (KINGS 11:3), the Roman Catholic church has chosen to condemn these portions of the Bible,⁹ and strongly speaks out against polygamy and all other definitions of marriage outside the one confined to marriage as between one man and one woman.¹⁰

From the accepted biblical definition of marriage, *Amici* examines, below, in a brief history religion's continued influence on the definition of marriage.

B. The Historical Religious Usurpation of the Institution of Marriage from the 4th Century to 20th Century.

The rise of Christianity in Europe, following the conversion of the Roman Empire under Emperor Constantine I in the 4th

⁹ "[Polygamy] directly negates the plan of God which was revealed from the beginning [in the Book of Genesis], because it is contrary to the equal personal dignity of men and women who in matrimony give themselves with a love that is total and therefore unique and exclusive." CATECHISM OF THE CATHOLIC CHURCH 2387. (accessed on January 10, 2009 at www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm).

¹⁰ In this brief history of religion's inseparable tie to marriage, the focus shall be primarily on the Roman Catholic church's involvement, because it had a more relevant affect on the definition of marriage, then other religions.

century had a major impact on marriage.¹¹ When Christianity first began interceding in marriage, Catholic theologians increasingly interpreted religion in marriage and eventually indoctrinated the institution as a "sacrament",¹² which is defined as "a rite in which God ... is uniquely active."¹³

1. *Why are Husbands' and Wives' Families Considered Related after Marriage? Answer: Religious Dogma.*

As introduction to this brief history, we first examine how religion has so infiltrated another commonly held belief regarding marriage that began in the early years of Christianity – "why are married couple's families related?" It is logical for the two married persons to be related to one another, so they may have all of the rights and benefits accorded to married individuals, including tax, property and healthcare rights. However, why are their families related?

In the early years, prior to the 10th century, Christianity

¹¹ Erwin J. Haeberle, Ph.D., Ed.D, "History of Marriage in Western Civilization." THE SEX ATLAS (The Continuum Publishing Company, 1983) (ISBN 0-8264-0057-4) (revised and expanded "New Popular Reference Edition" (1981)) (retrieved 01-07-2009 at www2.hubelin.de/sexology/ATLAS_EN/html/history_of_marriage_in_western.html) (paragraph 14).

¹² *Id.*; see generally, Augustinus Lehmkuhl, "Sacrament of Marriage." THE CATHOLIC ENCYCLOPEDIA. Vol. 9. (Robert Appleton Company, 1910.) (retrieved 01-07-2009 www.newadvent.org/cathen/09707a.htm.); see also Edward Westermarck. THE HISTORY OF MARRIAGE, pp. 427-428 (Macmillan Company, 1901).

¹³ Irving Hexham. CONCISE DICTIONARY OF RELIGION, p. 193 (InterVarsity Press, 1993).

inserted important concepts into marriage, including the religious dogma of "consanguinity" (the relationship by blood) into the definition of marriage from Genesis 2:24, where a man and woman became "one flesh" when married, so "all relatives on both sides [of the marriage] also became related to each other ..."14 Christianity is the foundational reason why the families of a husband and wife after marriage are considered related in modern western civilization.

This is a telling example of how Christian religious dogma regarding marriage has simply passed into western culture without scientific, secular or other public policy reasoning.¹⁵ As with the belief that definition of marriage must be between one man and one woman, the belief that married couple's families must be related is purely a religious artifact.

1. *Increasing Religious Intervention In Marriage in the 12th and 13th Centuries.*

¹⁴ Haeberle (online version), paragraph 17 (accessed January 7, 2009); see GENESIS 2:24.

¹⁵ Respondents and Interveners may argue that there are practical reasons why a married couple's families are related, like for the purposes of intestate succession or child custody. However, *Amici* disagrees. It is not integral that families be related for intestate succession. The legislature is able to designate individuals, including those related to one deceased spouse, to pass inheritance, without the need to recognize any familial relationship caused by marriage. Additionally, even in custody cases involving the minor children of deceased married parents, the courts may grant custody, if the deceased spouses have not previously so designated, to a member of one spouse's family, without the need for legal recognition that the deceased parents' families are related by the marriage.

It should also be noted that Christian leaders in the early centuries viewed marriage as "insoluble," except in the case of death, and outlawed divorce.¹⁶

As Christianity became more influential in Europe, its influence on marriage grew. In the 10th century, weddings were taking place just outside the church doors. However by the 12th century, wedding had been invited inside the church, and "a priest became part of the wedding ceremony, and not until the 13th century that he actually took charge of the proceedings."¹⁷ As the dominant religion in the world, where church and state were not separate, Christianity was able to infuse marriage with much Christian dogma.

However, Roman Catholic involvement in matters of state in Europe came to a head in England, when their prohibition on divorce came into conflict with the desire for divorce by King Henry VIII, and the beginning of the English Reformation.¹⁸

2. *Council of Trent: Mandating Religious Participation In Marriage in the 16th and 17th Centuries.*

Christianity's involvement in sculpting the definition of marriage increased in the 16th century as a response to the English Reformation's break from Catholicism. Part of the break from Catholicism was a rejection of the Catholic dogma that marriage

¹⁶ Haeberle (online version), paragraph 17 (accessed January 7, 2009).

¹⁷ Haeberle (online version), paragraph 13 (accessed January 7, 2009).

¹⁸ T. A. Morris, *EUROPE AND ENGLAND IN THE SIXTEENTH CENTURY* (Routledge 1998) p. 166.

was a sacrament.¹⁹ English Puritans in the 17th century even went so far as to pass an Act of Parliament stating "marriage to be *no sacrament*" (emphasis added), and soon thereafter attempted to make marriage secular.²⁰ It should be noted that although Protestants rejected marriage as a sacrament, they still did view marriage was a "Devine institution".²¹

During the Counter-Reformation in the same century, the "Catholic church, in response to the Protestant challenge, took its stand in the Council of Trent and, in 1563, confirmed its previous doctrines. Indeed, *it now demanded that all marriages take place before a priest and two witnesses.* (emphasis added)"²²

In this decree from the Council of Trent, we have another example of religious definitions of marriage survival to modern times. Please note that on most California County Marriage Licenses, including those issued by the County of Santa Clara to *Amici* Santiago, Martin, and Dorian, who are all residents of Santa Clara County, the marriage licenses include a signature by either a religious minister or a individual, who has been authorized to perform marriages, and two signature spaces for witnesses (although only one witness is required). This is another example of how modern marriage principals have been passed through the centuries and appear on civil marriage licenses.

¹⁹ Westermarck, p. 428.

²⁰ Haeberle (online version), paragraph 16 (accessed January 7, 2009).

²¹ Westermarck, p. 428.

²² Haeberle (online version), paragraph 17 (accessed January 7, 2009).

3. *Religion's Influence on Marriage in the 18th and Mid-19th Centuries and the Persecution of the Perception of Mormon Marriage in the United States.*

Although the French Revolution of 1791 added the concept of civil marriages to religious marriages,²³ the religious traditions from the preceding centuries have molded how modern society views almost all aspects of marriage.

Ironically, one of the best examples of how early Christian religious definitions of marriage were forced upon other definitions of marriage is the persecution of Mormon polygynous marriages in the mid 19th century America. Although, there are disputes regarding the history of polygyny in the Church of Jesus Christ and Latter-day Saints (LDS church), one thing that almost all historians can agree upon is that in the United States in the mid-19th century, the LDS church was perceived to believe in marriage between one man and multiple women (more precisely named polygyny, but popularly referred to as polygamy), and were publicly persecuted for it. Polygamy even became a part of the presidential contest of 1856, between Republican John C. Frémont and Democrat James Buchanan.²⁴

As a sign of the strength of the Catholic Christian definition of marriage, in 1856, the Republican Party issued what was seen as a targeted anti-Mormon platform. The Republican plat-

²³ Westermarck, p. 428.

²⁴ Eugene E. Campbell. ESTABLISHING ZION: THE MORMON CHURCH IN THE AMERICAN WEST, 1847-1869 (Signature Books, 1988), pp. 217-218.

form statement was: "Resolved: That the Constitution confers upon Congress sovereign powers over the Territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism — Polygamy, and Slavery."²⁵

The persecution of the actual or perceived view of the LDS church in Utah as supporting a non-traditional definition of marriage escalated after the election of President James Buchanan and the decision to commit U.S. troops to the Utah War, also known as the Utah Expedition or Buchanan's Blunder.²⁶ According to historian William MacKinnon, the Utah War was the United States' "most extensive and expensive military undertaking during the period between the Mexican and Civil Wars, one that ultimately pitted nearly one-third of the US Army against what was arguably the nation's largest, most experienced militia."²⁷

After much blood and treasure was lost,²⁸ the conflict ended with a negotiated agreement, whereby territorial governor and head of the LDS church, Brigham Young, would to step down, a non-Mormon governor would be installed, and the LDS church

²⁵ THE REPUBLICAN PLATFORM OF 1856 (accessed January 10, 2009 at http://www.ushistory.org/gop/convention_1856_republicanplatform.htm).

²⁶ See William P. MacKinnon. "Causes of the Utah War." FORT DOUGLAS VEDETTE (March 2007), pp. 4-5.

²⁷ *Id.*

²⁸ *Id.*, pp. 5-6.

would denounce polygamy.²⁹

The study of U.S. history often excludes this shameful incident, where this nation waged a domestic military conflict, against U.S. citizens, over the religious definition of marriage as between one man and one woman. To pressure President Buchanan towards peace, Senator Sam Houston of Texas spoke out that the Utah War would be "one of the most fearful calamities that has befallen this country ..."³⁰ Unfortunately, wars to enforce religious objectives often are.³¹

4. *Religion's Influence on Anti-Marriage Laws from the Mid-19th Century to the late 20th Century in the United States.*

Following the signing of the Emancipation Proclamation and the end of the U.S. Civil War, it is well-settled history that equality failed to be afforded to non-white individuals across the nation, particularly in the South, for more than one hundred years. Anti-miscegenation laws, preventing whites from marrying

²⁹ *Id.*, pp. 4-5.

³⁰ Leroy R. Hafen & Ann W. Hafen (eds.), *MORMON RESISTANCE: A DOCUMENTARY ACCOUNT OF THE UTAH EXPEDITION, 1857-1858* (Bison Books, 2005), p.258.

³¹ The causes of the Utah War are debated, but there appears to be a consensus of historians that have concluded that based on the Republican Platform, polygamy as an issue during the Frémont-Buchanan Presidential election, and other anti-polygamy statements made at the time, the actual or perceived conflict between Mormon marital practices and the definition of marriage as between one man and one woman was at least one central cause for the war.

non-whites, were justified by some using The Holy Bible.³²

As this brief history started with the Book of Genesis, so it returns, but this time to the story of the "Curse of Ham." GENESIS 9:20-27. On its face, the biblical "Curse of Ham" story does not prohibit inter-racial marriage. However, over the years, it was read with GENESIS 10:8-12 (the description of Nimrod), GENESIS 10:25 (describing the spreading of the peoples around the world), GENESIS 11:1-9 (the story of the Tower and scattering of the builders), and the so-called "Table of Nations" in chapter 10 of GENESIS. The combined reading led religious leaders that supported anti-miscegenation laws to construe the "Curse of Ham" (also known as Noah's Curse) as God's intent that after the cleansing biblical flood the races of the world be separated in different nations, just as the son's of Noah each populated a different continent.³³

Under this interpretation of God's intent, the joining of man and woman in holy matrimony and as one soul violated the concept of separation of the races. Separate people of different race, and inter-racial marriage would not be part of God's plan.³⁴ George Fitzhugh, the most respected slavery apologist in the U.S. in the mid-19th century, viewed abolitionists as anarchists, attempting to reorganize society that was out of line with God. Fitz-

³² See generally, Stephen R. Haynes. NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY (Oxford University Press, 2002).

³³ *Id.*, p. 5.

³⁴ *Id.*, p. 91.

Fitzhugh wrote that abolitionists sought: "to abolish ... or greatly to modify, the relations of husband and wife, parent and child ... and the institution of Christian churches as now existing in America."³⁵ Fitzhugh broadly believed that if abolitionists violated the Bible's construct of society, the minds of men would be "unsettled on all subjects, and there is, emphatically, faith and conviction about nothing ... Order, subordination, and adaptation have vanished; and with them, the belief in a Deity, the author of all order."³⁶

Anti-miscegenation laws persisted in the U.S. to the late 20th century. In April 1999, National Public Radio (NPR) aired a report on anti-marriage laws that persisted in the American South. Included in the report was the statistic that in November 1998, the state of South Carolina voted to end its anti-miscegenation laws and astonishingly 40% of the voters cast votes against repeal. To demonstrate why 40% of South Carolinian's voted, in essence, to the keep law preventing whites from marrying non-whites, the NPR report quoted State Representative Lanny L. Littlejohn, who declared that interracial marriage was "not what God intended when he separated the races back in the Babylonian days."³⁷

IV. RELIGION & THE ANTI-SAME-SEX MARRIAGE MOVEMENT IN THE 21ST CENTURY

³⁵ *Id.* (internal citation omitted).

³⁶ *Id.*

³⁷ *Id.*, p. 3.

The religious definition of marriage continues to cause major public policy issues, depriving individuals of freedoms today in the debate over same-sex marriages.

The movement against same-sex marriages is a national movement. Gary Glenn, a prominent member of the anti-same-sex marriage movement in Michigan, described the movement as "... a burgeoning alliance of white evangelicals, conservative Roman Catholics and African-American Protestants for whom gay marriage is like abortion: non-negotiable."³⁸

In California, the Yes on Proposition 8 campaign was comprised of Catholics, evangelical Christians, conservative black and Latino pastors, and a myriad of smaller ethnic groups with strong religious ties.³⁹

A. Energizing Churches to Campaign for the Biblical Definition of Marriage in the California Constitution.

"ProtectMarriage.com - Yes on 8" (hereinafter the "Yes on 8 campaign") was clearly calling for churches to uphold the religious definition of marriage in their campaign literature. The Yes on Proposition 8 campaign provided an online resource page for Churches at www.protectmarriage.com, accessible through a

³⁸ Jeffrey G. MacDonald, *Opponents of same-sex marriage gain momentum, eye federal amendment*, RELIGION NEWS SERVICE (November 4, 2004).

³⁹ Jesse McKinley & Kirk Johnson, *Mormon Tipped in Ban on Gay Marriage*, N.Y. TIMES, November 15, 2008, at www.nytimes.com/2008/11/15/us/politics/15marriage.html (accessed January 11, 2009).

large button on the website's homepage, that included a guide to instruct how churches to avoid endangering their tax-exempt status, while supporting Proposition 8. These materials included: "Churches and Politics" and "Your Legal Right to Support Prop. 8", a "Church Bulletin" (in black & white, color and bilingual translations), "Instructions for Conducting an Offering" (which is explained below as a plan for asking for political donations in church), and a "Donation Form for Churches". Each was paid for by the Yes on 8 campaign.⁴⁰

The "Church Bulletin" when viewed is titled "RESTORING AND PROTECTING MARRIAGE: YES ON PROPOSITION 8" with the subheading of "*For this reason, a man will leave his father and mother and be united to his wife, and they will become one flesh. (GENESIS 2:24)*". The Yes on 8 campaign goes on to state in their "Church Bulletin" that "[Marriage's] unique place in civilization is both derived from God and inherently natural to man."⁴¹

The phrase "inherently natural to man" should be understood in the context of the subheading's reference to the Book of Genesis, as described above in Section III.A of the Procedural and Factual Background. The Yes on 8 phrase "inherently natural to man" is a Biblical reference to women being created by God from

⁴⁰ See church resources page on the Official Site for the Yes on 8 campaign located at www.protectmarriage.com/resoures.

⁴¹ RESTORING AND PROTECTING MARRIAGE: YES ON PROPOSITION 8. (obtained from the www.protectmarriage.com/resources on January 5, 2009) (Paid for by ProtectMarriage.com – Yes on 8).

a part of man, and through marriage, the woman can be returned to man to become "one flesh" again.

B. Instruction on Covert Political Religious Tactics to Mandate the Biblical Definition of Marriage Upon All Californians.

The Yes on 8 campaign form "Instructions to Pastors" (titled on the website as "Instructions for Conducting an Offering") instructed church leaders on how to solicit political contributions from their parishioners, in a way where the church's political activity was hidden. These instructions include: (a) asking the churches to purchase "plain white envelopes" to distribute to their congregation; (b) informing the church to ensure that each individual contribution be "put into a separate white envelope"; (c) educating churches that "[d]onations of \$24 or less do not require the donor to complete the contribution form" (which is filled out to track multiple small donations from a single source); and (d) "FYI – There is no public disclosure of donor information for those who contribute \$99 or less."⁴²

Other than the strategic purpose to educate churches in covert religious political engagement, there appears to be no other reasonable motive for churches to have these instructions. Yes on 8 clearly provided instructions for churches to secrete their involvement in support of Proposition 8 on a massive scale

⁴² INSTRUCTIONS TO PASTORS: CONDUCTING AN OFFERING FOR PROTECTMARRIAGE.COM – YES ON 8. (obtained from the www.protectmarriage.com/resources on January 5, 2009) (Paid for by ProtectMarriage.com – Yes on 8).

to support the Biblical definition of marriage "derived from God".

C. Proposition 8, the Catholic Church and The Church of Jesus Christ of Latter-day Saints: The Argument For Participation in the Same-Sex Marriage Issue.

Following this Court's decision in the *In Re Marriage Cases* (2008) 43 Cal.4th 757, on or about July 13, 2008, Catholic Archbishop George H. Niederauer wrote an open letter to all Catholics, eventually posted on Catholic San Francisco – Online Edition, where he wished "to state the belief and practice of the Catholic Church about marriage, to support the nature of marriage as a union between one man and one woman, and to guide Catholics in their response to this present issue ..." Archbishop Niederauer went on to write:

"The Catholic Church teaches that God created the world and that marriage has a unique place in God's creation and his gift of human life. Our Savior Jesus Christ expresses this belief in the Gospel of St. Matthew: 'Have you not read that from the beginning the Creator 'made them male and female' and said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'? So they are no longer two but one flesh. Therefore, what God has joined together, no human being must separate.' (19:5-6)"

In the last line of the letter, Archbishop Niederauer writes, "for us as Catholic Christians, marriage between one man and one

woman is the gift of a wise and loving Creator."⁴³ It is clear that the definition of marriage as only being between a man and a woman is the supported teachings of the modern Catholic Church, which has not changed since the Church saw marriage as a sacrament in the early centuries following the birth of Christ.

However, in addition to guiding Catholics, Archbishop Niederauer admitted in his December 5, 2008 column in "Catholic San Francisco" a much more active role in the support of Proposition 8. He writes: "In the weeks since the adoption of [Proposition 8] the media have carried many speculations about the role of the Catholic bishops in California, and about my role in particular, in the passage of this proposition. It is my wish to clarify here what was done and why it was done, and offer some thoughts about the way forward amid so many misunderstandings and hard feelings."⁴⁴

So in an effort to unburden his conscience of any covert theocratic activities, Archbishop Niederauer, confessed that he and other California Bishops did the following: (1) "endorsed Proposition 8 and urged Catholics, and organizations of lay Catholics, to work for its passage, by means of grass roots activity and contributions from their resources"; (2) the San Francisco

⁴³ Archbishop George H. Niederauer, "Marriage and the Decision of the California State Supreme Court," CATHOLIC SAN FRANCISCO (June 28, 2008) (reprinted in the online edition on July 13, 2008).

⁴⁴ George H. Niederauer. CATHOLIC SAN FRANCISCO (December 5, 2008), p. 1, 5.

Archdiocese did "pay, and appropriately disclose, printing and distribution of [Yes on Proposition 8] flyers to parishes"; and (3) asked The Church of Jesus Christ and Latter-day Saints (LDS) in Utah to support the Proposition 8 campaign in California.

Considering the oppression of the LDS church during the mid-19th century in the Utah War, it is ironic that the LDS church could not identify with the oppression of the using an early Christian/Roman Catholic definition of marriage seeking dominion over another marriage definition. However, the LDS church believes in the scriptures of The Holy Bible as well.

In the December 5, 2008 column, Archbishop Niederauer went on to defend the California bishop's actions, "Some would say that, in light of the separation of church and state, churches should remain silent about any political matter. However, religious leaders in America have the constitutional right to speak out on issues of public policy. Catholic bishops, specifically, also have a responsibility to teach the faith, and our beliefs about marriage and family are part of this faith."⁴⁵ However, nowhere in the column does he make the distinction between teaching "the faith" about Catholicism's beliefs on marriage, and writing that faith and belief into the California Constitution for all non-Christians.

It should be noted that the Biblical definition of marriage was so critical that the Catholic leadership in California took the extraordinary step of asking the LDS church in Utah to engage their followers in California. It appears that in religiously des-

⁴⁵ *Id.*

perate times, strange bedfellows are made.

Shortly after the request was made, the First Presidency of the LDS Church issued a letter on June 20, 2008 to all Mormon "General Authorities, area Seventies and the following in California: Stake and Mission Presidents; Bishops and Branch Presidents."⁴⁶ This letter was ordered to be read during all sacrament meetings on June 29, 2008. The letter reads in pertinent part:

"On November 4, 2008, Californians will vote on a proposed amendment to the California state constitution that will now restore the March 2000 definition of marriage approved by the voters.

The Church's teachings and position on this moral issue are unequivocal. *Marriage between a man and a woman is ordained of God*, and the formation of families is central to the Creator's plan for His children ...

A broad-based coalition of churches and other organizations placed the proposed amendment on the ballot. The Church will participate with this coalition in seeking its passage. *Local Church leaders will provide information about how you may become involved in this important cause.*

We ask that you *do all you can to support the proposed constitutional amendment by donating of your means and time to assure that marriages in California is legally defined as being between a man and a woman.* Our best efforts

⁴⁶ Thomas S. Monson, Henry B. Eyring & Dieter F. Uchtdorf. *Letter from Office of the First Presidency of THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* (dated June 20, 2008).

are required to preserve the *sacred* institution of marriage" (emphasis added).⁴⁷

Even greater than the Catholic Bishops and LDS Church, the Knights of Columbus were the largest institutional donor to support Yes on Proposition 8 efforts.⁴⁸ The Knights of Columbus are a Catholic fraternal order. The Supreme Knight of the Knights of Columbus, Carl A. Anderson, on December 23, 2008, explained the order's philosophy for political action, writing: "we have found that regardless of any positive effects, *secularization has drained meaning from Christian life*. Secularizing the way Christians think affects the values by which they live."⁴⁹ The Supreme Knight advocated an abandonment of using secularization as a way to create God's world, but for use of bolder action in the name of the Lord.⁵⁰

As the shine has worn off the 21st century, it is becoming clearer that religious organizations, like the Knights of Columbus, are growing weary of using the political tactic of secular arguments to advance Christian religious law upon Christian and non-Christians alike, and will start publicly advocating for biblical law.

⁴⁷ *Id.*

⁴⁸ Max Blumenthal, *Avenging angel of the religious right*, SALON.com.

⁴⁹ Carl A. Anderson, *The Task of the Laity is to Renew Culture Through Distinctive and Authentic Christian Witness*, KNIGHTS OF COLUMBUS website, located at www.kofc.org/un/eb/en/news/supreme/detail/548175.html

⁵⁰ *Id.*

D. Follow The Money in Support of Proposition 8: Religious Donors Fervor in Defeating Same-Sex Marriages.

In a further attempt to conceal the donors to the Yes on 8 campaign, including religious donors, ProtectMarriage.org, in charge of the Yes on 8 campaign, filed suit for the court to prevent disclosure of donors who gave money in support of Proposition 8's limitation of marriage to one man and one woman.⁵¹

The donor lists for Yes on 8 campaign are telling in how seriously religious organizations saw Proposition 8 as a part of their religious mission to enforce the biblical definition of marriage. As of October 29, 2008, just prior to the November 4, 2008 election, the Knights of Columbus⁵² had given a total of \$1.4 million dollars.⁵³ The U.S. Conference of Catholic Bishops, which represents the hierarchy of the Roman Catholic Church in the United States, gave \$200,000 to support Proposition 8.⁵⁴

Mormons headed the call from the LDS church leadership. Proponents of Proposition 8 "raised ... \$1 million donation from Alan C. Ashton, the grandson of a former president of the Mormon Church."⁵⁵ Mormons for Proposition 8, an organization formed to provide as much information about the LDS church's

⁵¹ Steve Lawrence, *California Gay Marriage Foes Want Donors Anonymous*, ASSOCIATED PRESS report (January 9, 2009).

⁵² Max Blumenthal, *Avenging angel of the religious right*, SALON.com.

⁵³ *Catholic Bishops Give \$200K To Ban Gay Marriage*, THE ASSOCIATED PRESS STATE & LOCAL WIRE (October 29, 2008).

⁵⁴ *Id.*

⁵⁵ McKinley & Johnson at paragraph 3.

involvement in supporting California's Proposition 8, estimates that prior to November 10, 2008, just after the California election, LDS church members donated just over \$16 million dollars of the total approximate \$32.3 million dollars raised by proponents of Proposition 8.⁵⁶

Another major donor was Howard F. Ahmanson, Jr. and his wife, Roberta Green Ahmanson, who gave \$500,000. They are the well-know heirs of the founder of Home Savings & Loan and LDS members. Howard Ahmanson Jr. once told the Orange County Register in 1985 that his "goal is the total integration of biblical law into our lives."⁵⁷ However in 2004, while trying to distance himself from his longtime association with the late Reverend R.J. Rushdoony since the 1970s, Ahmanson stated he has matured since 1985, and does not agree with Rushdoony's call to execute all homosexuals.⁵⁸

V. SUMMARY OF THE HISTORICAL RELIGIOUS IMPACT ON THE DEFINITION OF MARRIAGE THROUGHOUT WESTERN CIVILIZATION TO MODERN TIMES AND PROPOSITION 8.

Obviously, it is not possible to examine in full measure and detail all religious impacts on the definition of marriage from the

⁵⁶ *Id.*; Mormons For 8 Donors list (accessed January 11, 2009 at <http://mormonsfor8.com>).

⁵⁷ Max Blumenthal, *Avenging Angel Of The Religious Right*, SALON.com (January 6, 2004) (accessed on January 11, 2009 at <http://dir.salon.com/story/news/feature/2004/01/06/ahmanson>); see also Peter Larsen, *Part 3: The Strength Of Their Conviction*, THE ORANGE COUNTY REGISTER (August 10, 2004).

⁵⁸ *Id.*

4th century through the 21st century. However, as Professor Robert Dallek instructed counsel for *Amici* on history at UCLA, from his mentor's book, the Pulitzer Prize-winning "The Age of Reform" by the late Richard Hofstadter, it is possible to analyze common historical beliefs, in this case religious beliefs and their control on the institution of marriage, from a modern perspective, chronologically and thematically to achieve real insight. And, this is what *Amicus Curiae* have attempted to do for this Court.

After reading all of the religious linkages to the definition of marriage throughout the centuries to the current religious fervor that erupted over Proposition 8 in sanctimonious biblical rhetoric and the great expense of church treasure, we pray that legal jurisprudence in California cannot return to simpler days, when individuals can argue that they are fighting for "traditional" marriage, without questioning from whence the "traditional" definition of marriage came.

The definition of marriage, traditional or otherwise, is inexorably based on verses from the Book of Genesis in The Holy Bible. God dictated that marriage must only be between one man and one woman. Despite the French Revolution's and Protestant Reformation's attempts to dislodge marriage from early-Christian and Roman Catholic dogma, such as proclaiming marriage as not a sacrament and creating civil marriage, the old religious ties survive, a triumph of the stubborn metal of knights and defenders of Catholicism and conservative churches in olden and modern times.

Possibly not since the Catholic Church's blessings for the

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In Support of Petitioners and Appellants.**

Spanish Armada to sail against England to install a Catholic monarch⁵⁹ has so much deception and gold been used by religious leaders bent on subjugating a people to conservative biblical terms. The Yes on 8 campaign instructions to churches, euphemistically titled on its website as "Instructions for Conducting an Offering", recommended the use of unmarked, plain envelopes when clergy ask their parishioners for suggested donation of \$24 or \$99 to avoid certain campaign reporting requirements. Due to accusation of the role of the Catholic Church in the victory of Proposition 8, it is revealed that Catholic bishops sought allegiances with wealthy and powerful non-Catholic churches (the LDS church) in a distant state. Finally, the chain ending with a motion to conceal donors in support of Proposition 8, made just days before filing of this *amicus* brief. Collectively, these incidents are a religious felonious assault on democracy in our republic.

As the legal arguments will demonstrate below the Establishment Clause, prohibiting state creation of religion, was placed in the First Article of the California Constitution and the First Amendment to the United States Constitution to prevent what Proposition 8 is attempting – to affix religious law into our state's secular Constitution.

⁵⁹ See generally, Anne Somerset. ELIZABETH I (Macmillan, 1992) pp. 443-468.

LEGAL ARGUMENT

I. THE COURT HAS ORIGINAL JURISDICTION IN WRITS OF MANDATE AND MAY DETERMINE THE WEIGHT OF EVIDENCE TO RESOLVE ISSUES OF EXTRAORDINARY CHARACTER.

This Court has "original jurisdiction" over writs of mandate where extraordinary relief is requested. CAL. CONST., art. VI, §10. As the Court has previously done in writs of mandate involving state proposition, it is exercising its power of original jurisdiction over the above-captioned case. *Branberg v. Jones* (1999) 20 Cal.4th 1045, 1054-1055, *see also Legislature v. Eu* (1991) 54 Cal.3rd 492, 500. Therefore, by the legal definition of "original jurisdiction," this Court may weigh evidence, such as that provided in this *Amici Curiae* brief and Request for Judicial Notice that evinces the "traditional" definition of marriage as wholly based in religion.

II. PROPOSITION 8 VIOLATES THE ESTABLISHMENT CLAUSE OF THE CALIFORNIA CONSTITUTION.

A. The Decision on Whether Proposition 8's Definition is an Establishment of Religion is Not a Religious Question.

This Court has repeatedly espoused that it defers religious questions to religious authorities, since courts have no expertise in religious matters. *Catholic Charities v. Superior Court et al.* (2004) 32 Cal.4th 527, 541-542. The Catholic and LDS churches' position is clear regarding the religious nature of the definition of marriage as being between only one man and one woman. In

Archbishop Niederauer's letter of July 13, 2008, *supra*, Archbishop Niederauer states: "The Catholic Church teaches that God created the world and that marriage has a unique place in God's creation and his gift of human life" and "marriage between one man and one woman is the gift of a wise and loving Creator."⁶⁰ Similarly, the LDS church in its letter from The First Presidency, dated June 20, 2008, *supra*, the First Presidency states: "The Church's teachings and position on this moral issue are unequivocal. Marriage between a man and a woman is ordained of God ..."

Therefore, this Court need not make any findings with regard to any religious questions. The major religious supporters of Proposition 8 definition of marriage state unequivocally that the definition of marriage is religious.

B. California's Development of Establishment Clause Law.

As this Court, noted in *East Bay Asian Local Development Corp. v. California* (2000) 24 Cal.4th 693, 704-705, "The [U.S.] Supreme Court has repeatedly recognized ... that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid. *What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause pro-*

⁶⁰ George H. Niederauer, "Marriage and the Decision of the California State Supreme Court," CATHOLIC SAN FRANCISCO (June 28, 2008) (reprinted in the online edition on July 13, 2008).

fects. Primary among those evils have been 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" (internal citations omitted) (emphasis added)

Nine years earlier, in *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3rd 863, 882-883, this Court wrote: "The California Constitution contains guarantees of the separation of religion and state in addition to those found in the federal Constitution ... Although federal cases may supply guidance for interpreting this provision, California courts must independently determine its scope."

While not overturning its holding in *Sands*, the Court did note in *East Bay Asian Local Development Corp. v. California, supra*, "We do not believe, however, that the protection against the establishment of religion embedded in the California Constitution creates broader protections than those of the First Amendment." *Id.* at p. 718.

The only logical reading of the *Sands* and *East Bay* cases together is that California courts should independently apply federal establishment of religion tests to decide whether a matter violates the California Constitution's Establishment Clause.⁶¹

⁶¹ This Court made sure to note in *East Bay Asian Local Development Corp. v. California, supra*, that "[t]his court has never had occasion to definitively construe the no preference clause of article I, section 4 and we need not do so here." *Id.*, p. 719. The no preference clause in the California Constitution reads as follows: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." Cal. Const. art I, §4. So, still in keeping with this Court's precedent, theoretically, this Court

In *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 420-421 (cert. denied Feb. 21, 2007), the court of appeal outlines the most recent federal tests from the U.S. Supreme Court in reviewing an establishment of religion challenge. "Prominent among [federal establishment clause tests] ... is *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612–613 ... *Lemon* presents a three-part test. First, the challenged municipal action must have a secular legislative purpose; second, the action's principal or primary effect must be one that neither advances nor inhibits religion; and finally, the action must not foster an excessive government entanglement with religion." *Id.*, p. 421 (emphasis added).

Regarding the *Lemon* test, the court of appeal also noted the recent U.S. Supreme Court decision in *McCreary County v. American Civil Liberties Union of Ky.* (2005) 545 U.S. 844, where a majority of justices expressed a renewed emphasis on the secular purpose arm of the *Lemon* test. *Id.*, pp. 421-422.

It should be noted that the recent case law involving the establishment clause has mostly involved displays, statues or objects. These things include a tablet or poster with the Ten Commandments, and a cross lit on the face of a city hall during Christmas and Easter holidays.

C. Proposition 8 Fails the Lemon Test.

1. Proposition 8 Has No Secular Purpose.

could independently interpret the separation between church and state broader than federal law, through an interpretation of the no preference guarantee.

The first question in the Lemon test is to determine whether or not Proposition 8 has a secular purpose. *Amici* finds no secular purpose after researching the history of marriage and religion. The Holy Bible is the basis for Proposition 8's limitation on marriage to opposite-sex couples. GENESIS 2:24; MATTHEW 19:4-6; *see also* MARK 10:6-9.

a. Yes on 8 Admitted the Religious Purpose of Proposition 8.

Amici argues with documents created by the Yes on 8 campaign that the purpose of Proposition 8 was to protect the Old Testament's biblical definition of marriage as found in the Book of Genesis, and referenced in the New Testament by Matthew and Mark. *Id.* In the Yes on 8 paid "Church Bulletin," the third and fourth lines on the page quote The Old Testament, Genesis chapter 2, verse 24, making the direct link to Proposition 8's religious purpose.⁶² Further down in the "Church Bulletin", the Yes on 8 campaign states that Proposition 8: "Restores the definition of marriage. God himself is the author of marriage. Its meaning is written in the very nature of man and woman as they come from the hand of the creator."⁶³ This reference to "come from the hand of the creator" is affirmation of the information provided in Procedural and Factual Background, section III.A, herein (detailing The Holy Bible's commandment that since God made Woman

⁶² RESTORING AND PROTECTING MARRIAGE: YES ON PROPOSITION 8. (obtained from the www.protectmarriage.com/resources on January 5, 2009).

⁶³ *Id.*

from a part of Man, and in marriage, God rejoins Man and Woman into one flesh.)

b. The Argument that Proposition 8 Protects Parents Rights Does Not Outweigh the Proposition's Religious Purpose.

Respondents and Interveners (excepting the California Attorney General) will likely claim that although the Yes on 8 campaign quoted and referred to The Holy Bible in the "Church Bulletin", Yes on 8 also argued for the protection of parent's right, which they will most likely claim as a secular purpose. In the "Church Bulletin," Yes on 8 states, that Proposition 8:

"Secures parental rights to teach children about relationships according to their own values and beliefs. Unless Proposition 8 passes, California law may compel public schools to teach children there is no difference between traditional marriage and same-sex marriage. When Massachusetts legalized gay marriage, schools began teaching second graders that boys can marry other boys. The courts ruled that parents had no right to object."

On the Yes on 8 paid flyer "Questions & Answers" About Proposition 8, titled "FAQ" on their website, they state:

"If Proposition 8 does not pass, will my children be forced to learn about gay marriage at school?"

Yes. In health education classes, state law requires teachers to instruct children as young as kindergarteners about marriage. (Education Code §51890.) If the same-sex marriage ruling is not overturned, teachers will be required to teach

**Brief of *Amicus Curiae* Mattos, Santiago, Martin & Dorian
In Support of Petitioners and Appellants.**

young children that there is no difference between gay marriage and traditional marriage."⁶⁴

Parent's rights to educate their children are important, but this secular purpose does not rise to the level of necessity balanced against the elimination of a fundamental right against government establishment of religion, since parents have so many other options. Parents have a right to pull their child out of class, if marriage is to be discussed on a particular day. Parents can speak to their children about their beliefs in same-sex marriages to revise what is taught in schools. There are many church operated Sunday Schools, at little or no cost, that are available for parents to teach the parent's faith's position on same-sex marriages. With these and other options, parental rights are an insufficient secular purpose to outweigh the tremendous religious purpose that burden those who seek to avoid the tyranny of state constitutional establishment of the biblical definition of marriage.

c. The Argument that Proposition 8 Has the Purpose of Protecting Children Does Not Outweigh the Proposition's Establishment of Religion.

Inferred in the above argument of parental rights, is that Proposition 8 provides protection for children, since parents should be allowed to limit their children's education on same-sex

⁶⁴ "Questions & Answers About Proposition 8," PROTECTMARRIAGE.COM – YES ON 8. (obtained from the www.protectmarriage.com/resources on January 13, 2009)

marriage.

First, Yes on 8 is not referring to same-sex marriage as a physical danger. *Yes on 8 believes that same-sex marriage is a dangerous idea.* The idea of teaching children about same-sex marriages in schools frightens supporters of Yes on 8, and ignorant members of the electorate. After all, those that follow The Holy Bible's teachings remember the story of Adam and Eve, who bit from the apple of knowledge and were evicted from Eden. Ideas are dangerous according to The Holy Bible, and teaching about same-sex couples is an apple that the Yes on 8 supporters want left unbitten.

In many establishment clause cases, religious ideas are at issue, because the cases generally challenge religious displays, like a cross, Star of David or the Ten Commandments, and the inquiry involves the secular or religious meaning of the display. *See Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190; *DiLoreto v. Board of Education* (1999) 74 Cal App 4th 267; *McCreary County v. American Civil Liberties Union of Ky, supra.* In the present matter involving Proposition 8, the meaning is quite clear. The definition of marriage as created by the God of The Holy Bible as only between one man and one woman must be protected. The campaign for Proposition 8, Yes on 8, acknowledged the marriage definition's base in religion.⁶⁵ The Catholic Church, who provided a great deal of funding to Proposition 8,

⁶⁵ RESTORING AND PROTECTING MARRIAGE: YES ON PROPOSITION 8. (obtained from the www.protectmarriage.com/resources on January 5, 2009).

preached that they were protecting the religious definition of marriage.⁶⁶ And, the LDS church believed Proposition 8 was protecting the religious definition of marriage.⁶⁷ In a constitutional sense, the idea from which children are being protected in public schools (same-sex marriage) is more appropriate than, if children are being taught about marriage from the perspective that it must only be between one man and one woman, since the information would constitute government's preference of the religious definition of marriage.

d. The Tradition Argument as the Secular Purpose Is Not Sufficient.

Another likely argument by proponents of Proposition 8 is that since marriage has "traditionally" only been between a man and a woman, maintaining tradition is a secular purpose. In the *In Re Marriage Cases, supra*, this Court has decided the importance of tradition when faced with fundamental constitutional rights.

"It is true, of course, that as an historical matter in this state marriage always has been limited to a union between a man and a woman. Tradition alone, however, generally has not been viewed as a sufficient justification for perpetuating, without examination, the restriction or denial of a funda-

⁶⁶ George H. Niederauer, "Marriage and the Decision of the California State Supreme Court," CATHOLIC SAN FRANCISCO (June 28, 2008) (reprinted in the online edition on July 13, 2008).

⁶⁷ Thomas S. Monson, Henry B. Eyring & Dieter F. Uchtdorf. *Letter from Office of the First Presidency of THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* (dated June 20, 2008).

mental constitutional right. [citation] As this court observed in *People v. Belous*, [citation], [c]onstitutional concepts are not static. ... In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights." *In Re Marriage Cases, supra*, pp. 820-821 (internal citations omitted) (internal quotes omitted).

As this court wrote, tradition (especially disguised in secular language, despite its acknowledged religious basis) cannot void a fundamental constitutional right. The right to freedom from government establishment of religion is arguably a greater fundamental constitutional protection than others, because of its placement in the state and federal constitution. The Establishment Clause can hardly have a higher position than in the first article of the state constitution and the first amendment of the federal constitution.

Proposition 8, simply, has no significant secular purpose, and an avowedly religious purpose.

2. *The Principal Or Primary Effect Of The Government Action Must Not Advance or Inhibit Religion.*

a. *Proposition 8 Will Advance Religion.*

As the history in this *Amicus* brief set forth above clearly demonstrates, the definition of marriage in Proposition 8 is completely based in The Holy Bible's dogma that marriage is the result of a chain of events: God's creation of Man, then His creation

of Woman from part of Man's body, and the merging back to one flesh after marriage. Christianity, particularly the Roman Catholic church, after the Protestant Reformation, for 1,700 years has attempted to control the definition of marriage, even reaching enough political power as to build sufficient pressure for President Buchanan in the mid-19th century to send U.S. troops into the Utah Territory, because Brigham Young had the temerity to have a different definition of marriage.

Let *Amici* be clear. *Amici* does *not* support polygyny, polygamy or bigamy, but offer this historical example to explain no nation is exempt from religious wars, even the United States, if they allow religion to dictate public policy. The slippery slope is often closer than it appears.

Proposition 8's religious definition, if allowed to become imbedded in the state's constitution, will act to the detriment of same-sex couples, who will not have their publicly avowed life commitments afforded the same dignity associated with the title of marriage.

b. Restoring the Right of Same-Sex Couples to Marry Does Not Inhibit Religion.

This Court has already held that same-sex marriages do not inhibit religion under article I, section 4 of the California Constitution. *In Re Marriage Cases, supra*, pp. 854-855. This Court reasoned that same-sex marriage would not impinge upon the religious freedom of any religious organization, official, or any other person, since no religion would be required to change its re-

religious policies or practices, and no religious officiant would be required to solemnize a marriage in contravention of his or her religious beliefs. *Id.*

3. *The Action Must Not Foster An Excessive Government Entanglement With Religion.*

If Proposition 8 is allowed to stand the State of California will initiate a continual government entanglement with religion by being placed in the impossible position of enforcing a religious definition of marriage that has no place in the laws of California.

Further entanglement must be expected as California will become embroiled in a religious clash between the gay and civil rights community and the churches that worked so hard to deny gays the institution most associated with the pursuit of happiness – marriage. Throughout ancient history and modern history, people have fought the hardest, when basic inalienable human rights are taken away.

Untold numbers of government levels, including the executive and judiciary branches, have been engaged to manage the frustration of a minority community, granted protected class status by this Court, from the religiosity of Proposition 8. Thus far, the gay community and their supporters have protested Mormon Temples, businesses that donated to Yes on 8, protested and heavily criticized the Catholic and evangelical Christian communities, and attempted to boycott those that have succeeded in writing religious dogma into the state constitution through the enactment of Proposition 8.

These displays of frustration has aggravated the supporters of Yes on 8 so much that the courts have been pulled in to decide a motion to conceal the identity of donors to Yes on 8, because they are under alleged threat.⁶⁸ No other proposition's supporters or donors have needed that special protection from the government in the most recent election.

Until the religious definition of marriage is wiped clean from the California Constitution, nothing but government entanglement can be reasonably foreseeable from a minority, who are eager to regain their inalienable right to the pursuit of love and happiness, honored by the state through the institution of marriage.

D. Proposition 8 Furthers the Evils Envisioned by the Drafters of the Establishment Clause and the Doctrine of the Division of Church and State.

This Court, adopting the general rule from the U.S. Supreme Court when looking at establishment clause challenges, recognized, "What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects. Primary among those evils have been sponsorship, financial support, and active involvement of the sovereign in religious activity." (internal quotes omitted)

All this Court need ask itself is whether there is any sig-

⁶⁸ Steve Lawrence, *California Gay Marriage Foes Want Donors Anonymous*, ASSOCIATED PRESS report (January 9, 2009).

nificant secular reason (now that *Amici* has set forth the history) why marriage should only be limited to one man and one woman as stated in Proposition 8. If this Court determines that the only significant reason that the opposite-sex definition of marriage exists is because of religion, then Proposition 8, on its face, suggests this Court allow government to approve religious dogma in the state's constitution, provide financial assistance through the exclusive benefits of marriage, and create continual and active involvement of the sovereign, every time a county clerk refuses to issue a marriage license to a same-sex couple.

Granted the sovereign by its silence thus far has participated in these evils, but as with any tradition of evil, once the evils are revealed and its eyes are open to the truth, this state cannot look away.

III. PROPOSITION 8'S RELIGIOUS DEFINITION AMOUNTS TO A REVISION OF THE CALIFORNIA CONSTITUTION.

If the effect of a ballot initiative is "so far reaching as to amount to a constitutional revision," then it falls "beyond the scope of the initiative process." *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 351. This Court recognized that even the "simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision." *Id.* at 351-352.

Even though Proposition 8 adds only one line to the California Constitution, it contains religious dogma that is in direct contradiction to article 1, §4 of the same document that prohibits

the establishment of state religion. If this Court agrees that Proposition 8's definition of marriage is religious through-and-through, then no matter how simple it reads, Proposition 8 will revise one of the state and federal constitution's most guarded rights – that each us have the right to be free from the establishment of government sanctioned or imposed religion. Allowing an initiative to establish religion is tantamount to allowing an initiative to eliminate the right of certain people to engage in political speech.

Anything so drastic requires a careful and deliberative process, not meant for the initiative process, but designed by the authors of the California Constitution in a Constitutional Convention, as prescribed in Article XVIII, §2. "The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may submit at a general election the question whether to call a convention to revise the Constitution. If the majority vote yes on that question, within 6 months the Legislature shall provide for the convention. Delegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable." CAL. CONST. ART. XVIII, §2.

Since Proposition 8 places a untenable conflict within the California Constitution, Proposition 8 is unconstitutional and should be stricken.

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IV. SAME-SEX MARRIAGE: TRANSFORMING A JURISPRUDENCE OF DOUBT INTO A JURISPRUDENCE OF CLARITY.

As Justice Sandra Day O'Connor so eloquently wrote: "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey* (1992) 505 U.S. 833 (plurality opinion by Justices O'Connor, Kennedy, and Souter). The status of marriage in California as to whether it is inclusive of same-sex couples exists in nothing but doubt.

Amicus Curiae argue that now is the time for California to bring clarity to the definition of marriage and act as a beacon for other states in the union. There are many good legal arguments now presented by Petitioners and Appellants regarding equal protection and the singling out of gays as a suspect class, for which we applaud the Court for creating in the *In Re Marriage Cases, supra*.

However, the Establishment Clause argument presented herein has the potential of being a winning argument for same-sex marriage in every state. Courts in other states need not toil over suspect classification status. A level of review and scrutiny need not be selected for homosexual individuals. Decisions regarding the state's equal protection clause need not be reached. All that this Court and other courts need find is that the definition of marriage, as only between opposite-sex couples, is an establishment of religion under well-settled tests from state and federal case law.

Liberty is in question in this case and around this nation. Despite the Founders intentions, as set forth in Article IV, §1 of

the U.S. Constitution, that the public records of one state be honored by all states,⁶⁹ same-sex marriage records are not. As this Court has seen, homosexuals are treated differently. Perhaps Justice Stevens put it best, when he wrote in *Boy Scouts of America v. Dale* (2000) 530 U.S. 640 (J. Stevens, dissenting):

"The only apparent explanation for the majority's holding, then, is that *homosexuals are simply so different from the rest of society that their presence alone-unlike any other individual's-should be singled out for special First Amendment treatment.* Under the majority's reasoning, an openly gay male is irreversibly affixed with the label 'homosexual.' That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority. (emphasis added)"

Now is the time for heroes.

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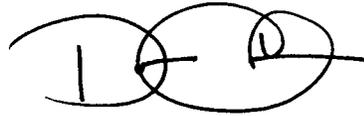
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⁶⁹ "Full Faith and Credit shall be given in each state to the public acts, records, and judicial proceedings of every other State." U.S. Const. art. IV, §1.

Amicus Curiae pray that this most honorable Court finds the information and legal arguments provided herein are useful in reaching its final determination on the constitutionality of Proposition 8, and will ultimately find in favor of the rights of same-sex couples to regain the right to marry.

DATED: January 14, 2009 PRODIGYLAW.COM

A handwritten signature in black ink, consisting of several overlapping loops and a vertical stroke, positioned above a horizontal line.

By: _____

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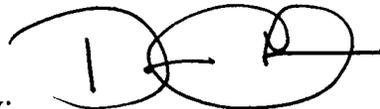
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court 8.204(c), I hereby certify that the foregoing BRIEF OF AMICUS CURIAE OF STEVEN MATTOS, AMOR SANTIAGO, HARRY MARTIN, AND PAUL J. DORIAN IN SUPPORT OF PETITIONERS AND APPELLANTS STRAUSS et al., TYLER et al., CITY AND COUNTY OF SAN FRANCISCO, et al. (Case Nos. S168047, S168066, S168078) was produced on a computer using Microsoft Word 2004 for Mac in "Century Schoolbook" (a proportionally-spaced font) in the size of 13-points, and contains no more than 14,000 words, inclusive of footnotes.

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DATED: January 14, 2009 PRODIGYLAW.COM

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I, Dennis W. Chiu, declare:

I am a resident of the State of California, am over the age of eighteen years, and not a party to the within action; my business address is 675 N. First Street, Suite 790A, San Jose, CA 95112.

On January 14, 2009, I served the following document(s):

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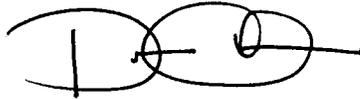
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 14, 2008 in San Jose, California.

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