

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.

No. S168047 (Original Action)

(Also For S168066 And S168078
Per Court Order Of Nov. 20, 2008)

**APPLICATION AND BRIEF AMICUS CURIAE OF
SACRAMENTO LAWYERS FOR EQUALITY OF
GAYS AND LESBIANS (“SAC LEGAL”)
IN SUPPORT OF PETITIONERS**

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**APPLICATION OF SACRAMENTO LAWYERS FOR
EQUALITY OF GAYS AND LESBIANS TO FILE
BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

TO THE HONORABLE RONALD M. GEORGE, CHIEF
JUSTICE OF CALIFORNIA, AND TO THE HONORABLE
ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE
STATE OF CALIFORNIA:

Under Rule 8.520(f) of the California Rules of Court, as modified by this Court's order of November 19, 2008 in Nos. S168047, S168066 and S168078, SACRAMENTO LAWYERS FOR EQUALITY OF GAYS AND LESBIANS ("Sac LEGAL"), respectfully moves this Honorable Court for permission to file a brief *amicus curiae* in support of the petitioners in No. S168047, Karen L. Strauss et al. The proposed brief *amicus curiae* is bound with and attached to this Application.

The proposed brief is submitted under this Court's order of November 20, 2008, by which *amicus curiae* filings submitted in any one of three lead actions (S168047, S168066, S168078) will be considered in all. It is therefore also submitted in support of the petitioners in S168066, Robin Tyler et al., and S168078, City and County of San Francisco et al.

Statement Under Rule 8.520(f)(4)

There are no parties, counsel for parties, persons or entities under rule 8.520(f)(4). Counsel of record for this proposed brief is its sole author, and no monetary contributions were made to fund the preparation or submission of the brief other than by *amicus curiae*, its members, or its counsel in this appeal.

Interest of Amicus Curiae

Sacramento Lawyers for Equality of Gays and Lesbians (“Sac LEGAL”) is the professional association of attorneys, legal professionals, and legislative advocates for the greater Sacramento area. Its overall goal is to promote equality for members of the LGBT (lesbian/gay/bisexual/transgender) community, through leadership, advocacy, education, and participation in civic and social activities within the legal community and the community at large.

Specifically, Sac LEGAL’s mission statement includes as among the purposes for the existence of the organization: “To defend and expand the legal rights of LGBT people, and to secure for LGBT individuals basic human and civil rights, such as the right to be free from discrimination.” As such, Sac LEGAL members have a strong interest in the legal status of LGBT individuals, couples and families, and in efforts to promote legal equality and nondiscrimination for the LGBT community.

Sac LEGAL believes this case implicates those goals and purposes. It construes Proposition 8 as a major retrenchment and reduction of legal rights of gay people, changing the nondiscriminatory rules of law which promoted LGBT equality set forth in the *Marriage Cases*, into a legal climate that requires official State discrimination against gay people with a resulting inequality and second-class status. Sac LEGAL considers this to be highly injurious to the broader community of gay people, as well as specifically to those who wish to marry. Its proposed *amicus* brief strongly supports the efforts of the petitioners in these cases, and the Attorney General, who seek to restore California law to the state of constitutional equality and nondiscrimination that resulted from the *Marriage Cases* decision.

Many of Sac LEGAL's members are also very directly and personally affected by Proposition 8. Some entered into marriages between June 16 and November 4, 2008 – one of the subjects of this Court's briefing order in this case – but after Proposition 8 live in a state of uncertainty as to whether their lifelong legal commitments will be annulled by operation of law. Others wish to marry in the future – either because they have partners now with whom they wish to form lifelong legal commitments, or wish to at a later time – but would be unable to do so if Proposition 8 were held to be valid law.

Sac LEGAL previously participated in the Proposition 8 cases, as among the many organizations that submitted letters under Rule 8.500(g) asking this Court to exercise its original jurisdiction. Its letter was lodged in one of the trailing cases, *Asian Pacific American Legal Center et al. v. Horton*, No. S168281.

Amicus curiae is familiar with the questions involved in this case and the scope of their presentation. Its counsel has reviewed all of the petitioners,' Attorney General's and intervenors' briefs on the merits in the lead cases in this Court (S168047/168066/168078).

Amicus curiae believes that additional briefing is warranted and would be helpful to this Court, in this case of extremely high statewide importance, for the following reasons:

1. The situation in the current case – where this Court has held a particular act to be violative of numerous provisions of the state Constitution, and then the state's legislative authority (here, the electorate) proceeded to make the same act mandatory under that Constitution – appears to be unprecedented. Furthermore, unlike the *Marriage Cases*, where the applicability *vel non* of *Perez v. Sharp* (1948) 32 Cal.2d 711 would clearly be important to any analysis because of strong arguments of parallels between the two, here there appear to be no prior legal parallels to the current situation.

In a case such as this, raising questions of first impression of such widespread importance where the Court to an extent may have to ‘start from scratch,’ *amicus* believes it would help this Court to see multiple reasoned approaches to the questions.

2. It appears that neither of *amicus*’s primary arguments has been made by any party as of this writing. Specifically:

(a) *Amicus*’s first argument, a separation of powers argument, comes from a significantly different perspective than those of the parties, and no argument like it been filed to date. In addition, it appears the petitioners so far have devoted comparatively less analysis to the separation of powers as compared with the revision vs. amendment question; for example, none of the petitioners’ briefs has the separation of powers argument going first, and petitioners in one of the cases do not appear to argue separation of powers as a stand-alone question. *Amicus*’s analysis supporting petitioners is significantly more detailed than any on this question to date.

It also appears that none of the petitioners have addressed the separation of powers authorities in the Attorney General’s Answer Brief. *Amicus*, by contrast, considers those authorities (and others to like effect that it has supplied) to be completely consistent with its separation of powers argument, and has discussed those authorities in some detail.

Amicus believes that the separation of powers question stands on its own, and presents major issues regarding the role of the judiciary in our tripartite system. While *amicus* completely supports petitioners in all of their arguments, from the somewhat different perspective of *amicus*, separation of powers is the place where the analysis starts. Consequently, *amicus* has proffered a thorough argument that Proposition 8 violates the separation of powers, in that it effectively substitutes the legislative for the judicial branch as the ultimate arbiter of the meaning of the Constitution, a function beyond the proper purview of the legislative branch.

Accordingly, *amicus* believes this argument would be of significant assistance to this Court, because it goes well beyond any separation of powers argument made by the parties, and because separation of powers was one of the areas in which this Court specifically requested briefing in its order of November 19, 2008.

(b) *Amicus's* second argument, a revision vs. amendment argument, is made in an area in which the parties have devoted significantly more resources to briefing. *Amicus* supports the petitioners' arguments, and is not seeking to duplicate any of them. Rather, *amicus* has offered an extra perspective on the question which has not been argued by any of the parties, arising from a line of this Court's authority beginning with *Livermore v. Waite*

(1894) 102 Cal. 113. This extra perspective is intended as a supplement to the petitioners' arguments, to assist in providing this Court with a broader understanding of the authorities supportive of the conclusion that Proposition 8 is an impermissible revision.

(c) Finally, *amicus* briefly discusses the status of existing marriages if Proposition 8 is valid. Due to space limitations, its discussion is limited to a brief statement of reasons and authorities for the validity of existing marriages irrespective of Proposition 8, some of which have not been discussed in the parties' briefs, and a short discussion of the perspectives of this organization of gay and lesbian attorneys in light of the *Marriage Cases*.

Counsel for *amicus curiae* has been involved full-time in appellate and appellate-related matters for 16 of her 24 years in practice, and was a civil litigator for another five. Dating back to 1986, she has written briefing on the merits and *amicus curiae* for the highest courts of three states including this Court, the U.S. Second and Ninth Circuit Courts of Appeal, and the U.S. Supreme Court. She is a certified appellate law specialist, certified by the State Bar of California Board of Legal Specialization. This proposed brief represents solely the views of the organization on the brief, and of counsel of record solely in her capacity as a private individual.

For all of these reasons, *amicus curiae* requests that this court accept the attached brief, and permit Sacramento Lawyers for the Equality of Gays and Lesbians (“Sac LEGAL”) to appear as *amicus curiae* in support of the petitioners.

I declare under penalty of perjury under the laws of the State of California that the facts set forth herein are true and accurate to the best of my personal knowledge.

Respectfully submitted this 13th day of January, 2009.

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This application and proposed brief represents solely the views of the organization on the brief, and of counsel of record solely in her capacity as a private individual.

INTRODUCTION

This case presents an institutional collision between the legislative and judicial powers of government, perhaps as drastic a separation of powers problem as this Court has seen in decades. It is, in many ways, a modern-day version of *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137.

Apart from striking at the essence of our tripartite system of government, this case deeply affects everyone in California with a same-sex orientation and their families, millions of people by any authoritative estimate. Derivatively, it affects all Californians, as it affects the courts' ability to adjudicate vital issues about the society we live in – raising questions about whether discrimination and other practices that this Court holds to violate our Constitution can be transformed by majority vote to become permissible, and even mandatory. One scarcely need wonder what would have happened to *Brown v. Board of Education* (1954) 347 U.S. 483, *Perez v. Sharp* (1948) 32 Cal.2d 711 [4-3 opinion], *Sei Fujii v. State* (1952) 38 Cal.2d 718 [4-3 opinion] or *Yick Wo v. Hopkins* (1886) 118 U.S. 356, had such landmark decisions been submitted to voters of those times. But one can certainly wonder about the judiciary's role, if its decisions interpreting our Constitution are open to voter nullification.

However, after a controversial advertising campaign, a majority of voters said they want just that – an act of government, profoundly and personally aimed at the hearts and lives of an “historically disfavored minority group” (*In re Marriage Cases* (2008) 43 Cal.4th 757, 854 [*“Marriage Cases”*]) that has long been a target of “widespread disparagement” (*id.* at p. 846), which purports to reinterpret our Equal Protection, Privacy and Due Process Clauses by legislatively trumping this Court’s interpretation of those provisions.

That, however, cannot suffice to disable the judiciary from its Article VI role as final authority for interpretation of our Constitution.

Whether one agreed or disagreed with the original *Marriage Cases* decision, all can presumably agree: The separation of powers is an immutable component of our system of government. It is not open to selective repudiation by popular vote. (*Accord Marriage Cases*, 43 Cal.4th at p. 860 [conc. opn. of Kennard, J.] [*“Whether an unconstitutional denial of a fundamental right has occurred is not a matter to be decided by the executive or legislative branch, or by popular vote, but is instead an issue of constitutional law for resolution by the judicial branch of state government.”*])

These principles of our tripartite system of government are not “antidemocratic.” They are at the heart of American democracy.

Because Proposition 8 purports to substitute the legislative power for the judicial as the final arbiter of the meaning of the Equal Protection, Privacy, and Due Process Clauses of our Constitution, it violates the Separation of Powers Clause of Article III. In addition and separately, under this Court's opinion in *Livermore v. Waite* (1894) 102 Cal. 113 and its progeny, and also in light of the core constitutional functions with which it interferes, Proposition 8 violates the revision provisions of Article XVIII.

I. PROPOSITION 8 VIOLATES THE SEPARATION OF POWERS CLAUSE

A. Overview; Nature And Limitations Of Amicus's Argument

1. Limitations: The Electorate Has The Power To Enact Initiatives Superseding Specific Court Decisions, As Long As It Stays Within The Proper Legislative Function And Doesn't Violate Other Constitutional Provisions

In the initiative process, the electorate exercises legislative power – the power of lawmaking. (*Professional Engineers in California Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1042; *Independent Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020, 1033; *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 542.) The Separation of Powers Clause (Art. III, sec. 3) provides that the legislative power is separate from the judicial. Consequently, the electorate, in its legislative capacity, is subject to the same separation of powers restrictions as the Legislature.

This points toward one reason why Proposition 8 is unconstitutional – it is a use of legislative power to prohibit all branches of government from giving legal effect to this Court's interpretations of our Constitution prohibiting marriage discrimination, in the *Marriage Cases*.¹ Facially, that gives every indication of

¹ References in Parts I and II of this brief, and its Introduction and Conclusion, to Proposition 8 affecting either this Court's interpretation of the state Constitution in the *Marriage Cases* or the validity of same-sex marriages, are intended to apply only in
(continued...)

making the legislative rather than the judicial branch the ultimate interpreter of the Constitution, which is clearly impermissible. (*E.g.*, *Nougues v. Douglass* (1857) 7 Cal. 65, 70.)²

To show why Proposition 8 violates the Separation of Powers Clause, *amicus* first analyzes how Proposition 8 would have to operate. This discussion is based on the fact that in the *Marriage Cases*, this Court held the statutory prohibition against same-sex marriage violated three state constitutional provisions – the Equal Protection Clause (*id.* at p. 854); the Due Process Clause (*id.* at pp. 829, 854); and the Inalienable Rights Clause, most notably including the Privacy Clause (*id.* at p. 829).

¹(...continued)

the alternative to marriages validly contracted prior to November 5, 2008. *Amicus* concurs strongly with the petitioners and the Attorney General that Proposition 8 does *not* affect the validity or recognizability of pre-Nov. 5, 2008 marriages, and nothing in this brief is intended to affect that concurrence (*see post*, Coda). The points in Arguments I and II and the Introduction and Conclusion are intended to show that Proposition 8 is invalid as to all marriages, without at all agreeing that even if hypothetically valid, Proposition 8 would have any effect on existing marriages.

² Proposition 8 does not purport to alter the Separation of Powers Clause to make fundamental changes in the boundaries between the legislative and judicial branches. Even if it had, such a radical change in the nature of California’s judicial power could only have been accomplished by constitutional revision. (*See Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352-355.)

Amicus also wishes to make clear what it is not arguing, and what it agrees the legislative branch – including the electorate, by initiative – can permissibly do in superseding a judicial opinion.

Amicus agrees that mere rules of judicial procedure or evidence may be amended or repealed by the electorate in a nondiscriminatory, neutral initiative, even if that supersedes a decision of this Court, because the legislative power includes regulating modes of procedure and evidence. (*E.g.*, *In re Lance W.* (1985) 37 Cal.3d 873, 891-892 [1982 Proposition 8 permissibly abrogated a “judicially created rule of evidence” permitting criminal defendants to seek evidentiary suppression based on third parties’ interests].) *Amicus* also agrees that the electorate can eliminate nondiscriminatorily one of many effective remedies for an unconstitutional practice (*see, e.g.*, *Tinsley v. Superior Court* (1983) 150 Cal.App.3d 90, 99-100, 109-110 [construing 1979 Proposition 1, which did so for *de facto* segregation that violated the state Constitution]), because the legislative branch can modify or restrict existing remedies, provided an effective means of enforcing the underlying right remains and no vested rights are impaired. (*County of San Bernardino v. Ind’l Acc. Comm.* (1933) 217 Cal. 618, 629.)

These examples merely reiterate the voters' power to pass nondiscriminatory, neutral initiatives in proper areas of legislation, even if that supersedes a previously authoritative judicial opinion. It is the proper power of lawmaking, which doesn't encroach on the judicial power of final law-*interpreting*.

Therefore, *amicus* isn't contending that "the initiative process may never be used to abrogate legal holdings announced by this Court" (Atty. Gen. Br., p. 56). Clearly it can, when the initiative process nondiscriminatorily and neutrally stays within recognized legislative bounds. *Lance W.* and *Tinsley*, discussed above, pass that test. So do the two initiative amendment cases cited by the Attorney General on this topic (Atty. Gen. Br., pp. 56-57): *People v. Frierson* (1979) 25 Cal.3d 142, upheld the 1972 death penalty initiative (*id.* at pp. 186-187), well within the legislative function of enacting nondiscriminatory laws for criminal punishment (see *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631); and *Bowens v. Superior Court* (1991) 1 Cal.4th 36, upheld the 1990 initiative abolition of postindictment preliminary hearings (*id.* at p. 39), well within the legislative function of nondiscriminatorily regulating judicial procedure (see *Lance W.*, *supra*, 37 Cal.3d at p. 891).

But the analysis has an extra layer when an initiative amendment (or any other legislation) is discriminatory or nonneutral. In those cases, it isn't enough that the initiative operates within a recognized legislative area. Even if so, one must also determine whether the discrimination violates other provisions of the Constitution, such as the Equal Protection or Due Process Clauses. That makes this case far different from those cited above (*Lance W., Tinsley, Frierson and Bowens*).

As an extreme hypothetical for illustration, if the 1972 death penalty initiative had been restricted solely to people with brown eyes, the initiative wouldn't be automatically valid based on the fact that criminal sentencing is a proper legislative area, as it would be subject to challenge under the Equal Protection, Due Process, or Inalienable Rights Clauses. Similarly, if the 1990 initiative abolishing postindictment preliminary hearings had applied only to people who earned under \$50,000 in the previous year, it wouldn't suffice to say that regulating court procedure is a proper legislative area, because of the inevitable equal protection and due process challenges.

Not every form of discrimination will invalidate an initiative or other legislation; each such form is adjudged on its own. But a discriminatory initiative still must comport with all constitutional provisions by which discriminatory legislation would be tested.

Marriage can certainly be a proper subject for legislative regulation, and therefore for neutral, nondiscriminatory initiatives. If for example, the electorate passed an initiative amendment providing that a date of separation under Family Code section 771 must be established by clear and convincing evidence, by the party who seeks to have property adjudicated as separate, that would likely be proper – even though it would supersede an authoritative pronouncement of the judicial branch to the contrary (*see In re Marriage of Peters* (1997) 52 Cal.App.4th 1487). Such a regulation of judicial procedure relating to marriage is certainly a proper field for legislation, and a nondiscriminatory initiative of that nature should present no other constitutional questions.

Proposition 8, however, is not a nondiscriminatory, neutral “regulation of marriage.” Its very essence is discriminatory; indeed, it *defines* marriage in discriminatory terms. Because it is nonneutral and discriminatory as to people whom this Court have held are similarly situated (*see Marriage Cases*, 43 Cal.4th at p. 831, fn. 54), we get to the second layer of analysis – namely, determining

whether the discrimination violates the Equal Protection or Due Process Clauses, or any other provision of the Constitution.

If that analysis were performed, it would be easy. This Court already performed it in the *Marriage Cases*, when it held the same law in statutory form violated the Equal Protection, Due Process, and Privacy Clauses. Therefore, if this Court is empowered to perform this second layer of analysis – determining whether a discriminatory initiative violates other provisions of the Constitution – Proposition 8 would fail.

Consequently, for Proposition 8 to survive, this Court (and every other) *must be disabled from performing that second layer of analysis*. Otherwise, Proposition 8 runs headlong into the *Marriage Cases*, and cannot survive the crash.

Proposition 8 purports to disable the judiciary in just that manner. Far from mere regulation of procedure or remedy, Proposition 8 is a wholesale repudiation of this Court's authoritative interpretation of what is a governmental tort (unlawful discrimination) under three different provisions of our Constitution that have never changed. It is, quite literally, the electorate – in its legislative capacity, displacing the judicial branch – proclaiming itself the ultimate arbiter of the meaning of our Equal Protection, Privacy, and Due Process Clauses.

It may be unprecedented for a state's legislative authority to write official discrimination into its Constitution, after the state's highest court found the same discriminatory practice to violate its Constitution. *Amicus* is certainly unaware of any California precedent supporting it.

To do that, Proposition 8 has to render a practice of official discrimination constitutional, when this Court already held it unconstitutional under provisions that remain intact (the Equal Protection, Privacy and Due Process Clauses); and, it must trump this Court's holding. This implicates principles of judicial independence which have been integral to California jurisprudence and the governmental structure since earliest statehood, and to American jurisprudence and government for over two centuries.

2. Nature: Analyzing The Precise Means By Which Proposition 8 Would Nullify The *Marriage Cases* On Same-Sex Marriage Questions

If the *Marriage Cases* were not nullified on same-sex marriage questions, then Proposition 8 would fail the compelling state interest test and strict judicial scrutiny, and would be found under the *Marriage Cases* to violate the Equal Protection, Privacy, and Due Process Clauses. It is, after all, the same law as its statutory counterpart, Family Code section 308.5, which this Court found unconstitutional on the above grounds in the *Marriage Cases*.

So to be effective, Proposition 8 must interfere with judicial adjudication of same-sex marriage cases by (i) ensuring the courts cannot effectuate this Court's opinion in the *Marriage Cases*, and (ii) requiring all branches of government to follow Proposition 8 rather than the *Marriage Cases* for interpretation of the Equal Protection, Privacy, and Due Process Clauses of the state Constitution.

But, how? How can Proposition 8 disable the judiciary – and all other branches of government – from invoking the *Marriage Cases*, when such invocation would result in Proposition 8 being declared unconstitutional under the Equal Protection, Due Process, and Privacy Clauses, as its statutory predecessor was?

To do so, one must first ask and analyze a more basic question: How, exactly, would Proposition 8 work? By what precise legal mechanism would it purport to achieve its goal of eradicating what this Court held to be a “basic, inalienable civil right” (*Marriage Cases*, 43 Cal.4th at p. 781)?

The Attorney General's separation of powers discussion (Atty. Gen. Br., at pp. 59-61) doesn't reach this question. Rather, its focus is to demonstrate that “it is not impermissible for the voters, when done through a valid amendment, to exercise their authority through the initiative process to alter legal pronouncements issued by the courts.” (Atty. Gen. Br., at p. 61.) As discussed above, *amicus* fully

agrees, in cases – such as those the Attorney General cites – where the initiative power is used to perform traditional legislative functions nondiscriminatorily and neutrally. But that isn't this case.

Amicus therefore turns to the question: How, exactly, would Proposition 8 work?

B. How Proposition 8 Would Operate; “Amendment By Implication”

1. Proposition 8 Does Not Amend The Text Of The Equal Protection, Privacy, Or Due Process Clauses

Proposition 8 was not written into the Privacy, Equal Protection, or Due Process Clauses of our Constitution. It is numbered Article I, section 7.5, a different provision than the Privacy, Equal Protection, or Due Process Clauses. Nothing in the text of Proposition 8 purports to amend any of those clauses. Nor do the initiative's voter materials hint at anything so drastic; none of the above clauses is discussed, and voters weren't asked if they wanted to diminish these long-standing, vital protections of our organic law.

Article I, section 7.5 therefore stands on its own, while every other provision of the Constitution is textually unaffected. Instead of textually amending the Equal Protection, Privacy and Due Process Clauses, Proposition 8 sets up an irreconcilable conflict with this Court's interpretation of those provisions in the *Marriage Cases*.³

2. Proposition 8 Does Not Repeal Those Clauses By Implication

Nor is Proposition 8 an implied repeal of the Privacy, Equal Protection, or Due Process Clauses. That seems self-evident.

³ *Amicus* need not analyze the hypothetical of what might have happened had the opponents of marriage equality instead created an initiative for textual alteration of the Equal Protection, Privacy and Due Process Clauses, to write this type of discrimination against lesbians, gay men and their families expressly into each of those clauses. That option was never presented to the voters, so it shouldn't be relevant here. One could speculate that many voters might have been chary of supporting such a hypothetical initiative, since they would then have been told that specific constitutional protections of individual liberty – which have been used to protect other traditionally disempowered groups through much of our state's history, and to this day – were being textually diminished in our Constitution, for the sole purpose of making marriage discrimination a constitutional mandate. Voters might well have decided these fundamental protections weren't worth diminishing for this purpose, e.g., because of a strong belief in the sanctity of those provisions, or to avoid the slippery slope of what protections of individual liberty, equality, or human dignity might be legislatively stripped from our Constitution next. Furthermore, for the reasons in Part II, *post*, and those offered by the petitioners and the Attorney General, any such textual alteration would have been an unconstitutional revision in any event. It would also have raised issues under other (unamended) constitutional provisions. But since Proposition 8 didn't do this, *amicus* needn't speculate further on such "what ifs."

Presumably, its proponents would not claim a result so drastic as an implied wholesale repeal of those basic organic laws.

“So strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, ‘In order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.’ [Citation.]” (*ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 866 [because Article XIII-A was not a revision of the entire subject of taxation, but merely amended the Constitution on some aspects of real property taxation, it did not impliedly repeal Article III, section 19].)

Proposition 8 is not a revision of the entire subject of equal protection, privacy, or due process. It leaves intact many such guarantees (though more for people who aren’t gay or in gay people’s families). Therefore, Proposition 8 does not repeal the Equal Protection, Privacy or Due Process Clauses impliedly.⁴

⁴ Had Proposition 8 been such a revision of the entire field of equal protection, privacy or due process, it would undoubtedly be unconstitutional as a violation of Article XVIII; it seems self-evident that total abrogation of three of the most important individual rights provisions of our Constitution would require a revision and couldn’t be done by mere amendment. *Amicus* assumes this hypothetical is too obvious, and too far from reality here, to warrant further discussion.

3. Proposition 8 Could Only Be Construed As An “Amendment By Implication” Of The Equal Protection, Privacy And Due Process Clauses, Insofar As This Court Held Those Clauses Prohibit Marriage Discrimination

Because Proposition 8 is not an express textual repeal or amendment of the Equal Protection, Privacy or Due Process Clauses, and does not repeal them by implication, the only alternative is that it would have to “amend by implication” those clauses as construed in the *Marriage Cases*.

Amendments by implication are recognized only in the absence of another rational way to harmonize the provisions in question. (*Cacho v. Boudreau* (2007) 40 Cal.4th 341, 352.) Here, there appears to be no rational way to harmonize the provisions, because Proposition 8 reflects a “clear intent by the electorate to supersede prior law” (*Professional Engineers in California Gov’t v. Kempton, supra*, 40 Cal.4th at p. 1039).

Consequently, Proposition 8 can only operate by “amending by implication” the Privacy, Equal Protection and Due Process Clauses, to the extent those clauses had required official recognition of same-sex marriages – including judicial recognition – as valid and equal to opposite-sex marriages before November 5, 2008. That in turn would require nullifying (prospectively) the effect of this Court’s opinion in the *Marriage Cases*, because if the *Marriage Cases* could

be given effect, Proposition 8 would suffer the same constitutional infirmities as Family Code section 308.5. It is, after all, the same law, only this time written into the Constitution.

An “amendment by implication” is not an actual, textual amendment. It is merely a means of resolving conflicts among irreconcilably competing enactments, providing that the later enactment controls over the earlier to the extent necessary to resolve the conflict. (*Peatros v. Bank of America NT & SA* (2000) 22 Cal.4th 147, 167-168; *California Correctional Peace Officers Ass’n v. Dep’t of Corrections* (1999) 72 Cal.App.4th 1331, 1339; see also *American Lung Ass’n v. Wilson* (1996) 51 Cal.App.4th 743, 752 [conc. opn. of Blease, J., joined by Scotland, J.].) All of the competing enactments remain textually intact. What changes is how some are construed.

Since it doesn’t textually amend the Equal Protection, Privacy or Due Process Clauses, and doesn’t repeal by implication any of those provisions, Proposition 8 can only change the way the Equal Protection, Privacy and Due Process Clauses are construed. It would have to block all branches of government from applying the Equal Protection, Privacy, or Due Process Clauses in the manner required by the *Marriage Cases*. It would have to resolve the conflict among constitutional provisions by mandating that this Court’s

interpretations of the Equal Protection, Privacy and Due Process Clauses in the *Marriage Cases* must be deemed ineffective as to same-sex marriages. Otherwise, Proposition 8 would collide with the *Marriage Cases*, and couldn't survive the collision.⁵

As discussed below, Proposition 8 “amends by implication” not only the Equal Protection, Privacy and Due Process Clauses, but also the *Marriage Cases*' authoritative pronouncement of the judicial branch on the meaning of those constitutional provisions. It does the former solely by doing the latter. A legislative act, however, cannot permissibly “amend” – whether by implication or otherwise – a judicial interpretation of the meaning of constitutional provisions that have otherwise remained intact.

C. Proposition 8 Would Block All Branches Of Government From Following This Court's Interpretations Of The Equal Protection, Privacy And Due Process Clauses In The *Marriage Cases*, In Violation Of The Separation Of Powers

Under the Article VI judicial power, the judicial branch – not the legislative – is the ultimate arbiter of the meaning of our Constitution.

(*People v. Birks* (1998) 19 Cal.4th 108, 117; *Raven v. Deukmejian*

⁵ Aspects of the *Marriage Cases* decision not intrinsically bound up with marriage equality – for example, the application of strict scrutiny and the compelling state interest test to classifications based on relational (sexual) orientation, or the exegesis of law on the fundamental nature of the right to marry (as applied to anyone other than a same-sex couple) – would remain unaffected in cases not involving same-sex marriages, as Proposition 8 is not inherently inconsistent with them.

(1990) 52 Cal.3d 336, 354; *Nougues v. Douglass*, *supra*, 7 Cal. at p. 70.) “It is, emphatically, the province and duty of the judicial department, to say what the law is.’ (*Marbury v. Madison* (1803) 5 U.S. 137, 177 [2 L. Ed. 60].)” (*McClung v. Employment Dev’t Dep’t* (2004) 34 Cal.4th 467, 469-470.)

Concomitantly, a legislative authority cannot be the final arbiter of the Constitution’s meaning. Granted, as discussed above, a legislative authority can sometimes change the Constitution within the proper bounds of nondiscriminatory legislation – but this case doesn’t involve nondiscriminatory legislation. And in any event, the authority to be the final interpreter of the meaning of constitutional provisions is not within the proper bounds of the lawmaking power.

The *Marriage Cases* may have been “only” a 4-3 decision, but for Article VI judicial power, it doesn’t matter if the vote was 4-3 or 7-0 or anything in between. (*Compare Perez v. Sharp*, *supra*, 32 Cal.2d 711 [also 4-3].) It was still the decision of this Court, binding on all branches of government as a matter of Article VI judicial power. (*Accord Arnold v. City of San Jose* (1889) 81 Cal. 618, 620 [with conc. opns. of Works and Fox, JJ].)

Consequently, after the *Marriage Cases*, same-sex couples who sought to marry but were not parties to the *Marriage Cases* did not have to file lawsuits. They could still utilize the *Marriage Cases*,

because the officers of every branch of government are sworn to uphold our Constitution (Art. XX, sec. 3), which includes following the decisions of the judicial branch on the meaning of the Constitution.

Since as discussed above, this Court under Article VI is required to be the ultimate arbiter of the meaning of our Constitution, and has final authority to “say what the law is,” the executive and legislative branches were duty-bound after the *Marriage Cases* to effectuate this Court’s decision – that governmental prohibition of same-sex marriage is unlawful discrimination which violates our Equal Protection, Privacy, and Due Process Clauses. This is further reflected in the *Marriage Cases* disposition, where this Court permitted petitioners to marry on the same basis as an opposite-sex couple, then did the same for all other qualifying same-sex couples, and directed state and local officials to do everything necessary to make it happen. (See *id.*, 43 Cal.4th at pp. 856-857.)

Proposition 8 turns that on its head. It tells the executive, legislative and judicial branches that they cannot follow the judicial branch’s authoritative exposition of what the Equal Protection, Privacy and Due Process Clauses mean, after this Court in the *Marriage Cases* performed its judicial duties of “say[ing] what the law is,” and acting as ultimate arbiter of the meaning of our Constitution.

Instead, Proposition 8 requires that all officials of state government follow the *electorate's* exposition of “what the law is,” the *electorate's* “interpretation” of our Constitution, acting in its legislative capacity. Proposition 8 requires that by legislative fiat – and contrary to this Court’s mandate in the *Marriage Cases* – California government officials must conclude that (i) state discrimination against lesbians and gay men as to marriage is consistent with the Equal Protection Clause, Inalienable Rights Clause including privacy, Due Process Clause, Uniform Operation Clause, and every other clause in the state Constitution (whether or not specifically addressed in the *Marriage Cases*); and based on that, (ii) such discrimination is not only permissible, it is mandatory.

In other words, if Proposition 8 were valid, then a majority of voters, not the judicial branch, would be the ultimate arbiter of the meaning of the Equal Protection, Privacy and Due Process Clauses of our Constitution.

This cannot be. Given that this Court’s power as ultimate arbiter of the meaning of our Constitution and its duty to “say what the law is” with final authority are part of the Article VI judicial power, as the opinions discussed herein – and many more – make clear, the legislative power cannot trump the judicial in the interpretation of the Equal Protection, Privacy and Due Process Clauses.

“The several departments were intended to be kept separate and distinct, within their proper spheres. . . . [T]o say that the judiciary have no power to protect themselves from legislative interference, would be to confess our own abject weakness, and acknowledge a power in the legislative branch of government more colossal than that of the British Parliament itself.” (*People v. Wells* (1852) 2 Cal. 198, 213-214.)

That is particularly true in constitutional interpretation. This Court has made clear from early statehood that the judicial branch’s power to construe the Constitution is the sole power of last resort:

The Constitution is itself a law, and must be construed by some one. Each department must be kept within its appropriate sphere. There must, then, from the very nature of the case, be a power lodged somewhere in the government to construe the Constitution in the last resort. The different departments cannot be each left the sole and conclusive judge of its own powers. If such was the case, these departments must always contest and always be in conflict; and this cannot be the case in a constitutional government, practically administered.

The judiciary, from the very nature of its powers and the means given it by the Constitution, must possess the right to construe the Constitution in the last resort, in those cases not expressly, or by necessary implication, reserved to the other departments. It would be idle to make the Constitution the supreme law, and then require the judges to take the oath to support it, and after all that, require the Courts to take the legislative construction as correct.

(*Nougues v. Douglass, supra*, 7 Cal. at p. 70.)

This Court can only preserve its role as final authority on the meaning of our Constitution, by holding that the electorate's "interpretation" of the Equal Protection, Due Process and Privacy Clauses in Proposition 8 must yield to the judiciary's authoritative interpretation of those clauses in the *Marriage Cases*.

This case is about the electorate's legislative declaration of what is and is not a substantive legal wrong under the Constitution. Under Proposition 8, what this Court held to be an impermissibly discriminatory practice, in violation of at least three different provisions of our Constitution, has been legislatively redefined as permissible and violative of *none of those three* provisions of the state Constitution – and then, it has been made mandatory on all branches of government. This goes far over the line dividing legislative from judicial power.

On this basis alone, Proposition 8 violates the Separation of Powers Clause.

D. Proposition 8 Would Also Unconstitutionally Interfere With The Judicial Power As To Same-Sex Couples That Ask The Judiciary To Enforce The Equal Protection, Privacy, Due Process, Or Similar Clauses

Amicus next discusses what happens if a same-sex couple seeks a judicial remedy to enforce the Equal Protection, Privacy or Due Process Clauses as construed in the *Marriage Cases*, or any other constitutional nondiscrimination guarantee, after Proposition 8.

Amicus will examine every possibility it can think of for how Proposition 8 would have to work, in its effect on the judicial branch and the judicial branch's ability to hear cases on same-sex marriage. Whatever the means, all violate the Separation of Powers Clause.

The various possibilities appear to be:

1. *Proposition 8 could purport to strip the courts of the power to effect a remedy for unconstitutional discrimination under the Marriage Cases – i.e., it could let a court rule that refusal to recognize a same-sex marriage violates the Equal Protection, Privacy, and Due Process Clauses, but deprive the courts of all power to do anything about it.*

2. *Proposition 8 could be construed mandatorily, as requiring a court to rule that governmental refusal to recognize the marriage of a same-sex couple complies with the Equal Protection, Privacy and Due Process Clauses.*

3. *Proposition 8 could be construed prohibitively, i.e., it could purport to prohibit a court from ruling that a governmental refusal to recognize the marriage of a same-sex couple violates the Equal Protection, Privacy, or Due Process Clauses.*

They are analyzed here in turn.

1. Can Proposition 8 Strip The Courts Of The Power To Effect A Remedy For Unconstitutional Discrimination Under The *Marriage Cases*, While Leaving Intact The Power To Hear Such Cases?
 - a. *Marbury v. Madison* and *Mandel v. Myers* – Prohibition Against Stripping The Judiciary Of The Power To Award A Remedy For Deprivation Of An Adjudicated Right

Since *Marbury v. Madison, supra*, it has been inherent in the judicial power that where the judiciary can adjudicate a violation of a legally created right, it must be able to award a corresponding effective remedy. This Court has recognized that principle from early statehood: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” (*Guy v. Hermance* (1855) 5 Cal. 73, 74.)

As this Court stated it more recently, relying on *Marbury v.*

Madison:

Chief Justice John Marshall set down the rule of law in 1803 in *Marbury v. Madison*. "In the 3d vol. of his Commentaries (p. 23), Blackstone states . . . 'In all other cases, . . . it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.' And afterwards (p. 109, of the same vol.), he says, '. . . for it is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress.' [para.] The government of the United States has been emphatically termed a government of laws, and not of men [or women]. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." (*Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 87, 103 [2 L.Ed. 60, 69].)

(*Mandel v. Myers* (1981) 29 Cal.3d 531, 564; see also *In re Sturm* (1974) 11 Cal.3d 258, 268-269 [also citing *Marbury v. Madison*].)

Since the power to award a remedy for deprivation of an adjudicated legal right is an inherent part of the Article VI judicial power, Proposition 8 would impinge unconstitutionally on the judicial power, if it permitted the judiciary to adjudicate violations of such rights but stripped it of power to award an effective remedy.

There is only one effective remedy for violation of the Equal Protection, Privacy and Due Process Clause guarantees adjudicated in the *Marriage Cases*. That remedy – the one in the *Marriage Cases* (at pp. 856-857) – is to hold that a same-sex couple must be granted the fundamental right to marry on the same bases as an

opposite-sex couple. A “remedy” is the means of effectuating a legal or equitable cause of action (*Frost v. Witter* (1901) 132 Cal. 421, 426), and when the cause of action is a governmental edict requiring unlawful discrimination, the minimum effective remedy is to eliminate the discrimination. (See, e.g., *Cooper v. Aaron* (1958) 358 U.S. 1, 17; *General Motors Corp. v. City and County of San Francisco* (1999) 69 Cal.App.4th 448, 454.) If the courts cannot award that effective remedy, they cannot exercise their Article VI judicial power.

Were Proposition 8 to have this effect, it would contravene the basic principles of *Marbury v. Madison*, reiterated in cases from this Court as discussed above. Therefore, Proposition 8 cannot strip the judiciary of its power to award that sole effective remedy, without violating the separation of powers.

b. Prohibition Against Relegating The Judiciary To Rendering Advisory Opinions

In addition, if Proposition 8 acted by permitting the judiciary to rule that refusal to recognize a same-sex marriage is unconstitutional but prohibiting it from awarding any effective remedy, this would make the judicial ruling an advisory opinion, an interesting piece of paper that binds nobody. This too would violate the separation of powers.

A court has a constitutional duty to exercise the jurisdiction conferred on it, whether by the Constitution or by statute. (*People v. Jordan* (1884) 65 Cal. 644, 646.) Under Article VI, the California courts have general original and reviewing jurisdiction over civil actions, and this Court has discretionary jurisdiction. The legislative branch may regulate the modes and procedures by which jurisdiction is exercised, but it cannot abrogate constitutional jurisdiction altogether. (*Haight v. Gay* (1857) 8 Cal. 297, 300.)

We are positing in this subsection that Proposition 8 leaves the cause of action intact, but abrogates the only effective remedy. That would turn the court's "exercise" of jurisdiction into an advisory opinion – the court could "adjudicate" the cause, but couldn't do anything meaningful about it.

A California court cannot sit to declare a constitutional violation in the abstract, without having ever had the power to do anything about it. "The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court." (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912.) "[T]he proper role of the judiciary does not extend to abstract differences of legal opinion" (*Pacific Legal Foundation v. California Coastal Commission* (1983) 33 Cal.3d 158, 170-171.) A controversy for which no effective relief could be granted is not within the Article VI judicial power.

For this reason as well, if Proposition 8 purported to disable the courts from awarding an effective remedy, it would violate the Separation of Powers Clause.

2. Can Proposition 8 Require A Court To Rule That Governmental Refusal To Recognize The Marriage Of A Same-Sex Couple Complies With The Equal Protection, Privacy, And Due Process Clauses?

If Proposition 8 instead required courts to rule that government refusal to recognize or permit a same-sex marriage *complies with* the Equal Protection, Privacy and Due Process Clauses, when this Court held the opposite in the *Marriage Cases*, it would amount to prescribing a rule of decision for pending cases. Since *United States v. Klein* (1872) 80 U.S. (13 Wall.) 128, this has been recognized as “pass[ing] the limit which separates the legislative from the judicial power.” (*Id.* at p. 147.) So too in this situation.

This Court recognized *Klein* as stating essential separation of powers principles for California’s governance. (*Mandel v. Myers, supra*, 29 Cal.3d at pp. 549-550.) They are fully applicable here.

Klein’s principles are also applicable here for a second reason. The State of California, its agents, and/or its subdivisions would be parties to a case where a governmental official refused to recognize or permit a same-sex marriage. So if Proposition 8 prescribed a rule of decision for pending cases, that would “allow one party to [a]

controversy to decide [the case] in its own favor,” which under *Klein* also violates the separation of powers. (*Id.*, 80 U.S. at p. 146.)

An independent judicial branch must be able to make its own decisions on claims of constitutional deprivations, under its own interpretation of the Constitution, not have decisions forced upon it by another branch of government. If Proposition 8 required courts to rule that its provisions comply with the Equal Protection, Privacy or Due Process Clauses, this would violate the separation of powers.

3. Can Proposition 8 Prohibit A Court From Ruling That Governmental Refusal To Recognize The Marriage Of A Same-Sex Couple Violates The Equal Protection, Privacy, Or Due Process Clauses?

a. Generally

Finally, there is the possibility that Proposition 8 prohibits the courts from following this Court’s opinion in the *Marriage Cases*, and from making any other ruling to reach a result which had been required by the *Marriage Cases*. How would this work?

Amicus can only think of two ways. They would require deeming Proposition 8 to be equivalent to either of the following:

i. A reinterpretation of the Equal Protection, Privacy and Due Process Clauses, to the effect of “The Supreme Court’s contrary decision in *Marriage Cases* is deemed null and void, to the extent needed to ensure it cannot be enforced in favor of same-sex

couples; so that these clauses cannot be construed as applying to individuals in same-sex couples who seek to marry, and Proposition 8's new mandate of official state discrimination can be enforced"; or

ii. A directive that the judiciary lacks jurisdiction to resolve claims under the Equal Protection, Privacy, or Due Process Clauses, or any other, in favor of the validity of a same-sex marriage.

Either would violate the separation of powers principle that the judiciary is the ultimate arbiter of the meaning of the Constitution, since this Court has already held in the *Marriage Cases* that the Equal Protection, Privacy, and Due Process Clauses do protect gay men and lesbians seeking to marry. Because this Court is the ultimate arbiter of the meaning of the Constitution with the power and duty to "say what the law is," the legislative power cannot disable the judiciary from deciding same-sex marriage cases on the judiciary's independent interpretation of the Equal Protection, Privacy or Due Process Clauses.

For this reason alone, this mechanism would render Proposition 8 violative of the Separation of Powers Clause.

b. Specific Encroachments On The Judicial Power To Construe The Constitution Authoritatively

In addition, this mechanism would have direct consequences on the law which the courts would have to apply. Any one of these consequences would render Proposition 8 unconstitutional.

i. *Disabling the courts from applying the judicial doctrine of stare decisis.* Proposition 8 would violate the separation of powers by directing the courts not to follow this Court's interpretation of the Privacy, Equal Protection and Due Process Clauses in the *Marriage Cases* – *i.e.*, by abrogating *stare decisis* in cases involving the validity of a same-sex marriage.

The lower courts would normally be bound to follow the *Marriage Cases* under *stare decisis*, as required in *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. This Court isn't bound to follow its own decisions, but it would normally have the authority to do so – and usually would – under *stare decisis*. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1080.) But if Proposition 8 prohibited the courts from ruling in favor of same-sex marriage, then no court could adhere to the judicial doctrine of *stare decisis* for interpreting the Privacy, Equal Protection, and Due Process Clauses in same-sex marriage cases; courts would have to discard it in favor of Proposition 8. This too would violate the separation of powers, by

the legislative branch disabling the judiciary from invoking its own legal precedent – the *Marriage Cases* – to interpret our Constitution.

ii. *Prohibiting the courts from utilizing the compelling state interest test and strict scrutiny in cases involving same-sex marriage.* The compelling state interest test and strict judicial scrutiny were cornerstones of this Court’s opinion in the *Marriage Cases*.

If Proposition 8 were subjected to the compelling state interest test and strict scrutiny, it would fail on the same bases as Family Code section 308.5 did in the *Marriage Cases*. However, Proposition 8 purports to prohibit the result in the *Marriage Cases* without textually amending the Equal Protection, Privacy or Due Process Clauses. It would therefore have to block application of this Court’s rulings in the *Marriage Cases* on what those clauses mean.

In cases involving marriage, such a mechanism would prohibit the judicial branch from applying or utilizing this Court’s rulings in the *Marriage Cases* that (i) relational (sexual) orientation is a suspect class, such that discrimination on that basis requires a compelling state interest; (ii) deprivation of a fundamental right, such as the right to marry, also requires a compelling state interest; and (iii) both are subject to strict judicial scrutiny.

It appears the only ways Proposition 8 could accomplish that would be by either:

(A) "Adopting" a rule of law exempting itself from equal protection scrutiny, perhaps by "deeming" that same-sex couples are not similarly situated to opposite-sex couples for these purposes, contrary to this Court's holding in the *Marriage Cases* (43 Cal.4th at p. 831, fn. 54). Or:

(B) Acting as a *de facto* law that the courts have no jurisdiction to rule in cases involving the validity of a same-sex marriage, though they still have jurisdiction in cases involving the validity of any other marriage, or any other form of Equal Protection, Privacy, or Due Process Clause question.

The former would involve telling the courts what to rule in a pending case, in violation of the Article VI principles of *Mandel v. Myers* and *United States v. Klein* discussed in section (D)(2) above.

The latter would again substitute the legislative branch for the judiciary as the ultimate arbiter of the Constitution, in violation of Article VI as discussed in section (C) above. "The courts of this state derive their powers and jurisdiction from the constitution of the state. The constitutional jurisdiction can neither be restricted nor enlarged by legislative act. An attempt to take away from the courts judicial power conferred upon them by the constitution is void." (*In re Sutter-*

Butte By-Pass Assessment (1923) 190 Cal. 532, 536.) Since the Constitution confers upon courts the power to adjudicate causes of action which require interpretation of the Constitution, the legislative branch – whether through the Legislature or the electorate – cannot strip the courts of jurisdiction to do exactly that.

A branch of government cannot do indirectly what it cannot do directly (*Bramberg v. Jones* (1999) 20 Cal.4th 1045, 1063; *Metropolitan Water Dist. v. County of Riverside* (1943) 21 Cal.2d 640, 642), least of all in constitutional interpretation. “To give effect to the constitution it is as much the duty of the courts to see that it is not evaded as that it is not directly violated.” (*Sheehy v. Shinn* (1894) 103 Cal. 325, 340; see also *Cooper v. Aaron, supra*, 358 U.S. at p. 17.)

In short, it would violate the separation of powers for the legislative branch to prohibit the courts from using the “compelling state interest” test and strict scrutiny in cases involving the validity of same-sex marriages, when this Court had held the compelling state interest test and strict scrutiny *must* be used in such cases.

iii. *Utilizing the rational basis test, or any other standard below strict scrutiny, even if this Court might have otherwise concluded that Proposition 8 violated it. Amicus believes Proposition 8 does violate the rational basis test after the *Marriage Cases*, irrespective of whether it would have done so before. Proposition 8's act of depriving gay men and lesbians of an existing, expressly recognized fundamental right – what this Court held to be a “basic civil right” (*Marriage Cases*, at p. 820) and a “fundamental right of free men [and women] (*id.* at p. 818) – was intended to discriminate; that is its essence. Laws enacted with the animus to discriminate fail rational basis review. (*Romer v. Evans* (1996) 517 U.S. 620, 634-635.)*

One would not have to call Proposition 8's proponents “irrational, ignorant or bigoted” (*Marriage Cases*, at p. 856, fn. 73), and one could assume *arguendo* that its proponents acted with good intentions – following their religious, social, or other beliefs – because the conclusion is still obvious: Proposition 8 is intentionally discriminatory; its intent and very nature is to require, as organic law, the precise discrimination that the *Marriage Cases* had forbidden. This is different from 2000's Proposition 22, which was enacted when there was no authoritative constitutional pronouncement on same-sex marriage; here by contrast, the avowed purpose of

Proposition 8 was to take away an existing, expressly recognized fundamental civil right. “A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective.” (*Mulkey v. Reitman* (1966) 64 Cal.2d 529, 533 [aff’d (1967) 387 U.S. 369].)

Proposition 8 purports to deprive the courts of the power to adjudicate this question. Because Proposition 8 requires all courts to refuse to recognize a same-sex marriage, the courts could not adjudicate a same-sex marriage question under the rational basis test of the state Equal Protection Clause, or any other test.⁶

This too violates the separation of powers. The analysis is the same as that *ante*, section (C), incorporated by reference here.

iv. *Applying the Uniform Operation Clause* (Art. IV, sec. 16), or the *Privileges and Immunities Clause* (Art. I, sec. 7(b)). Although these clauses have been construed similarly to the state Equal Protection Clause, before 1974, they were the only equality-based California constitutional protections of individual

⁶ *Amicus* does not conclude that a rational basis analysis would necessarily be the same in other jurisdictions. The discussion here, apart from being limited to California jurisprudence, is also limited to this unprecedented context unique to California; where a jurisdiction’s highest court ruled a form of discrimination unconstitutional, and then the jurisdiction’s legislative authority wrote that same form of discrimination into its Constitution and made it mandatory.

liberty. Both have been part of our Constitution since 1849. (See *Ex Parte Smith* (1869) 38 Cal. 702, 710; *Smith v. Judge of the Twelfth Judicial District* (1861) 17 Cal. 547, 555-556.)

If a person seeking a same-sex marriage license couldn't use the Equal Protection Clause, but wanted to challenge Proposition 8's discrimination on an equality basis, that person might turn to the Uniform Operation Clause or the state Privileges and Immunities Clause. Proposition 8, however, would also block the courts from finding in favor of marriage – and therefore from making any ruling at all – based on those constitutional provisions. The analysis *ante*, section (C), is incorporated by reference here.

E. Conclusion To Part I

“James Madison, in writing of the separation of powers doctrine in The Federalist Papers, quoted Montesquieu's warnings of the dangers posed by legislative exercise of judicial power: ‘Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator’ [Citation to Madison, The Federalist No. 47.]” (*Mandel v. Myers, supra*, 29 Cal.3d at p. 549, fn. 8.)

That is this case. The initiative laws are supposed to mean only that “the people have simply withdrawn from the legislative body and reserved to themselves the right to exercise a part of their inherent legislative power.” (*Dwyer v. City Council* (1927) 200 Cal. 505, 513.) Here, by contrast, the voter initiative has gone well beyond exercising “inherent legislative power,” and has extended into exercising inherent *judicial* power.

For all these reasons, this Court should declare Proposition 8 violative of Article III, section 3 of our Constitution.

II. PROPOSITION 8 IS A CONSTITUTIONAL REVISION, WHICH CANNOT BE EFFECTUATED BY INITIATIVE

A. Separation Of Powers

If Proposition 8 were construed to alter any of the separation of powers principles in Part I above, it would vest an essential part of the judicial power – the judiciary’s role as ultimate arbiter of the meaning of the Constitution – in the legislative branch. That would violate the revision provisions of Article XVIII. (*Raven v. Deukmejian, supra*, 52 Cal.3d at p. 355.) Nor can Proposition 8 disable this Court from effectuating its own prior precedents or hearing this case, for the same reason.

This point is assigned as *amicus*’s first reason in this Part, independent of the others, as to why Proposition 8 is an improper revision. The point significantly overlaps with Part I above (*see ante*, fn. 2), so *amicus* need not discuss it further here.

B. Proposition 8 Fails The “Betterment Of Purpose” Requirement For Constitutional Amendments, Set Forth In This Court’s Opinions In *Livermore v. Waite* And Its Progeny

1. Overview; The “Betterment Of Purpose” Requirement

Proposition 8 also violates Article XVIII of our Constitution because it is a revision without the required convention or legislative submission. (*See Raven v. Deukmejian, supra*, 52 Cal.3d at pp. 349-350.) While petitioners have also made this argument, *amicus*

has an extra perspective: Proposition 8 fails another requirement for a nonrevisory amendment – the “betterment of purpose” requirement – which this Court has promulgated beginning with its 1894 opinion in *Livermore v. Waite*, *supra*, 102 Cal. 113 [“*Waite*”].

Amicus will not repeat the excellent presentations in petitioners’ briefs, except to say it wholly concurs.

Amicus does wish to make the following specific point, however, based on this Court’s definition of the difference between an amendment and a revision:

“The very term ‘constitution’ implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles on which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term ‘amendment’ implies *such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.*” (*Livermore v. Waite*, *supra*, 102 Cal. at pp. 118-119 [all emphasis added] [quoted in part in *Raven v. Deukmejian*, *supra*, 52 Cal.3d at p. 355]; accord *Amador Valley Joint Union H.S. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 222; *McFadden v. Jordan* (1948) 32 Cal.2d 330, 333.)

This Court has never held that abrogation of a “basic, constitutionally protected civil right” (*Marriage Cases*, at p. 818), particularly one which this Court had held protected by strict scrutiny, could be deemed “an addition or change within the lines of the original [Constitution] as will effect an *improvement*, or *better carry out the purpose for which it was framed*.” Nor has impairing judicial review for deprivation of a fundamental right been deemed to effect an improvement in the Constitution, or better carry out the purposes for which it was framed. As a matter of common sense, how could it?

2. Ways In Which Proposition 8 Fails The Betterment Of Purpose Requirement, Including Contravening Purposes For Which The Original Instrument Was Framed

To the contrary, Proposition 8 is much *worse* for the purposes for which our Constitution was framed, quite the opposite of an improvement, for those purposes. Each reason in subsections (a) through (d) below focuses on a different core principle which is among the central purposes for which the Constitution was framed. If Proposition 8 fails to better carry out any of these purposes, it violates this Court’s betterment of purpose requirement in *Waite* and its progeny, and is an impermissible revision.

As shown in subsections (a) through (d) below, Proposition 8 fails as to not just one, but all. On each such basis, separately and together, Proposition 8 is not an “improvement” on the original

instrument and does not “better carry out the purposes for which [the Constitution] was framed.” (*Livermore v. Waite, supra.*) Therefore, it is an impermissible revision.

Beyond that, in subsection (e) below, *amicus* will show that nothing about Proposition 8 better carries out any core purpose of the 1879 Constitution – let alone when compared against the detriment it causes – because nothing in that Constitution had a purpose of discrimination with respect to marriage. For this reason too, separately and together with the others, Proposition 8 fails this Court’s betterment of purpose requirement in *Waite* and its progeny.

a. Impairment Of Core Judicial Functions

Proposition 8 impairs the judiciary’s ability to “test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority.” (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.) “The architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups, and that the most effective remedy for this form of oppression is an independent judiciary charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and

equal protection. [Citations.]” (*Marriage Cases*, 43 Cal.4th at p. 860 [conc. opn. of Kennard, J.].) As this Court has held, that is “probably the most fundamental” type of protection emanating from the separation of powers, which this Court called a “basic philosophy of our constitutional system of government.” (*Bixby v. Pierno, supra*, 4 Cal.3d at p. 141.)

Proposition 8 purports to exempt the fundamental right to marry, and constitutional rights of lesbians and gay men as adjudicated in the *Marriage Cases*, from such judicial scrutiny. This is a major impairment of a core judicial function, removing the judiciary’s check and balance from a majority obliteration of minority constitutional guarantees.

b. Derogation From The Core Guarantee Of Equal Protection

The principle of equal protection has been one of our Constitution’s most basic principles since statehood. It was written into the Constitution as early as 1849, when there wasn’t even a federal Equal Protection Clause (let alone a California version), by the Uniform Operation Clause, now Article IV, section 16. (See *Dep’t of Mental Hygiene v. Kirchner* (1965) 62 Cal.2d 586, 588 [Uniform Operation Clause construed similarly to federal Equal Protection Clause; see also *Smith v. Judge of the Twelfth District, supra*, 17

Cal. at pp. 555-556 [discussion of equal protection principles in 1849 Constitution].)

Equal protection principles are among the core guarantees of our Constitution. As Justice Harlan wrote in his courageous and farsighted dissent in *Plessy v. Ferguson* (1896) 163 U.S. 537, they are a central part of individual liberty, which exist to “protect all the civil rights that pertain to freedom.” (*Id.* at p. 555.)

Proposition 8 acts contrary to basic equal protection principles, for the reasons in the *Marriage Cases*, and also for the more basic reason that its very purpose is to discriminate in an area where this Court had found the discrimination to violate the Constitution.

c. Alienation Of Rights Previously Guaranteed By The Inalienable Rights Clause, And Previously Found To Be Inalienable

The Inalienable Rights Clause, Article I, section 1 of the Constitution, was enacted to secure the most basic rights to California citizens, rights so essential that they are “protected not merely against state action [but rather] may not be violated by anyone.” (*Hill v. National Collegiate Athletic Ass’n* (1994) 7 Cal.4th 1, 18.) This Court has held the Inalienable Rights Clause is one of the very purposes of the organization of our Constitution (*Brown v. City of Los Angeles* (1920) 183 Cal. 783, 786), representing some of the most cherished of individual liberties (*Ex Parte Drexel* (1905) 147

Cal. 763, 764) – including marriage itself, which it has recognized as a “fundamental right of free [people].” (*Perez v. Sharp* (1948) 32 Cal.2d 711, 714.) The clause is so central to our Constitution that it was numbered first (Article I, section 1) in the 1849 version, and again in 1879.

This Court set forth the essential nature of the rights guaranteed by the Inalienable Rights Clause, and their vital nature in our system of government, shortly after statehood:

This principle is as old as the Magna Charta. It lies at the foundation of every constitutional government, and is necessary to the existence of civil liberty and free institutions. It was not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.

(*Billings v. Hall* (1857) 7 Cal. 1, 6.)

The Inalienable Rights Clause is therefore among the “purposes for which [the Constitution] was framed,” within the meaning of *Waite* and its progeny. Proposition 8 is invalid if it fails to achieve a betterment of that clause’s purpose.

It is, and it does. Proposition 8 severely alienates vital rights in the Inalienable Rights Clause, without a commensurately strong basis in the police power for doing so.

The rights in the Inalienable Rights Clause cannot be taken away or restrained by the legislative branch, except by reasonable regulations in the exercise of the police power. (*Roystone Co. v. Darling* (1915) 171 Cal. 526, 531-532.) In turn, the police power which justifies intruding on rights guaranteed by the Inalienable Rights Clause is circumscribed by the need to preserve individual liberty. (*Ex Parte Jentsch* (1896) 112 Cal. 468, 471-472.)

That balance requires restricting the police power so that it only prohibits individuals from exercising specified rights to prevent injury to the public health and general welfare. That is a broad power, but it is not unlimited, and it must be based in protection of the public. As this Court put it:

Because of the great value to mankind and the consequent paramount importance of the preservation of individual liberty, it is universally admitted and held that the police powers of the legislature are not absolute or unlimited. These personal rights cannot be taken away or impaired at the mere will of the legislature, nor at all, unless public welfare demands it. . . . The injury [justifying exercise of the police power] must be of such character and extent and to such a number of persons that it may be reasonably supposed that it will cause injury to others, that is, to the community in general, or, as it is expressed, to the public health and general welfare. [Citation.]

(*In re Miller* (1912) 162 Cal. 687, 693-694.) In short, the Inalienable Rights Clause means “[e]very individual citizen is to be allowed so much liberty as may exist without impairment of the equal rights of his fellows.” (*Ex Parte Jentsch, supra*, 112 Cal. at p. 472.)

As this Court recognized in the *Marriage Cases*, the marriage of any same-sex couple does not endanger or impair the marriage rights of any opposite-sex couple, who are free to enjoy the benefits and pursue the aspirations of their own marriages for themselves and their families. “[Retaining] access to the designation of marriage to same-sex couples will not deprive any opposite-sex couples or their children of any of the rights and benefits conferred by the marriage statutes” (*Id.*, 43 Cal.4th at pp. 854-855.) The connection between Proposition 8, and preventing injury to public health and general welfare, is therefore weak and attenuated at best. In light of the above-quoted portion of the *Marriage Cases*, *amicus* submits it is nonexistent.

Conversely, prohibiting same-sex couples from marrying on an equal basis with opposite-sex couples severely impairs the inalienable right of pursuing happiness for gay men, lesbians, and their families. This Court in the *Marriage Cases* well stated the impact that the right to marry has on one’s ability to pursue happiness. *Amicus* refers this Court to 43 Cal.4th at pp. 781 and 817-818, incorporated here by reference.

Furthermore, forcing lesbians, gay men, and their families to bear the stigma of discrimination and second-class citizenship, by a State pronouncement that gay and lesbian relationships and families

are unworthy of the State recognition and privileges bestowed freely on opposite-sex couples and their families, severely detracts from gay individuals' and families' once-inalienable right of pursuing happiness. This Court got it right again in the *Marriage Cases*; *amicus* refers this Court to 43 Cal.4th, pp. 784-785, 845-847, 855, incorporated here by reference.

In particular, the stigma of official discrimination, and the resulting state-sponsored second-class citizenship, is antithetical to the pursuit of happiness – and not just for people who want to marry. The injuriousness of official race discrimination, after all, was not limited to those who wanted to marry outside their race, or who wanted to sit up front in the bus.⁷

⁷ *Amicus* recognizes that some find objectionable a neutral state of laws which recognizes same-sex marriages on an equal plane with opposite-sex marriages. That, however, is not a proper basis for exercising the police power to override nondiscrimination provisions of the Constitution, any more than objections to racial equality could justify using the police power to uphold miscegenation statutes. (See *Perez v. Sharp, supra*, 32 Cal.2d 711.) Of course, some also have religious objections to same-sex marriage, while others' religious beliefs embrace loving couples in both opposite-sex and same-sex relationships. (See *also Marriage Cases*, 43 Cal.4th at p. 791, fn. 10.) But religion has no part in the police power. (*Ex Parte Jentsch, supra*, 112 Cal. at pp. 471-472.) Moreover, religious beliefs of some individuals are legally insufficient to invoke the police power, because marriage discrimination isn't needed to protect anyone's religious freedom. (*Marriage Cases*, at pp. 854-855.)

d. Grant Of Special Privileges To One Class, While Discriminatorily Denying Those Privileges To Another Similarly Situated

Another equal protection provision, considered part of our Constitution back to 1849 (see *Smith v. Judge of the Twelfth District, supra*, 17 Cal. at pp. 555-556), is Article I, section 7(b): “A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.”

This provision is also essential to the purposes for which the Constitution was framed. “The constitutional convention of 1879 was ... firmly set against special legislation of all kinds,” and the state Privileges and Immunities Clause was part of those prohibitions. (*Boca Mill Co. v. Curry* (1908) 154 Cal. 326, 330.)

This provision has been construed similarly to the Equal Protection and Uniform Operation Clauses. (*Department of Mental Health v. Kirchner, supra*, 62 Cal.2d at p. 588.) Those clauses focus on detriment to the aggrieved citizen. By contrast, the state Privileges and Immunities Clause prohibits special benefits from being conferred upon one class of citizens similarly situated to another. (*Meyerfield v. South San Joaquin Irrigation Dist.* (1935) 3 Cal.2d 409, 418.)

Proposition 8 does exactly that: It confers the benefits of state-sanctioned marriage on only the class of persons in opposite-

sex relationships, while discriminatorily denying it to the class of persons in same-sex relationships – whom this Court has held to be similarly situated (*Marriage Cases*, 43 Cal.4th at p. 831, fn. 54) – thereby creating a class of citizens on whom is conferred special benefits. This contravenes the core principle of our Constitution against special privileges. Proposition 8 changes marriage from an institution of nondiscrimination, into a bestowment of state-granted privileges on some similarly situated couples but not others.⁸

⁸ *Amicus* defers to prior briefing on the benefits and privileges of marriage that don't exist in unequal lesser institutions such as "domestic partnerships." (*Cf. Marriage Cases*, 43 Cal.4th at p. 805, fn. 24.) However, one benefit that may have been omitted is marriage recognition by other states and counties.

Currently, two states permit same-sex marriage (Massachusetts and Connecticut), at least three others recognize valid marriages from outside their borders (Rhode Island, New York, New Mexico), and several foreign countries permit same-sex marriage (Canada, Belgium, the Netherlands, Spain, and South Africa). The number of such jurisdictions should only grow over time.

To the knowledge of *amicus*, these jurisdictions do not recognize foreign-state "domestic partnerships" as having all legal rights of marriage. At the same time, these jurisdictions would be expected to grant full recognition for foreign-state marriages. This disparity between extraterritorial recognition of marriage vs. domestic partnership would have huge impact on California residents whose interests could touch on such other jurisdictions – e.g., probate, intestacy, property rights, divorce, health care, travel, insurance benefits, etc. This is yet another basis to show that "separate but equal" is rarely if ever truly equal, and certainly isn't here.

However, the most fundamental inequality is the very nature of the separateness, an official State edict that a disparaged minority is
(continued...)

e. Apart From The Above, Nothing About Proposition 8 Better Carries Out The Purposes For Which Our Constitution Was Framed

In addition to all of this, *amicus* cannot see any sound argument that legislative supersession of the constitutional guarantees in the *Marriage Cases* would “effect[] an improvement, or better carry out the purpose for which [the California Constitution] was framed” (*Livermore v. Waite, supra*). Certainly, *amicus* sees none that overcomes the major detriments described above.

The 1879 Constitution does not address same-sex marriage. That is unsurprising – discrimination against gay men and lesbians was so ingrained into society then, and gay people were so widely viewed in far more disapproving and disparaging terms (*accord Marriage Cases*, at p. 853), that few if anyone back then could have envisioned same-sex marriages. But the 1879 Constitution was a living document, which permitted reassessment of past practices “in the light of the continued evolution of fundamental precepts of our constitutional system.” (*In re Antazo* (1970) 3 Cal.3d 100, 109; *Marriage Cases*, at pp. 820-821; see also Atty. Gen. Br., pp. 82-84.) And the 1879 Constitution didn’t mention marriage, let alone

⁸(...continued)
unworthy of participating in the same State institutions the majority get to take for granted. This Court well addressed that in *Marriage Cases*, at pp. 830-831, 844-847.

establish fundamental marital policy. Nothing in that Constitution evinces a purpose of requiring permanent State discrimination against same-sex couples in this civil right, even when society evolved to a point where official nondiscrimination was plausible.⁹

This Court's *Marriage Cases* opinion further reinforces that. If the 1879 Constitution had a central purpose to require permanent marriage discrimination against lesbians and gay men, the *Marriage Cases* opinion couldn't exist. But there was no such central purpose, as the Constitution left ample room for reevaluation on constitutional evolution. "Constitutional 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

⁹ Social evolution toward nondiscrimination is often the backdrop for modern-day interpretations of the state Constitution that would have been implausible in the 19th century. The evolution of racial and ethnic nondiscrimination laws is an obvious example (although to a large extent, judicial opinions drove that social evolution). Another is the emancipation of women, which was not in our law when the Constitution was enacted; when society evolved toward women's equality, interpretations of the Constitution could similarly evolve toward gender nondiscrimination, and nothing in the Constitution prohibited this. (*Compare, e.g., Ex Parte Smith, supra*, 38 Cal. at pp. 709-712 *with Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1.) The same is true of modern nondiscrimination interpretations of the state Constitution with respect to marriage itself. (*See, e.g., Follansbee v. Benzenberg* (1954) 122 Cal.App.2d 466, 476; *Perez v. Sharp, supra*, 32 Cal.2d 711.) Similar principles were part of what underlay the *Marriage Cases*. (*Id.*, 43 Cal.4th at pp. 850-852.)

time deemed to be the limits of fundamental rights.” (*Marriage Cases*, 43 Cal.4th at pp. 820-821 [citations omitted].) This couldn’t have been written if a central purpose of the 1879 Constitution had been marital discrimination against same-sex couples.

Beyond that, “[f]undamental rights may not be submitted to vote; they depend on the outcome of no election.” (*Id.* at p. 852 [citations omitted].) Proposition 8 contravenes this constitutional declaration of government organization. That itself fails to “better carry out the purposes for which the original document was framed.” (*Livermore v. Waite*, 102 Cal. at pp. 118-119.)

Again, Prop. 8 fails this Court’s betterment of purpose requirement in *Waite* and its progeny, and is an invalid revision.

C. Proposition 8 Is An Improper Revision On Each Of The Bases In Part II(B)(2)(a)-(d) Above

Irrespective of this Court’s betterment of purpose requirement in *Waite* and its progeny, each consideration in sections (B)(2)(a), (b), (c) and (d) represents a profound change in the fabric of our Constitution that affects the inherent nature of the entire document.

Rather than restating these arguments, *amicus* incorporates each here by reference (sections (B)(2)(a), (b), (c), and (d), respectively). *Amicus* also agrees with the petitioners’ positions on

these issues; and as to section (B)(2)(c), with the Attorney General's argument on pp. 75-90 of its answering brief.

The spatial brevity of this section should not be construed as diminishing the importance of these arguments. Brevity is needed because of space limitations and organizational constraints. But each point in sections (B)(2)(a)-(d) above represents a sea change in our Constitution, and each deserves its own argument.

The changes in these clauses – or more precisely here, in their interpretation – appear unprecedented. To the knowledge of *amicus*, this State has never enacted initiative amendments to these clauses which discriminatorily *reduced* their protections, and made mandatory what was once unconstitutional discrimination as to something this Court held to be a “basic, *constitutionally protected* civil right.” (*Marriage Cases*, 43 Cal.4th at p. 818 [italics in original].)

The question is whether these impairments, separately or together, change the fundamental character of the document, so as to implicate revision rather than amendment. *Amicus* respectfully submits the answer must be yes.

CODA (RE: EXISTING MARRIAGES)

A. What If, Hypothetically, Proposition 8 Were Valid? (In Brief)

Due to space limitations, this brief cannot analyze in depth what would happen to same-sex marriages contracted before Proposition 8 became effective, if (hypothetically) Proposition 8 were constitutional.

Amicus does wish to state a brief concurrence with the petitioners and Attorney General that those marriages are valid irrespective of Proposition 8, on these grounds:

(i) The legislative branch of government cannot permissibly override the judiciary's judgment that these marriages are constitutionally valid, as decided in the *Marriage Cases*, on the bases in Part I above.

(ii) All couples who were validly married under pre-November 5, 2008 law are similarly situated, so revoking that status for a disfavored few would violate the state and federal Equal Protection Clauses (*Romer v. Evans, supra*, 517 U.S. at pp. 634-635).

(iii) Lawfully married same-sex couples obtained liberty and property interests that vested upon their marriage, which cannot be retroactively divested by the State (*Seymour v. McEvoy* (1898) 121 Cal. 438, 442).

(iv) Marriage is a contract, the validity of a contract is measured by the law at the time of the contract, and the State cannot abrogate an existing contract by changing the law *post hoc* (*Creighton v. Pragg* (1862) 21 Cal. 115, 119).

(v) Marriage is a contract that creates legal obligations (*Marriage Cases*, at pp. 828-829; *see also ante*, fn. 8), and the federal (Art. I, sec. 10) and state Constitutions (Art. I, sec. 9) prohibit this State from impairing the obligations of any contract.

(vi) Proposition 8 does not specify that it applies retroactively to nullify existing marriages, so given the strong presumption of nonretroactivity of legislation (*e.g.*, *Myers v. Philip Morris Cos.* (2002) 28 Cal.4th 828, 841), Proposition 8 operates prospectively only. And:

(vii) An express statement of retroactivity is required for retroactive operation of legislation, which cannot be implied (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209), but Proposition 8 has none. And also:

(viii) On all grounds asserted by petitioners and the Attorney General.

B. Further Considerations

Amicus also strongly supports full recognition of existing marriages because it rejects the notion that marital “separate but equal” is at all equal, in part because official discrimination so profoundly affects those who are subject to it. (See *Brown v. Board of Education*, *supra*, 347 U.S. at pp. 494-495; *Marriage Cases*, 43 Cal.4th at pp. 845-848.)

Amicus also submits that official discrimination in core areas of basic civil rights – here, a “basic, inalienable civil right” (*Marriage Cases*, 43 Cal.4th at p. 781) in an area which this Court recognized as crucial to the inalienable right of happiness (*id.* at pp. 781, 817-818) – deeply affects not only those who are directly deprived of the civil right, but every member of the targeted class. Just as miscegenation laws were a badge of second-class status for racial minorities (*Loving v. Virginia* (1967) 388 U.S. 1, 11; *Perez v. Sharp*, *supra*, 32 Cal.2d at pp. 719-720, 725), a prohibition against marrying a person of one’s own relational (sexual) orientation is a stigmatizing badge of second-class status and condemnation against gay people – and their families, including their children (the vast majority of whom are and will be heterosexual). In the schoolyard, the workplace, public and private gathering places, and everywhere else, acts of prejudice in society are only fostered by governmental

designations of unworthiness. Gay men, lesbians and their families will forever be second-class citizens and greater targets of discrimination if official edict ratifies just that.

Then, too, who would find tolerable a law that prohibited opposite-sex couples from invoking the State-recognized institution and privileges of marriage, solely because they happened to be of the opposite sex?

Marriage is a profound right and privilege, central to a married person's sense of self, that literally defines the lives of so many. That is particularly so for those with long marriages, an opportunity central to the dreams and aspirations of almost all who choose to marry. Married people's status as such is so often integral to the fabric of their being, fully recognized by society. Landmarks such as anniversaries and births or adoptions – and of course, the wedding itself – reinforce this deeply held life definition in their own eyes and those of their families, friends, acquaintances, and society in general.

After the *Marriage Cases*, how could it be contended that domestic partnerships, and the emotionally sterile process of entering into one, are the same as a real marriage? (Who ever heard of gatherings of dozens or hundreds of family and friends, in a beautiful setting of a couple's choice, for a domestic partnership signing?) And what purpose would separate institutions serve after

the *Marriage Cases*, except to reinforce expressly that government does not deem lesbians and gay men and their families worthy of participating in the same government institution as opposite-sex couples? Government may not control societal norms or feelings of individuals. But it can require – or prohibit – official discriminatory treatment which fosters major differences in life treatment.

Whether or not the word “marriage” is constitutionally required, if this State is to use it after the *Marriage Cases*, it shouldn’t be as a means of reinventing discrimination against a constitutionally suspect class – of consigning gays and lesbians to second-class citizenship by mandating that as official discriminatory policy, they don’t deserve the fundamental right to secure happiness through a family unit *with the same governmental respect, dignity, and privileges, as everyone else*. (See also *Marriage Cases*, at pp. 845-848.) And as with past efforts at “separate but equal” restrictions of human rights, this one isn’t even equal in the law (see *id.* at pp. 845-846; *ante*, footnote 8), let alone with respect to the social prejudice and sense of second-class citizenship and unworthiness it helps foster.

“Exemption from legal discrimination [] implying inferiority in civil society” is a central aspect of equality provisions of a Constitution. (*Strauder v. West Virginia* (1880) 100 U.S. 303, 307-308.) That well describes the kind of equality Proposition 8 purports to prohibit.

The Proposition 8 voter materials reinstated the historical tradition of disparagement of gay people (see *Marriage Cases*, 43 Cal.4th at p. 846), among other things, by prominent references to “the gay lifestyle” (2008 Official General Election Voter Information Guide, Arguments for Proposition 8, par. 3) – as if one’s orientation were a mere choice akin to where one vacations. “Lifestyle” often connotes travel, entertainment, or lavish living (e.g., “Lifestyles of the Rich and Famous”); worse, in this context, it is often used to connote sexual licentiousness. It certainly implies voluntaristic choices that could be ditched tomorrow if a person wanted.

Being gay isn’t a mere “lifestyle”; it is an integral part of one’s life, one’s most deeply held identity, just as being heterosexual is. In the lives of gay men and lesbians, this Court was spot on in discussing the connection between relational orientation and human identity: “Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid

discriminatory treatment. [Citations.]” (*Marriage Cases*, 43 Cal.4th at p. 842.) Proposition 8's demeaning references to “the gay lifestyle,” disparaging the lives of committed, loving couples which so resemble the lives of opposite-sex couples, sought to replace this Court’s nondiscrimination ruling in the *Marriage Cases* with an official State pro-discrimination perspective – a giant step backward.

Anyway, who would tolerate official discrimination against opposite-sex couples, let alone in this central area of human happiness, based on disparaging references to some undefined “heterosexual lifestyle”?

This Court’s opinion in the *Marriage Cases* stands as governing law saying our Constitution doesn’t accept that kind of discrimination for anyone. It is the law applicable to pre-November 5, 2008 marriages, under all circumstances.

CONCLUSION

In the *Marriage Cases*, this Court found unconstitutional a practice of State-mandated marriage discrimination. The electorate then enacted Proposition 8 to trump this Court. We all heard and saw plenty in the campaign about how judicial branch of our tripartite government – which, in the campaign, was reduced to a disdainful mantra of “four activist judges in San Francisco” (Arguments for Proposition 8, *supra*, pars. 2, 13) – should bow to more popular sentiment of the time. That kind of theme is hardly unprecedented; it is perhaps even inherent in the role of the judiciary as a check and balance to other branches of government.

No doubt if *Brown v. Board of Education* had gone to popular vote in 1954, it would have lost too. Yet who today questions an African-American’s right to an education on the same footing as the Caucasian majority, though it was declared by courts rather than voters? Or, who today questions a person’s right to marry outside their race or ethnic group, though *Perez v. Sharp* was unprecedented in 1948 (and was decided by 4-3 vote, like the *Marriage Cases*)?

As this Court made clear in *Bixby v. Pierno* (1971) 4 Cal. 3d 130, that is among the most important reasons for a tripartite system of government, where the judiciary's interpretations of the Constitution – especially its determination of what acts are prohibited by the Constitution – are the ultimate authority under the law. This Court's words have particular meaning here:

The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. [Citations.] Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority. [Citations, including *Marbury v. Madison*.] Because of its independence and long tenure, the judiciary probably can exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority. [Citations.] . . .

[T]he limitations imposed by our constitutional law upon the action of the governments . . . are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

(*Bixby v. Pierno*, *supra*, 4 Cal. 3d at p. 141.)

That was true in landmark antidiscrimination cases such as *Brown v. Board of Education* and *Perez v. Sharp*. It is all the more here, when the system of checks and balances is being so challenged.

This is not the first time California's electorate has taken a step backward from state nondiscrimination, to write official discrimination into our Constitution. Most recently, 1964's Proposition 14 tried to do so. (*Mulkey v. Reitman* (1966) 64 Cal.2d 529 [aff'd (1967) 387 U.S. 369].)

Yet not even Proposition 14 sought to overturn a nondiscrimination ruling of this Court. This appears to be the first time the electorate has tried that, seeking to trump this Court's constitutional power and duty to "say what the law is" on the question of what constitutes unlawful discrimination. This case therefore appears to be unprecedented in its means of presenting the stark question: Who really has the ultimate power to decide the meaning of existing provisions in our Constitution, the judicial branch, or a simple majority of voters?

The answer should be self-evident, once the question is posed.

This Court's observation in *Wallace v. Zinman* (1927) 200 Cal. 585, though made in a different context, seems particularly appropriate here:

We have a state government with three departments, each to check upon the others, and it would be subversive of the very foundation purposes of our government to permit an initiative act of any type to throw out of gear our entire legal mechanism. Our common sense makes us rebel at the suggestion.

(*Id.* at p. 593.)

That, in a nutshell, is what this case is about.

The issues here have far deeper implications for our system of government than the *Marriage Cases* did. But the result must be the same, for the judiciary to preserve its constitutionally mandated role as the final arbiter of our Constitution.

Amicus strongly supports the petitioners in asking this Court to declare that Proposition 8 violates the Separation of Powers Clause, and the revision provisions of Article XVIII.

Respectfully submitted this 13th day of January, 2009.

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DECLARATION OF WORD COUNT

S. Michelle May declares: I am counsel for *amicus curiae* Sac LEGAL in this appeal. My address is 3104 O St. # 245, Sacramento CA 95816.

The length of this brief is 13,975 words under the computation set forth in the Rules of Court, as stated by the word processing software used to prepare the brief, which was prepared in WordPerfect 12.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed this 13th day of January, 2009.

S. Michelle May

DECLARATION OF SERVICE BY MAIL

S. Michelle May declares: I am counsel for *amicus curiae* Sac LEGAL in this appeal. My address is 3104 O St. # 245, Sacramento, California 95816. On January 13, 2009, I served this APPLICATION AND BRIEF AMICUS CURIAE OF SACRAMENTO LAWYERS FOR EQUALITY OF GAYS AND LESBIANS (“SAC LEGAL”) IN SUPPORT OF PETITIONERS by sending copies in the U.S. Mail (first-class or priority), postage paid, to the following.

(For each such counsel, in addition to hard copy service described above, a courtesy email copy with this application and proposed brief attached in .pdf format was sent to counsel’s last known email address. This is done and intended purely as an extra courtesy due to the time constraints in this case, and is not intended to replace rule-based service.)

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