CASE NO. S168066

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBIN TYLER, ET AL.,
Petitioners,

v.

THE STATE OF CALIFORNIA, ET AL.,
Respondents,

DENNIS HOLLINGSWORTH, ET AL.,
Intervenors

APPLICATION TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF

ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS AND
AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, NORTHERN CALIF. CHAPTER

LESLIE ELLEN SHEAR, CFLS*
SBN 072623
16000 Ventura Boulevard, Suite 500
Encino, CA 91436-2755
Telephone: (818) 501-3691
Facsimile: (818) 501-3692
lescfls@earthlink.net

GARRETT C. DAILEY, CFLS*
SBN 076180
2915 McClure St
Oakland, CA 94609
Telephone: (510) 465-3920
Facsimile: (510) 465-7348
garrett@atybriefcase.com

KATHERINE E. STONER, CFLS*
SBN 083949
Stoner, Welsh, & Schmidt
413 Forest Ave.
Pacific Grove, CA 93950
Telephone: (831) 373-1993
Facsimile: (831) 373-1492
kes@stonerwelsh.com

SHANE R. FORD, CFLS*
SBN 172706
500 12th Street, Suite 250
Oakland, CA 94607
Telephone: (510) 835-9000
Facsimile: (510) 835-9090
sford@fordfamilylaw.com

Attorneys for *Amici Curiae* ACFLS and AAML Northern California

*State Bar of California, Board of Legal Specialization

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Oakland, CA 94607
Telephone: (510) 835-9000
Facsimile: (510) 835-9090
sford@fordfamilylaw.com

Attorneys for *Amici Curiae* ACFLS and AAML Northern California

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

The Association of Certified Family Law Specialists (ACFLS), and the Northern California Chapter of the American Academy of Matrimonial Lawyers (AAML) request leave to file the accompanying *amici curiae* brief per Cal. Rules of Court, rule 8.520(f).

No individual or organization other than ACFLS made any monetary contribution intended to fund the preparation or submission of the brief in the pending proceeding.

Leslie Ellen Shear (ACFLS president-elect) authored the brief, with suggestions and comments from Garrett C. Dailey, Katherine E. Stoner, Shane F. Ford, Joseph Bell (ACFLS president), Dawn Gray (ACFLS *amicus* committee chair), Mary-Lynne Fisher, Camille Hemmer and brief comments on early drafts from others.

ACFLS, a non-profit corporation, was founded in 1980 by Stephen Adams, following certification of the first group of California Family Law Specialists under the "pilot" program that became the State Bar of California Board of Legal Specialization. ACFLS membership includes approximately 550 of California's Certified Family Law Specialists.

It is the mission of ACFLS to promote and preserve the family law specialty. To that end, the Association seeks to:

1. Advance the knowledge of Family Law Specialists;
2. Monitor legislation and proposals affecting the field of family law;
3. Promote and encourage ethical practice among members of the bar and their clients; and
4. Promote the specialty to the public and the family law bar.

ACFLS monitors administration by the State Bar of the specialization program; monitors proposed legislation and court rules; promotes family law practice skills, presents advanced educational programs for the bar, judiciary and public; and submits *amicus* briefs in family law matters before this Court and the intermediate appellate courts. Every family law bench officer in California receives the ACFLS newsletter, which has been cited by the Court of Appeal. ACFLS members include many of the most experienced and expert family lawyers in California. ACFLS members represent parents and children in family law proceedings, serve as judges *pro tem* in family courts, and volunteer as courthouse mediators and settlement officers. ACFLS maintains an active list-serv to encourage consultation, sharing of expertise, and support between our members.

Founded in 1962 with a mission to elevate the standards of matrimonial law and to preserve the welfare of the family and society, the American Academy of Matrimonial Lawyers is a national not-for-profit membership association comprised of the nation's leading matrimonial attorneys from 46 states and the District of Columbia.

Fellows of the Academy specialize in all issues related to marriage, divorce, annulment, matters affecting unmarried cohabitants, child custody and visitation and property distribution, alimony and support. Each fellow must demonstrate by personal conduct a professional and ethical commitment to his or her clients and to society at large in resolving what are often intensely emotional and complex family problems. By demonstrating the highest standards of matrimonial practice themselves, Fellows of the Academy have set the standard for the rest of the matrimonial bar and have helped improve the quality of family law practice throughout the country for attorneys and litigants alike.

The Northern California chapter is one of 33 chapters in 24 states that conduct local continuing education programs, participate in the legislative process and engage in a variety of other activities to serve the public and improve the practice of matrimonial law.

AAML's Northern California Chapter was founded to bring together the top attorneys in the fields of matrimonial law: including divorce, prenuptial agreements, legal separation, annulment, custody, property valuation, support and the rights of domestic partners and unmarried cohabitors. The 1500 AAML Fellows across the United States are generally recognized by judges and attorneys as pre-eminent family law practitioners with a high level of knowledge, skill and integrity. Only 60 Northern California family lawyers have met the stringent admission requirements of the national organization required to become fellows of the Northern California chapter.

Like all Californians, ACFLS and AAML members have professional and personal interests in the protection of fundamental guarantees of liberty set forth in our state constitution, particularly as applied to marital law. ACFLS, AAML and our members have a interest in preservation of the power of the judicial branch of California government to protect fundamental rights.

ACFLS and AAML members and our clients have a vital interest in the institution of civil marriage and the incidents of civil marriage in California. Our professional work keeps us acutely aware of the complex bundle of legal benefits and duties conferred by civil marriage. Family law practice gives us a unique perspective on the role that civil marriage plays in our state, and the potential impact of Proposition 8 on California families, businesses and institutions. California's family lawyers help our residents protect their marital rights and meet their marital responsibilities. If Proposition 8 is

applied retroactively, California's family lawyers will play a huge role in helping our residents, institutions and business entities try to navigate and mitigate the aftermath of retroactive application of Proposition 8.

ACFLS and AAML members have vital personal interests as well. Our personal relationships keep us acutely aware of the extent to which civil marriage is more than a bundle of concrete legal benefits and duties. A number of ACFLS members (including one of our board members), our colleagues in the family law community, our bench officers, and our friends and family members married their same-sex partners in the four months after this Courts decision and before the election. Proposition 8 forced other ACFLS members, colleagues, friends and family members to cancel or suspend marriage plans. (We did not survey AAML, but there is considerable overlap of membership between the two groups.)

When ACFLS surveyed our members by list-serv, we learned that many of them had exercised the rights this Court recognized in *The Marriage Cases*. Some celebrated privately and others publicly. Many described the participation of children and grandchildren in ceremonies that celebrated the marriages of partners who had functioned as families for decades, without the honor that the term marriage carries.

One member wrote,

> I married my partner of 24 years on [date] and the ability to marry was certainly a civil rights issue and a legitimacy issue to us and our 21-year-old daughter. I had not realized how much the right to marry meant until I was able to do so. It amazed me how complacently I had accepted second-class citizenship on this issue.

Another member who married just before the election had not disclosed sexual orientation to professional colleagues over many decades of family law practice, but volunteered to be identified by name in this brief. These members remind us of the burdens of the social stigma and diminished dignity that this Court recognizes must inevitably flow from the use of different words for relationships that carry an almost identical bundle of concrete legal rights and responsibilities.

Respectfully submitted,

Leslie Ellen Shear, CFLS
Attorney for A*mici* C*uriae* ACFLS and AAML

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I. *Introduction: Alienating inalienable rights*

This Court should:

- **Exercise judicial review to resolve a conflict between provisions of the California Constitution's Declaration of Rights;**
- **Invalidate Cal. Constitution article I, section 7.5 as inconsistent with the guarantees of liberty contained in article I, section 1 and section 7;**
- **Decline to give section 7.5 retroactive effect if it upholds Proposition 8.**

> Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, 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.
>
> H*urtado v. California* (1884) 110 U.S. 516, 536

> Courts are the filter through which all laws must pass, whether enacted by representative government or by the people directly. [FN] Unlike the legislative process, in which judicial review is but the last of many redundant institutional checks and balances, in the initiative process it is the only effective institutional check. In fact the courts play an extremely active and important role in checking and countering the otherwise unfiltered majoritarian initiative process.
>
> Kenneth P. Miller (2001) *Constraining Populism: The Real Challenge of Initiative Reform*, 41 Santa Clara L. Rev. 1037, 1059-1060

These cases challenging the newly-adopted article I, section 7.5 of the California Constitution require this Court to answer three

broad questions, that will shape the future relationship between articles II and VI of our state Constitution:

1. May the voters amend our state Constitution to exclude one segment of the populace from article I fundamental and inalienable civil rights established by that Constitution?

2. What is the scope of judicial review of state constitutional amendments adopted through ballot initiative?

3. May a constitutional amendment nullify specific article I, section 1 and 7 fundamental rights and legal status legally exercised and acquired before the amendment's adoption?

> The rights set forth in California's Declaration of Rights are fundamental and should be permanent. A number of commentators have emphasized the difference between constitutions and statutory law. Justice Cardozo wrote, "[a] constitution states or ought to state not rules for the passing hour but principles for an expanding future." [FN] A constitution should "set down fundamental and enduring first principles" [FN] in general terms. Former Chief Justice Traynor of the California Supreme Court, wrote that if a constitution "is to retain respect it must be free from popular whim and caprice which would make of it a mere statute." [FN]
>
> With the increased use of the voter initiative, some state constitutions are no more than super-statutes.
>
> Rachel A. Van Cleave (1993) A *Constitution in Conflict*: T*he* D*octrine of* I*ndependent* S*tate* G*rounds and the* V*oter* I*nitiative in C*a*lifornia*, 21 Hastings Const. L.Q. 95, 98 -99

In this brief submitted on behalf of many of the state's most experienced and expert family lawyers, we discuss (1.) the invalidity of Proposition 8's stealth repeal of inalienable rights, and (2.) the real-world consequences, and destabilizing uncertainties that will reverberate throughout California's society, courts, and economy if this Court determines to give Proposition 8 any retroactive effect. We incorporate discussion of the separation of powers issue in the discussion of the standard for repealing fundamental and inalienable

state constitutional rights. We express no opinion about the issue of revision versus amendment.[1]

The Attorney General urges this Court to hold that selective exclusion of a class from the inalienable rights protections established by our constitution requires a compelling state interest. We agree. The Attorney General urges this Court to find that section 7.5's ban on recognition of marriages that were valid when formed is unconstitutional under the established standards for giving laws retroactive effect. We agree.

Newly adopted section 7.5 appended to our Constitution's article I Declaration of Rights is directly at odds with the unamended article I due-process, equal-protection and privacy guarantees that this Court has recognized confer unalienable rights. That conflict requires this Court to exercise judicial review over the substance of the amendment to resolve the conflict. Section 7.5 simply cannot be harmonized with sections 1 and 7.

Section 7.5 states, "Only marriage between a man and a woman is valid or recognized in California." Proposition 8 grafted the language of former Fam. Code §308.5 onto article I of the California

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[1] We do share Petitioners' concerns about the risks of piecemeal changes to California's Declaration of Rights. Van Cleave, observes that a stronger qualitative standard for distinguishing revisions from amendments would help avoid the piecemeal excision of rights by initiative, "The California Supreme Court should impose a more exacting qualitative standard to determine whether an initiative has revised, rather than amended, provisions in the Declaration of Rights. There is nothing in the courts reasoning in R*aven* to prevent the voters in future initiatives from enacting piecemeal changes to provisions in the Declaration of Rights .... " Rachel A. Van Cleave (1993) A C*onstitution in Conflict*: ..., *supra*, at 21 Hastings Const. L.Q. 134

Van Cleave warns that California should not "permit the voters to slowly chip away at the Declaration of Rights independence by voting for specific exceptions to various sections over multiple elections, rather than adopting one measure to accomplish that goal."

Constitution, without repealing or amending sections 1 and 7. Last May, this Court voided former Fam. Code §308.5 as violative of the due-process, equal-protection, and privacy guarantees of article I, sections 1 and 7. *The Marriage Cases* (2008) 43 Cal.4th 757. If this unconstitutional statute acquired constitutional validity when reincarnated in the form of a constitutional amendment, it operates to except recognition of marriage between same-sex partners from the established equal-protection, due-process, and privacy guarantees the people have established in sections 1 and 7, while not amending those sections.

The privileges and immunities clause of the California Constitution provides in pertinent part, "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens...." (Cal. Const., art. I, §7, subd. (b).) Section 7.5 cannot coexist with section 7(b). If section 7.5 is valid, then California grants the privilege of marriage to the partner of one's choice to everyone except those who choose a same-sex spouse. The privileges and immunities clause's prohibition of differential treatment admits no exceptions.

For more than half a century, California has recognized that civil marriage to the person of one's choice is an inalienable civil right. *Perez v. Sharp* (1948) 32 Cal.2d 711. More recently, this Court recognized that classification by sexual orientation requires a compelling state interest. *The Marriage Cases*, *supra*, 43 Cal.4th 784. The voters neither repealed nor amended the equal-protection, due-process, and privacy clauses of our Constitution that compelled those decisions of this Court. Instead, they added a new section prohibiting state recognition of a single minority group's exercise of those rights.

As a result, this is not a case about marriage between persons of the same sex, even though section 7.5 imperils thousands of those existing marriages and the future exercise of marriage equality rights by same-sex partners. This is a case about resolution of conflicts between the provisions of our Constitution establishing inalienable liberty guarantees, and provisions exempting a group or a form of exercise of those guarantees from their protection.

We find ourselves at a very scary moment in California's constitutional history. This Court's holding must be strong enough to protect the people's established and inalienable rights even if future voters try to amend our Constitution to create arbitrary or discriminatory exceptions to civil liberties based upon race, gender, religion, hair color, being born in an odd-numbered year, or any other classification unsupported by a compelling state interest. If this Court may not subject constitutional amendments to constitutional scrutiny, any amendment creating an exception to fundamental rights must be enforced – no matter how inconsistent, arbitrary, irrational or discriminatory the exception may be.

All acts of California government, direct and indirect, are the collective actions of California's people. Exercises of direct democracy do not have any special legal status. The people have not revised the Constitution to exempt amendments adopted by the voters from judicial review. The people have not revised the Constitution to repeal the fundamental guarantees of liberty adopted by the people in the sections of our Declaration of Rights guaranteeing due process, equal protection and privacy. Nothing in the Constitution's structure exempts constitutional amendments from constitutional scrutiny.

Interveners direct this Court to "bow down" to the will of the people as expressed through the initiative process. They assert that this Court has no power of judicial review of constitutional amendments. In other words, this litigation over Proposition 8 is a Trojan horse that opens to reveal a doctrine that will permanently diminish the California judicial system as the guardian of the people's individual rights and liberties.[2] Under Interveners' paradigm, government and the people are opponents, and the people act to protect themselves from government. In a democracy, the government is the agent of the people, not the opponent of the people.

If Interveners succeed, this Court will be fatally weakened -- any measure that this Court deems unconstitutional could be reinvented as an amendment to the constitution, and thus immunized from judicial review. There could be no greater threat to this Court itself. By distracting the public with the controversy over marriage equality rights for same-sex partners, Proposition 8's proponents divert attention from the greater threat -- that they will lure this Court into adopting a doctrine that weakens its ability to protect minorities from the majority.

Judicial review is a vital component of the checks and balances that the people have established in our Constitution to ensure the strength and stability of our government.

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[2] This appears to be why Interveners did not find it worth their while to discuss in any detail what state interests Proposition 8 furthers, or to put human faces on the families who will lose both status and rights if the amendment is permitted to bar recognition of marriages that were valid when formed. Interveners appear less concerned with marriage rights than with the opportunity to weaken California's judicial branch by making it "bow down" whenever a new scheme is marketed to the voters by private interest groups with a sufficient budget.

> 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. (See Cal. Const., arts. IV, V and VI; The Federalist, Nos. 47, 48 (1788).) (6)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. (*Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 175-178 [2 L.Ed. 60]; *People v. Wells* (1852) 2 Cal. 198, 213-214; see *Myers v. United States* (1926) 272 U.S. 52, 293 [71 L.Ed. 160, 242, 47 S.Ct. 21] (dissenting opn. of Brandeis, J.); Rostow, *The Democratic Character of Judicial Review* (1952) 66 Harv.L.Rev. 193, 199, 202-204.) 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. (See Cardozo, *The Nature of the Judicial Process* (1921) 92-94; Hand, *The Contribution of an Independent Judiciary to Civilization in The Spirit of Liberty* (1959) 118-126.) [FN]
>
> *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141

Although this Court would always prefer to resolve issues on the narrowest procedural grounds, substantive judicial review is essential to resolve direct conflicts between sections of our constitution. The people, through their elected attorney general, assert that this Court has a duty to exercise judicial review when such clashes between expressions of the will of the people occur. We agree.

We further urge this Court to hold that the language of any ballot measure purporting to repeal article I, sections 1 and 7 guarantees of individual liberty must expressly identify the existing constitutional guarantee of individual liberty to be repealed. Where the law has recognized a right to be "inalienable," it cannot tolerate any ambiguity or uncertainty in construing the voters' intent to authorize alienation of that right.

If this Court finds Proposition 8 valid, it should not give section 7.5 retroactive effect to alienate the vested rights of thousands of families and those who interact with them. Retroactive application of sec. 7.5 will force involuntary annulment or dissolution of approximately 18,000+ California validly contracted marriages between same-sex spouses[3], and prohibit California from recognizing the marriages of same-sex couples validly celebrated in other states and nations.

More than 36,000 Californians await the decision of this Court as to whether their marriages are valid. Many more Californians await the decision of this Court as to whether they will be able to marry the partners of their choice.

Although framed in the present tense, section 7.5 retroactively "question[s] the legitimacy of existing families heretofore created in this state through established administrative and judicial procedures[4]" Children who attended their parents' and grandparents' weddings are left wondering if their parents and grandparents are "really" married.

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[3] The Williams Institute at the UCLA School of Law estimates that approximately 18,000 California marriages between same-sex couples took place after the effective date of *The Marriage Cases* decision, and before adoption of Proposition 8. [http://www.law.ucla.edu/williamsinstitute/press/18000GayCouplesMarriedInCalifornia.html]

The Williams Institute also reported what it characterized as a conservative estimate of 11,000 marriages between same-sex couples performed in California in the first three months after *The Marriage Cases*. The report observed, "California marriage licenses do not collect information about the sex of the spouses. So it is virtually impossible to ascertain exact counts of the number of same-sex couples who have married." The Williams Institute (October 2008), *Research Note: Same-Sex Marriage in California* [http://www.law.ucla.edu/williamsinstitute/home.html]

[4] *Sharon S. v. Super. Ct.* (*Annette F.*) (2003) 31 Cal.4th 417, 441.

While Interveners dismiss the real world impact of section 7.5's retroactive application with two brief paragraphs[5], California's family law bar and bench must address the complex practical consequences and uncertainties family-by-family, and issue-by-issue over a period of many years. California families, businesses, institutions and taxpayers will have to pay the cost.

Each civil marriage is positioned at the center of a web of legal, social, and psychological relationships. The rights, obligations, and incidents of each of those relationships turn on the validity of the marriage. The work of family lawyers, and the huge body of California family law jurisprudence, arise from the complexity of those relationships. Family lawyers are reminded every day that the legal status of marriage affects everything from parentage to tax status, from eligibility for health insurance to inheritance rights, and from property ownership to liability for debts. Family lawyers also witness the profound impact of the social status of marriage on how family members view themselves, and how others in the society view and treat families. For parties who profess to speak for the people, they demonstrate little concern about what happens to real people.

> Meanwhile, the initiative process achieved total domination of the California political scene. Every discussion or debate of public policy ... is haunted by the specter of an initiative to "settle" the debate. More often, initiatives create more questions than they resolve, and those questions then take another initiative to provide answers. The initiative has thus become a fourth branch of government, with its own industrial complex available to draft and qualify measures on a recurring basis. Like the carnivorous plant in the movie Little Shop of Horrors, [FN] the initiative industry opens its mouth in anticipation of every election, says "feed me!," and then grows larger. Each time Californians go to the polls, they expect to encounter a dozen ballot propositions, to determine questions as basic

[5] Interveners' Opposition Brief, pp. 41-42

> as who should go to jail, who should be executed, who should pay taxes and how much they should pay, and who can marry whom. Initiative contests become the political battleground where trial lawyers shoot it out with insurance companies, prosecutors face off against criminal defense lawyers, the religious right confronts the gay rights movement, and environmentalists take on polluters.
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> Gerald F. Uelmen (2001) H*andling* H*ot* P*otatoes*: J*udicial* R*eview of* C*alifornia* I*nitiatives* A*fter* S*enate v*. J*ones* (2001) 41 Santa Clara L. Rev. 999, 999 -1000

The Proposition 8 cases are certainly a sack of hot potatoes — ones this Court cannot dodge. The initiative process must be subject to the checks and balances of judicial review because it is the least deliberative lawmaking process, subject to the fewest inherent checks and balances, and thus the most likely to cause mischief. There can be no fourth branch of government, immune from the checks and balances that ensure stable government. The Attorney General's approach encourages judicial restraint by employing "fundamental rights" and "compelling state interest" standards. Most amendments by initiative will survive such scrutiny, but Proposition 8 cannot.

II. ***"A right is not something that somebody gives you; it is something that nobody can take away."***

- **Constitutional amendments adopted by initiative are subject to substantive judicial review;**
- **Amendments creating exceptions to inalienable constitutional rights are only valid where a compelling state interest supports the exception;**
- **A ballot measure that does not expressly state that it repeals established article I rights may not have the effect of indirectly repealing those rights.**

Under our Constitution's structure, the judicial branch must exercise the same power of judicial review over constitutional amendments adopted through direct democracy that it does over any other direct or representative lawmaking. The stability of our government requires that our courts have the power to exercise judicial review over the substantive provisions of constitutional amendments adopted through the initiative process. Initiatives are subject to the same constitutional analysis as statutes. *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540.

We recognize that the court does not pass upon the wisdom, expediency, or policy of enactments by the voters any more than it would enactments by the Legislature. *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016. When this Court invalidated Fam. Code §308.5, it did so because a prohibition on recognition of same-sex marriage violates the guarantees of the California Constitution's Declaration of Rights. Inserting the same unconstitutional prohibition into the Declaration of Rights must not make any difference – the prohibition remains unconstitutional no matter where it appears.

Last May this Court held,

> ... the constitutionally based right to marry properly must be understood to encompass the core set of basic substantive legal rights and attributes traditionally associated with marriage that are so integral to an individuals liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process."
>
> *The Marriage Cases*, *supra*, 43 Cal.4th 781

This Court further held that sexual orientation is a suspect classification and that laws based upon that classification require a compelling state interest for validity. *Id.* at 43 Cal.4th 784. Those holdings apply the privacy, equal-protection, and substantive due-process guarantees that we, the people, have included in our state constitution. This Court recognized that the individual's right to civil marriage to a chosen partner is embodied in the liberty guarantees of our state Constitution established by the people.

Amici agree with the Attorney General that the fundamental state constitutional rights of members of a suspect class may not be abrogated by constitutional amendment without a showing of a compelling state interest. *Amici* further argue that a ballot measure that does not expressly state that it is repealing established rights may not have the effect of indirectly doing so. Neither the text of Proposition 8 nor the ballot materials contained any mention of an express intent to repeal existing constitutional guarantees. In fact, voters were told that Proposition 8 would not take away any rights. (Voter Information Guide, Gen. Elec., (Nov. 4, 2008) Rebuttal to Argument Against Prop. 8, p. 57; see Interveners' RJN at Exh. 6.) The record does not support a finding that the voters intended to abrogate fundamental rights.

The approach to judicial review of constitutional amendments proposed by the people through our Attorney General balances respect for the both recent and historical expressions of the will of the people as expressed through the adoption, revision and amendment of our Constitution by applying a compelling state interest test. Unless this Court has the power to void amendments that would deprive some of us of established fundamental constitutional rights where there is no compelling state interest to do so, constitutional protections are ephemeral rather than the expression of enduring principles applied to contemporary circumstances.

The voters may not eliminate constitutionally established core liberty rights by initiative without a compelling state interest to do so, any more than Californians may do so through our elected representatives. We need judicial review to protect our liberties. This law's transmutation from statute to amendment (using the identical language that this Court found unconstitutional last year) does not support use of different principles or standards of judicial review for constitutionality.

Our core system of checks and balances is essential to the stability of our society. Judicial review checks and balances all acts of the people expressed through the voters, or through their elected representatives. In turn, our Constitution itself, the acts of the voters, and the power of the voters to elect or retain judges all provide important constraints to excesses of judicial action.

The promise of *inalienable* rights is meaningless, if those rights may be readily discarded without a compelling state interest. Interveners fail to articulate any state interest served by section 7.5 in either of their briefs. The people and the state can have no compelling interest in denying gay and lesbian families equal dignity.

> Clearly, numerous benefits (and burdens) accompany a state's conferral of legal-marriage status. [FN] Yet the reasons for denying the status of legal marriage to same-sex couples are unclear or, if considered clear, then are controversial. One is left with the unmistakable impression that majoritarian morality, bolstered by conservative religious tenets and coupled with a widespread homophobia in the general population, furnishes the main contemporary reason for outlawing same-sex marriage.
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> Amy Doherty (2000) *Constitutional Methodology and Same-Sex Marriage*, 11 J. Contemp. Legal Issues 110, 111

Section 7.5 embodies either a preference to reserve the term "marriage" to heterosexuals that is unrelated to any identifiable social policy, or the extension of religious marriage doctrines to the civil sphere. The first rationale is not a compelling state interest, and the latter is barred by article I, section 4 of the California Constitution. Dougherty observes that a policy claim that marriage exists for procreation must fail, since no state limits marriage to those who are able to reproduce, and adoption and assisted reproduction enable same-sex spouses to enjoy parenthood. Consequently, she concludes,

> [T]hat the State's real interest in prohibiting same-sex marriage is similar to its interest in prohibiting interracial marriage. To decree that a couple who wishes to marry may do so but only if they represent opposite sexes seems perfectly analogous, and no less illegitimate, than to decree that a couple who wishes to marry may do so but only if they are members of the same race. That interest, to preserve supposed majoritarian moral and traditional — indeed, discriminatory -- values, can no longer be considered a legitimate interest today.
>
> *Id.* at 11 J. Contemp. Legal Issues 113

Interveners ask this Court to find that an initiative amending the California Constitution is immune from judicial review. If one takes Interveners' argument about the absolute sovereignty of the people's exercise of the initiative process literally, this Court would have no power to review and void an initiative that amended the state

Constitution to deny redheads the right to vote in even-numbered years, or an amendment that exempts those who live North of Santa Barbara from taxation.

Interveners' discourse about natural law is a red herring.[6] The fundamental rights protected by California's Constitution gained their status as inalienable rights of Californians through the republican processes established in our Constitution. They are now part of our positive law as reflected in the text of article I, section 1, and related provisions.

Acting through our government and our courts, we Californians have determined that the most fundamental of the article I rights we have adopted in our Constitution are *inalienable* rights. "Inalienable" means "not liable to being annulled or voided or undone." (www.visualthesaurus.com, accessed January 13, 2009).[7]

As Eleanor Roosevelt explained, "a right is not something that somebody gives you; it is something that nobody can take away." I*d*. Roosevelt teaches us, "It is not that you set the individual apart from society but that you recognize in any society that the individual must have rights that are guarded." New York Times (February 4, 1947) And she used her syndicated newspaper column to wonder, "Will people ever be wise enough to refuse to ... take away the freedom of other people? (October 16 1939)

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[6] Of course, the principle of the people's sovereignty itself expressed in the nation's founding documents derives from eighteenth century natural law philosophy.

[7] Black's Law dictionary defines "inalienable right" as "a right that cannot be transferred or surrendered; esp., a natural right such as the right to own property. – also termed *inherent right*. Black's Law Dict. (8th Ed.) p. 1348, col. 1.

The constitutional processes by which inalienable rights became part of the positive law include, but are not limited to, direct democracy.

Interveners discuss the Court as if it were an independent entity opposed to the people, rather than the people's judicial branch charged with the duty to secure and safeguard their rights and liberties. Judicial review is a critical component of democracy's checks and balances -- the means by which the people guard and protect their established rights and liberties. This Court's refusal to protect minority civil rights in this instance would cause considerable injury to the stature and respect of the Court and to the state's judicial system.

The authorities cited by Interveners do not require the holding Interveners advocate. The fundamental right to marriage, and the fundamental right not to suffer discrimination based on sexual orientation differ markedly from the criminal procedure right at-issue in B*owens v*. S*uperior C*o*urt* (1991) 1 Cal.4th 36. Because the classification of criminal defendants (those indicted by Grand Jury) who lost the right to a preliminary hearing was not suspect, it required no compelling state interest. I*d*., at p. 42. By contrast, this Court has recognized that the right to marry the partner of one's choice is fundamental and inalienable, as is the right to equal treatment by the state regardless of sexual orientation. Those two inalienable rights are inextricably interlinked, just as they are in the context of race. Their abrogation in either setting requires a compelling state interest.

Interveners also direct the Court to P*eople v*. V*alentine* (1986) 42 Cal.3d 170, holding that a ballot initiative amending the Constitution nullified an earlier appellate decision construing the California Evidence Code. V*alentine* has no relevance to an initiative purporting

to selectively repeal fundamental constitutional rights. In *dicta*, this Court observed (I*d*, 42 Cal.3d 181), "The people may adopt constitutional amendments which define the scope of existing state constitutional protections." That observation does not mean that amendments that purport to repeal fundamental rights are not subject to strict scrutiny, any more than it means that the people may adopt amendments to California's Constitution that violate the federal constitution. Nor does it restrict this Court's power to expand upon that holding, when asked to apply it.

Article I, section 26 of our Constitution provides, "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." This Court can neither ignore nor subordinate the mandatory constitutional guarantees of equal protection, substantive due process, and privacy, or the established construction of those guarantees to protect the individual's right to choose a spouse. Nothing in the language of the amendment itself, nor in the ballot materials, supports a construction of Proposition 8 to repeal existing constitutional rights.

Like a statutory scheme, provisions of our Constitution may not be interpreted in isolation, but must be construed in the context of the entirety in order to achieve harmony among the parts. See R*obert* L. *v*. S*uperior Court* (2003) 30 Cal.4th 894, 903. In fact, it is impossible to honor article I, section 26, without applying that rule of construction. There is no way to construe section 7.5 to work harmoniously with the long-established fundamental rights protections of our constitution. Nothing in the language of the proposition itself, or its history supports construing it to repeal fundamental established constitutional rights.

Interveners used the ballot materials to tell Californians that their votes for Proposition 8 would not take away any rights. (Voter Information Guide, Gen. Elec., (Nov. 4, 2008) Rebuttal to Argument Against Prop. 8, p. 57; see Interveners RJN at Exh. 6.)[8] Now Interveners claim to defend the will of the voters by pushing this Court to declare the marriages void, stripping those individuals and those who relied on their marital status of the rights that flow from civil marriage. This Court may not conflate Interveners' intent with that of the voters. This Court recently held that,

> ... [T]he "motive or purpose of the drafters of a statute is not relevant to its construction, absent reason to conclude that the body which adopted the statute was aware of that purpose and believed the language of the proposal would accomplish it. [Citations.] The opinion of drafters or legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent. [Citations.]"
>
> *Robert L. v. Superior Court, supra*, 30 Cal.4th 904, citing *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm.* (1990) 51 Cal.3d 744, 764-765, fn. 10

One commentator observes, "Electoral ratification of constitutional proposals ... guarantees only the sovereignty of the electorate, not the sovereignty of the people." Michael G. Colantuono (1987) *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change* 75 Cal. L. Rev. 1473, 1502. Colantuono concludes,

> In sum, the evidence collected in studies of voting behavior suggests that even those who do vote may be incapable of expressing informed and rational consent to constitutional change. Log-rolling, low levels of electoral participation, and limited voter capacity all suggest that the idealized view of

[8] The Court may test its view of the voter's intent by reference to ballot materials. *Robert L. v. Superior Court, supra*, 30 Cal.4th 894, 904 citing *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 560.

> electoral ratification as the voice of the popular sovereign is incorrect.
>
> *Id.*, at 75 Cal. L. Rev. 1506

The record does not establish that the voters who adopted Proposition 8 intended to abrogate any rights, much less fundamental rights. In construing sec. 7.5, this Court should look to the proponents' failure to mention repeal of rights in the text of the amendment itself, coupled with their representations in the ballot materials that no rights would be lost, and conclude that the voters did not think adoption of Proposition 8 would abrogate existing rights.

To the extent that this Court agrees with Interveners that the people may selectively repeal established constitutional rights, surely the record must manifest their unequivocal intent to do so. This Court should hold that an amendment that repeals established fundamental constitutional rights must expressly state an intent to repeal those rights.

Evidently, the proponents of this initiative claimed that no rights would be lost because they disagreed with this Court's recognition of equal dignity as a right. *The Marriage Cases*, *supra*, 43 Cal. 4th 757, 823. If Proposition 8 is enforceable, the right to equal dignity will be lost. If Proposition 8 is retroactively enforceable, innumerable concrete rights for 36,000+ people who married same sex partners in California when it was legal to do so will also be lost.

Because Proposition 8 operates to eliminate the right to marry the spouse of one's choice only if that person is of the same sex, it cannot co-exist with the guarantees of article I, sections 1 and 7 to equal protection, due process, and privacy. If section 7.5 is immune from judicial scrutiny, the people cannot protect our rights under sections 1 and 7 against the new section's counterweight.

An inconsistent constitution is no constitution at all. Without meaningful judicial review, amendments like this one transmute the highest law of our state to an inconsistent and internally contradictory mishmash.

One scholar recently explained that the "bulwark of judicial review" is necessary to prevent the use of the initiative process to endanger individual rights and safeguards or undermine the independence of state courts,

> A recourse to direct democracy, regardless of the immediate provocation or remedial orientation, ought not to be taken as a roving commission to dilute essential services or revenue sources, to endanger individual rights or safeguards, or to undermine the independence of state courts. With respect to the latter, there can be no general warrant to invade established spheres of activity or to reverse doctrinal pronouncements. Courts must remain respected expositors of constitutions and statutes. Attempts to substitute ephemeral popular mandates for carefully devised precedents may prove to be counterproductive and may encourage negative reactions once initial passions have subsided.
>
> ...
>
> Viewed on an even broader, more open-ended canvas, assessing the impact and consequences of initiative and referendum, the travails of democracy itself must be taken into account and carefully weighed. More than 170 years ago, Alexis de Tocqueville, in his much acclaimed Democracy in America, warned of the dangers of unlimited popular control and the effects of the aberrations of democracy on liberty and the rights of minorities. [FN] It was Tocqueville who is said to have coined the phrase, "tyranny of the majority," [FN] and to have reminded his readers of its possibly dire outcomes. [FN]
>
> Fortunately, American versions of initiative and referendum, albeit outgrowths of European ventures, have been restrained by a constitutional system with built-in safeguards. The nation has been protected by such bulwarks as judicial review and the continuing leverage of state legislatures and gubernatorial intervention. Because of these mechanisms, initiative and referendum have been accepted and, at times, have even flourished as significant adjuncts in the overall governmental scheme.
>
> Stanley H. Friedelbaum (2007) *Initiative and Referendum: The Trials of Direct Democracy*, 70 Alb. L. Rev. 1003, 1032-1033

Friedelbaum warns of particular risks arising from circumstances like those presented by Proposition 8,

> More pointedly, both state and local egalitarian efforts may be thwarted, particularly when unpopular minorities seem to be favored by legislative bodies. For example, it was only the intervention of courts, and ultimately the Supreme Court, that deterred a wave of popularly driven moves to undo the protection of those pursuing "deviant" sexual practices. [FN] As recent developments suggest, major exercises of power by initiative and referendum require circumspection if the devices are to prove to serve as manageable political instruments.
>
> I*d*, at p. 1032

As the Attorney General points out, the right excised from the Constitution may be same-sex civil marriage rights this year, second-parent adoptions by non-married adults next year, and interracial marriage rights in yet another election. If the voters can repeal inalienable rights on a piecemeal basis, the exceptions could soon swallow the rights. If valid, Proposition 8 amends California's constitution to deprive one class of California families membership in the institution of civil marriage. If this Court finds Proposition 8 valid, then it adopts a doctrine that permits alienation of inalienable rights, issue by issue. This Court should find that sec. 7.5 constitutes an invalid attempt to repeal fundamental and inalienable rights.

Direct democracy bypasses the most important protections of other democratic processes. Miller argues that direct democracy is actually the least democratic form of lawmaking, and is thus fraught with the greatest dangers. Kenneth P. Miller (2001) C*onstraining* P*opulism*: *supra*, 41 Santa Clara L. Rev. 1051-1054.

Miller's discussion of the initiative process first observes that, "A well-functioning democratic system not only aggregates preferences, it also provides opportunities for refinement of proposals, informed deliberation, consensus-building, and compromise. A reasonably functional legislature tends to maximize these opportunities, but the initiative process does not. [FN]"

Miller next contrasts "the often slow, careful, iterative, and compromise-oriented nature of legislative action" with what has been called the "battering ram" of the initiative process,

> In order to make major changes quickly, the initiative process substitutes the legislature's elaborate system of checks and balances with much more direct lawmaking. Bypassing checks and balances can in fact help produce major policy breakthroughs in an expedited way, but these benefits come at a cost.
>
> At the "front end" of the policy process, the initiative system has two primary features that undermine democratic values: 1) proponents have absolute control of the framing and drafting of the measure; and 2) measures are fixed and unamendable at an early stage of the process. [FN] Initiative proponents are accountable to no one, [FN] and routinely exclude the measure's opponents and other interested parties from their decisions on how to draft the measure's language. [FN] There are no open meeting laws, public notice requirements, hearings to solicit public input, or other guarantees to give the press and public access to the drafting and editing stages of the initiative policy-making process. Instead, measures simply "appear" in final form at the titling and circulation stage. After they have finished drafting, proponents file the measure with the attorney general's office, which prepares a title and summary, but again no one involved in that process has the power to amend the proposal. Proponents then circulate the measure to gather sufficient signatures to place it on the ballot. At that point, the measure cannot be amended again, even by the proponents, even if it becomes apparent that the measure contains a flaw that should be corrected.
>
> I*d*.

"These characteristics of the initiative process shortchange deliberation and refinement," Miller tells us. He explains,

> By permitting opponents and other interested parties to be excluded from the drafting process, the initiative system limits input regarding the proposed measure's legality and practical implications. The closed process also limits consideration of other, perhaps more optimal, alternatives. In addition, the restrictions on amendment after circulation prevent opportunities to address flaws and refine the measure. As a result, the nature of the initiative lawmaking makes it more likely that the end-product will be seriously flawed. [FN]
>
> Moreover, by limiting the opportunities for opponents and other interested parties to participate in the process, the initiative system makes compromise and consensus-building less necessary than in the legislature. In the initiative process, opponents have no leverage to force amendments or compromise. If the proponents are confident that their proposal can win a simple majority of the electorate, they can ignore their opponents' interests with impunity and instead draft the initiative in a way that most directly serves their own interests. There is no need to build a large consensus in order to win approval of an initiative — 50 percent-plus-one will do, --even if the majority is relatively apathetic and the minority intense. In allowing proponents to eschew compromise and accommodation of competing interests, the initiative process fosters polarization rather than consensus-building. [FN]
>
> Id.

Miller cites studies raising "serious doubt whether voters are capable of making informed decisions regarding initiatives, especially complex ones that have wide-ranging impact." He worries that because voters can only vote "yes" or "no" rather than consider a range of options, initiatives fail to accurately reflect voters' true preferences.

Miller concludes that California's initiative system is far from the epitome of democracy that Interveners describe.

> In sum, it is ironic that initiatives have the reputation of being a more pure form of democracy [FN] when the process undermines democratic opportunities and violates procedural guarantees observed by almost every freely elected legislature in the world. In important ways, direct democracy is less "democratic" than the indirect, representative system. The initiative process could be reformed

> in ways that address some of these procedural concerns. [FN] At present, it is enough to recognize that the initiative system, as it currently operates in California, is not as "democratic" as some claim it to be.
>
> *Id.*

This Court should not adopt Interveners' idealized view of direct democracy, as purer and more worthy of deference than the exercise of representative democracy.

III. ***Retroactive application of a law applies the new law of today to the conduct of yesterday:***

- **Sec. 7.5 is unconstitutional to the extent it bars recognition of existing marriages;**
- **The voters did not intend to take away any rights;**
- **The presumption against retroactivity is not rebutted by unequivocal evidence of voter intent;**
- **Due process prohibits retroactive nullification of marriages valid when performed.**

While Proposition 8 itself is silent on the issue of retroactivity, the ballot argument promised that enactment of the amendment would not strip rights away from Californians. That ballot argument provides clear evidence that the voters did not intend to retroactively invalidate existing marital rights and relationships. No matter what intent might be imputed to the electorate, *amici* agree with our Attorney General that the people's inalienable marriage equality rights guaranteed by our Constitution cannot be repealed retroactively by initiative.

Interveners assert that "a person's interest in the status of marriage, however it be classified, [is] subject to the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy," citing I*n re* M*arriage of* W*alton* (1972) 28 Cal.App.3d 108, 113 (retroactive application of Family Law Act's no-fault grounds for marital dissolution does not constitute an invalid impairment of contract). Interveners' Opposition Brief at p. 36. But they fail to show how section 7.5's "traditional" definition of marriage mandating unequal treatment of families based upon the sexual orientation of the partners furthers the public good, or public

policy. Reservation of a term of honor for family relationships to one segment of the population can further no legitimate public policy goal. This Court has already held that marriage inequality violates the due-process, equal-protection and privacy guarantees of the Constitution's Declaration of Rights.

California law presumes that new laws will only apply prospectively,

> A statute is retroactive if it affects rights, obligations, acts, transactions and conditions performed or existing prior to adoption of the statute and substantially changes the legal effect of those past events. [Citations] There is a strong presumption that statutes are to operate prospectively, absent a clear indication to the contrary. [Citations] This long-established presumption applies particularly to laws creating new obligations, imposing new duties, or exacting new penalties because of past transactions. [Citations] The rationale behind the presumption was succinctly stated by the preeminent author on the subject: "[R]etroactive laws are characterized by want of notice and lack of knowledge of past conditions and [they] disturb feelings of security in past transactions." (2 Sutherland (5th ed. 1993) Statutory Construction, § 41.04, p. 350.) An additional element of the rationale is the fact "that the purpose of a legislative alteration would not often attain significant advancement by application of the amended legislation to transactions which preceded the legislative change." [Citation]
>
> I*n re* M*arriage of* R*euling* (1994) 23 Cal.App.4th 1428, 1439

A law may not be construed to have retroactive effect "unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 980 citing U.S. F*idelity Co. v. Struthers Wells Co.* (1908) 209 U.S. 306, 314.

Ignoring established retroactivity doctrine, Interveners use a trick of grammar to direct our focus to prospective non-recognition of marriages of same-sex spouses rather than retroactive nullification

of those marriages. In fact, the word "retroactive" does not occur in their Opposition Brief, despite this Court's grant of review on the issue of retroactivity. Interveners' use of smoke and mirrors must not divert our eyes from the reality that prospective non-recognition of existing marriages entails retroactive application of a new law of marriage inequality.

Article I, section 7.5 is a retroactive law. Retroactive application of a recently enacted law applies the new law of today to the conduct of yesterday. I*n re Joshua* M. (1998) 66 Cal.App.4th 458, 469, fn. 5. "The critical question is whether a change in the law can be applied retrospectively to create a substantive change in the legal circumstances in which an individual has already placed himself in direct and reasonable reliance on the previously existing state of the law." R*osasco v. Com. on Judicial Performance* (2000) 82 Cal.App.4th 315, 322.

Interveners indirectly assert the "intent of voters" exception to the presumption against retroactivity through their claim the voters intended section 7.5 to bar recognition existing marriages, not just future ones. "Emphasizing the intent of the voters is particularly troubling," Van Cleave tells us, "Where an initiative alters fundamental rights, courts should be especially wary of relying on ambiguous voter intent to justify unnecessarily broad interpretations of the initiative." Rachel A. Van Cleave, A C*onstitution in Conflict ... supra*, at 21 Hastings Const. L.Q. 123.

Retroactive application of section 7.5 would void the marital status and marital rights of thousands of spouses and those who formed legal relationships with those spouses. In addition to the 18,000+ California marriages, section 7.5 may well imperil recognition of valid same-sex marriages performed in other states and countries.

If the Court adopts Interveners views, Proposition 8 will strip the civil incidents, benefits and obligations of marriage from same-sex couples that married in Canada, Sweden, Spain or Massachusetts when they cross our borders. The status of their relationships to one another, their children, their heirs, their employers, the State, their insurers, their debtors, their bankers, and their creditors are all nullified. Remarriage terminates the spousal support obligation of a former spouse. Fam. Code §4337. If that remarriage is subsequently voided by constitutional amendment, is the support obligation reinstated *nunc pro tunc*?

Changes to California's Constitution operate prospectively only, absent unequivocal indication to the contrary. *Rosasco v. Com. on Judicial Performance*, *supra*, at 82 Cal.App.4th 322. No such indication appears in Proposition 8. In fact, the ballot statement reassuring the voters that no rights would be lost is a clear indication that the voters did not intend retroactive application.

Much of California's law governing retroactivity developed out of the laws of marriage. For example, in *Roberts v. Wehmeyer* (1923) 191 Cal. 601, 612, this Court refused to give retroactive effect to a statute expanding married women's community property rights from a mere expectancy interest to a shared management and control because "to provide that the husband must now obtain the consent of his wife to transfer realty acquired at a time when no such limitation was imposed on his right of alienation would deprive him of a vested right."

Times had changed by 1976, when this Court retroactively applied a community property statute replacing a constitutionally infirm law based upon suspect sex-based classifications in *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592 (retroactive application

of statute making treating both husband and wife's post-separation earnings as community property, replacing statute that treated wife's earnings as her separate property). California law had come a long way from R*oberts v*. W*ehmeyer*, recognizing that retroactive application of statutes designed to protect spouses interests fair and equitable marital property rights meets due-process standards. Here the retroactive application of section 7.5 Interveners advocate would take away marital status, and fair and equitable property rights from same-sex spouses.

An inquiry into the retroactive application of a law follows the steps this Court outlined in B*ouquet* when it considered retroactive application of a statute amending marital property law to treat husbands and wives post-separation property rights equally.

Writing for a unanimous court, Justice Tobriner first observed that because the amendment remedied the unfair and potentially unconstitutional gender bias in the prior law, it was reasonable to conclude that the legislature intended the amendment to apply retroactively. By contrast, the new section 7.5 that the voters have added to article I moves California away from fair and equal application of marriage rights law and attempts to reverse this Court's application of constitutional guarantees of marriage equality. We cannot presume from this amendment that the voters even considered the question of retroactivity.

Justice Tobriner's opinion next teaches us that the presumption against retroactive application of new law controls, in the absence of evidence that the enactors intended retroactivity. I*d*. at 16 Cal.3d 591, fn. 6. Interveners have proffered no evidence to support a finding that the voters intended Proposition 8 to apply retroactively. Under B*ouquet*, the absence of evidence of retroactive intent is

determinative. Three decades after this Court decided B*ouquet*, California still disfavors retroactive application of new laws.

> Generally, we may retroactively apply a new statute "only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." [Citation] Even then, "the retrospective application of a statute may be unconstitutional ... if it deprives a person of a vested right without due process of law." [Citation]
>
> I*n re* M*arriage of* M*c*C*lellan* (2005) 130 Cal.App.4th 247, 255

Revisiting B*ouquet* after thirty-two years, as we consider an effort to restrict marriage equality, the reader is struck by the Court's appreciation that justice is served by expanding the reach of a statute that ensured marriage rights equality between the sexes.

The legal standard for determining retroactivity of ballot initiatives is the same as that for any other enactment,

> ... [A]t least in modern times, we have been cautious not to infer the voters or the Legislatures intent on the subject of prospective versus retrospective operation from "vague phrases" [Citation] and "broad, general language" [Citation] in statutes, initiative measures and ballot pamphlets. We have also disapproved statements to the contrary in certain older cases. [Citations]
>
> Accordingly, we will not attempt to infer from the ambiguous general language of Proposition 64 whether the voters intended the measure to apply to pending cases. Instead, we will employ the ordinary presumptions and rules of statutory construction commonly used to decide such matters when a statute is silent.
>
> ... When a statute's application to a given case is challenged as impermissibly retroactive, we typically begin our analysis by reiterating the presumption that statutes operate prospectively absent a clear indication the voters or the Legislature intended otherwise. [Citations] The presumption embodies "'[t]he first rule of construction[, namely,] that legislation must be considered as addressed to the future, not to the past.'"[Citations]
>
> C*alifornians for* D*isability* R*ights v*. M*ervyns*, LLC (2006) 39 Cal.4th 223, 229-230

In B*ouquet*, this Court identified the criteria under which retroactive application of a statute meets due-process requirements, and rebuts the presumption against retroactive application,

> In determining whether a retroactive law contravenes the due process clause, we consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.
>
> I*n re* M*arriage of* B*ouquet*, *supra*, 16 Cal.3d 592

The B*ouquet* factors do not support retroactive application of a ban on civil marriage between same-sex partners. Section 7.5 serves no articulatable state interest. It embodies a voter preference regarding the terminology used for family relationships. Retroactive application of that preference to 18,000 same-sex couples will not alter the respect and social status of heterosexual spouses and their families, who are the intended beneficiaries of the amendment. By contrast, some 36,000+ individuals made significant life changes in reliance on the validity of their California civil marriages. They expected their parentage, property, support, insurance, inheritance and other rights and relationships to be altered by their marital status. Those couples relied upon the holding of this Court in T*he* M*arriage* C*ases* when they married with the expectation that California law conferred the responsibilities and rights of married persons on them. Retroactive application of section 7.5 would profoundly disrupt most aspects of their finances and personal relationships.

This Court declined to retroactively apply a change in community property law requiring a writing to transmute community

property to separate property in I*n re* M*arriage of* B*uol* (1985) 39 Cal.3d 751, 756-757. This Court held,

> Legislative intent, however, is only one prerequisite to retroactive application of a statute. Having identified such intent, it remains for us to determine whether retroactivity is barred by constitutional constraints. We have long held that the retrospective application of a statute may be unconstitutional if it is an *ex post facto* law, if it deprives a person of a vested right without due process of law, or if it impairs the obligation of a contract. [Citations]
>
> Retroactive application ... would operate to deprive Esther of a vested [FN] property right without due process of law. (Cal. Const., art. I, § 7.) At the time of trial, Esther had a vested property interest in the residence as her separate property. The law had long recognized that "separate property ... [might] be converted into community property or vice versa at any time by oral agreement between the spouses. [Citations.]" [Citations]

This Court held that a

> ... literal reading of the statute without due consideration for its practical application to proceedings initiated prior to its effective date, unnecessarily exalts form over substance, substantially impairing vested property rights along the way.
>
> I*d* at p. 758

A literal reading of the use of the present tense in section 7.5 to support retroactive application would similarly exalt form over substance and substantially impair vested property rights. This Court held in B*uol* that laws substantially impairing vested property rights only meet due-process standards where the state has a paramount and compelling interest in effectuating the purposes of the new law. I*d* at p. 761. California simply has no compelling interest in depriving people of vested rights to satisfy a public policy in favor of using different terminology for same-sex and opposite-sex family partnerships. This Court has already held that differential terminology deprives one class of families of equal dignity. Doing so can hardly be termed a compelling public interest.

This Court followed B*uol* in I*n re* M*arriage of* F*abian* (1986) 41 Cal.3d 440, where it declined to retroactively apply a new statute calling for reimbursement of separate property contributions to the acquisition of community property. B*ouquet* is distinguishable from B*uol* and F*abian* because the new law in B*ouquet* furthered marriage equality and equal protection, while the new laws in B*uol* and F*abian* affected all married people equally.

Each marriage follows its own trajectory. If this Court upholds Proposition 8, some same-sex spouses may opt to register as domestic partners, but their registration can have no retroactive effect. During the period when they were neither married nor registered as domestic partners, they may well have taken actions in reliance on their marital status[9], including

a. conceived or given birth to children,
b. used assisted reproduction,
c. entered into contracts,
d. taken title to property as community property,
e. transmuted separate property to community property,
f. incurred financial obligations and debts,
g. obtained domestic violence restraining orders,
h. secured health insurance coverage and benefits (and forfeited others),
i. engaged in estate planning,
j. relied on other benefits of marital status that attach by operation of law,
k. earned retirement benefits,

[9] For actual examples of actions taken by same-sex couples who married in 2008, see Exhibits in support of Reply of City and County of San Francisco, *et al.*

l. brought a wrongful death action, or

m. engaged in state tax planning and paid taxes based upon their marital status.

It is likely that some of the same-sex spouses have died. Some have moved to other jurisdictions, which may or may not recognize same-sex marriage. Some couples that married elsewhere have relocated to California, in reliance on our recognition of their marriages. Some have relied upon a spouse's duty to support them, and others lost spousal support rights as the result of remarriage. No doubt, a few of these newlywed couples have separated, and have no idea whether they should bring marital dissolution proceedings or nullity proceedings.

There is no basis in law to convert marriages to registered domestic partnerships *nunc pro tunc*. Section 7.5 cannot magically transmute 18,000+ marriages into registered domestic partnerships. It contains no language providing that such marriages are to be treated as registered domestic partnerships – it merely bars recognizing any marriage where the spouses share the same gender.

This Court should hold that, to the extent that the state Constitution permits repeal of fundamental rights by initiative, the language of the initiative must explicitly identify the rights repealed. The Constitution cannot permit stealth repeal of article I, section I inalienable rights. This principle applies equally to the constitutional invalidity of Proposition 8 itself, and to nonrecognition of marriages formed before Proposition 8's enactment. Nothing in the language of the amendment, nor in the ballot materials, gave the voter any reason to believe that voting for Proposition 8 would have the effect of selectively repealing inalienable rights, including equal protection and family privacy protections.

As family lawyers, ACFLS members spend our working lives dealing with all of the complex and concrete incidents of civil marriage that Interveners blithely refer to globally, but fail to enumerate. Interveners urge this Court to either "evaluate the remaining substantive rights, benefits, and obligations of same-sex couples who married prior to Proposition 8 on an individual, case-by-cases [sic] basis," or "leave these issues to the Legislature for resolution." Interveners would send the parties to nullified civil marriages to litigate their rights *vis-à-vis* one another and third parties without ground rules in thousands of lawsuits.

Interveners continue to assert that Proposition 8 does not remove any rights. In their January 5, 2009 response, Interveners disingenuously assert (at p. 2),

> ... that what is at stake here is emphatically not a bundle of substantive legal rights being stripped away from a class of individuals. Far from it. Proposition 8 leaves fully intact what this Court recognized as virtually all the legal rights and benefits presently enjoyed by opposite-sex couples. The purpose of this narrow, targeted measure is solely to restore to California law, after a brief hiatus, the ancient and nearly ubiquitous definition of marriage.

In the real world, there is no way in which retroactive application of Proposition 8 can be accomplished without depriving thousands of citizens of their rights, burdening the family and civil courts, and burdening California citizens with unwanted legal expenses. The Court has no magic wand that can convert 18,000 civil marriages to 18,000 registered domestic partnerships, and the language of Proposition 8 clearly does not do so. In fact, the statutory procedures for forming civil marriages and domestic partnerships differ significantly. See Fam. Code §§ 295, 298, 308, 350-426, 500-506, etc., and *Velez v. Smith* (2006) 142 Cal.App.4th 1154.

Moreover, this position flies in the face of this Court's determination in T*he Marriage Cases* that domestic partnership is not an adequate substitute for marriage even if the concrete legal incidents are the same – separate but equal is no more equal when it comes to marriage than it is in education.

Another alternative would be to treat the civil marriage as valid from the date of formation until the date of the amendment. That alternative could well result in the filing of 18,000 involuntary marital dissolution proceedings to sort out the rights and responsibilities of the parties. Interveners urge this court to treat all 18,000 civil marriages as void *ab initio*, and to essentially let the chips fall where they may. This Court is unlikely to share Interveners' callous disregard of the impact of such a ruling on those families and those who had legal relationships with them.

This Court could treat the 18,000 civil marriages as valid, but bar prospective marriages. Such a holding would perpetuate inequality for a generation. The only resolution of this case that leads to a just result is invalidation of sec. 7.5 as incompatible with the other provisions of the Declaration of Rights, and unsupported by compelling state interest.

ACFLS members routinely represent parties to voluntary Family Law Act nullity proceedings – we know how messy a task it is. While Family Code §2254 may protect quasi-marital property rights between the parties to electorally-voided same-sex California civil marriages, their parentage rights, support rights, inheritance rights and their legal relationships with third parties will be left in limbo if this Court adopts Interveners claim that the amendment must be applied retroactively.

The voters clearly did not intend to deprive the parties to existing same-sex civil marriages of the legal rights and responsibilities conferred by marriage. The voters were only interested in limiting use of the word "marriage" to heterosexuals.

In fact, the ballot argument that Interveners provided reassured the voters that no rights would be lost, proclaiming "P*rop*. 8 *will* NOT *take away any other rights or benefits of gay couples*." Voter Information Guide, Gen. Elec., *supra*. (Nov. 4, 2008) Rebuttal to Argument Against Prop. 8, p. 57; see Interveners RJN at Exh. 6.)

Interveners go far beyond the ballot language to urge that all marriages between same-sex couples be voided, and to leave the fall-out, expense and uncertainty from that retroactive nullification to the families themselves, community members, trial courts and the Legislature.

While arguing that this Court must "bow to the will of those whom they serve," [Interveners Opposition Brief, p. 5], Interveners ask this Court to take a position contrary to Interveners' representations to the voters. Interveners contend that thousands of marriages that were valid under California law when formed may not be recognized now, despite Interveners representation to the voters that no rights would be taken away by enactment of Proposition 8. The voters did not believe Proposition 8 would strip rights away from anyone.

This Court should apply the equitable estoppel doctrine and hold that Interveners cannot trifle with the Courts and the voters of California by taking one position in their ballot argument and another position in their brief. Having represented to the voters that "... Prop. 8 will NOT take away any other rights or benefits of gay couples," I*nterveners are estopped from urging this Court to void the marriages, and thereby strip rights away from gay spouses and those who have ties to them*.

See K*ristine* H. *v.* L*isa* R. (2005) 37 Cal.4th 156 (lesbian mother who invoked the pre-birth jurisdiction of the family court to obtain a stipulated judgment establishing herself and her partner as the parents of her unborn child was estopped from challenging the Courts jurisdiction to enter that judgment, and from challenging her partners parenthood).

Retroactive application of Proposition 8 will strip vested rights away from thousands of Californians, and impair the obligations of the contracts they entered into as married people. Similarly, each party to a marriage that was valid at its inception acquired a vested interest in community property, support rights, and the other economic incidents of civil marriage. Their creditors each have a vested interest in recourse against the community property for debts incurred by either partner during these marriages.

Declaring thousands of civil marriages collectively void *ab initio* will require individuals who married in good faith to engage in costly litigation or negotiation of domestic partnership "prenuptial agreements" in a legal environment where there is no predictability or established standards. Interveners' readiness to require these families to bear these costs and cope with such uncertainty where the state has no compelling interest in restricting civil marriage to heterosexuals shows a stunning disregard for their neighbors, and for the economic stability of families. Moreover, the last thing our overburdened and drastically underfunded family law courts need, as the State government is making drastic budget cuts and we move into a recession economy, is case by case determinations of the rights of parties to the electorally-nullified civil marriages. This Court cited Justice Sims' dissent (B*uol* at p.7630 in I*n re* M*arriage of* T*aylor* (1984) 160 Cal.App.3d 471, 478-478 (Sims, J. dis.)) with approval. Justice Sims

wisely pointed out the burden that retroactive family laws create for California family courts, California appellate courts, and California families,

> Surely the already overburdened trial judges of our state do not need the convenience of retrials that will result from the retroactive application of this ill conceived statute.
>
> ...
>
> Attorneys who represent parties in family law cases can never know, with certainty, whether the Legislature will amend existing property relationships in the future. Consequently, if the Legislature or the Congress begins to enact retroactive property rights legislation as a matter of course, and if these enactments are upheld by the courts, family law practitioners will surely begin to file appeals routinely to protect their clients against the finality of judgments that could otherwise be altered by legislation enacted in the future but made retroactive. The net effect of retroactive legislation is that parties to marital dissolution actions cannot intelligently plan a settlement of their affairs nor even conclude their affairs with certainty after a trial based on then-applicable law. If there is any area of law in which finality and certainty and planning should be paramount, it is the area of family law. Great emotional stress occurs in prolonged proceedings, and it often affects the children of the marriage.

There's a multiplier effect here. Nullification each of 18,000 marriages will not only require resolution of the interests of the partners with respect to one another, it will require resolution of dozens of other claims. Health insurance carriers, for example, will wish to recoup dependent benefits; creditors that depended on community property credit may be left unprotected, children will not benefit from application of the statutory marital parentage presumptions (Fam. Code §§ 7540 and 7611) – the list goes on and on. Retroactive application of Proposition 8 will not just impact parties to marital dissolutions, it will disrupt the financial and personal lives of every person and entity with ties that depend on the marital status of those individuals.

IV. ***Conclusion: Judicial branch's ability to protect people's rights is gravely diminished if statute that courts invalidate as unconstitutional can turn up on the ballot as an amendment to our Declaration of Rights, immune from substantive judicial review.***

- **Constitutional amendments enacted by initiative are not immune from judicial review;**
- **Court must resolve the conflicts when constitutional provisions clash;**
- **Inalienable liberty interests prevail over provision unsupported by compelling state interest.**

> ... [C]onstitutional change by voter initiative allows for unchecked "majority tyranny." As discussed, declarations of rights protect fundamental rights from state intrusion. The initiative process endangers those rights, however, by raising the possibility that popular will may restrict unpopular rights.... Because these rights are especially susceptible to popular passions and fears, it is even more important to insulate them from voter whim. While voters should have the opportunity to change the constitution, this right should be somewhat restricted in order to preserve the fundamental rights of all Californians.
>
> Rachel A. Van Cleave, A *Constitution in Conflict... supra*, at 21 Hastings Const. L.Q. 121

> ... [I]t is clear that the direct initiative can be and has been used to disadvantage minorities. [FN] The checks-and-balances system of representative government is designed to harmonize majority rule with protection of minority rights. In contrast, the direct initiative system, by bypassing checks and balances, is weighted heavily toward majority rule at the expense of certain minorities. Racial minorities, [FN] illegal immigrants, [FN] homosexuals, [FN] and criminal defendants [FN] have been exposed to the electorate's momentary passions as Californians have adopted a large number of initiatives that represent Populist backlash against representative government's efforts to protect or promote the interests of racial or other minorities. These initiatives should not be too easily caricatured as majority efforts to tyrannize minorities — although some may indeed have been motivated by animus. The broader problem

> is that initiatives that directly and differentially affect unpopular minorities can tap into a strain of anti-minority sentiment in the electorate. [FN]
>
> Kenneth P. Miller, C*onstraining* P*opulism* ..., *supra*, 41 Santa Clara L. Rev. 1056-1057

The sound constitutional analysis of T*he* M*arriage* C*ases* is NOT susceptible to popular vote. If a right is inalienable, it is just that: inalienable by popular vote as well as legislative fiat. If Proposition 8 stands, simply put, California will not have a constitution and no Californian will have any inalienable rights.

It is impossible to reconcile the effect of section 7.5 with the guarantees of inalienable rights established in our Constitution. Judicial review of constitutional amendments to reconcile such conflicts is an essential component of the Judicial Branch's article VI, section 1 responsibilities. Nothing in article II exempts exercises of direct democracy from article VI review. In order to sustain a stable governmental structure, direct democracy must be subject to the same principles of checks and balances as all other collective acts of the people.

Our Attorney General, not Interveners, is the people's lawyer, and represents the people's interests in this action. The people's lawyer, like the Court, must look to enforcing the will and rights of the people as expressed in our entire constitution, not just in a single subsection. Abdication of the judicial power over constitutional amendments would reduce the constitution to a series of contradictory provisions.

As a matter of public policy, the interests of Californians are not served by a rule that would encourage use of the initiative process to make the constitution an adjunct to our statues, but one that is exempt from judicial review. Proposition 8 teaches us

that the judicial branch's ability to protect the people's rights is gravely diminished if every statute that the courts invalidate as unconstitutional can turn up on the ballot as an amendment to our Declaration of Rights.

When provisions of the constitution clash, this Court must resolve the conflicts. When provisions embodying inalienable liberty protections clash with a provision that is unsupported by compelling state interest, the inalienable liberty interests must prevail. This Court has already held that reserving use of the word "marriage" to denote heterosexual relationships serves no compelling state interests. Refusal to recognize thousands of existing marriages would have profoundly destabilizing consequences for families, children, businesses, and institutions. While a decision by this court declaring those marriages a nullity would make a lot of work for family lawyers, it would do great harm to the state and its people.

Public policy is served by validating marriages, not invalidating them. Interveners have failed to articulate what interest is served by voiding thousands of marriages. In *Macedo v. Macedo* (1938) 29 Cal.App.2d 387, 391, the Third District upheld a curative statute validating civil marriages formed where one of the parties had obtained an interlocutory judgment of divorce from a prior spouse, but had inadvertently not obtained a final judgment. ("The act is both curative and remedial, and the retroactive operation of such statute should be given effect unless it disturbs some vested right or impairs the obligation of some contract.") Section 7.5 is neither curative, nor remedial. Refusal to recognize those marriages disturbs the vested rights of marriage partners, and those whose relationships with them had legal consequences arising from their marital status.

The *Macedo* Court went on to observe that public policy favors validating civil marriages, not invalidating them. ("In fact it would be the tendency of the law to validate the marriage rather than to find ways of destroying it. It confirms rather than impairs the contract.") *Id* at p. 391. Public policy continues to support validation, not invalidation of marriages. The State can have no possible interest in declaring existing civil marriages invalid.

Public policy is also furthered by promoting the stability of the family unit. *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932. Section 7.5, whether prospectively or retroactively applied, is profoundly destabilizing to California families. Children who celebrated the weddings of parents and grandparents will be hurt if those marriages are nullified. Apart from the psychological damage, some children's legal parent-child relationships derive from their parents' marital status. The stability and permanency of those parent-child relations requires recognition of the marriages.

The precepts of constitutional jurisprudence that Interveners advance, if adopted, would profoundly destabilize California's constitutional governmental structure, and weaken the judicial branch. In an era where it takes substantial sums of money to get an initiative on the ballot, and to successfully campaign for its success, the will of the voters on a particular November day is not necessary the will of the people. Expanding the power of the initiative process to permit lawmaking that is not subject to judicial review will result in a shriveling of the ability of the judicial branch in its role of protector of the constitution as a whole.

Although Interveners cast themselves as the voice and champions of California's people, they are usurpers. Our elected Attorney General is the people's lawyer. Interveners represent a well-funded

interest group that placed this measure on the ballot, and conducted a very expensive campaign to market it to voters.

California's initiative process "... no longer serves one of its original purposes. The initiative process as originally conceived was meant to avoid the domination of the legislature by powerful interest groups. [FN] Today, however, interest groups dominate the initiative process. [FN]" Rachel A. Van Cleave (1993) A *Constitution in Conflict...*, *supra*, at 21 Hastings Const. L.Q. 121.

Miller terms this phenomenon "faux populism,"

> Some commentators concede that initiative lawmaking in its current form is far from the Progressive ideal, but argue that it does not really represent "Populism," either, in that it is not controlled by "the people," but rather by well-heeled [FN] special interests (e.g., big business, big labor, trade associations) or political parties and public officials; moreover, some argue, "the people" are merely pawns in the process who are powerless to shape proposals or register their true preferences. [FN] It is hard to dispute that the present initiative system is a distorted form of Populism; interest groups and public officials, armed with the tools of the initiative industry, are often the ones driving the process. [FN] Some political scientists, such as Daniel A. Smith, contend that even modern taxpayer revolts are not truly "Populist" movements, in that they are often run by professional organizations and receive financial backing from wealthy interests. [FN] Other political scientists, such as Elisabeth Gerber, take a slightly different view, suggesting that a movement is "Populist" if its supporters are "citizen" groups supporting "broad based" interests, rather than "economic" groups pursuing "narrow" interests. [FN] However, the important point is not whether a given initiative campaign is well-financed or whether its objectives are broad or narrow. Instead, it is more important to note that initiative proponents are resorting to a process that bypasses representative government, and which more often than not, taps into the public's discontent with the government in order to undermine it. In this respect, the process is clearly "Populist" in its orientation.
>
> Kenneth P. Miller, *Constraining Populism ...*, *supra*, 41 Santa Clara L. Rev. 1058 -1059

In 1991 the California Legislature adopted a resolution observing that "The right of initiative was added to the California Constitution in 1911 as means for the people to diffuse the power of special interests and monopolies ..." but that it was being subverted by well-funded special interests. Stats.1991, Res.Ch. 120 (A.C.R.13)

California's initiative process has been described as having dual historical roots in the Progressive and Populist movements,

> The historical record is clear that both Populists and Progressives sought introduction of the initiative process but had different motivations for doing so. Progressives wanted the initiative, referendum, and recall to serve as an additional check on representative government, one tool among many to improve the government's quality and effectiveness. Populists, however, had a more radical vision. They sought to use the initiative power to undermine representative government and shift power to the people themselves.
>
> Populists and Progressives provided two approaches to direct democracy. Under the Progressives, direct democracy would not constitute a "fourth branch" of government with co-equal or even greater power than the other three branches but rather a supplementary and corrective check on the tripartite Madisonian scheme.
>
> Kenneth P. Miller, C*onstraining* P*opulism*: *supra*, 41 Santa Clara L. Rev.1043-1044

Miller deconstructs the Populist reasoning,

> One might reasonably ask: Isn't this a good thing? Doesn't the sharp increase in initiative lawmaking demonstrate that over the past couple of decades Californians have enjoyed a unique opportunity to participate in the democratic process? And isn't this system certainly "more democratic" than the representative system--and therefore an improvement? Although this perspective seems appealing at first glance, since who wants to argue against the people's right to decide, a closer examination suggests that initiative lawmaking--at least in its current Populist-oriented form--gives cause for concern. First, the process of Populist-oriented initiative lawmaking is not necessarily "more democratic" than the representative system, if one conceives of "democracy" as not just "majority rule" but instead a process that includes a range of democratic norms. Second, the substance of Populist-oriented initiative lawmaking tends to undermine representative government

> and impose majoritarian values at the expense of minority rights. In our constitutional system, these substantive outcomes often give rise to post-election legal challenges, which frequently result in judicial invalidation of voter-approved initiatives -- a chain of events that is hardly optimal.
>
> *Id.*, at 41 Santa Clara L. Rev. 1050-1051

The views expressed in Interveners' briefs renew the Populists' threat to representative government. Like the early 20th Century Populists, Interveners are trying to make direct democracy a most powerful fourth branch of government, rather than a part of the complex checks and balances that preserve government stability. They do so in the name of populism, but at the behest of special interest groups with very large war chests.

As we near the end of the first decade of the twenty-first century, it is clear that the people need a judicial branch empowered to review constitutional amendments adopted by the initiative process and apply a compelling state interest test in order to "diffuse the power of special interests," that often mask their goals with Populist rhetoric. By preserving this Court's power to exercise substantive judicial review over piecemeal amendments to our Constitution's Declaration of Rights, this Court fulfils the progressive intent of article II, section 8 of our Constitution.

California's people will not be well served if the judicial branch "bows down" whenever the Court overturns a statute, and the voters are persuaded to graft the same provision onto the Constitution. This Court must safeguard the judicial power it derives from our Constitution, and use that power to safeguard the rights and liberties of our people, and the stability of our government.

Respectfully submitted,

Leslie Ellen Shear, CFLS
Attorney for A*mici Curiae*

WORD COUNT

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Leslie Ellen Shear, CFLS

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Supreme Court Case No.: S168066

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THE STATE OF CALIFORNIA, ET AL., *Respondents*,
DENNIS HOLLINGSWORTH, ET AL., *Intervenors*

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Shannon P. Minter Christopher F. Stoll Melanie Rowen Catherine Sakimura Ilona M. Turner Shin-Ming Wong National Center for Lesbian Rights 870 Market Street, Suite 370 San Francisco, CA 94102 Telephone: 415 392-6267 Facsimile: 415 392-8442	Attorneys for Petitioners Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmund Wu, James Tolen and Equality California (S168047)
Gregory D. Phillips Jay M. Fujitani David C. Dinielli Michelle Friedland Lika C. Miyake Mark R. Conrad Munger, Tolles & Olson, LLP 355 S. Grand Avenue, 35th Floor Los Angeles, CA 90071-1560 Telephone: 213 683-9100 Facsimile: 213 687-3702	
Alan L. Schlosser Elizabeth O. Gill ACLU Foundation of Northern California 39 Drumm Street San Francisco, CA 94111 Telephone: 415 621-2493 Facsimile: 415 255-1478	
Mark Rosenbaum Clare Pastore Lori Rifkin ACLU Foundation of Southern California 1313 West 8th Street Los Angeles, CA 90017 Telephone: 213 977-9500 Facsimile: 213 250-3919	

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David Blair-Loy ACLU Foundation of San Diego and Imperial Counties Post Office Box 87131 San Diego, CA 92138-7131 Telephone: 619 232-2121 Facsimile: 619 232-0036	
Stephen V. Bomse Orrick, Herrington & Sutcliffe LLP 405 Howard Street San Francisco, CA 94105 Telephone: 415 773-5700 Facsimile: 415 773-5759	
David C. Codell Law Office of David C. Codell 9200 Sunset Boulevard, Penthouse Two Los Angeles, CA 90069 Telephone: 310 273-0306 Facsimile: 310 273-0307	
Jon W. Davidson Jennifer C. Pizer Tara Borelli Lambda Legal Defense and Education Fund 3325 Wilshire Blvd., Suite 1300 Los Angeles, CA 90010 Telephone: 213 382-7600 Facsimile: 213 351-6050	
Andrew P. Pugno Law Offices of Andrew P. Pugno 101 Parkshore Drive, Suite 100 Folsom, CA 95630-4726 Telephone: 916 608-3065 Facsimile: 916 608-3066 E-mail: andrew@pugnolaw.com	Attorneys for Interveners Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, Mark A. Jansson, and Protectmarriage.com
Kenneth W. Starr 24569 Via De Casa Malibu, CA 90265-3205 Telephone: 310 506-4621 Facsimile: 310 506-4266	

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Gloria Allred Michael Maroko John Steven West Allred, Maroko & Goldberg 6300 Wilshire Blvd, Suite 1500 Los Angeles, CA 90048-5217 Telephone: 323 653-6530 & 302-4773 Facsimile: 323 653-1660	Attorneys for Petitioners Robin Tyler and Diane Olson (S168066)
Dennis J. Herrera, City Attorney Therese M. Stewart Danny Chou Kathleen S. Morris Sherri Sokeland Kaiser Vince Chhabria Erin Bernstein Tara M. Steeley Mollie Lee City Hall, Room 234 One Dr. Carlton B. Goodlett Place San Francisco, CA 94012-4682 Telephone: 415 554-4708 Facsimile: 415 554-4699	Attorneys for Petitioner City and County of San Francisco (168078)
Jerome B. Falk, Jr. Steven L. Mayer Amy E. Margolin Amy L. Bomse Adam Polakoff Howard Rice Nemerovski Canady Falk & Rabkin Three Embarcadero Center, 7th Floor San Francisco, CA 94111-4024 Telephone: 415 434-1600 Facsimile: 415 217-5910	Attorneys for Petitioners City and County of San Francisco, Helen Zia, Lia Shigemura, Edward Swanson, Paul Herman, Zoe Dunning, Pam Grey, Marian Martino, Joanna Cusenza, Bradley Akin, Paul Hill, Emily Griffen, Sage Andersen, Suwanna Kerdkaew and Tina M. Yun (S168078)
Ann Miller Ravel, County Counsel Tamara Lange Juniper Lesnik Office of the County Counsel 70 West Hedding Street East Wing, 9th Floor San Jose, CA 95110-1770 Telephone: 408 299-5900 Facsimile: 408 292-7240	Attorneys for Petitioner County of Santa Clara (S168078)

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Rockard J. Delgadillo, City Attorney Richard H. Llewellyn, Jr. David J. Michaelson Office of the Los Angeles City Attorney 200 N. Main Street City Hall East, Room 800 Los Angeles, CA 90012 Telephone: 213 978-8100 Facsimile: 213 978-8312	Attorneys for Petitioner City of Los Angeles (S168078)
Raymond G. Fortner, Jr., County Counsel Leela A. Kapur Elizabeth M. Cortez Judy W. Whitehurst Office of Los Angeles County Counsel 648 Kenneth Hahn Hall of Administration 500 West Temple Street Los Angeles, CA 90012-2713 Telephone: 213 974-1845 Facsimile: 213 617-7182	Attorneys for Petitioner County of Los Angeles (S168078)
Richard E. Winnie, County Counsel Brian E. Washington Claude Kolm Office of County Counsel County of Alameda 1221 Oak Street, Suite 450 Oakland, CA 94612 Telephone: 510 272-6700 Facsimile: 510 272-5020	Attorneys for Petitioner County of Alameda (S168078)
Patrick K. Faulkner, County Counsel Sheila Shah Lichtblau 3501 Civic Center Drive, Room 275 San Rafael, CA 94903 Telephone: 415 499-6117 Facsimile: 415 499-3796	Attorneys for Petitioner County of Marin (S168078)
Michael P. Murphy, County Counsel Brenda B. Carlson Glenn M. Levy Hall of Justice & Records 400 County Center, 6th Floor Redwood City, CA 94063 Telephone: 650 363-1965 Facsimile: 650 363-4034	Attorneys for Petitioner County of San Mateo (S168078)

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Dana McRae County Counsel, County of Santa Cruz 701 Ocean Street, Room 505 Santa Cruz, CA 95060 Telephone: 831 454-2040 Facsimile: 831 454-2115	Attorneys for Petitioner County of Santa Cruz (S168078)
Harvey E. Levine, City Attorney Nellie R. Ancel 3300 Capitol Avenue Fremont, CA 94538 Telephone: 510 284-4030 Facsimile: 510 284-4031	Attorneys for Petitioner City of Fremont (S168078)
Rutan & Tucker, LLP Philip D. Kohn City Attorney, City of Laguna Beach 611 Anton Blvd., 14th Floor Costa Mesa, CA 92626-1931 Telephone: 714 641-5100 Facsimile: 714 546-9035	Attorneys for Petitioner City of Laguna Beach (S168078)
John Russo, City Attorney Barbara Parker Oakland City Attorney City Hall, 6th Floor 1 Frank Ogawa Plaza Oakland, CA 94612 Telephone: 510 238-3601 Facsimile: 510 238-6500	Attorneys for Petitioner City of Oakland (S168078)
Michael J. Aguirre, City Attorney Office of City Attorney, Civil Division 1200 Third Avenue, Suite 1620 San Diego, CA 92101-4178 Telephone: 619 236-6220 Facsimile: 619 236-7215	Attorneys for Petitioner City of San Diego (S168078)
Atchison, Barisone, Condotti & Kovacevich John G. Barisone Santa Cruz City Attorney 333 Church Street Santa Cruz, CA 95060 Telephone: 831 423-8383 Facsimile: 831 423-9401	Attorneys for Petitioner City of Santa Cruz (S168068)

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Marsha Jones Moutrie, City Attorney Joseph Lawrence Santa Monica City Attorney's Office City Hall 1685 Main Street, 3rd Floor Santa Monica, CA 90401 Telephone: 310 458-8336 Facsimile: 310 395-6727	Attorneys for Petitioner City of Santa Monica (S168078)
Lawrence W. McLaughlin, City Attorney City of Sebastopol 7120 Bodega Avenue Sebastopol, CA 95472 Telephone: 707 579-4523 Facsimile: 707 577-0169	Attorneys for Petitioner City of Sebastopol (S168078)
Edmund G. Brown, Jr., Attorney General of the State of California James M. Humes Manuel M. Mederios David S. Chaney Christopher E. Krueger Mark R. Beckington Kimberly J. Graham Office of the Attorney General 1300 I Street, Suite 125 Sacramento, CA 95814-2951 Telephone: 916 322-6114 Facsimile: 916 324-8835 E-mail: Kimberly.Graham@doj.ca.gov Edmund G. Brown, Jr. Office of the Attorney General 1515 Clay Street, Room 206 Oakland, CA 94612 Telephone: 510 622-2100	State of California; Edmund G. Brown, Jr.
Kenneth C. Mennemeier Andrew W. Stroud Kelcie M. Gosling Mennemeier, Glassman & Stroud LLP 980 9th Street, Suite 1700 Sacramento, CA 95814-2736 Telephone: 916 553-4000 Facsimile: 916 553-4011 E-mail: kcm@mgslaw.com	Attorneys for Respondents Mark B. Horton, State Registrar of Vital Statistics of the State of California, and Linette Scott, Deputy Director of Health Information and Strategic Planning for CDPH

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Eric Alan Isaacson Alexandra S. Bernay Samantha A. Smith Stacey M. Kaplan 655 West Broadway, Suite 1900 San Diego, CA 92101 Telephone: 619 231-1058 Facsimile: 619 231-7423 E-mail: eisaacson@csgrr.com	Attorneys for Petitioners California Council of Churches, the Right Reverend Marc Handley Andrus, Episcopal Bishop of California, the Right Reverend J. Jon Bruno, Episcopal Bishop of Los Angeles, General Synod of the United Church of Christ, Northern California Nevada Conference of the United Church of Christ, Southern California Nevada Conference of the United Church of Christ, Progressive Jewish Alliance, Unitarian Universalist Association of Congregations, and Unitarian Universalist Legislative Ministry California (S168332)
Jon B. Eisenberg Eisenberg and Hancock, LLP 1970 Broadway, Suite 1200 Oakland, CA 94612 Telephone: 510 452-2581 Facsimile: 510 452-3277 E-mail: jon@eandhlaw.com	
Raymond C. Marshall Bingham McCutchen LLP Three Embarcadero Center San Francisco, CA 94111-4067 Telephone: 415 393-2000 Facsimile: 415 393-2286	Attorneys for Petitioners Asian Pacific American Legal Center, California State Conference of the NAACP, Equal Justice Society, Mexican American Legal Defense and Educational Fund, and NAACP Legal Defense and Education Fund, Inc. (S168281)
Tobias Barrington Wolff (pro hac vice pending) University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104 Telephone: 215 898-7471 E-mail: twolff@law.upenn.edu	
Julie Su Karin Wang Asian Pacific American Legal Center 1145 Wilshire Blvd., 2nd Floor Los Angeles, CA 90017 Telephone: 213 977-7500 Facsimile: 213 977-7595	

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Eva Paterson Kimberly Thomas Rapp Equal Justice Society 220 Sansome Street, 14th Floor San Francisco, CA 94104 Telephone: 415 288-8700 Facsimile: 415 288-8787	
Nancy Ramirez Cynthia Valenzuela Dixon Mexican American Legal Defense and Educational Fund 634 South Spring Street Los Angeles, CA 90014 Telephone: 213 629-2512 Facsimile: 213 629-0266	Attorneys for Petitioners Asian Pacific American Legal Center, California State Conference of the NAACP, Equal Justice Society, Mexican American Legal Defense and Educational Fund, and NAACP Legal Defense and Education Fund, Inc. (S168281)
Irma D. Herrera Lisa J. Leebove Equal Rights Advocates 1663 Mission Street, Suite 250 San Francisco, CA 94103 Telephone: 415 621-0672 ext. 384 Facsimile: 415 621-6744	Attorneys for Petitioner Equal Rights Advocates (S168302)
Vicky Barker California Women's Law Center 6300 Wilshire Blvd., Suite 980 Los Angeles, CA 90048 Telephone: 323 951-1041 Facsimile: 323 951-9870	Attorneys for Petitioner California Women's Law Center (S168302)
Laura W. Brill Moez J. Kaba Richard M. Simon Mark A. Kressel Irell & Manella LLP 1800 Avenue of the Stars, Suite 900 Los Angeles, CA 90067 Telephone: 310 277-1010 Facsimile: 310 203-7199	Attorneys for Petitioners Equal Rights Advocates and California Women's Law Center (S168302)