

Nos. S168047, S168066, S168078

In the
SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, *et al.*, Petitioners
v. No. S168047
MARK B. HORTON, *etc.*, *et al.*, Respondents

ROBIN TYLER, *et al.*, Petitioners
v. No. S168066
THE STATE OF CALIFORNIA, *et al.*,
Respondents

CITY AND COUNTY OF SAN FRANCISCO,
et al., Petitioners
v. No. S168078
MARK B. HORTON, *etc.*, *et al.*, Respondents

Application for Leave to file brief *Amicus Curiae*
and Brief *Amicus Curiae*
of the Center for Constitutional Jurisprudence
in support of Intervenors and Respondents

David L. Llewellyn, Jr., SBN 71706
John Eastman, SBN 193726
Anthony T. Caso, SBN 88561
Karen Lugo, SBN 241268
Of counsel,
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, California 92866
(714) 628-2500

Nos. S168047, S168066, S168078

In the
SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, *et al.*, Petitioners
v. No. S168047
MARK B. HORTON, *etc.*, *et al.*, Respondents

ROBIN TYLER, *et al.*, Petitioners
v. No. S168066
THE STATE OF CALIFORNIA, *et al.*,
Respondents

CITY AND COUNTY OF SAN FRANCISCO,
et al., Petitioners
v. No. S168078
MARK B. HORTON, *etc.*, *et al.*, Respondents

Application for Leave to file brief *Amicus Curiae*
of the Center for Constitutional Jurisprudence
in support of Intervenors and Respondents

David L. Llewellyn, Jr., SBN 71706
John Eastman, SBN 193726
Anthony T. Caso, SBN 88561
Karen Lugo, SBN 241268
Of counsel,
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, California 92866
(714) 628-2500

Pursuant to California Rules of Court, Rule 8.200(c), the Center for Constitutional Jurisprudence, by its counsel of record, requests leave to file the attached brief *amicus curiae* in support of the Intervenor and Respondents in this original proceeding.

The *amicus curiae* the Center for Constitutional Jurisprudence was founded in 1999 as the public interest litigation arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy. It provides legal representation and litigation support through the work of students at law school clinics it sponsors and affiliated attorneys in cases of constitutional significance, advancing through strategic litigation its mission of restoring the principles of the American Founding to their rightful and preeminent authority in our national life.

The Center for Constitutional Jurisprudence and its counsel are familiar with the issues before this Court and the scope of their presentation. The Center intends for the amicus brief filed herewith to assist the Court to consider constitutional principles and legal authorities not similarly addressed in the briefs of the parties.

The interest of the Center for Constitutional Jurisprudence in the litigation now before this Court pertains to the fundamental constitutional rights of the people of the state of California to amend

their Constitution by the initiative process.

January 14, 2009

Respectfully submitted,

David L. Llewellyn, Jr.
Attorney for *Amicus Curiae*
Center for Constitutional
Jurisprudence

Nos. S168047, S168066, S168078

In the
SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, *et al.*, Petitioners
v. No. S168047
MARK B. HORTON, *etc.*, *et al.*, Respondents

ROBIN TYLER, *et al.*, Petitioners
v. No. S168066
THE STATE OF CALIFORNIA, *et al.*,
Respondents

CITY AND COUNTY OF SAN FRANCISCO,
et al., Petitioners
v. No. S168078
MARK B. HORTON, *etc.*, *et al.*, Respondents

Brief *Amicus Curiae*
of the Center for Constitutional Jurisprudence
in support of Intervenors and Respondents

David L. Llewellyn, Jr., SBN 71706
John Eastman, SBN 193726
Anthony T. Caso, SBN 88561
Karen Lugo, SBN 241268
Of counsel,
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, California 92866
(714) 628-2500

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
INTEREST OF <i>AMICUS CURIAE</i>	4
I. ARTICLE I, § 7.5, IS NOW PART OF THE CALIFORNIA CONSTITUTION AND BINDING ON THIS COURT AS THE SOVEREIGN ACT OF THE PEOPLE, SUPERSEDING PREVIOUS TEXTUAL INTERPRETATIONS AND CONFLICTING JUDICIAL PRINCIPLES.	5
A. THE PLAIN MEANING OF ARTICLE 1, §7.5, OF THE CALIFORNIA CONSTITUTION, ADOPTED BY PROPOSITION 8, IS THE FINAL AND BINDING CONSTITUTIONAL AUTHORITY ON THE SUBJECT IT ADDRESSES.	5
B. THE PROPER PRINCIPLE FOR THE INTERPRETATION OF ARTICLE 1, §7.5, IS TO FOLLOW THE SIMPLE RULE THAT THE CONSTITUTIONAL PROVISION ADOPTED LATEST IN TIME IS THE FINAL AUTHORITY.	8
II. PROPOSITION 8 AMENDED, BUT DID NOT REVISE, THE STATE CONSTITUTION.	12
A. PROPOSITION 8 EXERCISED THE PEOPLE'S AMENDMENT POWER. IT IS NOT A CONSTITUTIONAL "REVISION."	13
B. CONSTITUTIONAL AMENDMENTS THAT AFFECT FUNDAMENTAL RIGHTS DO NOT THEREBY BECOME "REVISIONS" AND ARE NOT REQUIRED TO SHOW A COMPELLING GOVERNMENTAL INTEREST.	26

III. THIS COURT HAS NO POWERS APART FROM THOSE GRANTED, AND LIMITED, BY THE STATE CONSTITUTION, AND NO AUTHORITY TO ABROGATE AN AMENDMENT TO THE CONSTITUTION.	32
CONCLUSION	38
CERTIFICATION	40

TABLE OF AUTHORITIES

	Page
Cases	
<i>Amador Valley Joint Union High School District v. State Board of Equalization</i> (1978) 22 Cal.3d 208	14-15, 16
<i>Board of Supervisors v. Lonergan</i> (1980) 27 Cal.3d 855	6
<i>Boca Mill Co. v. Curry</i> (1908) 154 Cal. 326	7, 38
<i>Bowens v. Superior Court</i> (1991) 1 Cal.4th 36	28, 30-32
<i>Brosnahan v. Brown</i> (1982) 32 Cal.3d 236	26, 39
<i>City and County of San Francisco v. County of San Mateo</i> (1995) 10 Cal.4th 554	5-6
<i>City of Pasadena v. Railroad Commission of California</i> (1920) 183 Cal. 526	6
<i>Crawford v. Board of Education</i> (1976) 17 Cal.3d 280	9
<i>Crawford v. Huntington Beach Union High School District</i> (2002) 98 Cal.App.4th 1275	9-10
<i>Ex parte Kazas</i> (1937) 22 Cal.App.2d 161	36
<i>Germania Trust Co. v. City and County of San Francisco</i> (1900) 128 Cal. 589	2
<i>Harris v. Capital Growth Investors XIV</i> (1991) 52 Cal.3d 1142	37
<i>Hawkins v. Superior Court</i> (1978) 22 Cal.3d 584	28-30
<i>Hill v. National Collegiate Athletic Association</i> (1994) 7 Cal.4th 1	6
<i>In re Lance W.</i> (1985) 37 Cal.3d 873	26-27

<i>Jackson v. Pasadena City School Dist.</i> (1963) 59 Cal.2d 876	9
<i>Kingsbury v. Nye</i> (1908) 9 Cal. App. 574	1-2
<i>Legislature v. Eu</i> (1991) 54 Cal.3d 492	21-25
<i>Lynch v. State Board of Equalization</i> (1985) 164 Cal.App.3d 94	36-37
<i>Marriage Cases</i> (2008) 43 Cal.4th 757	8, 13, 32, 33
<i>McFadden v. Jordan</i> (1948) 32 Cal.2d 330	14, 15, 18
<i>Nougues v. Douglass</i> (1857) 7 Cal. 65	34, 35-36
<i>People v. Adamson</i> (1946) 27 Cal.2d 478	8, 9
<i>People v. Anderson</i> (1972) 6 Cal.3d 628	16, 17
<i>People v. Frierson</i> (1979) 25 Cal.3d 142	16, 17-18
<i>People v. Johnson</i> (1856) 6 Cal. 499	32, 34, 35
<i>Powers v. City of Richmond</i> (1995) 10 Cal.4th 85	6
<i>Raven v. Deukmejian</i> (1990) 52 Cal.3d 336	18-21, 27, 28
<i>Romer v. Evans</i> (1996) 517 U.S. 620,	38
<i>Sandelin v. Collins</i> (1934) 1 Cal.2d 147	7
<i>San Francisco Unified School District v. Johnson</i> (1971) 3 Cal.3d 937	9
<i>Slavich v. Walsh</i> (1947) 82 Cal.App.2d 228	9
<i>Serrano v. Priest</i> (1971) 5 Cal.3d 584	9, 10
<i>Walker v. Superior Court</i> (1991) 53 Cal.3d 257	33

California Constitution

Preamble	2
Article 1	2, 4
Article 1, §1	22
Article 1, §7	8, 10
Article 1, §7.5	<i>passim</i>
Article 1, §13	26, 27
Article 1, §17	16
Article 1, §27	16, 17
Article 1, §31	8
Article 2, §1	1
Article 6, §1	32, 33
Article 18	10, 13, 18, 23-24

Other

Proposition 8	<i>passim</i>
---------------	---------------

SUMMARY OF ARGUMENT

As noted by the Attorney General, the California Constitution, provides that "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." Article 2, §1; Answer Brief, at 88. In quoting this passage the Attorney General emphasizes the last six words, seeking to suggest some substantive restriction on the inherent political power of the people. Petitioners implicitly stake a portion of their claim on this contention as well. But the core constitutional principle is that in this state, political power is inherent in the people, and the people retain the right to alter or reform their government, including the Constitution. If we are to give meaning to Article 2, §1, then it must be the people who determine "when the public good may require" a change and who make this determination known through the process of amending the Constitution.

When the people enacted the Constitution, and through the Constitution created and empowered their government and its officials, the people "never surrendered the power that resided in themselves, nor could the people who adopted the Constitution of 1879 limit the power of the people afterwards to alter or amend that

Constitution." *Kingsbury v. Nye* (1908) 9 Cal. App. 574, 581. This Court has held that "[i]n adopting the constitution the people themselves declared how it might be amended." *Germania Trust Co. v. City and County of San Francisco* (1900) 128 Cal. 589, 605; see also, California Constitution, Preamble ("*We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution.*") (emphasis added). The constitutionally mandated procedure was followed in the adoption of the constitutional amendment at issue in this case, and the Court should reject the suggestions of the petitioners and the Attorney General that a new procedure be created.

The Attorney General is correct, however, that the addition of section 7.5 to Article 1 of the Constitution was an amendment rather than a revision. Prior decisions of this Court establish that the people are entitled to disagree with rulings of the Court and to adopt amendments to their constitution as a means clarifying their intent, including the reach of the provisions of Article 1. Those decisions and the constitutional theory on which they are based compel rejection of the petitions at issue here.

Apparently recognizing the force of this precedent, the

petitioners, the Attorney General and others argue, either explicitly or implicitly, that this Court can, on its own, refuse to permit the Constitution to be amended by the adoption of Proposition 8, even after the Court finds that Proposition 8 is a constitutional amendment and not a revision. This extra-legal argument is a thinly disguised appeal to judicial activism, an effort to achieve a political change by attempting to bypass the voters.

Since the authority of the judiciary derives entirely from the state Constitution, the claim that this or any court can use powers derived from the Constitution to nullify an amendment to the Constitution requires using the Constitution to overrule itself, a logically self-contradictory and self-refuting contention. Authority exercised under one part of the Constitution cannot be employed to invalidate the plain language of another, more recent, part of the Constitution no matter how fervently the losing side in the election feels that its position is morally and politically superior to the principle of law now contained in the Constitution at Article 1, §7.5. If a conflict exists, or if provisions of the state Constitution overlap, then the rule of law is indisputably clear that the constitutional provision adopted later in time prevails.

Even if an actual contradiction existed in the Constitution

between the provisions of Article 1, §7.5, and other statements of rights in Article 1, as the petitioners and the Attorney General assert, the conflict must be resolved according to the clear and long-established principle of constitutional law that the most recently adopted provision prevails, even though it may qualify pre-existing provisions or interpretations of the Constitution.

Denial of the petitions in this proceeding on their merits is what the law requires, and such an action by this Court will protect the rights of the people to self government and restore public confidence in the integrity of the state judiciary and in the rule of law.

INTEREST OF *AMICUS CURIAE*

The *amicus curiae*, the Center for Constitutional Jurisprudence, was founded in 1999 as the public interest litigation arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy. It provides legal representation and litigation support in cases of constitutional significance through the work of students at law school clinics it sponsors and affiliated attorneys, advancing through strategic litigation its mission of restoring the principles of the American Founding to their rightful and preeminent authority in our state and national life.

I. ARTICLE 1, § 7.5, IS NOW PART OF THE CALIFORNIA CONSTITUTION AND BINDING ON THIS COURT AS THE SOVEREIGN ACT OF THE PEOPLE, SUPERSEDING PREVIOUS TEXTUAL INTERPRETATIONS AND CONFLICTING JUDICIAL PRINCIPLES.

The proper starting point for analysis of the petitions in this proceeding is the present language of the Constitution itself. Proposition 8 amended the California Constitution by the addition of Article 1, §7.5, and the plain meaning of the language of that section of the Constitution must be accepted as binding on all public officials and institutions of government, including this Court.

A. THE PLAIN MEANING OF ARTICLE 1, §7.5, OF THE CALIFORNIA CONSTITUTION, ADOPTED BY PROPOSITION 8, IS THE FINAL AND BINDING CONSTITUTIONAL AUTHORITY ON THE SUBJECT IT ADDRESSES.

The issue presented in this case begins and ends with enforcement of the plain meaning of the language of the Constitution. This Court quite accurately described its obligation to give full effect to the Constitution's language when it was confronted with a similar challenge to a constitutional amendment adopted by a controversial voter initiative some thirty years ago: "[O]ur task is to effectuate the voters' intent in adopting article XIII-A [Proposition 13].

In performing this task, we are guided by familiar principles. A constitutional provision should be construed according to the natural and ordinary meaning of its words." *City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 562; citing *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 17; *Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 863.

Indeed, this obligation to give effect to plain meaning is particularly important when interpreting constitutional provisions because "[t]he *Constitution*," unlike acts of the Legislature, "owes its whole force and authority to its ratification by the people; and they judged of it by the meaning apparent on its face according to the general use of the words employed where they do not appear to have been used in a legal or technical sense." *City of Pasadena v. Railroad Commission of California* (1920) 183 Cal. 526, 532 (citation omitted; emphasis added); see also *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 92 ("In construing constitutional provisions, the intent of the enacting body is the paramount consideration. To determine that intent, courts look first to the language of the constitutional text, giving the words their ordinary meaning.") (citations omitted).

If the plain meaning of a constitutional amendment adopted by initiative is clear, the courts have no function other than to enforce its

terms:

This conclusion is not arrived at by any process of construction or the ascertainment of the intention of the people of the state in enacting [an amendment to] the Constitution, but is *compelled from the plain meaning* of the words used. In such case *there is no opportunity for construction; nor is there any function for the court to perform other than to apply to the facts the meaning which the constitutional provision plainly imports.*

Sandelin v. Collins (1934) 1 Cal.2d 147, 155, construing then Proposition 2; emphasis added.

This Court has long recognized that the power to reform the Constitution remains with the people:

Whatever may be the views of the courts as to the necessity for or propriety of such a provision [of the California Constitution] is, of course, immaterial. If the language used plainly and unequivocally shows a certain and definite purpose to be accomplished thereby, it is the duty of the courts to so construe it as to carry that purpose into effect.

Boca Mill Co. v. Curry (1908) 154 Cal. 326, 338. Because there is no dispute about the meaning of Article 1, §7.5, it must be given effect.

B. THE PROPER PRINCIPLE FOR THE INTERPRETATION OF ARTICLE 1, §7.5, IS TO FOLLOW THE SIMPLE RULE THAT THE CONSTITUTIONAL PROVISION ADOPTED LATEST IN TIME IS THE FINAL AUTHORITY.

The precedents of this Court plainly establish that when any two provisions of the state Constitution cannot be reconciled, then the latest in time prevails. Proposition 8 has added language to the state Constitution, Article 1, §7.5, that overturned this Court's interpretation of another provision of the state Constitution, the Article 1, §7, equal protection clause, in the *Marriage Cases* (2008) 43 Cal.4th 757. If the two clauses cannot be reconciled, then the language of the more recently adopted provision, Article 1, §7.5 (Proposition 8), controls. *People v. Adamson* (1946) 27 Cal.2d 478, 487 ("the [constitutional] amendment . . . being later in time, controls provisions adopted earlier").

The rule that the constitutional provision adopted later in time controls applies even in the context of claims that a constitutional amendment conflicts with earlier fundamental civil rights declared by this Court under the state equal protection clause.

In 1996, the people amended the California Constitution by the adoption of Proposition 209, which added Article 1, §31, to the state Constitution to bar racial, gender, and ethnicity preferences in public

education, employment and contracting. Opponents of Proposition 209 challenged the constitutional amendment on the grounds that it removed rights that had previously been declared by this Court to be fundamental under the equal protection clause of the state Constitution, the same argument made by the petitioners and the Attorney General in this proceeding. The court rejected the argument on the simple, and decisive, ground that when provisions of the state Constitution conflict, the later in time controls, even when the issues concern what are asserted to be fundamental equal protection rights:

With respect to the equal protection provisions of the California constitution, the District relies, in part, on statements from *Crawford v. Board of Education* [1976], *supra*, 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28; *Serrano v. Priest* (1971) 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241, *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 92 Cal.Rptr. 309, 479 P.2d 669; and *Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 and other pre-Proposition 209 California cases. ***But Proposition 209 has undeniably changed the state law. It is a firmly established rule of constitutional jurisprudence that where two constitutional provisions conflict, the one that was enacted later in time controls.*** (*People v. Adamson* (1946) 27 Cal.2d 478, 486-487, 165 P.2d 3 [1934 constitutional amendment qualified previous inability to comment on defendant's failure to take stand]; *Slavich v. Walsh* (1947) 82 Cal.App.2d 228, 236-237, 186 P.2d 35 [resolving conflict in power of chartered cities under one constitutional provision by looking to other constitutional

provisions enacted later in time].)

Crawford v. Huntington Beach Union High School District (2002) 98 Cal.App.4th 1275, 1285-1286; emphasis added.

In the present proceeding, the principle that the constitutional amendment adopted later in time controls is buttressed by the corollary principle that specific constitutional language prevails over a more general provision:

Elementary principles of construction dictate that where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should be adopted. . . . If the two provisions were found irreconcilable, section 6 would prevail ***because it is more specific and was adopted more recently.***

Serrano v. Priest (1971) 5 Cal.3d 584, 596; citations omitted; emphasis added. Article 1, §7.5, added to the Constitution by Proposition 8, is clearly more specific on the issue of the definition of marriage and thus must prevail over this Court's prior interpretation of the general principles of the Article 1, §7, equal protection clause.

The petitioners and the Attorney General in effect have asked this Court to ignore these simple and well-established rules of law, (1) that the more recent constitutional provision prevails over all contradictory language and prior judicial interpretations and (2) that the more specific constitutional provision prevails over more general

principles, and instead to employ hitherto unknown judicial powers to negate a duly-enacted amendment to the Constitution because petitioners ideologically oppose this sovereign act of the people.

Most troubling, the petitions appear intended to appeal to presumed policy preferences of some members of this Court based on dubious inferences from the opinions in the *Marriage Cases* decision. Such an appeal does a great disservice to the holding of this Court in the *Marriage Cases*, which the majority rooted in the text of the Constitution in effect at that time. No such contention can credibly be made here, leaving what appears to be a naked appeal to the presumed policy preferences of the justices. Unlike the petitioners or even the present Attorney General, this Court has previously shown that it appreciates the dangerous consequences of such a position, that if it chose to ignore the Constitution's text in favor of a contrary policy preference of its own, future Courts would have precedent to impose their own ideological revisions. The rule of law would be undermined and the sovereignty of the people dangerously compromised. Constitutional self government must not be sacrificed for any immediate political ends, however worthy they may seem.

II. PROPOSITION 8 AMENDED, BUT DID NOT REVISE, THE STATE CONSTITUTION.

The Answer Brief filed by the Attorney General, although seriously defective in its closing appeal to nonexistent extra-constitutional powers of the Supreme Court, makes three useful contributions to the analysis of the issues in these petitions. The Attorney General has correctly demonstrated, first, that Proposition 8 is an amendment to the Constitution and not an unlawful revision; second, that Proposition 8 does not violate principles of the separation of powers; and third, that the arguments presented by the petitions which are offered as if they related to claims of revision of the Constitution actually seek to persuade this Court to invoke judicially created standards to invalidate the plain language of the Constitution as amended by Proposition 8.

The petitions urge an ideological argument that the Supreme Court justices hold extra-constitutional powers to declare Article 1, §7.5 (Proposition 8) to be an unconstitutional revision of the state Constitution under Article 18, but this contention defies clear judicial precedents and disrespects the right of the people of California to constitutional self government.

A. PROPOSITION 8 EXERCISED THE PEOPLE'S AMENDMENT POWER. IT IS NOT A CONSTITUTIONAL "REVISION."

Article 1, §7.5 is not a prohibited "revision" of the state Constitution by initiative within the meaning of Article 18. Article 1, §7.5 simply restored California law to what it has been throughout state history except for the brief period between the decision in the *Marriage Cases* on May 15, 2008 and the enactment of Article 1, §7.5 on November 4. No claim that this represents a major change in the structure of state government should be taken seriously. The argument that a return to the status quo of the law regarding marriage as it existed prior to May 16, 2008, less than a year ago, would now constitute an unconstitutional "revision" of the state Constitution is logically and legally untenable. Indeed, if the legislative act of the people of the state of California adding the definition of marriage to the state Constitution were to represent a revision of the state Constitution, then the decision of the 4-3 majority of this Court in the *Marriage Cases*, broadly interpreting the state equal protection Clause to encompass, for the first time, marriage to partners of the same sex, would also be an unconstitutional revision of the state Constitution and an ultra vires, extra-judicial act.

In *McFadden v. Jordan* (1948) 32 Cal.2d 330, this Court emphasized that there is "a real difference between amendment and revision" (32 Cal.2d at 347), not a flexible line that petitioners or courts can manipulate to accommodate political preferences. The determinative factor for identifying a constitutional revision (as opposed to an amendment) was identified in *McFadden* as "its effect on the totality of our plan of government as now constituted," that is, whether it would make "extensive alterations in the basic plan and substance of our present Constitution." 32 Cal.2d 345, 347. The proposed initiative rejected by the Supreme Court in *McFadden* as an unlawful revision was so extensive that it contained "two hundred and eight subsections . . . set forth in more than twenty-one thousand words," would have affected a minimum of twenty-one (21) different sections of the existing Constitution, and would have enacted more changes than the Constitution of 1879 made to the Constitution of 1849. 32 Cal.2d 334, 340-345, 349.

In *Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208, this Court further explicated the *McFadden* rule for determining the line between constitutional revisions and amendments, observing that "revision" originally meant "a substantial alteration of the entire Constitution,"

not "a less extensive change in one or more of its provisions" (22 Cal.3d 222). The Supreme Court held in *Amador Valley* that to be a revision an initiative must fundamentally alter the structure of the Constitution or the basic plan of government for the state. A revision requires either (1) a quantitative change in the Constitution "so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions" or (2) a qualitative change, perhaps by even a "relatively simple enactment," that imposes "far reaching changes in the nature of our basic governmental plan." 22 Cal.3d 223.

Article 1, §7.5, Proposition 8, has made no alteration in the constitutional structure or the basic plan of government in California. It has simply restored the legal definition of marriage to what it had been in this State since California's first Constitution in 1849. Under the rule of *McFadden*, *Amador Valley* and their progeny, Proposition 8 simply cannot be considered a constitutional revision.

Many more extensive and substantive changes to California law and the operation of state government have been made by initiatives, which the courts have accepted as lawful amendments, and not revisions, to the Constitution. In *Amador Valley*, for example, this Court rejected a challenge that Proposition 13 was an

unlawful revision, although that initiative substantially altered the tax structure of the state and the funding of local government.

The specter of wresting self-government from the people of the state was a dire and unconstitutional consequence recognized by this Court in rejecting the revision argument in *People v. Frierson* (1979) 25 Cal.3d 142. In *Frierson*, this Court upheld the adoption by initiative of Article 1, §27 of the California Constitution, which restored the death penalty and abrogated this Court's decision in *People v. Anderson* (1972) 6 Cal.3d 628. Previously the Court had interpreted Article 1, §17 (then §6), which prohibits cruel and unusual punishment, to ban the death penalty. The parallel between the death penalty initiative in 1972 and the marriage amendment in 2008 is unmistakable. Both were initiatives adopted by the people just months after a decision by this Court expansively interpreting an existing provision of the state Constitution to declare new constitutional rights to which the people objected. Both initiatives added new articles to the state constitution, leaving unchanged the original articles upon which this Court's previous decision relied, and each of the new articles specified clearly, precisely and narrowly what the state constitution means and how it is to be interpreted and applied, then to the death penalty and now to marriage.

Addressing the revision issue, this Court stated in *Frierson* that although it had held in *Anderson* that the death penalty is "unnecessary to any legitimate goal of the state and incompatible with the dignity of man and the judicial process" (6 Cal.3d at 656), nevertheless, the initiative that added Article 1, §27 to the Constitution and reversed the holding in *Anderson* was not an unconstitutional revision. "The clear intent of the electorate in adopting section 27 was to circumvent *Anderson* by restoring the death penalty," the Court noted in *Frierson*. "The decisions of the people in 1972 and 1978 and of the Legislature in 1977 may or may not have been wise, but we think there can be no reasonable doubt as to their intention or purpose. [¶] We conclude that, properly construed, section 27 validates the death penalty as a permissible type of punishment under the California Constitution." *Frierson*, 25 Cal.3d at 184. This Court then added its warning against disenfranchising the people of the state by refusing to honor a validly adopted constitutional amendment:

Furthermore, in *Amador Valley*, we cautioned that too strict a construction of the revision rule "would in effect bar the people from ever achieving any local tax relief through the initiative process." Similarly, the adoption of defendant's position might effectively bar the people from ever directly reinstating the death penalty, despite the apparent belief of a very substantial majority

of our citizens in the necessity and appropriateness of the ultimate punishment. Applying a reasonable interpretation, we conclude that article I, section 27, fairly may be deemed a constitutional amendment, not a revision.

Frierson, 25 Cal.3d at 187; citation omitted; emphasis added.

The initiative approved in *Frierson* amended the state Constitution to reverse the decision of this Court condemning the death penalty and stripped the Court of its prior authority to ban the taking of a criminal defendant's life by judicial process. This life-or-death initiative was recognized as a constitutional amendment, not a revision. It would be rationally unjustifiable to treat the enactment by initiative of Article 1, §7.5 (Proposition 8) as a revision of the state Constitution in violation of Article 18, when it does nothing comparable to justifying the taking of a person's life by judicial process but rather simply restores the pre-existing definition of marriage.

Raven v. Deukmejian (1990) 52 Cal.3d 336, illustrates the standard for a truly invalid constitutional revision. (*McFadden* and *Raven* represent the only cases in which this Court has rejected initiatives on the grounds that they made unlawful constitutional revisions.) In *Raven* the Court disapproved one section of Proposition 115, the "Crime Victims Justice Reform Act," which as a

whole made extensive changes to state criminal procedure, eliminating post-indictment preliminary hearings, adding a due process right to a speedy and public trial, barring any interpretation of the Constitution that would prohibit joinder of criminal cases, authorizing the use of hearsay evidence at preliminary hearings, imposing reciprocal discovery requirements on prosecutors and defense counsel, restricting the admissibility of evidence at preliminary hearings, restricting juror voir dire and modifying its governing legal standards, adding offenses to the felony murder rule, making multiple changes to the special circumstances statute concerning application of the death penalty, permitting proof of the corpus delicti of a criminal offense by confession without corroboration, providing sentences of up to life imprisonment without parole for 16- and 17-year-old minors convicted of first degree murder, eliminating the authority of judges to strike special circumstance findings, lessening the burden of proof of torture as a special circumstance concerning the death penalty, setting detailed standards for appointment of defense counsel by the state, and establishing a requirement of good cause for extending the time for commencement of a felony trial beyond 60 days after the arraignment. 52 Cal.3d at 342-345. All of these provisions were

held to be valid constitutional amendments. 52 Cal.3d at 350, 355-356.

The one section of Proposition 115 held to be a revision rather than an amendment to the Constitution would have added qualifying language to Article 1, §24, which provides that "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Section 3 of Proposition 115 would have restricted the authority of the California Constitution to that of the United States Constitution as interpreted by the United States Supreme Court in criminal cases, in the following language:

In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and not to suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

Raven, 52 Cal.3d at 350.

This section of Proposition 115 was held to be an invalid revision to the state Constitution because it "would vest all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court."

As a practical matter, ultimate protection of criminal defendants from deprivation of their constitutional rights would be left in the care of the United States Supreme Court. Moreover, the nature and extent of state constitutional guarantees would remain uncertain and undeveloped unless and until the high court had spoken and clarified federal constitutional law.

In effect, new article I, section 24, would substantially alter the substance and integrity of the state Constitution as a document of independent force and effect.

52 Cal.3d at 352.

Article 1, §7.5, added by Proposition 8, does nothing to diminish the independent force of the state Constitution. On the contrary, it establishes the California Constitution as the final authority on a matter of law not referenced in the United States Constitution. Proposition 8 clearly has made no change to the state Constitution comparable to the revision invalidated in *Raven*.

In *Legislature v. Eu* (1991) 54 Cal.3d 492, this Court approved Proposition 140, the Political Reform Act of 1990, as a constitutional amendment rather than a revision, although it limited the number of terms that state legislators and constitutional officers could serve in

their offices and restricted budgetary authority and pension rights of state legislators. These indisputably material changes to the "plan of government," including a "lifetime ban" on persons who had previously served in office from further election to certain public offices (54 Cal.3d at 503-506), were recognized as proper amendments that did not alter the fundamental governmental structure of the state. 54 Cal.3d at 506-512.

The decision in *Legislature v. Eu* elucidates four important principles that bear on the present challenges to Proposition 8.

First, the people hold the reserved constitutional power to reform the Constitution and the operation of their government:

All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.

California Constitution, Article 2, §1. Initiatives that "alter or reform" the government do not necessarily "revise" the constitutional form of government. "It seems indisputable that Proposition 140 represents an attempt by the people to 'alter or reform' their own government." *Legislature v. Eu*, 54 Cal.3d at 511.

Even if Proposition 8 is considered a reformation of the government, because its definition of marriage establishes a

provision of law that the Legislature, the Executive and/or the Judiciary would prefer to have legal authority to change, such a reform does not constitute a revision of the plan of government but rather represents an exercise of the sovereign power of the people over their government and its officials.

Second, the decision in *Legislature v. Eu* recognizes that restriction of constitutional changes to the revision process actually has the effect of giving veto power to the state Legislature over constitutional reforms, since constitutional revisions under Article 18 can be made only by legislative action either by placing a proposed revision on the ballot at an election or by calling for a constitutional convention. Article 18 provides that:

Section 1. The *Legislature* by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may propose an amendment or *revision* of the Constitution and in the same manner may amend or withdraw its proposal. Each amendment shall be so prepared and submitted that it can be voted on separately.

Section 2. The *Legislature* by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may submit at a general election the question whether to call a *convention to revise the Constitution*. If the majority vote yes on that question, within 6 months the Legislature shall provide for the convention. Delegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable.

Section 3. The electors may amend the

Constitution by initiative.

Section 4. A proposed amendment or *revision* shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.

Article 18, California Constitution; emphasis added.

Designating constitutional changes as "revisions" insulates the Legislature from reform by the people through the initiative process.

"To construe article XVIII as vesting the Legislature with a power to veto such reform measures would be seriously inconsistent with the democratic principles expressed in article II." *Legislature v. Eu*, 54

Cal.3d at 511-512. The decision does not suggest that if the

changes to the state Constitution adopted by an initiative are

considered sufficiently objectionable by opponents of the measure

that this Court is empowered to make such changes on its own. If

that were the case, then this Court, like the Legislature, would have

an effective veto power over the right of the people to self

government. The people of California have the right to amend their

Constitution even against the preferences and interests of the

Legislature, the Executive or the Judiciary.

Third, *Legislature v. Eu* wisely observes that the Legislature

and the people have a constitutional means to respond to an amendment to the state Constitution to which they object, which is to propose and qualify for the ballot an alternative amendment for adoption by the voters at a future election.

If, as petitioners predict, Proposition 140 ultimately produces grave, undesirable consequences to our governmental plan, the Legislature (Cal. Const., art. XVIII, § 1) or the people (*id.*, art. XVIII, § 3) are empowered to propose a new constitutional amendment to correct the situation.

Legislature v. Eu, 54 Cal.3d at 512.

Fourth, constitutional amendments are presumptively valid. "Resolving, as we must, all doubts in favor of the initiative process, we conclude that nothing on the face of Proposition 140 effects a constitutional revision." *Legislature v. Eu*, *id.*

Each of these principles compels the conclusion that Proposition 8 is a valid exercise of the people's sovereign authority to amend their Constitution.

B. CONSTITUTIONAL AMENDMENTS THAT AFFECT FUNDAMENTAL RIGHTS DO NOT THEREBY BECOME "REVISIONS" AND ARE NOT REQUIRED TO SHOW A COMPELLING GOVERNMENTAL INTEREST.

In *Brosnahan v. Brown* (1982) 32 Cal.3d 236, and *In re Lance W.* (1985) 37 Cal.3d 873 at 891-892, this Court twice rejected claims that a previous Proposition 8, the Victim's Bill of Rights, unlawfully revised the Constitution, although it added multiple provisions to the Constitution to protect the safety of citizens, changed criminal law enforcement procedures, modified rules of evidence, and restricted judicial power to fashion rules of evidence, particularly the exclusionary rule, a fundamental principle broadly impacting criminal procedure, law and evidence.

The immense scope of the people's constitutional amendment authority by initiative, even affecting fundamental rights, was strikingly illustrated by this Court in *Lance W.* when it declared that Article 1, §13 could be removed entirely through the initiative amendment process:

The people could by amendment of the Constitution repeal section 13 of article I in its entirety. The adoption of section 28(d) which affects only one incident of that guarantee of freedom from unlawful search and seizure, a judicially created remedy for violation of the guarantee, cannot be considered such a sweeping change either in the distribution of powers made in the

organic document or in the powers which it vests in the judicial branch as to constitute a revision of the Constitution within the contemplation of article XVIII.

In re Lance W., 37 Cal.3d at 892; emphasis added.

The section of the California Constitution that this Court said could be deleted entirely by a valid initiative amendment contains one of the most basic of all civil rights of California residents, the vital guarantee against unreasonable search and seizures:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

Article 1, §13.

Clearly nothing in the addition of Article 1, §7.5 to the state Constitution by Proposition 8 even approaches the impact that removal of the constitutional guarantee against unreasonable search and seizure in Article 1, §13, would have on the plan, operation and constitutional structure of the state government. By this standard, Proposition 8 cannot conceivably be considered a constitutional revision.

The constitutional amendments approved in *Raven* also impacted fundamental rights and yet were deemed proper by this

Court. In *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, this Court had declared that the right to a post-indictment preliminary hearing protected "fundamental rights" of the accused (22 Cal.3d at 592-593), and yet the repeal of that procedure by Proposition 115 was later approved in *Raven* and that holding confirmed in *Bowens v. Superior Court* (1991) 1 Cal.4th 36. "[W]e conclude that a new constitutional provision enacted by Proposition 115 has abrogated the holding of *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 150 Cal.Rptr. 435, 586 P.2d 916 (*Hawkins*) and that, as such, a defendant indicted in California is no longer entitled to, and indeed may not be afforded, a postindictment preliminary hearing or any other similar procedure." *Bowens*, 1 Cal.4th at 39.

The *Hawkins*, *Raven*, *Bowens* line of cases refutes the argument raised by the petitions and the Attorney General in this proceeding that an initiative impacting fundamental equal protection rights must demonstrate a compelling state interest in order to be accepted as a valid constitutional amendment. This Court's opinion in *Hawkins* expressly found that criminal prosecutions that proceeded by indictment rather than by information deprived defendants of fundamental procedural rights, violated equal protection of the law, and were subject to a strict scrutiny standard of

review concerning their constitutional validity, which included a showing of a compelling state interest.

Under the traditional two-tier test of equal protection, a discriminatory legislative classification that impairs *fundamental rights* will be subjected to *strict scrutiny* by the courts, and the state will be required to bear the heavy burden of proving not only that it has a *compelling interest* which justifies the classification but also that the discrimination is necessary to promote that interest.

For the reasons stated in Part I, Ante, the denial of a postindictment preliminary hearing deprives the defendant of "such fundamental rights as counsel, confrontation, the right to personally appear, the right to a hearing before a judicial officer, and the right to be free from unwarranted prosecution. These guarantees are expressly or impliedly grounded in both the state and federal Constitutions and must by any test be deemed 'fundamental.'"

Hawkins, 22 Cal.3d at 592-593; citations omitted; emphasis added.

The Attorney General was required by the Court in *Hawkins* to satisfy the strict scrutiny, compelling state interest test in order to justify prosecutions by indictment that did not provide defendants with the preliminary hearings and related rights that accompany a prosecution by grand jury information, and when the Attorney General was unable to do so to the satisfaction of the Court, the denial of post-indictment preliminary hearings was declared unconstitutional:

[N]one of these reasons amounts to a constitutionally

"compelling" state interest that justifies depriving an indicted defendant of the above-discussed fundamental rights guaranteed to him in a preliminary hearing. [¶] We conclude that the denial of a postindictment preliminary hearing deprived defendants herein of equal protection of the laws guaranteed by article I, section 7, of the California Constitution.

Hawkins, 22 Cal.3d at 593.

Nevertheless, when Proposition 115 eliminated the right to a post-indictment preliminary hearing, this Court in *Raven* imposed no requirement of a showing of a compelling state interest to justify the constitutional amendment and did not apply strict scrutiny in the examination of the issue. In *Bowens*, when this Court again specifically focused on the denial of the right to a post-indictment preliminary hearing due to the constitutional amendments adopted through Proposition 115, it expressly applied a rational basis test to the federal equal protection claims:

These legitimate state interests, rationally related to the system of indictment by grand jury without a preliminary hearing, compel our conclusion that the alternative charging procedure contemplated by article I, sections 14 and 14.1 of the California Constitution does not violate the Fourteenth Amendment's guarantee of equal protection of the laws.

Bowens, 1 Cal.4th at 43-44.

As to the state constitutional arguments, the review by the Court was even more deferential to the amended constitutional text.

The Court simply analyzed the language of the amendment and found that a plain reading of the text eliminated the post-indictment preliminary hearing requirement founded upon the state equal protection concerns in *Hawkins* and held that no preliminary hearings (or judicially created "quasi-preliminary hearings" urged by the petitioners) were permissible under the Constitution:

The only reasonable interpretation of Proposition 115 is that article I, section 14.1 was purposefully intended to abrogate the equal protection analysis underlying the substantive holding of *Hawkins*.

The express mandate of article I, section 14.1 -- that "[i]f a felony is prosecuted by indictment, there shall be no postindictment preliminary hearing" -- is inherently inconsistent with this court's interpretation of the scope of the state equal protection clause in *Hawkins*. . . . According to its plain, ordinary meaning, article I, section 14.1 bars from the indictment process the very same procedure this court adopted in *Hawkins*; namely, the postindictment preliminary hearing. The inconsistency between the new constitutional provision and this court's previous interpretation of an indicted defendant's rights under the state equal protection clause is inescapable. . . .

. . . . To the extent *Hawkins* mandates that an indicted defendant be afforded a postindictment preliminary hearing, the voters' adoption of article I, section 14.1 must be seen as abrogating that holding, and limiting the scope of the state constitutional right of equal protection (Cal.Const., art. I, § 7) as it relates to the constitutionally mandated indictment process. Similarly, article I, section 14.1, also limits and thereby precludes a challenge based on the due process clause contained in article I, section 7 of the California Constitution, an issue not reached by the court in *Hawkins*.

This interpretation gives full effect to the intent of the electorate in passing Proposition 115 and article I, section 14.1. The manifest intent behind the measure was to prohibit preliminary hearings in criminal cases prosecuted by indictment. The voters' intent is clear from the words of article I, section 14.1.

Bowens, 1 Cal.4th at 44-45; citations omitted.

The references in the *Marriage Cases* to fundamental rights under the state equal protection clause do not undermine the validity of Proposition 8 or turn it into a revision rather than an amendment.

III. THIS COURT HAS NO POWERS APART FROM THOSE GRANTED, AND LIMITED, BY THE STATE CONSTITUTION, AND NO AUTHORITY TO ABROGATE AN AMENDMENT TO THE CONSTITUTION.

"Human nature is fallible, and we do not arrogate to ourselves any superiority of judgment. . . ." *People v. Johnson* (1856) 6 Cal. 499, 506.

This Court has no lawful authority to remove Article 1, §7.5 (Proposition 8) from the state Constitution. The Judiciary, just as the Executive and Legislative Branches of government, derives its powers only from the state Constitution itself, Article 6, §1 ("The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record."). In

support of the petitions, the Attorney General asserts that the courts have inherent judicial powers even to overrule the text of the Constitution itself, but in reality "the inherent powers of the courts are derived from the Constitution (art. VI, § 1)." *Walker v. Superior Court* (1991) 53 Cal.3d 257, 267.

The four justices who acted to invalidate the state statutory definition of marriage under the authority of their reading of the equal protection clause of the state Constitution in the *Marriage Cases* no longer have any constitutional justification for such a holding because Article 1, §7.5 is now part of the Constitution and binding on the Courts. To the extent that the state Constitution acts as a restraint on the powers of the government, its restraints apply equally to the state judiciary. As this Court stated in the majority opinion in the *Marriage Cases*, "the provisions of the California Constitution itself constitute the ultimate expression of the people's will." 43 Cal.4th at 852.

A constitutional separation of powers problem would exist in this case if this Court were to strike Article 1, §7.5 from the Constitution, as urged by the petitioners and the Attorney General, because the Court lacks authority either to amend the Constitution or to disregard any of its provisions.

In the early case of *People v. Johnson, supra*, this Court was asked by petitioners, in the interests of public policy, to treat a provision of the state Constitution as merely directory and not binding on the parties or government officials. The Court ruled that despite the general disposition of public officials to disregard the constitutional restrictions placed on them, the Court has no authority other than to interpret and apply the clear meaning of the constitutional language:

The language of the article already quoted, is too clear and explicit to admit of but one interpretation. In fact, it would defy the ingenuity of the most subtle intellect to invent a consistent interpretation, other than that which naturally suggests itself from the words of the Article. It is without ambiguity. . . . So plain is the meaning of the language, that it is scarcely worth while to invoke rules of construction, and ***in cases where the language of an Act is plain and unambiguous, Courts are not permitted to resort to rules of construction to alter such meaning.*** . . .

People v. Johnson (1856) 6 Cal. at 500-501; emphasis added; see also *Nougues v. Douglass* (1857) 7 Cal. 65, at 67 ("[W]here the language of the Constitution is express and the intent plain, ***there is no power in the judicial department to set it aside***, whatever inconvenience may result from a legitimate application of the provision." (emphasis added)).

More profoundly, the *Johnson* Court recognized the dangers

that would flow were it to accept the invitation to ignore the binding effect of clear constitutional language:

If a Court were at liberty to say at pleasure that the organic law of the State was directory, then the whole Constitution could be frittered away by judicial decisions, involving in its abrogation the social and political rights of the citizen. Such a power is too dangerous ever to be committed to the arbitrary will of any man or set of men.

Johnson, 6 Cal. at 504. This is true even if adherence to the constitutional mandate might, in the Court's judgment, have injurious consequences of its own. As the *Nougues* Court noted, "The argument against the correctness of the construction . . . is entirely based upon the supposed injurious consequences that it is alleged must flow from that decision; and it is insisted, for this reason, that the limitation does not apply." The Court correctly rejected that argument in *Nougues*, holding instead that it has no power to substitute its judgment for the text of the Constitution itself. *Id.*

Constitutional powers and authority arise from the people whose sovereign act of constructing the state Constitution is the predicate for all valid authority of government officials. No court can overrule the authority that creates its powers:

The reserved powers of the State reside primarily in the people; and they, by our Constitution, have delegated all their own powers to the three departments -- legislative, executive and judicial -- except in those cases where

they have themselves exercised these powers. . . . **So far, then, as the people have exercised the legislative powers of government in the formation of the Constitution of the State, their action is conclusive upon all the departments.**

Nougues, 7 Cal. at 69; emphasis added.

A similar foundational rule of law states that courts are forbidden to employ manipulative rules of interpretation to avoid the clear requirements of the state Constitution. Courts cannot interpret rights granted or restricted under the state Constitution to promote concepts of the public welfare that contradict the language of the Constitution itself:

The term "public welfare" has never been given a fixed or static definition. The development of the judicial definition of its scope is illustrative of the progressive thinking of the judiciary and its forward march to keep abreast with sociological, political, and moral progress. ***Where constitutions are restrictive in their positive terms, courts are powerless to change them by interpretation. That power is vested solely in the sovereign people to be exercised only by way of constitutional amendment.***

Ex parte Kazas (1937) 22 Cal.App.2d 161, 170; emphasis added.

[T]his court is not at liberty to add provisions to the constitution. However wise we may believe such an exception to be, we cannot carve it out from [an initiative amendment to the Constitution] unless there is an affirmative indication of voter intent or language in the measure itself which is reasonably susceptible of such a meaning.

Lynch v. State Board of Equalization (1985) 164 Cal.App.3d 94, 112; citations omitted.

In *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, this Court closely examined its prior practice of expanding legal protection to claims of civil rights not specifically listed in the text of the Unruh Civil Rights Act and concluded that it would be inappropriate to continue to extend the scope of the statute by the authority of the judiciary acting alone even though the Legislature had not acted to overrule the Court. This Court reasoned that although "Legislative inaction is a weak reed upon which to lean" (52 Cal.3d at 1156) the Legislature could be said to have accepted by implication the Court's expansion of the statute. 52 Cal.3d at 1154-1159. The Court refused, however, to expand further the categories of people protected under the law on its own authority alone. 52 Cal.3d at 1161-1165.

In the present action, this Court is being asked to act not with the implicit consent of the Legislature but in opposition to the plain language of the Constitution. The judicial restraint explained and practiced by this Court in *Harris* represents the constitutionally mandated course of action to take in response to the petitions now before the Court.

CONCLUSION

Unlike the plaintiffs in Colorado in *Romer v. Evans* (1996) 517 U.S. 620, the proponents of same sex marriage in California are not left without viable recourse. Like advocates for other cultural movements before them, they can continue their efforts to turn public opinion in their favor and then propose another constitutional amendment by initiative to approve same sex marriage. When that day comes, no argument that such an effort should be rejected as an unconstitutional revision would be sustained. No more can that contention be sustained today.

Regarding an earlier amendment adopted after a contentious election, this Court noted that the proper recourse was another election. In order to change the Constitution, the Court held, the recourse is not to the judiciary but to the electorate. "If it is desired" to change a constitutional rule, then

a change in our constitutional provision is essential. A proposed constitutional amendment of this character is now pending to be voted on at the next election, and the people of the state will thus presently be afforded the opportunity to make the change if they so desire.

Boca Mill Co. v. Curry (1908) 154 Cal. 326, 340.

Consternation has been raised in the media and in the petitions filed in this Court about the decision by the People of this

State to restore the definition of marriage to what it has been throughout most of recorded history and the entire history of this state until last year. Whether that consternation is well founded is not the issue presently before this Court. Rather, and profoundly, this case presents vital issues about the right of the People, and only the People, to amend the Constitution, as manifested in Proposition 8. Prior precedent and the basic precepts of government in a constitutional democracy clearly sustain the authority that was exercised by the People last November, however much some might wish they had acted otherwise.

"[The] power of initiative must be liberally construed. . . . [I]t is our solemn duty jealously to guard the sovereign people's initiative power, it being one of the most precious rights of our democratic process." *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241. The petitions must be denied.

January 14, 2009

Respectfully submitted,

David L. Llewellyn, Jr.
John C. Eastman
Anthony T. Caso
Karen Lugo
Of counsel, Center for
Constitutional Jurisprudence

CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c)(1), this is to certify that this brief contains 8,440 words, as determined by the word count feature of the word processing program in which it was prepared.

January 14, 2009

David L. Llewellyn, Jr.
Of counsel, Center for
Constitutional Jurisprudence

PROOF OF SERVICE

I am over the age of 18 and not a party to this action. I am a resident of or employed in the county where the document(s) described below were mailed. My business address is 5530 Birdcage Street, Suite 210, Citrus Heights, California 95610. I served the document(s) described below on the interested parties in this action by placing a true and correct copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, by Express Mail, or with Federal Express, for overnight delivery:

Date of deposit: January 15, 2009
Location of deposit: Citrus Heights, California

Description of document(s): Brief *Amicus Curiae* of the Center for Constitutional Jurisprudence in support of the Intervenors and Respondents, in *Strauss v. Horton*, S168047; *Tyler v. State of California*, S168066; *City and County of San Francisco v. Horton*, S168078

Addressee(s):

See attached service list

I declare under penalty of perjury that the foregoing is true and correct. Executed at Citrus Heights, California, January 15, 2009.

Service List

For Supreme Court Case Nos. S168047, S168066 and S168078.

SHANNON MINTER
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
Tel 415-392-6257

Attorneys for Petitioners KAREN L. STRAUSS et al. (S168047)

GLORIA ALLRED
Allred, Maroko & Goldberg
6300 Wilshire Blvd, Ste 1500
Los Angeles, CA 90048
323-653-6530

Attorneys for Petitioners ROBIN TYLER et al. (S168066)

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Deputy City Attorney
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
(S168078)

JEROME B. FALK, JR
HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
A Professional Corporation
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, Suwana Kerdkaw and Tina M. Yun (S168078)

ANN MILLER RAVEL
County Counsel
Office of The County Counsel
70 West Hedding Street
East Wing, Ninth Floor
San Jose, CA 95110-1770
Telephone: (408) 299-5900
Facsimile: (408) 292-7240

Attorneys for Petitioner COUNTY OF SANTA CLARA (S168078)

ROCKARD J. DELGADILLO
City Attorney
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
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
Office of County Counsel
County of Alameda
1221 Oak Street, Suite 450
Oakland, CA 94612
Telephone: (510) 272-6700

Attorneys for Petitioner COUNTY OF ALAMEDA (S168078)

PATRICK K. FAULKNER
County Counsel
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
Hall of Justice and 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)

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
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 Boulevard, Fourteenth 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
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 the City Attorney, City of San Diego, 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 (S168078)

MARSHA JONES MOUTRIE
City Attorney
Santa Monica City Attorney's Office
1685 Main Street, 3rd Floor
Santa Monica, CA 90401
Telephone: (310) 458-8336
Telephone: (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.
CHRISTOPHER E. KRUEGER
MARK R. BECKINGTON
Office of the Attorney General
1300 I St Ste 125
Sacramento, CA 95814-2951
(916) 445-7385

Attorneys for Respondent EDMUND G. BROWN JR. (S168047, S168066, S168078) and for Respondent STATE OF CALIFORNIA (S168066)

KENNETH C. MENNEMEIER
MENNEMEIER, GLASSMAN & STROUD LLP
980 9th Street, Suite 1700
Sacramento, CA 95814-2736
Telephone: (916) 553-4000
Facsimile: (916-553-4011

Attorneys for Respondents MARK B. HORTON and Linette Scott (S168047, S168078)

ANDREW P. PUGNO
101 Parkshore Dr Ste 100
Folsom, CA 95630-4726
Telephone: (916) 608-3065

Attorneys for Interveners (S168047, S168066, S168078)

KENNETH W. STARR
24569 Via De Casa
Malibu, CA 90265-3205
Telephone: (310) 506-4621

Attorneys for Interveners (S168047, S168066, S168078)