Case Nos. S168047, S168066, S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS et al., Petitioners,
v.
MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al., Respondents;
DENNIS HOLLINGSWORTH et al., Interveners.

ROBIN TYLER et al., Petitioners,
v.
THE STATE OF CALIFORNIA et al., Respondents;
DENNIS HOLLINGSWORTH et al., Interveners.

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners,
v.
MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al., Respondents;
DENNIS HOLLINGSWORTH et al., Interveners.

APPLICATION BY LOG CABIN REPUBLICANS FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS;

[PROPOSED] AMICUS CURIAE BRIEF OF LOG CABIN REPUBLICANS IN SUPPORT OF PETITIONERS

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

Pursuant to California Rules of Court, rule 8.520(f), Log Cabin Republicans respectfully requests leave to file the attached brief of amicus curiae in support of all Petitioners. This application is made pursuant to this Court's November 19, 2008 order.

I. AMICUS CURIAE

Log Cabin Republicans ("Amicus") is a nonprofit corporation organized under the laws of the District of Columbia. Log Cabin Republicans is the largest organization associated with the Republican Party dedicated to the interests of the gay and lesbian community. The organization got its start in California in the late 1970s and now boasts over fifty chapters across the United States, including several in this State. The organization stands for, among other things, limited government, individual liberty, individual responsibility, free markets, and a strong national defense. Additionally, the organization believes that the moral values underlying these principles require the pursuit of equal protection under the law for all, including gay and lesbian Americans. Throughout its history, Log Cabin Republicans and its members have supported political candidates, community activities and educational initiatives that provide equal rights under the law to all Americans, discourage discrimination against or harassment of persons who are gay or lesbian, and encourage participation in the Republican Party by gay and lesbian Americans. Log Cabin Republicans' membership encompasses both heterosexual and homosexual Republicans.

II. AMICUS CURIAE'S INTEREST

The issues presented in this case implicate the rights and privileges of Log Cabin Republicans' members. Because Amicus maintains several chapters within the State of California, the resolution of Proposition 8's validity directly impacts its resident members' fundamental right to marry. In addition, Log Cabin Republicans' membership includes individuals who married following this Court's May 2008 decision in *In re Marriage Cases* (2008) 43 Cal. 4th 757. Thus, Log Cabin Republicans has a substantial interest in this matter.

III. NEED FOR ADDITIONAL BRIEFING

Amicus is familiar with the issues before this Court and the scope of their presentation. Log Cabin Republicans believes that further briefing is necessary to address matters not fully addressed by the filed briefs. For example, so far as Log Cabin Republicans is aware, no party has raised or addressed the argument that the initiative amendment process of article XVIII is circumscribed by several other express provisions of the Constitution. In addition, no party appears to have addressed the impact of article I, section 7(b)'s privileges or immunities clause (and its irreconcilable conflict with Proposition 8). Finally, Log Cabin Republicans believes this Court would benefit from the correction of several erroneous and misleading aspects of Interveners' arguments, some of which appear in briefing filed after the Petitioners' briefs were filed, to which Petitioners will not have the opportunity to respond.

IV. IDENTIFICATION OF AUTHORS AND MONETARY CONTRIBUTORS

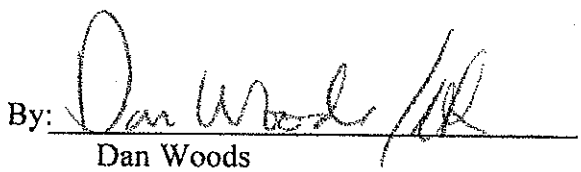
Pursuant to California Rules of Court, rule 8.520(f), Amicus confirms that no party or their counsel authored this brief in whole or in part. Nor did any party, their counsel, person, or entity make a monetary contribution to the preparation or submission of this brief, except Amicus, its members, or its counsel in the pending case.

V. CONCLUSION

For the foregoing reasons, Log Cabin Republicans respectfully requests that this Court accept the accompanying brief for filing in this case in support of Petitioners.

Dated: January 15, 2009

Respectfully submitted,

By: 

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I. INTRODUCTION

Log Cabin Republicans respectfully submits in support of Petitioners this amicus brief specifically addressed to the first question raised by this Court in its November 19, 2008 Order, namely: "Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution?" (See Cal. Const., art. XVIII, §§ 1-4.)

As Interveners concede, this Court can "properly intervene" in the people's use of the initiative process to amend the Constitution "when the use of that power has clearly and unmistakably exceeded the boundaries the people themselves have set." (Interveners' Opp'n Br. 29.) The threshold question of first impression here is whether, as Interveners argue, the only "boundary" is the amendment/revision analysis developed by this Court's jurisprudence interpreting article XVIII of the Constitution, or whether the efficacy of Proposition 8 must be measured against other "boundaries the people themselves have set" embodied in the actual text of the Constitution itself, including these express textual protections of the rights of the people:

- "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(b).)
- "A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the law." (Cal. Const., art. I, § 7(a).)
- "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty,

acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const., art. I,§ 1.)

– "All laws of a general nature have uniform operation." (Cal. Const., art. IV, § 16(a).)

Notwithstanding their fulminations about "judicial activism" and "extra-constitutional notions," Interveners' argument simply ignores – worse, it brusquely shunts aside – *the text of the Constitution* quoted above and well-settled principles of constitutional construction to arrive at the result they want: that the amendment power is limitless to the point that Proposition 8 trumps everything that came before it. Interveners' expansion of the amendment power yields an illogical result – that a bare majority of the moment can nullify the core constitutional provisions designed to rein it in. Such a result cannot be how the architects of our Constitution intended article XVIII to operate, as it would essentially negate the amendment/revision distinction. The only way to harmonize the scope of the amendment power with the Constitution's equal protection provisions and avoid an irreconcilable conflict is to recognize Proposition 8 for what it is: a revision.

Even if one were to assume that the amendment power itself granted in article XVIII were not circumscribed by other provisions of the Constitution, and simply submit Proposition 8 to an amendment/revision analysis, Proposition 8 necessarily fails as an unconstitutional revision. While no Petitioner appears to have raised the argument, Log Cabin Republicans respectfully submits Proposition 8 should be adjudged an improper revision both as a quantitative and qualitative matter. First, as described below, Proposition 8 fails the revision/amendment analysis as a quantitative matter because it materially affects several core constitutional

provisions (including the privileges or immunities clause, the right to privacy, the right to intimate association, the right to pursue and obtain happiness, the fundamental right to marry, and the equal protection clause), not just one (equal protection) as Interveners profess.

Second, recognizing the validity of Proposition 8 would necessarily entail a qualitative "revision" of the Constitution as it would constitute an implied repeal of the Constitution's privileges or immunities clause as well as the several other provisions of the Constitution underlying this Court's decision in *In re Marriage Cases* (2008) 43 Cal. 4th 757. These concepts represent such a "wide spectrum of important rights under the state Constitution" (*Raven v. Deukmejian* (1990) 52 Cal. 3d 336, 355) that they amount to an unconstitutional revision. Moreover, Proposition 8 is an entirely unprecedented attempt to use the initiative amendment process to redefine the scope of constitutional rights only for a targeted, historically-persecuted class of Californians, not for all. Nowhere in their briefs do Interveners cite authority for such a remarkable departure from traditional concepts of equality, liberty, and constitutional democracy. Should this court rule in favor of the validity of Proposition 8, it would sanction this disgraceful principle for the first time.

For the foregoing reasons, Interveners' blanket statement that "what is at stake here is emphatically not a bundle of substantive legal rights being stripped away from a class of individuals" is flat wrong. (See Interveners' Resp. to pp. 75-90 of the Att'y Gen.'s Answer Br. 2 [hereinafter Interveners' Response].) It is part and parcel of Interveners' disingenuous attempts to minimize the discriminatory intent, effect, and ramifications of Proposition 8. (See, e.g., Interveners' Response at 15

("This is emphatically not the case of the majority in any manner tyrannizing a vulnerable minority.").)

The consequence of Interveners' argument is that the text of the Constitution would not mean what it says:

- the California Constitution explicitly recognizes the concept of "equal protection" and at the same time by the operation of Proposition 8 the "equal protection clause continues fully to protect gays and lesbians in literally all areas of the law, with the sole caveat that the definition of marriage is limited." (Interveners' Opp'n Br. 23.)
- the Constitution can both explicitly require that a "citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens" and at the same time one class of citizens can be denied privileges or immunities granted to another.

The "power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them" is doublethink. That Orwellian concept has never been this Court's guiding principle for constitutional interpretation and it should not be elevated to that stature now at the expense of gay and lesbian Californians.

II. THE AMENDMENT POWER CANNOT ENCOMPASS PROPOSITION 8 FOR, IF IT DOES, IT WOULD IMPERMISSIBLY REPEAL THE CONSTITUTION'S EQUALITY PROVISIONS

Article XVIII and article I of the California Constitution cannot be reconciled so as to permit the enactment of Proposition 8 as an amendment to our Constitution. The architects of the Constitution could not have

intended that the electorate, by simple majority vote, might eviscerate the equality protections of article I, section 7. Were this Court to hold otherwise, it would, by judicial fiat, destroy bedrock principles which the people long ago enacted to preserve their freedom.

Article XVIII provides for the amendment and revision of the Constitution. However, as this Court has noted, the Constitution fails to define which changes may be enacted as mere amendments – by simple majority vote of the electorate – and which must go through the more deliberative and burdensome legislative supermajority approval process for revisions. (See *Raven v. Deukmejian*, *supra*, 52 Cal. 3d at p. 350.) Over time, this Court has provided "guidelines" to assist in determining where to draw the line between revisions and amendments, but never has it declared the "guidelines" to be the exclusive analysis. (See *id.* ("the courts have developed some guidelines helpful to resolving the present issue").)

As described below in Parts III and IV, this Court's traditional guidelines – the quantitative and qualitative analyses discussed, for example, in *Raven* – preclude Proposition 8's enactment as an amendment to the Constitution. However, the issue immediately before this Court can be resolved without resort to these guidelines. Settled principles of constitutional construction teach that the article XVIII amendment power does not encompass an enactment such as Proposition 8.

Where "constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted." (*Bowens v. Superior Court* (1991) 1 Cal. 4th 36, 45; *Serrano v. Priest* (1971) 5 Cal. 3d 584, 596.) Similarly, where a provision is ambiguous and open to alternative meanings, this Court has a duty to resolve the ambiguity by

construing the provision in harmony with other constitutional provisions. (*City & County of San Francisco v. County of San Mateo* (1995) 10 Cal. 4th 554, 563.) The aim is to "avoid the implied repeal of one provision by another." (*Id.*) Irreconcilable conflicts are to be avoided such that "if the two provisions can be construed to apply concurrently, we must do so." (*Id.* at p. 567 (emphasis added).)

The provisions of article XVIII are ambiguous. Absent is any textual direction for distinguishing amendatory and revisory constitutional changes. By contrast, California's equality protections memorialized in article I, section 7 are specific and unambiguous. Section 7(a) contains California's equal protection clause while section 7(b) contains the privileges or immunities clause. The latter provision states, "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." These provisions unequivocally demand what this Court implicitly recognized last May – that when the State treats groups of citizens differently so as to violate its equal protection principles, the state-afforded benefits must be extended to include the previously excluded class or withheld from the populace as a whole. (*In re Marriage Cases*, *supra*, 43 Cal. 4th at p. 856.)[1]

Interveners would resolve the ambiguity in article XVIII by adopting an overly broad view of the amendment power. They posit that the people,

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[1] This Court stated, "When a statute's differential treatment of separate categories of individuals is found to violate equal protection principles, a court must determine whether the constitutional violation should be eliminated or cured by extending to the previously excluded class the treatment or benefit that the statute affords to the included class, or alternatively should be remedied by withholding the benefit equally from both the previously included class and the excluded class."

by simple majority vote, may refuse to grant the right to marry to all California citizens on the same terms. Worse, they maintain that the people may eliminate the right for a suspect classification of citizens. (See Interveners' Req. for Jud. Notice in Supp. of Interveners' Opp'n. Br., Ex. 4, Voter Information Guide, Gen. Elec. Nov. 4, 2008 (describing Proposition 8 as "eliminat[ing] right of same-sex couples to marry").)

Interveners' view of the article XVIII amendment power sets up a direct conflict between that provision and California's equality protections. The inescapable result would be that the amendment power permits exactly what the privileges or immunities clause prevents. Clearly, the privileges or immunities clause is intended to restrict the majority from withdrawing rights from disfavored minorities. Yet, according to Interveners, the amendment power allows exactly that – removal of rights from a suspect classification of citizens by a bare majority of voters. An irreconcilable conflict is assured. This Court must therefore construe the textually ambiguous amendment power to avoid this conflict and harmonize the provisions, if at all possible.

Interveners' preferred construction yields a logically absurd result. The framers of our Constitution could not have intended to grant lofty equality protections against government by the majority of the moment but also permit that same majority to subvert such protections through the amendment process. The only logical construction of article XVIII, and the result which this Court's "harmonization" principle mandates, is that a proposed constitutional change which abrogates these fundamental protections underlying our constitutional democracy may only be enacted by the avenues which require something more than a bare majority vote –

legislative revision or constitutional convention. This is the only construction of article XVIII which avoids a direct, irreconcilable conflict with the equal protection and privileges or immunities clauses. Any other construction would impliedly repeal – write out judicially – core provisions the people enacted over a century ago. Viewing Proposition 8 as a revision thus properly resolves the inherent ambiguity in article XVIII so as to harmonize it with article I, section 7.

This Court's "harmonization" jurisprudence amply supports this result. *Serrano v. Priest* (1971) 5 Cal. 3d 584, 595-96, instructs that where, as here, two constitutional provisions potentially clash due to the ambiguity of one or both provisions, the ambiguity must be resolved to avoid that clash, if at all possible. *Serrano* concerned the intersection and possible clash of sections 5 and 6 of article IX. (*Id.* at p. 592.) Section 5 ambiguously requires that the legislature provide for a "system of common schools" in California, i.e., one system applicable to all public schools in the State. (*Id.* at p. 595.) Plaintiffs argued that this ambiguity should be resolved to require equal school spending. (*Id.* at pp. 595-96.) However, section 6 expressly permits each city and county to levy such taxes to support its schools as it deems necessary. (*Id.*) The requested construction of section 5, thus, would have rendered the two provisions irreconcilable. (*Id.*) As a result, this Court resolved the ambiguity in section 5's "common system" requirement to avoid the clash by mandating only a uniform curriculum, not uniform spending. (*Id.*)

Legislature v. Eu (1991) 54 Cal. 3d 492, 506-12, exemplifies how this Court resolves the amendment/revision ambiguity by reference to the absurd outcome an alternative construction would produce. *Eu* concerned a

potential conflict between the article XVIII powers and article II, section 1, which places all political power in the people and invests the people with the right to alter or reform their government. (*Id.* at pp. 511-12). In 1990, the people of California adopted Proposition 140, a constitutional amendment establishing term and budgetary limitations on the Legislature. (*Id.* at 499, 506.) The *Eu* petitioners, however, argued that the limitations Proposition 140 introduced could only be enacted by constitutional revision, not amendment. (*Id.* at p. 506.)

The petitioners' view of the amendment/revision powers would have placed article XVIII in direct conflict with article II, section 1. (*Eu, supra,* 54 Cal. 3d at pp. 511-12). Because constitutional revisions require a two-thirds vote of both houses of the Legislature, the petitioners' requested reading of the amendment power would vest the Legislature with a *de facto* power to veto reform measures aimed at itself, such as Proposition 140. (*Id.*) It would eliminate "the only practical means the people possess to achieve reform of that branch" and render the article II, section 1 rights a nullity. To avoid this absurd result, this Court resolved the ambiguity by holding that the amendment power encompassed Proposition 140. (*Id.*)

In *Serrano*, this Court construed article IX, section 5 to avoid undermining each school district's express right to independently determine the amount to tax its constituents. In *Eu*, this Court construed article XVIII to avoid undermining the people's express power to reform their government. This Court must now construe article XVIII to avoid undermining the people's express equal protection guarantees. (See also *Carman v. Alvord* (1982) 31 Cal. 3d 318, 333 (requiring that courts "adopt

a reasonable interpretation" of constitutional provisions that "avoid[] the constitutional issue inherent in a contrary construction").)

III. PROPOSITION 8 IS A REVISION BECAUSE OF ITS SUBSTANTIAL QUANTITATIVE EFFECT ON EXISTING CONSTITUTIONAL RIGHTS

Whether a constitutional enactment is an amendment or a revision depends on its quantitative and qualitative effect. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 223.) An enactment may amount to a revision if either the quantitative or qualitative effect is substantial. (*Raven v. Deukmejian*, *supra*, 52 Cal. 3d at p. 350.) Here, Proposition 8 unquestionably constitutes a revision because it significantly impacts Californians' constitutional rights, both quantitatively and qualitatively.

The quantitative impact is substantial if the enactment deletes or alters numerous existing constitutional provisions. (*Amador Valley*, *supra*, 22 Cal. 3d at p. 223.) Interveners dismiss Proposition 8's significant quantitative impact by claiming throughout their opposition brief that Proposition 8 creates an exception only to the equal protection clause, while leaving all other constitutional rights intact. (See, e.g., Interveners' Opp'n Br. 25 (stating that Proposition 8 "alters the Constitution so that equal protection no longer requires same-sex marriage").)[2] Proposition 8, however, in one brief sentence, sweepingly alters or nullifies no less than *six* essential constitutional rights. It alters express constitutional rights this

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[2] In their later-filed response to the Attorney General, Interveners acknowledged that Proposition 8's reach is far broader: Proposition 8 "limit[s] the scope of – or carv[es] out an exception to . . . provisions in the Declaration of Rights protecting liberty, privacy, equality, due process, etc." (Interveners' Response at 5.)

Court relied on in *In re Marriage Cases*. It also directly contradicts the privileges or immunities clause. Its quantitative effect is substantial and undeniable.

First, Proposition 8 attempts to strip inalienable rights from same-sex couples. Specifically, Proposition 8 denies same-sex couples the right to privacy, which includes the freedom of intimate association, and the right to pursue and obtain happiness. Interveners worry that this Court would analyze amendments based on "its own understanding of extra-constitutional notions of natural rights." (See Interveners' Response at 11.) We emphasize again that these inalienable rights are anything but extra-constitutional: they are plainly stated in the very first section of the Constitution.

In addition, the explicit right to privacy encompasses the fundamental right to marry. (*In re Marriage Cases*, *supra*, 43 Cal. 4th at pp. 809-10 (citing *Conservatorship of Valerie N.* (1985) 40 Cal. 3d 143, 161).) Similarly, the right to privacy embraces the constitutionally protected freedom of intimate association which shelters highly personal relationships, including marriage. (*In re Marriage Cases*, 43 Cal. 4th at p. 814 (citing *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal. 4th 594, 629-30); see also *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1303 (finding "under the state Constitution, the right to marry and the right of intimate association are virtually synonymous.").)

Also, as this Court recognized, the inalienable right of individuals to pursue and obtain happiness depends on their right to marry. (See Cal. Const., art. I, § 1; *In re Marriage Cases*, *supra*, 43 Cal. 4th at p. 816 ("The ability of an individual to join in a committed, long-term, officially

recognized family relationship with the person of his or her choice is often of crucial significance to the individual's happiness and well-being."); see also *Loving v. Virginia*, (1967) 388 U.S. 1, 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").)

The effect of Proposition 8 is not limited to depriving same-sex couples of inalienable rights enumerated in article I, section 1. Proposition 8 modifies other fundamental constitutional provisions, including the due process and equal protection clauses (art. I, § 7(a)). Proposition 8 implicates the due process clause because the liberty component of that clause embodies the constitutional right to marry. (*In re Marriage Cases*, *supra*, 43 Cal. 4th at p. 810 (citing *People v. Belous* (1969) 71 Cal. 2d 954, 963).) Moreover, forbidding same-sex couples access to the state-sanctioned designation of marriage violates the equal protection clause because the differential treatment fails strict scrutiny. (*Id.* at pp. 855-56.) Notwithstanding this recognized violation, Proposition 8, again, would redefine and reinterpret the meaning of "equal protection of the laws." (Cal. Const., art. I, § 7(a).) Proposition 8 would embed into the California Constitution a distinction based on sexual orientation, even though it is a suspect classification. (*In re Marriage Cases*, *supra*, 43 Cal. 4th at p. 843.) Additionally, it would deny same-sex couples the opportunity to have their family relationship accorded the same respect and dignity accorded to opposite-sex couples, as required by the equal protection clause. (*Id.* at p. 845.)

Finally, Proposition 8 directly conflicts with the privileges or immunities clause, a part of our Constitution since 1879. (Cal. Const. of

1879, art. I, § 21.)[3] The framers intended the privileges or immunities clause to provide protections which are substantially equivalent to an equal protection clause. (See *Brown v. Merlo* (1973) 8 Cal. 3d 855, 861 (noting that the privileges or immunities clause preserves the principle of equal protection); see also *Molar v. Gates* (1979) 98 Cal. App. 3d 1, 12-13 (identifying the privileges or immunities clause as one of California's "equal protection provisions").) Although Interveners observe that the "equal protection clause was not part of the Constitution of 1879," (Interveners' Opp'n Br. 22) they overlook the essential fact that equal protection was safeguarded by the adoption of the privileges or immunities clause in the Constitution of 1879. In 1974, an express equal protection clause was adopted in article I, section 7(a) and logically placed next to the long-established privileges or immunities clause, which was reworded slightly and renumbered section 7(b). (Cal. Const., art. I, § 7.)

The privileges or immunities clause states that a "class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." (Cal. Const., art. I, § 7(b).) Since the privileges or immunities clause independently protects the same rights as the equal protection clause, it likewise forbids improper classifications infringing upon the fundamental right to marry a person of one's choice. By restricting this fundamental right to a "class of citizens" – members of opposite-sex couples – and not granting that right on the same terms to all citizens, Proposition 8 violates the privileges or immunities clause.

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[3] As originally worded, the clause read "...[N]or shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

In sum, Proposition 8 amounts to a substantial quantitative change in the California Constitution. Interveners argue that the constitutional rights affected by Proposition 8, outlined both in *In re Marriage Cases* and in the Attorney General's Answer Brief, are mere figments of "undefined notions of natural law and natural rights." (Interveners' Response at 4.) No party to this case is more strongly committed than is Amicus to the principles that the touchstone of constitutional interpretation is the plain language of the Constitution itself, and that any elucidation of constitutional rights must be grounded in the text of that document. So long as *any* Californian has the right to marry the individual of his or her choice, the fundamental right of *every* Californian to do the same is compelled by numerous provisions of constitutional text, dating back to the adoption of the Constitution in 1879.

Without question, the explicit constitutional text recognizes the existence of inalienable rights:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

(Cal. Const., art. I, § I (emphasis added).) Thus, by its very language, the Constitution sets forth certain inherent, unassailable rights, immune from judicial, legislative, or popular repudiation. (See *In re Marriage Cases*, *supra*, 4 Cal. 4th at p. 852 (quoting *W. Va. Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 638 (stressing the purpose of a Bill of Rights, the federal analogue to California's Declaration of Rights, as withdrawing "certain subjects from the vicissitudes of political controversy")).)

Based on the numerous substantial constitutional alterations highlighted above, Proposition 8 is a revision, not an amendment. It sweepingly redefines and reinterprets the constitutional right to privacy, including the fundamental right to marry and freedom of intimate association, the right to pursue and obtain happiness, the due process clause, the equal protection clause, and the privileges or immunities clause.

IV. THE QUALITATIVE IMPACT OF PROPOSITION 8 UPON THE CALIFORNIA CONSTITUTION PRECLUDES ITS ENACTMENT AS AN AMENDMENT

A. Proposition 8 Would Abrogate Several Fundamental and Abiding Principles Underlying California's System of Government

The number and extent of changes Proposition 8 would inflict upon longstanding and fundamental constitutional principles also precludes its qualitative characterization as a mere amendment to our Constitution. This Court's well-settled jurisprudence makes clear that Proposition 8's far reaching impact upon our Constitution demands that it be passed as a revision, if at all.

This Court has consistently explained that an enactment, even if "relatively simple," must be passed as a revision if it would accomplish "far reaching changes in the nature of our basic governmental plan." (*Raven v. Deukmejian* (1990) 52 Cal. 3d 336, 351-52 (citing *Amador Valley, supra*, 22 Cal. 3d at p. 223 and *McFadden v. Jordan* (1948) 32 Cal. 2d 330, 347-48 (internal quotations omitted)).) An enactment that impairs the Constitution's "underlying principles" and is of a "permanent and abiding nature" similar to that of the Constitution itself must be passed as a

revision. (*Raven, supra*, 52 Cal. 3d at pp. 354-55; *Amador Valley, supra*, 22 Cal. 3d at p. 222.)

By contrast, an enactment may be done by amendment when it is merely an "addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (*Amador Valley, supra*, 22 Cal. 3d at p. 222.) Proposition 8 would do the opposite. By excluding a suspect classification of citizens from the right to marry, Proposition 8 would contravene the purpose of each of several constitutional principles.

Few, if any, constitutional provisions are more representative of the principles underlying our system of government than equal protection, due process, the right to privacy, the right to liberty, the right to pursue happiness, and the protection of the privileges or immunities clause. These protections are permanent and abiding guarantees framing the freedoms upon which the people of this State have come to rely.

Proposition 8 would nullify the long-mandated guarantee that no class of citizens be deprived the same privileges or immunities granted to other citizens. Proposition 8 falls well outside the lines of equal protection of the laws and the right to due process, among the most cherished principles securing our constitutional democracy.[4] Indeed, Interveners

[4] Interveners' argument that California's equal protection guarantee is due less deference because of its relatively recent enactment is without merit. (See Interveners' Opp'n Br. 22.) This Court rejected such illogic in *Raven*. (*Raven, supra*, 52 Cal. 3d at pp. 353-54.) The enactment at issue there would have partially nullified article I, section 24 of the Constitution, which guarantees that the rights protected by California's Constitution are not dependent on those guaranteed by the United States Constitution. (*Id.*) Though section 24 was passed in 1974, concurrently with the equal protection clause, this Court recognized that the section merely "made explicit a preexisting fundamental principle of constitutional

recognize that Proposition 8 "limit[s] the scope of – or carv[es] out an exception to – more general provisions in the Declaration of Rights protecting liberty, privacy, equality, due process, etc." (Interveners' Response at 5.) Because Proposition 8 disturbs such core constitutional principles, it must be construed as a revision.

This Court's analysis in *Raven v. Deukmejian, supra*, 52 Cal. 3d at pp. 349-356, further demonstrates that a change to our Constitution limiting an array of rights of the highest order must be enacted as a revision rather than an amendment. In *Raven*, this Court held that section 3 of Proposition 115 (1990) was qualitatively an invalid revision. (*Id.* at p. 355.) That section delegated to the federal courts all judicial interpretive power relating to several rights of criminal procedure. (*Id.* at p. 351.) The enactment would have impacted and limited at least four "fundamental constitutional rights," including due process and equal protection, and many "other important rights." (*Id.* at p. 352.) This Court viewed such an enactment as "a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution" and as changing "underlying principles on which the Constitution rests." (*Id.* at p. 355 (citations omitted).) As a result, that section of the proposition could only be passed as a revision.

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jurisprudence." (*Id.* at p. 354.) As a result, the proposition would have "substantially alter[ed] the preexisting constitutional scheme," requiring that it be enacted as a revision. (*Id.*) The equal protection clause enacted in 1974 is similarly a mere declaration of a preexisting constitutional principle. (See Reply in Sup. of Pet. for Extraordinary Relief [*Strauss*], at 8-9.) Moreover, California's privileges or immunities clause, like many other rights-guaranteeing provisions of the Constitution affected by Proposition 8, has been an express component of our Constitution for over a century and a quarter. (See Part III, above.)

Proposition 8 would similarly constitute a broad attack on state court authority to construe a wide spectrum of fundamental and important rights. As discussed, excluding same-sex couples from the right of marriage limits the equal protection, due process, and privileges or immunities clauses, and the many others discussed in this brief. It changes the meaning of several principles underlying our Constitution, including the long recognized principle that a "class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." (Cal. Const., art. I, § 7(b).)

Both the equal protection clause and the privileges or immunities clause of the California Constitution explicate constitutional principles of the highest order because they enshrine a vital bulwark against majority-endorsed discrimination of citizen classes. These provisions guarantee that the majority will not deny to any members of the populace enjoyment of rights that the majority itself is not willing to cede. (See also Reply in Supp. of Pet. for Extraordinary Relief [Strauss] at 7.) In this way, the equal protection and privileges or immunities clauses are part of our system of checks and balances preventing majoritarian absolutism and are important components of our system of democratic government.

Proposition 8 flies in the face of these protections. Interveners would have this Court endorse the removal of rights from a targeted class of citizens based solely on the vote of a bare majority. It is absurd to contend simultaneously that the framers of our Constitution intended to sanctify lofty protections against government by the majority of the moment, but would permit that same majority to subvert such protections

through the amendment process.[5] One of these contentions must yield, and the balance is not even close. The only logical result, and the result which *Raven* and this Court's other jurisprudence recognizes, is that a change which impacts such fundamental principles underlying our system of democratic government is only capable of enactment as a revision.[6]

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[5] Interveners acknowledge, "*All* constitutional rights are countermajoritarian. Their entire purpose is to protect fundamental interests against majoritarian power. Eliminating a right - or reducing its substantive scope - necessarily renders someone more vulnerable to the power of the majority." (Interveners' Opp'n Br. 22 (emphasis in original).) Yet, Interveners also claim a mere majority may strip away those constitutional protections. (See Interveners' Response at 5.)

[6] Indeed, to uphold Proposition 8 would result in an implied repeal of long-standing provisions of the Constitution, including the equal protection and privileges or immunities clauses. As discussed above in Part II, when choosing between alternative interpretations of constitutional provisions, a court is constrained by a duty to avoid an implied repeal of one of them. Implied repeals are disfavored, "[a]nd the law shuns repeals by implication, particularly where ... 'the prior act has been generally understood and acted upon.'" (*Bd. of Supervisors v. Lonergan* (1980) 27 Cal. 3d 855, 868 (quoting *Penziner v. West American Finance Co.* (1937) 10 Cal. 2d 160, 176).) That test is clearly met here where since this Court's decision in *In re Marriage Cases* over 36,000 Californians have exercised their right to marry the individual of their choice. (See Log Cabin Republicans' Req. for Jud. Notice in Supp. of Amicus Curiae Br., Ex.'s 2-4 (News Articles Reflecting that Approximately 18,000 Same-Sex Marriages were Performed between this Court's Ruling in *In Re Marriage Cases* and the Passage of Proposition 8).)

The presumption against implied repeal is so strong that a court will create an implied constitutional repeal only when the more recently enacted of two provisions constitutes a revision of the entire subject addressed by the provisions, and the drafters intended the subsequent provision to be a substitute for the first. (*City & County of San Francisco v. County of San Mateo* (1995) 10 Cal. 4th 554, 563 (1995) (internal citations omitted) (emphasis added) (quoting *Bd. of Supervisors v. Lonergan, supra*, 27 Cal. 3d. 855).) For this reason as well, Proposition 8 must be a revision; as a

B. Interveners' "Carve-Out" Theory of Constitutional Interpretation Does Not Apply Where Two or More Constitutional Provisions Directly and Irreconcilably Conflict

The heart of Interveners' argument to sustain the validity of Proposition 8 is their claim that under *Bowens v. Superior Court* (1991) 1 Cal. 4th 36, in order to avoid conflict, "a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision of the Constitution." (Interveners' Response at pp. 4-5 (citing *Bowens*, 1 Cal. 4th at 45). Thus, they assert, the right of gay and lesbian Californians to marry can be carved out of their fundamental rights, and discarded.

However, *Bowens* is not to be read as broadly as Interveners assert. Interveners' brief omits the immediately preceding sentence, which delimits the circumstances under which an exception may be carved out: "[W]hen constitutional provisions *can reasonably be construed so as to avoid conflict*, such a construction should be adopted." (*Bowens*, *supra*, 1 Cal. 4th at p. 45 (emphasis added).) In instances where two provisions *cannot* be reasonably construed to avoid conflict, the rule of construction allowing an exception to be carved out does not apply.

Here, the conflicting constitutional provisions cannot be construed so as to avoid an irreconcilable conflict. For 130 years, the California Constitution has provided that 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(b).) Proposition 8, however, states that only marriage between a man and a woman is valid or recognized in

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mere amendment, it would be an unconstitutional implied repeal of article I, section 7.

California, and therefore that a homosexual person does not have the same privilege to marry the partner of his or her choice as a heterosexual person. These inconsistent provisions simply cannot be interpreted in any reasonable manner that would avoid the direct conflict resulting from Proposition 8's grant of privileges to members of opposite-sex couples while denying those same privileges to members of same-sex couples.[7]

C. To Eliminate the Fundamental Rights of a Suspect Classification of Persons Is the Province of Revision, Not of Initiative Amendment

If this Court were to validate Proposition 8, it would be holding that a bare majority of the voters have the power, by initiative, to strip fundamental rights from a minority group, taking that extreme and potentially oppressive step without the protections safeguarded by the republican reflection that the revision process mandates. This Court has never held that such a power is a permissible use of the initiative process, and the cases Interveners cite for that proposition do not support that.

Interveners argue that "this Court has repeatedly upheld initiative amendments limiting or outright eliminating important state constitutional rights without raising any serious question as to whether such rights are among the underlying principles alterable only by revision." (Interveners'

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[7] Even if the Court wished to accept Interveners' theory and seek to harmonize these inconsistent provisions of the Constitution, it is not at all apparent that Proposition 8 is the more specific provision. In fact, the language of the other provisions contains the specific enumerated protections granted to the citizens of California – equal protection, privacy, due process, and privileges or immunities. Proposition 8, despite affecting so many other constitutional provisions, speaks broadly of the definition of marriage. Thus, Proposition 8 is the more general provision. Even the "well-established rule" for which Interveners contend only comes into play if the more recent provision is in fact the more specific provision.

Opp'n Br. 18.) But this Court has never been faced with a constitutional amendment that both limited or outright eliminated fundamental rights, and did so for only a limited group – and a group defined by suspect classification at that, as Proposition 8 would do.

Interveners rely heavily on *People v. Frierson* (1979) 25 Cal. 3d 142, arguing it controls the outcome here. (See Interveners' Opp'n Br. 13, 17-19.) Interveners' view is tempting, particularly because *Frierson* involved a voter-enacted amendment to a right guaranteed in article I of the Constitution – the cruel and unusual punishment clause. For several reasons, however, 1972's Proposition 17, and the *Frierson* opinion considering its validity, are readily distinguishable.

First, the enactment in *Frierson* was facially neutral – it did not deny or limit rights to a class of California citizens. In conformity with the equal protection and privileges or immunities clauses, the amendment redefined cruel and unusual punishment for the populace as a whole. This distinction is crucial. The plurality's view in *Frierson* – that the proposition was amendatory in nature – does not produce the same logical inconsistency that would result from finding Proposition 8 to be an amendment. By reinstating the death penalty, all California citizens became subject to that punishment, not just those citizens who happen to be a member of a suspect classification.

Only if the initiative at issue in *Frierson* reinstated the death penalty for homosexuals exclusively, for example, would the initiative be analogous here. (See also Reply in Supp. of Pet. for Extraordinary Relief [Strauss] 13-14.) As Petitioners rightly hypothesize (Am. Pet. for Extraordinary Relief [Strauss] 30), if the voters had attempted to amend the

Constitution to reinstate the death penalty only for persons of a certain sex, race, or other suspect classification, the attempt would plainly have failed.[8]

Second, *Frierson* concerned an initiative which reinterpreted but a single constitutional provision – the cruel and unusual punishment clause. Proposition 8, by contrast, implicates a wide array of fundamental rights, as explained above. (See *Raven, supra*, 52 Cal. 3d at p.355 (acknowledging that *Frierson* involved a "somewhat similar" restriction on judicial power but distinguishing the case because it involved an "isolated" provision).) Moreover, the prohibition against cruel and unusual punishment is not a systemic protection. It is a substantive right which defines the limits of the State's power to punish. (See generally *Frierson, supra*, (1979) 25 Cal. 3d 142.) By contrast, the guarantees of equal protection and equal distribution

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[8] Interveners allude to sociological arguments that the death penalty violates equal protection – by virtue of the supposed disproportionate imposition of the death penalty on racial minorities and the poor – and argue that this Court simply "brushed aside" such concerns and upheld Proposition 17. From this straw-man premise Interveners conclude that "equal protection rights validly may be removed through the amendment process from a vulnerable class facing the death penalty." (Interveners' Opp'n Br. 19.) The conclusion is a *non sequitur*. On its face, Proposition 17 enacted a constitutional provision that applied equally to all; if the implementation of the provision raised equal protection implications, they were at most latent. Proposition 8, on the other hand, presents those implications as its sole and specific purpose.

Moreover, in the Supreme Court decision which Proposition 17 overturned, this Court based its holding that the death penalty was unconstitutional exclusively on the ground that it constituted cruel and unusual punishment in violation of article I, section 6. (*People v. Anderson* (1972) 6 Cal. 3d 628, 656.) Indeed, the Court noted that it had historically upheld the death penalty against equal protection challenges. (*Id.* at pp. 643-44 (citing *People v. Finley* (1908) 153 Cal. 59).) Thus, contrary to Interveners' assertion, equal protection rights were not simply "brushed aside" in *Frierson* – they were not at issue.

of privileges and immunities define how the State must administer the substantive rights it its citizens enjoy. A central concern which this Court expressed in *Amador Valley* is that the amendment process not be used to effect systemic changes to our democratic system of government. (*Amador Valley, supra*, 22 Cal. 3d at p. 223 (stating that the revision/amendment analysis is concerned with changes "in the nature of our basic governmental plan.").)

The *Frierson* plurality all but acknowledged this distinction. In finding the death penalty initiative to be an amendment, it noted that state courts "retain broad powers of judicial review of death sentences to assure that each sentence has been properly and legally imposed and to safeguard against arbitrary or disproportionate treatment." (*Frierson*, *supra*, 25 Cal. 3d at p. 187.) Proposition 8, by contrast, does purposefully foreclose that ability, by purporting to enshrine in the Constitution an immutable definition of marriage that has no purpose other than to deny it to a protected class of persons.

A third element of the *Frierson* plurality's decision further distinguishes it. In *Frierson*, the plurality relied, in part, on the fact that "a very substantial majority of our citizens" desired to reinstate the death penalty. (*Frierson*, *supra*, 25 Cal. 3d at p. 187.) Indeed, Proposition 17 passed by a margin of 67.5% to 32.5%, representing a margin of approximately 2.8 million votes. (See Log Cabin Republicans' Req. for Jud. Notice in Supp. Of Amicus Curiae Br., Ex. 1 (Statement of Vote, Proposition 17, November 7, 1972).)

By contrast, Proposition 8's majority was not nearly of that magnitude. It passed 52.3% to 47.7%. (See Resp't Att'y Gen.'s Req. for

Jud. Notice in Supp. of Answer Br. to Pet's for Writ of Mandate, Ex. 3, Statement of Vote.) Less than 600,000 votes decided the issue, in an election where Californians cast approximately 5.3 million more votes than in 1972. (*Id.*; Log Cabin Republicans' Req. for Jud. Notice in Supp. of Amicus Curiae Br., Ex. 1 (Statement of Vote, Proposition 17, November 7, 1972).)[9]

Finally, the plurality in *Frierson* found initiative to pass muster as an amendment on the basis that California's judiciary retained the authority to "appraise the constitutionality of the death penalty under the federal Constitution, in accordance with the guidelines established by the United States Supreme Court." (*Frierson, supra*, 25 Cal. 3d at p. 187.) Interveners also argue that the United States Constitution's protections permit Proposition 8's characterization as an amendment rather than a revision. (See Interveners' Opp'n Br. 29-30.) Interveners ignore, however, that this Court later qualified this "backstop" argument in deciding *Raven v. Deukmejian.*

In *Raven, supra*, 52 Cal. 3d at p. 355, this Court determined that an initiative must be enacted as a revision when it would vest judicial power to interpret a wide spectrum of important state constitutional rights in the federal judiciary by attacking state court authority to do the same. As explained above, Proposition 8 would limit the state judiciary's power to interpret an array of rights throughout article I of the Constitution, thereby

[9] Notably, if Proposition 17 received the same percentage of votes in California's Legislature as it received at the polls – in excess of two-thirds – it would have passed as a revision. The same cannot be said for Proposition 8.

ceding authority to construe the protections afforded to marriage in this State to the federal courts.

Interveners lay great store by this Court's passing remark in *In re Lance W.* (1985) 37 Cal. 3d 873, 892, that the "people could by amendment of the Constitution repeal section 13 of article I in its entirety," characterizing that as "a formidable power indeed." Formidable it might be, but it is a power the people had not wielded; the Court's remark was *dictum*. All that the people had done in the amendment this Court was construing in *Lance W.* was to add section 28(d) to article I of the Constitution, providing that "relevant evidence shall not be excluded in any criminal proceeding." (*Lance W.*, 37 Cal. 3d at. P. 902). As a provision dealing solely with admissibility of evidence, merely a matter of trial procedure, the amendment did not repeal section 13 but merely affected a single incident of the section, namely the judicially created exclusionary remedy for a violation of the constitutional guarantee against unreasonable searches and seizures. Section 28(d) left intact all other remedies, and eliminated nothing that had ever been held to be a fundamental right.

This Court opened its consideration of the issue, moreover, by observing that its scrutiny of constitutional amendments was far from unconstrained: "Faced with a constitutional amendment adopted by initiative ... we are obliged to set aside our personal philosophies and to give effect to the expression of popular will, as best we can ascertain it, *within the framework of overriding constitutional guarantees.*" (*Lance W.*, *supra*, 37 Cal. 3d at p. 879 (emphasis added).) No such overriding constitutional guarantee was implicated in *Lance W.* Unlike in *Lance W.*, however, the alteration to the Constitution wrought by Proposition 8 is

systemic, and it does directly and purposefully undermine the overriding constitutional guarantee of equal protection by eliminating, for a suspect classification of persons, the fundamental right to marry.

Nor does this Court's jurisprudence that Interveners cite in their response to the Attorney General's Answer Brief (Interveners' Response at 4-5) support the proposition that an initiative amendment to the Constitution may eliminate the fundamental rights of a suspect classification of persons. *Bowens v. Superior Court*, *supra*, validated the abrogation of a defendant's right to a post-indictment preliminary hearing that the people adopted in Proposition 115 (1990) through the addition of section 14.1 to article I of the Constitution. As *Bowens* specifically recognized, however, section 14.1 "does not single out a suspect class"; "nor does the denial of the preliminary hearing procedure implicate a fundamental right under the United States Constitution." (*Bowens*, *supra*, 1 Cal. 4th at p. 42.) The aspect of Proposition 115 under consideration in *Bowens* therefore survived scrutiny as an amendment to the Constitution: "because the state's denial of preliminary hearings to indicted defendants neither works to the disadvantage of a suspect class nor encroaches on a fundamental right, the People need only assert a rational basis for the enactment of article I, section 14.1, in seeking to establish its constitutionality." (*Id.* at p. 43.) The situation presented here is not analogous to that in *Bowens*, since Proposition 8 both singles out a suspect classification of citizens and implicates their fundamental rights, here their fundamental right under the California Constitution to marry.[10]

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[10] The other case on which Interveners rely in their response, *People v. Valentine* (1986) 42 Cal. 3d 170, also involved a constitutional amendment of universal application. *Valentine* concerned that portion of Proposition 8

V. CONCLUSION

The suggestion, repeated by Interveners like an incantation, that this Court can only invalidate Proposition 8 through an act of judicial activism or by substituting its will or abstract notions of natural law for the will of the people, is polemic, not legal doctrine. Far from engaging in activism, by invalidating Proposition 8 as it should the Court would be respecting and enforcing the explicit *constitutional* boundaries the "people themselves have set." The people themselves have created a constitutional government structure that will not allow such a fundamental change to our government or California citizens' core constitutional and fundamental rights by simple majority vote. "Whether an unconstitutional denial of a fundamental right has occurred is not a matter to be decided by the executive or legislative branch, or by popular vote, but is instead an issue of constitutional law for resolution by the judicial branch of state government." (*In re Marriage Cases*, *supra*, 43 Cal. 4th at p. 860 (Kennard, J., concurring).)

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(1982) which added section 28(f) to article I of the Constitution to require that a prior felony conviction, if such is an element of a later felony offense with which a defendant is charged, must be proven to the trier of fact in open court. (*Valentine*, 42 Cal. 3d at pp. 172-73). Again, this change adopted a provision that affected all Californians equally, not one restricted in its effect to the members of a suspect classification.

This Court should hold fast to these principles and reject Interveners' gambit of using 14 words to rewrite the Constitution in such a broad, discriminatory, and unprecedented manner.

Dated: January 15, 2009 Respectfully submitted,

By: _____
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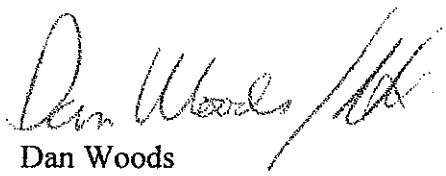
Certificate of Compliance

I hereby certify that this Amicus Curiae Brief complies with California Rule of Court 8.204. I certify that this Brief contains 7948 words, exclusive of tables and this Certification. I further certify that the type size is 13 point and the type style is Times New Roman.

I declare, under penalty of perjury, that this Certificate of Compliance is true and correct. This Certificate was executed on January 15, 2009.

Dated: January 15, 2009 Respectfully submitted,

By: 

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 W. Fifth Street, Suite 1900, Los Angeles, California 90071-2007. I am employed by a member of the Bar of this Court at whose direction the service was made.

On **Thursday, January 15, 2009**, I served the foregoing document(s) described as

1. **APPLICATION BY LOG CABIN REPUBLICANS FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS; [Proposed] AMICUS CURIAE BRIEF OF LOG CABIN REPUBLICANS IN SUPPORT OF PETITIONERS; and**
2. **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF AMICUS CURIAE LOG CABIN REPUBLICANS' BRIEF; DECLARATION OF ADAM SUMMERFIELD; [Proposed] ORDER**

on the person(s) below, as follows:

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☐ **(BY MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing at White & Case LLP, Los Angeles, California, following our ordinary business practices. I am readily familiar with White & Case LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

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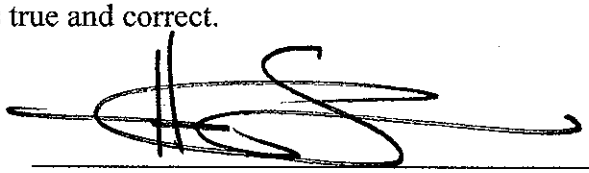
Executed **Thursday, January 15, 2009**, at Los Angeles, California.

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



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