

Case No. 164520
IN THE
Supreme Court of the State of California

Brian Bennett, Xavier Barrerra, Audrey Koh, and Equality California

Petitioners,

v.

Debra Bowen, in her official capacity as Secretary of State,

Respondent;

Initiative Proponents Dennis Hollingsworth, Gail J. Knight, Martin F.
Gutierrez, Hak-Shing William Tam, and Mark A. Jansson,

Real Parties in Interest.

**PRELIMINARY OPPOSITION OF REAL PARTIES IN INTEREST
TO PETITION FOR EXTRAORDINARY RELIEF, INCLUDING
WRIT OF MANDATE AND REQUEST FOR STAY**

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Real Parties in Interest hereby certify that they are not aware of any person or entity that must be listed in accordance with California Rule of Court 8.208(d).

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PRELIMINARY STATEMENT

On June 20, 2008, Petitioners filed a Petition for Extraordinary Relief, Including Writ of Mandate and Request for Stay. On June 23, 2008, the Real Parties in Interest filed a short letter stating they did not intend to file a preliminary opposition pursuant to Rule 8.490(g) of the California Rules of Court unless requested to do so. On June 24, 2008, this Court requested a preliminary opposition by June 30, 2008. As requested, the following arguments constitute only a preliminary opposition, focusing mainly on the most egregious problems perceived in the Petition. Real Parties reserve the right to make additional arguments should the Court decide to entertain the Petition.

FACTS

Proposition 8, the California Marriage Protection Act (referred to by Petitioners as the “Proposed Initiative”) would add the following 14 words to the State Constitution: “*Only marriage between a man and a woman is valid or recognized in California.*” On November 29, 2007, Real Parties (the official proponents of Proposition 8) began circulating petitions bearing the text of the measure and the title and summary issued by the Attorney General. (Petition, p. 4, paras. 16-17.) The title and summary read:

LIMIT ON MARRIAGE. CONSTITUTIONAL AMENDMENT.
Amends the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California.
Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local government: The measure would have no fiscal effect on state or local governments. This is because there would be no change to the manner in which marriages are currently recognized by the state.
(Initiative 07-0068.)

(Petition, p. 5, para. 18.)

On April 24, 2008, Real Parties submitted to elections officials far more signatures than needed to qualify Proposition 8 for the November 4, 2008 ballot. (Petition, p. 6, para. 21.) On May 15, 2008, this Court interpreted the state constitution to require same-sex marriage. (Petition, p. 6, para. 22.) This challenge to Proposition 8 was filed June 20, 2008.

SUMMARY OF PRELIMINARY OPPOSITION

Petitioners want this Court to take the dramatic step of removing Proposition 8 from the impending November election ballot. Their main claim is that Proposition 8 is a constitutional “revision”, and therefore cannot be enacted by initiative. Although preelection review of such a claim is not presumptively improper, this Court’s most recent guidance establishes that, because the Petition is the type of challenge that can be raised and resolved after an election (i.e., voter approval does not render the claim moot), deferring judicial resolution until after the election when there will be more time for full briefing and deliberation is the “wiser course”. (*Independent Energy Producers Ass’n v. McPherson* (2006) 38 Cal.4th 1020, 1030.) Moreover, as this Court has cautioned, the fundamental right of the people to proposed constitutional amendments is jeopardized if the Court hastens to remove a qualified initiative from the ballot. (*Costa v. Superior Court* (2006) 37 Cal.4th 986, 1007.)

On the merits, Petitioners contend that Proposition 8 is really a proposed constitutional revision that cannot be enacted through the initiative process, and that the title and summary circulated on petitions for Proposition 8 were defective. Both arguments are wholly without merit.

Petitioners’ first contention asserts that Proposition 8, which seeks to amend the Constitution simply to limit marriage to a man and a woman, constitutes a far-reach revision of the fundamental structure of California’s

government. They posture their argument as a defense of “a basic, foundational principle (namely, equality before the law) upon which the structure of the entire Constitution rests.” (Petition at 24.) But in reality, Petitioners are challenging the sovereign power of the People to amend their Constitution to override judicial interpretations of the Constitution with which they disagree. On many occasions, including cases involving important constitutional rights of individuals, this Court has repeatedly acknowledged the reserved power of the People to use the initiative process to amend their Constitution. This Court has never held that the reserved power of initiative may be used only to *expand* the scope of constitutional rights, whether long-established in the Constitution or newly recognized by this Court. Contrary to Petitioners’ suggestion, the amendment process is not a one-way, progressive ratchet. The same sovereign power of the People that creates constitutional rights and protections through the initiative process can likewise alter or repeal them.

For example, in *People v. Anderson* (1972) 6 Cal.3d 628, this Court struck down the death penalty as a violation of fundamental state constitutional rights. The People disagreed, and in the exercise of their sovereign power reversed that interpretation of their Constitution through the initiative-amendment process. Despite the life-and-death implications of the People’s decision, and despite the fundamental rights of individuals at stake, this Court respected the decision of the People and rejected the argument that the amendment was in fact a revision. (*People v. Frierson* (1979) 25 Cal.3d 142.) In a concurring opinion, Justice Mosk expressed his personal disgust with the People’s decision, believing it not only wrong but akin to barbarism (*id.* at 189, Mosk, J., concurring), but nevertheless acknowledged the People’s authority to decide the issue through the initiative-amendment process. The right of same-sex unions to be recognized as “marriages” is surely no more fundamental to the structure of

our Constitution or to the basic rights of citizenship than the right – once clearly recognized by this Court – not to be put to death by the State. The issue is weighty, to be sure; but it does not affect the basic structure of the Constitution and thus, rather than being a subject that can be addressed only through a revision, it is properly the subject of an initiative constitutional amendment.

Petitioners greatly exaggerate when they suggest that Proposition 8 – which simply reads, “Only marriage between a man and a woman is valid or recognized in California.” – would result in a fundamental abrogation of the right to equal protection of the laws. This Court’s recent holding in *In re Marriage Cases* was based on an opinion by four justices of this Court about the meaning of certain provisions of the Constitution. The majority’s conclusion was neither obvious nor inevitable. Three justices of this Court and two justices of the Court of Appeal – all learned and equally devoted to fundamental notions of equality before the law – reached the opposite conclusion. With one exception, the same is true of all other state supreme courts to address this issue under analogous state equality and fundamental rights provisions. It is great hyperbole for Petitioners to argue that a proposed amendment limiting marriage to its traditional meaning, a result found constitutional by so many justices and state supreme courts, nevertheless “would severely compromise a basic structural element of our Constitution,” or “destabilize our Constitution and our basic government plan,” or constitute a result that is “deeply antithetical to the core principle of equal protection.” (Petition, pp. 22-23.) None of that would have been true if a majority of this Court had rejected the right to same-sex marriage in *In re Marriage Cases*, and it would still not be true if the People place the traditional definition of marriage in the Constitution via Proposition 8.

Nor would Proposition 8 affect the judiciary’s ability to carry out its judicial functions, including the protection of gays and lesbians through

appropriately robust interpretations of the Constitution's privacy, due process, and equal protection provisions. If passed, Proposition 8 would do nothing to alter the power of the judiciary to define the nature and scope of such provisions in numerous other contexts. It would simply establish the State's substantive policy regarding marriage. That is not a constitutional revision.

Petitioners' second contention, that the petitions circulated for Proposition 8 were defective, is based entirely on the expectation that the Attorney General ought to have described the measure's impact on a *future, hypothetical* intervening change in the law. At the time the petitions were circulated, the statements on it were accurate and correctly stated the *current* status of California's marriage law. Also, as a matter of law, because all 14 words of Proposition 8 were restated in the title and summary, "[t]he electorate can hardly be deceived by this essentially verbatim recital of the straightforward text of the measure itself." (*Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, 441.)

ARGUMENT

I. JUDICIAL RESOLUTION OF PETITIONERS' CLAIM THAT PROPOSITION 8 IS A CONSTITUTIONAL "REVISION" SHOULD BE DEFERRED UNTIL AFTER THE IMPENDING ELECTION.

- a. **Under this Court's recent, unanimous guidance in *Independent Energy Producers Ass'n v. McPherson*, the revision/amendment claim should not be subjected to preelection judicial review.**

As a general rule, there is a strong presumption against preelection review. It is usually more appropriate to review challenges to initiative measures "after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." (*Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4.)

However, this general rule has been refined to apply primarily when the challenge is based on the alleged unconstitutionality of the substance of the proposed initiative. (*Costa v. Superior Court, supra*, 37 Cal.4th at 1005.) Thus, a challenge “based upon an allegation that a proposed initiative measure has failed to comply with the essential procedural requirements necessary to qualify an initiative measure for the ballot (for example, an initiative petition's alleged failure to have obtained the requisite number of qualified signatures) - may be brought and resolved prior to an election.” (*Costa v. Superior Court, supra*, 37 Cal.4th at 1006.)

However, in the recent case of *Independent Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020 (“*Independent Energy*”), this Court retained jurisdiction of a preelection challenge and issued a post-election opinion “to provide guidance for the future” on whether preelection review is warranted for a claim that a proposed initiative is not one that can be adopted by a vote of the people through the initiative process. (*Id.* at 1023-1024.) After noting that preelection review of a claim that a measure is not one that properly may be enacted by initiative is not “presumptively improper” (*Id.* at 1029-1030), this Court made a new and important distinction for future cases:

Nonetheless, although the strong presumption against preelection review does not apply to such a claim, we believe it is appropriate for a court presented with this type of preelection challenge to keep in mind that unlike the type of procedural challenge relating to the petition-circulation process at issue in our recent decision in *Costa, supra*, 37 Cal.4th 986, 39 Cal.Rptr.3d 470, 128 P.3d 675 - a type of claim that, as explained in *Costa*, generally can be remedied only prior to an election and that usually will become moot after an election (see *id.* at pp. 1006-1007, 39 Cal.Rptr.3d 470, 128 P.3d 675) - **a contention that an initiative measure is invalid because the measure cannot lawfully be enacted through the initiative process is a type of claim that generally will not become moot if the initiative is**

approved by the voters at the election. [Citations omitted.] Because this type of claim is potentially susceptible to resolution either before or after an election, there is good reason for a court to be even more cautious than when it is presented with the type of procedural claim at issue in *Costa* before deciding that it is appropriate to resolve such a claim prior to an election rather than wait until after the election. Of course... potential costs are incurred in postponing the judicial resolution of a challenge to an initiative measure until after the measure has been submitted to and approved by the voters, and such costs appropriately can be considered by a court in determining the propriety of preelection intervention. **Nonetheless, because this type of challenge is one that can be raised and resolved after an election, deferring judicial resolution until after the election - when there will be more time for full briefing and deliberation - often will be the wiser course.**

(*Independent Energy, supra*, 38 Cal.4th at 1030 (bold added, footnotes omitted).)

Since Petitioners' claim is that Proposition 8 is a constitutional revision that cannot be enacted by initiative, it is the type of claim that cannot become moot, even if it is approved by the voters.¹ Under *Independent Energy*, the availability of postelection relief in this case makes it preferable "to leave the challenge for resolution with the benefit of the full, unhurried briefing, oral argument, and deliberation that generally will be available after the election" instead of resolving the case "in the often charged and rushed atmosphere of an expedited preelection review". (*Id.* at 1025.)

¹ In other words, preelection review is not necessary in this case to protect the justiciability of the Petitioners' revision/amendment claim, because it is not the kind of defect, alleged to have occurred at the petition-circulation stage of the process, that may become moot after the election is held. (See *Costa v. Superior Court, supra*, 37 Cal.4th at 1007.)

b. Removal of Proposition 8 from the ballot poses a substantial risk of irreparable harm to the interests of over 1.1 million Californians who signed the petition for Proposition 8 in the exercise of their fundamental right to enact legislation by initiative.

“The initiative is the power of the electors,” not just the proponents. (Cal. Const., art. II, § 8, subd. (a).) Thus the rights at stake in this proceeding far exceed those of the Real Parties. They belong to the People. As this Court has strongly cautioned, the fundamental right of the people to proposed constitutional amendments is jeopardized if the Court hastens to remove a qualified initiative from the ballot:

Particularly when a preelection challenge is brought against an initiative measure that has been signed by the requisite number of voters to qualify it for the ballot, the important state interest in protecting the fundamental right of the people to propose statutory or constitutional changes through the initiative process requires that a court exercise considerable caution before intervening to remove or withhold the measure from an imminent election. Only when a court is confident that the challenge is meritorious and justifies withholding the measure from the ballot, should a court take the dramatic step of ordering the removal of a measure that ostensibly has obtained a sufficient number of qualified signatures.

(*Costa v. Superior Court*, *supra*, 37 Cal.4th at 1007; see also *Zarembeg v. Superior Court* (2004) 115 Cal.App.4th 111, 116 [“ [t]he ballot box is the sword of democracy. A court will intervene in the ... process only when there are clear, compelling reasons to do so’ ”].)

These considerations weigh in favor of this Court declining preelection review in this case. Proposition 8 has not only “ostensibly” been signed by enough voters to qualify for the ballot, in fact the petition signatures have already been validated by elections officials and the measure officially placed onto the ballot by the Secretary of State. (Petition, p. 6, para. 23.) The deadline for submitting qualified measures

for printing in the voter pamphlet is imminent. (*Id.* at p. 8, para 28.) The fundamental right of the more than 1.1 million Californians, who signed the petition for Proposition 8, to propose constitutional changes through the initiative process is a vital state interest that should not be abrogated hastily. The little time remaining does not likely permit this Court “an adequate opportunity for briefing, argument, deliberation, and the preparation and filing of an opinion prior to the election without unduly interfering with the printing and distribution of the ballot pamphlet and the administration of the election.” (*Costa v. Superior Court, supra*, 37 Cal.4th at 1008.) In light of the risk of irreparable harm to the voters’ fundamental initiative power, this Court should not take the “dramatic step” of removing Proposition 8 from the ballot at this late hour.

c. Petitioners’ substantial delay in bringing this action, the doctrine of Laches, and the impending period of public review of ballot materials all disfavor engaging in preelection review of the revision/amendment claim.

As in *Independent Energy, supra*, 38 Cal.4th 1020, where this Court declined to engage in an expedited preelection review, the 20-day statutory period for public inspection of the materials to be included in the ballot pamphlet is about to commence, on July 22, 2008. (*Id.* at 1023; Elec. Code 9054, 9092 [105 days prior to the election].) However, the Petitioners’ reply to this Preliminary Opposition is not expected until July 10, 2008, or 10 days after this Preliminary Opposition is filed. (See Court’s letter of June 24, 2008, requesting preliminary opposition by June 30, 2008.) This leaves less than two weeks for this Court to consider whether to entertain the Petition and, if so, proceed with briefing, argument, deliberation and decision.

The little time available is a direct result of Petitioners’ delay in bringing the Petition. Evidence is available to show the Petitioner Equality

California had knowledge that Proposition 8 was likely to receive the required number of signatures many weeks before the signatures were submitted in April 2008. No challenge was filed then. Real Parties submitted to elections officials a number of signatures far in excess of the minimum required on April 24, 2008. (Petition, p. 6, para. 21.) No challenge was filed then, either. On May 15, 2008, this Court issued its decision in *In re Marriage Cases*. (Petition, p. 6, para. 22.) Still no challenge was filed. On June 2, 2008, the Secretary of State announced that Proposition 8 officially qualified for the ballot. (Petition, p. 6, para. 23.) Still, no challenge was filed until almost three weeks later, late on Friday, June 20, 2008.

Laches requires unreasonable delay plus either acquiescence in the act about which the complainant complains or prejudice to the party asserting the equitable defense resulting from the delay. (*Chemical Specialties Mfrs. Ass'n, Inc. v. Deukmejian* (1991) 227 Cal.App.3d 663, 672.) In this case, Real Parties would be substantially prejudiced in having to mount an entire defense of Proposition 8 in the short time left as a result of Petitioners' delay. Moreover, by failing to raise any objection to Proposition 8 until this late hour, almost two months following the date when Real Parties submitted far more signatures than are needed to qualify for the ballot, Petitioners have hitherto acquiesced in the matters about which they now complain. This Court should decline to engage in a hurried preelection review on such a matter of enormous importance.

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II. PROPOSITION 8 IS A CONSTITUTIONAL AMENDMENT, NOT A REVISION.

As explained below, Petitioners' argument that the voters cannot amend the constitution to limit marriage effectively abrogates the People's reserved initiative power. Proposition 8 is not a revision because it only changes the *substantive* law of marriage. The basic and fundamental structure of the judiciary as a coequal branch of government is left substantially unchanged by Proposition 8. Even if the voters adopt Proposition 8, the judiciary will still retain full authority to continue protecting the rights of minorities under the equal protection, due process, and privacy provisions of the state constitution.

a. The Petitioners' arguments violate the separation of powers provision of the California Constitution, and abrogate the People's retained power of initiative.

One branch of government may not exercise the powers of another. (Cal. Const., art. III, § 3 ["The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."]) One of the principal checks on the power of the judicial branch is the legislative branch's ability to enact legislation or amend the constitution to address undesirable policies resulting from judicial decisions. If, as Petitioners suggest, a new social policy resulting from the judicial branch's interpretation of the state constitution is treated as immune from legislative correction, the judiciary has thereby usurped the legislative function, and the separation of powers provision has failed.

In this case, the Petition is an attack on the reserved power of the people to amend the constitution through the initiative process. Petitioners' argument boils down to the assertion that the People cannot use their initiative power to overrule a judicial determination that equal protection,

privacy, and due process require a particular substantive social policy. (See, e.g., Petition, p. 28 [“...once such a right is recognized and is acknowledged as *fundamental* under the state Constitution, any attempt to withdraw that right... strips state courts of their authority to enforce the Constitution’s equality guarantees.”]) In Petitioner’s view, the initiative process can be used only to expand constitutional rights, never to limit them. Thus, this Court’s landmark decision in *In re Marriage Cases* – a decision that profoundly altered the definition of society’s most basic social institution – is immune from the initiative amendment process. If adopted, this cramped and unprecedented view of the People’s initiative power would itself constitute a profound revision of the Constitution, one that would fundamentally undermine the power the People reserved to directly intervene in fundamental public policy issues when they disagree with the decisions of the three branches of government.

The availability of the “revision” process does not remedy the abrogation of the people’s right to amend the constitution directly by initiative. In this case, Petitioners claim that the definition of marriage cannot be restored to only a man and a woman except by constitutional revision, which requires a two-thirds vote of the Legislature to initiate. (Cal. Const., art. 18, §§ 1, 2.) However, as noted by this Court, the Legislature is hostile to this position, having twice passed legislation in recent years that, if approved by the Governor, would have legalized same-sex marriage. (*Marriage Cases*, pp. 29-30, fn. 17.) As a result, Petitioners’ contention means that it is now *impossible* for the voters to restore the definition of marriage in California to only a man and a woman.

As this Court stated in *In re Marriage Cases*, “the provisions of the California Constitution itself constitute the ultimate expression of the people’s will...” (*In re Marriage Cases*, Slip Opn., p. 113.) To give expression to the people’s will, the initiative power is “in essence a

legislative battering ram which may be used to tear through the exasperating tangle of traditional legislative procedure and strike directly toward the desired end.” (*Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 228 (“*Amador Valley*”), quoting Key & Crouch, *The Initiative and the Referendum in Cal.* (1939) p. 485, italics added.) If the initiative power is to remain the “legislative battering ram” it was intended to be, then Proposition 8 must be recognized to be a constitutional amendment. In the same way that the “substantial changes” in taxation accomplished by Proposition 13 were found to “operate functionally within a relatively narrow range to accomplish a new system of taxation”, so, too, in this case Proposition 8 is drafted no broader than necessary to achieve its singular purpose: to limit marriage in California to a man and a woman. To hold otherwise would produce the anomalous result that “the sovereign people cannot themselves act directly... but instead must defer to the Legislature, their own representatives”. (*Amador Valley, supra*, 22 Cal.3d at 229.)

b. The reserved power to amend the constitution by initiative is extremely broad and encompasses all subjects, except substantial changes in the structure or power of California’s system of government.

It is undisputed that “[a]ll political power is inherent in the people.” (Cal. Const., art. II, § 1.) In exercising their inherent power, the people have expressly reserved to themselves the authority to amend the Constitution through initiative. (Cal. Const., art. II, § 8, subd. (a).) This Court has repeatedly acknowledged that the people’s “power of initiative must be liberally construed . . . to promote the democratic process.” (*Amador Valley, supra*, 22 Cal.3d at 219.) It is this Court’s “solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise.” (*Legislature v. Eu* (1991) 54 Cal.3d 492,

501; *see also* *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332 [“The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter”].) “[A]ll presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.” (*Legislature v. Eu, supra*, 54 Cal.3d at 501.) In light of the strong presumption favoring voter initiatives, this Court should affirm the people’s initiative power unless it is unmistakable and beyond dispute that Proposition 8 amounts to a revision. (*See id.* at 512.) Petitioners fall far short of overcoming this heavy presumption. Rather, it is clear and unmistakable that Proposition 8 is an amendment, not a revision.

A proposed enactment constitutes a revision only where it “necessarily or inevitably appear[s] from the face of the challenged provision that the measure will substantially alter the basic governmental framework set forth in [the California] Constitution.” (*Legislature v. Eu, supra*, 54 Cal.3d at 510 [emphasis omitted].) This Court’s revision/amendment analysis has always focused on the change to the structure of governmental power. (*See In re Lance W.* (1985) 37 Cal.3d 873, 892 [concluding that a constitutional enactment was not a revision where it did not affect “a sweeping change either in the distribution of powers made in the [Constitution] or in the powers which it vests in the judicial branch”]; *Legislature v. Eu, supra*, 54 Cal.3d at 509 [concluding that an enactment was not a revision where “[t]he relationships between the three governmental branches, and their respective powers, remained untouched”].) But it is not enough for a proposed enactment to “accomplish substantial changes” in a realm of constitutional law; it must affect “far reaching changes in the nature of [California’s] *basic governmental plan.*” (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 260

[emphasis in original].) Plainly stated, a constitutional revision, as interpreted by this Court, occurs only when a proposed enactment causes a substantial change in the *framework or structure of government*—a fundamental alteration in governmental *power*.

In an attempt to make the simple provision of Proposition 22 to appear as a fundamental change to California’s basic governmental plan, Petitioners grossly overstate the effect of Proposition 8 on the constitutional principles of equal protection, due process, and privacy. Those broadly applicable, far-reaching rights are not affected at all outside the marriage context. Enactment of Proposition 8 impacts those constitutional rights only to the limited extent that they touch upon the right to marry. Proposition 8 does not, as Petitioners would have this Court believe, abolish equal protection, due process, or privacy rights from the State Constitution; it merely informs and refines the application of those rights in the context of marriage. In short, Petitioners’ apocalyptic portrayal of the demise of constitutional rights for Californians is legally irrelevant and objectively overstated.

This Court’s analysis “in determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature.” (*Amador Valley, supra*, 22 Cal.3d at 222; *see also Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349.) From a quantitative standpoint, “an enactment which is so extensive in its provisions as to change directly the ‘substantial entirety’ of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof.” (*Amador Valley, supra*, 22 Cal.3d at 222.) Here, it is undisputed that the brief one-sentence Marriage Initiative does not amount to a quantitative revision. It does not delete or directly alter the express language of any existing provisions of the Constitution. Neither does it affect, directly or otherwise, a substantial number of constitutional

provisions. It is thus clear that Proposition 8 does not effectuate a substantial quantitative constitutional change.

“[A] qualitative revision includes one that involves a change in the basic plan of California government, i.e., a change in its fundamental *structure* or the foundational *powers* of its branches.” (*Legislature v. Eu*, *supra*, 54 Cal.3d at 509 [emphasis added].) Not only must the proposed measure alter governmental power or structure, it must accomplish “*far reaching changes* in the nature of [California’s] basic governmental plan.” (*Amador Valley*, *supra*, 22 Cal.3d at 223 [emphasis added]; *see, e.g., McFadden v. Jordan*, *supra*, 32 Cal.2d at 348 [finding a revision where the proposed measure delegated “far reaching and mixed powers to [a newly created] commission,” thereby placing that commission’s authority “substantially beyond the system of checks and balances which heretofore has characterized [California’s] governmental plan”].) Enactment of Proposition 8 will not substantially alter governmental structure or power. It will not shift governmental power from one branch to another, and despite Petitioners’ contention, it will not deprive the state judiciary of its constitutional authority to interpret and protect individual rights. Because of the complete absence of any substantial alteration in California’s “basic governmental plan,” Proposition 8 does not amount to a constitutional revision.

c. This Court has upheld various initiative amendments that alter the judicial interpretation of provisions of the Constitution; Amendments are rarely struck down as improper revisions.

There is nothing constitutionally exceptional about an initiative amendment overruling or altering judicial interpretations of the Constitution. In a regime where the judicial branch has the authority to declare actions by the political branches unconstitutional, the only direct

mechanism for correcting an errant interpretation of the state constitution is by amendment. Indeed, that was one of the reasons the initiative-amendment procedure was created.

This Court has consistently construed initiatives proposing to change the Constitution as “amendments” rather than “revisions” – so much so that Justice Mosk once observed that “[o]ver the years to an almost universal extent, initiatives have been judicially untouchable.” (Stanley Mosk, *Raven and Revision*, 25 U.C. Davis L.Rev. 1, 1 (1991), quoted in Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L.R. 1079, 1122 (2004).)

In *McFadden v. Jordan*, *supra*, 32 Cal.2d 330, this Court addressed a revision challenge to a proposed “amendment” that would have added to the Constitution a new article composed of 208 subsections totaling more than 21,000 words. This Court rejected this massive proposed amendment because it was so “far reaching and multifarious” as to amount to a revision. *Id.* at 788.

But such holdings are relatively rare. In *Amador Valley*, *supra*, 22 Cal.3d 208, this Court stated that the revision vs. amendment analysis “must be both quantitative and qualitative in nature.” (*Id.* at 223.) However, recognizing the People’s retention of sovereign power in the Constitution, this Court imposed a high bar for judicial interference to prevent initiative amendments: “[The] power of initiative must be liberally construed ... to promote the democratic process.” (*Id.* at 219.) The Court upheld Proposition 13 as an amendment, despite its dramatic alteration of the system of property taxation – a change that significantly altered the balance between municipal and State government. (*Id.* at 229.) (See Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L.R. 1079, 1124 n. 210 (2004) [“If a

complete revolution in the state's fiscal structure does not constitute a constitutional revision, then nothing does."].)

In *Brosnahan v. Brown*, *supra*, 32 Cal.3d 236, this Court applied *Amador's* quantitative/qualitative analysis in holding that the Victim's Bill of Rights proposition was a legitimate initiative amendment. Again, the Court concluded that the "substantial changes" the proposition would accomplish was not a sufficiently "far reaching change[] in the nature of [the] basic governmental plan as to amount to a revision." (*Id.* at 260, quoting *Amador Valley*, 22 Cal.3d at 223).

The decision in *In re Lance W.*, *supra*, 37 Cal.3d 873, demonstrates the importance of the initiative power as the People's check on the judiciary's power to construe the Constitution. Several decisions of this Court had held, under the California Constitution, that to secure certain basic rights the State's exclusionary rule would extend beyond the protections provided by the federal Constitution. Proposition 8, passed by the voters as an amendment to the Constitution, effectively overturned those decisions by including a provision stating that "relevant evidence shall not be excluded in any criminal proceeding." The State Public Defender argued that Proposition 8 was a revision rather than an amendment "because it abrogates the judicial function of fashioning appropriate remedies for violation of constitutional rights." (*Id.* at 885.) This Court rejected the argument: "The restriction on judicial authority to fashion nonstatutory rules of evidence or procedure governing admission of unlawfully seized evidence does not, either qualitatively or quantitatively, accomplish such far reaching changes in the nature of judicial authority as to amount to a revision of the Constitution." (*Id.* at 891 [internal quotation marks and brackets omitted].)

This Court's decision in *Legislature v. Eu*, *supra*, 54 Cal.3d 492, underscores just how reluctant this Court has been to deem an amendment

an unlawful revision, even when it directly relates to the basic structures of State government. *Eu* involved a challenge to a term limits proposition that affected, among other things, the time a citizen could serve in the Legislature. Although some considered the amendment a profound weakening of the Legislature as an institution, this Court refused to deem the amendment a revision. The Court reasoned that “[t]erm and budgetary limitations may affect and alter the particular legislators and staff who participate in the legislative process,” but “the basic and fundamental structure of the Legislature as a representative branch of government is left substantially unchanged” and therefore the proposal was not a constitutional revision. (*Id.* at 508.).

In short, this Court’s case law establishes that only significant changes to the structure of the Constitution qualify as revisions. All other matters – including the alteration of Constitutional rights – are properly the subject of initiative amendments.

d. The precedent of *People v. Frierson* establishes that even fundamental minority rights involving personal dignity can be amended by initiative.

This Court’s decision in *People v. Frierson*, *supra*, 25 Cal.3d 142, is perhaps most instructive. It demonstrates that even fundamental minority rights that protect the dignity of the individual can be amended by a constitutional initiative.

Prior to *Frierson*, this Court had held that the death penalty “may no longer be exacted in California consistently with article I, section 6, of [the] Constitution” because it is “unnecessary to any legitimate goal of the [S]tate and is incompatible with the dignity of man and the judicial process.” (*People v. Anderson*, *supra*, 6 Cal.3d 628, 656.) In that decision, this Court described the Cruel and Unusual Punishment Clause of Article I,

Section 6 in much the same way that Petitioners describe the Equal Protection Clause here, as reflecting an overarching principle permeating the entire Constitution and protecting the fundamental rights of minorities against majority rule. The *Anderson* Court explained that the “cruel or unusual punishment clause of the California Constitution, like other provisions of the Declaration of Rights, operates to restrain legislative and executive action and to *protect fundamental individual and minority rights* against encroachment by the majority.” (*Id.* at 640 [emphasis added].) The Court then described capital punishment as “offensive to the cardinal principles for which the Constitution stands,” stating that the “dignity of man, the individual and the society as a whole, is . . . demeaned” by its continued practice. (*Id.* at 650.)

The people of California responded with a voters’ initiative that effectively overruled *Anderson’s* holding on the death penalty by reinstating it in the state constitution. (Cal. Const., art. I, § 27.) That led to a prompt challenge by a criminal on death row, who raised virtually the same arguments as raised now by our Petitioners.

The defendant in *Frierson*, like Petitioners here, argued that Article I, Section 27 was improperly enacted as a voter initiative and, accordingly, must be invalidated. He contended that the initiative “remov[ed] . . . judicial review of the death penalty from a carefully built state constitutional structure, thereby resulting in a significant change in a principle underlying [California’s] system of democratic government[.]” (*People v. Frierson, supra*, 25 Cal.3d at 186.) This Court rejected that argument, acknowledging that it retained “broad powers of judicial review” including the “unrestricted authority to measure and appraise the constitutionality of the death penalty under the federal Constitution.” (*Id.* at 187.) The Court then concluded that “the constitutional change worked

by [Article I, Section 27] [was] not so broad as to constitute a fundamental constitutional revision.” (*Ibid.*)²

This Court should likewise conclude that Proposition 8 is not a constitutional revision. Petitioners here, like the defendant in *Frierson*, argue that Proposition 8 removes this Court’s authority to interpret and protect the constitutional right to marry, thus altering California’s constitutional structure. But the narrow provisions of Proposition 8, like those in Article I, Section 27, would guide this Court’s interpretation of only one constitutional right, *i.e.*, the right to marry. This Court still retains broad authority to interpret and protect constitutional rights including equal protection, due process, and privacy in all other contexts; it will be limited only in its ability to define marriage for Californians. Such a limited constitutional change—one which does not substantially alter governmental structure or power—is not “so broad as to constitute a fundamental constitutional revision.” (*People v. Frierson, supra*, 25 Cal.3d at 187.)

Moreover, Proposition 8’s impact on the constitutional right to marry does not transform that measure into a revision. The mere fact that a proposed constitutional enactment impacts or even alters a fundamental right does not convert that provision into a revision. The people’s enactment of Article I, Section 27, effectively overturned this Court’s protection of “fundamental individual and minority rights” in *Anderson*. (*See People v. Anderson, supra*, 6 Cal.3d at 640.) This Court nevertheless found that Article I, Section 27 did not constitute a revision. (*People v.*

² In his concurring opinion, Justice Mosk acknowledged his deference to the people’s will despite his personal beliefs on the inhumane nature and prior unconstitutionality of the death penalty: “That as one individual I prefer values more lofty than those implicit in the macabre process of deliberately exterminating a human being does not permit me to interpret in my image the common value of the people of our state.” (*People v. Frierson, supra*, 25 Cal.3d at 189 [Mosk, J., concurring].)

Frierson, *supra*, 25 Cal.3d at 186-87; *see also In re Lance W.*, *supra*, 37 Cal.3d at 892 [finding that an initiative did not amount to a revision where it “affect[ed] only one incident of that guarantee of freedom from unlawful search and seizure”].) Similarly, Proposition 8 does not amount to a revision regardless of whether it impacts or restricts the fundamental right to marry.

This Court has repeatedly cautioned against “too strict a construction of the revision rule,” warning that it will deprive Californians of their reserved powers under the Constitution, thereby affecting an undemocratic result. (*People v. Frierson*, *supra*, 25 Cal.3d at 187.) In *Amador Valley*, *supra*, 22 Cal.3d 208 for example, this Court noted that characterizing the challenged initiative as a revision would achieve the undesirable result of “bar[ring] the people from ever achieving *any* local tax relief through the initiative process.” (22 Cal.3d at 225 [emphasis in original].) Similarly, in *Frierson*, this Court recognized that a “strict construction of the revision rule” would “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.” (*People v. Frierson*, *supra*, 25 Cal.3d at 187.) The *Frierson* Court realized that this result was untenable under California’s democratic constitutional system. Here, if Proposition 8 is determined to be a revision—a conclusion at odds with the governing case law—it will effectively prevent Californians from defining marriage for themselves and, more specifically, from returning marriage in California to the union of one man and one woman. This result unnecessarily deprives the people of their initiative power and conflicts with California’s constitutional structure.

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e. This Court's decision in *Raven v. Deukmejian* is inapposite.

Since *McFadden*, the only case where this Court found an initiative to be an unlawful revision is *Raven v. Deukmejian* (1990) 52 Cal.3d 336. Petitioners rely on this Court's decision in *Raven*, but that decision does not support their position here. The initiative challenged in that case, Proposition 115, stated that *all* constitutional rights for criminal defendants "shall be construed by the courts of this [S]tate in a manner consistent with the Constitution of the United States." (*Id.* at 350.) This Court had previously acknowledged that "an enactment which purported to vest all judicial power in the Legislature would amount to a revision." (*Amador Valley, supra*, 22 Cal.3d at 223.) The *Raven* Court found that Proposition 115 "contemplate[d] a similar qualitative change" by "vest[ing] all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court." (*Raven v. Deukmejian, supra*, 52 Cal.3d at 352 [emphasis omitted].) This is a very important distinction because *Raven* effectively changed the governmental structure by slaving state courts to federal courts. That is very unlike Proposition 8 in this case, which would only restore the substantive meaning of marriage as between a man and a woman. It would not alter governmental structure or the related interplay of governmental power in any way.

Raven rested on three substantial modifications of governmental structure, none of which is satisfied here.

First, Proposition 115, by its express terms, removed from this Court all judicial interpretive power over an entire class of rights. Here, however, Proposition 8 does not expressly eradicate the interpretive power of this Court; it simply defines marriage in California as the union of a man and a woman. To be sure, Proposition 8 will affect and in a sense limit this Court's subsequent interpretation of the Constitution. But every

constitutional enactment, be it a revision or amendment, restricts constitutional interpretation in the sense that this Court must interpret the Constitution in light of the newly enacted provisions. Proposition 8, unlike Proposition 115, does not expressly remove from this Court and bestow upon another body all interpretive power over an entire class of rights. For this reason alone, the *Raven* case is inapposite and unpersuasive here.

Second, the *Raven* Court recognized that the initiative caused a *significant* restriction on the state courts' judicial power. (*Raven v. Deukmejian, supra*, 52 Cal.3d at 354.) The Court did not state or in any way imply that all restrictions on judicial power, no matter how small or indirect, amount to revisions; in fact, the Court candidly acknowledged that it had previously "rejected revision challenges to initiative measures which included somewhat similar restrictions on judicial power." (*Id.* at 355.) Unlike the previously upheld restrictions on judicial power, the initiative challenged in *Raven* was struck down because it amounted to a "broad attack on state court authority to exercise independent judgment in construing a *wide spectrum* of important rights under the state Constitution." (*Ibid.* [emphasis added].) Here, Proposition 8 does not involve a "broad attack" on judicial authority to construe a "wide spectrum" of constitutional rights. Instead, it is a narrow attempt by the people of California to define the fundamental social institution of marriage. This judicial restriction is much narrower than that imposed by the initiative in *Raven*, which expressly removed this Court's interpretive authority over every constitutional right available to criminal defendants.

Third, the *Raven* Court found that the challenged initiative altered the "integrity of the [S]tate Constitution as a document of independent force and effect." (*Raven v. Deukmejian, supra*, 52 Cal.3d at 352.) This transfer of state judicial power to the federal judiciary comprised a fundamental change in California's governmental plan that is wholly absent

here. Here, the people of California seek to define marriage according to its well-established, historical meaning; they are not, as was the case in *Raven*, taking power from the state judiciary for the purpose of giving it to another person, agency, or sovereign entity.

As this Court later explained, the proposal in *Raven* was one that “would have fundamentally changed and subordinated the constitutional role assumed by the judiciary in the governmental process.” (*Legislature v. Eu, supra*, 54 Cal.3d at 508-509.) Simply stated, the enactment of Proposition 8 will not create any change in governmental structure or power as contemplated by the revision/amendment analysis—by, for example, a blanket transfer of state judicial power to the federal judiciary. The *Raven* case is thus wholly unlike the present circumstances and, therefore, fails to support Petitioners’ arguments.

f. The Courts of other states have uniformly rejected “revision” claims brought against constitutional amendments limiting marriage to a man and a woman.

Courts in our sister states have rejected closely analogous challenges to nearly identical amendments. Judicial decisions from other jurisdictions—two from Oregon and one from Alaska—also confirm that Proposition 8 is an amendment, rather than a revision.

In the first of these cases, *Lowe v. Keisling* (Or. Ct. App. 1994) 882 P.2d 91, the plaintiffs sought to prevent voting on a ballot measure that would have denied “minority status” based on “sexual orientation,” restricted public education regarding “homosexuality,” and prohibited the government from granting “marital status or spousal benefits on the basis of homosexuality.” (*Id.* at 93.) The plaintiffs in that case, like Petitioners here, argued that the ballot measure amounted to a revision because it “propose[d] far reaching changes . . . including profound impacts on

existing fundamental rights and radical restructuring of the government's relationship with a defined group of citizens." (*Id.* at 96.) They also contended, like Petitioners here, that the initiative "will refashion the most basic principles of [state] constitutional law." (*Id.* at 96-97.) The Oregon court readily acknowledged that the proposed measure "may affect a number of constitutional provisions, and may in fact have substantive constitutional defects," but the court nevertheless held that the measure "would not result in the kind of fundamental change in the constitution that would constitute a revision." (*Id.* at 97-98.)

In a more recent decision, *Martinez v. Kulongoski* (2008) 220 Or.App. 142,³ an Oregon appellate court rejected a revision/amendment challenge to the Oregon Marriage Amendment, which states, much like the proposed California Marriage Amendment, that "only a marriage between one man and one woman shall be valid or legally recognized as a marriage." (Or. Const., art. XV, § 5a.) The plaintiffs in that case, like the plaintiffs in *Lowe* and Petitioners here, argued that the Oregon Marriage Amendment constitutes a revision because of the "profound impacts on existing fundamental rights and radical restructuring of the government's relationship with a defined group of citizens." (*Martinez v. Kulongoski, supra*, 220 Or.App. at 156.) The *Martinez* court relied on the *Lowe* decision, rejected the plaintiffs' contentions as a basis for finding a revision, and held that the Oregon Marriage Amendment did not amount to a constitutional revision.

In *Bess v. Ulmer* (Alaska 1999) 985 P.2d 979, the Supreme Court of Alaska likewise concluded that the Alaska Marriage Amendment—which states that "a marriage may exist only between one man and one woman"—did not constitute a revision. Importantly, that court began its analysis by

³ Because of the recent issuance of this decision, citation to the Westlaw Pacific Reporter is unavailable.

looking to this Court’s revision/amendment jurisprudence for guidance. (*Id.* at 984-87.) The Alaska court then applied this Court’s “hybrid analysis” to address the proposed ballot measure. (*Id.* at 988.) The *Bess* court found that only a “[f]ew sections of the Constitution [were] directly affected” by the Alaska Marriage Amendment, and reasoned based upon this Court’s precedent that “nothing in the proposal [would] ‘necessarily or inevitably alter the basic governmental framework’ of the Constitution.” (*Ibid.* [quoting *Brosnahan v. Brown, supra*, 32 Cal.3d at 261].) Based on this analysis, the court concluded that the Alaska Marriage Amendment was “sufficiently limited in both quantity and effect of change as to be a proper subject for a constitutional amendment.” (*Ibid.*)

Like the Oregon appellate court in *Martinez* and the Supreme Court of Alaska in *Bess*, this Court should conclude that Proposition 8 does not constitute a revision. Regardless of Proposition 8’s impact—on already-existing individual rights, it does not amount to a constitutional revision because it does not “necessarily or inevitably alter the basic governmental framework” (*Bess v. Ulmer, supra*, 985 P.2d at 988 [quoting *Brosnahan v. Brown, supra*, 32 Cal.3d at 261]); that is, it does not effectuate a fundamental change in governmental power or structure. To adopt the Petitioners’ reasoning would eviscerate the amendment process, it would deprive Californians of the ability to amend their constitution any time the alteration would incidentally affect individual rights. The proposed Marriage Initiative seeks to accomplish exactly what was achieved by the Oregon and Alaska Marriage Amendments—defining an important social institution for state purposes. Those state marriage amendments did not amount to revisions, and accordingly, neither does the materially indistinguishable California Marriage Amendment.

Massachusetts has also addressed this issue under a similar provision excluding from the initiative process “measure[s] that relate[] to . . . the

powers . . . of courts.” (Mass. Const., Art. 48, The Referendum, Part III, § 2.) In an effort to preempt the Supreme Judicial Court’s decision in *Goodridge v. Dept. of Pub. Health* (Mass. 2003) 798 N.E.2d 941, recognizing same-sex marriage, an initiative was proposed stating that “only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts.” This initiative was challenged as excluded under Article 48. The Supreme Judicial Court rejected the challenge: “We have specifically stated that a petition is not excluded under art. 48 merely because it changes the law enforced by the courts. To adopt such an interpretation would be to render the popular initiative virtually useless.” *Albano v. Att’y Gen.*, 769 N.E. 2d 1242, 1245 (Mass. 2002). Laws that relate to the powers of the courts are those that “alter[] the courts’ basic ability to render decisions in an entire category of cases By contrast, when an initiative petition only alters the substantive law enforced by the courts, the work of the courts is affected in an incidental way; it cannot be said that the ‘main feature’ of that petition is to alter the power of the courts.” *Id.* at 1245-46. This recognizes that *every* change in the law, whether by initiative or otherwise, affects the power of the courts insofar as courts interpret the law. But such a change does not implicate the fundamental *power* of the courts to interpret the law. (*Id.* at 1246-47.)

In brief, Petitioners’ arguments find no support in either California initiative law or in the decisions of other states addressing essentially the identical issues. Granting the petition would constitute a serious and inexcusable incursion into the right of the People to amend their Constitution – including in matters involving fundamental rights and basic public policy – through the initiative process.

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g. Petitioners' claims, which amount to a thinly-veiled but premature challenge to Proposition 8 on Federal Constitutional grounds under *Romer v. Evans*, are irrelevant to the revision/amendment issue.

Petitioners' revision/amendment argument is actually a premature substantive challenge to the constitutionality of Proposition 8. Their arguments attempt to mirror the reasoning of the United States Supreme Court in *Romer v. Evans* (1996) 517 U.S. 620. In *Romer*, the Supreme Court struck down a Colorado constitutional amendment that prohibited state and local governments from enacting laws prohibiting sexual orientation discrimination. In effect, such laws could be enacted only through constitutional amendment. The High Court held that “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” (*Id.* at 634.) The Court also stated “that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. ‘[I]f the constitutional conception of “equal protection of the laws” means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.’” (*Id.*, quoting *Department of Agriculture v. Moreno* (1973) 413 U.S. 528, 534.) The Court concluded that the amendment “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else,” an outcome that violates the federal Equal Protection Clause. (*Id.* at 635.)

The Petition is filled with essentially *Romer*-based arguments masquerading as revision/amendment arguments. (*See, e.g.*, Petition at 17-24.) Twice the Petition cites *Romer* directly. (*Id.* at 17, 24.) The point here is not to address the validity of such arguments, but merely to note that they are premature because they go to the substance of Proposition 8 rather

than the procedural correctness of enacting the marriage definition via initiative-amendment rather than revision. The proper time for such a challenge is after the People have deliberated and decided whether to adopt the amendment in the first place. If they reject the amendment, then the issue will be moot. If they adopt it, then Petitioners and their allies will be free to challenge it on the basis of *Romer* and various other federal and state-law theories.⁴

III. AS A MATTER OF LAW, THE TITLE AND SUMMARY CIRCULATED ON PETITIONS FOR PROPOSITION 8 WERE NOT MISLEADING.

Prior to circulation of the petition, the Attorney General is responsible for preparing “a title and summary of the chief purpose and points of the proposed measure.” (Elec. Code, § 9002.) The Attorney General’s statement must be true and impartial, and not argumentative or likely to create prejudice for or against the measure. (Elec. Code, §§ 9004, 9051.) The title and summary prepared by the Attorney General are presumed accurate, and substantial compliance with the “chief purpose and

⁴ That is precisely the approach this Court took in connection with the amendment at issue in *Mulkey v. Reitman* (1966) 64 Cal.2d 529. In 1951, the Legislature adopted various civil rights laws, including the Rumford Fair Housing Act which prohibited discrimination in housing. The voters responded with Proposition 14, which “was enacted . . . with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate and to forestall future state action that might circumscribe this right.” (*Id.* at 534-35.) Prior to the vote on the amendment, an action was brought challenging its constitutionality. Although this Court recognized “grave questions whether the proposed amendment to the California Constitution is valid under the Fourteenth Amendment to the United States Constitution” (*id.* at 535 [quoting minute order]), it nevertheless rejected a petition for a writ of mandamus to keep the initiative off the ballot. In an unpublished minute order, this Court ruled that it could not “interfere with the power of the people to propose laws and *amendments* to the Constitution and to adopt or reject the same at the polls.” (*Id.* at 829 [quoting minute order, emphasis added].)

points” statutory provision is sufficient. (*Zaremborg v. Superior Court* (2004) 115 Cal.App.4th 111, 117.) Only in a clear case should the title and summary so prepared be held insufficient. (*Epperson v. Jordan* (1938) 12 Cal.2d 61, 66.) If reasonable minds can differ as to whether a particular provision is or is not a chief point of the measure, the determination of the Attorney General should be accepted. (*Zaremborg v. Superior Court, supra*, 115 Cal.App.4th at 117.)

The main purpose of the title and summary requirements “is to avoid misleading the public with inaccurate information.” (*Amador Valley, supra*, 22 Cal.3d at 243.) In this case, the title and summary prepared by the Attorney General read as follows:

LIMIT ON MARRIAGE. CONSTITUTIONAL AMENDMENT.
Amends the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California.
Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local government: The measure would have no fiscal effect on state or local governments. This is because there would be no change to the manner in which marriages are currently recognized by the state. (Initiative 07-0068.)

(Petition, p. 5, para. 18.)

- a. **Because the official title and summary for Proposition 8 repeated the full text of the proposed constitutional amendment verbatim, voters who signed the petition could not have been misled.**

Because the Attorney General repeated the full text of the proposed constitutional amendment within the title and summary, it is impossible to suggest that the voters signing the petition were misled regarding the measure. Here, as in case of Proposition 209 (the California Civil Rights Initiative) discussed in *Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, “the brevity of the operative language of [the proposition] lends itself

to the formulation of a title and summary of the initiative measure in its very own words.” (*Id.* at 440.) In this case, the title and summary prepared by the Attorney General for circulation “are essentially verbatim recitations of the operative terms of the measure.” (*Id.* at 441.) As the Third District Court of Appeal said:

The Attorney General has added nothing, omitted nothing and the words used are all subject to common understanding. The electorate can hardly be deceived by this essentially verbatim recital of the straightforward text of the measure itself.

(*Lungren v. Superior Court, supra*, 48 Cal.App.4th at 441.)

As in *Lungren*, the Petitioners here believe the Attorney General should have included in the title and summary various other statements about hypothetical, future consequences of the measure. (Compare, Petition, 36-38, and *Lungren, supra*, 48 Cal.App.4th at 441-442.) But “[t]he mandate to the Attorney General is... not to reiterate selectively fragments of public commentary and debate on the measure.” (*Id.* at 442.) Any such statements would be “overinclusive and hence ‘false and misleading.’” (*Id.* at 442.) Therefore, “[b]y essentially repeating the operative language of [the proposition], the Attorney General has complied with the mandate that he provide the electorate with ‘a true and impartial statement of the purpose of the measure....’” (*Id.* at 443.)

b. Since Proposition 8 would restore the manner in which marriages are recognized by the state to the manner in which they were “currently” recognized when all signatures for the measure were gathered (i.e., only between a man and a woman), the voters were not misled.

The summary prepared by the Attorney General for Proposition 8 was not misleading because, regardless of any intervening change in the law between the submission of the signatures and the election in November,

passage of Proposition 8 would result in marriage being recognized only between a man and a woman – that is, the same manner in which marriage was “currently” recognized at the time the signatures were gathered.

As noted above, the official petition summary estimated that the measure would have no fiscal effect on state or local governments “because there would be no change to the manner in which marriages are *currently* recognized by the state.” (Italics added.) If the manner in which marriages were currently recognized had changed sometime during the period of petition circulation, some confusion would have naturally resulted. But in reality, throughout the entire period during which voters signed the petition, marriages were “currently” recognized only between a man and a woman. To have stated otherwise, as Petitioners suggest, would have misled voters to believe that marriage was then recognized in relationships other than between a man and a woman, which was simply not true.

Petitioners attack this language in the summary as though it led voters to believe that the measure would affect no change to the manner in which marriages are recognized by the state *at the time the initiative appears on the ballot*. This the summary did not say. Nor should the proponents or the Attorney General, who is charged with preparing a fair summary, be responsible for predicting future changes in the law which may occur between the time the petition is circulated and the measure appears on the ballot. To the extent that Petitioners argue that the post-circulation change in the law affected by this Court’s decision in *In re Marriage Cases* was inevitable, foreseeable, or merely “clarified” current, uncertain law (Petition, p. 38), the argument is without merit. At the time of circulation, a majority of the learned judges of the First Appellate District had ruled there was no state constitutional right to same-sex marriage. Marriage had existed solely between a man and a woman in California ever since the beginning of statehood. (*In re Marriage Cases*,

Slip Opn., p. 23.) And this Court later interpreted the state constitution to require same-sex marriage by only a single-vote margin. As confident as Petitioners may have been that they would ultimately prevail in the *Marriage Cases*, that does not mean that the Attorney General's failure to predict a future change in the marriage laws retroactively causes the title and summary of Proposition 8 to have been misleading.

Moreover, the Attorney General and proponents cannot reasonably be held to such a standard. If anything, attempts to predict a proposed initiative's effect on potential future changes in the law carry even greater risk of misleading voters. Any such statements would be "overinclusive and hence 'false and misleading.'" (*Lungren v. Superior Court*, supra, 48 Cal.App.4th at 442.) Such a standard would also open the door to mischief. An opponent of a proposed measure need only file suit to challenge the validity of a law while initiative petitions related to the subject matter are circulating, and claim the summary should describe current law as "uncertain". Or lawmakers could enact intervening changes in the law after petitions are submitted such that a qualified initiative would have a legal effect different than the effect described in the circulated petition summary. This would, of course, frustrate the people's exercise of their fundamental right to legislate by initiative. Petitioners' theory should be summarily rejected.

c. To include the hypothetical economic impact advanced by Petitioners in the title and summary circulated for Proposition 8 would have misled voters.

Petitioners argue that the fiscal impact analysis in the title and summary was misleading because it failed to predict that Proposition 8 would "deprive the state of significant revenue streams associated with *continuing to permit gay and lesbian couples to marry* on an equal basis

with others, *as current California law requires.*” (Petition, p. 38, italics added.) But obviously, current California law did *not* permit gay and lesbian couples to marry at any time during which the title and summary was circulated to voters. Moreover, the suggested analysis would have been completely hypothetical in that it could only become true upon the happening of a future, intervening change in the law to permit same-sex marriage. There is no merit to Petitioners’ argument.

d. Any voter confusion caused by the intervening change in the manner in which marriage is recognized, as a result of *In re Marriage Cases*, will be remedied when the Attorney General prepares a new ballot title for Proposition 8 for the November ballot.

To the extent that the official title and summary circulated between November 2007 and April 2008 does not reflect the new, *intervening* change in current law as a result of *In re Marriage Cases*, that is easily remediable without judicial intervention. As the Elections Codes specifically contemplates, now that Proposition 8 has qualified for the ballot, the Attorney General must provide the Secretary of State a new ballot title (not to exceed 100 words) that gives “a true and impartial statement of the purpose of the measure in such language that the ballot title shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure.” (Elec. Code 9050, 9051.) This new ballot title is then provided to the Secretary of State for inclusion in the voter pamphlet mailed to all voters. (Elec. Code 9054.)

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CONCLUSION

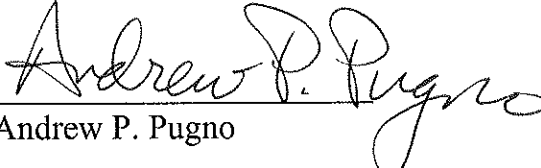
For all the foregoing reasons, this Court should summarily deny Petitioners' request to remove Proposition 8 from the impending election ballot.

Dated: June 30, 2008

Respectfully submitted,

LAW OFFICES OF ANDREW P. PUGNO
ANDREW P. PUGNO

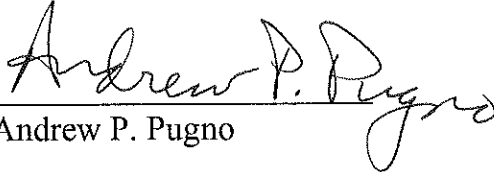
ALLIANCE DEFENSE FUND
TIMOTHY DONALD CHANDLER


Andrew P. Pugno

Attorneys for the Real Parties in Interest

RULE 8.204(C)(1) CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for the Real Parties in Interest hereby certifies that this Preliminary Opposition to Petition for Extraordinary Relief is proportionately spaced, has a typeface of 13 points or more, and contains 10,671 words, including footnotes but excluding the Table of Contents, Table of Authorities and Certificate of Compliance, as calculated by using the word count feature in Microsoft Word.


Andrew P. Pugno

Attorney for the Real Parties in Interest

PROOF OF SERVICE

I, Michele Schmidt, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 101 Parkshore Drive, Suite 100, Folsom, CA 95630. On June 30, 2008, I served the within document(s):

**PRELIMINARY OPPOSITION OF REAL PARTIES IN INTEREST
TO PETITION FOR EXTRAORDINARY RELIEF, INCLUDING
WRIT OF MANDATE AND REQUEST FOR STAY**

- by transmitting via facsimile from (916) 608-3066 the above listed document(s) without error to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Folsom, California addressed as set forth below.

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Debra Bowen Secretary of State of California 1500 11 th Street Sacramento, CA 95814 Phone: (916) 657-2166 <i>In her official capacity as Secretary of State</i>	Debra Bowen Secretary of State of California 455 Golden Gate Avenue San Francisco, CA 94102 <i>In her official capacity as Secretary of State</i>

I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 30, 2008, at Folsom, California.



Michele Schmidt