Case No. S168047

**IN THE SUPREME COURT OF CALIFORNIA**

**KAREN L. STRAUSS**, **RUTH BORENSTEIN**, **BRAD JACKLIN**, **DUSTIN HERGERT**, **EILEEN MA**, **SUYAPA PORTILLO**, **GERARDO MARIN**, **JAY THOMAS**, **SIERRA NORTH**, **CELIA CARTER**, **DESMUND WU**, **JAMES TOLEN**, and **EQUALITY CALIFORNIA**,

*Petitioners,*

v.

**MARK D. HORTON**, in his official capacity as State Registrar of Vital Statistics of the State of California and Director of the California Department of Public Health; **LINETTE SCOTT**, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; and **EDMUND G. BROWN, JR.**, in his official capacity as Attorney General for the State of California,

*Respondents,*

and

**DENNIS HOLLINGSWORTH**, **GAIL J. KNIGHT**, **MARTIN F. GUTIERREZ**, **HAK-SHING WILLIAM TAM**, **MARK A. JANSSON**, and **PROTECTMARRIAGE.COM**, Yes on 8, a project of California Renewal,

*Intervenors.*

# APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONAL LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND INTERVENORS

Urging the Invalidity of Same-Sex "Marriages" Performed Between June 16, 2008, and November 5, 2008.

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## APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES:

Pursuant to the California Rules of Court, Rule 8.520(f), *Amicus Curiae,* The National Legal Foundation, respectfully requests permission to file the accompanying brief in support of the respondents and intervenors in *Strauss, et al. v. Horton, et al.*

*Amicus Curiae*, The National Legal Foundation (NLF), is a 501(c)(3) non-profit public interest law firm based in Virginia Beach, Virginia. The NLF is dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has filed numerous briefs in important cases pertaining to the sanctity of marriage. The NLF has an interest, on behalf of its constituents and supporters, in particular those in California, in arguing to protect the sanctity of traditional opposite-sex marriage. This brief should aid the Court in reaching the conclusion that same-sex "marriages" solemnized between June 16, 2008, and November 5, 2008, are invalid.

DATED: January 14, 2009

_____
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## SUMMARY OF THE ARGUMENT

The Intervenors have persuasively argued that the text of Proposition 8 and the circumstances surrounding its ratification by the citizens of California conclusively invalidate any same-sex "marriages" solemnized after this Court's Order of June 16, 2008, and prior to the passage of Proposition 8 on November 5, 2008. Simply put, these "interim marriages" no longer legally exist under the newly amended California Constitution. In addition to the textual and circumstantial reasons necessitating the invalidation of the interim marriages, viewing them as valid would run afoul of the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Furthermore, historical analogy arising out of plural marriage laws in nineteenth century Utah illustrates the propriety of the invalidation of the interim marriages.

## ARGUMENT

### I. "INTERIM MARRIAGES" ARE INVALID BECAUSE VIEWING THEM AS VALID VIOLATES THE PRIVILEGES AND IMMUNITES CLAUSE OF ARTICLE IV OF THE UNITED STATES CONSTITUTION.

In addition to agreeing that Proposition 8 is good public policy and worthy of respect as the will of the citizens of California, your *Amicus* agrees with the Intervenors that Proposition 8 has *amended* California's Constitution in the plainest of ways—California may recognize no marriage except those which are between a man and a woman—and such an amendment has no adverse implications on the law-interpreting power of the judiciary. (Intervenors' Opp'n Br. at 6-8, 24-25.) Therefore, the restriction of marriage to those between a man and a woman logically, and constitutionally, invalidates all interim marriages. Failing to invalidate the interim marriages would also lead to violations of the United States Constitution.

Article IV, Section 2 of the United States Constitution ("Article IV") requires that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." (U.S. Const. art. IV, § 2, cl. 1.) These privileges and immunities, whatever they include, recognize every person's right to "claim citizenship of any State in which they reside[] and . . . preclud[e] that State from abridging . . . rights of national citizenship," as guaranteed by the Fourteenth Amendment. (*Saenz v. Roe*

(1999) 526 U.S. 489, 502 n.15.) The Fourteenth Amendment states, in pertinent part,

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

(U.S. Const. amend. XIV, § 1.)

The primary purpose of Article IV Privileges and Immunities "was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of [one state] who ventures into [another] the same privileges which the citizens of [the first state] enjoy." (*Toomer v. Witsell* (1948) 334 U.S. 385, 395.) The privileges and immunities protected are not absolute and do not require complete parity of treatment between citizens and non-citizens of a state. (*Id.* at 396.) They do, however, "bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." (*Id.*) The reach of Article IV protection extends to both out-of-state visitors and newly transplanted California residents, and it guarantees them the "right to be treated like other citizens of that State." (*Saenz*, 526 U.S. at 500.)

It is against this backdrop that this Court must consider what to do with the "interim marriages," those relationships solemnized by same-sex couples during the approximately five months prior to the vote affirming

Proposition 8. One may be tempted to argue that "what's done is done" or those "marriages" could persist as a sort of historical anomaly or that they should be "grandfathered in." The United States Constitution, however, must not be ignored for the sake of preferences, and to carve out an exception permitting the ongoing legal vitality of the interim marriages would violate the privileges and immunities of same-sex couples who were "married" during their residency in another state (*e.g.*, Massachusetts).

This Court has recently noted the privileges and immunities implications of California's treating in-state and out-of-state same-sex couples differently. (*In re Marriage Cases* (2008) 43 Cal. 4th 757, 799-800.) In the "prequel" to the instant case, the plaintiffs—advocates of same-sex "marriage"—argued that Proposition 22 (codified as section 308.5) only invalidated same-sex "marriages" from out-of-state who were moving into California. (*Id.* at 798-99.) This Court first rejected plaintiffs' argument based on the plain language and the legislative purpose of section 308.5, but went on to note that such a reading of 308.5 would create "serious constitutional problems under the privileges and immunities clause . . . of the federal Constitution . . . were section 308.5 to be interpreted as creating a distinct rule for out-of-state marriages as contrasted with in-state marriages." (*Id.* at 797, 799-800.)

As this Court went on to note,

> [u]nder plaintiffs' proposed interpretation, section 308.5 would prohibit the state from recognizing the marriages of same-sex couples lawfully solemnized in other states without resubmitting the question to the voters and obtaining a confirming vote of the electorate, but would permit the state to recognize the validity of marriages of same-sex couples performed in California by legislative action alone without a vote of the electorate, raising the very real possibility that the state could approve the validity of marriages of same-sex couples that are performed in California while continuing to deny recognition to marriages of same-sex couples that are lawfully performed in another state. (See, *ante*, at p. 797, fn. 17.) Imposing such discriminatory treatment against out-of-state marriages of same-sex couples, as contrasted with marriages of same-sex couples performed within the state, would be difficult to square with governing federal constitutional precedents.

(*Id.* at 800.) This Court then concluded that "it is appropriate to interpret the limitations imposed by section 308.5 as applicable to marriages performed in California as well as to out-of-state marriages, in order to avoid the serious federal constitutional questions that would be posed by a contrary interpretation." (*Id.*) For,

> [i]f a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.

(*People v. Superior Court* (*Romero*) (1996) 13 Cal. 4th 497, 509.)

Just as the state statute referenced above was susceptible to a federal constitutional challenge, so also is a state constitutional amendment susceptible. (*See, e.g., Romer v. Evans* (1996) 517 U.S. 620.) For California to recognize a class of same-sex partners "married" during a five-month period in 2008, but hold invalid any incoming couple's "marriage" solemnized in another state during the same period violates the privilege or immunity of those incoming same-sex couples. The only reason for the differential treatment would be the couple's residency at the time the "marriage" was entered. As stated previously, such a situation "would be difficult to square with governing federal constitutional precedents." (*In re Marriage Cases*, 43 Cal.4th at 800.)

## II. "INTERIM MARRIAGES" ARE INVALID BECAUSE VIEWING THEM AS VALID VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

In a manner similar to the previously discussed Privileges and Immunities Clause, the Fourteenth Amendment requires "equal protection of the laws" of all people within a state's "jurisdiction." (U.S. Const., amend. XIV, § 1.) Because many of the arguments for equal protection violations are similar to privileges and immunities violations, your *Amicus* will not reiterate at length the similarities. Simply put, an equal-protection violation occurs when the government adopts "a classification that affects

two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530 (emphasis in original).)

Although the precise question here appears to be one of first impression, for purposes of marital recognition, same-sex couples "married" in California are similarly situated in all relevant respects to same-sex couples "married" in Massachusetts. Importantly, this Court has found opposite-sex couples and same-sex couples to be similarly situated for the purposes of equal protection analysis. (*In re Marriage Cases* (2008) 43 Cal. 4th at 831 n.54.) As this Court noted,

> Both groups at issue [same-sex and opposite-sex couples] consist of pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term family relationship that affords the same rights and privileges and imposes the same obligations and responsibilities. Under these circumstances, there is no question but that these two categories of individuals are sufficiently similar to bring into play equal protection principles that require a court to determine "whether distinctions between the two groups justify the unequal treatment."

(*Id.* (citation omitted).) If opposite-sex and same-sex couples can be viewed as similarly situated, how much more would same-sex couples be similarly situated, both of whom solemnized their relationships between mid-June and early November 2008, albeit in different states.

Regardless of what standard of review this Court applies, the different treatment of in-state and out-of-state couples amounts to an equal-protection violation, as there can surely be no legitimate basis for the

disparity. To "avoid the serious . . . constitutional questions that would be posed by a contrary interpretation," (*In re Marriage Cases*, 43 Cal.4th at 800), this Court should interpret Proposition 8 to invalidate California same-sex "marriages" solemnized prior to its enactment.

## III. HISTORY AND LOGIC DICTATE THAT THE INTERIM MARRIAGES BE INVALIDATED.

It goes without saying that the emotions, opinions, and fervor over Proposition 8 have had little rival in our nation's recent past. But emotions, opinions, and fervor are not the stuff of constitutional adjudication. The United States Supreme Court (and other courts as well) has often attempted to root its analysis of the case before it in light of the long-standing history and traditions of the nation and to analogize the right result from that history and tradition. (*See, e.g., Marsh v. Chambers* (1983) 463 U.S. 783, 787-791.) Here, a remarkably analogous historical precedent dictates the invalidation of the interim marriages.

In 1852, Joseph Smith announced a "revelation" sanctioning and encouraging plural marriage within the Church of Jesus Christ of Latter Day Saints. This practice was deeply out of step with the social mores and plainly offensive to much of the nation, and Congress intervened with legislation in 1862, plainly prohibiting the taking of another spouse while lawfully married to a first one. (*Cope v. Cope* (1891) 137 U.S. 682, 686.) What resulted, therefore, was a ten-year period where "marriages" occurred

without explicit proscription, but which were then voided by the law of 1862. Although it does not appear the courts ever directly addressed the question of what happened to "marriages" solemnized between 1852 and 1862, there is not a hint in the cases of a "grandfathering in" of any plural marriages. (*See, e.g., Id.*; *Riddle v. Riddle* (1903) 26 Utah 268; and *In re Handley's Estate* (1897) 15 Utah 212.)

Instead, one finds apparent unanimity that a plural marriage, regardless of when consummated, was invalid (and prosecutable as a crime). For instance, in *Riddle*, 26 Utah at 270-71, the defendant began his married life in 1853, then married again in 1861, 1863, and 1886. His last "wife" sued for "separate maintenance," an action only available to a legal spouse. (*Id.* at 270.) The court's final substantive paragraph is telling:

> *We are clearly of the opinion that none of the three women mentioned* became the legal wife of the appellant, but that their relations to him were those of plural wives, and he did not, therefore, incur the legal obligations of marriage in respect to either of them. We are, however, of the opinion that he became, and still is, morally bound, not only, if able to do so, to support his plural wives but also to support and educate the children of the plural wives begotten by him; *but, as secular courts are powerless to enforce any but legal obligations*, the judgment must be reversed.

(*Id.* at 282 (emphases added).)

It is not as though the courts, however, were insensitive to the consequences of the plural marriages. In a particularly insightful holding, the Supreme Court upheld a Utah statute from 1852 that made illegitimate

children with known fathers able to take under the inheritance laws. (*Cope* 137 U.S. at 689.) As the court explained,

> Legislation admitting illegitimate children to the right of succession is undoubtedly in derogation of the common law, and should be strictly construed, and hence it has generally been held that laws permitting such children, whose parents have since married, to inherit, do not apply to the fruits of an adulterous intercourse. . . .
>
> It is true that the peculiar state of society existing at the time this act was passed, and still existing in the Territory of Utah, renders a law of this kind much wider in its operation than in other States and Territories; but it may be said in defence of this act that the children embraced by it are not responsible for this state of things, and that it is unjust to visit upon them the consequences of their parents' sins. To recognize the validity of the act is in the nature of a punishment upon the father, whose estate is thus diverted from its natural channel, rather than upon the child; while to hold it to be invalid is to treat the child as in some sense an outlaw and a *particeps criminis*.

(*Id.* at 685.) As the Intervenors have aptly noted, this Court will be called upon to make similar types of judgment moving forward. (Intervenors' Opp'n Br. at 41-42.) That new types of cases may arise is not sufficient ground to continue validating the interim marriages. Reason dictates that some actions arising out of those "marriages" may be void (such as expectations of taking under the laws of intestacy upon the death of one partner), and others voidable (such as obligations arising out of a joint adoption contemplating the partners were married). But in like manner to how courts viewed events in Utah 120 years ago, so should this Court view

the interim marriages. California law plainly does not recognize them, and nor should this Court.

## CONCLUSION

For the foregoing reasons, this Court should find the interim marriages invalid.

Respectfully submitted this 14th day of January 2009.


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## CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface, containing 2,434 words, including footnotes. In making this certification, I have relied on the word count function of Microsoft Office 2007.

_____

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## PROOF OF SERVICE

I, Andrea Fitschen, declare: I am a resident of the State of Virginia and over the age of eighteen years, and not a party to the within action; my business address is 2224 Virginia Beach Boulevard, Suite 204, Virginia Beach, Virginia 23454.

On January 14, 2009, I served the following document(s):

**1.** APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONAL LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND INTERVENORS URGING THE INVALIDITY OF SAME-SEX "MARRIAGES" PERFORMED BETWEEN JUNE 16, 2008, AND NOVEMBER 5, 2008.

on the interested parties in this action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

**PLEASE SEE ATTACHED SERVICE LIST**

and served the document(s) in the manner indicated below:

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Virginia Beach, Virginia, addressed as set forth below.

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. Executed on January 14, 2009, at Virginia Beach, Virginia.

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