S168332

No. S_____

IN THE
SUPREME COURT OF CALIFORNIA

CALIFORNIA COUNCIL OF CHURCHES, THE RIGHT REVEREND MARC HANDLEY ANDRUS, Episcopal Bishop of California, THE RIGHT REVEREND J. JOHN BRUNO, Episcopal Bishop of Los Angeles, GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, NORTHERN CALIFORNIA NEVADA CONFERENCE OF THE UNITED CHURCH OF CHRIST, SOUTHERN CALIFORNIA NEVADA CONFERENCE OF THE UNITED CHURCH OF CHRIST, PROGRESSIVE JEWISH ALLIANCE, UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS, and UNITARIAN UNIVERSALIST LEGISLATIVE MINISTRY CALIFORNIA,

Petitioners,

vs.

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.

SUPREME COURT
FILED
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Frederick K. Ohlrich Clerk
Deputy

PETITION FOR WRIT OF MANDATE OR PROHIBITION

(RELATED PROCEEDINGS PENDING: S168047, S168066, S168078, S168281)

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TABLE OF CONTENTS

Page

INTRODUCTION 1

PRELIMINARY JURISDICTIONAL STATEMENT 3

THE PARTIES 6

FACTS 14

CLAIMS ASSERTED 16

RELIEF SOUGHT 16

VERIFICATION 18

MEMORANDUM 20

I. SUMMARY OF ARGUMENT 20

II. ARGUMENT 22

A. Equal Protection of the Laws is an Inalienable Right at the Core of the California Constitution 22

B. History Demonstrates the Need for the Constitutional Guarantee of Equal Protection to Safeguard Religious Minorities 24

C. The Constitutional Guarantee of Equal Protection – For Gay Men and Lesbians As Well As Religious Minorities – Cannot Be Selectively Undermined By the Initiative Process 32

III. CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES

Amador Valley Joint Union High School Dist. v. State Bd. of Equalization
(1978) 22 Cal.3d 208 ..... 21, 22, 33, 34

Banks v. Board of Pharmacy
(1984) 161 Cal.App.3d 708 31

Bowers v. Hardwick
(1986) 478 U.S. 186 (1986) 36

Brosnahan v. Brown
(1982) 32 Cal.3d 236 ..... 1, 21, 22

Brown v. Board of Education
(1954) 347 U.S. 483 36

Common Cause v. Board of Supervisors
(1989) 49 Cal.3d 432 21

Commonwealth v. Kneeland
(1838) 37 Mass. 206 26

Dawson v. Westerly Investigations, Inc.
(1988) 204 Cal.App.3d Supp. 20 31

Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection
(2008) 44 Cal.4th 459 21

First Unitarian Church of Los Angeles v. County of Los Angeles
(1958) 357 U.S. 545 (con. opn. of (Douglas, J.)) 12

Gabrielli v. Knickerbocker
(1938) 12 Cal.2d 85 29

Green v. Obledo
(1981) 29 Cal.3d 126 21

Hale v. Everett
(1868) 53 N.H. 9 27

Page

Hering v. State Board of Education
(1938) 303 U.S. 624 29

Hirabayashi v. United States
(1943) 320 U.S. 81 36

Hogar Dulce Hogar v. Community Dev. Comm'n
(2003) 110 Cal.App.4th 1288 21

Johnson v. State
(1942) 204 Ark. 476 [163 S.W.2d 153] 28

Korematsu v. United States
(1944) 323 U.S. 214 36

Lawrence v. Texas
(2003) 539 U.S. 558 36

Leoles v. Landers
(1937) 302 U.S. 656 29

Livermore v. Waite
(1894) 102 Cal. 113 ..... 21, 32, 34

Loving v. Virginia
(1967) 388 U.S. 1 36

McFadden v. Jordan
(1948) 32 Cal.2d 330 ..... 32, 34

In re Marriage Cases
(2008) 43 Cal.4th 757 ..... *passim*

Minersville School District v. Gobitis
(1940) 310 U.S. 586 ..... 29, 35, 36

Nicholls v. Mayor & School Committee of Lynn
(1937) 297 Mass. 65 [7 N.E. 2d 577] 29

Owens v. City of Signal Hill
(1984) 154 Cal.App.3d 123 31

Page

People ex rel. Fish v. Sandstrom
(N.Y. Suffolk County Ct. 1938) 167 Misc. 436 29

Perez v. Sharp
(1948) 32 Cal.2d 711 36

Plessy v. Ferguson
(1896) 163 U.S. 537 ..... 35, 36

Raven v. Deukmeijian
(1990) 52 Cal.3d 336 ..... 21, 22, 33, 35

Serrano v. Priest
(1976) 18 Cal.3d 728 35

State ex rel. Bolling v. Superior Court
(1943) 16 Wn.2d 373, [133 P.2d 803] 29

West Virginia State Board of Education v. Barnette
(1943) 319 U.S. 624 ..... 30, 36

Williams v. Kapilow & Son, Inc.
(1980) 105 Cal.App.3d 156 31

STATUTES, RULES AND REGULATIONS

California Code of Civil Procedure
Section 1085 ..... 4, 6
Section 1086 ..... 5, 21
Section 1103 ..... 4, 5, 6, 21

California Rules of Court
Rule 8.490 6

California Constitution
art. I, § 1 ..... *passim*
art. I, § 7 ..... 5, 15, 20, 22
art I, § 24 ..... 35, 36
art. VI, §10 ..... 1, 4, 6
art. XVIII ..... *passim*
art XVIII, §1 ..... 21, 34

Page

art XVIII, §2 ..... 21, 34
art. XVIII, §3 ..... 21, 32, 33

United States Constitution
art. V 2

PETITION FOR WRIT OF MANDATE OR PROHIBITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

INTRODUCTION

California's constitutional right of equal protection is sacrosanct. Not even the electorate can take it away selectively – at least not without a two-thirds vote of the Legislature or a constitutional convention. This writ petition seeks to enforce that basic principle.

The California Supreme Court has "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." (Cal. Const., art. VI, §10.) This court's assumption of original jurisdiction is reserved for cases where "the issues are of great public importance and should be resolved promptly." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241 (*Brosnahan*).) This is such a case.

Proposition 8, a ballot initiative passed by a bare majority of votes on November 4, 2008, purports to do something unprecedented in California by changing our state Constitution to undermine a fundamental constitutional and human-rights principle – the right of all citizens to equal protection of the laws

– by taking that right away from some of those citizens. The California Constitution, however, provides safeguards against such threats to equal protection: Under article XVIII, such a change is a "revision" which cannot occur by initiative but instead requires a two-thirds vote of the Legislature, or a constitutional convention, followed by a vote of the people. In this way, the California Constitution insulates its guarantee of equal protection from the passions of popular prejudice that occasionally creep into the political process – much like the United States Constitution ensures the endurance of the federal guarantee of equal protection by requiring a three-fourths vote of state legislatures or conventions to amend the Bill of Rights. (See U.S. Const. art. V.)

The religious institutions that file this petition – and their member congregations and parishioners – count on article XVIII to ensure that the California Constitution's guarantee of equal protection for *religious minorities* cannot be taken away without a deliberative process of the utmost care possible in a representative democracy. If Proposition 8 is upheld, however, the assurance will disappear – for, just as surely as gay men and lesbians could be deprived of equal protection by a simple majority vote, so too could religious minorities be deprived of equal protection – a terrible irony in a nation founded by people who emigrated to escape religious persecution. Petitioners seek this court's pronouncement on Proposition 8 because of past experience and fear for the future – the experience of historical persecution

against religious minorities, and the fear that it could happen again, here in California, if a path is cleared for an initiative-based selective deprivation of equal protection.

There is no matter of greater public importance to California than the damage Proposition 8 does to our Constitution's guarantee of equal protection. And that damage is happening *now*, as of November 5, 2008. Today, tomorrow, and every day until this court acts, a basic human right is being selectively withheld from some of our citizens, who are hurting deeply from what they have lost. Their hurt is real and palpable, and it cannot be undone in hindsight by a decision of this court – which is surely inevitable – a few years down the line in the routine course of the judicial process. Extraordinary injustice calls for extraordinary relief. The time for this court's decision – like the effective date of Proposition 8 – is *now*.

PRELIMINARY JURISDICTIONAL STATEMENT

1. By this original petition for writ of mandate or prohibition, petitioners California Council of Churches, the Rt. Rev. Marc Handley Andrus, Episcopal Bishop of California, the Rt. Rev. J. Jon Bruno, Episcopal Bishop of Los Angeles, General Synod of the United Church of Christ, Northern California Nevada Conference of the United Church of Christ, Southern California Nevada Conference of the United Church of Christ, Progressive Jewish Alliance, Unitarian Universalist Association of Congregations, and Unitarian Universalist Legislative Ministry California,

respectfully seek a writ of mandate or prohibition under California Constitution article VI, section 10, and California Code of Civil Procedure sections 1085 and 1103, enjoining State Registrar of Vital Statistics of the State of California and Director of the California Department of Public Health Mark B. Horton, MD, MSPH, Deputy Director of Health Information & Strategic Planning of the California Department of Public Health Linette Scott, MD, MPH, and California Attorney General Edmund G. Brown, Jr., all in their official capacities, from enforcing, taking any steps to enforce, directing any persons or entities to enforce, or otherwise seeking to implement or give effect to Proposition 8, the initiative measure entitled "Eliminates the Right of Same-Sex Couples to Marry," which has received a majority of the votes cast in the November 4, 2008, election.

2. This petition is brought on the ground that Proposition 8's purported amendment of California's Constitution to deprive a distinct segment of the population of equal protection of the laws and withdraw from them a fundamental civil right amounts to a revision and not an amendment that can be accomplished by initiative upon a simple majority vote. (See Cal. Const., art. XVIII.)

3. As such, Proposition 8 is a nullity, the enforcement of which threatens petitioners' legitimate interests.

4. Petitioners, as diverse religious organizations, have a profound interest in the guarantee of equal protection secured by the California

Constitution both under the express equal protection clause of article I, section 7, and as an implicit requirement of the fundamental right to religious liberty and freedom, which must be applied equally to all persons and religious faiths without government favoritism or partiality.

5. Petitioners the Rt. Rev. Marc Handley Andrus, the Rt. Rev. J. Jon Bruno, the California Council of Churches, Northern California Nevada Conference of the United Church of Christ, Southern California Nevada Conference of the United Church of Christ, and the Unitarian Universalist Legislative Ministry are citizens of California.

6. Each organizational petitioner's membership includes many citizens of California.

7. As citizens of California, and as organizations representing diverse religious faiths whose membership includes many citizens of California, petitioners have a beneficial interest in the continuing vitality and integrity of the equality guarantees of the California Constitution and of the safeguard against hasty or improvident changes to our state Constitution established by article XVIII, which prohibits the use of the initiative process for a constitutional change of the magnitude of Proposition 8. (See Code Civ. Proc., §§1086, 1103.)

8. Petitioners have no other plain, speedy or adequate remedy at law. No administrative or other proceedings are reasonably available to enjoin the enforcement of Proposition 8.

9. Petitioners respectfully invoke the original jurisdiction of this Court under California Constitution article VI, section 10; Code of Civil Procedure sections 1085 and 1103; and rule 8.490 of the California Rules of Court.

10. This petition presents no questions of fact that would have to be resolved before granting the relief sought.

THE PARTIES

1. Petitioner **California Council of Churches** is an organization of California's Christian churches that traces its history to a gathering at San Francisco's Central Methodist Church where, on January 28, 1913, twenty delegates from several county and city church federations organized a statewide California Church Federation, with a constitution declaring: "In the providence of God, the time has come more fully to manifest the essential oneness of the Christian Churches of America in Jesus Christ as their Divine Lord and Savior, and to promote the spirit of fellowship, service and cooperation among them." The Council today is a leading voice representing the theological diversity in the state's mainstream and progressive communities of faith. Its membership includes 51 denominations and judicatories in California, representing over 4,000 congregations and more than 1.5 million members drawn from the mainstream Protestant and Orthodox Christian communities, as well as allies from other faith traditions. They include: **American Baptist Churches** (American Baptist Churches of the

West; Pacific Southwest Region); **African Methodist Episcopal Church** (Fifth Episcopal District); **African Methodist Episcopal Zion Church**; **Armenian Church of America** (Western Diocese of the Armenian Church); **Christian Methodist Episcopal Church** (Ninth Episcopal District); **Church of the Brethren** (Pacific Southwest District); **Christian Church (Disciples of Christ)** (Northern California-Nevada Region; Pacific Southwest Region); **Community of Christ**; **The Episcopal Church** (Episcopal Diocese of California; Episcopal Diocese of El Camino Real; Episcopal Diocese of Los Angeles; Episcopal Diocese of Northern California; Episcopal Diocese of San Diego; Episcopal Diocese of San Joaquin); **Ethiopian Orthodox Church**; **Evangelical Lutheran Church in America** (Pacifica Synod; Sierra Pacific Synod; Southwest California Synod); **Greek Orthodox Church** (Orthodox Diocese of San Francisco); **Independent Catholic Churches International**; **Moravian Church**; **National Baptist Convention**; **Presbyterian Church (U.S.A.)** (Presbytery of Los Ranchos; Presbytery of the Pacific; Presbytery of the Redwoods; Presbytery of Riverside; Presbytery of Sacramento; Presbytery of San Diego; Presbytery of San Fernando; Presbytery of San Francisco; Presbytery of San Gabriel; Presbytery of San Joaquin; Presbytery of San Jose; Presbytery of Santa Barbara; Presbytery of Stockton; Sierra Mission Partnership; Synod of the Pacific; Synod of Southern California & Hawaii); **Reformed Church in America**; **Swedenborgian Church**; **United Church of Christ** (Northern California Nevada Conference; Southern California Nevada

Conference); **United Methodist Church** (California-Nevada Conference; California-Pacific Annual Conference); **Universal Fellowship of Metropolitan Community Churches** (Region 1; Region 6); **Church Women United**; and **Orthodox Clergy Council**.

2. Petitioner **Right Reverend Marc Handley Andrus** is the eighth bishop of the Episcopal Diocese of California, elected in a special convention at San Francisco's Grace Cathedral on May 6, 2006, and invested as Bishop of California on July 22, 2006. Before his election as Bishop of California, Andrus served as Bishop Suffragan in the Episcopal Diocese of Alabama. The Episcopal Diocese of California serves a diverse community of faith, with 27,000 people forming 80 congregations, 22 of them missions, including 2 special ministries, in 49 cities and towns. The diocese is organized into six deaneries – the Alameda, Contra Costa, Marin, San Francisco and Southern Alameda deaneries cover their respective counties; the Peninsula Deanery consists of all of San Mateo County and a small portion of Santa Clara County. The diocese has 335 priests and 85 vocational deacons who minister to the congregations.

3. Petitioner **Rt. Rev. J. Jon Bruno** became the sixth bishop of Los Angeles on February 1, 2002. The Episcopal Church in the Diocese of Los Angeles encompasses 85,000 Episcopalians in 147 congregations located in Los Angeles, Orange, Riverside, San Bernardino, Santa Barbara, and Ventura counties. Served by some 400 clergy, the Diocese also includes some 40

Episcopal schools and some 20 social service and chaplaincy institutions. Upon becoming Bishop of Los Angeles, Bishop Bruno called on the people of the diocese to be people of mission for the Christian faith. He has identified the "facts" of such mission as formation in faith, a sense of the abundance of God's generosity, competence, truth and service. In his call to mission, Bishop Bruno encourages clergy and laypersons to "plan and prepare for God's service, work for abundance, and care for the community as we would care for Jesus." Bishop Bruno is a leader in the Episcopal Church in many areas, including interfaith ministry, education, nonviolence and reconciliation.

4. Petitioner **General Synod of the United Church of Christ** is a "mainline" Protestant denomination in the Reformed tradition, and has a history of witness and profound commitment to peace-seeking and advocacy for justice for all. In 2005, at its General Synod the United Church of Christ delegates approved a resolution supporting marriage equality, and this petition is grounded in that action.

5. Petitioner **Northern California Nevada Conference United Church of Christ** is a manifestation of the church of Jesus Christ and a constituting body of the **United Church of Christ (UCC)**. Members of the Conference include 130 local churches in the State of California. Within the state of California the Conference extends from the Oregon border to the southern borders of Inyo, Tulare, Kings, and Monterey counties. The Conference's membership includes, for example, the **First Congregational**

Church of Berkeley, which was founded in 1874 as the first church in Berkeley and whose members were instrumental in the founding of the University of California at Berkeley; the **San Mateo Congregational Church United Church of Christ**, which was founded in 1865 and whose members provided housing for Japanese-Americans when they returned from internment at the end of World War II; and the **First Congregational Church of Oakland**, which was founded in 1860 and which for many weeks fed, housed, and clothed thousands of refugees from the 1906 earthquake and fire that devastated San Francisco.

6. Petitioner **Southern California Nevada Conference of the United Church of Christ** is a faith community gathered in over 130 diverse congregations. The purpose of the SCNC is to be a united and uniting community of the people of God, covenanting together for mutual support and common mission. Its denomination, the United Church of Christ, is a "mainline" Protestant denomination in the Reformed tradition, and its history is witness to a long and profound commitment to peace-seeking and advocacy for justice for all. In 2004, at its Annual Gathering, the Conference delegates approved a resolution supporting marriage equality. This petition is grounded in that action.

7. Petitioner **Progressive Jewish Alliance (PJA)**, www.pjalliance.org, is a non-profit, California-based membership organization, with over 4,000 members, that educates, advocates and organizes

on issues of peace, equality, diversity and justice. Founded in 1999 and with offices in Los Angeles and the San Francisco Bay Area, PJA serves as a vehicle connecting Jews to the critical social justice issues of the day, to the life of the cities in which they live, and to the Jewish tradition of working for *tikkun olam* (the repair of the world). As an integral part of its social justice agenda, PJA supports equal access to marriage for all. Representing a people who have long known the sting of marginalization and inferior citizenship, PJA opposes any efforts to discriminate against gay men and lesbians, whether by constitutional amendment or by the creation of second-class domestic partnerships or civil unions. PJA's views on this subject are grounded in the Jewish legal tradition that the law should be applied equally to all, citizen and stranger alike. Those views are further elaborated upon in PJA's May 12, 2004, policy statement, which can be found at http://www.pjalliance.org/article.aspx?ID=76&CID=9.

8. Petitioner **Unitarian Universalist Association of Congregations (UUA)** is a denomination comprising more than 1,000 congregations, including many of America's founding churches, and more than 70 congregations in the State of California. The denomination's membership includes, for example, the congregation of Pilgrims who ventured to sail on the Mayflower, landing at Plymouth Rock in 1620 and celebrating the First Thanksgiving in 1621, the **First Parish Church in Plymouth, Massachusetts** ("at the top of Town Square since 1620"); the congregation

organized in 1630 by John Winthrop as the beacon light for his Puritan settlers' shining "city upon a hill," the **First Church in Boston**; the congregation organized at Salem, Massachusetts in 1629, that had some troubling issues with "witches" in 1692, the **First Church in Salem**; and the **United First Parish Church (Unitarian), Quincy, Massachusetts**, which first gathered in the 1630s, where President John Adams, First Lady Abigail Adams, President John Quincy Adams, and First Lady Catherine Louisa Adams worshipped, and where their bodies rest in peace in their home church to this day. In California, the denomination's membership includes, for example, the **First Unitarian Church of Los Angeles**, which first gathered in 1877, and which at McCarthyism's height defended the right of religious organizations to refuse government-mandated oaths or affirmations "as to church doctrine, advocacy or beliefs." (*First Unitarian Church of Los Angeles v. County of Los Angeles* (1958) 357 U.S. 545, 546-547 (con. opn. of (Douglas, J.)); **Throop Memorial Church** of Pasadena, whose name memorializes its founding in 1886 by Amos Throop, who also founded the California Institute of Technology; and the **First Unitarian Universalist Society of San Francisco**, first gathered in 1850, whose minister the Rev. Thomas Starr King was credited by President Abraham Lincoln's General-in-Chief Winfield Scott for tireless efforts that, in time of national crisis, "saved California to the Union."

9. Petitioner **Unitarian Universalist Legislative Ministry California (UULM CA)** is a statewide justice ministry that serves to empower the moral voice of Unitarian Universalist values in the public arena. Guided by Unitarian Universalist principles, the Ministry seeks to develop the skills of civic engagement that we may educate, organize, and advocate for public policies that: uphold the worth and dignity of every person; further justice, equity, and compassion in human relations; ensure use of the democratic process; protect religious freedom; and promote respect for the interdependent web of all existence. Unitarian Universalist congregations throughout the state have chosen to affiliate with the UULM CA in order to advance the values of their faith community.

10. Respondent Mark D. Horton, MD, MSPH ("Horton") is the Director of the California Department of Public Health and, as such, is the State Registrar of Vital Statistics of the State of California. Horton is sued in his official capacity. It is Horton's legal duty, among other things, to prescribe and furnish the forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate.

11. Respondent Linette Scott, MD, MPH ("Scott") is the Deputy Director of Health Information & Strategic Planning for the California Department of Public Health. Scott is sued in her official capacity. Upon information and belief, it is alleged that Scott reports to Respondent Horton

and is the California Department of Public Health official responsible for prescribing and furnishing the forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate.

12. Respondent Edmund G. Brown Jr. ("Brown") is the Attorney General of the State of California. Brown is sued in his official capacity. It is Brown's legal duty, among other things, to ensure that the laws of the State of California are uniformly and adequately enforced.

FACTS

1. On May 15, 2008, the Supreme Court of California issued its opinion holding that marriage is a fundamental civil right which cannot, consistent with the California Constitution's guarantee of equal protection of the laws, be denied to gay and lesbian people. (*In re Marriage Cases* (2008) 43 Cal.4th 757 (*Marriage Cases*).)

2. This court held that its precedents "make clear that the right to marry is an integral component of an individual's interest in personal autonomy protected by the privacy provision of article I, section 1" (*Marriage Cases*, *supra*, 43 Cal.4th at p. 818), which by its terms makes the right "inalienable" (Cal. Const., art. I, § 1).

3. This court held, moreover, that government discrimination based on sexual orientation is inherently suspect under the California Constitution's guarantee of equal protection of the laws, and that denying same-sex couples

the right to marry violates that guarantee. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 855-856; Cal. Const., art. I, § 7.)

4. This court also confirmed that discrimination based on religion implicates a suspect classification and violates equal protection (see *Marriage Cases*, *supra*, 43 Cal.4th at pp. 841-842), and that permitting equal access to the fundamental freedom to marry is fully consistent with religious liberty (*id.* at pp. 854-855).

5. On November 4, 2008, a bare majority of California voters cast ballots in favor of Proposition 8, an initiative measure that if given effect would override the California Constitution's equal protection guarantee and deprive gay and lesbian couples of the right to marry by inserting a new section 7.5 into article I, stating: "Only marriage between a man and a woman is valid or recognized in California."

6. The Official Title and Summary of Proposition 8, prepared by respondent Brown, says the provision would "[e]liminate the right of same-sex couples to marry in California."

7. It is widely understood that the campaign to pass Proposition 8 was sponsored and significantly funded by a few religious groups seeking to limit civil marriages in California to reflect their own religious rites limiting marriage to unions between a man and a woman.

CLAIMS ASSERTED

1. Proposition 8 would effect a radical revision of the California Constitution because it purports to revoke from a particular class of Californians (those who are gay or lesbian) a right that the Constitution designates "inalienable" and thereby deprive this class of equal protection of the laws, the bedrock principle upon which our social contract and system of constitutional government are based.

2. Under article XVIII of the California Constitution, the text of Proposition 8 is a constitutional "revision" which cannot occur by initiative but instead requires a two-thirds vote of the Legislature, or a constitutional convention, followed by a vote of the people. For this reason, Proposition 8 is invalid.

RELIEF SOUGHT

Wherefore, petitioners respectfully request the following relief:

1. That this court forthwith issue an alternative writ of mandate or prohibition directing respondents to refrain from taking any action that might give effect to Proposition 8;

2. That upon respondents' return to the alternative writ, a hearing be held before this court at the earliest practicable time so that the issues presented by this petition may be adjudicated without delay and, if this court deems appropriate, pursuant to an expedited briefing and hearing schedule;

3. That upon issuance of the alternative writ and oral argument, this court issue a peremptory writ of mandate or prohibition declaring that Proposition 8 effects no amendment of the California Constitution but is null and void in its entirety;

4. That petitioners be awarded their attorneys' fees and costs of suit; and

5. For such other relief as the court may deem just and equitable.

VERIFICATION

I the Rev. Dr. Rick Schlosser, declare and state:

I am Executive Director of the California Council of Churches, a petitioner in the above-captioned matter. I have read the foregoing petition for writ of mandate or prohibition and know the contents thereof, and know the facts asserted to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Sacramento, California, on November 16, 2008.

RICK SCHLOSSER

I Eric Alan Isaacson, declare and state:

I am a member of the law firm of Coughlin Stoia Geller Rudman & Robbins LLP and am counsel for petitioners California Counsel of Churches, The Rt. Rev. Marc Handley Andrus, The Rt. Rev. J. Jon Bruno, General Synod of the United Church of Christ, Northern California Nevada Conference of the United Church of Christ, Southern California Nevada Synod of the United Church of Christ, Progressive Jewish Alliance, Unitarian Universalist Association of Congregations, and the Unitarian Universalist Legislative Ministry California. I make this verification because I am particularly familiar with the relevant facts. I have reviewed the facts referred to in this petition and know them to be true based on my review of the public record concerning this court's decision in the *Marriage Cases* and the results of the November 4, 2008, election with respect to Proposition 8.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this verification was executed on November 17, 2008, at San Diego, California.

ERIC ALAN ISAACSON

MEMORANDUM

I. SUMMARY OF ARGUMENT

Petitioners are religious organizations representing the broad mainstream of our state's religious life, who join together in seeking to have Proposition 8 ruled invalid. Allowing the removal of fundamental constitutional rights for a particular group of Californians, based on a suspect classification and by a simple majority vote, would present a profound threat to the critical protections afforded by the guarantee of equal protection to the broad diversity of religious groups in this state.

Petitioners and their members enjoy the protection of article I, section 7 of the California Constitution, which guarantees the equal protection of the laws without discrimination based on religion. (See *Marriage Cases*, *supra*, 43 Cal.4th at pp. 841-842 [religion is a suspect classification under the state Constitution's equal protection clause].) Yet this constitutional guarantee of equal protection will be directly and immediately threatened if Proposition 8 is given effect. If a simple majority vote of the people by ballot initiative may deprive gay and lesbian citizens of the right to equal protection of the laws – the very bedrock on which our state Constitution rests – thereby withdrawing what article I, section 1, terms an "inalienable" right, then any disfavored minority group may be deprived of equal protection rights in such a manner.

If article XVIII means what it says then Proposition 8 is a nullity. According to article XVIII, substantial revisions of California's fundamental

constitutional law may be accomplished only if submitted to the voters following the Legislature's "rollcall vote entered in the journal, two-thirds of the membership concurring" or the proposal of a validly called constitutional convention. (Cal. Const., art XVIII, §§ 1, 2.) Although the electors may *amend* the Constitution by initiative under article XVIII, section 3, *revisions* of the fundamental principles of California's constitutional law are beyond the amendment power, which is limited to promulgating "'an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.'" (*Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 222 (*Amador Valley*), quoting *Livermore v. Waite* (1894) 102 Cal. 113, 118-119 (*Livermore*).)

Petitioners are proper parties, entitled to challenge the enactment of an invalid initiative amendment. (Code Civ. Proc., §§ 1086, 1103.)[1] They have a

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[1] See *Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479 ["'[W]here the question is one of public right and the object is to procure the enforcement of a public duty, . . . it is sufficient that [petitioner] is interested as a citizen in having the laws executed and the duty in question enforced'"], quoting *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439; accord *Green v. Obledo* (1981) 29 Cal.3d 126, 144; *Hogar Dulce Hogar v. Community Dev. Comm'n* (2003) 110 Cal.App.4th 1288, 1294-1295; see also *Raven v. Deukmeijian* (1990) 52 Cal.3d 336, 340 (*Raven*) (citizens' writ petition challenging initiative amendment properly transferred to the Supreme Court because "'the issues are of great public importance and should be resolved promptly,'" making it "'appropriate that we exercise our original

direct and beneficial interest in seeing that California honors the rules concerning revisions of fundamental constitutional principles, including the provisions of article XVIII, which proscribe revisions of constitutional fundamentals by initiative amendment. Because this issue is of great public importance and should be resolved quickly, this court's original jurisdiction is properly invoked and should be exercised forthwith.[2]

II. ARGUMENT

A. Equal Protection of the Laws is an Inalienable Right at the Core of the California Constitution

"Equal protection of the laws" is guaranteed by article I, section 7 of the California Constitution. But this guarantee against the oppression of minorities by fleeting majorities would mean relatively little if it could be overridden by initiative on a simple majority vote. And if Proposition 8 is valid, taking away from gay and lesbian citizens the right to equal protection of the laws as it affects a fundamental right (the right to marry), then the petitioners' right to be free from discrimination or persecution on the basis of

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jurisdiction'") (quoting *Brosnahan, supra,* 32 Cal.3d at p. 240-41)); *Livermore v. Waite* (1894) 102 Cal. 113, 115 (affirming judgment in an action brought by a citizen of the state to restrain secretary of state from certifying proposed amendment).

[2] See *Raven, supra*, 52 Cal.3d. at page 340 (quoting *Brosnahan, supra,* 32 Cal.3d at p. 241); accord *Amador Valley, supra,* 22 Cal.3d at p. 219 ("The issues herein presented are of great public importance and should be resolved promptly. Under well settled principles petitioners, accordingly, have properly invoked the exercise of our original jurisdiction.").

religion is similarly vulnerable to being overridden in a general election by a simple majority vote.

Nothing is more fundamental to the very foundation of our constitutional government than the principle of equal protection of the laws. Article I, section 1's declaration of "inalienable" rights itself assumes every person's fundamental equality before the law, asserting that *all people* have rights that are fundamental and *inalienable*: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Calif. Const., art. I, § 1.) Article I, section 7, subdivision (a), further declares that no person may be "denied equal protection of the laws." And article I, section 7, subdivision (b), emphasizes: "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."

This equal protection principle is the basis of our governmental social contract and thus the bedrock foundation upon which our state Constitution is built. It cannot be overridden by fleeting majorities. Thus, while article I, section 3 acknowledges that "[t]he people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good," section 3 also specifically provides that not even the people's right to instruct governmental representatives and

petition for redress can override individuals' right to equal protection of the laws.[3]

B. History Demonstrates the Need for the Constitutional Guarantee of Equal Protection to Safeguard Religious Minorities

Religious minorities receive special protection under the equal protection guarantee (see *Marriage Cases, supra* 43 Cal.4th at pp. 841-842) – and for good reason. Religious bigotry is one of the most enduring kinds of prejudice, playing a central role in many of the most painful episodes in world history. The history of Christianity itself has, at times, involved horrible persecutions of Christians by Christians on the basis of doctrinal differences or denominational loyalties. Anti-Semitism too has been a tragic recurring theme of Western history, one that has yet to be put finally to rest. Throughout their long history, Jews have known the pain of group-based discrimination. Their religion, although recognized in Roman times as a "religio licita" (a legally

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[3] Article I, section 3, subdivision (a) specifies:

"(3) *Nothing in this subdivision supersedes or modifies the right of privacy* guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

"(4) *Nothing in this subdivision supersedes* or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied *equal protection of the laws*, as provided in Section 7." (Italics added).

recognized religion), was frequently the target of state-initiated and popular violence – including, of course, the unspeakably horrific slaughter of six million Jews at the hands of the Nazis during World War II.

And though we understand ourselves to be a nation founded in liberty, our own history as Americans has featured far too many instances of religious intolerance and persecution.

Petitioners Unitarian Universalist Association of Congregations and United Church of Christ are painfully aware of the potential for good people, motivated by sincere religious conviction, to do great harm to their neighbors. These petitioners' membership includes congregations that were in earlier times directly involved in some of our nation's worst episodes of religious persecution, as when "Antinomians" like Anne Hutchinson and Baptists like Roger Williams were expelled from Massachusetts beginning in the 1630s.[4] Quakers too were first banished, and then even hanged on Boston Common, in the 1650s and 1660s – their persecution instigated in significant part by ministers of the First Church in Boston, a member today of the Unitarian

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[4] See Cobb, The Rise of Religious Liberty in America (1968) pp. 181-194 (Cobb). Before his banishment and flight to Rhode Island, Roger Williams had preached from the pulpits of the First Church in Salem and the First Church in Plymouth, both today members of petitioner Unitarian Universalist Association. See Miller, Roger Williams: His Contribution to the American Tradition 19-20 (1962) pp. 19-20.

Universalist Association.[5] With the anti-witch hysteria of 1692, the First Church in Danvers (today affiliated with the United Church of Christ) and the First Church in Salem (today affiliated with the Unitarian Universalist Association) excommunicated members for "witchcraft" and saw them put to death.[6] As late as 1838, the Rev. Abner Kneeland, once an officer of the New England Universalist General Convention, was imprisoned in Massachusetts for the crime of blasphemy.[7] And in 1868, New Hampshire's Supreme Court declared the Rev. Francis Ellingwood Abbot insufficiently "Christian" to be

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[5] See Adams, Three Episodes in Massachusetts History (1892) pp. 407-408) (recounting the role of the Rev. John Wilson, minister of the First Church in Boston, in the persecution of Quakers and the 1659 hangings of William Robinson and Marmaduke Stevenson); Rogers, Mary Dyer of Rhode Island: The Quaker Martyr that was Hanged on Boston Common, June 1, 1660 (1896) pp. 3-4 (recounting the role of First Church ministers, the Rev. John Norton and the Rev. John Wilson, in the persecution and hangings of Quakers); see also Cobb, *supra*, at pp. 213-218 (recounting the persecution of Quakers in seventeenth-century Massachusetts).

[6] See Nevis, Witchcraft in Salem Village in 1692, Together with an Account of Other Witchcraft Prosecutions in New England and Elsewhere (1892) pp. 105-106, 128-129 (recording the excommunications of First Church in Salem members Rebecca Nurse, who was then hanged, and Giles Corey, who was pressed to death); Rice, Proceedings at the Celebration of the Two Hundredth Anniversary of the First Parish at Salem Village, Now Danvers, October 8, 1872 (1874) pp. 247-256 (general overview of the anti-witch hysteria of 1692).

[7] See *Commonwealth v. Kneeland* (1838) 37 Mass. 206 (affirming Kneeland's criminal conviction); see generally Levy, Blasphemy in Massachusetts: Freedom of Conscience and the Abner Kneeland Case: A Documentary Record (1973); Papa, The Last Man Jailed for Blasphemy (1998).

employed by his congregation, the First Unitarian Society of Christians in Dover, New Hampshire.[8]

Petitioners have learned something, they hope, from their own history. They also have learned much from the nineteenth-century and twentieth-century persecutions of religious minorities at the hands of fellow citizens who often were moved by sincere religious belief and patriotic fervor.

Members of the Church of Jesus Christ of Latter-day Saints (LDS), for example, once faced vicious persecution. On October 27, 1838, Missouri Governor Lilburn Boggs issued Missouri Executive Order 44, declaring "the Mormons must be treated as enemies, and must be exterminated or driven from the State if necessary for the public peace – their outrages are beyond all description."[9] By the spring of 1839, more than 10,000 Mormons had been driven from Missouri. The "Mormon Extermination Order" was not formally

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[8] See *Hale v. Everett* (1868) 53 N.H. 9; Kinney, Church & State: The Struggle for Separation in New Hampshire, 1630-1900 (1955) at pp. 94-97 ("One of the more celebrated cases in New Hampshire jurisprudence is that of Hale versus Everett.").

[9] Available online at the Missouri State Archives: http://www.sos.mo.gov/archives/resources/findingaids/miscMormonRecords.asp?rec=eo.

rescinded until 1976, when Governor Christopher S. Bond acknowledged at last that it had "clearly contravened" Mormons' constitutional rights.[10]

In the twentieth-century, few groups in America have suffered more than the Jehovah's Witnesses, who understand the Bible to forbid saluting objects of human creation – including national flags. We know that in Nazi Germany thousands of Jehovah's Witnesses were consigned, along with millions of European Jews, to die in concentration camps.[11] But even in the United States we find that Jehovah's Witnesses faced criminal prosecutions for adhering to their convictions during the Second World War,[12] and that their

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[10] Available online at the Missouri State Archives: http://www.sos.mo.gov/archives/resources/findingaids/miscMormonRecords.asp?rec=eo.

[11] See United States Holocaust Memorial Museum, Jehovah's Witnesses: Victims of the Nazi Era (2002); King, Jehovah's Witnesses under Nazism in A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis (Bernbaum, edit., 1980) pp. 188, 190 ("approximately one-quarter of the membership lost their lives"); Peck, *Historical Note* in Liebster, Facing the Lion: Memoirs of a Young Girl in Nazi Europe (2000) p. xi ("We are familiar with the statistics: nearly 10,000 Jehovah's Witnesses imprisoned and at least 2,000 admitted to Nazi concentration camps of which at least half were murdered, over 250 by beheading."); see generally Reynaud & Graffard, The Jehovah's Witnesses and the Nazis: Persecution, Deportation and Murder, 1933-1945 (Moorehouse tr. 2001); Penton, Jehovah's Witnesses and the Third Reich: Sectarian Politics Under Persecution (2004) pp. 106-207; Hesse, ed., Persecution and Resistance of Jehovah's Witnesses During the Nazi Regime 1933-1945 (2001).

[12] See American Civil Liberties Union, The Persecution of Jehovah's Witnesses: The record of violence against a religious organization unparalleled in America since the attacks on the Mormons (1941) at pp. 19-21 (recounting for example, the trial and conviction at Connersville, Indiana, "of two women

children were systematically expelled from America's public schools. In *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, for example, this court deemed a nine-year-old girl's adherence to her faith such a threat to public order that the court unanimously sustained her expulsion from public school. Across the country Jehovah's Witnesses' children were perceived as a serious threat and were expelled from their schools.[13]

The United States Supreme Court at first regularly refused to hear Jehovah's Witnesses' appeals challenging such expulsions, "for want of a substantial federal question."[14] Then, in *Minersville School District v. Gobitis* (1940) 310 U.S. 586 (*Gobitis*), the United States Supreme Court upheld the

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residents, one aged seventy, and the other in her fifties, for 'riotous conspiracy' which in substance was their refusal to salute the flag," and who were sentenced "to two to ten years in Indiana State Prison"); *Johnson v. State* (1942) 204 Ark. 476 [163 S.W.2d 153] [affirming criminal conviction with fine and jail time for Jehovah's Witness who refused to salute flag, calling it a "rag"].

[13] See, e.g., *Nicholls v. Mayor & School Committee of Lynn* (1937) 297 Mass. 65 [7 N.E. 2d 577]; *People ex rel. Fish v. Sandstrom* (N.Y. Suffolk County Ct. 1938) 167 Misc. 436 [3 N.Y. Supp. 2d 1006]. In the state of Washington, government authorities took Jehovah's Witnesses children from their parents, placing them in state custody because the children "refused to repeat the pledge of allegiance . . . stating that according to their religious belief, the repetition of words constituting the pledge, together with accompanying gestures, are acts which are against their religious convictions." (*State ex rel. Bolling v. Superior Court* (1943) 16 Wn.2d 373, 375-376, [133 P.2d 803, 805] [reversing lower-court orders adverse to the Jehovah's Witnesses].)

[14] See, e.g., *Leoles v. Landers* (1937) 302 U.S. 656; accord, e.g., *Hering v. State Board of Education* (1938) 303 U.S. 624.

expulsion of two elementary-school children, in an opinion penned by the great Justice Frankfurter – and with Justice Stone the lone dissenter. A horrific nationwide wave of violence followed that ruling, much of it sanctioned by local law enforcement, in which Jehovah's Witnesses were beaten, tarred and feathered, and even castrated, and in which their places of worship were vandalized and burned.[15] Their children were banished by the thousands from the public schools as a purported threat to public order and domestic security.[16] All this, perhaps, induced the Supreme Court to reverse itself in 1943, holding by a 6-3 vote – over Justice Frankfurter's vigorous dissent – that Jehovah's Witnesses' children might not be such a threat after all. (*West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624. (*Barnette*).)

Such episodes remind us that, even in America, majorities sometimes fall into patterns of distrust and discrimination against religious minorities, particularly in times of national crisis or war. In hindsight, we can clearly see

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[15] See Finkelman, Encyclopedia of American Civil Liberties (2006) pp. 591-593; Ellis, To the Flag: The Unlikely History of the Pledge of Allegiance (2005) pp. 105-110; see generally. Manwaring, Render Unto Caesar: The Flag Salute (1962); ACLU, The Persecution of Jehovah's Witnesses, *supra* note 12, at pp. 6-22.

[16] See Ellis, To The Flag, *supra* note 15, at p. 108 ("By 1942 the number of Jehovah's Witnesses expelled from school had climbed into the thousands.").

that Jehovah's Witnesses and their children never really posed the threat to public order and national security that so many Americans, in a time of war, once so vividly perceived. Yet we are human – and for us as humans it remains altogether too easy to imagine new threats from those whose faith may be different from our own.

We must remind ourselves, even today, that minorities in general – and religious minorities in particular – require protection from the oppression of majorities. Although a person's religion is not an "immutable" characteristic, it is, like other classifications that receive strict scrutiny, an "integral . . . aspect of a person's identity" which it is not "appropriate to require a person to repudiate . . . in order to avoid discriminatory treatment." (*Marriage Cases*, *supra* 43 Cal.4th at p. 842.) That is why California courts have long recognized that discrimination based on a person's religion is a suspect classification, subject to strict scrutiny.[17]

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[17] See *Marriage Cases*, 43 Cal.4th at pages 841-842, citing *Owens v. City of Signal Hill* (1984) 154 Cal.App.3d 123, 128 and *Williams v. Kapilow & Son, Inc.* (1980) 105 Cal.App.3d 156, 151-62; see also *Banks v. Board of Pharmacy* (1984) 161 Cal.App.3d 708, 714, and *Dawson v. Westerly Investigations, Inc.* (1988) 204 Cal.App.3d Supp. 20, 25.

C. The Constitutional Guarantee of Equal Protection – For Gay Men and Lesbians As Well As Religious Minorities – Cannot Be Selectively Undermined By the Initiative Process

Equal protection of the laws, which protects all minority groups from oppression and underlies our entire constitutional edifice, means virtually nothing if it may be overridden by an initiative amendment approved by a simple majority vote. That is precisely what Proposition 8 purports to do. It purports to amend the California Constitution to revoke an "inalienable" right protected by article I, section 1, only for a minority group, gay and lesbian people, that is protected by the equal protection guarantee of article I, section 7, subdivision (a). (*Marriage Cases*, *supra*, 43 Cal.4th at p. 844.)

Proposition 8 is invalid under article XVIII of the California Constitution, which sets forth the *only* permissible methods for modifying the Constitution's core provisions. Our state Constitution "'can be neither revised nor amended except in the manner prescribed by itself.'" (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 333 (*McFadden*), quoting *Livermore, supra,* 102 Cal. at p. 117.) And article XVIII distinguishes between revisions, which affect the core structure of our constitutional government, and mere amendments, which are consistent with the Constitution's fundamental structure and principles.

"Although '[t]he electors may amend the Constitution by initiative' (Cal. Const., art. XVIII, § 3), a 'revision' of the Constitution may be

accomplished only by convening a constitutional convention and obtaining popular ratification (*id.*, § 2), or by legislative submission of the measure to the voters (*id.*, § 1)." (*Raven, supra,* 52 Cal.3d at p. 349.) Under article XVIII, "although the voters may accomplish an amendment by the initiative process, a constitutional revision may be adopted only after the convening of a constitutional convention and popular ratification or by legislative submission to the people" after a two-thirds majority vote in each house of the Legislature. (*Amador Valley, supra*, 22 Cal.3d at p. 221.)

Even though article XVIII does not specifically "define the terms 'amendment' or 'revision,' the courts have developed some guidelines" which feature "a dual aspect, requiring us to examine both the *quantitative* and *qualitative* effects of the measure on our constitutional scheme." (*Raven, supra*, 52 Cal.3d at p. 350, italics added.)

Proposition 8 adds to the California Constitution but a single sentence: "Only marriage between a man and a woman is valid or recognized in California." But the *qualitative* impact of the proposed addition is devastating. Its effect would be to repeal the principle of equal protection of the laws for a segment of the population – gay and lesbian people – denying them a fundamental right encompassed within an "inalienable" right recognized by article I, section 1.

This amounts to a radical breach of the social contract that our state Constitution represents:

> "The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed."

(*Amador Valley*, *supra*, 22 Cal.3d at p. 222, quoting *Livermore, supra,* 102 Cal. at pp. 118-119); accord *McFadden, supra,* 32 Cal.2d at p. 333, quoting *Livermore, supra,* 102 Cal. at pp. 117-119.)

Selectively denying a class of citizens the right to equal protection of the laws with respect to an inalienable right is not "'an addition or change *within the lines of the original instrument* as will effect an improvement,'" or one to "'carry out the purpose for which it was framed.'" (*Amador Valley, supra,* 22 Cal.3d at p. 222, quoting *Livermore, supra,* 102 Cal. at pp. 118-119, italics added.) This is contrary to the Constitution's central purpose, and a radical departure from "'the underlying principles upon which it rests.'" (*Ibid.*) As such, the text of Proposition 8 is a revision of our fundamental constitutional law that may be accomplished – if at all – only by the procedures specified in article XVIII, sections 1 and 2.

If Proposition 8 is valid, then our most cherished rights are in danger, including the right to be free from persecution based on religion. After all, if the equal protection rights of one group defined by a suspect classification

may be taken away by a mere majority vote, those rights of *any* such group may be taken away just as easily. Religious groups like petitioners know from long experience the dangers posed by placing that kind of power in the hands of temporary, easily manipulated majorities.

Nor is it a satisfactory answer that petitioners can rely on the federal Constitution to safeguard their equal protection rights. California's Constitution itself declares: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." (Cal. Const., art I, § 24.) Thus, California's constitutional equal protection principle provides *greater* protection that its federal counterpart. (*Serrano v. Priest* (1976) 18 Cal.3d 728, 764.) In *Raven* this court invalidated an initiative amendment precisely *because* it required California courts to defer to federal courts' construction of federal constitutional rights in criminal cases. (See *Raven*, *supra*, 52 Cal.3d at p. 355.)

History shows us that it would be a mistake for Californians to stake their equal protection rights on the United States Constitution alone. In 1896, the United States Supreme Court, by a vote of 7-1, upheld racial discrimination in *Plessy v. Ferguson* (1896) 163 U.S. 537, under a "separate but equal" doctrine that persisted until 1954. The United States Supreme Court initially refused to hear Jehovah's Witnesses appeals before ruling in 1940 in *Gobitis*, *supra*, 310 U.S. 586, that public schools were free to persecute Jehovah's Witnesses' children. (See *ante*, pp. 28-30.) In

Hirabayashi v. United States (1943) 320 U.S. 81, the United States Supreme Court unanimously upheld race-based curfews imposed on Japanese Americans, preliminary to their systematic internment. In *Korematsu v. United States* (1944) 323 U.S. 214, the court sanctioned the internment of Japanese Americans whose only crime was their ethnic background. In *Bowers v. Hardwick* (1986) 478 U.S. 186 (1986), the court sustained prosecutions of homosexual citizens for the crime of consensual intimacy.

Gobitis was overruled, thankfully, in 1943, *Plessy* in 1954, and *Bowers* in 2003. (See *Barnette, supra*, 319 U.S. at p. 642 [overruling *Gobitis*]; *Brown v. Board of Education* (1954) 347 U.S. 483 [overruling *Plessy*]; *Lawrence v. Texas* (2003) 539 U.S. 558 [overruling *Bowers*].) *Hirabayashi* and *Korematsu,* on the other hand, have yet to be formally overruled. Overruled or not, such constructions of the United States Constitution demonstrate why the California Constitution wisely *forecloses* dependence on the federal Constitution when it comes to protecting the equal protection rights of Californians. (Cal. Const., art. I, § 24.) And if such federal precedents are not enough to make the point, then consider this court's landmark decision in *Perez v. Sharp* (1948) 32 Cal.2d 711, which upheld the right of mixed-race couples to marry. It took the United States Supreme Court *nearly two decades* to catch up. (See *Loving v. Virginia* (1967) 388 U.S. 1.)

Step-by-step elimination of California's equal protection guarantee by mere amendment is impermissible under article XVIII. Proposition 8

constitutes an invalid revision of the California Constitution, and not merely an amendment, because it purports by a simple majority vote to create an exception to the fundamental principle of equal protection in order to selectively deprive a suspect class of such protection. According to article XVIII of this state's Constitution, Proposition 8 is a nullity.

III. CONCLUSION

For the foregoing reasons, mandate or prohibition should issue permanently enjoining respondents from enforcing, implementing, or otherwise giving effect to Proposition 8.

DATED: November 17, 2008

Respectfully submitted,

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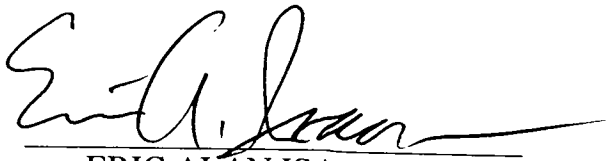
CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 8.204(c)(1)

Pursuant to California Rule of Court 8.204(c)(1), counsel for petitioners hereby certifies that the number of words contained in this Petition for Writ of Mandate or Prohibition, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate is 8,208 words as calculated using the word-count feature of the computer program used to prepare the brief.



ERIC ALAN ISAACSON

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DECLARATION OF SERVICE BY OVERNIGHT MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on November 17, 2008, declarant served by UPS, next day delivery, the **PETITION FOR WRIT OF MANDATE OR PROHIBITION** to the parties listed on the attached Service List.

3. On the same date, declarant filed one original and 13 copies of **PETITION FOR WRIT OF MANDATE OR PROHIBITION** with the Clerk of the Court by depositing with UPS, next day delivery in a sealed package with postage thereon fully prepaid.

4. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of November, 2008, at San Diego, California.

Tamara McSweeny

TAMARA McSWEENY

California Council of Churches, et al. v. Horton, et al.
November 17, 2008

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