COPY

CONSTITUTIONAL LAW CENTER
OF THE MONTEREY COLLEGE OF LAW

Supervisory Faculty:

Joel Franklin, Esquire
Professor of Law

Michael W. Stamp, Esquire
Professor of Law

Amy M. Larson, Esquire
Professor of Law

Monterey Office
2100 Garden Road
Suite G
Monterey, California 93940-5393
Telephone: (831) 649-2545
Facsimile: (831) 649-2547

Direct:

Joel Franklin:
T: (831) 649-2545
E: JFEsq@redshift.com

Michael W. Stamp:
T: (831) 373-1214
E: Stamp@stamplaw.us

Amy M. Larson:
T: (831) 372-5525
E: AMLEsqAPP@prodigy.net

November 17, 2008

The Honorable Chief Justice Ronald M. George
and Associate Justices
SUPREME COURT OF CALIFORNIA
350 McAllister Street
San Francisco, California 94102-4797

RECEIVED

NOV 17 2008

CLERK SUPREME COURT

Re: *Strauss, et al. v. Horton, et al.*
Cal. S. Ct. Case No. S168047
Tyler, et al. v. State of California, etc.
Cal. S. Ct. Case No. S168066
City and County of San Francisco, et al. v. Horton, et al.
Cal. S. Ct. Case No. S168078

Dear Chief Justice and Associate Justices:

Pursuant to California Rules of Court, Rule 8.500, subdivision (g), the Constitutional Law Center of the Monterey College of Law respectfully submits this letter as amicus curiae in support of each of the Petitions for Writ of Mandate and other Extraordinary Relief filed in the above-referenced cases before this Court.

Statement of Interest

Amicus curiae is familiar with the issues in this case and has reviewed each of the Petitions filed, the amendments thereto, the letters in support of Petitioners, the request to intervene, the letter requesting denial of stay and dismissal of the Petition by the City and County of San Francisco, et al., and the order of the court for preliminary opposition by the Attorney General. The Constitutional Law Center of the Monterey College of Law is directed by professors of constitutional law and appellate advocacy, and other faculty, who

are also attorneys, seasoned in constitutional law, appellate practice, legal writing and analysis, and moot court training. The Constitutional Law Center provides opportunity for qualified law students to gain practical education in constitutional law litigation by working with faculty in the drafting of scholarly motions, writs, and briefs, particularly amicus curiae briefs, in California appellate courts.

The law school was founded in 1972 and is accredited by the State Bar of California. The law school has a long-standing tradition of clinical programs and education for its law students, and currently offers an array of clinical education opportunities in the Monterey, Santa Cruz and San Benito County areas, including a Small Claims Advisory Clinic, internships in various government law offices (for example, the District Attorney, County Counsel, Public Defender) and judicial extern placements. The law school also operates the Mandell-Gisnet Center for Conflict Management, which promotes public policy dialogues in the Central Coast region, offers community training and continuing education for attorneys in the fields of negotiation, mediation, and conflict resolution, and provides law students with hands-on experience in conflict management and resolution.

The recently-formed Constitutional Law Center, under the supervision of law professors, selects pending cases of Constitutional significance, such as this matter, and seeks amicus curiae status to assist appellate courts in resolving important Constitutional, rule of law, civil rights and civil liberties issues. Qualified law students receive clinical legal education units for their work at the Law Center.

Joinder in Petitioners' Arguments and Amicus Letter Briefing

Amicus Constitutional Law Center does not wish to repeat the arguments submitted by Petitioners in the above-referenced cases as to why Proposition 8 must be considered as a fundamental revision, rather than an amendment, to the California Constitution. We join in the thoughtful arguments in those Petitions and the amici letter briefing in support of the Petitioners by THE BAR ASSOCIATION OF SAN FRANCISCO, et al.; Forty-Four Members of the California State Legislature, etc.; and THE ANTI-DEFAMATION LEAGUE, et al.

Overview

The Constitutional Law Center submits that the passage of Proposition 8 has effected a radical limitation on this Court's judicial authority to enforce the Constitutional guarantee of equal protection under the California Constitution. It has also, by amendment through simply a majority vote of the people without also two-thirds approval of both houses of the Legislature, substantially altered California's "preexisting constitutional scheme" (*Raven v. Deukmejian* ["*Raven*"] (1990) 52 Cal.3d 336, 354), by removing fundamental

rights of a particular suspect classification of citizens -- the right to marry and the guarantee of equal protection of the laws -- and encroaching on the vital role of the judicial branch in review and determination of equal protection claims (*see Katzberg v. Regents of Univ. of Cal.* (2002) 29 Cal.4th 300, 331). Indeed, the fundamental right this Proposition seeks to eliminate, the right to marry, is among our *inalienable* rights, which inheres in several other inalienable Constitutional rights -- the rights of privacy, liberty, expression, association, autonomy and due process. (*See In re Marriage Cases* ["*Marriage Cases*"] (2008) 43 Cal.4th 757, 781-782, 802, 809-810, 814-815 ["the right to marry . . . is of fundamental significance both to society and to the individual"], 817, 819, fn. 41, 822-823, 839-844, *inter alia*; Cal. Const., Art. I, §§ 1, 7, subd. (a).)

When this brief refers to the problem of approval of such a substantial change in the Constitution by "simply a majority vote" of the people, the error of this lies in the failure to have advance consideration by the Legislature and approval by two-thirds of the members of both houses.

The question raised in these pending cases challenging Proposition 8 is, at its core, basic: May a majority of the people, without prior approval of the proposed Constitutional change by two-thirds vote of both houses of the Legislature, take away a fundamental right of some, but not all, citizens, based on a suspect classification?

That is what this initiative would do, if allowed to stand. Even more, a simple majority has written *into* our State's Constitution invidious discrimination in the enjoyment of this fundamental right, eliminating it for an historically-denigrated portion of the populace, by an absolute declaration beyond the reach of the judiciary if the Proposition is permitted to take effect.

While the initiative currently at issue is aimed at one particular classification of persons entitled to "strict" Constitutional protection and judicial "scrutiny" (*see Marriage Cases*, *supra*, 43 Cal.4th at p. 844), the essential question presented – whether a merely a majority of voters may, without also two-thirds approval of the full Legislature be permitted to eliminate fundamental, Constitutionally-protected rights (particularly when based upon a suspect classification) -- obviously has implications for all citizens of California: If Proposition 8 is permitted to take effect, what is to distinguish and prevent other attempts to eliminate by simply a majority popular vote any fundamental, Constitutional right of others, particularly those of suspect classifications entitled to equal protection?

This amicus curiae letter briefing is offered to provide the Court additional analysis of the issues to assist the Court in conjunction with its review of the above-referenced pending original writ petitions.

//
//
//
//

Two Fundamental Rights of a Suspect Class Have Been Eliminated by Proposition 8, the Right to Full Equal Protection and the Right to Marry and, as Such, Proposition 8 Constitutes an Invalid Revision of the California Constitution

We write here on the specific issue of the profound effect that Proposition 8 has on a discrete, suspect class of citizens by Constitutionalizing an animus against their fundamental rights, and on the independent vitality of the courts as the branch of government entrusted with safeguarding equal protection under this State's Constitution and interpreting the Constitution. This Court's own jurisprudence on the subject, particularly its authoritative decision in *Raven*, informs the basis for the Court granting writ relief.

Suspect classes' freedom from invidious discrimination is a fundamental right enforced through the equal protection clause. (*See Sail 'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17; *San Antonio School Dist.* (1973) 411 U.S. 1, 28; *U.S. v. Cruikshank* (1875) 92 U.S. 542, 554-555 ["Equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle . . . ."].) Equal protection has been a "fundamental part" of the California Constitution since it was adopted. (*See* Stanley Mosk, *Raven and Revision* (1991) 25 U.C. Davis. L. Rev. 1, 13.)

Likewise, the right to marry is a fundamental right. (*See*, e.g., *Perez v. Sharp* (1948) 32 Cal.2d 711, 714-717; *Marriage Cases*, *supra*, 43 Cal.4th at pp. 781-782, 809, 814-815 [marriage "is the foundation of the family and of society, without which there would [not be] civilization . . . ."], 844, *inter alia*, *quoting Maynard v. Hill* (1888) 125 U.S. 190, 211; *see also Marriage Cases*, *supra*, 43 Cal.4th at pp. 801-808, 830-831.) As reiterated by this Court very recently in the *Marriage Cases*, the right to marry arises from other inalienable and fundamental Constitutional protections: privacy, liberty, autonomy, intimate association, expression and due process. (*See id.*, at pp. 822-823, 839-844; *see Billings v. Hall* (1857) 7 Cal. 1, 6 [noting that the concept of the existence of inalienable rights "is as old as the Magna Charta" and is "necessary to the existence of civil liberty . . . ."].) As such, it may not be eliminated for a portion of the populace, but not its entirety, or, at the least, based on a suspect classification. (*See In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 810, 818.)

Pursuant to the California Constitution, abridgment or removal of equal rights based on a suspect classification of a historically disfavored or unpopular class is impermissible absent a compelling state interest, which this Court has already determined does not exist in the context of the equal protection limitation here. (*See Marriage Cases*, *supra*, 43 Cal.4th at pp. 843, 847, 855-856, *inter alia*.) The state interest offered in support of the new initiative – indeed the text of the initiative itself – has not changed simply because it is created as a Constitutional provision instead of a statute. Thus, it

//

//

is no more compelling that it was when this discriminatory enactment was passed as a statute and invalidated by this Court in the *Marriage Cases*, *supra*, 43 Cal.4th 757.

The United States Supreme Court, also, has recognized that an enactment – enactment of a State Constitutional provision by the initiative process – which removes the equal protection of laws of a class of citizens, subjecting them to discrimination and limited status, violates "our constitutional tradition" and "the rule of law". (*Romer v. Evans* (1997) 517 U.S. 620, 633.) Proposition 8 would, if validated, be just such a law. As shown in *Romer*, the fact the discrimination is written into the State Constitution does not mean it does not violate the foundations of our Constitutional theories. Passage and enforcement of such a law is anathema to the very principle of equal protection, a bedrock principle of this State and this Nation.

As this Court has recognized, the people of this State, both through their elected representatives and directly, have created a State Constitution which provides independent and, at least in some instances, broader protection of individual rights than does the federal Constitution. (*See* Cal. Const., Art. I, § 24; *Raven*, *supra*, 52 Cal.3d at pp. 353-354, *citing People v. Longwell* (1975) 14 Cal.3d 943, 951, fn. 4 [a characteristic of the California Constitution which existed even prior to the addition of an express statement of this principle to it].)

The "formidable bulwark" of the process for revising the California Constitution (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 347) recognizes that "[t]he very term 'constitution' implies an instrument of a permanent and abiding nature" and "indicate[s] the will of the people that the underlying principles upon which it [the State Constitution] rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature." (*Livermore v. Waite* ["*Livermore*"] (1894) 102 Cal. 113, 118.) As observed by Roger Traynor, before he became Chief Justice of this State, if a Constitution "is to retain respect it must be free from popular whim and caprice which would make of it a mere statute." (Rachel A. Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California* (1993) 21 Hastings. Const. L. Qtrly. 95, 98, fn. 19, *quoting* Roger Traynor, "Amending the United States Constitution" (1927) [unpublished Ph.D. thesis while at the University of California at Berkeley].) Protection of rights equally for historically-oppressed minorities is an important value of this society and exists as a limit on pure democracy, a limit on pure majority rule of the society, a limit on the "tyranny of the majority," as deTocqueville termed it.

The right to equal protection exists to prevent continued persecution of groups historically mistreated and to prevent discrimination against the minority by the majority. The equal protection and suspect classification doctrines <u>exist</u> to counteract the animus of a majority. (*United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152, fn. 4.) The underlying purpose of equal protection would be imperiled if the Constitutional protection of

unpopular minorities were subject to majority rule without the additional deliberative safeguards of Legislative approval by two-thirds vote. Such a result would work an extreme, substantive change to our Constitution's "underlying principles" of equality to a magnitude never previously tolerated by this Court (*Livermore*, *supra*, 102 Cal. at pp. 117-119), and "would substantially alter the substance and integrity of the state Constitution as a document of independent force and effect" (*Raven*, *supra*, 52 Cal.3d at p. 352).

Amendment and the process by which it is accomplished reaches changes to the Constitution "within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (*Livermore*, *supra*, 102 Cal. at pp. 118-119.) In contrast, therefore, are alterations to the State Constitution which work the opposite, a limitation or removal of underlying principles of the State Constitution which are permanent and abiding in nature. When proposed amendments to the Constitution would work "far reaching changes in the nature of our basic governmental plan", such modifications to the State Constitution are <u>*revisions*</u> to it and, as such, are subject to additional deliberative requirements before they may be made (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* ["*Amador Valley*"] (1978) 22 Cal.3d 208, 223). The additional processes required for revisions ensure enhanced thought and solemnity in making them.

Such a fundamental modification of the Constitution has been passed through the initiative Proposition 8. "[T]he basic *substantive* legal rights and attributes traditionally associated with marriage . . . are so integral to an individual's liberty and personal autonomy that they *may not be eliminated or abrogated* by the Legislature or *by the electorate through the statutory initiative process*." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 781, second and third emph. added.) Proposition 8 defines the meaning of marriage in contravention of this Court's previous determination of what is required by the equal protection clause of California's Constitution. Thus, because this Court has found this particular suspect class has, coextensive with the rest of society, the fundamental right to marry, then the class' right to marry may not be "eliminated or abrogated" by merely a majority vote on an initiative. In short, <u>*if amenable at all to abrogation*</u>, it must be done by the revision process. Because the right to marry is such a fundamental individual liberty right, it is equal in stature to other <u>*inalienable*</u> rights.

This court has consistently retained the power to review initiatives against fundamental standards of Constitutionality. This Court has articulated its role. "We do not consider or weigh the . . . social wisdom or general propriety of the initiative. Rather, our sole function is to evaluate [the initiative] legally in light of established constitutional standards." (*Amador Valley*, *supra*, 22 Cal.3d at p. 219.) The Court's ability to review initiatives under the lens of Constitutionality is critical to enforcing the Constitution and providing clarity to governmental agencies and of great importance to Californians, which justifies the Court in asserting original jurisdiction in this matter. (*Raven*, *supra*, 52 Cal.3d at p. 340.)

This court's jurisprudence has "reasoned that a constitutional amendment should be given a common-sense construction in accordance with the natural and ordinary meaning of its words, with a view toward fulfilling the apparent intent of the framers." (*People v. Frierson* ["*Frierson*"] (1979) 25 Cal.3d 142, 186, analyzing *Amador Valley*, *supra*, 22 Cal.3d at p. 245.)

While Proposition 8 is a seemingly discrete alteration of the California Constitution, it is not. As noted in *Raven*, it is not the quantity of the Constitution which is modified that dictates whether the modification is an amendment or a revision, but the *quality* of the alteration. Although *Raven* involved modification of numerous provisions and protections of the California Constitution, it was the nature of the alterations which doomed their adoption by initiative. This Court in *Raven* recognized that the changes effected a modification of the essential precepts of the Constitution. (*See Raven*, *supra*, 52 Cal.3d at pp. 353-354.) As such, the citizenry was entitled to the additional protections of the requirements for adoption of revisions to the Constitution.

Proposition 8 is unlike the initiative at issue in *Frierson*, which reinstated the availability of the death penalty for certain crimes, stating that for such crimes the death penalty did not constitute cruel and unusual punishment under the California Constitution. Two distinctions are critical. First, the death penalty is equally applicable to all citizens; it was not made applicable to any limited portion of the populace. (*See Frierson*, *supra*, 25 Cal.3d at p. 185.) Proposition 8 does, expressly and intentionally eliminates the right of one class to participate in an existing fundamental right, reserving it only to another class. And, second, as discussed in the subsequent section of this amicus letter brief, judicial review of application of the re-instituted death penalty was preserved, unlike in Proposition 8. (*See Frierson*, *supra*, 25 Cal.3d at p. 187; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.) As a result, the initiative in *Frierson* was valid, while Proposition 8 is not.

Both of these effects of Proposition 8 qualitatively alter foundational principles of the California Constitutional, in the former making equal protection of the laws unequal and in the latter unbalancing the checks and balances of the separation of powers.

Therefore, Proposition 8 must meet the heightened standards of a revision pursuant to Article XVIII, required in sections 1 and 2: Revisions satisfy the more deliberative process of representative or republican government, through the Legislature or a Constitutional Convention, followed by popular ratification. (*Raven*, *supra*, 52 Cal.3d at pp. 349-350.)

//
//
//
//
//
//
//

The Court's Unique Role in Safeguarding Equal Protection and Fundamental Rights under the California Law Would Be Eviscerated by Proposition 8 and, therefore, It Is Invalid as an Impermissible Revision of the State Constitution

With just fourteen words, Proposition 8 revises Article 1 of the California Constitution (adding section 7.5) and qualitatively alters the balance of the courts' authority to act as an independent arbiter of rights guaranteed by equal protection clause, which appears elsewhere in the same Article. (Cal. Const. Art. I, § 7, subd. (a) ["(a) person may not be . . . denied equal protection of the laws"].) Historically, this Court has observed it performs a core role as guardian and interpreter of Constitutional freedoms in our system of checks and balances. A "protection" most "fundamental" to our Constitutional system "lies in the power of the courts . . . in particular to preserve Constitutional rights, whether of individual or minority, from obliteration by the majority." (*Bixby*, *supra*, 4 Cal.3d at p. 141; *Johnson v. Goodyear Min. Co.* (1899) 127 Cal. 4, 7 [courts were created as "guardians of the people" to protect and preserve "people's charter of rights].)

In this way, the judicial branch fulfills its Constitutional province and duty "'to say what the law is.'" (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 469, *quoting Marbury v. Madison* (1803) 5 U.S. 137, 177.) As Justice Chin echoed, "*interpreting* the law is a judicial function." (*McClung*, *supra*, 34 Cal.4th at pp. 470, 472, emph. in original; *Marbury v. Madison*, *supra*, 5 U.S. at p. 176 [interpreting and applying the Constitution is "the very essence of judicial power".]) "The judiciary, from the very nature of its powers and means given it by the Constitution, must possess the right to construe the Constitution in the last resort . . . ." (*See Raven*, *supra*, 52 Cal.3d at p. 354, quoting *Nogues v. Douglass* (1858) 7 Cal. 65, 69-70; *Katzberg v. Regents of Univ. of Cal.*, *supra*, 29 Cal.4th at p. 331.)

Moreover, this Court observed the qualitative impact of an initiative is not measured by how extensive its language is. Removing the Court's review of

> "[e]ven a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision . . . . [A]n enactment which purported to vest all judicial power in the Legislature would amount to a revision without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change."

(*Amador Valley,* supra, 22 Cal.3d at p. 223.) This is especially true when the effect of the initiative "unduly restricts judicial power [and] does so in a way which severely limits the independent force and effect of the California Constitution." (*Raven*, *supra*, 52 Cal.3d at p. 353.)
//

If Proposition 8 is upheld, how will this or any other court protect minorities from what James Madison warned against? That is: "[the] turbulence, violence, and abuse of power by the majority trampling on the rights of the minority . . . ." (Madison, Speech at the Virginia Convention to Ratify the Federal Constitution (June 6, 1788); *see also* Madison, The Federalist, No. 10 (Rossiter ed. 2003 [when the ordinary political process cannot protect unpopular minorities from "the superior force of an interested and overbearing majority," the courts' enforcement of equal protection clause does].) In fact, 212 years after Madison's warning, this Court preserved this overarching principle when it determined that the equal protection clause prohibits State discrimination on the basis of sexual orientation, which extends the fundamental right to marriage for same-sex couples. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 820-823, 840-843, 855-856.)

By a procedure requiring only a vote of the people, a single sentence initiative would eradicate the vital Constitutional jurisprudence of the *Marriage Cases*, which held fundamental rights cannot be withheld from a minority class of citizens and are guaranteed to us all. (*See Marriage Cases*, *supra*, 43 Cal.4th at pp. 781, 820, 824.) And, the case's precedential value would vanish from the landscape of California Constitutional law without the full deliberative debate and vote by two-thirds of the both houses of the Legislature to either submit it to the voters for popular ratification or to a Constitutional Convention. (Cal Const., Art. XVIII, §§ 1-2; *Raven*, *supra*, 52 Cal.3d at pp. 349-350.)

As earlier discussed, the lesson of *Raven* is instructive. In *Raven*, this Court did not tolerate the majoritarian initiative (Proposition 115), which prevented this Court from interpreting this State's Constitution independently of the federal Constitution in matters of certain criminal procedural protections, including <u>*equal protection of the laws*</u>. (*Raven*, *supra*, 52 Cal.3d at pp. 350-351.) The Court held such a change "would substantially after the substance and integrity of the state Constitution as a document of independent force and effect." (*Raven*, *supra*, 52 Cal.3d at p. 352.) Qualitatively, the effect of Proposition 115 on the interpretative role of the courts was considered "devastating" (*Raven*, *supra*, 52 Cal.3d at p. 352) and would have wrought "far reaching changes in the nature of our basic governmental plan as to amount to a revision [of the Constitution] . . . ." (*Raven*, *supra*, 52 Cal.3d at p. 355; citations omitted; see also *Livermore*, *supra*, 102 Cal. at pp. 118-119 [revisions invoke changes in the "underlying principles" on which the Constitution rests].)

As the Court in *Raven* noted, neither *In re Lance W.* (1985) 37 Cal.3d 873, 891, or *Frierson*, *supra*, 25 Cal.3d at pp. 184-187, both of which rejected arguments that initiative measures were revisions, were applicable. *Lance W.* upheld a provision of an initiative limiting the State exclusionary remedy for search and seizure violations to the boundaries set by the Fourth Amendment to the federal Constitution. (*Raven*, *supra*, 52 Cal.3d at p. 355.) In *Frierson*, the Court upheld a provision which required courts in capital cases to apply the State cruel or unusual punishment clause consistently with the federal

Constitution. (*Raven*, *supra*, 52 Cal.3d at p. 355) The *Raven* Court found that neither *Lance W.* or *Frierson* involved a Constitutional revision because the isolated provisions in issue did not "achieve a far reaching, fundamental change in the governmental plan," nor did either case involve a broad attack on the independent vitality of state court authority to interpret important rights under the Constitution. (*Ibid.*) The Court in *Frierson* noted that the Court "retain[ed] broad powers of judicial review of death sentences to assure that each sentence has been properly and legally imposed and to safeguard against arbitrary or disproportionate treatment" and apply federal Constitutional protections as well. (*Frierson*, *supra*, 25 Cal.3d at p. 187.)

Unlike *Frierson*, Proposition 8 singles out a class of persons based on their sexual orientation and excludes them, just them, from the exercise of a fundamental right that is otherwise given to all other qualified state citizens. As discussed, there is no effective judicial review of this discriminatory classification if it is allow to pass into law. By contrast, in *Frierson* and *Lance W.*, the initiative applied the death penalty to and limited the exclusionary rule for all Californians, not just members of a disfavored group, such as racial or ethnic minorities. Obviously, if the two propositions in *Frierson* and *Lance W.* had limited their application only to a protected class, such an amendment would draw the scrutiny of a *Raven* analysis and be seen for what it is -- a revision masquerading as an amendment.

Proposition 8 establishes a classification on its face based on sexual orientation and requires government discrimination against same-sex couples with respect to their fundamental right to marry. This Court explicitly held such a classification offends guarantees of equal protection, privacy, autonomy, freedom of intimate association and expression, and due process. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 822-823, 839-844.) Proposition 8 represents a "broad attack on state court authority," plain and simple. (*Raven*, *supra*, 52 Cal.3d at p. 355.) It prohibits California courts from interpreting and enforcing full equal protection for this insular class of citizens. Put bluntly, this initiative engrafts into our State Constitution animus against a minority group, denying that group the above fundamental rights guaranteed by our State Constitution.

Courts must zealously guard these rights, particularly against the animus of the majority. (*Bixby*, *supra*, 4 Cal.3d at p. 141; *United States Steel Corp. v. Public Utilities Commission* (1981) 29 Cal.3d 603, 611-612 [principles of law imposed by officials on minority must also be imposed generally].) That is why when classifications are suspect and touch on fundamental interests "courts adopt 'an attitude of active and critical analysis, subjecting the classifications to strict scrutiny.'" (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 480, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 17; *Marriage Cases*, *supra*, 43 Cal.4th at pp. 833-834.)

//
//
//

The *Marriage Cases* should not be dismissed with the backhand swipe of only a vote of the people without the Legislature's two-thirds approval. The Constitutional law which this Court recognized is far too important to the structural integrity of the equal protection clause and cherished inalienable rights. The reach of this Court's doctrine does not merely safeguard the rights of same-sex couples, but protects all Californians who may, for reasons not now apparent, find themselves facing the sharp end of the discrimination stick, held firmly by the majority and pointed directly at the fundamental rights of unpopular members of the minority. *If* the Constitutionalization of such discrimination and the alteration of the judiciary's role to interpret and enforce the Constitution and laws of this State is to be countenanced at all, then this Court must enforce the requirements for revision of the Constitution in Article XVIII. The Legislature must weigh in on such the substantial change to the "preexisting governmental plan." (*Raven*, *supra*, 52 Cal.3d at p. 355.) Without such a fundamental check by the Legislature on the whim of the majority, the judicial branch will itself be stripped of its Constitutional power and solemn role in society.

Conclusion

Proposition 8 and the challenges brought by the three cases at bench do nothing to undermine, affect or enhance the rights of opposite-sex couples to marry or any of their other rights. Quite simply, Proposition 8 is not necessary to protect the rights of heterosexual couples, and it does not do so. The only rights affected by Proposition 8 are those of same-sex couples – and the very fabric of equal protection generally.

This Proposition removes one fundamental right of a protected class (the right to marry) and limits another (equal protection). Such a pivotal modification of the California Constitution may not be allowed to stand based on a simply a majority vote of the citizenry with no prior deliberation and two-thirds approval of the full Legislature.

Discrimination against any group in our society based on arbitrary or irrational classifications is an affront to all citizens and our society.

Due to the passage of Proposition 8 by only a popular vote through the initiative process, without following the revision process, this Court must now determine what types of proposed changes to the California Constitution should be permitted by simply a vote of the people and which constitute revisions requiring additional two-thirds approval of the both houses of the Legislature. The equal protection provision exists to prevent discrimination of historically-disfavored or -oppressed minorities by the majority. The equal protection of laws ensured by the California Constitution is a core example of a fundamental principle underpinning the Constitution and, indeed, our society, which should, therefore, be protected by sections 1 and 2 of Article XVIII, and particularly when equal protection of a suspect class is being removed as to

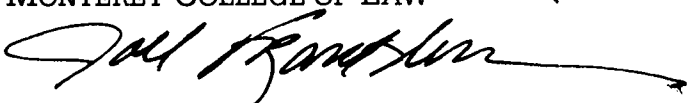
the enjoyment of another fundamental right. These requirements offer an additional layer of protection for historically-unpopular and -mistreated groups from the "tyranny of the majority" by providing the additional thoughtful deliberation and sober decisional process of more than a single vote on a single occasion.

This Court may proceed at this time to address the question of the validity of Proposition 8's not-so-transparent revision of the Constitution. No factual development is necessary, as the issue presents only questions of law. Writ relief, a stay, and merits briefing is justified.

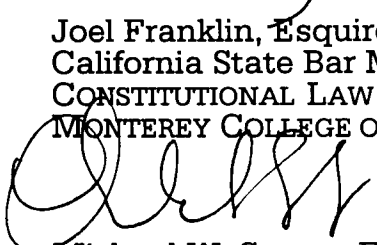
We urge this Court to state that such removals of the fundamental rights and equal protections are revisions to the fabric of the California Constitution. In the context of its consideration of the validity of this Proposition, the Court could also provide needed clarification and guidance for the future in identifying what types of proposed changes to the California Constitution require the additional democratic protections of section 1 and 2 of Article XVIII.

Respectfully submitted,

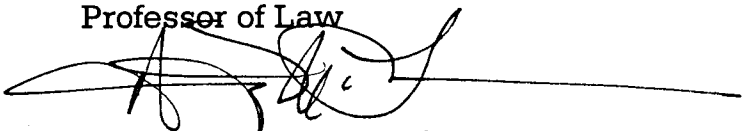
CONSTITUTIONAL LAW CENTER OF THE
MONTEREY COLLEGE OF LAW



Joel Franklin, Esquire
California State Bar Member, No. 69705
CONSTITUTIONAL LAW CENTER OF THE
MONTEREY COLLEGE OF LAW



Michael W. Stamp, Esquire
California State Bar Member, No. 72785
Professor of Law



Amy M. Larson, Esquire
California State Bar Member, No. 148643
Professor of Law

cc: See attached Proof of Service

PROOF OF SERVICE

I, Amy M. Larson, declare as follows:

I am a United States citizen, over 18 years; my business address as related to this matter is 100 Col. Durham Street, Seaside, California 93955; and I am not a party to the within action. On the date shown below I served a copy of:

LETTER TO CHIEF JUSTICE AND ASSOCIATE JUSTICES IN SUPPORT OF PETITIONERS BY AMICUS CURIAE, CONSTITUTIONAL LAW CENTER OF THE MONTEREY COLLEGE OF LAW

on the following parties, by placing true copies thereof in a sealed envelope addressed as indicated below, with postage fully prepaid thereon, in the United States Mail at Monterey, California, and/or, if and as so indicated below, by causing such document(s) to be hand delivered, sent by express mail or overnight delivery, or sent by facsimile transmission to each of the following parties at the address or facsimile telephone numbers set forth below:

Persons Served	***Party:***
MARK B. HORTON, M.D., M.S.P.H., in his official capacity State Registrar of Vital Statistics Director, DEPARTMENT OF PUBLIC HEALTH STATE OF CALIFORNIA 1615 Capitol Avenue Suite 73.720 Post Office Box 997377 MS 0500 Sacramento, CA 94899	Respondent, in his official capacity as State Registrar of Vital Statistics of the State of California and Director of the California Department of Public Health (Cal. S. Ct. Case No. S168047) and Respondent, in his official capacity as State Registrar of Vital Statistics (Cal. S. Ct. Case No. 168078)
LINETTE SCOTT, M.D., M.P.H., in her official capacity Deputy Director of Health Information and Strategic Planning DEPARTMENT OF PUBLIC HEALTH STATE OF CALIFORNIA 1616 Capitol Avenue Suite 74.317 Mail Stop 5000 Sacramento, CA 95814	Respondent, in her official capacity as Deputy Director of Health Information and Strategic Planning for the California Department of Public Health (Cal. S. Ct. Case Nos. S168047, 168078)

Persons Served	***Party:***
EDMUND G. BROWN, JR., in his official capacity Attorney General STATE OF CALIFORNIA 1300 "I" Street Post Office Box 94255 Sacramento, CA 94244-2550	Respondent, in his official capacity as Attorney General for the State of California (Cal. S. Ct. Case Nos. S168047, 168078)
EDMUND G. BROWN, JR., in his official capacity Attorney General STATE OF CALIFORNIA 1515 Clay Street Room 206 Oakland, CA 94612	Respondent, in his official capacity as Attorney General for the State of California (Cal. S. Ct. Case Nos. S168047, 168078)
STATE OF CALIFORNIA c/o Edmund G. Brown, Jr. Christopher E. Krueger STATE OF CALIFORNIA DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL 1300 "I" Street Suite 125 Post Office Box 944255 Sacramento, CA 94244	Respondent (Cal. S. Ct. Case No. 168066), STATE OF CALIFORNIA, a political body acting in its own right and/or through Edmund G. Brown, Jr., Esq., in his official capacity as Attorney General and/or Debra Bowen, in her official capacity as Secretary of State
EDMUND G. BROWN, in his official capacity Attorney General STATE OF CALIFORNIA DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL 1300 "I" Street Suite 125 Post Office Box 944255 Sacramento, CA 94244	Respondent (Cal. S. Ct. Case No. 168066), STATE OF CALIFORNIA, a political body acting in its own right and/or through Edmund G. Brown, Jr., Esq., in his official capacity as Attorney General and/or Debra Bowen, in her official capacity as Secretary of State
DEBRA BOWEN, in her official capacity Secretary of State 1500 11th Street Sacramento, CA 95814	Respondent (Cal. S. Ct. Case No. 168066), STATE OF CALIFORNIA, a political body acting in its own right and/or through Edmund G. Brown, Jr., Esq., in his official capacity as Attorney General and/or Debra Bowen, in her official capacity as Secretary of State

Persons Served	***Party:***
DEBRA BOWEN, in her official capacity Secretary of State 455 Golden Gate Avenue San Francisco, CA 94102	Respondent (Cal. S. Ct. Case No. 168066), STATE OF CALIFORNIA, a political body acting in its own right and/or through Edmund G. Brown, Jr., Esq., in his official capacity as Attorney General and/or Debra Bowen, in her official capacity as Secretary of State

Persons Served	***Counsel for:***
NATIONAL CENTER FOR LESBIAN RIGHTS Shannon P. Minter, Esq. Melanie Rowen, Esq. Catherine Sakimura, Esq. Ilona M. Turner, Esq. Shin-Ming Wong, Esq. Christopher F. Stoll, Esq. 870 Market Street Suite 370 San Francisco, CA 94102	Petitioners (Cal. S. Ct. Case No. S168047), 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
MUNGER, TOLLES & OLSON, LLP Gregory D. Phillips, Esq. Jay M. Fjitani, Esq. David C. Dinielli, Esq. Michelle Friedland, Esq. Lika C. Miyake, Esq. Mark R. Conrad, Esq. 355 South Grand Avenue 35th Floor Los Angeles, CA 90071-1560	Petitioners (Cal. S. Ct. Case No. S168047), 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
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. Jon W. Davidson, Esq. Jennifer C. Pizer, Esq. F. Brian Chase, Esq. Tara Borelli, Esq. 3325 Wilshire Boulevard Suite 1300 Los Angeles, CA 90010	Petitioners (Cal. S. Ct. Case No. S168047), 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

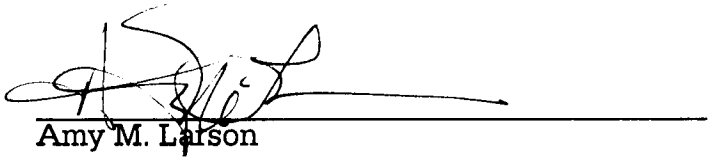
Persons Served	***Counsel for:***
ACLU FOUNDATION OF NORTHERN CALIFORNIA Alan L. Schlosser, Esq. Elizabeth O. Gill, Esq. 39 Drumm Street San Francisco, CA 94111	Petitioners (Cal. S. Ct. Case No. S168047), Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas Sierra North, Celia Carter, Desmund Wu, James Tolen, and Equality California
ACLU FOUNDATION OF SOUTHERN CALIFORNIA Mark Rosenbaum, Esq. Clare Pastore, Esq. Lori Rifkin, Esq. 1313 West 8th Street Los Angeles, CA 90017	Petitioners (Cal. S. Ct. Case No. S168047), 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
ACLU FOUNDATION OF SAN DIEGO AND IMPERIAL COUNTIES David Blair-Loy, Esq. Post Office Box 87131 San Diego, CA 92138-7131	Petitioners (Cal. S. Ct. Case No. S168047), 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
LAW OFFICE OF DAVID C. CODELL David C. Codell, Esq. 9200 Sunset Boulevard Penthouse Two Los Angeles, CA 90069	Petitioners (Cal. S. Ct. Case No. S168047), 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
ORRICK, HERRINGTON & SUTCLIFFE LLP Stephen V. Bomse, Esq. 405 Howard Street San Francisco, CA 94105-2669	Petitioners (Cal. S. Ct. Case No. S168047), 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

Persons Served	***Counsel for:***
Dennis J. Herrera, Esq. City Attorney Therese M. Stewart, Esq. Chief Deputy City Attorney Vince Chhabria, Esq. Tara M. Steeley, Esq. Mollie Lee, Esq. Deputy City Attorneys City Hall, Room 234 One Dr. Carlton B. Goodlett Place San Francisco, CA 94102-4682	Petitioners (Cal. S. Ct. Case No. S168078), CITY AND COUNTY OF SAN FRANCISCO, THE COUNTY OF SANTA CLARA, and THE CITY OF LOS ANGELES
Ann Miller Ravel, Esq. County Counsel Tamara Lange, Esq. Lead Deputy County Counsel Juniper Lesnik, Esq. Impact Litigation Fellow COUNTY OF SANTA CLARA OFFICE OF THE COUNTY COUNSEL 70 West Hedding Street East Wing, Ninth Floor San Jose, CA 95110-1770	Petitioners (Cal. S. Ct. Case No. S168078), CITY AND COUNTY OF SAN FRANCISCO, THE COUNTY OF SANTA CLARA, and THE CITY OF LOS ANGELES
Rockard J. DelGadillo, Esq. City Attorney Richard H. Llewellyn, Jr., Esq. Chief Deputy City Attorney David Michaelson, Esq. Chief Assistant City Attorney OFFICE OF THE LOS ANGELES CITY ATTORNEY 200 N. Main Street City Hall East, Room 800 Los Angeles, CA 90012	Petitioners (Cal. S. Ct. Case No. S168078), CITY AND COUNTY OF SAN FRANCISCO, THE COUNTY OF SANTA CLARA, and THE CITY OF LOS ANGELES
Gloria Allred, Esq. Michael Maroko, Esq. John S. West, Esq. ALLRED, MAROKO & GOLDBERG 6300 Wilshire Boulevard Suite 1500 Los Angeles, CA 90048	Respondent (Cal. S. Ct. Case No. 168066), STATE OF CALIFORNIA, a political body acting in its own right and/or through Edmund G. Brown, Jr., Esq., in his official capacity as Attorney General and/or Debra Bowen, in her official capacity as Secretary of State

Persons Served	***Counsel for:***
LIBERTY COUNSEL Mary E. McAlister, Esq. Post Office Box 11108 Lynchburg, VA 24506	Intervention Requester (Cal. S. Ct. Case Nos. 168047, 168066, 168078), ROBIN TYLER, an individual, and DIANE OLSON, an individual
LIBERTY COUNSEL Mary E. McAlister, Esq. 100 Mountain View Road Suite 2775 Lynchburg, VA 24502	Intervention Requester (Cal. S. Ct. Case Nos. 168047, 168066, 168078), CAMPAIGN FOR CALIFORNIA FAMILIES
James M. Finberg, Esq. Eve H. Cervantez, Esq. Barbara J. Chisholm, Esq. ALTSHULER, BERZON LLP Elizabeth Cabraser, Esq. Kelly Dormody, Esq. LIEFF, CABRASER, HEIMANN & BERNSTEIN c/o ALTSHULER, BERZON LLP 177 Post Street Suite 300 San Francisco, CA 94108	Amici Curiae in Support of Petitioners (Cal. S. Ct. Case Nos. 168047), THE BAR ASSOCIATION OF SAN FRANCISCO, LEGAL AID SOCIETY -- EMPLOYMENT LAW CENTER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, and THE IMPACT FUND
Ethan Dettmer, Esq. Frederick Brown, Esq. Sarah Piepmeier, Esq. Rebecca Justice Lazarus, Esq. Enrique Monagas, Esq. Kaiponanea Matsumura, Esq. GIBSON, DUNN & CRUTCHER LLP One Montgomery Street San Francisco, CA 94102	Amici Curiae in Support of Petitioners (Cal. S. Ct. Case Nos. 168047), Forty-Four Members of the California State Legislature, etc.
Lindsay Pennington, Esq. Douglas Champion, Esq. Lauren Eber, Esq. Heather Richardson, Esq. GIBSON, DUNN & CRUTCHER LLP 333 South Grand Avenue 49th Floor Los Angeles, CA 90071	Amici Curiae in Support of Petitioners (Cal. S. Ct. Case Nos. 168047), Forty-Four Members of the California State Legislature, etc.

Persons Served	***Counsel for:***
Clifford S. Davidson, Esq. Albert C. Valencia, Esq. Lois D. Thompson, Esq. PROSKAUER ROSE LLP 2049 Century Park East Suite 3200 Los Angeles, CA 90067-3206	Amici Curiae in Support of Petitioners (Cal. S. Ct. Case Nos. 168047), THE ANTI-DEFAMATION LEAGUE, ASIAN LAW CAUCUS, BET TZEDEK LEGAL SERVICES, JAPANESE AMERICAN CITIZENS LEAGUE AND PUBLIC COUNSEL
Irving H. Greines, Esq. Catherine E. Tobisman, Esq. GREINES, MARTIN, STEIN & RICHLAND, LLP 5900 Wilshire Boulevard 12th Floor Los Angeles, CA 90036	Amici Curiae in Support of Petitioners (Cal. S. Ct. Case Nos. S168047, 168066, 168078), BEVERLY HILLS BAR ASSOCIATION, et al.
Kevin T. Snider, Esq. Matthew B. McReynolds, Esq. PACIFIC JUSTICE INSTITUTE Sacramento Office Post Office Box 276600 Sacramento, CA 95827	Amicus Curiae in Opposition to Petition (Cal. S. Ct. Case Nos. S168047, 168066, 168078), PACIFIC JUSTICE INSTITUTE

I declare under penalty of perjury under the laws of the State of California that each of the foregoing statements is true and correct, and that this declaration was executed on November 17, 2008, at Monterey, California.



Amy M. Larson