Case No. S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS et al.,

Petitioners

v.

MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,

Respondents.

CORRECTED APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS AND [PROPOSED] AMICI CURIAE BRIEF OF AMICI CONCERNED WITH GENDER EQUALITY: EQUAL RIGHTS ADVOCATES, CALIFORNIA WOMEN'S LAW CENTER, WOMEN LAWYERS OF SANTA CRUZ COUNTY, LAWYERS CLUB OF SAN DIEGO, LEGAL MOMENTUM AND NATIONAL ASSOCIATION OF WOMEN LAWYERS

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CORRECTED APPLICATION TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 8.520(f) of the California Rules of Court, and the Court's November 20, 2008 order in *Equal Rights Advocates, et al. v. Horton et al.* (S168302), Equal Rights Advocates, California Women's Law Center, Women Lawyers of Santa Cruz, Lawyers Club of San Diego, Legal Momentum, and the National Association of Women Lawyers (collectively, "*amici*") respectfully request leave to file the attached brief, in support of Petitioners, to be considered in the above-captioned cases. This application is timely made pursuant to the briefing schedule set forth in the Court's November 19, 2008 scheduling order.

A. Equal Rights Advocates

Amicus Equal Rights Advocates ("ERA") is a San Francisco-based women's rights organization whose mission is to protect and secure equal rights and economic opportunities for all California women and girls through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases in both state and federal courts for the past thirty-three years. ERA has been dedicated to the empowerment of women through the establishment of women's economic, social, and political equality. ERA recognizes that women have historically been the target of invidious discrimination and unequal treatment under the law, and ERA is especially concerned that if Proposition 8 is allowed to

stand, any bare majority of voters would be empowered to deny equal protection to a disfavored group on the basis of a suspect classification.

B. California Women's Law Center

Amicus California Women's Law Center ("CWLC"), founded in 1989, is dedicated to addressing the comprehensive and unique legal needs of women and girls. CWLC represents California women who are committed to ensuring that life opportunities for women and girls are free from unjust social, economic, legal, and political constraints. CWLC's Issue Priorities on behalf of its members are gender discrimination, women's health, reproductive justice, and violence against women. CWLC and its members are firmly committed to eradicating invidious discrimination in all forms. CWLC recognizes that women have historically been the target of invidious discrimination and unequal treatment under the law, and CWLC is especially concerned that if Proposition 8 is allowed to stand, any bare majority of voters would be empowered to deny equal protection to a disfavored group on the basis of a suspect classification.

C. Women Lawyers of Santa Cruz County

Amicus Women Lawyers of Santa Cruz County ("WLSCC"), organized in 1975 and incorporated in 1995, promotes the advancement of women in the legal profession and is an active advocate for the concerns of women in society. WLSCC membership consists of women and men

involved in all aspects of the legal profession, including lawyers, law students, and legal workers. WLSCC lists amongst its purposes the desire to study and implement appropriate means to further the welfare of women in the community and to eliminate discrimination based on gender. WLSCC and its members are firmly committed to eradicating invidious discrimination in all its forms. WLSCC recognizes that women have historically been the target of invidious discrimination and unequal treatment under the law, and WLSCC is especially concerned that if Proposition 8 is allowed to stand, any bare majority of voters would be empowered to divest a currently disfavored minority group of the right to equal protection under the law.

D. Lawyers Club of San Diego

Since 1972, Lawyers Club of San Diego ("Lawyers Club") has sought to advance the status of women in law and society. Lawyers Club is a voluntary bar association, comprised of female and male attorneys, law students and others in the San Diego community who share our interests and goals. Lawyers Club is committed to advocating for equal treatment of all members of society, and recognizes that when one segment is discriminated against, all members of society are negatively impacted. Proposition 8 separates one group of Californians from another and excludes them from enjoying the same rights as others. Therefore, Lawyers Club continues to oppose Proposition 8. Should Proposition 8 be permitted

to stand, any narrow majority of voters would be empowered to deny individuals of the right to equal protection under the law.

E. Legal Momentum

Amicus Legal Momentum is the oldest legal advocacy organization in the United States dedicated to advancing the rights of women and girls. Legal Momentum is committed to securing equality and justice for women and girls. Legal Momentum's work on behalf of women and girls ensures economic security for women, freedom from violence, opportunities for equal work and equal pay, and seeks to promote the health of women and girls. Legal Momentum recognizes that women have historically been the target of invidious discrimination and unequal treatment under the law, and Legal Momentum is especially concerned that if Proposition 8 is allowed to stand, any bare majority of voters would be empowered to deny equal protection to a disfavored group on the basis of a suspect classification.

F. National Association of Women Lawyers

Amicus National Association of Women Lawyers ("NAWL"), founded in 1899, is the oldest women's bar association in the country. NAWL is a national voluntary organization with members in all fifty states, devoted to the interests of women lawyers, as well as all women. Through its members, committees and the Women's Law Journal, it provides a collective voice in the bar, courts, Congress and the workplace. NAWL stands committed to ensuring equality and fairness for women of all sexual

identification. Through its amicus work, NAWL has been a strong and clear voice for same sex equality. NAWL recognizes that any limitation of civil rights based upon sex or gender, limits the civil rights of all.

G. Interests of Amici Curiae

This petition raises several important issues arising in connection with the question of whether the initiative process can be used to change the California Constitution so as to deny equal protection under the law to a disfavored group based upon a suspect classification. Proposition 8 is a ballot initiative that purports to remove from gay and lesbian persons the right to marry the partner of their choice, a fundamental right "so integral to an individual's liberty and personal autonomy that [it] may not be eliminated by the Legislature or by the electorate through the statutory initiative process." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 781 [76 Cal.Rptr.3d 683, 183 P.3d 384].) Although targeted at gay men and lesbians, mobilized and well-funded groups could attempt to use the same process embodied in Proposition 8 to deprive any number of other disfavored or politically vulnerable groups of Californians of many or even all of their protected rights under the state Constitution. Once the doors to discrimination by popular will have swung open, such efforts targeted at women could certainly follow.

Amici are dedicated to protecting California women and girls from invidious discrimination and unequal treatment in all forms, and *amici* have

played a significant role in the evolution over the past four decades of California constitutional decisions that have been at the forefront of recognizing that sex-based classifications are inherently suspect under the state equal protection clause and merit strict judicial scrutiny. *Amici* are deeply concerned and alarmed about the process used to promote the discrimination embodied in Proposition 8. The unprecedented framework established by Proposition 8, if left undisturbed, could preclude judicial enforcement of the suspect classification doctrine to protect these women, and in time could lead to the unwinding of what has been achieved through decades of civil rights struggles.

Amici support Petitioners' effort to prevent Respondents from taking any action based on Proposition 8 because Proposition 8 was not lawfully enacted. California voters are entitled to a fair initiative process that complies with the state Constitution's procedural and substantive mandates and that does not allow a bare majority of voters to strip a politically unpopular group of the rights guaranteed by the state Constitution's equal protection clause. Indeed, the issues disputed in this action are of such significance to *amici* that on November 18, 2008, amicus ERA and amicus CLWC jointly filed their own original Petition for Writ of Mandate, seeking a peremptory writ of mandate directing the Respondents to refrain from implementing, enforcing or applying Proposition 8. (See Petition for Writ of Mandate, *Equal Rights Advocates, et al. v. Mark B. Horton, et al.*,

action deferred, Nov. 20, 2008, S168302.) On November 20, 2008, the Court issued an order deferring the *amici*'s Petition for Writ of Mandate, as well as petitions filed by other civil rights groups, pending further notification. In its order, the Court invited the petitioners to file an application to appear as amici curiae in this action.

H. Need For Further Briefing

Amici are familiar with the issues before the Court and the scope of their presentation. *Amici* believe that further briefing is necessary to provide detailed discussion of certain authorities and arguments that the parties did not fully address. In particular, as longtime legal advocates for women's rights, *amici* offer a unique perspective on the dangerous precedent embodied by Proposition 8 beyond Proposition 8's open discrimination against homosexuals and grievous injury to families headed by same-sex couples, important issues that Petitioners have addressed in their briefs with stirring eloquence.

Women as a group have long been the target of sex discrimination, and for much of California's history women were denied such basic rights as the right to vote, the right to serve on juries and the right to be treated as equal to men under property and contract law. Moreover, as *amici* are well aware, women have long faced, and still face, diminished economic opportunities, sex-stereotyping, and restrictions on their reproductive choices. At the same time, California has a proud and storied history of

protecting women's rights under the state Constitution's equal protection clause, and this Court has been called upon many times before to enforce the Constitution's promise of equality for women. Indeed, the Court held that legal classifications based on sex merit strict scrutiny under California's equal protection clause six years before the federal courts recognized any level of heightened scrutiny for sex classifications. Even today, the California Constitution provides greater protection from sex discrimination than that provided by federal courts construing the U.S. Constitution, much as this Court has rightly recognized that sexual orientation discrimination is prohibited under the state Constitution even where the federal courts largely have been silent.

Full equality for women, like full equality for same-sex couples, remains vulnerable to the ebbs and flows of popular antagonism. While same-sex couples are the immediate targets of Proposition 8, the use of the initiative process to enact Proposition 8 threatens all minority and disadvantaged groups. If Proposition 8 stands, women's basic rights, like those of gays and lesbians, could be as ephemeral as the next election and subject to unending attack. Voting majorities could simply perpetuate through the initiative process the very conditions that have led this court to designate gender and sexual orientation as suspect classifications that merit strict, rather than some lesser level of, scrutiny.

As set forth in greater detail in the brief filed herewith, if Proposition 8 stands, no California constitutional barrier will exist to prevent the next constitutional initiative mandating discrimination, and women would run the unacceptable and very real risk of again being relegated to the status of second class citizens under the California Constitution.

DATED this 14th day of January, 2009.

Respectfully submitted,
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INTRODUCTION

By stripping rights from an unpopular minority through simple popular vote—rights that are declared in our Constitution and affirmed as fundamental by this Court—Proposition 8 would alter the very nature of our governmental plan.

The question before the Court could not be more clear: will the Court endorse a radical abuse of the People's initiative power by validating a scheme in which a slim majority of voters may deny equal protection to any currently disfavored group? The stakes for our Constitutional system could not be higher: if allowed to stand, Proposition 8 provides a mechanism for future voting majorities to "amend" the Constitution so the objects of their disapprobation lose the right to equal treatment.

If that happens, women across California have much to fear, and even more to lose. Women have long struggled to achieve the equal protection of the laws and rely on the principle that equal protection is not a privilege in this state to be selectively revoked at will. It is a right that is fundamental to our social order and that must be preserved. It was only recently that women were given equal rights to employment.[1] It was only

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[1] See *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 19 [95 Cal.Rptr. 329, 485 P. 2d 529] [enumerating severe legal and social disabilities, such as the denial of the right to vote, the right to serve on juries, diminished employment and economic opportunities, and treatment as "inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts"].

recently that courts rejected the legitimacy of differing property rights for women. And still women struggle to secure equal pay for equal work, to pursue equal opportunity in education, to obtain equal access to health care, and to live free of sexual violence and harassment. Throughout these struggles, women have turned to Constitution's promise of equality and the constant guardianship of the courts, sometimes against the will of the voting majority, for protection.[2] For equal protection to have any meaning, it cannot be up for grabs in the next election (and in every following election).

It is easy to see what harms will come from ceding to an emboldened voting majority the Court's power to interpret and apply the Constitution. The 1940's version of Proposition 8 would have constitutionalized discrimination against the Japanese. The 1960's version of Proposition 8 would have extinguished the burgeoning women's rights movement. The 1980s version of Proposition 8 would have required the forced quarantine of people with AIDS.[3] The 2001 version of Proposition 8 would have constitutionalized anti-Muslim and anti-Arab sentiment

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[2] See, e.g., *Arp v. Workers' Compensation Appeals Bd.* (1977) 19 Cal.3d 395, 405 [138 Cal.Rptr. 293, 563 P.2d 849] ["Society is belated in its recognition of the baseless prejudices inherent in long-standing notions of woman's proper social and economic roles"].

[3] See, eg., California Proposition 64 (1986).

gripping the state in the aftermath of September 11.[4] In the years to come, the targets will change. Step by step, the Constitution's guarantees will narrow, and the equal protection clause will protect only those who can muster 50% plus one votes on election day.[5] Even if a politically disadvantaged group is able to defend itself at the polls from time to time, unchecked recourse to the initiative process empowers any person with the funds to gather sufficient signatures to divert the resources and energies of the less powerful to prevent their rights from being stripped away.[6]

The progressive dehumanization of segments of our society by a state-sanctioned system of Constitutional "amendment" is intolerable in a

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[4] Petitioner's fears are not unwarranted. Invidious discrimination against disfavored groups has been written into constitutions in the past. For instance, California's Constitution of 1879 contained a provision that forbade "native[s] of China" from voting. (Cal. Const. of 1849, art. II, § 1, repealed 1926 ["No native of China, no idiot, no insane person, or person convicted of any infamous crime . . . shall ever exercise the privileges of an elector in this State"].) Similarly, until 1994, West Virginia's Constitution contained a provision requiring segregated schools. (See W. Va. Const., art. XII, § 8, repealed 1994 ["White and colored persons shall not be taught in the same school"]).

[5] All Californians should vigilantly guard against the easy diminution of basic rights that Proposition 8 portends. As Justice Kennedy cautioned, equal protection rights are "taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." (*Romer v. Evans* (1996) 517 U.S. 620, 631 [116 S.Ct. 1620, 134 L.Ed.2d 855].)

[6] California is among the most expensive media markets in the country, and costs to oppose Proposition 8 reportedly reached nearly $40

free society and prohibited by our Constitution. Here, that dehumanization materializes in the selective revocation of marital rights that this Court recently held to be "so integral to an individual's liberty and personal autonomy that they may not be eliminated by the Legislature or by the electorate through the statutory initiative process." *In re Marriage Cases* (2008) 43 Cal.4th 757, 781 [76 Cal.Rptr.3d 683, 183 P.3d 384] (hereafter *Marriage Cases*).) Further, the process of stigmatization and exclusion occurs without any rational deliberative process and would be substantively beyond judicial review. The equal protection clause by its nature empowers courts to protect minorities and other politically disenfranchised groups from unfair treatment by the voting majority. Indeed, while the other branches of government and the People have roles to play, our basic governmental plan envisions the courts as the ultimate check on injustice. Proposition 8 purports to seize that unique and well-settled judicial power.

Interveners Dennis Hollingsworth, et al. ("Interveners") argue for a system where this Court has virtually no power to right the wrongs perpetrated by voting majorities and must abdicate its historical and foundational role to interpret and safeguard the Constitution. Interveners cast this case as if it were a dispute between the People and the Court. Of course it is not. The question presented to this Court is whether the voting

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million. (Garrison, *Angrier Response to Prop. 8 Arises*, L.A. Times (Nov. 13, 2008) p. A1.)

majority has complied with the required Constitutional procedure in seeking to fundamentally change the Constitution itself. This Court is the ultimate authority on the proper interpretation of the Constitution, including provisions distinguishing between amendments and revisions, in cases presented to it. If Proposition 8 fails, it is because a voting majority (whom Interveners term the "People") in 2008 did not comply with the correct procedure for making such a constitutional change. This is an important issue for all Californians, and should not be considered a battle between the People and the Court. Any decision by this Court will solemnly weigh the arguments on all sides in light of existing case law and the history of our Constitution and our State. Fulfilling that duty places this Court firmly on the side of the People in every sense that matters.

This Court has long been the ultimate defender of the Constitution, giving relief to those who society would seek to oppress. (See *Nogues v. Douglass* (1857) 7 Cal. 65, 69 ("[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 . . . "].) In *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 19 [95 Cal.Rptr. 329, 485 P.2d 529] (hereafter *Sail'er Inn*), the Court rejected institutionalized discrimination against women and set up a system of reviewing gender-based laws that served as a model for other courts. Likewise, in *Perez v. Sharp* (1948) 32 Cal.2d 711 [198 P.2d 17], this Court held, nearly 20 years before the United States

Supreme Court did the same in *Loving v. Virginia* (1968) 388 U.S. 1 [87 S.Ct. 1817, 18 L.Ed.2d 1010], that there is no place for anti-miscegenation laws in a free and equal society, and that such laws violate equal protection.[7] Most recently, in *Marriage Cases*, the Court defended the Constitutional rights of same-sex couples and their families by holding that the Constitution's promises of equal treatment and fundamental rights apply to them, too. If Proposition 8 can repeal *Marriage Cases*, then *Sail'er Inn* could have likewise been swept away by popular vote, and *Perez* could have been repealed by a resourceful majority, and every other step this Court has taken to protect those who face discrimination based on a suspect classification could be undone by bare majority vote. The Court now has an opportunity to head off this danger. While the principle that requires Proposition 8 to be characterized as a revision is easily confined—the voting majority may not strip fundamental rights from a disfavored minority based upon membership in a suspect class—the damage that will be done if Proposition 8 is characterized as an amendment cannot be so

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[7] Only 20 percent of Americans supported, while 73 percent opposed, interracial marriage in 1968, a year after the Supreme Court issued its decision in *Loving*. (Carroll, *Most Americans Approve of Interracial Marriages* (Aug. 16, 2007) Gallup News Services <https://www.gallup.com/poll/28471/Most-Americans-Approve-Interracial-Marriages.aspx> [as of Jan. 10, 2008].) Although a vast majority may have opposed the decision, it is hard to imagine that anyone would today argue that *Loving* must be overturned or that anti-miscegenation laws are acceptable.

confined. If the Court affirms Proposition 8 as a legitimate amendment, it will necessarily embolden those who would exploit misconceptions and fears about disfavored groups to subject them to second class status. A judicially-sanctioned vehicle will have been established whereby majorities could attempt to strip the rights of anyone deemed, or portrayed as, an outsider. In a state made of immigrants, of men and women, black and white, Anglo, Latino and Asian, gay and straight, old and young, Proposition 8 threatens us all.

With the passage of Proposition 8, this Court is called on again to breathe meaning into the Constitution's equal protection guarantee, as it did in 1948 and 1971. If Proposition 8 is allowed to stand, the status of the equal protection guarantee of our state Constitution will be reduced to a mere shadow, promising only that minorities will be protected from unfair majority encroachment until the majority votes otherwise. A decision to empower the voting majority to impose second-class status on a group of citizens who have suffered a history of irrational prejudice is so totally contrary to the history and values underlying our government structure that it cannot be accomplished through an initiative amendment like Proposition 8.

ARGUMENT

I. Article XVIII Of The California Constitution Prohibits Revision Of The Constitution By Initiative

In 1911, the People specified a procedure to make certain limited changes to the California Constitution through the initiative process. (Cal. Const., art. IV, § 1; *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332-333, 196 P.2d 787].) Significantly, "[a]lthough '[t]he electors may amend the Constitution by initiative' [citation], a 'revision' of the Constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification [citation], or by legislative submission of the measure to the voters [citation]." (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349, 340 [276 Cal.Rptr. 326, 801 P.2d 1077] (hereafter *Raven*) [quoting Cal. Const., art. XVIII, §§ 1-3].) As this Court has explained, "because a revision may not be achieved through the initiative process," were this Court to conclude that Proposition 8 "constituted a revision not an amendment, that would end [the Court's] inquiry; the initiative would be invalid for its failure to meet the constitutional requirements of a revision." (*Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 221 [149 Cal.Rptr. 239, 583 P.2d 1281] (hereafter *Amador Valley*).) Because Proposition 8 effects a revision of the Constitution by subjecting the Constitution's fundamental equal protection guarantees to simple majority nullification, it must be held invalid.

While the Constitution itself does not define a revision or an amendment, this Court's cases have clarified the distinction. As early as 1894, in *Livermore v. Waite*, the Court held that certain "underlying principles" go to the core of the Constitution and must be guarded as such:

> 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.

(*Livermore v. Waite* (1894) 102 Cal. 113, 118-119 [36 P. 424] (hereafter *Livermore*).)[8]

In *Amador Valley*, the Court further distilled the *Livermore* principle, and explained that the "analysis in determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature." (22 Cal.3d at p. 223; see also

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[8] Interveners would have this Court ignore *Livermore* because it is a "narrow" "114 year-old decision." (Interveners' Br. at pp. 19-20.) However, numerous subsequent cases in this Court have reaffirmed the *Livermore* principle. (E.g., *Raven*, *supra*, 52 Cal.3d at p. 355 [citing *Livermore*]; *Amador Valley*, *supra*, 22 Cal.3d at p. 222 [citing and discussing *Livermore*].) That *Livermore* has been an undisturbed part of this Court's jurisprudence for over a century reinforces, not diminishes, the wisdom and force of its analysis. (See *Golden Gateway Ctr. v. Golden Gateway Tenants Assn* (2001) 26 Cal.4th 1013, 1022 [111 Cal.Rptr.2d 336, 29 P.3d 797] [explaining that the doctrine of stare decisis carries significant

Raven, *supra*, 52 Cal.3d at p. 350 ["Substantial changes in either [quantitative or qualitative ways] could amount to a revision"].) As relevant here, the Court held "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also." (*Amador Valley*, *supra*, 22 Cal.3d at p. 223.) For example, the Court explained, and the parties agreed, that "an 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." (*Ibid.*; see also *McFadden v. Jordan*, *supra*, 32 Cal.2d at p. 332 [holding that an initiative that was substantively "far reaching and multifarious," was a revision rather than an amendment]; *Raven*, *supra*, 52 Cal.3d at p. 351 [holding that an initiative that limited the California courts' power to interpret certain criminal rights differently than the United States Supreme Court's interpretation was a revision]; cf. *People v. Frierson* (1979) 25 Cal.3d 142 [158 Cal.Rptr. 281, 599 P.2d 587] [holding that a provision limiting the reach of the cruel and unusual punishment clause was an amendment].)

The purpose behind the differing procedural requirements of revisions and amendments is clear. Enactments that fundamentally alter the

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"persuasive force" and should not be disturbed where a prior decision is "embedded in our...jurisprudence with no apparent ill effects"].)

state Constitution or the rights and protections it grants, or those which affect the "substance and integrity of the state Constitution as a document of independent force and effect" must not be subject to the will of a simple majority. (*Raven, supra*, 52 Cal.3d at p. 352.) Rather, such changes must be made only after deliberation and consideration. In a representative democracy, the reason of the elected must at times calm the passions of the electors. As James Madison explained:

> [I]t may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. ...
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> [A republic, on the other hand, serves] to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

(Madison, Federalist No. 10; see also *League of United Latin American Citizens v. Perry* (2006) 548 U.S. 399, 469-470 [126 S.Ct. 2594, 165 L.Ed.2d 609] "[O]ur system of representative democracy is premised on the assumption that elected officials will seek to represent their constituency as

a whole, rather than any dominant faction within that constituency"] (conc. & dis. opn. of Stevens, J.).)

Giving the power to strip basic equal protection rights of a historically disfavored group to a bare majority of the voting people, free from the constraints of judicial review to ensure equal protection, and without safeguarding the process of rational deliberation that legislative approval promotes, is a "far reaching change in the nature of [California's] basic governmental plan," and qualifies as a revision. (*Amador Valley*, *supra*, 22 Cal.3d at p. 223.) Altering the Constitution's promise of equality in this way would render the equal protection provision neither equal nor protective. Moreover, it would undermine the power of the courts to interpret and apply the Constitution. Revocations of the Court's power, or limitations on its ability to protect the citizenry, are precisely the sort of changes to the Constitution's "underlying principles" that *Livermore* and its progeny hold cannot be accomplished by mere initiative.

II. Equal Protection Of The Laws Is Fundamental To California's Constitutional Structure

Proposition 8, if permitted to take effect, would subvert the underlying principle of equal protection that lies at the heart of California's constitutional system. It would also divest the court of its traditional power to interpret and apply the fundamental guarantees of the equal protection clause.

There is no right more basic to California's constitutional scheme than equal protection. The right to equal protection has been part of the California Constitution from the inception of statehood. (Cal. Const. of 1849, art. I, §§ 1 & 11.1.) The original drafters recognized the need for inalienable rights to protect not only individuals, but vulnerable minorities, from the tyranny of majority power. (See Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution, in September and October, 1849 (1850) p. 409 ["My object is to provide for the protection of minorities—a principle which is so generally recognized under our system of government" (statement of Mr. Price)]; *id.* at 22 ["The majority of any community is the party to be governed; the restrictions of law are interposed between them and the weaker party; they are to be restrained from infringing upon the rights of the minority" (statement of Mr. Gwin)]; *id.* at 309 ["The object of the Constitution was to protect the minority" (statement of Mr. Botts)].)[9]

California's modern Constitution maintains this emphasis on the centrality of equal protection to our system of governance. This Court has

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[9] Interveners suggest that equal protection has only superficial roots in the Constitution because the modern formulation of the equal protection clause was added in the 1970's, Interveners' Brief at p.22, fn. 6., and thus, the Court should sacrifice the integrity of equal protection when it conflicts with the People's power to amend the Constitution. However, as is unmistakable from the text accompanying this note, the principle of equal protection lies at the very foundation of our original state Constitution from the birth of statehood. (See Cal. Const. of 1849, art. I, §§ 1 & 11.1.)

described these equal protection provisions as "one feature of the constitution more marked, [one] characteristic more pervasive than all others." (*Darcy v. San Jose* (1894) 104 Cal. 642, 645 [38 P. 500] [quoting *Dougherty v. Austin* (1892) 94 Cal. 601, 620 [29 P. 1092] (conc. opn. of Beatty, J.)].)

The principle of equal protection is the *sine qua non* of this Court's fundamental rights and due process jurisprudence; that is, in this state, equal protection finds its significance not only in Article I, section 7, but it permeates all rights conferred by the Constitution. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 831 [holding that the constitutional right to marry incorporates a requirement of "equal dignity and respect"]; *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 276 & fn. 22 [172 Cal.Rptr. 866, 625 P.2d 779] [explaining that when determining whether a law restricts a fundamental right in a "discriminatory manner," the Court's analysis "closely parallels" the requirements of equal protection]; *People v. Ramirez* (1979) 25 Cal.3d 260, 267 [158 Cal.Rptr. 316, 599 P.2d 622] [holding the right to due process incorporates a requirement that every person must be treated "as an equal, fully participating and responsible member of society"].)

A. Proposition 8 Offends The Constitutional Scheme By Enabling Majority Oppression Of An Unpopular Group.

One primary purpose of equal protection is to protect groups that,

based on a history of discrimination, are vulnerable to oppression by a political majority. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 843, fn. 63; see also *Sail'er Inn, supra*, 5 Cal.3d at p. 19.) Underlying all suspect classifications is "the stigma of inferiority and second class citizenship associated with them." (*Sail'er Inn*, at p. 19.) Suspect classifications "irrespective of the nature of the interest implicated," "in and of themselves are an affront to the dignity and self-respect of the members of the class set apart for disparate treatment." (*Molar v. Gates* (1979) 98 Cal.App.3d 1, 16 [159 Cal.Rptr. 239] [invalidating gender discrimination in prison rules].) "Such classifications . . . violate 'the most fundamental interest of all, the interest in being treated by the organized society as a respected and participating member.'" (*Ibid.* [quoting Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv. L.Rev. 1, 33]).

Proposition 8 demands the government treat a stigmatized minority group differently *based on* a suspect classification. By eliminating the requirement of equal protection for a vulnerable minority seeking to exercise a fundamental right, Proposition 8 would remove an essential structural check on the exercise of majority power. As this Court explained in the *Marriage Cases*, the original purpose of enumerated Constitutional rights is to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . ." (*Marriage*

Cases, *supra*, 43 Cal. 4th at p. 852 [citing *W. Va. State Bd. of Ed. v. Barnette* (1943) 319 U.S. 624, 638 [63 S.Ct. 1178, 87 L.Ed. 1628].) Altering this foundational premise is nothing short of redefining our "basic governmental plan," and therefore must be deemed a revision that cannot be passed by a bare voting majority.[10] (*Amador Valley*, *supra*, 22 Cal.3d at p. 223.)

The Attorney General nonetheless claims that "[t]aken together, *Raven* and *Bowens* appear to recognize that the voters may deny fundamental rights protected by the equal protection clause." (Atty. Gen. Br. at p. 43.) This statement is perilously broad. *Raven* and *Bowens v. Superior Court* (1991) 1 Cal.4th 36 [2 Cal.Rptr.2d 376, 820 P.2d 600],

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[10] If it were true, as Interveners insist, that once the "People" speak through a voting majority, even where the will of the majority stigmatizes and eliminates equal protection rights for a suspect class, the Court must dutifully enforce this will, then Proposition 22 would not (indeed, could not) have been overturned by this Court in *Marriage Cases*. Interveners offer no explanation for why the Court has the power to overturn an "initiative statute" that violates the Constitution's core promises but not have the power to overturn an "amendment" that does the same. In our republican form of government, it cannot be that the Court is allowed to defend the Constitution if a ballot measure qualifies with 677,000 signatures, but the Court must fall silent if the same measure qualifies with 1,100,000 signatures. (Compare Ingram, *Measure to Ban Gay Marriage Ok'd for Ballot*, L.A. Times (Nov. 18, 1998) p. A-3, available at <http://articles.latimes.com/1998/nov/18/news/mn-44154> [explaining that Proposition 22 qualified for the ballot with 677,000 signatures] with Press Release, California Secretary of State, *Secretary of State Debra Bowen Certifies Eighth Measure for November 4, 2008, General Election* (June 2, 2008), *available at* <http://www.sos.ca.gov/admin/press-releases/2008/DB08-068.pdf> [explaining that Proposition 8 qualified for the ballot with 1,120,801 signatures].)

established only that the voting majority can reserve power to the prosecutor to decide between methods of bringing criminal charges (where one method, the information, includes a certain procedural package, while the other method, the indictment, does not, and both methods are expressly provided in the Constitution). These cases are best understood as concerning prosecutorial discretion, not fundamental rights for a suspect class. (See *Bowens*, at p. 42 ["Clearly, the system of prosecution contemplated by article I, sections 14 and 14.1 of the California Constitution does not single out a suspect class within the meaning of [the Federal Constitution]"].) All Californians became potentially subject to such discretion, not just members of a suspect class. No clear rule on the distinction between amendments and revisions emerges from these cases, and they certainly should not be read by the Court as endorsing the power of the bare voting majority to dramatically alter the equal protection clause by eliminating fundamental rights for a suspect class. Moreover, the underlying justification for the proposition at issue in *Raven* and *Bowens* (Proposition 115) may have been judicial efficiency or administrative flexibility. As this Court held in *Marriage Cases*, no such legitimate justification exists with respect to Proposition 8.

In the face of the unmistakable evidence that Proposition 8 effects a devastating change to the Constitution's equal protection guarantee, Interveners seek to dismiss the significance of Proposition 8's

consequences. Interveners argue, "Proposition 8 does not in any manner seek to repeal the equal protection clause. On the contrary, it merely modifies one dimension of its application, as established by a path-breaking ruling of this Court and to a particular set of facts." (Interveners' Br. at p. 23.) But the claim that Proposition 8 does not repeal "in any manner" the Constitution's equal protection guarantee is belied by Interveners' own brief, which admits that Proposition 8 will preclude same-sex couples from being married (and enjoying the rights concomitant with that status). (Interveners' Br. at p. 16; see also *id.* at p. 17 [asserting "The Initiative Power Includes the Power to Define the Scope of Equal Protection . . . ."].) Furthermore, equal protection jurisprudence, by its very nature, is "path breaking." (See *Arp v. Workers' Compensation Appeals Board* (1977) 19 Cal.3d 395, 405 [138 Cal.Rptr. 293, 563 P.2d 849] ["Society is belated in its recognition of the baseless prejudices inherent in long-standing notions of woman's proper social and economic roles . . . "].) If initiatives were allowed to eliminate any "path-breaking" ruling, this Court's civil rights jurisprudence would be a mirage, appearing for one moment, and then vanishing the next.

Interveners next insist that the arguments demonstrating that Proposition 8 is a revision because of its devastating effect on California's basic governmental plan are "conjectural and speculative," and must, therefore, fail. (Interveners' Br. at p. 8.) To the contrary, the consequences

for same sex couples could not be clearer and the neutering of the equal protection clause could not be more direct. Furthermore, history has demonstrated that, if left unchecked by the courts' enforcement of equal protection guarantees, the voting majority will oppress the politically unpopular or marginalized. Indeed, this state's modern jurisprudence is replete with judicial enforcement of the equal protection clause to protect suspect classes against invidious discrimination. (E.g., *Darces v. Wood* (1984) 35 Cal.3d 871 [201 Cal.Rptr. 807, 679 P.2d 458] [holding that state action discriminating against child welfare recipients merely because the recipients lived with undocumented immigrant children violates equal protection]; *Woods v. Horton* (2008) 167 Cal.App.4th 658 [84 Cal.Rptr.3d 332] [invalidating on equal protection grounds certain domestic violence statutory programs that provided benefits based on gender].)

Because equal protection is a foundational principle of our constitutional scheme, the distinction between initiatives of general application and those that target specific groups is dispositive. Neither the Interveners nor the Attorney General identify a single initiative enacted by a bare voting majority of the people, without approval of two thirds of the legislature, and targeting only members of a suspect class for disfavored treatment that has ever survived to become part of our Constitution. (See *Crawford v. Los Angeles Bd. of Educ.* (1982) 458 U.S. 527, 532, fn. 5 [102 S.Ct. 3211, 73 L.Ed.2d 948 [noting that an initiative of general application

affecting remedies for school segregation was approved by a two-thirds vote of each house of the state legislature before being submitted for popular vote]; *Reitman v. Mulkey* (1967) 387 U.S. 369, 377-381 [87 S.Ct. 1627, 18 L.Ed.2d 830 [invalidating a constitutional initiative that would have involved the state in private discrimination against members of any racial group on federal equal protection grounds without addressing whether initiative procedure was proper].)

In the face of this clear veneration for the equal protection clause and protections for suspect classes, Interveners rely on *In re Lance W.* and *Frierson* to claim that Proposition 8 is no different than the "right-stripping" initiatives at issue in those cases. Interveners miss the mark. In *In re Lance W.* (1985) 37 Cal.3d 873 [210 Cal.Rptr. 631, 694 P.2d 744], the Court upheld an initiative that limited the exclusionary remedy under California law for violations of the search and seizure rules of the Federal Constitution. Significantly, the amendment at issue in *Lance W.* was one of neutral and general application. That is, its narrow effect was to limit a remedy for all who suffered violations of the Fourth Amendment, not to eliminate the rights of only a certain, identifiable group. Similarly, the initiative deemed to be an amendment in *People v. Frierson* involved a provision of general application, not a law aimed at a suspect class and did not require this Court to abdicate its authority to enforce the guarantee of equal protection. (*People v. Frierson* (1979) 25 Cal.3d 142 [158 Cal.Rptr.

281, 599 P.2d 587] [addressing effort to limit scope of the cruel and unusual punishment clause as to all defendants otherwise eligible for the death penalty].)[11]

Neither the *Lance W.* nor the *Frierson* Court had an opportunity to consider whether an initiative providing that only men, or only the poor, or only minorities, or only Jews, or only gays would be subject to the narrower exclusionary rule or be eligible for the death penalty, would be an alteration so "insubstantial" as to be permitted to come into force through the initiative process, or whether such an initiative would so fundamentally alter the basic principles of governance such that the deliberative processes of a constitutional revision would have been required. The revulsion we necessarily feel at the thought of such an injustice answers the question before this Court today. And if instead we say that our society has learned from the past and would no longer rely on prejudice to cast out one group

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[11] Notably, the scope of the cruel and unusual punishments clause necessarily depends on evolving standards of decency prevalent in the community. (E.g., *Roper v. Simmons* (2005) 543 U.S. 551, 560-561 [125 S.Ct. 1183, 161 L.Ed.2d 1].)

Moreover, the *Frierson* discussion of whether the initiative at issue was an amendment or a revision appeared in a plurality opinion and may be considered dictum. (See *Legislature v. Eu* (1991) 54 Cal.3d 492, 541 [286 Cal.Rptr. 283, 816 P.2d 1309] (conc. & dis. opn. of Mosk, J.) ["Then, in *People v. Frierson* . . . a plurality of the court considered in dictum whether a 1972 initiative measure was amendatory or revisory"].)

of citizens or another, we are faced with the reality that this is precisely what has happened with Proposition 8.

B. Proposition 8 Alters The Constitutional Scheme By Removing Equal Protection From Judicial Review.

The Constitution requires the Court to guarantee equal protection against the whims of the voting majority. (See *Everson v. Board of Ed. of Ewing Tp.* (1947) 330 U.S. 1, 28 [67 S.Ct. 504, 91 L.Ed. 711] (dis. opn. of Jackson, J.) ["[T]he great purposes of the Constitution do not depend on the approval or convenience of those they restrain"]; *Howard Jarvis Taxpayers' Assn v. Fresno Metro. Projects* (1995) 40 Cal.App.4th 1359, 1362 [48 Cal.Rptr.2d 269] ["[S]ometimes the majority cannot impose its view because the Constitution restrains that action. This is because the Constitution is the ultimate social and legal contract. It allows the majority to promote its view so long as it does not interfere with the constitutional provisions guaranteed to the minority"].) Unless the judiciary is vested with the ultimate power and responsibility to protect the rights of the minority against encroachment by the voting majority, equal protection is an empty concept. Of the various protections that the California Constitution entrusts to the judiciary to enforce, this Court has singled out equal protection: "Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights,

whether of individual or minority, from obliteration by the majority." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141 [93 Cal.Rptr. 234, 481 P.2d 242]; see also *United States Steel Corp. v. Public Utilities Com.* (1981) 29 Cal.3d 603, 611-612 [175 Cal.Rptr. 169, 629 P.2d 1381] ["[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally") (quoting *Railway Express Agency, Inc. v. New York* (1949) 336 U.S. 106, 112-113 [69 S.Ct. 463, 93 L.Ed. 533] (conc. opn. of Jackson, J.))].)

None of the other branches of government—and certainly not a bare majority of voters—is as capable as the Courts of protecting the rights of politically unpopular groups. As this Court explained with respect to the unique power of the judiciary in the context of discrimination against aliens: "'[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.'" (*Purdy and Fitzpatrick v. State* (1969) 71 Cal.2d 566, 579-580 [79 Cal.Rptr. 77, 456 P.2d 645] (quoting *United States v. Carolene Products Co.* (1938) 304 U.S. 144, 153 & fn. 4 [58 S.Ct. 778, 82 L.Ed. 1234]).) Or, in the words of Justice Scalia, "[o]ur salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved

ones what they impose on you and me." (*Cruzan v. Director, Missouri Dept. of Health* (1990) 497 U.S. 261, 300 [110 S.Ct. 2841, 111 L.Ed.2d 224] (conc. opn. of Scalia, J.).)

Proposition 8 is dangerous and unprecedented in that it would—in addition to "[e]liminat[ing] the right of same-sex couples to marry in California"—act to revise and limit the Article 1 guarantee of equal protection with respect to groups defined by a suspect classification. Previous initiatives to amend the Constitution were exercised without disturbing the power of the judiciary to require the equal protection of laws, because previous initiatives had a universal effect on voters. Such is not the case when a majority of voters, as with Proposition 8, seek to revoke equal protection rights of a distinct group. The members of the political majority do not put themselves at risk, because they are singling out only the unpopular minority for adverse treatment.

The 1911 amendment that added the initiative process to the state Constitution could not itself remove the power to interpret Article I from the judiciary, where it was originally vested, and place such power in the hands of the voting majority. To accomplish something so bold would itself have required a constitutional revision. But the 1911 amendment was adopted through the amendment process, not the revision process. (See Grodin et al., The California State Constitution: A Reference Guide (1993) pp. 69, 303.) Therefore, the initiative power itself cannot be interpreted to

negate the power of the courts to declare and require correction of equal protection violations or to grant to the people the power to remove equal protection from a suspect class. No mere amendment could have stripped the judiciary of its most essential role in guaranteeing the equal protection of the law.

Significantly, the Attorney General agrees that Proposition 8 cannot stand because "the initiative power could never have been intended to give the voters an unfettered prerogative to amend the Constitution for the purpose of depriving a disfavored group of rights determined by the Supreme Court to be part of fundamental human liberty." (Atty. Gen. Br. at p. 76.) As the Attorney General states, there are certain "inalienable" rights "inherent in human nature," and "not surrendered in the social compact." (*Id.* at p. 80.) "The protection of these rights," such as the right to liberty and to equal dignity, "was one of the very purposes of the Constitution." (*Id.* at p. 81.) Regardless of the precise doctrine chosen to protect the Constitution's core guarantees, the office of this Court is to afford such protection. At a bare minimum, if drastic changes like Proposition 8 are to take effect, they must first be subject to the more rigorous revision process. "Mere majority support alone for the measure does not suffice." (*Id.* at p. 89.)

C. Proposition 8 Dramatically Changes The Plain Text Of The Constitution's Equal Protection Clause

Comparing the text of Proposition 8 to the text of the Constitution's equal protection provisions renders inescapable the conclusion that, as a matter of simple textual analysis, Proposition 8 purports to revise those provisions.

Article I, Section 7(a) of the California Constitution plainly states: "A person may *not* be deprived of life, liberty, or property without due process of law or denied *equal* protection of the laws; . . ." (Emphasis added.) Article I, section 7(b) goes on to declare: "A citizen or class of citizens may *not* be granted privileges or immunities not granted on the same terms to all citizens." (Emphasis added.)

By mandating different treatment of certain Californians, Proposition 8, as to those Californians, effectively deletes the word "equal" from the very clause that prevents the government from denying "equal protection of its laws" to anyone. The nullification of the equal protection provisions can hardly be considered "an addition or change within the lines of the original instrument." (*Livermore*, *supra*, 102 Cal. at pp. 118-119.) If core provisions of the California Declaration of Rights can have their operative words effectively deleted as to particular groups by mere "amendment," it is difficult to determine what would constitute a "revision." Would all of the words of the equal protection clause have to change? Would more than one group have to be excluded of its coverage?

Certainly no group hoping to mobilize a majority to strip the right to equal protection from a minority would bother first to go through the more cumbersome procedure required to pass a valid revision when a mere amendment, passed by a bare majority of voters, will affect the desired change. (See *Livermore*, *supra*, 102 Cal. at p. 118 [holding that the text of Article XVIII "precludes the idea that it was the intention of the people, by the provision for amendments authorized in the first section of this article, to afford the means of effecting the same result which in the next section has been guarded with so much care and precision"]; cf. *McFadden v. Jordan*, *supra*, 32 Cal.2d at 347 [explaining that the people of California purposefully "made amendment relatively simple but provided the formidable bulwark" of additional procedural gateways to prevent improvident passage of a revision].) Accordingly, established law dictates that Proposition 8, and any majority-vote ballot initiative having the effect of stripping the core of equal protection rights from the Constitution, is a revision and cannot come into force.

III. A Fundamental Change In The Constitutional Scheme That Eliminates Reasonable Checks On The Oppression Of Politically Vulnerable Groups Would Pose A Threat, Not Only To Lesbian And Gay Persons, But Also To Other Disfavored Groups.

If the initiative process can be used to deny equal protection under the law to gay and lesbian persons because of their sexual orientation, then the same process could be used to deprive any number of other disfavored

groups of Californians of many or even all of their protected rights under the state Constitution. Efforts targeted at women could be close behind.

Women as a group have historically been the target of invidious discrimination and unequal treatment, and *amici* are especially concerned that this Court reject the process used to promote the discrimination embodied in Proposition 8. (See *Sail'er Inn, supra*, 5 Cal.3d at p. 19 [explaining that "[w]omen, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities" and collecting historical instances of sex discrimination, such as the denial of the right to vote, the right to serve on juries, diminished "employment and economic opportunities," and treatment as "inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts"].) Women of color, in particular, may be among the most vulnerable groups to attacks on their right to equal protection through the initiative process, as they would be negatively affected by initiatives targeting women and racial or ethnic minorities for disfavored treatment. And, left undisturbed, the unprecedented framework established by Proposition 8 would preclude judicial enforcement of the suspect classification doctrine to protect these women.

California has a long and proud history of protecting women's rights under the equal protection clause. Since its ratification in 1879, California's Constitution has expressly provided protections against

discrimination based on sex. (Cal. Const. of 1879, art. XX, § 18 ["No person shall, on account of sex, be disqualified from entering upon or pursuing a lawful business, vocation or profession"].) As early as 1881, this Court sustained women's claims of sex discrimination under the California Constitution. In *In re Maguire* (1881) 57 Cal. 604, the Court, relying on section 18, invalidated a San Francisco ordinance prohibiting women from waiting on customers between the hours of 6 p.m. and 6 a.m. in a place where liquor was sold. The Court held that the Constitution admitted of no exceptions, and "neither [the Court] nor any other power in the State have the right or authority to insert any, whether on the ground of immorality or any other ground." (*Id.* at p. 608.)

Notwithstanding the Constitution's express guarantee and this Court's established precedent, in the not so distant past, this Court was required to intervene to enforce the Constitution's promise of equality for women. In *Sail'er Inn, supra*, 5 Cal.3d at p. 1, the Court invalidated a statewide law that prohibited women from tending bar unless they fit into narrow exceptions, a law remarkably similar to the ordinance at issue in *Maguire*. In so doing, the Court held that legal classifications based on sex merit strict scrutiny under California's equal protection clause—six years before the federal court recognized heightened scrutiny for sex classifications – albeit in a more limited fashion. (See *Craig v. Boren* (1976) 429 U.S. 190 [97 S.Ct. 451, 50 L.Ed.2d 397] [holding gender

discrimination claims under the U.S. Constitution's equal protection clause subject to intermediate scrutiny].)[12]

Since *Sail'er Inn*, this Court has reaffirmed its central holding that classifications based on sex are subject to strict scrutiny. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37 [219 Cal.Rptr. 133, 707 P.2d 195] ["[C]lassifications based on sex are considered 'suspect' for purposes of equal protection analysis under the California Constitution"]; *Arp v. Workers' Compensation Appeals Board*, *supra*, 19 Cal.3d at p. 400 ["[T]he strict scrutiny/compelling state interest test must govern sex discrimination challenges under . . . the California Constitution"]; *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 564 [10 Cal.Rptr.3d 283, 85 P.3d 67] ["We long ago concluded that discrimination based on gender violates the equal protection clause of the California Constitution (art. I, § 7(a)) and triggers the highest level of scrutiny"].) The

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[12] In fact, the U.S. Supreme Court had only 23 years earlier upheld a Michigan statute providing that in cities with a population over 50,000, no female could be licensed as a bartender unless she was the wife or daughter of the male owner. (See *Goesaert v. Cleary* (1948) 335 U.S. 464 [69 S.Ct. 198, 93 L.Ed. 163].) *Sail'er Inn* distinguished and criticized the holding in *Goesaert*, see *Sail'er Inn*, *supra*, 5 Cal.3d at pp. 21-22, a position that was vindicated by the U.S. Supreme Court's subsequent decision in *Craig*, which overruled *Goesaert*. (See *Craig v. Boren*, *supra*, 429 U.S. at p. 210, fn. 23.) California's Constitution may still provide more robust protection against gender discrimination than the U.S. Constitution. (See *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 31-32 [112Cal. Rptr.2d 5] [noting distinction between federal intermediate scrutiny and California strict scrutiny standards].)

Constitution's protections against gender discrimination extend to dignitary harms and official impositions of social stigma, not just financial interests. (See *Bobb v. Municipal Court* (1983) 143 Cal.App.3d 860, 866 [192 Cal.Rptr. 270] [reversing contempt sanctions where only women were asked, as potential jurors, to answer questions about marital status].) A hallmark of our equal protection clause is to guard against "second class citizenship." (*Id.* at p. 865.)

But in the face of a proposition like Proposition 8, even the Court's constitutionally required protection of equality for women is called into doubt. Just as strict scrutiny applies to gender-based discrimination, the Court has identified gays and lesbians as a suspect class entitled to heightened protection. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 844.) While same-sex couples, rather than women, are the immediate targets of Proposition 8, the use of the initiative process to enact Proposition 8 threatens all minority and disadvantaged groups. If Proposition 8 stands, simple majorities could attempt to strip other minority groups of protection. Women's basic rights, like those of gays and lesbians, could be as ephemeral as the next election and subject to unending attack. Voting majorities could simply perpetuate through the initiative process the very conditions that have led this court to designate gender and sexual orientation as suspect classifications.

If Proposition 8 stands, no California constitutional barrier will exist to prevent the next constitutional initiative mandating discrimination. Will we have a world in which year after year we go to the polls to vote on a potentially endless array of propositions by which powerful groups seek to limit the fundamental rights of the less powerful? Proposition 9 may require that a woman be prevented from marrying if she has ever had an abortion or been divorced. Proposition 10 may require that a woman provide evidence of her fertility before being allowed to marry. Proposition 11 may require that unmarried women or immigrant women be denied social services available to others.

The claim by Interveners that the United States Constitution serves as the lone bulwark against, or the "complete answer," Interveners' Br. at p. 30, to invidious discrimination offends longstanding principles of federalism and this Court's well-established jurisprudence. Under this country's system of federalism, states are recognized as separate sovereigns, each with the power to grant and protect the rights of its citizens. (See *Bennett v. Mueller* (9th Cir. 2003) 322 F.3d 573, 582-583 ["[T]he federal courts will not encroach on the constitutional jurisdiction of the states. . . . It is fundamental that state courts be left free and unfettered by the federal courts in interpreting their state constitutions. . . . This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and federal courts and is of equal

importance to each. . . . [¶] Therefore, we respect the California Supreme Court's sovereign right to interpret its state constitution independent of federal law" (internal alterations, citations and quotation marks omitted)].) Although the federal equal protection clause may provide shelter from the most extreme abuses, federal protection is by no means assured. (See *Nguyen v. INS* (2001) 533 U.S. 53 [121 S.Ct. 2053, 150 L.Ed.2d 115] [holding that 8 U.S.C. § 1409, which makes it more difficult for a child born out of wedlock whose father is a citizen to prove U.S. citizenship than for one whose mother is a citizen, does not violate equal protection]; see also *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) 550 U.S. 618, 127 S.Ct. 2162, 2188 [167 L.Ed.2d 982] (dis. opn. of Ginsburg, J.) [stating that imposing a strict statute of limitations is "totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure"]; *Gonzales v. Carhart* (2007) 550 U.S. 124 [127 S.Ct. 1610, 167 L.Ed.2d 480] [upholding a statute that restricted certain abortion procedures without an exception for maternal health]; cf. *Korematsu v. United States* (1944) 323 U.S. 214 [65 S.Ct. 193, 89 L.Ed. 194] [holding that exclusion orders against Japanese-Americans did not violate equal protection].) This Court has an independent obligation to guard rights under the California Constitution. As this Court explained in *Committee to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d at p. 261, the California Constitution "is, and always has been, a document of independent force"

and the Court "cannot properly relegate [its] task to the judicial guardians of the federal Constitution, but instead must recognize [its] personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions." (Quotation marks and citations omitted.)

Woman must not once again be relegated to the status of "second class citizen[]" that the Constitution expressly prohibits. *Sail'er Inn*, *supra*, 5 Cal.3d at p. 19. Sustaining Proposition 8 creates precisely this risk.

CONCLUSION

Californians of all stripes rely on the courts and the Constitution as guarantors of equal protection. If, however, a mobilized majority can nullify such power, we have only equal protection politics, not equal protection law. Our common understanding that the Constitution and the courts can protect minorities will have been a naïve fantasy. Our history as Californians tells a different story. The equal protection clause is part of the foundation of our governance and it cannot be diminished by amendment to deprive a suspect class of a constitutional right.

For the foregoing reasons, as well as those stated in the Petitioners' Briefs, this Court should grant the petition for writ of mandate and order Respondents to refrain from enforcing or effectuating Proposition 8.

DATED this 14th day of January, 2009.

Respectfully submitted,

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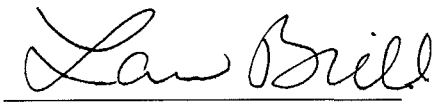
By: 
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CERTIFICATE OF COMPLIANCE

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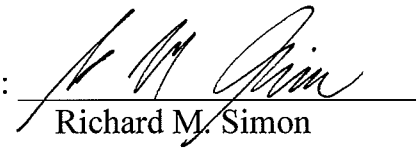
By: 
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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1800 Avenue of the Stars, Suite 900, Los Angeles, California 90067-4276.

On January 14, 2009, I served the foregoing document described as **CORRECTED APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS AND [PROPOSED] AMICI CURIAE BRIEF OF AMICI CONCERNED WITH GENDER EQUALITY: EQUAL RIGHTS ADVOCATES, CALIFORNIA WOMEN'S LAW CENTER, WOMEN LAWYERS OF SANTA CRUZ COUNTY, LAWYERS CLUB OF SAN DIEGO, LEGAL MOMENTUM AND NATIONAL ASSOCIATION OF WOMEN LAWYERS** on each interested party, as stated on the attached service list.

[X] (BY MAIL) I placed a true copy of the foregoing document in a sealed envelope addressed to each interested party, as set forth above. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing at Irell & Manella LLP, Los Angeles, California. I am readily familiar with Irell & Manella LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

Executed on January 14, 2009, at Los Angeles, California.

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

Mark A. Kressel
(name)

(Signature)

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