Case Nos. S168047, S168078 and S168281

IN THE SUPREME COURT OF CALIFORNIA

KAREN L. STRAUSS et al.,
Petitioners,

v.

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

DENNIS HOLLINGSWORTH et al.,
Interveners.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to Rule 8.520 of the California Rules of Court, the applicants listed below ("Applicants") respectfully request leave to file the accompanying [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS in the above-captioned matter.

Undersigned counsel certifies that there are no parties, counsel, entities or other individuals to identify under Rule 8.200(c)(3) of the California Rules of Court.

STATEMENTS OF INTEREST OF AMICI CURIAE

Applicant Anti-Defamation League was founded in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all. Today, it is one of the world's leading civil and human rights organizations combating anti-Semitism, all types of prejudice, discriminatory treatment and hate. The League is committed to protecting the civil rights of all persons, and to assuring that each person receives equal treatment under law.

Applicant Asian Law Caucus is a non-profit organization advancing the legal and civil rights of Asian American and Pacific Islander communities. Founded in 1972, it is the nation's oldest legal organization serving Asian Americans and is dedicated to the pursuit of equality and justice for all sectors of society.

Applicant Americans United for Separation of Church and State is a national, nonsectarian public interest organization that is committed to defending the constitutional principles of religious liberty and separation of

church and state. Since its founding in 1947, Americans United has regularly been involved as a party, as counsel, or as an amicus curiae in many of the leading church-state cases in federal and state courts throughout the nation.

Applicant Japanese American Citizens League, founded in 1929, is the nation's largest and oldest Asian American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. It vigilantly strives to uphold the human and civil rights of all persons. Since its inception, JACL has opposed the denial of equal protection of the laws to minority groups. In 1967, JACL filed an amicus brief in *Loving v. Virginia*, urging the Supreme Court to strike down Virginia's anti-miscegenation laws, and contending that marriage is a basic civil right of all persons. In 1994, JACL became the first API non-gay national civil rights organization, after the American Civil Liberties Union, to support same-sex marriage equality for same-sex couples, affirming marriage as a fundamental human right that should not be barred to same-sex couples. JACL continues to work actively to safeguard the civil rights of all Americans.

Applicant Southern California Chinese Lawyers Association is a nonprofit bar organization providing mutual support for Chinese American lawyers, jurists and law students in Los Angeles and Orange Counties, whose goals include promoting the interests of the Chinese American and broader Asian Pacific American communities.

Applicant Asian Pacific Islander Legal Outreach is the largest social justice nonprofit law firm serving the Asian-American and Pacific Islander communities of the Greater Bay Area. Founded more than thirty years ago, its mission has always been to serve the most marginalized segments of the API communities, including underserved ethnic populations, seniors, those with limited English proficiency, immigrants, and LGBT members of the

API community. APILO's staff has authored and signed on to a number of amicus briefs representing the interests of the API community.

Applicant Legal Aid Foundation of Los Angeles is California's oldest and largest legal services organization, providing free legal assistance in a range of matters, including family law, to indigent clients for 80 years. Driven by a mission explicitly committed to combating discrimination, LAFLA advocates for equal protection under the laws for all California residents.

Applicant Bet Tzedek Legal Services has been dedicated to its core mission of pursuing equal justice for all since it was founded in 1974. As a direct legal services office in Los Angeles, Bet Tzedek works to protect the fundamental rights of its clients to housing, benefits, health care, security, safety and fairness. Bet Tzedek represents clients of every race, religion, sexual orientation and ethnicity.

Applicant Public Counsel is the public interest law office of the Los Angeles County and Beverly Hills Bar Associations and the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to indigent and underrepresented children, adults and families throughout Los Angeles County, ensuring that other community-based organizations serving this population have legal support, and mobilizing the pro bono resources of attorneys, law students and other professionals.

Applicant Orange County Asian Pacific Islander Community Alliance's mission is to build a healthier and stronger community by enhancing the well-being of Asian and Pacific Islanders through inclusive partnerships in the areas of service, education, advocacy, organizing, and research. It advocates for the equality and equity for members of the API

community, and believes that access to marriage is a right that should be available to all.

Applicant National Senior Citizens Law Center advocates to promote the independence and well-being of America's low income elders and people with disabilities through litigation, policy advocacy and through technical assistance and training of lawyers and other advocates.

Applicant API Equality – LA is a coalition of organizations and individuals who are committed to working in the Asian and Pacific Islander community in the greater Los Angeles area for equal marriage rights and the recognition and fair treatment of LGBT families through community education and advocacy. API Equality – LA recognizes that the long history of discrimination against the API community, especially California's history of anti-miscegenation laws and exclusionary efforts targeted at Asian immigrants, parallels the contemporary exclusion of lesbians and gay men from marriage in California.

Applicant API Equality is a coalition of organizations and individuals committed to working in the Asian and Pacific Islander communities in California, with a focus on Northern California, for equal marriage rights and the fair treatment of LGBT people and their families. Given the long history of exclusion and unequal treatment of APIs, API Equality is dedicated to redressing the inequality of depriving same-sex couples the right to marry.

Applicant API Parents and Friends of Lesbians and Gays (Los Angeles Chapter) is a nonprofit organization dedicated to providing support, education and advocacy for gays and lesbians in the Asian Pacific Islander community.

Applicant Chicana Latina Foundation is a non-profit organization whose mission is the empowerment of Chicanas/Latinas, through their personal, professional and educational advancement. CLF students, many

of whom are immigrant, low-income and second-language learners, receive financial support, leadership training and mentoring from CLF. CLF serves and advocates for the civil and social rights of its students and their families, including the right to marriage equality.

Applicant American Jewish Committee, a national human relations organization with over 175,000 members and supporters and 28 regional chapters, including four in the state of California, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the civil and religious rights of all Americans are equally secure.

Applicant Barbara Jordan/Bayard Rustin Coalition is a political advocacy organization working to empower Black LGBT individuals and families in Greater Los Angeles, to promote equal marriage rights and to advocate for fair treatment of everyone without regard to race, sexual orientation and gender identity or expression. JRC seeks to combat homophobia in the Black community as well as racism in the LGBT community with equal fervor and determination.

Applicant Asian Pacific Americans for Progress is a national network of progressive Asian Americans. APAP advocates full equality for all Americans.

Applicant BIENESTAR is a grass-roots, non-profit community service organization established in 1989. BIENESTAR is committed to enhancing the health and well-being of the Latino community and other underserved communities, with a special focus on LGBT Latino health and advocacy. BIENESTAR accomplishes this through community education, prevention, mobilization, advocacy, and the provision of direct social support services.

Applicant Asian Law Alliance is a nonprofit legal services organization serving and advocating for Asian and Pacific Islanders and

low income communities in Santa Clara County. It is ALA's mission to advocate for civil rights, including the right to marriage equality.

Applicant National Asian Pacific American Women's Forum is a multi-issue Asian Pacific American women's organization dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of APA women and girls. NAPAW advocates for the civil rights of all women and girls, including the right to marriage equality for same sex-couples.

Applicant Gay Vietnamese Alliance is a support group for gay, bisexual and transgender men of Vietnamese descent. GVA provides a safe space in which to network, educate, and empower.

Applicant South Asian Network is a community-based organization dedicated to advancing the health, empowerment and solidarity of persons of South Asian origin in Southern California. Founded in 1990, SAN's goal is to inform and empower South Asian communities by acting as an agent of change in eliminating biases, discrimination and injustices targeted against persons of South Asian origin and by providing linkages amongst communities through shared experiences.

Applicant Chinese for Affirmative Action is a 38-year old, membership-based nonprofit organization whose mission is to defend and promote the civil rights of Asian Americans, including the right to marriage equality, within the context of advancing a multiracial democracy.

Applicant Gay Asian Pacific Alliance is an organization dedicated to furthering the interests of gay and bisexual Asian Pacific Islanders by creating awareness, by developing a positive collective identity and by establishing a supportive community. GAPA was formed from the need for an organization to address, through a democratic process, social, cultural and political issues affecting the gay and bisexual Asian Pacific Islander community.

Applicant Gay Asian Pacific Support Network is a volunteer community-based organization serving the greater Los Angeles area and providing supportive environments for gay and bisexual Asian Pacific Islander men to meet, network, voice concerns, foster self-empowerment, and advocate on issues of significance to the gay Asian Pacific Islander community. GAPSN has been active in the fight for marriage equality for over a decade, beginning with early efforts to mobilize and educate the community around the issue following the Hawaii Supreme Court ruling in *Baehr v. Lewin*.

Applicant Korean Resource Center, a non-profit organization based in Los Angeles, was founded in 1983 to empower immigrants and people of color communities. KRC's mission is to provide needed social and health services to traditionally marginalized communities, educate the public on issues affecting low-income immigrants and people of color, advocate for the civil and immigrant rights of Korean Americans, and initiate dialogue and build coalitions with other communities of color. KRC believes that every human being, regardless of immigration status, ethnicity, race, gender, age, or sexual orientation, should hold and have access to equal rights.

Applicant Asian Communities for Reproductive Justice is a grassroots community-based organization in Oakland, California that works with communities and organizations to advance reproductive justice on the local, state and national levels. ACRJ believes that reproductive justice will be achieved when all people have the economic, social and political power and resources to make their own healthy decisions about gender, bodies and sexuality, including the right to marry.

Applicant And Marriage For All is an outreach effort to African-American communities in Northern California regarding the importance of marriage equality as a civil right.

Applicant Korean Community Center of the East Bay's mission is to empower the Korean American and other communities of the Bay Area through education, advocacy, services, and the development of community-based resources. KCC advocates for the civil rights, including the right to marriage equality, of all community members.

Applicant Advocacy Coalition of Tulare County for Women and Girls engages women of all ages in leadership opportunities that will promote social and personal change. Through social justice activism, ACT hopes to promote social growth and change among its current population for many years to come. As issues arise that affect women and girls, ACT is a catalyst for action.

Applicant Asian & Pacific Islander Wellness Center, headquartered in San Francisco, is the oldest and largest nonprofit in North America focusing on sexual health and HIV in Asian and Pacific Islander communities. The Center's mission is to educate, support, empower and advocate for Asian and Pacific Islander communities – particularly members of the community living with, or at risk for, HIV/AIDS. The Center serves its constituent communities through a variety of activities, including providing medical care, HIV and other testing, cultural competency training and materials, peer advocacy, and case management.

Applicant Filipinos for Affirmative Action is a 35-year old nonprofit the mission of which is to build a strong and empowered Filipino community by organizing constituents, developing leaders, providing services, and advocating for policies that promote social and economic justice and equity.

Applicant National Korean American Service & Education Consortium is a national nonprofit organization based in Los Angeles that was founded in 1994 by local community centers to promote a multi-issue civil rights and human rights agenda, project a national progressive voice

for Korean-Americans and promote their full participation in the United States. To this end, NAKASEC promotes equitable and just changes to the political and legislative systems through education, policy advocacy, grassroots organizing, and community mobilization.

Applicant Asian & Pacific Islander Family Pride is a nonprofit organization dedicated to ending the isolation of Asian and Pacific Islander families with LGBT members through support, education and dialogue. A&PI Family Pride believes that marriage is a fundamental right for all.

Applicant Ô-Môi is a support group for lesbians, bisexual women, and transgender persons of Vietnamese descent. Ô-Môi's goal is to provide a resources and support for its members.

Applicant Asian and Pacific Islander American Health Forum is a national organization dedicated to promoting policy, program, and research efforts to improve the health and well-being of API communities. Founded in 1986, the Health Forum approaches activities with the philosophy of coalition-building and developing capacity within local API communities. It advocates on health issues of significance to API communities, conducts community-based technical assistance and training, provides health and U.S. Census data analysis and information dissemination, and convenes regional and national conferences on API health.

Applicant Asian Pacific AIDS Intervention Team's mission is to improve the quality of life for Asian and Pacific Islanders living with or at-risk for HIV/AIDS by providing prevention, health and social services, community leadership and advocacy in Southern California. As one of the nation's largest providers of HIV/AIDS prevention and care services for the Asian and Pacific Islander communities, APAIT has been providing culturally and linguistically appropriate services to API's since 1987.

Applicant Asian Pacific Policy & Planning Council (A3PCON) is a coalition of Asian and Pacific Islander American (APIA) health, human

service, educational, cultural and policy agencies, and individuals who advocate for the rights of and services for the APIA community in Southern California, primarily in Los Angeles County. During over 30 years of its history, A3PCON and its member organizations have advocated on behalf of low-income, immigrant, refugee and other disadvantaged sectors of the population.

Applicant Philippine American Bar Association is a nonprofit organization that supports law students and attorneys of Filipino descent and advocates on behalf of the greater Filipino-American community in and around Los Angeles County.

The aforementioned Applicants provide services to, and advocate on behalf of, a wide range of Californians who have suffered unequal treatment in a variety of different areas. Applicants are united in their belief that our Constitution mandates that equal protection and fundamental rights apply equally to all, and that this fundamental principle can be changed, if at all, only through revision and not amendment. Applicants base this belief on their extensive experience representing the interests of minorities – those who benefit most from equal protection of the laws.

THE ACCOMPANYING BRIEF WILL ASSIST THE COURT IN DECIDING THIS MATTER

This brief will assist the Court in deciding this matter by addressing the fundamental nature of equal protection, an abiding and permanent principle the People have enshrined in the Constitution. Amici contend that the People have willed, through the procedures of article XVIII, that a bare majority of voters may not withhold equal protection – or even a single aspect of equal protection – from members of a disfavored minority. Such a dramatic alteration of equal protection principles may only be effected

through the more open, extensive and deliberative process of revision or convention and not by amendment. Applicants present these arguments to the Court from the unique perspective of organizations that serve the political, social, legal and medical needs of racial, religious and ethnic minorities, as well as those of all Californians.

For these reasons, Applicants respectfully request leave to file the accompanying [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS.

Dated: January 14, 2009

PROSKAUER ROSE LLP
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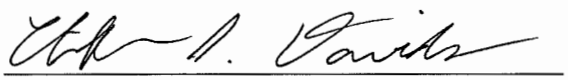

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INTRODUCTION

Notwithstanding the November vote, allowing Proposition 8 to stand would flout the will of the People. This is so because "[t]he provisions of the California Constitution itself constitute the ultimate expression of the People's will." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 787.) For the entirety of California's history – though with some dark hours in which such principles were disregarded – the People have willed, in sum or substance, that "[a] person may not be . . . denied equal protection of the laws . . . . A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." (Cal. Const., art. I, §§ 7(a)-(b).) Proposition 8 purports to selectively withdraw full equal protection rights from a disfavored minority by an amendment approved at the ballot box. But in our Constitution, that venerable expression of the People's will, the People wisely ensured that they could effect such a dramatic change only through the more open, extensive and deliberative process of revision or convention (See (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 347.) This distinction is not merely semantic. (*Id.*) Rather, by establishing this separate, more rigorous mechanism for fundamental changes, the People have sought to protect basic rights, and the integrity of our foundational document, from "the vicissitudes of political controversy." (*In re Marriage Cases*, *supra*, 43 Cal. 4th at p. 852 [quoting *Board of Education v. Barnette* (1943) 319 U.S. 624, 638].)

The principles of equal protection – and the suspect classification doctrine in particular – protect groups historically subject to discrimination based on characteristics unrelated to the ability to participate in or contribute to society. (*Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1, 19.) As the Court has held, the core of equal protection is its mandate that "the principles of law that officials would impose upon a minority must be imposed generally." (*United States Steel Corp. v. Public Utilities Com.*

(1981) 29 Cal. 3d 603, 611-612 [quoting *Railway Express Agency v. People of State of New York* (1949) 336 U.S. 106, 112 (conc. op'n. Jackson, J.)].) That requirement is the Constitution's safeguard against any tendency of majorities to exclude members of disfavored groups from basic civil rights and protections and is so fundamental to our system of government that it may not be altered other than through revision.

Equally fundamental to California's government plan is the precept that all persons are entitled not simply to equal protection under the law, but also to *equal application* of such equal protection. Interveners suggest that Proposition 8 is acceptable as a mere "caveat" to the equal protection rights gay and lesbian Californians otherwise enjoy. (Int. Opp. Br. at p. 23 ["The equal protection clause continues fully to protect gays and lesbians in literally all areas of the law, with the sole caveat that the definition of marriage is limited."].) But this assertion acknowledges the radical change Proposition 8 purports to accomplish. Proposition 8 seeks to replace the fundamental principle that all persons are equally entitled to equal protection of the laws with a new credo: All Californians are equal, but some are more equal than others.

Labeling this radical change a mere "caveat" does not alter its profound implications. Both history and this Court's precedents teach that the unavailability of even a single right in a single area renders a minority group inferior. (See *People v. Hall* (1854) 4 Cal. 399.) If the initiative process may be used to eliminate gay and lesbian Californians' right to marry, then that process also can be employed to strip gay men and lesbians – or racial, religious or other minorities – of full equal protection and other fundamental rights. As discussed below, California's unfortunate history of enacting discriminatory measures based on national original, immigration status and race underscore the need for rigorous safeguards against the whims of a bare majority of voters in a single election.

Radical changes to the Constitution's mandate of equality cannot be accomplished through mere amendment. The Court, empowered by article XVIII's distinction between revision and amendment, is the guardian of the Constitution. The only way to respect the People's will as expressed in this abiding document is to hold that "caveats" to equal protection may not be created as readily as Interveners propose, but only through procedures that provide for a magnitude of public deliberation commensurate with the magnitude of the proposed change.

ARGUMENT

A. Adjudging Proposition 8 a Revision, Rather Than an Amendment, Comports with the Restraints the People Placed on the Initiative Power in Article XVIII of Our Constitution.

When first considering the distinction between "revision" and "amendment," this Court emphasized, in *Livermore v. Waite* (1894) 102 Cal. 113, 118, the permanence of the principles on which our Constitution rests:

> 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.

Proposition 8 threatens the permanent and abiding nature of the requirement that laws must apply equally to all – the most basic principle of democratic government. Although Proposition 8 is only 14 words long, the simplicity of a proposed constitutional provision says nothing of its scope. As this Court observed, "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." (*Amador Valley Joint Union High School Dist. v. State Board of Equalization* (1978) 22 Cal.3d 208, 223.)

Proposition 8 on its face seeks to compel government discrimination against an historically disfavored group by constitutional decree adopted through the amendment process. The relative novelty of that proposal underscores how significantly it would alter existing constitutional

principles.[1] Under this Court's precedents, such a drastic alteration of the nature and application of equal protection and the protections of the suspect classification doctrine is a revision, not an amendment. As such, Proposition 8 cannot be enacted through the typical initiative process. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 354-355; *Livermore v. Waite* (1894) 102 Cal. 113, 118-119.)

As this Court has made clear, statutory measures enacted by initiative are subject to the same constitutional constraints as ordinary legislation. (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 851.) Accordingly, if the Legislature or the People enact a discriminatory statute, the courts can fulfill their constitutionally mandated role of enforcing the equality guarantees of the California Constitution and invalidating laws that violate those guarantees. (See, e.g., *Sail'er Inn v. Kirby, supra*, 5 Cal. 3d at p. 22 [striking law restricting women's choice of occupation under the California equal protection clause]; *Estate of Yano* (1922) 188 Cal. 645 [invalidating provision of Alien Property Act that denied an alien parent the right to become the guardian of the estate of his native-born child, in part under the California privileges and immunities clause].) The suspect

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[1] Attempts to alter the California Constitution (as opposed to California's statutory law) to mandate official discrimination or to permit private discrimination on suspect bases have been few and far between, and amici are not aware of any California constitutional measure adopted by initiative that on its face mandated such official discrimination. The *constitutional convention* of 1879 enacted article XIX, which expressly mandated discrimination against Chinese persons in employment and other areas. In 1964, California voters approved a constitutional amendment that was neutral on it face but sought to encourage and permit private racial discrimination in the sale and rental of housing. (See *Mulkey v. Reitman* (1966) 64 Cal.2d 529 [invalidating Proposition 14 under the federal Constitution].)

classification doctrine, enforced by the courts, thus safeguards the minority from the biases of the majority.

In the context of *constitutional* initiatives, the People, through our Constitution, have provided an analogous form of protection against enactments that would infringe upon the equal protection rights of disfavored minorities: the distinction between constitutional amendments, which may be enacted through the typical initiative process, and constitutional revisions, which may not. As stated above, this Court has noted that "the provisions of the California Constitution itself constitute the ultimate expression of the People's will." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 852.) Indeed, by enshrining the distinction between amendment and revision in our Constitution, "[t]he people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood there was a real difference between amendment and revision." (*McFadden v. Jordan*, *supra*, 32 Cal.2d at p. 347.) "The differentiation required [between 'amendments' and 'revisions'] is not merely between two words; more accurately it is between two procedures and between their respective fields of application." (*Id.*) By requiring a more deliberative, formalized process for the enactment of measures that seek to significantly alter the underlying principles of the California Constitution or the nature of our basic governmental plan, the People have attempted to minimize the likelihood that such changes will be based on any animus or whim of a majority of voters.

Interveners argue that Proposition 8 must be upheld in order to carry out the People's will. However, to do so, the Court would have to contravene the People's will as expressed in the Constitution. The People

have distinguished between amendments and revisions in article XVIII and have imposed on their own initiative power an important restraint to be enforced by the Court. In so doing, the People recognized that the Constitution loses its venerable status when its core principle, equal protection of the laws applied equally, can be nullified for a class of persons by fifty percent plus one of the voters participating in a single election. Amici therefore urge the Court to respect the will of the People so long expressed in our Constitution. Just as this Court protects the interests of minorities through the application of heightened scrutiny to laws that discriminate based on suspect classifications, this Court should recognize that a measure that seeks selectively to remove equal enjoyment of a fundamental right only from a disfavored (and otherwise constitutionally protected) group is a proposed revision to the Constitution and can be adopted, if at all, only through the more rigorous procedures for constitutional revision codified by the People in article XVIII.

In urging this Court to enforce that self-imposed restraint, amici do not suggest that the Court should thereby deny the People the power to change the ultimate expression of their will. Rather, by subjecting Proposition 8 to the more deliberative process required for constitutional revision, this Court would ensure that change in the ultimate expression of the People's will is accomplished through the procedures mandated by article XVIII for alterations of such magnitude. Those procedures entail open and extensive debate in the Legislature followed by a vote of the People. Rather than silencing the People's voice, those procedures expand public consideration and discussion of the relevant issues.

B. Piecemeal Withdrawal of Equal Protection of the Laws May Be Accomplished Only through Constitutional Revision.

Notwithstanding Interveners' characterization of Proposition 8 as a "caveat" that leaves all other equal protection rights intact, (Int. Opp. Br. at p. 23), both history and this Court's suspect classification doctrine teach that such measures inevitably impose "the stigma of inferiority and second class citizenship." (*Sail'er Inn v. Kirby*, *supra*, 5 Cal.3d at p. 19.) Codifying such second-class treatment in the current Constitution would denigrate the freedoms the People have enshrined therein.

As the Court's precedents demonstrate, deprivation of a single right based on minority status can mean the difference between full citizenship and inferiority. A powerful illustration of this principle is *People v. Hall, supra*, 4 Cal. 399. The *Hall* Court considered whether a rule of evidence barred the testimony of Chinese Californians in criminal prosecutions of white defendants.[2] The Court ruled that, based on the profound implications of affording this *single right in a single area*, public policy necessitated that testimony of Chinese Californians be excluded:

> The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls.
>
> This is not a speculation which exists in the excited and over-heated imagination of the patriot and statesman, but it is an actual and present danger.

[2] The specific question was whether Chinese Californians were included in a statute that read: "No Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man." The Court considered whether Chinese people were "Indian" for purposes of the ban. (*People v. Hall*, *supra*, 4 Cal. at p. 400.)

> The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State, except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.

People v. Hall, *supra*, 4 Cal. at pp. 404-405.

While clearly the Court has abandoned such prejudices, the Court's central insight – that equal protection principles are indivisible – transcends its unfortunate application. To preserve or deprive one equal protection right is to recognize or denigrate equal protection in its entirety.

Proposition 8 thus represents a fundamental alteration of equal protection principles. If the initiative process can be used to change the California Constitution to strip gay and lesbian individuals of the fundamental right to marry, then that process also can be used to strip gay and lesbian people of any and all state constitutional rights, such as the right to parent, to work in certain professions, or even to enter into private consensual relationships. Such a result is anathema to the fundamental right to equal protection of the laws which, like our Constitution as a whole, rests upon the inalienable dignity, personhood, and equality of the individual. (See, e.g., Cal. Const., art. I, § 1.)

Interveners attempt to belie such fears by assuring the Court that the Federal Constitution protects gay men and lesbians from further denigration

of their state equal protection rights. (Inter. Opp. Br. at pp. 29-30). That is irrelevant and not necessarily true. (See, e.g., *Lofton v. Sec'y of the Dep't of Children & Family Servs.* (11th Cir. 2004) 358 F.3d 804 [upholding Florida's ban on adoption by "homosexuals"].) The People are not required to depend on the Federal Constitution or United States Supreme Court to protect their basic civil rights. Our Constitution is – and must continue to be – an independent guarantor of such rights. (See, Cal. Const., art. I, § 24; *People v. Hannon* (1977) 19 Cal.3d 588, 607 fn. 8 [calling the California Constitution "a document of independent force and effect particularly in the area of individual liberties"].)

Accordingly, in order to effectively protect individual and minority rights, the *state* guarantee of equal protection cannot be parceled out or abrogated in a particular arena; to deny gay and lesbian people equal protection with regard to the fundamental right to marry is to stigmatize them as unworthy of equal protection across the board. (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 846 ["[P]articularly in light of the historic disparagement of and discrimination against gay persons, there is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships whereby the term 'marriage' is denied only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship."].) As *Hall* illustrates, when a law denies the equality of a particular group in one area, that denial inevitably has far-reaching – and often devastating – effects.

C. Denying Full Equal Protection to One Group Undermines the Principles of Equal Protection for All.

Permitting Proposition 8's supporters to forgo the revision process jeopardizes the freedom of all Californian minority groups – not just gay and lesbian people. If Proposition 8 can strip fundamental rights from gay and lesbian people by a 52 percent majority, future amendments can strip away fundamental rights from other disfavored groups based on race, national origin, gender or religion. If Proposition 8 were a proper subject for an initiative vote, then so would be a measure seeking to amend the California Constitution to bar interracial or interfaith marriages, to exclude women from certain occupations, to limit freedom of speech only for certain racial or national groups, or to suspend protections against unwarranted searches and seizures for members of certain national groups.[3]

Official discrimination throughout California history against persons of Asian and Pacific Islander descent, as well as members of other national, racial and ethnic groups, illustrates the wisdom of the safeguards contained in article XVIII and of applying them to purported amendments that strip disfavored minorities of equal protection rights. Such discriminatory measures have included, among others:

- tax statutes designed to drive Chinese immigrants from the state (see, e.g., Foreign Miners' License Tax, Stats. 1852 ch. 37; Chinese Police Tax, entitled "An Act to protect Free White Labor against competition with Chinese Coolie Labor, and to discourage the Immigration of the Chinese into the State of California," Stats. 1862 ch. 339);

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[3] To reiterate, although the federal Constitution and Supreme Court might provide protection against such enactments, Californians are entitled to the independent protections of their state Constitution. (See Cal. Const., art. I, § 24; *People v. Hannon, supra*, 19 Cal.3d at p. 607 fn. 8.)

- statutes prohibiting persons designated as "black or mulatto . . . or Indian" from testifying "in favor of, or against, any white person" (Stats. 1850, ch. 99, p. 14 [criminal cases]; Stats. 1851, ch. 5, p. 394, subds. 3-4 [civil cases]; see also *People v. Hall, supra*, 4 Cal. 399 [upholding the constitutionality of those laws and holding that they applied to bar testimony by Chinese persons as well]; Stats. 1863, ch. 70 [codifying the decision in *Hall*]);

- statutes and ordinances barring "Negroes, Mongolians, and Indians" from public schools (see, e.g., Stats. 1860, ch. 329, p. 8) and requiring the provision of separate schools "for children of Mongolian or Chinese descent" (Stats. 1885, ch. 117, p. 1); City and County of San Francisco Order Nos. 1,569, §§ 1-3 and 1,587, § 68 (enacted Jul. 28, 1880) [cited in *Yick Wo v. Hopkins* (1886) 118 U.S. 356]; and

- statutes prohibiting marriage between "white persons [and] negroes, Mongolians, members of the Malay race, or mulattoes." (Former Cal. Civ. Code § 60, added by Stats. 1850, ch. 140, p. 424, amended by Stats. 1901, p. 335 and Stats. 1933, p. 561 [cited in *Perez v. Sharp* (1948) 32 Cal.2d 711].)

The People have enacted similar discriminatory statutes through the initiative process, as well. In 1920, for example, California voters approved an initiative that strengthened and expanded the so-called Alien Land Law, which prohibited certain immigrants who were ineligible for citizenship from owning agricultural lands. Although the initiative did not mention Japanese persons by name, it was enacted through "a campaign with a bitter anti-Japanese flavor. All the propaganda devices then known – newspapers, speeches, films, pamphlets, leaflets, billboards, and the like – were utilized to spread the anti-Japanese poison." (*Oyama v. California* (1948) 332 U.S. 633, 658 (conc. opn. Murphy, J.).)

Similarly, in 1964, California voters enacted Proposition 14, which amended the California Constitution to overturn recently enacted state laws prohibiting racial discrimination in housing. (See *Mulkey v. Reitman* (1966) 64 Cal.2d 529.) While Proposition 14 was facially neutral, its unmistakable purpose was to encourage and facilitate private racial discrimination in the rental and sale of residential property. This Court held that Proposition 14 violated the federal equal protection clause because the state had "affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is [impermissibly] encouraged." (*Id.* at p. 542.) That decision was affirmed by the United States Supreme Court. (*Reitman v. Mulkey* (1967) 387 U.S. 369.) Because Proposition 14 was struck down on federal equal protection grounds, this Court did not consider whether it was a revision of the California Constitution. Had the Court done so, it should have invalidated Proposition 14 on that additional basis.

Unlike Proposition 14, which was couched in disingenuously neutral terms, Proposition 8 openly seeks to mandate *government* discrimination against gay and lesbian couples by incorporating into our Constitution a *facial* classification excluding such couples from marriage. Amici urge this Court not to open the door to similar future "amendments" to our Constitution by erroneously permitting such a drastic departure from the principle of equal protection to stand as an amendment. As this Court and its federal counterpart have recognized, no person should have such fundamental rights – even one of them – subject to the vicissitudes of a bare majority of voters. (*In re Marriage Cases*, *supra*, 43 Cal. 4th at p. 852 [quoting *Board of Education v. Barnette* (1943) 319 U.S. 624, 638].) Our Constitution imposes a substantial hurdle to stripping disfavored minorities of the rights of equal citizenship. The ultimate will of the People,

enshrined in our Constitution, is that momentary passions – even those that garner a majority vote – should not deprive us of equal liberty.

CONCLUSION

Through article XVIII, the People declared that the Constitution should not be revised lightly. Because Proposition 8 selectively withdraws equal protection from disfavored minorities, Proposition 8 is subject to the more deliberative revision process. Our Constitution does not suffer a system under which some people are more equal than others. Amici therefore respectfully request that the Court grant the Petitions.

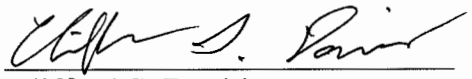
CERTIFICATE OF WORD COUNT

PURSUANT TO RULE 8.520(c)(1)

Pursuant to California Rule of Court 8.520(c)(1), counsel for amici curiae hereby certifies that the number of words contained in this brief, including footnotes but excluding the table of contents, table of authorities, and this certificate, is 3,715 words as calculated using the word count feature of the computer program used to prepare this brief.

Dated: January 14, 2009

Respectfully submitted,

By: 

Clifford S. Davidson

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I declare that: I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within cause; my business address is 2049 Century Park East, Suite 3200, Los Angeles, CA 90067.

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