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Honorable Justices of the California Supreme Court
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102

To the Honorable Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.500(g), amici curiae respectfully submit this letter in support of Petitioners in this original writ proceeding. Amici urge this Court to grant the relief sought by Petitioners, and to issue a writ of mandate ordering preelection relief in this matter.

Amici are professors at law schools in the State of California. Amici list their titles and affiliations solely for identification purposes:

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STATEMENT OF INTEREST

Amici's teaching, scholarship, and other work have been in the areas of constitutional law, civil rights, or the protection of rights belonging to members of groups against whom discrimination is constitutionally suspect. Collectively, amici's work reflects a deep respect and concern for the principles of equal protection, particularly as they apply to members of groups discriminated against on the basis of a classification warranting high levels of constitutional scrutiny. Amici have played a role in the development of constitutional and civil rights jurisprudence, and have an interest in the continuing cohesive and sound

development of those laws. Amici believe that their submission may aid the Court in assessing the petition now before it.

SUMMARY OF ARGUMENT

As repeatedly recognized by the Court, even relatively simple initiative enactments may seek to bring about monumental change in the underlying principles of the Constitution or in our system of government.[1] The proposed initiative directly and facially targets members of a group that has been the subject of discrimination on the basis of a classification warranting strict constitutional scrutiny. It seeks to change the California Constitution to mandate governmental discrimination against that group with regard to one of the most valued, important, and personal of all fundamental rights – the right to marry the person of one's choice. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 813-820.)

The import of that proposed alteration is unprecedented. If permitted to proceed by this Court, the measure would establish that voters may use the initiative process to decide that a group is no longer entitled to equal protection under the law, but instead shall be discriminated against by the government on the basis of a suspect classification. The implications are devastating, for it would enshrine the concept that the majority may explicitly tyrannize the minority with relative ease and meager deliberation. This undermines a bedrock constitutional concept and capsizes core judicial function.

Over the last century, this Court has been called upon to review heated and undoubtedly heartfelt concerns about supposed societal harms posed by recognizing the equal dignity and equal rights of certain vulnerable members of society. Repeatedly, the Court has exercised its "most fundamental" power to analyze those concerns, to distinguish compelling need from irrational fear and prejudice, and to "preserve constitutional rights, whether of individual or minority, from obliteration by the majority." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.) The majority acting through initiative has never had, and still does not have, the power to obliterate in turn the essential judicial function of enforcing the guarantee of equal protection of the laws, merely by amending the Constitution to abolish that guarantee for a particular group. Were it otherwise, the Court's quintessential role in protecting vulnerable minorities from arbitrary action would be negated, and there would be no significant check on the ability of a simple majority of voters to strip minorities of basic civil rights.

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[1] See, e.g., *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 351-352; *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 223; *People v. Frierson* (1979) 25 Cal.3d 142, 186-187.

California voters wield broad authority to amend, but not revise the Constitution through the initiative process. The proposed "amendment" challenged here radically redesigns a key component of constitutional structure. If it is truly the will of the people to overhaul such a central tenet of the California Constitution's Article I Declaration of Rights, the measure must undergo the more rigorous deliberative process created for constitutional revision. That process incorporates the power of the ballot box while guarding against the danger of "improvident or hasty" revision. (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 347.)

Although the proposed measure is revisionary, it has not undergone the prescribed safeguards of formalized discussion and debate set forth in Article XVIII, Sections (1) and (2) of the California Constitution. The Court should order the preelection relief sought by Petitioners. Since the proposed measure is clearly a revision and not an amendment to the Constitution, it is not appropriate to first submit the matter to voters as an initiative. An initiative "is not a public opinion poll ... and if the proposed measure ... seeks to compel legislative action which the electorate has no power to compel, it should not be on the ballot." (*Am. Federation of Labor-Congress of Indus. Orgs. v. Eu* (1984) 36 Cal.3d 687, 695.) Chief among harms would be subjecting members of the protected class and their families to the fear, shame and indignity of a public referendum on their right to equal treatment, a right this Court has already deemed to be guaranteed by the California Constitution.

ARGUMENT

I. The Proposed Fundamental Alteration To The Preexisting Constitutional Framework Is A Revision, Not An Amendment.

The California Constitution provides two methods for changing its content: one for amendments, and one for broader or more profound revisions. Electors may amend the Constitution through the initiative process. (Cal. Const., art. XVIII, § 3.) By contrast, a revision of the Constitution may only be accomplished through the more formal and deliberative processes of legislative submission of the measure to the voters, (*id.,* § 1), or by convening a constitutional convention and obtaining popular ratification (*id.,* § 2.) (See *Raven,* 52 Cal.3d at 349-350; *Amador Valley*, 22 Cal.3d at 221-222; see also *McFadden*, 32 Cal.3d at 347 ["The differentiation required [between 'amend' and 'revise'] is not merely between two words; more accurately it is between two procedures and between their respective fields of application. ... The 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 that there was a real difference between amendment and revision."].)

Petitioners ably have set forth the governing standards regarding what constitutes an amendment as opposed to a revision. Amici do not expand upon that presentation. Amici simply note that although the power of the California initiative is undeniably formidable,[2] it is expressly limited by the California Constitution, and cannot be used to bring about "revisional effect" that is "substantially beyond the system of checks and balances which heretofore has characterized our governmental plan." (*McFadden*, 32 Cal.2d at 343, 345-346, 348 [also noting certain provisions "would limit materially the functions of the courts of this state and would effect a substantial change in balance of governmental power."]; see also *Raven*, 52 Cal.3d at 351-352 [provision vesting California court's judicial interpretive power regarding fundamental criminal rights in the federal courts is a revision rather than an amendment, because "in essence and practical effect," the shift of power is "devastating."].)

In finding that the provision effected a revision, rather than an amendment of the Constitution, *Raven* paid particular heed to the measure's fundamental alteration of *historic and unique judicial function*:

> Proposition 115 ... substantially alters the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections. It directly contradicts the well-established jurisprudential principle that, "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 ...." (*Nogues v. Douglass* (1858) 7 Cal. 65, 69-70; see also *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 176) [interpreting and applying the Constitution is "the very essence of judicial power"]; *Marin Water, etc. Co. v. Railroad Com.* (1916) 171 Cal. 706, 711-712.) In short, in the words of *Amador*,

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[2] See, e.g., *Amador Valley*, 22 Cal.3d at 229 (finding Proposition 13's tax reform was an amendment, and not a revision to California's Constitution); *People v. Frierson* (1979) 25 Cal.3d 142, 186-187 (in context of individual criminal case arguing a "technical defect" four years after passage of the initiative that reinstated the death penalty, finding that the initiative was an amendment, and not a revision, and noting the "broad powers of judicial review" retained by the court to "safeguard against arbitrary or disproportionate treatment.").

> *supra*, this "relatively simple enactment [accomplishes] ... such far reaching changes in the nature of our basic governmental plan as to amount to a revision ...." (22 Cal.3d at 223; see also *Livermore v. Waite* (1894) 102 Cal. 113, 118-119 [revisions involve changes in the "underlying principles" on which the Constitution rests].)

Raven, 52 Cal.3d at 354-355.

The proposed initiative does not simply purport to take away the fundamental right to marry the person of one's choice. What makes the measure wholly unprecedented is that it is targeted at divesting fundamental rights from members of a single group of people – a group this Court has recognized is in need of the highest level of constitutional and judicial protection. If successfully put to the ballot, the measure would stand for the proposition that the initiative process may be used to nullify the historical judicial function of protecting members of vulnerable groups against the prejudices of the majority. In practical effect, it would give the electorate the power to override a Court's careful deliberation and analysis of compelling need, and substitute unchecked majoritarian will through the relatively non-deliberative initiative process.

II. In California's Constitutional Form of Government, Courts Hold the Central Judicial Function of Ensuring The Protection of Basic Civil Rights Against Arbitrary or Prejudicial Actions By The Majority.

As recently acknowledged by this Court, our governmental system places certain inalienable rights "beyond the reach of majorities," delegated instead to judicial authority as "applied by the courts:"

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights *may not be submitted to vote; they depend on the outcome of no elections.*

In re Marriage Cases, 43 Cal.4th 757, 852 (quoting *West Virginia State Bd. Of Education v. Barnette* (1943) 319 U.S. 624, 638, emphasis added; see also *Lucas v. Forty-Fourth General Assembly of State of Colo.* (1964) 377 U.S. 713, 736 [same].)

The judiciary's central role in preserving basic rights against arbitrary

majoritarian rule is firmly embedded in the California Constitution:

> The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. (See Cal. Const., arts. IV, V and VI; The Federalist, Nos. 47, 48 (1788).) *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* ... Because of its independence and long tenure, the judiciary probably can exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority.

Bixby, 4 Cal.3d at 141 (internal citations omitted; emphasis added.) (See also *United States Steel Corp. v. Public Utilities Com.* (1981) 29 Cal.3d 603, 611-612 [The constitutional bedrock upon which all equal protection analysis rests is composed of the insistence upon a rational relationship between selected legislative ends and the means chosen to further or achieve them.].)

One of the core structural principles of our form of government guarantees that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of people choose that it be." (*Lucas*, 377 U.S. at 736-737.

The guarantee against the divesting of individual civil rights by the majority is a bedrock constitutional concept. It is "too clear for argument that constitutional law is not a matter of majority vote. Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority." *Lucas*, 377 U.S. 713, 737 n.30 (quoting *Lisco v. Love* (D.Colo. 1963) 219 F.Supp. 922, 944 (Doyle, J., dissenting).) This is because one of the purposes of the Constitution is to "protect minorities from the occasional tyranny of majorities. *No plebiscite can legalize an unjust discrimination.*" (*Hall v. St. Helena Parish School Bd.* (E.D. La. 1961) 197 F.Supp. 649, 659, *aff'd*, 368 U.S. 515 [quoted in part in *Lucas*, 377 U.S. 713, 736 n.29; emphasis added.]; Cf. *Plyler v. Doe* (1982) 457 U.S. 202, 216 ["The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises."].)

Our constitutional form of government has long employed judicial deliberation as a brake or check on unjustified exercises of democratic power over protected rights:

> [T]he limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. *The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.*

Hurtado v. California (1884) 110 U.S. 516, 536 (emphasis added.)

To preserve our constitutional rights, the basic governmental plan delegates authority to the judiciary to "insist on knowing the relation between the classification adopted and the object to be attained," for it is the "search for the link between classification and objective [that] gives substance to the Equal Protection Clause;. ... *By requiring that the classification bear [at least] a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.*" (*Romer v. Evans* (1996) 517 U.S. 620, 632-633; emphasis added.)

III. The California Supreme Court Repeatedly Has Exercised Its Core Judicial Function To Protect Vulnerable Minorities, A Function That Would Be Severely Compromised By the Proposed Initiative.

This year the Court was called upon to exercise its fundamental judicial duty to analyze whether the laws of the State constitutionally could exclude a historically stigmatized minority from the right to marry someone of the same sex. (*In re Marriage Cases* (2008) 43 Cal.4th 757.) That decision is only the most recent in a historic line of cases in which the Court discharged "its gravest and most important responsibility under our constitutional form of government." (*In re Marriage Cases*, 43 Cal.4th at 859-860 (Kennard, J., concurring.)

In each instance, often against a backdrop of significant controversy, the California Supreme Court exercised uniquely judicial authority to search for the link between classification and proffered objective, and to determine whether there was any justifiable basis for unequal treatment of protected classes under the law.

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

Perez challenged the constitutionality of California's anti-miscegenation statute, which provided that "no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race." *Perez v. Sharp* (1948) 32 Cal.2d 711, 712. The Court's role was to determine whether the law was "directed at a social evil and employ[ed] a reasonable means to prevent that evil," or whether the law was "discriminatory and irrational." (*Id.* at 713.) Among the justifications put forward and analyzed at length by the Court were concerns that: certain races were more prone than Caucasians to diseases such as tuberculosis (*id.* at 718); the amalgamation of races is unnatural (*id.* at 720); the progeny of mixed-race marriages are sickly, effeminate, inferior, and likely to be a burden on the community (*id.* at 720, 724); certain races are physically, mentally, or socially inferior (*id.* at 722-724, 727); persons wishing to marry in contravention of racial barriers come from the "dregs of society" (*id.* at 724); and the prevention of interracial marriage through the law would diminish racial tension in society and prevent the birth of children who might become social problems. (*Id.* at 724-725; see also 756-760 [Shenk, J., dissenting].)

After addressing and analyzing each of the proffered reasons for the legislation, the majority of the *Perez* Court concluded that the law "impair[ed] the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups." (*Id.* at 731-732.) The Court took the opportunity to identify the "circular reasoning" in popular attitudes that leads to racial prejudice:

> For many years progress was slow in the dissipation of the insecurity that haunts racial minorities, for there are many who believe that their own security depends on its maintenance. *Out of earnest belief, or out of irrational fears, they reason in a circle that such minorities are inferior in health, intelligence, and culture, and that this inferiority proves the need of the barriers of race prejudice.*

Id. at 727 (emphasis added.) The United States Supreme Court did not declare anti-miscegenation laws unconstitutional until nearly 20 years later in *Loving v. Virginia* (1967) 388 U.S. 1, at which point there were still 16 states that prohibited and punished marriages on the basis of racial classifications. (*Id.* at 6.)

B. *Fujii v. California* (1952) 38 Cal.2d 718

The California Alien Land Law essentially prohibited all aliens who were "ineligible for citizenship" from owning land, and provided that property purchased in violation of the law would escheat to the State of California. (*Fujii v. California* (1952) 38 Cal.2d 718, 720 and n.1.) At the time of the decision, by virtue of the then-current federal immigration laws, the California Alien Land Law could only operate against people of Japanese descent, as well as a few other California residents of other races similarly prohibited from naturalizing. (*Id.* at 729, 734.) Thus, as noted by the Court, although the statutory language classified persons on the basis of eligibility for citizenship, in reality the law classified persons on the basis of race or nationality. (*Id.* at 729.) Plaintiff Sei Fujii challenged the law as racially discriminatory against aliens in both purpose and effect. (*Id.* at 725.)

In defense of the statute's constitutionality, the State asserted that the purpose of the alien land law was to "restrict the use and ownership of land to persons who are loyal and have an interest in the welfare of the state." (*Id.* at 732.)[3] The Court examined the proffered purpose against the backdrop of the law's enactment. Voter pamphlets described the law's "primary purpose" as "prohibit[ing] Orientals who cannot become Americans from controlling our rich agricultural lands," and urged that "Orientals, largely Japanese, are fast securing control of the richest irrigated lands in the state, and control of these rich lands means in time control of the products and control of the markets." (*Id.* at 735.)[4]

After analyzing the constitutional question presented, a majority of the Court held that "[t]he only disqualification urged against Sei Fujii is that of race, but it may be said of him ... '[that nothing] in this record indicates, and we cannot assume, that he came to America for any purpose different from that which prompted millions of others to seek our shores – a chance to make his home and

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[3] This echoed arguments successfully made to the United States Supreme Court, which previously had upheld the Washington state alien land law, reasoning that "obviously" one who could not become a citizen "lacks an interest in, and the power to effectually work for the welfare of, the state." (*Terrace v. Thompson* (1923) 263 U.S. 197, 220-221.) *Terrace* also declaimed that "the quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance..." (*Id.*)

[4] The 1952 *Fujii* decision was issued in the wake of World War II, and the Japanese Internment. (See generally Yamamoto, Chon, Izumi, Kang & Wu, *Race, Rights and Reparation: Law and the Japanese American Internment* (2001).)

work in a free country, governed by just laws, which promise equal protection to all who abide by them.'" (*Id.* at 733-734.)

C. *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1

The *Sail'er Inn* petitioners faced potential revocation of their on-sale liquor licenses because they employed women bartenders in violation of a statute prohibiting women from tending bar unless they were licensees, wives of licensees, or sole shareholders of a licensee corporation. (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 6.) The Attorney General proffered three arguments to justify the statute's facial discrimination on the basis of gender. First, the State's attorney suggested "the Legislature may have concluded that a male bartender or owner must be present in a liquor establishment to preserve order and protect patrons, a function [the Attorney General] contends a woman could not perform." (*Id.* at 9.) Second, the State argued the statute was "designed to protect women since fewer women can be injured by inebriated customers if they are not permitted to work behind a bar." (*Id.* at 9.) Finally, the State offered that the law was intended to prevent "improprieties and immoral acts." (*Id.* at 10.)

The Court ultimately struck down the exclusionary statute on numerous grounds, including violation of the state and federal equal protection guarantees. The Court conducted its equal protection analysis, and found that women should be treated as a suspect classification. The Court noted that "Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities," then chronicled the historic supporting facts. (*Id.* at 19-20.) The Court concluded that "Women must be permitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment.... Such tender and chivalrous concern for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for women." "The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage." (*Id.* at 10, 20.)

In each of the foregoing cases, the Supreme Court exercised its "gravest and most important responsibility" to sort through the arguments, apply the appropriate legal standards, and decide whether there was sufficient factual support for compelling need to justify the discriminatory laws. In each case, the Court carried out its responsibility against a societal backdrop that was hostile to the rights asserted by the protected group. In each instance, it fell upon the Court to carry out its unique judicial function to weigh the arguments and abide by appropriate legal standards, rather than popular sentiment.

The passage of years has borne out that each decision was legally, morally, and socially just. Indeed, the concept of seeking justice under the law rather than bending to then-prevailing societal mores is built into our Constitution: "[T]he expansive and protective provisions of our constitutions ... were drafted with the knowledge that 'times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.'" (*In re Marriage Cases* (2008) 43 Cal.4th 757, 854 [quoting *Lawrence v. Texas* (2003) 539 U.S. 558, 579.].)

Each of the three decisions represented an absolute and inviolate judicial determination as to the civil rights of the affected individuals. (See *McClung v. Employment Dev. Dep't* (2004) 34 Cal.4th 467, 474 [a judicial construction of a statute or constitutional provision is an authoritative statement of what the provision meant before as well as after the decision.].) Our constitutional system of government would not permit "amendments" to the Constitution through the initiative process that would usurp judicial authority, and deny equal treatment and equal dignity under the law to women and non-Whites by providing:

- "No marriage between members of different races shall be valid in the State of California;"
- "People of Japanese descent are prohibited from owning real property in the State of California;" or
- "The Legislature may enact laws barring women from certain occupations."

Yet, the proposed measure seeks to accomplish just such a change.

In *In re Marriage Cases*, this Court specifically invoked its historic legacy when it held that "just as this court recognized in *Perez* that it was not constitutionally permissible to continue to treat racial or ethnic minorities as inferior..., and in *Sail'er Inn* that it was not constitutionally acceptable to treat women as less capable than and unequal to men..., we now similarly recognize that an individual's homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual's legal rights." (*In re Marriage Cases*, 43 Cal.4th at 822-823.)

The proposed measure seeks to override the Court's substantial deliberation and constitutionally-grounded reasoning regarding equal access to marriage. If approved, it would lay the groundwork for depriving minorities by simple

amendment to the state's constitution from any right provided to the rest of society. It proposes to eradicate constitutional protection for members of a vulnerable class with respect to a fundamental right. This revolutionary concept is far beyond the boundaries of constitutional checks and balances, and cannot be viewed as a mere "amendment" to Constitution.

IV. The Court Should Order Preelection Relief In Order To Prevent Considerable Harm To Members of the Protected Class and Their Families.

This Court has long recognized that preelection review and relief is appropriate where, as here, petitioners challenge the very propriety of using the initiative process to advance the measure at issue. (*Independent Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020, 1024-1025, 1029-1039.) (See also *McFadden v. Jordan* (1948) 32 Cal.2d 330 [ordering preelection relief where revision improperly was proposed through the initiative process.].)

There is no presumption against preelection relief when the challenging party contends that the measure in question is "not the *type of measure*" that may be adopted through the initiative process. (*Independent Energy Producers Ass'n.*, 38 Cal.4th at 1024-1025; emphasis in original.) (See also *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1006 ["if the threshold procedural prerequisites have not been satisfied the measure is not entitled to be submitted to the voters."]; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 666-667 [where challenge goes to power of electorate to adopt proposal in the first instance, question raised is "in a sense, jurisdictional."]; *Am. Federation of Labor-Congress of Indus. Orgs.*, 36 Cal.3d at 695, 696 nn. 9 & 11 [allegations charging that measure exceeds initiative power are properly justiciable before election; if electorate does not have the power to enact the measure, then it "should not be on the ballot;" footnote 9 cites California Supreme Court cases exercising pre-election review to bar elections on state initiative measures.]; *Senate of State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1154-1155 [If initiative is improper vehicle, it is "'wholly unjustified to allow voters to give their time, thought, and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was in vain ....'" [citation omitted].].)

In deciding whether to grant preelection relief, the Court must consider the "costs ... incurred in postponing the judicial resolution of a challenge to an initiative measure until after the measure has been submitted to and approved by the voters." (*Independent Energy Producers Ass'n*, 38 Cal.4th 1020, 1030.) (See also *Legislature v. Deukmejian*, 34 Cal.3d at 666 ("The general rule favoring

postelection review contemplates that no serious consequences will result if consideration of the validity of a measure is delayed until after an election.".)

In this instance, the cost of going forward with the election is heavy and the harm irreparable, both to members of the protected class and to their families. This Court has held that sexual orientation is a characteristic that "bears no relation to a person's ability to perform or contribute to society." (*In re Marriage Cases*, 43 Cal.4th at 841.) In ruling that gay and lesbian individuals are entitled to the highest level of constitutional scrutiny against discrimination, the Court acknowledged that "outside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility and such immediate and severe opprobrium as homosexuals." (*Id.* at 841 [citations omitted.].) It noted that members of the protected class historically and unfairly have been stigmatized or relegated to second-class citizen status. (*Id.* at 841.) The Court affirmed that "exclusion of same-sex couples from the designation of marriage works a real and appreciable harm upon same-sex couples and their children." (*Id.* at 855.) It recognized the deep dignitary injury that would flow from refusing to provide the fundamental right to marry on an equal basis to same-sex couples: "[for such a ruling likely would be] viewed as an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples." (*Id.* at 855.) In short, the Court "repudiated" the notion "*that it is permissible, under the law, for society to treat gay individuals and same-sex couples differently from, and less favorably than, heterosexual individuals and opposite-sex couples.*" (*Id.* at 855; emphasis added.)

Thus, the Court explicitly and authoritatively held that it is, and always has been, impermissible for our society to discriminate against members of the protected class on the basis of their sexual orientation. (See *McClung*, 34 Cal.4th at 474 [a judicial construction of a ... constitutional provision is an authoritative statement of what the provision meant before as well as after the decision.].) Yet, the proposed measure invites the California voting public to do precisely that which has been prohibited by this Court. More damaging still, the illegal question would be posed in the most public forum and manner available. If the Court allows the matter to proceed to ballot, members of the protected class and their families will continue to be subject to the very societal vilification and humiliation that this Court denounced.

To require the protected class to continue to suffer shame, fear, and uncertainty of outcome offends the deepest sense of fairness and human dignity. It is unthinkable that, having announced the decisions in *Perez*, *Fujii*, and *Sail'er Inn*, the Court would have refused to exercise its preelection authority, and

allowed lobbyists, politicians and voters to express continuing prejudice and ignorance about women and minorities. It is unconscionable to now invite the populace to debate the basic humanity and equality of gay and lesbian individuals. As was the case in *Legislature v. Deukmejian*, preelection relief is "essential" here to protect the rule of law at issue:

> [P]reelection review is here essential to further the purposes underlying the principle which is being invoked.... *Were we to defer judicial review until after the election, and then hold the initiative invalid on that ground, our ruling would come too late; part of the reason for the existence of the rule would already have been frustrated by default.*

Legislature v. Deukmejian, 34 Cal.3d at 667; emphasis added.

In addition to these grave dignitary harms, allowing the measure to proceed to vote carries other serious consequences. Unlike any other couples that wish to marry, same-sex couples and their families would be forced to rush to decision, as well as to action, in fear that the majority might divest them of the opportunity through the ballot box in November. The very presence of the invalid measure on the ballot would "steal[] attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure." (*Am. Federation of Labor-Congress of Indus. Orgs.*, 36 Cal.3d at 697; *Senate of State of Cal.*, 21 Cal.4th at 1154.)

To the extent the opposition contends that the Court should "Let the people's voice be heard," this "misunderstands the purpose of the initiative in California. It is not a public opinion poll. It is a method of enacting legislation, and if the proposed measure [seeks to enact that] which the electorate has no power to compel, it should not be on the ballot." (*Am. Federation of Labor-Congress of Indus. Orgs.*, 36 Cal.3d at 695.) By contrast, there is no harm in removing the ability to vote on the proposed measure in November, since voters do not have the authority to do so in the first place. If the measure is later put forward as a revision, the electorate would have the opportunity to exercise its votes, once the measure is subject to the more deliberative process set forth in the California Constitution.

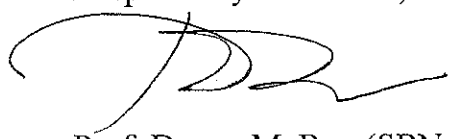
CONCLUSION

Under our Constitution, the judicial process is "the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." (*Hurtado v. California* (1884) 110 U.S. 516, 536.)

The proposed measure strikes at the very heart of this most essential and indispensable judicial function, a function repeatedly used by this Court for the protective purpose for which it was intended. The measure permits "the power of numbers," while "wielding the force of government," to transcend constitutional limits and dispossess susceptible minorities of their fundamental civil rights. It creates a dangerous and powerful foothold toward future abrogation of the rights of other vulnerable members of society.

As such, the proposed measure is nothing short of a radical revision of our basic governmental plan. It must not go forward inappropriately as an initiative, for it would expose protected individuals to the very discrimination from which they have been freed.

Respectfully Submitted,



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PROOF OF SERVICE

I, Nancy Jacot-Bell, declare that I am over the age of eighteen years and I am not a party to this action. My business address is Hastings Civil Justice Clinic, 100 McAllister Street, Suite 300, San Francisco, CA 94102. On July 10, 2008, I served the document listed below on the interested parties in this action in the manner indicated below:

AMICUS CURIAE LETTER OF CONSTITUTIONAL AND CIVIL RIGHTS LAW PROFESSORS IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

[X] **BY OVERNIGHT DELIVERY:** I caused such envelopes to be delivered on the following business day by FEDERAL EXPRESS service.

[ ] **BY PERSONAL SERVICE:** I caused the document(s) to be delivered to a process server for delivery by hand on the interested parties indicated below.

[ ] **BY MAIL**: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

[ ] **BY FACSIMILE**: I transmitted such documents by facsimile

INTERESTED PARTIES:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on July 10, 2008, at San Francisco, California.

Nancy Jacot-Bell

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