

Case Nos. S168047, S168066, S168078

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;
DENNIS HOLLINGSWORTH et al., Intervenors

ROBIN TYLER et al., Petitioners,

v.

THE STATE OF CALIFORNIA et al., Respondents;
DENNIS HOLLINGSWORTH et al., Intervenors

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners

v.

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

**APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*
MARRIAGE EQUALITY USA IN SUPPORT OF PETITIONERS
CHALLENGING PROPOSITION 8 AND [PROPOSED] *AMICUS* BRIEF**

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Pursuant to Rule 8.520(f) of the California Rules of Court, Applicant Marriage Equality USA requests leave of the Court to file the attached *amicus curiae* brief in support of Petitioners challenging Proposition 8.

Founded in the autumn of 2000, Applicant is an all-volunteer, national non-profit organization dedicated to securing legally recognized civil marriage equality for all, at the federal and state level, without regard to gender identity or sexual orientation. Applicant works person-to-person at the grassroots level to educate and inform the public about marriage equality with the goal of changing the social climate to end discrimination in civil marriage.

Applicant has a strong presence in California with chapters in Alameda, Butte, Contra Costa, El Dorado, Fresno, Humboldt, Imperial, Kern, Lake, Los Angeles, Marin, Mendocino, Modoc, Monterey, Napa, Nevada, Orange, Placer, Riverside, Sacramento, San Diego, San Francisco, San Joaquin, San Luis Obispo, San Mateo, Santa Clara, Solano, Sonoma, Stanislaus, Tulare, Tuolumne, and Yolo Counties and individual members throughout California.

After the vote on Proposition 8, Applicant organized town hall meetings across California and produced an on-line survey that displayed input from thousands of Californians, both gay and straight. Through this grassroots input, Applicant gathered over 1,200 stories of harm summarized

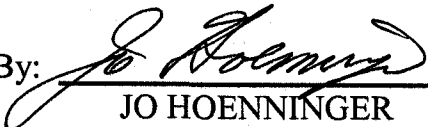
in a report, "Prop 8 Hurt My Family – Ask Me How," which presents personal stories of Californians to illustrate how Prop. 8 harmed same-sex couples, frightened children of same-sex couples, promoted bullying in schools, caused straight allies to experience homophobia, tore about families and destroyed neighborhoods.


Through this proposed *amicus curiae* brief, Applicant hopes to educate the Court about the use of the ballot measure to harm minority groups, particularly gays and lesbians.

The participation of Applicant in these proceedings as *amicus curiae* will not unduly delay or prejudice the adjudication of issues in this case. The original and copies of the *amicus curiae* brief are being timely filed with the Court as prescribed by the Court's November 19, 2008 Order, and copies are being duly served on all counsel in accordance with California Rule of Court 8.44(a)(1).

For these reasons, Applicant respectfully seeks leave to file the attached brief as *amicus curiae* in support of Petitioners challenging Proposition 8. Accordingly, Applicant respectfully requests this Court to accept, file, and consider the enclosed *amicus curiae* brief.

DATED: January 15, 2009

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IN SUPPORT OF
PETITIONERS CHALLENGING PROPOSITION 8**

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I. INTEREST OF THE AMICUS CURIAE

Founded in the autumn of 2000, Marriage Equality USA is an all-volunteer, national non-profit organization dedicated to securing legally recognized civil marriage equality for all, at the federal and state level, without regard to gender identity or sexual orientation. Marriage Equality USA works person-to-person at the grassroots level to educate and inform the public about marriage equality with the goal of changing the social climate to end discrimination in civil marriage.

Marriage Equality USA has a strong presence in California with chapters in Alameda, Butte, Contra Costa, El Dorado, Fresno, Humboldt, Imperial, Kern, Lake, Los Angeles, Marin, Mendocino, Modoc, Monterey, Napa, Nevada, Orange, Placer, Riverside, Sacramento, San Diego, San Francisco, San Joaquin, San Luis Obispo, San Mateo, Santa Clara, Solano, Sonoma, Stanislaus, Tulare, Tuolumne, and Yolo Counties and individual members throughout California.

After the vote on Proposition 8, Marriage Equality USA organized town hall meetings throughout California and conducted an on-line survey gathering input from thousands of Californians, both gay and straight. Through this grassroots input, Marriage Equality USA summarized over 1,200 stories of harm in a report, "Prop 8 Hurt My Family – Ask Me How." This report includes personal stories that illustrate how Prop. 8 harmed same-sex couples, frightened children of same-sex couples,

promoted bullying in schools, caused straight allies to experience homophobia, tore apart families and splintered neighborhoods.

Through this *amicus curiae* brief, Marriage Equality USA seeks to inform the Court about how the abuse of ballot measures to circumvent the legislative process harms minority groups, most recently gays and lesbians. Marriage Equality USA objects to the Inteveners' suggestion that their campaign is a "people's" movement when it is, in reality, only the latest iteration in a long string of antigay ballot measures – stretching back decades and largely driven, particularly in messaging, by national Christian Fundamentalist organizations.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

“Constitutions are checks upon the hasty action of the majority. They are self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority.”

(President (later Chief Justice) William Howard Taft, H.R.J.Res. No. 4, 62nd Cong., 1st Sess. (1911) 47 Cong. Rec. 4.)

Beginning largely in the early 1970s, gays and lesbians began to work through the established political process to obtain equal treatment under the law in their lives. In response to this work, as discussed below,

Christian Fundamentalists¹ organized a movement that largely vilified gays and lesbians by conducting a relentless campaign to undo the gains gays and lesbians have made in their struggle for equality. Christian Fundamentalists, in cooperation with the Mormon and Catholic Churches, are now focused on excluding gays and lesbians from the fundamental right to marry. In California and elsewhere, these groups have mis-used the initiative process to accomplish their goals.

The initiative process available to Californian's through Article II, section 8 of the California Constitution lacks many of the protections present when law (i.e, a bill, constitutional amendment or constitutional revision) is made either through the legislature or proposed by the legislature and put to the people. Representative government, by delegation of government responsibilities to a small number of elected representatives, allows a more detailed and considered evaluation of issues; it allows for compromise and revisions to law before it is enacted. (Fountaine, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of*

¹ The term "Christian Fundamentalists" refers to largely white evangelical protestant organizations and individuals who joined together to promote a Biblical vision in the political realm, a group that Didi Herman, in her seminal work, references as the "Christian Right". (Herman, *The Antigay Agenda* (1997) pp. 9-11 (hereafter Herman).) *Amicus* Marriage Equality USA does not consider Christian Fundamentalists to include the Mormon Church nor the Catholic Church who have only recently joined with Christian Fundamentalists to oppose marriage equality.

Legislating by Initiative (1988) 61 So. Cal. L. Rev. 733, 749 (hereafter Fountaine).)

“The initiative process was designed to allow grass-roots access to law-making.” (Comment, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent* (1994) 34 Santa Clara L. Rev. 945, 951 (hereafter *Construction*).) The danger is that the initiative process as it now operates allows a small few to manipulate the majority in order to “tyrannize” the minority. In the words of James Madison, “a pure democracy ... can admit of no cure for the mischief of factions.... [T]here is nothing to check the inducements to sacrifice the weaker party....” (Madison, *Federalist No. 10* (Nov. 22, 1787) The Constitution Society <<http://www.constitution.org/fed/federa10.htm>> [as of January 14, 2009].) This is not to say that the initiative and referendum should never be utilized. When an issue affects everyone equally, such as the building of a high-speed rail, it is a very useful majoritarian tool. But when the civil rights of a minority are at issue, the initiative process, in itself, has no protections against potential abuse by small but powerful factions.

Christian Fundamentalists have taken undue advantage of the initiative process to press their agenda of conforming American law to their

vision of Biblical law.² They have used the initiative process not only to reshape the government but also to fundraise, to expand their base of political supporters, and to strengthen their political posture at the expense of an unpopular minority.

Because of the misleading campaign rhetoric and advertising of the “Yes on 8” campaign, voters were not simply voting on whether civil marriage should be allowed only between one man and one woman, but instead about what children would be taught in schools and whether churches should be “forced” to marry same-sex couples or risk losing their tax-exempt status. It was not a simple, straightforward vote as claimed by the Interveners. (Interveners’ Opp. at 5.)

Absent the guaranteed protections of representative democracy in the U.S. Constitution, the Courts become the final guardians of minority (and indeed, majority) interests. (Linde, *When Initiative Lawmaking Is Not “Republican Government”: The Campaign Against Homosexuality* (1993) 72 Or. L.Rev. 19, 34. (hereafter Linde).) “Where courts are but *one* of many checks on majority preferences, they serve predominantly as a safety

² Concerned Women for America, one of the organizations that funded Proposition 8, proclaims that it is dedicated to helping “bring Biblical principles into all levels of public policy. (<<http://www.cwfa.org/about.asp>> [as of January 14, 2009].) The American Family Association, another contributor to Proposition 8, says that it seeks “to change the culture to reflect Biblical truth.” (<<http://www.afa.net>> [as of January 14, 2009].)

net to catch those grains of tyrannical majoritarianism that slip through when the constitutional filtering system malfunctions.” (Eule, *Judicial Review of Direct Democracy* (1990) 99 Yale L.J. 1503, 1525.) But where the initiative process is used to bypass the Constitutional safeguards of representative government, as it was used by the proponents of Proposition 8, this Court must diligently exercise its role of catching this particular grain of tyranny. The saddest thing is that with Proposition 8, it is not the tyranny of the majority, but the tyranny of a powerful faction that manipulated the majority by playing on their fears and prejudice. *Amicus Marriage Equality USA* has no doubt that if the voters had had the benefit of the type of deliberative process that is the hallmark of representative government, the result would have been different.

Accordingly, *Amicus Marriage Equality USA* agrees with Petitioners that Proposition 8 was an attempt to revise, not amend, the California Constitution. *Marriage Equality USA* also agrees with the Attorney General that the fundamental rights at issue here are inalienable and not the proper subject of an constitutional amendment.

III. THE HISTORY BEHIND PROPOSITION 8

A. The Gay and Lesbian Struggle for Equality

The gay and lesbian community makes up approximately ten (10) percent of the population. (See Kinsey, *Sexual Behavior in the Human Male* (1948) and Kinsey, *Sexual Behavior in the Human Female* (1953).)

Historically an unpopular minority, gay and lesbian people have been criminalized, misclassified as mentally ill, subjected to social persecution, ostracized by the majority of American society, and have been subject to “treatments” such as “[c]astration, hysterectomy, vasectomy, lobotomies, electrical and chemical shock therapy, and various forms of aversion therapy such as nausea-inducing drugs, negative verbal suggestion; and a type of behavior therapy called ‘sensitization’ intended to increase heterosexual arousal.” (Katz, *Gay American History* (1992) p. 129 (hereafter Katz).)

In 1948, the same year that Kinsey published the first landmark research on human sexuality, United States Senator Joseph McCarthy famously equated homosexuals with the threat of communism by implying that homosexual employees of the State Department could be blackmailed and therefore presented a threat to national security. (See Fadermann, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (1991) pp. 140-141 (hereafter, Fadermann).) Several gay people quit or were fired from their posts, while law enforcement officers were further emboldened to arrest homosexuals and raid gay bars. (*Ibid.*)

In response to these arrests, Harry Hay first proposed a concept that was shocking at the time, suggesting that the gay minority was similar to other oppressed minorities (such as Jews, Blacks, and Latinos) and deserved the same equal rights and protections. (Katz, *supra*, at pp. 406-