Case No. S168047

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

Karen L. Strauss, et al.,

Petitioners,

v.

Mark B. Horton, as State Registrar of Vital Statistics, etc., et al.,

Respondents;

Dennis Hollingsworth, et al.,

Interveners.

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONSTITUTIONAL AND CIVIL RIGHTS LAW PROFESSORS IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

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Pursuant to California Rule of Court 8.520(f), amici curiae hereby respectfully apply for permission to file an amicus curiae brief in support of Petitioners in this original writ proceeding. Amici urge this Court to grant the relief sought by Petitioners by declaring that Proposition 8 is null and void in its entirety.

Amici (listed below) are professors of law who teach at California law schools and/or are licensed to practice in the State of California. 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 therefore believe that their submission may aid the Court in assessing the petitions now before it.

No party or counsel for any party authored the attached amicus brief in whole or in part. Additionally, no party, counsel for any party, or any

other person or entity made any monetary contribution intended to fund the preparation or submission of the brief, other than the amici curiae or their counsel in this original writ proceeding.

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BRIEF OF AMICUS CURIAE

SUMMARY OF ARGUMENT

Proposition 8 represents the first time that the California initiative process has been wielded to abolish a fundamental freedom for an unpopular minority group and to alter the Constitution so as to mandate governmental discrimination against that group. In this way, Proposition 8 attempts to breach some of the most elemental textual and structural promises of our state Constitution. It revokes a fundamental right that, in the words of the Constitution, is "inalienable." It dismantles constitutional equality for a single group of Californians – a group that, because of its history of oppression and stigma, is entitled to the highest level of constitutional protection against discrimination. Moreover, it overrides the judiciary's core duty to test laws against the constitutional requirement of equality by "smoking out"[1] impermissible prejudice.

Such sweeping change in fundamental constitutional principles cannot be made by way of simple majority vote. The California Constitution is the written expression of the people's ground rules for how we will govern ourselves, and what the government and its branches can and cannot do. The Constitution itself, which is the ultimate expression of

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[1] (*City of Richmond v. Croson* (1989) 488 U.S. 469, 493 (plur. opn. of O'Connor, J.).)

the people's will, protects against simple majoritarian alteration of these basic ground rules, for although it recognizes an avenue for direct democracy, it also firmly dictates its limits. The Constitution limits the initiative power to ensure that changes this fundamental may be accomplished only through the multi-tiered process of debate, deliberation and decision reflected in a legislative supermajority followed by electoral approval, and never through unchecked majority rule. The requirements of the revision process preserve the people's insistence on the protections of formal discourse as a prerequisite of making momentous changes in our basic form of governance.

As the Court repeatedly has recognized, even relatively simple initiative enactments may substantially alter the underlying principles of the Constitution or our system of government.[2] Proposition 8's impacts are profound. If permitted to stand as an amendment, Proposition 8 would establish that voters may freely use the initiative process to carve out exceptions to the Constitution's equality principle for historically stigmatized minorities, and to do so with regard to valued, important, and personal fundamental rights – in this case, the right to marry the person of

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[2] (See, e.g., *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 351-352; *Amador Valley J. 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.)

one's choice, (*In re Marriage Cases* (2008) 43 Cal.4th 757, 813-820)[3] – thus abrogating inalienable rights so basic that "a government may [not] establish or abolish [them] as it sees fit." (*Id.* at p. 818, fn. 41.) Such a conclusion would undermine bedrock constitutional concepts and materially impair – indeed, defeat – the judiciary's unique and central role as the ultimate guardian of constitutional equality. Upholding Proposition 8 would tear the fabric of the equality principle itself, for it would validate the concept that vulnerable minorities have only a conditional and tentative entitlement to equality – an entitlement redeemable only unless and until a bare majority decides otherwise.

Over the last century, this Court has been called upon to evaluate asserted justifications for unequal treatment of certain disfavored minorities and to enforce the fundamental guarantees that protect the equal dignity and equal rights of vulnerable members of society. Repeatedly, the Court has exercised its "most fundamental" judicial role 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.)

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[3] See Amicus Curiae Brief on Behalf of California Professors of Family Law.

Proposition 8 would render this critical judicial role obsolete. By putting basic equality for an unpopular minority to popular vote, Proposition 8 permitted the decision-making process to become infected with the very fears, prejudices, stereotypes and misinformation that are repugnant to our laws, and that the judiciary is entrusted to prevent from becoming a basis for differential governmental treatment of persons. Upholding Proposition 8 would negate the Court's quintessential role in protecting vulnerable minorities from arbitrary action, thus eliminating any significant governmental check on the ability of a bare majority of voters to strip minorities of the most fundamental human rights based on the very prejudices against which the Constitution is designed to protect us all.

The Constitution makes clear that California voters possess broad authority to amend, but not revise, the Constitution through the initiative process. The distinction between amendment and revision, and the different procedures prescribed for each, are constitutionally-grounded structural checks on direct democracy that warrant vigorous judicial enforcement. As this Court recently noted, the judiciary not only must safeguard the power of direct democracy, but must also enforce its limits:

> Although California decisions consistently and vigorously have safeguarded the right of voters to exercise the authority afforded by the initiative process [citation omitted], our past cases at the same time uniformly establish that initiative measures adopted by the electorate are subject to the same constitutional limitations that apply to statutes adopted by the

> Legislature, and *our courts have not hesitated to invalidate measures enacted through the initiative process when they run afoul of constitutional guarantees provided by either the federal or California Constitution.*

(*In re Marriage Cases, supra,* 43 Cal.4th at p. 851, emphasis added.)

The "amendment" challenged here must be invalidated because it breaches constitutionally prescribed limits. If it is truly the will of the people to overhaul such central tenets of the California Constitution, the measure expressing that will 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.)

ARGUMENT

I. PROPOSITION 8 ATTEMPTS TO ERADICATE A RIGHT THAT THE CONSTITUTION, AS INTERPRETED BY THIS COURT, HAS DEEMED INALIENABLE.

A. The California Constitution Guarantees Certain Rights As Inalienable.

Article I, section 1 of the California Constitution declares that certain irrevocable rights belong to every individual:

> *All people* are by nature free and independent and have *inalienable* rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

(Emphasis added.)

Present in substantially the same form since the inception of the state Constitution,[4] this language reflects a choice by our state founders to follow the formulation of a number of sister states that declared certain rights "inalienable," belonging to the people, and existing beyond the undue interference of government. (Joseph Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety* (1997) 25 Hastings Const. L.Q. 1, 2-3.) While similar language in other state constitutions was viewed as "advisory or hortatory," California's language, which includes article I, section 26 ("The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise"), demonstrates that, in this state, inalienable rights are concrete and meaningful, and subject to judicial enforcement. (*Id.* at pp. 20-22.)[5] Thus, "California courts have viewed [article I, section 1] from the outset as a positive protection against interference with enumerated rights." (Grodin,

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[4] "Except for a 1972 amendment substituting the word *people* for the original *men* and adding *privacy* to the list of protected rights, this provision remains as it was first adopted in 1849." (Grodin, Massey & Cunningham, The California State Constitution: A Reference Guide (1993) 38, emphasis in original.)

[5] Indeed, despite their historical and philosophical roots in natural law theory, "most [states] have assumed that the inalienable rights clauses have some judicially enforceable content." (*Id.* at p. 22.)

Massey & Cunningham, The California State Constitution: A Reference Guide at p. 38.)

The California Supreme Court took up this question shortly after the adoption of the original 1849 Constitution. In *Billings v. Hall* (1857) 7 Cal. 1, the dissenting justice viewed the language of article I, section 1 as a mere "truism," rather than a limitation upon the power of government. (*Id.* at p. 19 (dis. opn. of Terry, J.).) The two justices forming the majority, however, each adamantly interpreted the section as providing important and enforceable protection:

> [The section is] one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.

(*Id.* at p. 6 (Murray, C.J.).)

> [F]or the Constitution to declare a right inalienable, and *at the same time leave the Legislature unlimited power over it*, would be a contradiction in terms, an idle provision, proving that a Constitution was a mere parchment barrier, insufficient to protect the citizen, delusive and visionary, and *the practical result of which would be to destroy, not conserve, the rights it vainly presumed to protect.*[6]

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[6] In essence, Proposition 8 attempts to give the popular majority virtually "unlimited power" to "destroy, not conserve" the inalienable rights of others through an exercise of the initiative power, which is an extension of legislative authority. (See, e.g., *Marine Forests Society v. California Coastal Comm'n* (2005) 36 Cal.4th 1, 35 [electorate acts in legislative capacity when exercising the initiative power].)

(*Billings*, *supra*, 7 Cal. at p. 17 (conc. opn. of Burnett, J.), emphasis added.) (See also *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 ["In construing the words of a . . . constitutional provision, . . . an interpretation which would render terms surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning"].)

Since that time, the Court has continued to strike down laws that unconstitutionally infringed upon article I, section 1 rights. (See, e.g., *Gibbs v. Tally* (1901) 133 Cal. 373, 377 [statutory restrictions on freedom to contract "clearly contravene[] the provisions of section 1 of article I"]; *Stimson Mill Co. v. Braun* (1902) 136 Cal. 122, 125 [constitutional provision respecting mechanics' liens was subordinate to article I, section 1 declaration that "all men have the inalienable right of 'acquiring, possessing and protecting property'"]; *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 163 [liberty interest under article I, section 1 protects "the right of every citizen to have the personal liberty to develop, whether by education, training, labor, or simply fortuity, to his or her maximum economic, intellectual, and social level"].)

B. The Right To Marry Is An Inalienable Right.

This Court recently reiterated that the right to marry is "one of the basic, *inalienable* civil rights guaranteed to an individual by the California

Constitution." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 781, emphasis added.) "[T]he right to marry is an integral component of an individual's interest in *personal autonomy* protected by the privacy provision of article I, section 1, and of the *liberty* interest protected by the due process clause of article I, section 7..." (*Id.* at p. 818, emphasis in original.)[7]

In so doing, the Court gave meaning to the inalienability of the fundamental right to marry, as a right that stands beyond the reach of governmental interference:

> In recognizing [that the right to marry is] "a fundamental right of free men [and women]," [citation omitted] the governing California cases establish that **this right embodies fundamental interests of an individual that are protected from abrogation or elimination by the state**...[I]t is apparent under the California Constitution that the right to marry – like the right to establish a home and raise children – has independent *substantive* content, **and cannot properly be understood as simply the right to enter into such a relationship *if (but only if)* the Legislature chooses to establish and retain it**.

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[7] (See also Laurence H. Tribe, *Lawrence v. Texas: The 'Fundamental Right' That Dare Not Speak Its Name* (2004) 117 Harv. L.Rev. 1893, 1922 [intimate relationships "occupy a fundamental place in our lives, in the ways we express ourselves and – especially but not exclusively in the case of lasting relationships – in the ways we learn from one another and reshape the ideas and values with which we entered into those relationships"]; Kenneth L. Karst, *The Freedom of Intimate Association* (1980) 89 Yale L.J. 624, 636 [intimate associations are central to an individual's identity because of their expressive qualities; "An intimate association may influence a person's self-definition not only by what it says to him but also by what it says (or what he thinks it says) to others"].)

(*In re Marriage Cases, supra*, 43 Cal.4th at p. 818, bold emphasis added.)

> [T]he right to marry is **not properly viewed as simply a benefit or privilege that a government may establish or abolish as it sees fit**, but rather that the right constitutes *a basic civil or human right of all people.*

(*Id.* at p. 818, fn. 41, bold emphasis added.)

> [T]he constitutionally based right to marry properly must be understood to encompass the core set of basic *substantive* legal rights and attributes traditionally associated with marriage **that are so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process.**[8]

(*Id.* at p. 781, bold emphasis added.)

> **[T]he fundamental rights embodied within that Constitution for the protection of all persons represent restraints that the people themselves have imposed upon the statutory enactments that may be adopted either by their elected representatives or by the voters through the initiative process.**

(*Id.* at p. 852, bold emphasis added.)

Thus, Proposition 8 purports to take away a right that has been identified as so fundamental that it is "protected from abrogation or

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[8] The reference in this quotation as well as the next to "statutory" enactments reflects the particular context of *In re Marriage Cases*, which examined the constitutionality of two statutes, one of which was enacted by voter initiative. As such, they should not be read as indicating a meaningful distinction regarding constitutional initiatives. More importantly, if the fundamental right to marry is "protected from abrogation or elimination by the state," then by definition it is protected from abrogation by

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elimination by the state." It may well be that violation of this principle, by itself, breaches the boundaries of a constitutional "amendment." The Court need not decide that question, however, for Proposition 8 makes additional serious intrusions into core constitutional structure.

II. PROPOSITION 8 UNDERMINES THE CONSTITUTIONAL PRINCIPLE OF EQUALITY.

As a constitutional concept, equality is not merely a minimum guarantee of the equal protection clause. Rather, it is an "informing principle" that permeates the Constitution. (Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv. L.Rev. 1, 40, 42.) "The most fundamental interest of all [is] the interest in being treated by the organized society as a respected and participating member." (*Molar v. Gates* (1979) 98 Cal.App.3d 1, 16; quoting Karst, 91 Harv. L.Rev. at p. 33.) The ideals of equality and freedom are "[f]undamental to all forms of democracy" and "key words for defining democracy in both the ancient and modern worlds." (Maureen B. Cavanaugh, *Democracy, Equality, and Taxes* (2003) 54 Ala.

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constitutional voter initiative, which is an exercise of state legislative power.

L.Rev. 415, 443.)[9] "Democracy has its own internal morality, based on the dignity and equality of all human beings . . . Above all, democracy cannot exist without the protection of individual human rights – rights so essential that they must be insulated from the power of the majority." (Aharon Barak, *The Supreme Court 2001 Term Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy* (2002) 116 Harv. L.Rev. 16, 39.)

The equality principle is a pervasive value woven throughout the state Constitution, extending far beyond the equal protection clause of article I, section 7(a). It is first set forth in the opening words of the

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[9] Citing Aristotle, Professor Cavanaugh explains that "freedom and equality are inherent in democracy . . . 'The fundamental idea underlying a democratic form of government is freedom . . . . Freedom means one thing, to rule and be ruled in turn. For this is democratic justice, for there to be an equal share according to number, not according to worth (no citizen being better than any other).'" (*Id.*, 54 Ala. L.Rev. at p. 444, quoting Aristotle, The Politics (T.E. Page et al. eds., H. Rackham trans., G.P. Putnam's Sons 1932) pp. 489-491.)

Abolitionist Charles Sumner has been credited with the first known use in English of the phrase "equality before the law." In an 1849 oral argument before the Massachusetts Supreme Court, Sumner traced the origins of the equality principle through Herodotus, Seneca, Milton, Diderot, and Rousseau, and into the French Revolutionary Constitution of 1791, the first occasion in which equality of rights was made a legal consequence of being "created equal." (John P. Frank & Robert F. Munro, The Original Understanding of 'Equal Protection of the Laws' in One Hundred Years of the Fourteenth Amendment: Implications for the Future (Jules B. Gerard ed., 1973) 49, 61-65.)

Constitution, that "*All people* are by nature free and independent, and have inalienable rights,"[10] and is echoed in numerous provisions of the article I Declaration of Rights and beyond, including:

- *Article I, section 2*: "Every person may freely speak, write and publish his or her sentiments on all subjects . . . ."
- *Article I, section 4*: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs."
- *Article I, section 6*: "Slavery is prohibited. Involuntary servitude is prohibited except to punish crime."
- *Article I, section 7*: "(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. . . ."
- *Article I, section 8*: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."
- *Article I, section 20*: "Noncitizens have the same property rights as citizens."
- *Article I, section 22*: "The right to vote or hold office may not be conditioned by a property qualification."
- *Article I, section 31*: "(a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

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[10] (Cal. Const., art. I, § 1, emphasis added.)

- *Article IV, section 16*: "(a) All laws of a general nature have uniform operation."[11]

In the 1879 Constitutional Convention, the delegates underscored the centrality of the equality principle, defeating a proposal to eliminate article I, section 11 ("all laws of a general nature shall have a uniform operation"):

> [*I*]*t is a fundamental principle in our government that no law shall be passed which affects one person and not the balance of the community. That is the principle, as I understand it, that saves all our personal rights.* That you shall not make a law that shall apply to me and not to the whole community; that you shall not tax my property and not the property of others equally; that the Legislature has no right to pass laws affecting a portion of the community and not the balance. I know that there has been some little difficulty in the Courts to construe that section correctly, but I think *there would be no safeguard to general personal liberty or personal rights in a Constitution that did not have some provision of that kind in it. . . . Our liberty depends upon the proposition that the Legislature shall not pass a law that will operate upon me personally and allow you to escape.*[12]

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[11] See also *Article I, section 24:* "This declaration of rights may not be construed to impair or deny others retained by the people."; *Article IX, section 9*: [The University of California] "(f) . . . . The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs, and no person shall be debarred admission to any department of the university on account of race, religion, ethnic heritage, or sex;" and *Article XIII, section 1*: "(a) All property is taxable and shall be assessed at the same percentage of fair market value . . ."

[12] (E.B. Willis & P.K. Stockton, Debates and Proceedings of the Constitutional Convention of the State of California Convened at the City

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From early on in the state's history, the California Supreme Court interpreted various constitutional provisions as embodying this equality principle. (See, e.g., *People ex rel. Smith v. Judge of Twelfth Dist.* (1861) 17 Cal. 547, 555 [construing article I, section 11 ("All laws of a general nature shall have a uniform operation") and explaining: "[T]o constitute partiality and the invidious discrimination against which the Constitution aims, the denial to another of what is given to one must be made upon substantially the same facts . . . ."]; *City of Pasadena v. Stimson* (1891) 91 Cal. 238, 249-252 [article I, section 2 and article IV, section 25 are sources of the principle that "although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law"]; *People v. Dawson* (1930) 210 Cal. 366, 369-370 [same]; *County of Los Angeles v. S. Cal. Tel. Co.* (1948) 32 Cal.2d 378, 388-389 [test for

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of Sacramento, Saturday, September 28, 1878 (1880) p. 264 (statement of Mr. McFarland), emphasis added.)