

Nos. S168047/S168066/S168078

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IN THE SUPREME COURT OF CALIFORNIA

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KAREN L. STRAUSS et al.,

*Petitioners,*

vs.

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

*Respondents.*

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ROBIN TYLER et al.,

*Petitioners,*

vs.

STATE OF CALIFORNIA et al.,

*Respondents.*

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CITY AND COUNTY OF SAN FRANCISCO et al.,

*Petitioners,*

vs.

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

*Respondents.*

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APPLICATION TO FILE BRIEF OF *AMICI CURIAE* CALIFORNIA  
COUNCIL OF CHURCHES, ET AL., PETITIONERS IN S168332; BRIEF  
OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS IN  
S1680471/S168066/S168078

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**TABLE OF CONTENTS**

**Page**

**APPLICATION TO FILE BRIEF OF *AMICI CURIAE***

I. INTRODUCTION .....ii

II. IDENTITY AND INTEREST OF *AMICI CURIAE* .....iv

    A. Identity of *Amici Curiae* .....iv

    B. Interest of *Amici Curiae* .....xiii

**BRIEF OF *AMICI CURIAE***

III. QUESTIONS PRESENTED ..... 1

IV. SUMMARY OF ARGUMENT..... 1

V. ARGUMENT.....4

    A. Proposition 8 Attempts a Revision of the California  
    Constitution ..... 4

        1. Equal Protection of the Laws is an Inalienable  
        Right at the Core of the California Constitution ..... 4

        2. History Demonstrates the Need for the  
        Constitutional Guarantee of Equal Protection to  
        Safeguard Religious Minorities ..... 6

        3. The Constitutional Guarantee of Equal  
        Protection – For Same-Sex Couples As Well As  
        Religious Minorities – Cannot Be Selectively  
        Undermined By the Initiative Process..... 14

    B. Proposition 8 Should Not be Applied Retroactively to  
    Invalidate Marriages Performed Before its Adoption..... 20

VI. CONCLUSION .....20

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Amador Valley Joint Union High School Dist. v. State Bd. of Equalization</i> (1978) 22 Cal.3d 208 .....	3, 4, 15, 17
<i>Banks v. Board of Pharmacy</i> (1984) 161 Cal.App.3d 708 .....	14
<i>Bowers v. Hardwick</i> (1986) 478 U.S. 186 (1986).....	19
<i>Brown v. Board of Education</i> (1954) 347 U.S. 483 .....	19
<i>Commonwealth v. Kneeland</i> (1838) 37 Mass. 206 .....	9
<i>Dawson v. Westerly Investigations, Inc.</i> (1988) 204 Cal.App.3d Supp. 20.....	14
<i>Evangelatos v. Superior Court</i> (1988) 44 Cal.3d 1188 .....	20
<i>First Unitarian Church of Los Angeles v. County of Los Angeles</i> (1958) 357 U.S. 545 .....	xii
<i>Gabrielli v. Knickerbocker</i> (1938) 12 Cal.2d 85 .....	11
<i>Gurnee v. Superior Court</i> (1881) 58 Cal. 88 .....	20
<i>Hale v. Everett</i> (1868) 53 N.H. 9 .....	9
<i>Hering v. State Board of Education</i> (1938) 303 U.S. 624 .....	12
<i>Hirabayashi v. United States</i> (1943) 320 U.S. 81 .....	18, 19

	Page
<i>In re Marriage Cases</i> (2008) 43 Cal.4th 757 .....	<i>passim</i>
<i>Johnson v. State</i> (1942) 204 Ark. 476 [163 S.W.2d 153].....	11
<i>Korematsu v. United States</i> (1944) 323 U.S. 214 .....	18, 19
<i>Lawrence v. Texas</i> (2003) 539 U.S. 558 .....	19
<i>Leoles v. Landers</i> (1937) 302 U.S. 656 .....	12
<i>Livermore v. Waite</i> (1894) 102 Cal. 113 .....	4, 15, 17
<i>Loving v. Virginia</i> (1967) 388 U.S. 1 .....	19
<i>McFadden v. Jordan</i> (1948) 32 Cal.2d 330 .....	15, 17
<i>Minersville School District v. Gobitis</i> (1940) 310 U.S. 586 .....	12, 18, 19
<i>Nicholls v. Mayor &amp; School Committee of Lynn</i> (1937) 297 Mass. 65 [7 N.E. 2d 577] .....	12
<i>Owens v. City of Signal Hill</i> (1984) 154 Cal.App.3d 123 .....	14
<i>People ex rel. Fish v. Sandstrom</i> (Suffolk County Ct. 1938) 167 Misc. 436 [3 N.Y. Supp. 2d 1006].....	12
<i>Perez v. Sharp</i> (1948) 32 Cal.2d 711 .....	19
<i>Plessy v. Ferguson</i> (1896) 163 U.S. 537 .....	18, 19

	<b>Page</b>
<i>Raven v. Deukmejian</i> (1990) 52 Cal.3d 336 .....	15, 16, 18
<i>Rosasco v. Commission on Judicial Performance</i> (2000) 82 Cal. App. 4th 315 .....	20
<i>Serrano v. Priest</i> (1976) 18 Cal.3d 728 .....	18
<i>State ex rel. Bolling v. Superior Court</i> (1943) 16 Wn.2d 373 [133 P.2d 803] .....	12
<i>West Virginia State Board of Education v. Barnette</i> (1943) 319 U.S. 624 .....	13, 19
<i>Williams v. Kapilow &amp; Son, Inc.</i> (1980) 105 Cal.App.3d 156 .....	14

## **STATUTES, RULES AND REGULATIONS**

### **California Constitution**

Article I, § 1 .....	<i>passim</i>
Article I, § 3 .....	5
Article I, § 3(a) .....	5
Article I, § 7 .....	ii, xv, 2, 4
Article I, § 7(a) .....	5, 15
Article I, § 24 .....	18, 19
Article XVIII, § 1 .....	1, 3, 17
Article XVIII, § 2 .....	1, 3, 17
Article XVIII, § 3 .....	1, 3, 5
Article XVIII, § 4 .....	1
 United States Constitution .....	 iii, 18, 19
Article V. ....	iii

## **SECONDARY AUTHORITIES**

Adams, Three Episodes in Massachusetts History (1892) .....	8
American Civil Liberties Union, The Persecution of Jehovah's Witnesses: The record of violence against a religious	

	Page
organization unparalleled in America since the attacks on the Mormons (1941) .....	11
Allen, Historical Sketch of the Unitarian Movement Since the Reformation (1894) .....	7
A.W. M'Clure, The Lives of the Chief Fathers of New England: The Lives of John Wilson, John Norton, and John Davenport (1870).....	8
Baird, Religion in America (1856) .....	7, 8, 9
Beller, Antisemitism: A Very Short Introduction (2007).....	6
Brockunier, The Irrepressible Democrat, Roger Williams (1940) .....	7
Bushman, Mormonism: A Very Short Introduction (2007) .....	10
Cobb, The Rise of Religious Liberty in America (1968) .....	7, 8
Davis, The Moral Theology of Roger Williams: Christian Conviction and Public Ethics (2004).....	7
Ellis, To the Flag: The Unlikely History of the Pledge of Allegiance (2005) .....	12, 13
Finkelman, Encyclopedia of American Civil Liberties (2006) .....	12
Harris, Historical Dictionary of Unitarian Universalism (2004).....	9
Hesse, ed., Persecution and Resistance of Jehovah's Witnesses During the Nazi Regime 1933-1945 (2001).....	11
Kinney, Church & State: The Struggle for Separation in New Hampshire, 1630-1900 (1955).....	9
Laqueur, The Changing Face of Anti-Semitism: From Ancient Times to the Present Day (2008) .....	6
Levy, Blasphemy in Massachusetts: Freedom of Conscience and the Abner Kneeland Case: A Documentary Record (1973) .....	9
Manwaring, Render Unto Caesar: The Flag Salute (1962) .....	13

	Page
Miller, Roger Williams: His Contribution to the American Tradition (1962).....	7
Nevis, Witchcraft in Salem Village in 1692, Together with an Account of Other Witchcraft Prosecutions in New England and Elsewhere (1892).....	8
Newman, A History of the Baptist Churches in the United States (1894).....	7
Northend, The Bay Colony: A Civil, Religious and Social History of the Massachusetts Colony (1896) .....	7
Papa, The Last Man Jailed for Blasphemy (1998) .....	9
Peck, <i>Historical Note</i> in Liebster, Facing the Lion: Memoirs of a Young Girl in Nazi Europe (2000).....	11
Penton, Jehovah's Witnesses and the Third Reich: Sectarian Politics Under Persecution (2004).....	11
Perry & Schweitzer, Anti-Semitism: Myth and Hate from Antiquity to the Present (2005) .....	6
Peters, Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution (2000).....	10
Rice, Proceedings at the Celebration of the Two Hundredth Anniversary of the First Parish at Salem Village, Now Danvers, October 8, 1872 (1874) .....	8
Riches, The Bible: A Very Short Introduction (2000) .....	6
Reynaud & Graffard, The Jehovah's Witnesses and the Nazis: Persecution, Deportation and Murder, 1933-1945 (Moorehouse tr. 2001) .....	11
Smith, <i>The Persecution of West Virginia Jehovah's Witnesses and the Expansion of Legal Protection of Religious Liberty</i> in Davis & Hankins, eds. <i>New Religious Movements and Religious Liberty in America</i> (2d ed. 2003).....	13

	<b>Page</b>
United States Holocaust Memorial Museum, Jehovah's Witnesses: Victims of the Nazi Era (2002) .....	11
Winslow, Master Roger Williams: A Biography (1957).....	7



## APPLICATION TO FILE BRIEF OF *AMICI CURIAE*

The California Council of Churches, the Rt. Rev. Marc Handley Andrus, Episcopal Bishop of California, the Rt. Rev. J. Jon Bruno, Episcopal Bishop of Los Angeles, General Synod of the United Church of Christ, Northern California Nevada Conference of the United Church of Christ, Southern California Nevada Conference of the United Church of Christ, Progressive Jewish Alliance, Unitarian Universalist Association of Congregations, and Unitarian Universalist Legislative Ministry California as petitioners in *California Council of Churches, et al. v. Horton, et al.*, No. S168332, respectfully seek leave to file the accompanying brief of *amici curiae* supporting three petitions for a writ of mandate enjoining respondent officers of the State of California from giving effect to Proposition 8.

*Amici curiae* filed their own writ petition challenging Proposition 8 on November 17, 2008. On November 20, 2008 this court deferred action on that petition, and invited the petitioners “to file an application to file an *amicus curiae* brief, accompanied by the proposed brief,” in cases numbered S168047, S168066, and S168078. (*California Council of Churches v. Horton*, No. S168332, Order (Nov. 20, 2008).)

*Amici curiae* accordingly submit this application to file the accompanying brief of *amici curiae*, which is bound herewith.

## I. INTRODUCTION

*Marriage Cases* held that the right to marry is firmly grounded in rights declared “inalienable” by article I, section 1 of the California Constitution, and that depriving same-sex couples of this inalienable right violates the bedrock principle of equal protection of the laws protected by article I, section 7. (*In re Marriage Cases* (2008) 43 Cal.4th 757.)

Not even the electorate can take away these sacrosanct rights on a whim. At the very least, article XVIII of the California Constitution requires a two-thirds vote of the Legislature, or a constitutional convention, before a historically disfavored minority may be deprived of equal protection of the laws with regard to “inalienable” rights. Additionally, as the Attorney General asserts, an initiative that targets constitutionally “inalienable” rights must survive strict scrutiny if those rights are to amount to anything. This Proposition 8 cannot do.

Proposition 8, which passed by a relatively narrow margin on November 4, 2008, purports to do something unprecedented in California by changing our state Constitution to undermine a fundamental constitutional and human-rights principle – the right of all citizens to equal protection of the laws – by withdrawing that right from some of those citizens, in order to deprive them of a constitutionally inalienable right. The California Constitution, however, provides safeguards against such threats to equal protection: Under article XVIII, such a dramatic qualitative change is a “revision” which cannot

occur by initiative but instead requires a two-thirds vote of the Legislature, or a constitutional convention, followed by a vote of the people. In this way, the California Constitution insulates its guarantee of equal protection from the passions of popular prejudice that occasionally creep into the political process – much like the United States Constitution ensures the endurance of the federal guarantee of equal protection by requiring a three-fourths vote of state legislatures or conventions to amend the Bill of Rights. (See U.S. Const., art. V.)

*Amici curiae* religious institutions, their member congregations, and parishioners count on article XVIII to ensure that the California Constitution's guarantee of equal protection for *religious minorities* cannot be taken away without a deliberative process of the utmost care possible in a representative democracy. If Proposition 8 is upheld, however, that assurance will disappear – for, just as surely as same-sex couples could be deprived of equal protection by a simple majority vote, so too could religious minorities be deprived of equal protection – a terrible irony in a nation founded by people who emigrated to escape religious persecution. *Amici curiae* seek this court's invalidation of Proposition 8 because of past experience and fear for the future – the experience of historical persecution against religious minorities, and the fear that it could happen again, here in California, if a path is cleared for an initiative-based selective deprivation of equal protection.

## II. IDENTITY AND INTEREST OF *AMICI CURIAE*

As explained below, *amici curiae* have a profound interest in the continuing vitality and integrity of the equality guarantees of the California Constitution and of the safeguard against hasty or improvident changes to our state Constitution established by article XVIII, which prohibits the use of the initiative process for a constitutional change of the magnitude of Proposition 8.

### A. Identity of *Amici Curiae*

The identities of petitioners in No. S168322, seeking leave now to appear here as *amici curiae*, are as follows:

1. *Amicus curiae* **California Council of Churches** is an organization of California's Christian churches that traces its history to a gathering at San Francisco's Central Methodist Church where, on January 28, 1913, twenty delegates from several county and city church federations organized a statewide California Church Federation, with a constitution declaring: "In the providence of God, the time has come more fully to manifest the essential oneness of the Christian Churches of America in Jesus Christ as their Divine Lord and Savior, and to promote the spirit of fellowship, service and cooperation among them." The Council today is a leading voice representing the theological diversity in the state's mainstream and progressive communities of faith. Its membership includes 51 denominations and judicatories in California, representing over 4,000 congregations and more

than 1.5 million members drawn from the mainstream Protestant and Orthodox Christian communities, as well as allies from other faith traditions. They include: **American Baptist Churches** (American Baptist Churches of the West; Pacific Southwest Region); **African Methodist Episcopal Church** (Fifth Episcopal District); **African Methodist Episcopal Zion Church**; **Armenian Church of America** (Western Diocese of the Armenian Church); **Christian Methodist Episcopal Church** (Ninth Episcopal District); **Church of the Brethren** (Pacific Southwest District); **Christian Church (Disciples of Christ)** (Northern California-Nevada Region; Pacific Southwest Region); **Community of Christ**; **The Episcopal Church** (Episcopal Diocese of California; Episcopal Diocese of El Camino Real; Episcopal Diocese of Los Angeles; Episcopal Diocese of Northern California; Episcopal Diocese of San Diego; Episcopal Diocese of San Joaquin); **Ethiopian Orthodox Church**; **Evangelical Lutheran Church in America** (Pacifica Synod; Sierra Pacific Synod; Southwest California Synod); **Greek Orthodox Church** (Orthodox Diocese of San Francisco); **Independent Catholic Churches International**; **Moravian Church**; **National Baptist Convention**; **Presbyterian Church (U.S.A.)** (Presbytery of Los Ranchos; Presbytery of the Pacific; Presbytery of the Redwoods; Presbytery of Riverside; Presbytery of Sacramento; Presbytery of San Diego; Presbytery of San Fernando; Presbytery of San Francisco; Presbytery of San Gabriel; Presbytery of San Joaquin; Presbytery of San Jose; Presbytery of Santa Barbara; Presbytery of Stockton; Sierra Mission

Partnership; Synod of the Pacific; Synod of Southern California & Hawaii); **Reformed Church in America; Swedenborgian Church; United Church of Christ** (Northern California Nevada Conference; Southern California Nevada Conference); **United Methodist Church** (California-Nevada Conference; California-Pacific Annual Conference); **Universal Fellowship of Metropolitan Community Churches** (Region 1; Region 6); **Church Women United**; and **Orthodox Clergy Council**.

2. *Amicus curiae* **Right Reverend Marc Handley Andrus** is the eighth bishop of the Episcopal Diocese of California, elected in a special convention at San Francisco's Grace Cathedral on May 6, 2006, and invested as Bishop of California on July 22, 2006. Before his election as Bishop of California, Andrus served as Bishop Suffragan in the Episcopal Diocese of Alabama. The Episcopal Diocese of California serves a diverse community of faith, with 27,000 people forming 80 congregations, 22 of them missions, including 2 special ministries, in 49 cities and towns. The diocese is organized into six deaneries – the Alameda, Contra Costa, Marin, San Francisco and Southern Alameda deaneries cover their respective counties; the Peninsula deanery consists of all of San Mateo County and a small portion of Santa Clara County. The diocese has 335 priests and 85 vocational deacons who minister to the congregations.

3. *Amicus curiae* **Rt. Rev. J. Jon Bruno** became the sixth bishop of Los Angeles on February 1, 2002. The Episcopal Church in the Diocese of

Los Angeles encompasses 85,000 Episcopalians in 147 congregations located in Los Angeles, Orange, Riverside, San Bernardino, Santa Barbara, and Ventura counties. Served by some 400 clergy, the Diocese also includes some 40 Episcopal schools and some 20 social service and chaplaincy institutions. Upon becoming Bishop of Los Angeles, Bishop Bruno called on the people of the diocese to be people of mission for the Christian faith. He has identified the “facts” of such mission as formation in faith, a sense of the abundance of God’s generosity, competence, truth, and service. In his call to mission, Bishop Bruno encourages clergy and laypersons to “plan and prepare for God’s service, work for abundance, and care for the community as we would care for Jesus.” Bishop Bruno is a leader in the Episcopal Church in many areas, including interfaith ministry, education, nonviolence, and reconciliation.

4. *Amicus curiae* **General Synod of the United Church of Christ** is the representative body of the national setting of the **United Church of Christ (UCC)** and is composed of delegates chosen by its Conferences from member churches, voting members of Boards of Directors of Covenanted Ministries who have been elected by General Synod as described in the Bylaws of the UCC, and of ex officio delegates. The UCC was formed in 1957, by the union of the **Evangelical and Reformed Church** and **The General Council of the Congregational Christian Churches of the United States** in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to

serve God's people in the world. The UCC has 5,600 churches in the United States, with a membership of approximately 1.2 million. The General Synod of the UCC, various settings of the UCC, and its predecessor denominations, have a rich heritage of standing in solidarity with those who are marginalized, oppressed, and who suffer under the tyranny of injustice. Seeking spiritual freedom, the Pilgrims, forebears of the United Church of Christ, left Europe for the New World. As they departed, their pastor, John Robinson, urged them to keep their minds and hearts open to new ways, saying "God has yet more light and truth to break forth out of his holy Word." Congregationalists were among the first Americans to take a stand against slavery. They published the first anti-slavery pamphlet in 1700, "The Selling of Joseph," and in 1846 organized the American Missionary Association which was the first anti-slavery society with multi-racial leadership. In 1773, five thousand angry colonists gathered in the Old South Meeting House in Boston, a Congregational house of worship, to demand repeal of an unjust tax on tea. Their protest inspired a defining moment in American history, the "Boston Tea Party." The General Synod of the UCC has continued this legacy, often being the first among Christian bodies to take courageous stands for justice, including support for the rights of women, farm workers, and mixed race marriage. For more than three decades, the General Synod of the UCC has set a clear course of welcome, inclusion, equality, and justice for lesbian, gay, bisexual, and transgender people. In 1975, the General Synod pronounced its



support for the full civil rights of gay and lesbian people, declaring, “we hold that, as a child of God, every person is endowed with worth and dignity that human judgment cannot set aside. Denial and violation of the civil liberties of the individual and her or his right to equal protection under the law defames that worth and dignity and is, therefore, morally wrong.” On July 4, 2005, the General Synod adopted a resolution affirming equal marriage rights for couples regardless of gender and declared that the government should not interfere with couples, regardless of gender, who choose to marry and share fully and equally in the rights, responsibilities and commitment of legally recognized marriage.

5. *Amicus curiae* **Northern California Nevada Conference United Church of Christ** is a manifestation of the church of Jesus Christ and a constituting body of the **United Church of Christ (UCC)**. Members of the Conference include 130 local churches in the State of California. Within the state of California the Conference extends from the Oregon border to the southern borders of Inyo, Tulare, Kings, and Monterey counties. The Conference’s membership includes, for example, the **First Congregational Church of Berkeley**, which was founded in 1874 as the first church in Berkeley and whose members were instrumental in the founding of the University of California at Berkeley; the **San Mateo Congregational Church United Church of Christ**, which was founded in 1865 and whose members provided housing for Japanese-Americans when they returned from internment

at the end of World War II; and the **First Congregational Church of Oakland**, which was founded in 1860 and which for many weeks fed, housed, and clothed thousands of refugees from the 1906 earthquake and fire that devastated San Francisco.

6. *Amicus curiae* **Southern California Nevada Conference of the United Church of Christ (SCNC)** is a faith community gathered in over 130 diverse congregations. The purpose of the SCNC is to be a united and uniting community of the people of God, covenanting together for mutual support and common mission. Its denomination, the United Church of Christ, is a “mainline” Protestant denomination in the Reformed tradition, and its history is witness to a long and profound commitment to peace-seeking and advocacy for justice for all. In 2004, at its Annual Gathering, the Conference delegates approved a resolution supporting marriage equality. This petition is grounded in that action.

7. *Amicus curiae* **Progressive Jewish Alliance (PJA)**, [www.pjalliance.org](http://www.pjalliance.org), is a non-profit, California-based membership organization, with over 4,000 members, which educates, advocates and organizes on issues of peace, equality, diversity and justice. Founded in 1999 and with offices in Los Angeles and the San Francisco Bay Area, PJA serves as a vehicle connecting Jews to the critical social justice issues of the day, to the life of the cities in which they live, and to the Jewish tradition of working for *tikkun olam* (the repair of the world). As an integral part of its social

justice agenda, PJA supports equal access to marriage for all. Representing a people who have long known the sting of marginalization and inferior citizenship, PJA opposes any efforts to discriminate against same-sex couples, whether by constitutional amendment or by the creation of second-class domestic partnerships or civil unions. PJA's views on this subject are grounded in the Jewish legal tradition that the law should be applied equally to all, citizen and stranger alike. Those views are further elaborated upon in PJA's May 12, 2004, policy statement, which can be found at <http://www.pjalliance.org/article.aspx?ID=76&CID=9>.

8. *Amicus curiae* **Unitarian Universalist Association of Congregations (UUA)** is a denomination comprising more than 1,000 congregations nationwide, among them many of America's founding churches, and more than 70 congregations in the State of California. The denomination's membership includes, for example, one of the churches organized by the Pilgrims who ventured to sail on the Mayflower, landing at Plymouth Rock in 1620 and celebrating the First Thanksgiving in 1621, the **First Parish Church in Plymouth, Massachusetts** ("at the top of Town Square since 1620"); the congregation organized in 1630 by John Winthrop as the beacon light for his Puritan settlers' shining "city upon a hill," the **First Church in Boston**; the congregation organized at Salem, Massachusetts in 1629, that had some troubling issues with "witches" in 1692, the **First Church in Salem**; and the **United First Parish Church (Unitarian), Quincy,**

**Massachusetts**, which first gathered in the 1630s, where President John Adams, First Lady Abigail Adams, President John Quincy Adams, and First Lady Catherine Louisa Adams worshipped, and where their bodies rest in peace in their home church to this day. In California, the denomination's membership includes, for example, the **First Unitarian Church of Los Angeles**, which first gathered in 1877, and which at McCarthyism's height defended the right of religious organizations to refuse government-mandated oaths or affirmations "as to church doctrine, advocacy or beliefs" (*First Unitarian Church of Los Angeles v. County of Los Angeles* (1958) 357 U.S. 545, 546-547 (con. opn. of Douglas, J.)); **Throop Memorial Church** of Pasadena, whose name memorializes its founding in 1886 by Amos Throop, who also founded the California Institute of Technology; and the **First Unitarian Universalist Society of San Francisco**, first gathered in 1850, whose minister the Rev. Thomas Starr King was credited by President Abraham Lincoln's General-in-Chief Winfield Scott for tireless efforts that, in time of national crisis, "saved California to the Union."

9. *Amicus Curiae* **Unitarian Universalist Legislative Ministry, CA** is a statewide justice ministry that cultivates and connects leaders and communities to empower the public voice of those who share Unitarian Universalist values and principles. The Ministry develops civic-engagement skills to educate, organize, and advocate for public policies that: uphold the worth and dignity of every person; further justice, equity, and compassion in

human relations; ensure use of the democratic process; protect religious freedom; and promote respect for the interdependent web of all existence. As a matter of human dignity, Unitarian Universalist congregations and clergy in California have long supported the freedom to marry for same-sex couples, both in their religious rites, and as a civil right. Hundreds of same-sex couples were legally married by Unitarian Universalist clergy in California between June 17, 2008, and November 4, 2008.

**B. Interest of *Amici Curiae***

*Amici curiae*, representing the broad mainstream of California's religious life, and as petitioners in No. S168332, have an interest in this proceeding because the possibility of eliminating fundamental constitutional rights for a particular group of Californians, based on a suspect classification and by a simple majority vote, presents a profound threat to the critical protections afforded by the guarantee of equal protection to the broadly diverse religious groups in this state.

*Amici curiae* acknowledge that people of faith are by no means of one mind concerning recognition of same-sex marriages as a religious rite. When California's Episcopal Bishops issued a statement opposing Proposition 8, they observed:

As bishops, we are not of one mind regarding how our Church's clergy should participate with the State in same-sex marriage. Some of us believe it is appropriate to permit our clergy to officiate at such marriages and pronounce blessings over the union; others of us believe that we should await consent of our

General Convention before permitting such actions. Nevertheless, we are adamant that justice demands that same-sex civil marriage continue in our state and advocate voting “No” on Proposition 8.<sup>1</sup>

The California Council of Churches represents more than 4,000 member churches, many of which do not recognize same-sex marriage as a religious rite. Some of its members do, including congregations affiliated with the United Church of Christ and with the Universal Fellowship of Metropolitan Community Churches. So do Unitarian Universalist congregations throughout the state. *Amici curiae* firmly believe that no place of worship should be forced to conduct a wedding that is contrary to its beliefs or discipline. The liturgical limitations of those that do not recognize same-sex marriage as a religious rite, however, should not be imposed by law to bar other faith traditions from recognizing, and their clergy from officiating over, the marriages of same-sex couples. And *no* California couples, whatever their faith may be, should be deprived of the right to civil marriage as a fundamental civil right, let alone be deprived of equal protection of the laws.

As petitioners in No. S168332 representing diverse religious organizations and faith traditions, *amici curiae* have a profound interest in

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<sup>1</sup> Statement on Proposition 8 by the Episcopal Diocesan Bishops of California (September 10, 2008), available online: [http://www.diocal.org/index.php?option=com\\_content&task=view&id=303&Itemid=215](http://www.diocal.org/index.php?option=com_content&task=view&id=303&Itemid=215)

core constitutional protections, including the guarantee of equal protection secured by the California Constitution both under the express equal protection clause of article I, section 7 and as an implicit requirement of the fundamental right to religious liberty and freedom, which must be applied equally to all persons and religious faiths without government favoritism or partiality.

Finally, as faith-based institutions, *amici curiae* wish to strengthen families. There is a broad spectrum of families in our communities, including those with lesbian, gay, bisexual, and transgender parents and other family members, and all of them should enjoy the full protection of the law and the full support of our social structures.

## BRIEF OF *AMICI CURIAE*

### III. QUESTIONS PRESENTED

(1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution? (See Cal. Const., art. XVIII, §§1-4.)

(2) Does Proposition 8 violate the separation of powers doctrine under the California Constitution?

(3) If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?

### IV. SUMMARY OF ARGUMENT

On May 15, 2008, this court held that marriage is a fundamental civil right which cannot, consistent with the California Constitution's guarantee of equal protection of the laws, be denied same-sex couples. (*In re Marriage Cases* (2008) 43 Cal.4th 757 (*Marriage Cases*)). The court held that its precedents "make clear that the 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" (*id.* at p. 818), which by its terms makes the right "inalienable" (Cal. Const., art. I, § 1).

This court held, moreover, that government discrimination based on sexual orientation is inherently suspect under the California Constitution's guarantee of equal protection of the laws, and that denying same-sex couples



the right to marry violates that guarantee. (*Marriage Cases, supra*, 43 Cal.4th at pp. 855-856; Cal. Const., art. I, § 7.) Discrimination based on sexual orientation is like discrimination based on religion – both violate equal protection. (*Id.* at pp. 841-842.) In contrast, permitting equal access to the fundamental freedom to marry is fully consistent with religious liberty. (*Id.* at pp. 854-855.)

In seeking to overturn the *Marriage Cases* decision, Proposition 8 attempts a radical revision of the California Constitution by purporting to revoke from a particular class of Californians (same-sex couples) a right that the Constitution designates “inalienable,” and thereby deprive this class of equal protection of the laws – a bedrock principle upon which our social contract and system of constitutional government is based. *All* Californians are threatened, for if “inalienable” rights and equal protection of the laws may be revoked by a simple majority vote, then none of us is safe from the tyranny of temporary majorities that constitutional safeguards are supposed to protect against. If what Proposition 8 purports to do can be done at all, it amounts to a constitutional “revision” that, under article XVIII of the California Constitution, cannot occur by initiative but instead requires a two-thirds vote of the Legislature, or a constitutional convention, followed by a vote of the people.

*Amici curiae* and their members count on the protection of article I, section 7 of the California Constitution, which guarantees equal protection of

