

Case No.: S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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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.

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**BRIEF OF *AMICI CURIAE* ASIAN PACIFIC AMERICAN LEGAL CENTER,  
CALIFORNIA STATE CONFERENCE OF THE NAACP, EQUAL JUSTICE  
SOCIETY, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL  
FUND, AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.  
IN SUPPORT OF PETITIONERS**

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## **I. INTEREST OF AMICI**

The Asian Pacific American Legal Center of Southern California (“APALC”) is the nation’s largest public interest law firm devoted to the Asian and Pacific Islander community. As a civil rights organization, APALC focuses on combating race and national origin discrimination in order to positively influence and impact Asian Pacific Americans and to create a more equitable and harmonious society.

The California State Conference of the NAACP (the “NAACP”) is part of a national network of NAACP affiliates. Founded in 1909 by a group of black and white citizens committed to social justice, the NAACP is the nation’s largest and strongest civil rights organization. The NAACP’s principal objective is to ensure the political, educational, social, and economic equality of minority citizens of the United States and to eliminate race prejudice.

The Equal Justice Society is a national organization of scholars, advocates and citizens that seek to promote equality and enduring social change, with a primary mission of combating the continuing scourge of racial discrimination and inequality in America.

Founded in 1968, the Mexican American Legal Defense and Educational Fund (“MALDEF”) is the leading national civil rights organization representing the 48 million Latinos living in the United States through litigation, advocacy, and educational outreach. MALDEF’s mission is to foster sound public policies, laws and programs to safeguard the civil rights of Latinos living in the United States and to empower the Latino community to participate fully in our society. MALDEF has litigated many cases under state and federal law to ensure equal treatment of Latinos, and MALDEF sets as a

primary goal ensuring that minority groups have equal protection of the law.

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) is a non-profit corporation founded in 1940 under the leadership of Thurgood Marshall. LDF’s mission is to serve as America’s legal counsel on issues of race. Since its founding, LDF has been committed to transforming this nation’s promise of equality into reality for all Americans, with a particular emphasis on the rights of African-Americans.

As organizations devoted to protecting civil rights of racial and ethnic minorities, Amici have a strong interest in protecting the integrity of the core constitutional principle of equal protection of the laws for all California citizens. To ensure that the rights of the minority constituencies that they represent are maintained regardless of political currents, Amici seek to protect the distinction between a revision and an amendment under the California Constitution.

## **II. INTRODUCTION**

This case is not simply about gay and lesbian equality. The enactment of Proposition 8 requires this Court to determine whether a ballot initiative can be used to deprive any historically disfavored minority of its fundamental rights on the basis of a constitutionally suspect classification. The answer is no. To hold that a ballot initiative can employ a suspect classification to strip a minority of its fundamental rights would subvert the defining principle of the equal protection clause, undermine a foundational power of the judiciary, and place every minority community in the State of California in jeopardy. The suspect classification doctrine makes it clear that the initiative process cannot be used to deprive unpopular minorities of their rights by simple majority vote.

In drawing a distinction between amendment and revision, article XVIII of the California Constitution requires this Court to decide which categories of constitutional changes are appropriate for majority vote through the initiative process and which should require the full deliberative participation of the legislature or a constitutional convention. In other words, article XVIII requires this Court to determine which constitutional alterations should be subject to simple majority rule and which should not. The equal protection clause of the California Constitution offers a clear answer to that question. The core purpose of equal protection is to protect the minority from systematic oppression by the majority. That purpose would be subverted if the rights of historically disfavored minorities were subject to simple majority rule. If there is one provision of the California Constitution that must be protected from the constant threat of alteration by a simple majority, it is the provision that aims to protect disfavored minority groups from oppression.

A holding that measures like Proposition 8 can be enacted by ballot initiative would also work a dangerous change to the structure of the California Constitution. This Court has long held that the principle of judicial review under the separation of powers is essential to the protection of individual and minority rights from majority oppression. Judicial review has repeatedly proven necessary to protect minorities from the shifting sentiments of hostile majorities in this State. If the constitutionally recognized rights of disfavored minorities could be abridged by simple initiative, as Proposition 8 attempts to do, then the judiciary's role in protecting against oppression by the majority could be circumvented by that very majority. Such a regime would undermine a key structural

feature of the California Constitution.

The imperative for this Court to grant the relief Petitioners seek extends far beyond the merits of this litigation. In holding that antigay discrimination is entitled to the same strict scrutiny that discrimination based upon race or sex receives – a holding that Amici fully endorse – this Court has necessarily placed attempts to deprive gay people of their constitutional rights on the same article XVIII footing as attempts to take rights away from women or people of color. A finding that suspect classifications of citizens can be selectively oppressed through the initiative process would jeopardize the rights of every member of a historically disfavored community in the State of California.

Despite the progress of recent years, Amici still carry a sober awareness of the discrimination that majorities can inflict against the communities whose interests we represent. This Court must reaffirm the protections to which all historically disfavored minorities in California are entitled. We therefore urge the Court to hold that (1) the discriminatory elimination of (2) a fundamental right from (3) a group defined by a suspect classification constitutes a revision requiring the deliberative processes of the legislature or a constitutional convention, as set forth in sections 1 and 2 of article XVIII. Hence, Proposition 8 is invalid.

### **III. ARGUMENT**

#### **A. The Constitutional Requirement Of Equal Protection For Suspect Classifications Is Inherently Counter-Majoritarian And Incompatible With The Process Of Amendment By Initiative**

The core function of equal protection is to protect minority groups within a

community from being singled out and targeted by laws that the majority would not be willing to impose upon itself. Justice Jackson offered the canonical statement of this proposition in a passage that this Court has since adopted as its own: “The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.” (*United States Steel Corp. v. Public Utilities Com.* (1981) 29 Cal.3d 603, 612, citing *Railway Express v. New York* (1949) 336 U.S. 106, 112-113 (conc. opn. of Jackson, J.); accord *Hays v. Wood* (1979) 25 Cal.3d 772, 786-87.) Though every constitutional restraint may involve some frustration of the preferences of the majority, as Alexander Bickel famously observed in coining the term “counter-majoritarian” to describe the operation of a Constitution (Bickel, *The Least Dangerous Branch* (2d ed. 1986) pp. 16-23), equal protection is distinctive. An equal protection clause does not merely “withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials,” as Justice Jackson wrote elsewhere in describing a Bill of Rights generally. (*West Virginia State Bd. of Education v. Barnette* (1943) 319 U.S. 624, 638.) Equal protection aims specifically at those laws by which the majority selectively oppresses the minority. The counter-majoritarian purpose of the equal protection clause, in other words, is twofold: Like any constitutional provision, it sometimes requires that a higher value trump a democratically enacted measure. But unlike most other constitutional provisions, the

higher value that the equal protection clause embodies is the imperative to protect minorities from hostile majority sentiment.

These core imperatives of equal protection are at their most urgent when laws target historically disfavored minorities. As the Supreme Court of the United States has explained, in words that speak directly to the issue before this Court, “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities,” hence calling for “a correspondingly more searching judicial inquiry.” (*United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152 fn.4.) The mandate of equal protection is at its apex when ordinary political processes are inadequate to protect unpopular minorities from what James Madison called “the superior force of an interested and overbearing majority.” (Madison, *The Federalist*, No. 10 (Rossiter ed. 2003) p. 72.) The suspect classification doctrine seeks to identify those groups that may experience “a social and cultural isolation that gives the majority little reason to respect or be concerned with [their] interests and needs.” (*City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 472 fn.24 (conc. and diss. opn. of Marshall, J.)) In such cases, “courts must look closely at classifications based on [a suspect] characteristic lest outdated social stereotypes result in invidious laws or practices.” (*Sail’er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 18; see also *In re Marriage Cases* (2008) 43 Cal. 4th 757, 842–43 [rejecting argument that recent progress can justify relaxing judicial protection of a “class of persons who exhibit a certain characteristic [that] historically has been subjected to invidious and prejudicial treatment”].)

Article XVIII draws a distinction between ordinary and extraordinary political processes that is directly responsive to this equal protection concern. Section 3 of article XVIII makes the process of amendment by initiative available for some constitutional alterations, but sections 1 and 2 require that revisions satisfy the more deliberative protections of republican government through the involvement of the legislature or a constitutional convention. In an equal protection case, it is the suspect classification doctrine that identifies those situations in which the “political processes ordinarily to be relied upon to protect minorities” are inadequate, requiring more robust safeguards. (*United States v. Carolene Products Co.*, *supra*, 304 U.S. at p. 152 fn.4.) The suspect classification doctrine thus offers the most direct possible answer to the question that article XVIII poses. Strict scrutiny defines those types of discrimination that equal protection has a “fundamental” or “substantial” purpose to prevent. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 354.) The “fundamental structure” of equal protection, and “the foundational powers of [the judicial] branch[.]” in enforcing that principle, would be transformed if historically disfavored minorities could be selectively deprived of their fundamental rights by simple majority vote. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 509.)

Justice Kennard summarized these principles well in her concurring opinion in the marriage litigation:

The architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups, and that the most effective remedy for this form of oppression is an independent judiciary charged with the solemn



responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection.

(*In re Marriage Cases*, *supra*, 43 Cal.4th 757, 860 (conc. opn. of Kennard, J.)) These words apply as forcefully to the interpretation of article XVIII as they did to the original equal protection issue before this Court in the marriage cases.

The greater deliberative processes that article XVIII requires for constitutional revisions offer protection of particular significance to disfavored minority groups, for those processes “offer[] time for reflection, exposure to competing needs, and occasions for transforming preferences.” (Eule, *Judicial Review of Direct Democracy* (1990) 99 Yale L.J. 1503, 1527; see also Note, *Choosing Representatives by Lottery Voting* (1984) 93 Yale L.J. 1283, 1304 [“[While] we cannot force white voters to listen to blacks in their neighborhoods, . . . black legislators can interact with and influence their white colleagues.”].) There is strong evidence in the social science literature that these constitutional principles reflect real differences in the outcomes that minority communities can expect when the processes of republican government, rather than the ballot initiative, govern matters involving their fundamental rights. (See Haider-Markel et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights* (June 1, 2007) 60 Pol. Res. Q. 304 [finding that the civil rights of gay men and lesbians receive substantially more protection in the legislative process than in the initiative process]; see also Hajnal et al., *Are There Winners and Losers? Race, Ethnicity, and California’s Initiative Process* (2001) [finding that on issues affecting discrete minorities in the California initiative process, people of color are less likely than whites to vote for

the winning side].)

Amici make these arguments with the benefit of long experience, for we represent Californians who know all too well the danger of rendering the protection of disfavored minorities subject to simple majority rule. From the laws that gave preferences to white labor over Chinese labor and discouraged Chinese immigration into California (see *Lin Sing v. Washburn* (1862) 20 Cal. 534, 564 [striking down such laws]); to the 1913 Alien Land Law that excluded Asian-Americans from owning property in this State (see *Sei Fujii v. State* (1952) 38 Cal.2d 718, 720 [declaring the prohibition unconstitutional]); to mandatory racial segregation within our public schools (see Stats. 1860, ch. 329, § 8, p. 325 [certain races “shall not be admitted into the public schools” but may be educated in “a separate school”]); to the use of English-only laws to deny Mexican-Americans the right to vote (see *Castro v. California* (1970) 2 Cal.3d 223 [striking down California constitutional provision that denied the franchise to voters who were not literate in English]); to the use of anti-miscegenation laws to relegate African-Americans to second-class citizenship (see *Perez v. Sharp* (1948) 32 Cal.2d 711, 712); to a voter-approved constitutional amendment allowing housing discrimination against minorities (see *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 532-33 [invalidating the purported constitutional amendment]); the history of California demonstrates with sobering clarity the potential for disfavored minorities to be subjected to oppression by hostile majorities.

And now, at a defining moment in the life of the California Constitution, the initiative process has been used to eliminate the protection against selective oppression that our state charter offers to another group of California residents defined by a suspect

classification. Make no mistake: If article XVIII were to permit the use of simple majority politics to oppress historically disfavored minorities in such a fashion, then we would all be less safe. That is why a clear rule is needed. Amici do not come before this Court concerned only for people of color who identify as lesbian, gay, bisexual or transgender. We come to the Court concerned about our entire communities, all of whom would be imperiled by a rule that permits the rights of the minority to be selectively revised at any time by the caprice of the majority.

The availability of the U.S. Constitution as a further potential check on discriminatory government action does not cure the problem. First, the protections of the U.S. and California Constitutions are not coextensive. (Cal. Const., art I, § 24.) “[T]he California Constitution is, and always has been, a document of independent force” from the U.S. Constitution. (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 261, quoting *People v. Brisendine* (1975) 13 Cal.3d 528, 549-550; see also *People v. Brisendine, supra*, 13 Cal.3d at p. 551 fn.4 [citing “numerous occasions” on which this Court has interpreted the California Constitution as providing greater protection than parallel provisions of the U.S. Constitution].) California’s Constitution protects against sex-based discrimination more strictly than does its federal counterpart (compare *Sail’er Inn, Inc. v. Kirby, supra*, 5 Cal.3d at p. 17, with *Craig v. Boren* (1976) 429 U.S. 190, 197-98), and this Court has repeatedly stepped ahead of the federal courts in recognizing the constitutional significance of equal access to marriage. (See *Perez v. Sharp, supra*, 32 Cal.2d at p. 714 [recognizing that anti-miscegenation statutes violated the Equal Protection Clause long before the United States Supreme Court held the same

in *Loving v. Virginia* (1967) 388 U.S. 1]; see also *In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 814-15.)

Second, the California Constitution is the charter of government for this State. Its content must be measured and its integrity preserved with reference to California law. (See *Raven v. Deukmejian*, *supra*, 52 Cal.3d at pp. 352-55 [reaffirming the independent role of the California Constitution in defining the rights of criminal defendants and rejecting an attempt to eliminate that independent role through the initiative process].) Indeed, the independent integrity of the California Constitution is particularly important in the case of article XVIII. In drawing a distinction between revision and amendment, article XVIII necessarily asks an internal question about the quality and nature of California's governing charter that demands an assessment of our Constitution on its own terms.

Finally, the availability of independent relief under the California Constitution is important for reasons extending beyond the document's substantive content. As this Court has recognized, "state courts, in interpreting constitutional guarantees contained in state constitutions, are *independently responsible* for safeguarding the rights of their citizens." (*Committee to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d at p. 261, citations omitted.) The vitality of the state Constitution enables the courts of California to play an active role in resolving questions of importance to the life of the community, rather than having federal courts always serve as the presumed forum for constitutional claims in civil cases.

The protection of groups defined by suspect classifications against selective

discrimination is the most important counter-majoritarian function that the founding charter of a polity can serve. In a constitution like that of California, which expressly distinguishes between amendments that can be accomplished by simple initiative and revisions that require the greater deliberative protections of republican government, it would be perverse to find that this most important of counter-majoritarian protections can be eliminated by the vote of a simple majority. Article XVIII demands that the discriminatory elimination of a fundamental right based upon a suspect classification be treated as a revision that must satisfy the procedural requirements of sections 1 and 2.

**B. Eliminating The Power Of The Judiciary To Protect Minorities From Selective Oppression Constitutes A Revision**

By claiming the power to eliminate the role of judicial review in protecting gay and lesbian Californians from discrimination, Proposition 8 threatens to alter a core function of the judiciary. If a group defined by a suspect classification can be selectively deprived of its rights through the initiative process, then the entire role of the judiciary in protecting historically disfavored minorities from discrimination would be forever compromised, and with it a basic structural feature of the California Constitution. As this Court made clear in *Eu*, the impact of a proposed constitutional change on the structural separation of powers is of key importance in article XVIII analysis. (*Legislature v. Eu*, *supra*, 54 Cal.3d at pp. 508-09.) The impact of Proposition 8 upon the separation of powers further establishes that the measure works an impermissible revision.

Among the protections offered by the separation of powers under article III section 3, “probably the most fundamental” is judicial review – “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.” (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141, citing, inter alia, Cal. Const. arts. IV, V and VI; *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 175-178; *People v. Wells* (1852) 2 Cal. 198, 213-14; *Myers v. United States* (1926) 272 U.S. 52 (diss. opn. of Brandeis, J.); Rostow, The Democratic Character of Judicial Review (1952) 66 Harv. L. Rev. 193, 199, 202-04.) Judicial review is an effective safeguard precisely because courts are insulated from the ebbs and flows of majority opinion. “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 v. Pierno, supra*, 4 Cal.3d at p. 141, citing Cardozo, The Nature of the Judicial Process (1921) 92-94, and Hand, The Contribution of an Independent Judiciary to Civilization in The Spirit of Liberty (1959) 118-26; see also *In re Porterfield* (1946) 28 Cal.2d 91, 103 [“We unequivocally recognize and affirm that it is the duty of courts to be most vigilant and vigorous in protecting individuals, as well as minority and majority groups, against encroachment upon their fundamental liberties.”].) This Court has recognized the importance of the separation of powers as a check on majority oppression since California’s first days of statehood. (See *People v. Wells, supra*, 2 Cal. at pp. 213-14 [“The several departments were intended to be kept separate and distinct, within their proper spheres . . . . The judiciary were placed upon a high and solid platform, beyond

the reach of hasty and inconsiderate legislation, of public assemblies, or the withering influence of party strife.”].)

Judicial review has proven essential in guaranteeing the fundamental rights of ethnic minorities in California, including Amici’s members. (See, e.g., *Castro v. California*, *supra*, 2 Cal.3d 223; *Mulkey v. Reitman*, *supra*, 64 Cal.2d 529, *aff’d sub nom. Reitman v. Mulkey* (1967) 387 U.S. 369; *Perez v. Sharp*, *supra*, 32 Cal.2d 711; *Lin Sing v. Washburn*, *supra*, 20 Cal. 534.) The occasional failures of some courts to enforce the rights of historically disfavored minorities stand as indelible reminders of the risks that flow from unbridled majority power and the essential role of judicial review in curtailing those risks. (See, e.g., *Korematsu v. United States* (1944) 323 U.S. 214; *Plessy v. Ferguson* (1896) 163 U.S. 537; *Dred Scott v. Sandford* (1856) 60 U.S. 393.) Judicial review of suspect discrimination – the function that this Court performed in the *Marriage Cases* – is a “foundational power[.]” (see *Legislature v. Eu*, *supra*, 54 Cal.3d at p. 509) that cannot be eroded by simple ballot initiative.

*Eu* establishes that the impact of a ballot initiative upon the structural operation of the California Constitution is a central consideration in determining whether the initiative works an improper revision. (*Legislature v. Eu*, *supra*, 54 Cal.3d at pp. 508-09.) *Eu* involved an article XVIII challenge to Proposition 140, a provision enacted by initiative that imposed term limitations on state legislative members and constitutional officers. The purpose of Proposition 140 was to redress the perceived problem of entrenched politicians who used the benefits of incumbency to retain office past the point of public benefit. In holding that the amendment process was a permissible means to achieve that

reform, the Court emphasized the structural impact that a contrary finding would have had upon the California Constitution. “[T]he main difficulty” with the argument that term-limit reform could only be accomplished through revision, the Court explained, was that such a conclusion would, “as a practical matter, insulate the Legislature from any severe reform measures directed at that branch and initiated by the people.” (*Id.* at p. 511.) Because the legislature is the gatekeeper of the revision process, there is a structural imperative that the ballot be available to address the problem of entrenchment. “To hold that reform measures such as Proposition 140, which are directed at reforming the Legislature itself, can be initiated only with the Legislature's own consent and approval, could eliminate the only practical means the people possess to achieve reform of that branch.” (*Ibid.*) *Eu* stands for the proposition that the practical impact of an initiative on the structural operation of the California Constitution necessarily informs the article XVIII analysis.

This same structural principle requires the conclusion that Proposition 8 is an impermissible revision. The suspect classification doctrine of the equal protection clause aims to protect historically disfavored minorities from the hostile sentiment of the majority. Were it possible to elude judicial review under that doctrine by simple majority vote, the initiative process would “eliminate the only practical means [that minorities] possess” to protect themselves from oppression. (*Legislature v. Eu, supra*, 54 Cal.3d at p. 511.) Whereas majority efforts at reform were the solution to the problem of legislative entrenchment in *Eu*, hostile majority sentiment is the danger to be guarded against in the case of discrimination against disfavored minorities. (See *Bixby v. Pierno*,



*supra*, 4 Cal.3d at p. 141; *In re Porterfield*, *supra*, 28 Cal.2d at p. 103; *People v. Wells*, *supra*, 2 Cal. at pp. 213-14; *In re Marriage Cases*, *supra*, 43 Cal.4th at p. 860 (conc. opn. of Kennard, J.).)

The Interveners respond to these principles by invoking the rhetoric of popular sovereignty and denigrating the role of equal protection in our constitutional system of government. (See Interveners’ Opposition Brief at 17; Interveners’ Response to Pages of 75–90 of the Attorney General’s Brief at 18–19.) Amici have heard these arguments before. Every struggle for equality undertaken by the communities that Amici represent has been met with the response that judges should ignore the imperative of equality and bow to the will of the majority. That history of struggle is precisely what this case is about. As Amici emphasized at the outset of this brief, this case does not simply involve a disagreement over the definition of marriage. Its outcome will determine the types of deprivation that can be inflicted upon all minorities through simple majority vote. This Court reaffirmed the structural importance of equal protection when it embraced Justice Jackson’s insight that “there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.” (*United States Steel Corp.*, *supra*, 29 Cal.3d at 612.) Nonetheless, the Interveners ask this Court to rule that any group, even those defined by a suspect classification, can be selectively deprived of their fundamental rights when a bare majority supports the result. It is the position of the Interveners that runs counter to this Court’s long-standing jurisprudence.

The sovereignty of the people will be fully respected by a ruling in favor of Petitioners. When the people of California added the provisions of article XVIII to the California Constitution, they imposed upon this Court the responsibility to distinguish between constitutional amendments that can be accomplished by ballot initiative and revisions that require the greater deliberative processes of the people's legislative representatives. Both processes are democratic in character; one is more direct, the other more deliberative. Recognizing that some changes are structurally appropriate for direct majority rule while others are not, the people imposed constitutional limitations upon the ends that a simple majority can bring about and charged this Court with enforcing those limitations. And this Court's equality jurisprudence makes it clear that matters involving the rights of unpopular minorities are structurally inappropriate for direct majority rule. There can therefore be no more appropriate role for article XVIII than to enforce the principle identified by James Madison at the birth of the Republic: the imperative to protect the rights of the minority from "the superior force of an . . . overbearing majority" by interposing the processes of republican government. (Madison, *The Federalist*, No. 10 (Rossiter ed. 2003) p. 72.) Giving voice to that article XVIII imperative is not an affront to popular sovereignty; it is a vindication.

Historically disfavored minorities depend upon the protection of judicial review. Were it possible to circumvent that protection by ballot initiative, then minority rights would always be at risk of elimination by a hostile majority. The corrosive impact upon judicial review under the equal protection clause in such a constitutional regime would be profound. The role of the judiciary in the enforcement of the strict scrutiny doctrine is a

“foundational power[.]” of the judicial branch (*Legislature v. Eu*, *supra*, 54 Cal.3d at p. 509) and can only be eliminated by means of an article XVIII revision.

**C. A Holding That Proposition 8 Is An Impermissible Revision Would Give Balanced Effect To This Court’s Article XVIII Precedents**

A holding that measures like Proposition 8 must satisfy the procedural requirements of an article XVIII revision is not just analytically appropriate, it is practically sensible. The proposed rule draws meaningful distinctions between different proposed changes to the California Constitution in the realm of fundamental individual liberties – distinctions that are consistent with this Court’s precedents and give balanced effect to article XVIII.

This Court has spoken most notably to the application of article XVIII to fundamental individual liberties in two cases: *People v. Frierson* (1979) 25 Cal.3d 142, and *Raven v. Deukmejian*, *supra*, 52 Cal.3d 336. In *Frierson*, the Court found that an adjustment to the manner in which one fundamental right applies to all people – the right to be free from cruel or unusual punishment and the application of that right to the death penalty – qualified as an amendment that could be accomplished through initiative. Central to that ruling was the Court’s observation that the amendment preserved the ability of California courts to apply constitutional restraints to the death penalty in particular cases. (*People v. Frierson*, *supra*, 25 Cal.3d at p. 187.) In *Raven*, this Court found that a proposed change that would have eliminated the independent role of the California Constitution altogether in defining the rights of criminal defendants constituted a revision. (*Raven v. Deukmejian*, *supra*, 52 Cal.3d at pp. 354-55.) Central to that ruling

was the Court’s observation that the proposition “would vest all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court” (a change that the Court found qualitatively “devastating”). (*Id.* at pp. 351-52, emphasis in original.) Between *Frierson* and *Raven* lies an expansive terrain within which many fundamental rights might be placed in jeopardy if the initiative process were deemed available. Simply put, it cannot be the case that a repeal of fundamental rights as all-encompassing as that under review in *Raven* is necessary to render a proposed change inappropriate for amendment through simple ballot initiative.

The relief Petitioners seek strikes an appropriate balance in applying article XVIII to a fundamental rights case. It recognizes the importance of an elimination of a fundamental right (as in *Raven*) rather than a mere adjustment (as in *Frierson*). It gives concrete meaning to *Raven*’s pronouncement that the purely qualitative impact of a constitutional change can render it a revision under article XVIII, regardless of the quantity of the language that the provision alters. (See *Raven v. Deukmejian, supra*, 52 Cal.3d at pp. 351-52.) And it offers a clear and well established principle – the suspect classification doctrine, which recognizes the distinct need to protect historically disfavored minorities from oppression by simple majority vote – that supplies the constitutional and structural justification for imposing the mediating effect of republican government under sections 1 and 2 of article XVIII.

As this Court has explained, the initiative provision of article XVIII section 3 is designed to permit the citizens of California to make “change[s] within the lines” of their state charter; it is not a license to change the “underlying principles upon which it rests.”

*(Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 222.)* The suspect classification doctrine gives that distinction real and much needed meaning in the context of fundamental individual rights.

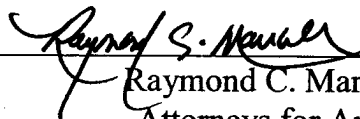
#### **IV. CONCLUSION**

We have won many victories in the fight to eradicate discrimination against historically disfavored minorities, but the struggle continues. This Court's landmark rulings on the suspect nature of discrimination based on sexual orientation and the equal right of same-sex couples to marry affirmed the importance of protecting that fundamental right in the tradition of struggle.

The Court's decision in these proceedings will affect the security of every member of a group defined by a suspect classification in the State of California. To hold that historically disfavored minorities can be deprived of their rights through the enactment of ballot initiatives like Proposition 8 would place all such minorities at risk. To avoid that result, this Court need do no more than hold that the discriminatory elimination of a fundamental right on a suspect basis is a revision of the California Constitution. That rule gives voice to the core principle of judicial review under the equal protection clause and affords the legal bulwark needed to prevent minority communities from being oppressed by simple majority vote. We respectfully urge this Court to grant the relief sought in the Writ Petitions.

DATED: January 15, 2009 BINGHAM McCUTCHEN LLP

By:




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**CERTIFICATE OF WORD COUNT**

Counsel hereby certifies that the foregoing brief was produced using 13-point Roman type and contains approximately 5,466 words. Counsel relies on the word count feature of Microsoft Word, the computer program used to prepare this brief.

Dated: January 15, 2009

  
Raymond C. Marshall

Case No.: S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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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.

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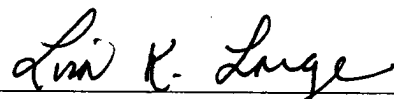
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 15, 2009, at San Francisco, California.



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Lisa K. Large