

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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SUPREME COURT  
**FILED**

JAN 15 2009

Frederick K. Ohlrich Clerk

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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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Deputy

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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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## **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

the laws without discrimination based on religion. (See *Marriage Cases*, *supra*, 43 Cal.4th at pp. 841-842 [religion is a suspect classification under the state Constitution's equal protection clause].) Yet this constitutional guarantee of equal protection will be directly and immediately threatened if Proposition 8 is given effect. If a simple majority vote of the people by ballot initiative may deprive same-sex couples of equal protection, thereby eliminating what article I, section 1 calls an "inalienable" right, then any disfavored minority group may be deprived of inalienable rights and equal protection in such a manner.

If article XVIII means what it says, then Proposition 8 is a nullity. According to article XVIII, substantial revisions of California's fundamental constitutional law may be accomplished only if submitted to the voters following the Legislature's "rollcall vote entered in the journal, two-thirds of the membership concurring" or the proposal of a validly-called constitutional convention. (Cal. Const., art. XVIII, §§ 1, 2.) Although the electors may *amend* the Constitution by initiative under article XVIII, section 3, *revisions* of the fundamental principles of California's constitutional law are beyond the amendment power, which is limited to promulgating "an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (*Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208,

222 (*Amador Valley*), quoting *Livermore v. Waite* (1894) 102 Cal. 113, 118-119 (*Livermore*).

## V. ARGUMENT

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

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

“Equal protection of the laws” is guaranteed by article I, section 7 of the California Constitution. But this guarantee against the oppression of minorities by fleeting majorities would mean relatively little if it could be overridden by initiative on a simple majority vote. And if Proposition 8 is valid, taking away from same-sex couples the right to equal protection of the laws as it affects a fundamental right (the right to marry), then *amici curiae*’s right to be free from discrimination or persecution on the basis of *religion* is similarly vulnerable to being overridden in a general election by a simple majority vote.

Nothing is more fundamental to the very foundation of our constitutional government than the principle of equal protection of the laws. Article I, section 1’s declaration of “inalienable” rights itself assumes every person’s fundamental equality before the law, asserting that *all people* have rights that are fundamental and *inalienable*: “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.” (Calif. Const., art. I, § 1.) Article I, section 7, subdivision (a) further declares that no person may be “denied equal protection of the laws.” And article I, section 7, subdivision (b) emphasizes: “A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.”

This equal protection principle is the basis of our governmental social contract and thus the bedrock foundation upon which our state Constitution is built. It cannot be overridden by fleeting majorities. Thus, while article I, section 3 acknowledges that “[t]he people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good,” section 3 also specifically provides that not even the people’s right to instruct governmental representatives and petition for redress can override individuals’ right to equal protection of the laws.<sup>2</sup>

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<sup>2</sup> Article I, section 3, subdivision (a) specifies:

“(3) *Nothing in this subdivision supersedes or modifies the right of privacy* guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

“(4) *Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.*” (Italics added).

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

Religious minorities receive special protection under the equal protection guarantee (see *Marriage Cases*, *supra*, 43 Cal.4th at pp. 841-842) – and for good reason. Religious bigotry is one of the most enduring kinds of prejudice, playing a central role in many of the most painful episodes in world history. The history of Christianity itself has, at times, involved horrible persecutions of Christians by Christians on the basis of doctrinal differences or denominational loyalties.<sup>3</sup> Anti-Semitism too has been a tragic recurring theme of Western history, one that has yet to be put finally to rest. Throughout their long history, Jews have known the pain of group-based discrimination. Their religion, although recognized in Roman times as a “*religio licita*” (a legally recognized religion), was frequently the target of state-initiated and popular violence – including, of course, the unspeakably horrific slaughter of six million Jews at the hands of the Nazis during World War II.<sup>4</sup>

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<sup>3</sup> See Riches, *The Bible: A Very Short Introduction* (2000) (“Nearly a third of the population of Europe died in the conflagration of the religious wars in the first half of the sixteenth century.”).

<sup>4</sup> See generally Beller, *Antisemitism: A Very Short Introduction* (2007); Perry & Schweitzer, *Anti-Semitism: Myth and Hate from Antiquity to the Present* (2005); Laqueur, *The Changing Face of Anti-Semitism: From Ancient Times to the Present Day* (2008).

And though we understand ourselves to be a nation founded in liberty, our own history as Americans has featured far too many instances of religious intolerance and persecution.

*Amici curiae* Unitarian Universalist Association of Congregations and United Church of Christ are painfully aware of the potential for good people, motivated by sincere religious conviction, to do great harm to their neighbors. These *amici curiae*'s memberships includes congregations that were in earlier times directly involved in some of our nation's worst episodes of religious persecution, as when Roger Williams and then Anne Hutchinson were expelled from Massachusetts beginning in the 1630s.<sup>5</sup> Quakers too were first

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<sup>5</sup> See Cobb, *The Rise of Religious Liberty in America* (1968) pp. 181-194 (Cobb); Baird, *Religion in America* (1856) pp. 115, 188-89 (Baird); Northend, *The Bay Colony: A Civil, Religious and Social History of the Massachusetts Colony* (1896) pp. 99-121 (Roger Williams) & 132-152 (Anne Hutchinson); see also Newman, *A History of the Baptist Churches in the United States* (1894) pp. 66-69 (Newman); Brockunier, *The Irrepressible Democrat, Roger Williams* (1940) pp. 56-100 (recounting Williams's trial, conviction and exile); Winslow, *Master Roger Williams: A Biography* (1957) pp. 117-124 (same); Davis, *The Moral Theology of Roger Williams: Christian Conviction and Public Ethics* (2004) pp. 6-9 (same). Before his banishment and flight to Rhode Island, Roger Williams had preached from the pulpits of the First Church in Salem and the First Church in Plymouth, both today members of *amicus curiae* Unitarian Universalist Association. (See Miller, *Roger Williams: His Contribution to the American Tradition* (1962) pp. 19-20; Baird, *supra*, at p.115 [noting that Williams, who "advanced doctrines on the rights of conscience, and the nature and limits of human government, which were unacceptable to the civil and religious authorities of the colony" was expelled from Massachusetts after preaching in Plymouth and Salem]; Allen, *Historical Sketch of the Unitarian Movement Since the Reformation* (1894) p. 170 [noting that "the First Church in Plymouth (1620), the First

banished from Massachusetts, and then even hanged on Boston Common, in the 1650s and 1660s – their persecution encouraged by ministers of the First Church in Boston, a member today of the Unitarian Universalist Association.<sup>6</sup> With the anti-witch hysteria of 1692, the First Church in Danvers (today affiliated with the United Church of Christ) and the First Church in Salem (today affiliated with the Unitarian Universalist Association) excommunicated members for “witchcraft” and saw them put to death.<sup>7</sup> As late as 1838, the

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Church in Salem (1629), and the First Church in Boston (1630)” are “all known now as Unitarian”].) Williams, of course, went on to found Rhode Island and the first Baptist Church in America; Anne Hutchinson was killed by native Americans engaged in hostilities with the Dutch.

<sup>6</sup> See Adams, *Three Episodes in Massachusetts History* (1892) pp. 407-408) (recounting the role of the Rev. John Wilson, minister of the First Church in Boston, in the persecution of Quakers and the 1659 hangings of William Robinson and Marmaduke Stevenson); Rogers, *Mary Dyer of Rhode Island: The Quaker Martyr that was Hanged on Boston Common, June 1, 1660* (1896) pp. 3-4 (recounting the role of First Church ministers, the Rev. John Norton and the Rev. John Wilson, in the persecution and hangings of Quakers); cf. 2 A. W. M’Clure, *The Lives of the Chief Fathers of New England: The Lives of John Wilson, John Norton, and John Davenport* (1870) pp. 66-138, 221-26, 232, 247-48 (striving to cast the Puritans’ actions against the unorthodox in a sympathetic light); see also Cobb, *supra*, at pp. 213-218 (recounting the persecution of Quakers in seventeenth-century Massachusetts); Baird, *supra*, at p. 189 (noting that Quakers “were expelled and prohibited from returning on pain of death”).

<sup>7</sup> See Nevis, *Witchcraft in Salem Village in 1692, Together with an Account of Other Witchcraft Prosecutions in New England and Elsewhere* (1892) pp. 105-106, 128-129 (recording the excommunications of First Church in Salem members Rebecca Nurse, who was then hanged, and Giles Corey, who was pressed to death); Rice, *Proceedings at the Celebration of the Two Hundredth Anniversary of the First Parish at Salem Village, Now Danvers,*

Rev. Abner Kneeland, once an officer of the New England Universalist General Convention, was imprisoned in Massachusetts for the crime of blasphemy.<sup>8</sup> And in 1868, New Hampshire's Supreme Court declared the Rev. Francis Ellingwood Abbot insufficiently "Christian" to be employed by his congregation, the First Unitarian Society of Christians in Dover, New Hampshire.<sup>9</sup>

*Amici curiae* have learned something, they hope, from their own history. They also have learned much from the nineteenth-century and twentieth-century persecutions of religious minorities at the hands of fellow citizens who often were moved by sincere religious belief and patriotic fervor.

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October 8, 1872 (1874) pp. 247-256 (general overview of the anti-witch hysteria of 1692); Baird, *supra*, at p. 190 (noting that "twenty persons were put to death for witchcraft").

<sup>8</sup> See *Commonwealth v. Kneeland* (1838) 37 Mass. 206 (affirming Kneeland's criminal conviction); see generally Levy, *Blasphemy in Massachusetts: Freedom of Conscience and the Abner Kneeland Case: A Documentary Record* (1973); Papa, *The Last Man Jailed for Blasphemy* (1998); Harris, *Historical Dictionary of Unitarian Universalism* (2004) pp. 292-294.

<sup>9</sup> See *Hale v. Everett* (1868) 53 N.H. 9; Kinney, *Church & State: The Struggle for Separation in New Hampshire, 1630-1900* (1955) pp. 94-97 ("One of the more celebrated cases in New Hampshire jurisprudence is that of Hale versus Everett.").

Members of the Church of Jesus Christ of Latter-day Saints (LDS), for example, once faced vicious persecution.<sup>10</sup> On October 27, 1838, Missouri Governor Lilburn Boggs issued Missouri Executive Order 44, declaring “the Mormons must be treated as enemies, and must be exterminated or driven from the State if necessary for the public peace – their outrages are beyond all description.”<sup>11</sup> By the spring of 1839, more than 10,000 Mormons had been driven from Missouri, and the “Mormon Extermination Order” was not formally rescinded until 1976, when Governor Christopher S. Bond acknowledged at last that it had “clearly contravened” Mormons’ constitutional rights.<sup>12</sup>

In the twentieth-century, few groups in America have suffered more than the Jehovah’s Witnesses, who understand the Bible to forbid saluting objects of human creation – including national flags.<sup>13</sup> We know that in Nazi

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<sup>10</sup> See Bushman, *Mormonism: A Very Short Introduction* (2007) pp. 42-44 (Bushman).

<sup>11</sup> Available online at the Missouri State Archives: <http://www.sos.mo.gov/archives/resources/findingaids/miscMormonRecords.asp?rec=eo>. See generally Lesueur, *The 1838 Mormon War in Missouri* (1990).

<sup>12</sup> Available online at the Missouri State Archives: <http://www.sos.mo.gov/archives/resources/findingaids/miscMormonRecords.asp?rec=eo>. See Bushman, *supra*, at p. 44 (“[t]he body of Saints fled Missouri for Illinois, and Joseph Smith was thrown in Jail”).

<sup>13</sup> See Peters, *Judging Jehovah’s Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (2000).

Germany thousands of Jehovah's Witnesses were consigned, along with millions of European Jews, to die in concentration camps.<sup>14</sup> But even in the United States we find that Jehovah's Witnesses faced criminal prosecutions for adhering to their convictions during the Second World War,<sup>15</sup> and that their children were systematically expelled from America's public schools. In *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, for example, this court deemed a nine-year-old girl's adherence to her faith such a threat to public order that the court unanimously sustained her expulsion from public school.

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<sup>14</sup> See United States Holocaust Memorial Museum, *Jehovah's Witnesses: Victims of the Nazi Era* (2002); pp. 188, 190 ("approximately one-quarter of the membership lost their lives"); Peck, *Historical Note* in Liebster, *Facing the Lion: Memoirs of a Young Girl in Nazi Europe* (2000) p. xi ("We are familiar with the statistics: nearly 10,000 Jehovah's Witnesses imprisoned and at least 2,000 admitted to Nazi concentration camps of which at least half were murdered, over 250 by beheading."); see generally Reynaud & Graffard, *The Jehovah's Witnesses and the Nazis: Persecution, Deportation and Murder, 1933-1945* (Moorehouse tr. 2001); Penton, *Jehovah's Witnesses and the Third Reich: Sectarian Politics Under Persecution* (2004) pp. 106-207; Hesse, ed., *Persecution and Resistance of Jehovah's Witnesses During the Nazi Regime 1933-1945* (2001).

<sup>15</sup> See American Civil Liberties Union, *The Persecution of Jehovah's Witnesses: The record of violence against a religious organization unparalleled in America since the attacks on the Mormons* (1941) pp. 19-21 (ACLU) (recounting for example, the trial and conviction at Connersville, Indiana, "of two women residents, one aged seventy, and the other in her fifties, for 'riotous conspiracy' which in substance was their refusal to salute the flag," and who were sentenced "to two to ten years in Indiana State Prison"); *Johnson v. State* (1942) 204 Ark. 476 [163 S.W.2d 153] (affirming criminal conviction with fine and jail time for Jehovah's Witness who refused to salute flag, calling it a "rag").

Across the country Jehovah's Witnesses' children were perceived as a serious threat and were expelled from their schools.<sup>16</sup>

The United States Supreme Court at first regularly refused to hear Jehovah's Witnesses' appeals challenging such expulsions, "for the want of a substantial federal question."<sup>17</sup> Then, in *Minersville School District v. Gobitis* (1940) 310 U.S. 586 (*Gobitis*), the United States Supreme Court upheld the expulsion of two elementary-school children, in an opinion penned by the great Justice Frankfurter – and with Justice Stone the lone dissenter. A horrific nationwide wave of violence followed that ruling, much of it sanctioned by local law enforcement, in which Jehovah's Witnesses were beaten, tarred and feathered, and even castrated, and in which their places of worship were vandalized and burned.<sup>18</sup> Their children were banished by the

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<sup>16</sup> See, e.g., *Nicholls v. Mayor & School Committee of Lynn* (1937) 297 Mass. 65 [7 N.E. 2d 577]; *People ex rel. Fish v. Sandstrom* (Suffolk County Ca. 1938) 167 Misc. 436 [3 N.Y. Supp. 2d 1006]. In the state of Washington, government authorities took Jehovah's Witnesses children from their parents, placing them in state custody because the children "refused to repeat the pledge of allegiance . . . stating that according to their religious belief, the repetition of words constituting the pledge, together with accompanying gestures, are acts which are against their religious convictions." (*State ex rel. Bolling v. Superior Court* (1943) 16 Wn.2d 373, 375-376 [133 P.2d 803, 805] [reversing lower-court orders adverse to the Jehovah's Witnesses].)

<sup>17</sup> See, e.g., *Leoles v. Landers* (1937) 302 U.S. 656; accord, e.g., *Hering v. State Board of Education* (1938) 303 U.S. 624.

<sup>18</sup> See Finkelman, *Encyclopedia of American Civil Liberties* (2006) pp. 591-593; Ellis, *To the Flag: The Unlikely History of the Pledge of*

thousands from the public schools as a purported threat to public order and domestic security.<sup>19</sup> All this, perhaps, induced the Supreme Court to reverse itself in 1943, holding by a 6-3 vote – over Justice Frankfurter’s vigorous dissent – that Jehovah’s Witnesses’ children might not be such a threat after all. (*West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624 (*Barnette*).)<sup>20</sup>

Such episodes remind us that, even in America, majorities sometimes fall into patterns of distrust and discrimination against religious minorities, particularly in times of national crisis or war. In hindsight, we can clearly see that Jehovah’s Witnesses and their children never really posed the threat to public order and national security that so many Americans, in a time of war, once so vividly perceived. Yet we are human – and for us as humans it remains altogether too easy to imagine new threats from those whose faith may be different from our own.

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Allegiance (2005) pp. 105-110 (Ellis); see generally Manwaring, *Render Unto Caesar: The Flag Salute* (1962); ACLU, *supra*, at pp. 6-22.

<sup>19</sup> See Ellis, *To The Flag*, *supra*, at p. 108 (“By 1942 the number of Jehovah’s Witnesses expelled from school had climbed into the thousands.”).

<sup>20</sup> See generally Smith, *The Persecution of West Virginia Jehovah’s Witnesses and the Expansion of Legal Protection of Religious Liberty* in Davis & Hankins, eds. *New Religious Movements and Religious Liberty in America* (2d ed. 2003) pp. 155-181.

We must remind ourselves, even today, that minorities in general – and religious minorities in particular – require protection from the oppression of majorities. Although a person’s religion is not an “immutable” characteristic, it is, like other classifications that receive strict scrutiny, an “integral . . . aspect of [a person’s] identity” which it is not “appropriate to require a person to repudiate . . . in order to avoid discriminatory treatment.” (*Marriage Cases*, *supra* 43 Cal.4th at p. 842.) That is why California courts have long recognized that discrimination based on a person’s religion is a suspect classification, subject to strict scrutiny.<sup>21</sup>

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

Equal protection of the laws, which protects all minority groups from oppression and underlies our entire constitutional edifice, means virtually nothing if it may be overridden by an initiative amendment approved by a simple majority vote. That is precisely what Proposition 8 purports to do. It purports to amend the California Constitution to revoke an “inalienable” right protected by article I, section 1, only for a minority group, same-sex couples,

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<sup>21</sup> See *Marriage Cases*, 43 Cal.4th at pages 841-842, citing *Owens v. City of Signal Hill* (1984) 154 Cal.App.3d 123, 128 and *Williams v. Kapilow & Son, Inc.* (1980) 105 Cal.App.3d 156, 161-62; see also *Banks v. Board of Pharmacy* (1984) 161 Cal.App.3d 708, 714, and *Dawson v. Westerly Investigations, Inc.* (1988) 204 Cal.App.3d Supp. 20, 25.

that is protected by the equal protection guarantee of article I, section 7, subdivision (a). (*Marriage Cases, supra*, 43 Cal.4th at p. 844.)

Proposition 8 is invalid under article XVIII of the California Constitution, which sets forth the *only* permissible methods for modifying the Constitution's core provisions. Our state Constitution “can be neither revised nor amended except in the manner prescribed by itself.” (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 333 (*McFadden*), quoting *Livermore, supra*, 102 Cal. at p. 117.) And article XVIII distinguishes between revisions, which affect the core structure of our constitutional government, and mere amendments, which are consistent with the Constitution's fundamental structure and principles.

“Although ‘[t]he electors may amend the Constitution by initiative’ (Cal. Const., art. XVIII, § 3), a ‘revision’ of the Constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification (*id.*, § 2), or by legislative submission of the measure to the voters (*id.*, § 1).” (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349 (*Raven*)). Under article XVIII, “although the voters may accomplish an amendment by the initiative process, a constitutional revision may be adopted only after the convening of a constitutional convention and popular ratification or by legislative submission to the people” after a two-thirds majority vote in each house of the Legislature. (*Amador Valley, supra*, 22 Cal.3d at p. 221.)

Even though article XVIII does not specifically “define the terms ‘amendment’ or ‘revision,’ the courts have developed some guidelines” which feature “a dual aspect, requiring us to examine both the *quantitative* and *qualitative* effects of the measure on our constitutional scheme.” (*Raven, supra*, 52 Cal.3d at p. 350, italics added.)

Proposition 8 adds to the California Constitution but a single sentence: “Only marriage between a man and a woman is valid or recognized in California.” But the *qualitative* impact of the proposed addition is devastating. Its effect would be to repeal the principle of equal protection of the laws for a segment of the population – same-sex couples– denying them a fundamental right encompassed within an “inalienable” right recognized by article I, section 1.

This amounts to a radical breach of the social contract that California’s Constitution represents:

“The very term ‘constitution’ implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term ‘amendment’ implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.”

(*Amador Valley*, *supra*, 22 Cal.3d at p. 222, quoting *Livermore*, *supra*, 102 Cal. at pp. 118-119); accord *McFadden*, *supra*, 32 Cal.2d at p. 333, quoting *Livermore*, *supra*, 102 Cal. at pp. 117-119.)

Selectively denying a class of citizens the right to equal protection of the laws with respect to an inalienable right is not “an addition or change *within the lines of the original instrument* as will effect an improvement,” or one to “carry out the purpose for which it was framed.” (*Amador Valley*, *supra*, 22 Cal.3d at p. 222, quoting *Livermore*, *supra*, 102 Cal. at pp. 118-119, italics added.) This is contrary to the Constitution’s central purpose, and a radical departure from “the underlying principles upon which it rests.” (*Id.*) As such, the text of Proposition 8 is a revision of our fundamental constitutional law that may be accomplished – if at all – only by the procedures specified in article XVIII, sections 1 and 2.

If Proposition 8 is valid, then our most cherished rights are in danger, including the right to be free from persecution based on religion. After all, if the equal protection rights of one group defined by a suspect classification may be taken away by a mere majority vote, those rights of *any* such group may be taken away just as easily. Religious groups like *amici curiae* know from long experience the dangers posed by placing that kind of power in the hands of temporary, easily manipulated majorities.

Nor is it a satisfactory answer that *amici curiae* can rely on the federal Constitution to safeguard their equal protection rights. California’s

Constitution itself declares: “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” (Cal. Const., art I, § 24.) Thus, California’s constitutional equal protection principle provides *greater* protection than its federal counterpart. (*Serrano v. Priest* (1976) 18 Cal.3d 728, 764.) In *Raven* this court invalidated an initiative amendment precisely *because* it required California courts to defer to federal courts’ construction of federal constitutional rights in criminal cases. (See *Raven, supra*, 52 Cal.3d at p. 355.)

History shows us that it would be a mistake for Californians to stake their equal protection rights on the United States Constitution alone. In 1896, the United States Supreme Court, by a vote of 7-1, upheld racial discrimination in *Plessy v. Ferguson* (1896) 163 U.S. 537, under a “separate but equal” doctrine that persisted until 1954. The United States Supreme Court initially refused to hear Jehovah’s Witnesses appeals before ruling in 1940 in *Gobitis, supra*, 310 U.S. 586, that public schools were free to persecute Jehovah’s Witnesses’ children. (See *ante*, pp. 10-13.) In *Hirabayashi v. United States* (1943) 320 U.S. 81, the United States Supreme Court unanimously upheld race-based curfews imposed on Japanese Americans, preliminary to their systematic internment. In *Korematsu v. United States* (1944) 323 U.S. 214, the court sanctioned the internment of Japanese Americans whose only crime was their ethnic background. In

*Bowers v. Hardwick* (1986) 478 U.S. 186, the court sustained prosecutions of homosexual citizens for the crime of consensual intimacy.

*Gobitis* was overruled, thankfully, in 1943, *Plessy* in 1954, and *Bowers* in 2003. (See *Barnette*, *supra*, 319 U.S. at p. 642 [overruling *Gobitis*]; *Brown v. Board of Education* (1954) 347 U.S. 483 [overruling *Plessy*]; *Lawrence v. Texas* (2003) 539 U.S. 558 [overruling *Bowers*].) *Hirabayashi* and *Korematsu*, on the other hand, have yet to be formally overruled. Overruled or not, such constructions of the United States Constitution demonstrate why the California Constitution wisely *forecloses* dependence on the federal Constitution when it comes to protecting the equal protection rights of Californians. (Cal. Const., art. I, § 24.) And if such federal precedents are not enough to make the point, then consider this court's landmark decision in *Perez v. Sharp* (1948) 32 Cal.2d 711, which upheld the right of mixed-race couples to marry. It took the United States Supreme Court *nearly two decades* to catch up. (See *Loving v. Virginia* (1967) 388 U.S. 1.)

Step-by-step elimination of California's equal protection guarantee by mere amendment is impermissible under article XVIII. Proposition 8 constitutes an invalid revision of the California Constitution, and not merely an amendment, because it purports by a simple majority vote to create an exception to the fundamental principle of equal protection in order to selectively deprive a suspect class of such protection. According to article XVIII of this state's Constitution, Proposition 8 is a nullity.

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

Petitioners and the Attorney General are correct in arguing that even if Proposition 8 were upheld, it should not be construed to invalidate marriages effected before its passage.

Retroactive intent must be clear before legislation or an initiative amendment may be given retroactive effect. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209; *Gurnee v. Superior Court* (1881) 58 Cal. 88, 91; *Rosasco v. Commission on Judicial Performance* (2000) 82 Cal. App. 4th 315, 323.) If the “retroactive application had been brought to the attention of the electorate, it might well have detracted from the popularity of the measure.” (*Evangelatos v. Superior Court, supra*, 44 Cal. 3d at p. 1219.) Here, indications of retroactive intent are wholly absent, and retroactive application would disrupt settled expectations of the many who married in reliance on this court’s interpretation of the California Constitution in the *Marriage Cases*.

**VI. CONCLUSION**

Inalienable rights and equal protection of the laws are too important, and too fundamental to our system of constitutional government, to hinge on the will of shifting majorities. If California’s constitutional protections are to

mean anything of substance, mandate or prohibition should issue, permanently enjoining respondents from enforcing, implementing, or otherwise giving effect to Proposition 8.

DATED: January 13, 2009

Respectfully submitted,

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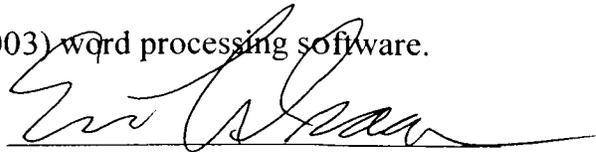
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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel certified that the 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 uses a proportionally spaced Times New Roman typeface, 13-point, and that the text of the application and brief comprises 8,339 words according to the word count provided by Microsoft Word 2002 (or 2003) word processing software.



ERIC ALAN ISAACSON

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on January 13, 2009, declarant served **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** by depositing one true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. On the same date, declarant filed one original and 14 copies of **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** with the Clerk of the Court by depositing in a United States mailbox at San Diego, California in a sealed package with postage thereon fully prepaid.

4. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed this 13 day of January, 2009, at San Diego, California.

  
TAMARA McSWEENY

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