

Case Nos. S168047, S168066, S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS et al., Petitioners,

v.

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

ROBIN TYLER et al., Petitioners,

v.

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

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners

v.

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

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

Jo Hoenninger, No. 205222
HOENNINGERLAW
2358 Market St
San Francisco, CA, 94114
Telephone: 415-816-0440
Facsimile: 866-671-0096
E-mail: jo@hlawSF.com

SUPREME COURT
FILED

JAN 16 2009

Frederick K. Chisholm Clerk

Attorneys for Marriage Equality USA

Shay Aaron Gilmore, No. 217196
44 Montgomery Street, Suite 400
San Francisco, CA, 94104
Telephone: 415-989-5900
Facsimile: 415-989-0932
E-mail: sgilmore@cbmlaw.com

Case Nos. S168047, S168066, S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS et al., Petitioners,

v.

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

ROBIN TYLER et al., Petitioners,

v.

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

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners

v.

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

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

Jo Hoenninger, No. 205222

HOENNINGERLAW

2358 Market St

San Francisco, CA, 94114

Telephone: 415-816-0440

Facsimile: 866-671-0096

E-mail: jo@hlawSF.com

Attorneys for Marriage Equality USA

Shay Aaron Gilmore, No. 217196

44 Montgomery Street, Suite 400

San Francisco, CA, 94104

Telephone: 415-989-5900

Facsimile: 415-989-0932

E-mail: sgilmore@cbmlaw.com

Case Nos. S168047, S168066, S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS et al., Petitioners,

v.

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

ROBIN TYLER et al., Petitioners,

v.

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

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners

v.

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

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

Jo Hoenninger, No. 205222

HOENNINGERLAW

2358 Market St

San Francisco, CA, 94114

Telephone: 415-816-0440

Facsimile: 866-671-0096

E-mail: jo@hlawSF.com

Attorneys for Marriage Equality USA

Shay Aaron Gilmore, No. 217196

44 Montgomery Street, Suite 400

San Francisco, CA, 94104

Telephone: 415-989-5900

Facsimile: 415-989-0932

E-mail: sgilmore@cbmlaw.com

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

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

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

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

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

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

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

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

DATED: January 15, 2009

By: 
JO HOENNINGER
Attorney for *amicus curiae*
Marriage Equality USA

By: 
SHAY AARON GILMORE
Attorney for *amicus curiae*
Marriage Equality USA

Case Nos. S168047, S168066, S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS et al., Petitioners,
v.
MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al., Respondents;
DENNIS HOLLINGSWORTH et al., Intervenors

ROBIN TYLER et al., Petitioners,
v.
THE STATE OF CALIFORNIA et al., Respondents;
DENNIS HOLLINGSWORTH et al., Intervenors

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners
v.
MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al., Respondents;
DENNIS HOLLINGSWORTH et al., Intervenors

**BRIEF OF *AMICUS CURIAE* MARRIAGE EQUALITY USA
IN SUPPORT OF
PETITIONERS CHALLENGING PROPOSITION 8**

Jo Hoenninger, No. 205222
HOENNINGERLAW
2358 Market Street
San Francisco, CA, 94114
Telephone: 415-816-0440
Facsimile: 866-671-0096
E-mail: jo@hlawSF.com

Attorneys for Marriage Equality USA

Shay Aaron Gilmore, No. 217196
44 Montgomery Street, Suite 400
San Francisco, CA, 94104
Telephone: 415-989-5900
Facsimile: 415-989-0932
E-mail: sgilmore@cbmlaw.com

TABLE OF CONTENTS

	Page
I. INTEREST OF THE AMICUS CURIAE.....	1
II. INTRODUCTION AND SUMMARY OF ARGUMENT.....	2
III. THE HISTORY BEHIND PROPOSITION 8	7
A. The Gay and Lesbian Struggle for Equality.....	7
B. The Antigay Movement in the United States	9
1. The Rhetorical Origin of the “Antigay Movement” – The Failure of the Race Message for Christian Fundamentalism	12
2. Eliminating Gay Civil Rights – The Founding of the Modern “Antigay Movement” in the Late 1970s.....	17
3. Intensified Rhetoric and Increasing Use of Direct Democracy – the “Antigay Movement” in the 1980s	24
4. The “Special Rights” Focus and Further Rights Elimination – the “Antigay Movement” in the 1990s through Today	31
IV. THE “LEGISLATIVE” PROCESS FAILS WHEN MINORITY RIGHTS ARE PUT TO A POPULAR VOTE.....	40
A. The Deliberative Safeguards of Representative Government.....	40
B. The Genesis of the Initiative Process in California.....	44
C. The Initiative Process	45
D. The Initiative and Referendum Industry	46

TABLE OF CONTENTS
(continued)

	Page
1. The Petition Drive	47
2. Multi Million Dollar Advertising Campaigns	49
E. The Initiative Has Become a Tool of Special Interests	50
F. The Initiative Process Lacks Essential Safeguards of Representative Democracy	51
1. The Initiative Process Has No Effective Safeguards Against False Claims Made During Campaigns	52
2. The Initiative Process Has No Effective Safeguards Against Fear Tactics Used In Initiative Campaigns Aimed At Restricting Rights Of Minorities	55
G. Minorities Typically Lose When Their Rights Are Put To A Popular Vote Through The Initiative Process	58
H. The Initiative Process Violates the Guaranty Clause of the U.S. Constitution	59
V. CONCLUSION.....	61

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati</i> (6th 1997) 128 F.3d 289	33
<i>Green v. Connally</i> (D.C.D.C. 1971) 330 F.Supp. 1150	14
<i>In re Duncan</i> (1891) 139 U.S. 449	58
<i>Merrick v. Board of Higher Education</i> (Or.App. 1992) 841 P.2d 646	27
<i>Minor v. Happersett</i> (1874) 88 U.S. 162, 175	58
<i>Pacific States Tel. & Tel. Co. v. Oregon</i> (1912) 223 U.S. 118	59
<i>Romer v. Evans</i> (1996) 517 U.S. 620	31, 32
<i>St. Paul's Citizens for Human Rights v. City Council</i> (Minn. 1979) 289 N.W.2d 402	54
<i>Village of Arlington Heights v. Metropolitan Housing Development Corp.</i> (1977) 429 U.S. 252, 265	42

TABLE OF AUTHORITIES
(continued)

	Page(s)
 Other Authorities	
<i>A Brief History of the Initiative and Referendum Process in the United States</i> , Initiative and Referendum Institute, University of Southern California Law School	43
<i>A Mighty Army</i> (Spring 2005) Southern Poverty Law Center Intelligence Report	21, 22, 23, 24, 25, 27
<i>A Thorn in Their Side</i> (interview with Rev. Mel White, author of <i>Stranger at the Gate: To Be Gay and Christian in America</i>) Southern Poverty Law Center Intelligence Report (Spring 2005)	9, 15, 16
Adams, <i>Is It Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures</i> (1998) 34 Willamette L.Rev. 449, 454	53
Bailey, <i>Gay Politics, Urban Politics</i> (1998) p. 316	29
Bell, <i>The Referendum: Democracy's Barrier to Racial Equality</i> (1978) 54 Wash. L. Rev. 1, 18	44, 57
Blumenthal, <i>Agent of Intolerance</i> (May 16, 2007) <i>The Nation</i>	13, 14
Blumenthal, <i>The Man Behind Proposition 8</i> , <i>The Daily Beast.com</i> (Nov. 3, 2008)	38
<i>Board Ignores Logic on Public Health Issue</i> , <i>L.A. Times</i> (June 18, 1989) p. 8	29
Cal. Const., art. II, Section 8	44, 46
Cal. Const., art. XVIII, Section 1	45

TABLE OF AUTHORITIES
(continued)

	Page(s)
Cal. Elec. Code, Sections 13300(c), 13303(a) et seq.....	50
California Comm’n on Campaign Financing, <i>Democracy by Initiative: Shaping California’s Fourth Branch of Government</i> (1992) pp. 39, 263-91	49
California Constitution Article II, section 8	3
California Secretary of State, Primary Elec. (Mar. 7, 2000).....	36
<i>California</i> , Initiative & Referendum Institute, (2008)	43, 46
Carter, <i>Stonewall: The Riots that Sparked the Gay Revolution</i> (2004) pp. 147-148	8
Clendinen and Nagourney, <i>Out for Good: The Struggle to Build a Gay Rights Movement in America</i> (1999) p. 303	18, 20, 22
Comment, <i>Anti-gay Initiatives: A Call for Heightened Judicial Scrutiny</i> , (1993) 41 UCLA L. Rev. 153, 193	42, 50, 52, 54
Donovan et al., <i>Direct Democracy and gay rights initiatives after Romer</i> in <i>The politics of gay rights</i> , (Craig A. Rimmerman et al. edits., 2000) pp. 161-90	27, 32, 46
Dunlap, <i>The 1994 Campaign: Homosexuality; Struggle over Gay Rights Moves to Statewide Level</i> , N.Y. Times (Nov. 6, 1994) p. A30	33
<i>Early Voting in Arkansas Favors Article 1</i> , <i>The Advocate</i> (Nov. 4, 2008).....	39
Eule, <i>Judicial Review of Direct Democracy</i> (1990) 99 Yale L.J. 1503, 1525	6
<i>Everything to do with Schools</i> , <i>ProtectMarriage.com</i> (2008)	56

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Facts About California's Initiative Process</i> , Intl. Herald Tribune (Oct. 29, 2008) [as of January 14, 2009]	47, 48
Fadernann, <i>Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America</i> (1991) pp. 140-141	7, 8
Fejes, <i>Gay Rights and Moral Panic: The Origins of America's Debate on Homosexuality</i> (2008) pp. 76, 94.....	18, 19, 20, 21
Fontaine, <i>Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative</i> (1988) 61 So. Cal. L. Rev. 733, 749.....	4, 42, 46, 49, 51, 52, 59
Gallagher and Bull, <i>Perfect Enemies: The Religious Right, the Gay Movement and the Politics of the 1990s</i> (1996)	14, 15, 16
Gamble, <i>Putting civil rights to a popular vote</i> (1997) 41(1) American J. of Political Science 245, 258.....	24, 27, 28, 29, 57
Goldberg, <i>We shall overcome ... liberals</i> (January 9, 2006) Salon.com.	12
Gunn, <i>Initiatives and Referendum: Direct Democracy and Minority Interests</i> (1981) 22 Urb. L. Ann. 135, 141	57
Haider-Markel et al., <i>Lose, Win or Draw? A Reexamination of Direct Democracy and Minority Rights</i> (2007) 60(2) Political Research Quarterly 304, Supp. Appen. p.	passim
Hardisty, <i>Constructing Homophobia: Colorado's Right-Wing Attack on Homosexuals</i> (March 1993) The Public Eye Magazine.....	15, 26, 28, 29, 32, 51
Hardisty, <i>Constructing Homophobia: Colorado's Right-Wing Attack on Homosexuals</i> (March 1993) The Public Eye Magazine.....	26

**TABLE OF AUTHORITIES
(continued)**

	Page(s)
Harkavy, <i>Slay It With a Smile: Paul Cameron's mission to stop homosexuality is hard to swallow</i> , Westword Denver News (Oct. 3, 1996).....	25
Herek, Paul Cameron Bio and Fact Sheet, University of California, Davis Psychology Department	25
Herman, <i>The Antigay Agenda</i> (1997) pp. 9-11	3, 8, 9, 10, 11, 23, 31
Hichborn, <i>Story of the Session of the California Legislature of 1911</i> (1911) p. 93 n. 115	44
<i>Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent</i> (1994) 34 Santa Clara L.Rev. 945, 951	4, 53
Katz, <i>Gay American History</i> (1992) p. 129	7
Kinsey, <i>Sexual Behavior in the Human Female</i> (1953).....	6
Kinsey, <i>Sexual Behavior in the Human Male</i> (1948)	6
Kondracke, <i>Anita Bryant Is Mad About Gays</i> (1980) <i>The New Republic</i> pp. 13-14	19
Kranish, <i>Beliefs drive research agenda of new think tanks</i> , <i>Boston Globe</i> (Jul. 31, 2005) p. A1	25
LaHaye, <i>What Everyone Should Know About Homosexuality</i> , 1978	23
Lernoux, <i>A Reverence for Fundamentalism</i> (Apr. 17, 1989) <i>The Nation</i> , at pp. 513-516.....	23
Letter from Mormon North America West Area Presidency to All Stake Presidents, bishops and Branch Presidents in California, February 13, 2000, quoting Mormon Church President Gordon B. Hinckley.....	36

TABLE OF AUTHORITIES
(continued)

	Page(s)
Letter to Mormon Church Elder M. Russell Ballard from Loren C. Dunn (Mar. 4, 1997).....	34, 35
Linde, <i>When Initiative Lawmaking Is Not “Republican Government”</i> : <i>The Campaign Against Homosexuality</i> (1993) 72 Or. L.Rev. 19, 34	5, 50, 59
Lowenstein and Stern, <i>The First Amendment and Paid Petition Circulators: A Dissenting View and a Proposal</i> (1989) 17 Hasting Const. L.Q. 175	47, 48
Madison, <i>Federalist No. 10</i> (Nov. 22, 1787) <i>The Constitution Society</i>	4, 39, 40
Manheim, <i>Symposium of the California Initiative Process</i> (1998) 31 Loy. L. A. L.Rev. 1161	44
McKinley and Goodstein, <i>Bans in 3 States on Gay Marriage</i> , N.Y. Times (Nov. 5, 2008) p. A1	37
McKinley and Johnson, <i>Mormons Tipped Scale in Ban on Gay Marriage</i> , N.Y. Times (Nov. 15, 2008) p. A1	37
<i>Miami Anti-gays Win in Landslide</i> , S.F. Examiner (Jun. 8, 1977) p. 1	19
Miller, <i>Constraining Populism: The Real Challenge of Initiative Reform</i> (2001) 41 Santa Clara L.Rev. 1037, 1060	39, 51, 56
Moser, <i>Holy War</i> (Spring 2005) Southern Poverty Law Center Intelligence Report.....	passim
National Gay and Lesbian Task Force Election 1998 Report.....	34
Navarro, <i>Gay Rights Battle Flares in Florida</i> , N.Y. Times (Dec. 12, 1994)	33

TABLE OF AUTHORITIES
(continued)

	Page(s)
Noah, <i>Jerry Fallwell’s Hit Parade</i> (May 15, 2007) Slate.com	26
Op-ed, <i>No on Proposition 8: Debunking the myths used to promote the ban on same-sex marriage</i> , L.A. Times (Nov. 2, 2008)	53
<i>Prop 8 Hurt My Family – Ask Me How</i> , Marriage Equality USA (January 2009)	55
<i>Proposition 8: Tracking the Money</i> , L.A. Times (Nov. 6, 2008).....	49
Reinhold, <i>AIDS Remark is at Issue in Houston Vote Today</i> , N.Y. Times (Nov. 5, 1985) p. B6	27
<i>Religion & Ethics Newsweekly</i> , California’s Proposition 22, aired February 25, 2000, Transcript of Episode no. 326	36
Resnick, <i>Issue 3 campaign was the most expensive in the city: Removing Article 12 broke the 1993 record set by its creation</i> , Gay Peoples Chronicle (Dec. 17, 2004).....	33
Ruskin, <i>Same-sex marriage foes given \$500,000</i> , Anchorage Daily News (Oct. 3, 1998) p. A1	35
Russell, <i>Voted Out: The Psychological Consequences of Anti-gay Politics</i> (2000) p. 2	58
Schacter, <i>Romer v. Evans and Democracy’s Doman</i> (1997) 50 Vand. L.Rev. 361, 374.....	31
Seeley, <i>The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey</i> (1970) 55 Cornell L. Rev. 881, 902	42
Shilts, <i>The Mayor of Castro Street: The Life and Times of Harvey Milk</i> (1982) p. 154	21

TABLE OF AUTHORITIES
(continued)

	Page(s)
Taylor, <i>Mayor controversial for support of gay rights</i> , Boulder County Daily Camera	17
<i>The California Initiative Process: A Suggestion for Reform</i> (1975) 48 So. Cal. L. Rev. 922, 927	45, 48
<i>The Establishment vs. the People: Is a New Populist Revolt</i> <i>on the Way?</i> , 1983	15
<i>The Thirty Years War</i> (Spring 2005) Southern Poverty Law Center Intelligence Report.....	17, 23, 24
<i>Top Prop. 8 organizational donors</i> , Sacramento Bee (Nov. 12, 2008)	38, 50
Tuggle and Stauffer, <i>California Initiative Process Remains</i> <i>Confounding and Controversial</i> , Berkeley Graduate School of Journalist (Oct. 31, 2006).....	47
<i>Voting Against Gay Rights</i> , Time (May 22, 1978).	21
Wentz, <i>Homophobia Hits Home</i> , Willamette Week (1992)	27
Wetzstein, <i>Gays Can't 'Marry,' 2 States Say</i> , Wash. Times (Nov. 5, 1998) p. A16.....	35
White, Allen, <i>Reagan's AIDS Legacy</i> , S.F. Chronicle (Jun. 8, 2004) p. B9	26
William Howard Taft, H.R.J.Res. No. 4, 62nd Cong., 1st Sess. (1911) 47 Cong. Rec. 4.....	2
Wilson and Ebbert, <i>California's Legislature</i> (2006) p. 104-105	40, 41
Wolinsky, <i>Are Citizens Losing the Initiative?</i> , L.A. Times (Oct. 7, 1988) p. 1.....	46, 48, 49

**TABLE OF AUTHORITIES
(continued)**

Page(s)

Young, God's Bullies: Native Reflections on Preachers and
Politics (1982) p. 46..... 18

I. INTEREST OF THE AMICUS CURIAE

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

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

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

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

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

II. INTRODUCTION AND SUMMARY OF ARGUMENT

“Constitutions are checks upon the hasty action of the majority. They are self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority.”
(President (later Chief Justice) William Howard Taft, H.R.J.Res. No. 4, 62nd Cong., 1st Sess. (1911) 47 Cong. Rec. 4.)

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE HISTORY BEHIND PROPOSITION 8

A. The Gay and Lesbian Struggle for Equality

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

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

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

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

420.) In the fall of 1950, he founded the Mattachine Society to unite and organize gay people to protect them from “discriminatory and oppressive legislation.” (*Id.*) In 1955, the first lesbian rights organization in America – the Daughters of Bilitis – was founded in San Francisco by Phyllis Lyon and Del Martin. (Fadermann, *supra*, at pp. 190-191.)

On June 28 1969, in response to yet another police raid of a gay bar called the Stonewall Inn in New York, a series of spontaneous, violent demonstrations broke out. (Carter, *Stonewall: The Riots that Sparked the Gay Revolution* (2004) pp. 147-148 (hereafter Carter); Fadermann, *supra*, at pp. 194-195.) Shortly thereafter, the “Gay Liberation” movement joined forces with the larger social justice movements of the late 1960s and began to further mobilize and organize throughout the country. (Fadermann, *supra*, at pp. 194-201; Irvine, *Disorders of Desire* (1991) p. 140 (hereafter Irvine).)

B. The Antigay Movement in the United States

Although gay and lesbian people have been the target of discrimination since the turn of the last millennium, it has only been during the last thirty-five years that the Antigay Movement in the United States found its voice. (See Herman, *supra*, at pp. 44-50.) In this remarkably short period of time, Christian Fundamentalists who once decried the advances of racial minorities and the conspiracies of communists have transitioned to railing against the civil rights protections achieved by gay

and lesbian people. In making this transition, the Antigay Movement has appreciated the power and made repeated use of direct democracy as a means to fundraise and to elevate the political profiles of its member organizations and individual personalities, all to the detriment of gay and lesbian people in the United States. (See *A Thorn in Their Side* (interview with Rev. Mel White, author of *Stranger at the Gate: To Be Gay and Christian in America*) Southern Poverty Law Center Intelligence Report (Spring 2005) <<http://www.splcenter.org/intel/intelreport/article.jsp?aid=525>> [as of January 14, 2009] (hereafter *A Thorn in Their Side*)).

Many of the themes Christian Fundamentalists have used in their campaigns against lesbians and gay men are reminiscent of, and likely drawn from, the rhetoric they employed in earlier messaging against other groups they believed were threats, including Jews, Catholics, and communists. (Herman, *supra*, at pp. 26, 28, 35-36.) For example, Christian Fundamentalists used themes of contagion, corruption and indoctrination to describe Jews, but later, Christian Fundamentalists began to view them more as “arrogant and pathetic” but necessary. (*Id.* at pp. 36, 39-41.) These same themes were used in reference to Communists, who were depicted as atheists and enemies of religion, evil, bloodthirsty, barbaric, brainwashing, cunning and conspiratorial. (*Id.* at pp. 36-37) Catholics were described as having “vast power” and using “the cleverest

of propaganda,” and while once described as “an ineffectual minority” were later seen as a “high-powered lobby.” (*Id.* at pp. 42-43.) Christian Fundamentalists claimed that Catholics had taken over the public schools, intimidated Congress, and were well on their way to establishing Catholicism as the official religion of the country. Catholics had undertaken a “massive indoctrination” of Americans with the aim of making America “subservient to Rome.” (*Id.* at pp. 42-43)

Early depictions of homosexuals, before they were perceived to be much of a threat, were as unnatural, contrary to God’s law, and as pathetic creatures who were sad and lonely. (*Id.* at pp. 46-47.) This was similar to their early depictions of Jews. (*Id.* at p. 42.) As gay people became more visible and began advocating for themselves in the political arena, Christian Fundamentalists, viewing them as more threatening, began to portray gays and lesbians in ways that were thematically similar to their prior anti-communist and anti-Catholic rhetoric. They “began to associate the gay movement with having a wider agenda, particularly one centered on promoting homosexuality in the schools.” (pp. 43, 47) Catholics had once been accused by Christian Fundamentalists of being responsible for child delinquency and of trying to take over the public schools, and of being engaged in a “massive indoctrination, a process of education designed to make America in the future a Catholic country” (*Id.* at p. 43.) As the gay rights movement grew in force, lesbians and gays began to be seen less

like Jews, i.e., “pathetic” (*Id.* at p. 41), and more like communists, i.e., evil, satanic, anti-religion, conspiratorial, bloodthirsty, etc. (*Id.* at pp. 36-37). Thus, Christian Fundamentalists began to portray homosexuals less as pathetic and more as “an anti-Christian force, promoting a heresy increasingly sanctioned by the state in the form of decriminalization and the extension of civil rights.” (*Id.* at p. 50.) The focus on children and indoctrination in schools was similar to earlier portrayals of communists and Catholics. (*Id.* at pp. 34, 47.)

In reviewing the history of the Antigay Movement, it is important to keep in mind what it is gay men and lesbians have sought to achieve in their struggle for civil rights – equal treatment with other citizens, nothing more, nothing less. This includes the right to protection from discrimination in housing, employment and education (which gay men and lesbians sought through local and state anti-discrimination laws) as well as the right to be free from harassment and violence (which gay men and lesbians have sought in the form hate crime laws). Without achieving these rights, gay people were and are at risk of losing their homes, jobs and even their lives solely because they are gay. Lesbians and gay men have also sought the right to have their families accorded basic dignity and respect through domestic partner and civil union laws and – ultimately – equal dignity and respect through the right to marry. When gay men and lesbians turned to the political process in an effort to secure these basic

protections (by forming organizations, lobbying local and state legislators, and petitioning the courts to uphold these protections), Christian Fundamentalists did two things: (1) they demonized gay and lesbian people for using the political process, painting them as conspiratorial and undeserving of protection, and (2) they sought, through relentless use of the initiative and referendum processes, to un-do every success gay and lesbian people achieved and to prevent any further political success through misleading rhetoric that portrayed gay people as seeking “special rights.”

1. The Rhetorical Origin of the “Antigay Movement” – The Failure of the Race Message for Christian Fundamentalism.

For much of the first 70 years of the twentieth century, Christian Fundamentalist leaders were focused on attacking racial minorities, aggressively opposing their struggle for civil rights and what they perceived to be the injustice of integration. In 1958, Jerry Falwell delivered a sermon titled “Segregation and Integration: Which?” where he argued that integration would destroy the white race. (Goldberg, *We shall overcome ... liberals* (January 9, 2006) Salon.com <http://www.salon.com/news/feature/2006/01/09/justice_sunday/> [as of January 14, 2009].) When ministering to his congregation at Thomas Road Baptist Church, Falwell proclaimed that, “[i]f Chief Justice Warren and his associates had known God’s word and had desired to do the Lord’s will, I am quite confident that the 1954 decision would never have been made. The facilities should be separate.

When God has drawn a line of distinction, we should not attempt to cross that line.” (Blumenthal, *Agent of Intolerance* (May 16, 2007) *The Nation* <<http://www.thenation.com/doc/20070528/blumenthal>> [as of January 14, 2009] (hereafter Blumenthal).)

Falwell argued that, “[t]he true Negro does not want integration ... He realizes his potential is far better among his own race.” Falwell maintained that integration “will destroy our race eventually. In one northern city,” he warned, “a pastor friend of mine tells me that a couple of opposite race live next door to his church as man and wife.” (Blumenthal, *supra*.) In 1964, Falwell told a local paper that the Civil Rights Act had been misnamed: “It should be considered civil wrongs rather than civil rights.” Falwell’s “Old Time Gospel Hour” television program regularly hosted prominent segregationists like Govs. Lester Maddox and George Wallace. (Moser, *Holy War* (Spring 2005) Southern Poverty Law Center Intelligence Report <<http://www.splcenter.org/intel/intelreport/article.jsp?aid=522>> [as of January 14, 2009] (hereafter Moser).)

In 1965, Falwell gave a sermon called, “Ministers and Marchers.” In this sermon, Falwell maligned Dr. Martin Luther King Jr. as a Communist. (Blumenthal, *supra*.) Falwell, after saying he questioned “the sincerity and intentions of some civil rights leaders such as Dr. Martin Luther King Jr., Mr. James Farmer, and others, who are known to have left-wing associations,” Falwell stated, “It is very obvious that the Communists

... are exploiting every incident to bring about violence and bloodshed.”

(*Ibid.*) In his sermon, Falwell maintained that the major Christian denominations had debased their faith by supporting the civil rights movement. If ministers could support Southern blacks, Falwell argued, they should fight alcoholism with equal ardency. There are as many “alcoholics as there are Negroes,” Falwell reasoned. (Gallagher and Bull, *Perfect Enemies: The Religious Right, the Gay Movement and the Politics of the 1990s* (1996) <<http://www.washingtonpost.com/wp-srv/style/longterm/books/chap1/perfectenemies.htm>> [as of January 14, 2009] (hereafter Gallagher and Bull).)

Falwell founded the Lynchburg Christian Academy (eventually re-named, “Liberty Christian Academy”), which *The Lynchburg News* described in 1966 as “a private school for white students.” (Blumenthal, *supra.*) Lynchburg Christian Academy was one among many so-called “seg-academies” instituted in the South in an effort to avoid integrated public schools. (*Id.*) In 1971, after the Supreme Court let stand the ruling in *Green v. Connally* (D.C.D.C. 1971) 330 F.Supp, 1150, to revoke the tax-exempt status of racially discriminatory private schools, the Internal Revenue Service moved to revoke the tax-exempt status of Bob Jones University, which forbade interracial dating. Falwell complained, “In some states it’s easier to open a massage parlor than to open a Christian school.”

(*Id.*)

As overt racism became unacceptable in the popular view throughout the 1970s, Falwell's increasingly limited ability to use anti-integration attacks to attract and energize his followers and to raise the funds he needed to keep his ministry alive led him on a search for new targets of antipathy. (*A Thorn in Their Side, supra.*) Making matters worse, during this time, Falwell's television show, Old Time Gospel Hour was in and out of receivership. (Gallagher and Bull, *supra.*) In 1979, Falwell consulted with Richard Viguerie³ and Christian Fundamentalist leaders to develop a strategy to increase his membership and to energize the fundraising of the membership.⁴ (*Id.*)

It was the influential fundamentalist leader Francis Schaeffer who first gave Falwell the idea of using pagans (i.e., non-believers) to increase Falwell's following. (*A Thorn in Their Side, supra.*) When

³ Viguerie was one of the earliest fundamentalist fundraisers to recognize the value of stirring up antigay sentiments among Americans as a means to achieving political strength. He was also prescient; in his 1983 book, *The Establishment vs. the People: Is a New Populist Revolt on the Way?*, Viguerie made use of the "special rights" argument that would later serve as the basis for antigay campaigns in the 1990s, including Colorado's Amendment 2. (Gallagher and Bull, *supra.*)

⁴ In fact, it was in support of Phyllis Schlafly's anti-Equal Rights Amendment campaign that Falwell's fundraising really caught fire. (Gallagher and Bull, *supra.*) Schlafly repeatedly made use of the accusation of lesbianism in her attacks on Equal Rights Amendment supporters. (Hardisty, *Constructing Homophobia: Colorado's Right-Wing Attack on Homosexuals* (March 1993) *The Public Eye Magazine* <<http://www.publiceye.org/magazine/v07n1/conshomo.html>> [as of January 14, 2009] (hereafter Hardisty).)

Falwell despaired that his following was too small to “win [the] country to Christ,” Schaeffer said Falwell should use pagans to do it. Schaeffer explained that God used pagans in the Old Testament to do God’s work. (*Id.*) When Falwell asked how, Schaeffer said, “Through co-belligerency issues. You find issues that you can work together on with pagans.” (*Id.*) Just as the “godless Soviet empire” co-belligerency issue was dimishing, Falwell and other Christian Fundamentalists found the “godless homosexual threat” a convenient and remarkably lucrative co-belligerency issue that promised an increased and energized membership as well as a heightened political profile. (*Id.*)

Messaging for this new co-belligerency issue went hand-in-hand with raising money thanks to direct mail fundraising, which was critical to political organizing in the wake of the campaign finance reforms following the 1972 Watergate scandal. (Gallagher and Bull, *supra.*) Direct mail fundraising campaigns relied upon provocative political charges launched at identified political opponents to be effective. (*Id.*) As the founder of the National Conservative Political Action Committee, Terry Dolan, put it, “The shriller you are [in direct mail fundraising], the easier it is to raise money.” (Gallagher and Bull, *supra.*) Much to the financial and organizational benefit of Christian Fundamentalist leaders, the political landscape soon became littered with the most shrill antigay rhetoric the United States had seen up to that point.

2. Eliminating Gay Civil Rights – The Founding of the Modern “Antigay Movement” in the Late 1970s.

The modern Antigay Movement began at the ballot box with the 1977 effort, led by Anita Bryant, to repeal a city ordinance in Dade County, Florida that outlawed discrimination against homosexuals in employment, housing and public services.⁵ (*The Thirty Years War* (Spring 2005) Southern Poverty Law Center Intelligence Report <<http://www.splcenter.org/intel/intelreport/article.jsp?aid=523>> [as of January 14, 2009] (hereafter *The Thirty Years War*.) After the Dade County (FL) Commission passed, on January 8, 1977, Ordinance 77-4 outlawing discrimination against gays and lesbians, Bryant and her husband, Bob Green, assembled a meeting of over thirty political professionals and

⁵ In 1974, three years prior to Dade County ballot measure, voters in Boulder, Colorado repealed an amendment to Boulder’s Human Rights Ordinance that extended employment protections to gays and lesbians. Penfield W. Tate II, Boulder’s first African-American City Council-member, introduced the amendment extending these protections. After Tate received death threats and hate mail, the City Council put the amendment up for repeal on the local ballot, and the voters repealed it overwhelmingly. A year later, Tate lost his bid for re-election. (Taylor, *Mayor controversial for support of gay rights*, Boulder County Daily Camera <<http://www.dailycamera.com/news/2008/nov/14/mayor-controversial-for-support-of-gay-rights/>> [as of January 14, 2009].)

ministers at their home to discuss a plan to undo this ordinance.⁶ (Fejes, *Gay Rights and Moral Panic: The Origins of America's Debate on Homosexuality* (2008) pp. 76, 94 (hereafter Fejes).) This group formed an organization (called "Save Our Children") to run their effort to repeal the Ordinance and elected Bryant to be the organization's president. (*Id.*)

One of the early organizers of Save Our Children, a Republican-affiliated advertising executive named Mike Thompson, discovered from a poll taken in March 1977 that women in Dade County opposed repealing Ordinance 77-4 two-to-one; these women saw their gay friends as relatively harmless. (Clendinen and Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America* (1999) p. 303 (hereafter Clendinen).) Therefore, Thompson helped develop Save Our Children's strategy to focus on proving that homosexuals were a specific danger to children. (*Ibid.*) Bryant held a press conference where she waved a pamphlet about homosexuality that she claimed was being distributed in the schools,⁷ claiming Dade County gay and lesbian people, "are trying to recruit our children into homosexuality." (*Id.* at p. 299.) Bryant tried several tactics in

⁶ Bryant later admitted that she knew next to nothing about gay people at the time she attended a 1977 revival at Miami's Northside Baptist Church where the preacher railed against Ordinance 77-4 and said he'd "burn down his church before he would let homosexuals teach in its school." (Moser, *supra.*)

⁷ Bryant later retracted this statement. (Young, *God's Bullies: Native Reflections on Preachers and Politics* (1982) p. 46.)

her speeches against Ordinance 77-4, saying “If homosexuals are allowed to change the law in their favor, why not prostitutes, thieves, or murderers?” (Kondracke, *Anita Bryant Is Mad About Gays* (1980) The New Republic pp. 13-14.) And Bryant specifically connected homosexuals with child molesters, saying, “Some of the stories I could tell you of child recruitment and child abuse by homosexuals would turn your stomach.” (*Ibid.*) Bryant often said, “Homosexuals cannot reproduce, so they must recruit. And to freshen their ranks they must recruit the youth of America.” (Moser, *supra.*)

Save Our Children ran full-page newspaper ads in The Miami Herald, showing collections of headlines announcing teachers having sex with their students, children in prostitution rings, and homosexuals involved with youth organizations, followed by the question “Are all homosexuals nice? ... There is no ‘human right’ to corrupt our children.” (Fejes, *supra*, at p. 137.)⁸ When the repeal of Ordinance 77-4 went to a vote, it attracted the largest response of any special election in Dade County’s history and passed by 70%. (*Miami Anti-gays Win in Landslide*, S.F. Examiner (Jun. 8, 1977) p. 1.)

⁸ Save Our Children also distributed a paper entitled, “Why Certain Sexual Deviations Are Punishable By Death.” Homosexuality was among those deviations, as was “racial mixing of human seed.” (Moser, *supra.*)

That same year, state senators in Minnesota, unable to pass an antigay law in the legislature, invited Bryant to come to St. Paul to help them organize a campaign to overturn St. Paul's gay civil rights ordinance that had been on the books since 1974. (Clendinen, *supra*, at p. 318.) In December 1977, Temple Baptist Church organized a petition drive to put St. Paul's ordinance to a city-wide vote. (*Id.* at p. 324.) Leading this drive, Richard Angwin, pastor of Temple Baptist Church, stated, "I don't want to live in a community that gives respect to homosexuals." (*Ibid.*) Angwin followed the Dade County campaign's strategy and even used some of Bryant's resources. (Clendinen, *supra*, at p. 327.) At a rally against the St. Paul ordinance, Angwin told the audience, "Homosexuality is a murderous, horrendous, twisted act." (*Id.* at p. 326; Fejes, *supra*, at pp. 172-173.) On April 25, 1978, special election day in St. Paul, again, more than the usual number of voters appeared at the polls, and again, the gay civil rights ordinance was overturned by more than two to one. (Clendinen, *supra*, at p. 327.)

In 1978, Bryant supported another campaign against a gay civil rights ordinance in Wichita, Kansas where the campaign literature focused on the "danger" of gays as role models for children: "There is a real danger that homosexual teachers, ... simply by public acknowledgement of their lifestyles, can encourage sexual deviation in children." (*Voting Against Gay Rights*, Time (May 22, 1978) <<http://www.time.com/time/magazine/>

article/0,9171,919647,00.html> [as of January 14, 2009].) The voters overturned this gay civil rights ordinance. (Fejes, *supra*, at pp. 174-175.) A similar initiative passed overwhelmingly that same year in Eugene, Oregon. (Fejes, *supra*, at p. 177.) It was amid this wave of antigay ballot measures that Rev. Donald Wildmon founded the American Family Association, an organization that would later donate heavily to the “Yes on 8” campaign, and built its membership and resources largely on the basis of antigay appeals. (*A Mighty Army* (Spring 2005) Southern Poverty Law Center Intelligence Report <<http://www.splcenter.org/intel/intelreport/article.jsp?pid=872>> [as of January 14, 2009] (hereafter *g*.)

California state senator John Briggs was in the crowd the night Anita Bryant and Save Our Children won the Dade County vote. (Shilts, *The Mayor of Castro Street: The Life and Times of Harvey Milk* (1982) p. 154.) Upon return to California, Briggs put forward Proposition 6 (the “Briggs Initiative”), a measure that would have altered California law to allow the dismissal of any public school employee for supporting gay civil rights (including voting against Proposition 6), regardless of the employee’s sexual orientation. (Fejes, *supra*, at p. 183.) Briggs stated, “What I am after is to remove those homosexual teachers who through word, thought or deed want to be a public homosexual, to entice young impressionable

children into their lifestyle.” (*Ibid.*) Although the Briggs Initiative did not pass, the campaign marked the start of Reverend Louis Sheldon’s⁹ role as a Christian Fundamentalist leader as Briggs put Sheldon in charge of Briggs’ campaign organization, California Defend Our Children. (Clendinen, *supra*, at p. 381.) Sheldon would go on, in 1981, to found the Traditional Values Coalition, whose direct mail appeals would state, “As homosexuals continue to make inroads to the public schools, more children will be molested and indoctrinated into the world of homosexuality.”¹⁰ (*A Mighty Army, supra.*) The Traditional Values Coalition now claims to represent 43,000 Christian churches across America.¹¹ Other Christian Fundamentalist groups emerged after Bryant’s campaign in Dade County, including Focus on the Family in Colorado (in 1977) and Concerned

⁹ In 1992, Sheldon reportedly told columnist Jimmy Breslin, “Homosexuals are dangerous. They proselytize. They come to the door, and if your son answers and nobody is there to stop it, they grab the son and run off with him. They steal him. They take him away and turn him into a homosexual.” (*A Mighty Army, supra.*)

¹⁰ Most of the Traditional Values Coalition direct appeals center on the idea that child-molesting is the real homosexual agenda. (*A Mighty Army, supra.*)

¹¹ <<http://www.traditionalvalues.org/about.php>> (as of January 14, 2009).

Women for America¹² in Washington, D.C. (in 1979) (*A Mighty Army, supra.*) Both of these groups would heavily fund the “Yes on 8” campaign in 2008.

Having seen the enthusiasm generated by Bryant and her antigay crusade, Falwell (along with Paul Weyrich), in 1979, marked Christian Fundamentalists’ most important entrance into politics by founding the Moral Majority, a national effort to stimulate the fundamentalist vote and elect Christian Fundamentalist candidates. (Lernoux, *A Reverence for Fundamentalism* (Apr. 17, 1989) *The Nation*, at pp. 513-516.) Early fundraising appeals included a “Declaration of War” on homosexuality. (*The Thirty Years War, supra.*) In the coming years, the Christian Fundamentalists would wage an unrelenting war against gay civil rights, using, as Bryant had, the initiative and referendum processes.

¹² The founder of Concerned Women of America is Beverly LaHaye, wife of Tim LaHaye, who in 1978 wrote *The Unhappy Gays* (later retitled *What Everyone Should Know About Homosexuality*) in which he argues “‘straights’ had better wake up fast to the fact that ‘[t]he homosexual community ... is designing a program to increase the tidal wave of homosexuality that will drown our children in a polluted sea of sexual perversion – and will eventually destroy America as it did Rome, Greece, Pompeii, and Sodom.” (Herman, *supra*, at p. 62.)

3. Intensified Rhetoric and Increasing Use of Direct Democracy – the “Antigay Movement” in the 1980s.

Despite the defeat of the Briggs Initiative in 1978, two new iterations of antigay ballot measures appeared at the California local level in Santa Clara and San Jose just two years later in 1980. (Gamble, *Putting civil rights to a popular vote* (1997) 41(1) *American J. of Political Science* 245, 258 (hereafter Gamble).) Just like the referenda in Dade County, St. Paul, Wichita, and Eugene, these measures sought – and achieved – the repeal of existing local legislation that protected gay and lesbian people from discrimination. (*Ibid.*) Very soon thereafter, Moral Majority allies in the United States Congress proposed the Family Protection Act, which would have barred giving federal funds to “any organization that suggests that homosexuality can be an acceptable alternative lifestyle.” (*The Thirty Years War, supra.*)

When Christian Fundamentalists needed “proof” that homosexuality was unacceptable, they relied on Paul Cameron. (Moser, *supra.*) A former psychology instructor at the University of Nebraska, Paul Cameron, in 1980, began publishing “scientific” studies that supported the claims of Bryant and Falwell that gay people were “diseased perverts” determined to implement a program of child molestation. (*A Mighty Army, supra.*) Cameron founded the Institute for Scientific Investigation of

Sexuality (ISIS),¹³ which distributed pamphlets falsely claiming that gay people were much more likely than the general population to commit serial murder and child molestation. (Harkavy, *Slay It With a Smile: Paul Cameron's mission to stop homosexuality is hard to swallow*, Westword Denver News (Oct. 3, 1996) <<http://www.westword.com/1996-10-03/news/slay-it-with-a-smile/1>> [as of January 14, 2009].) In a 1981 debate, Cameron claimed that a 4-year-old boy had been sexually mutilated in a Lincoln, Nebraska mall rest room as part of a “homosexual act” – but Lincoln police said no such crime ever occurred. (*A Mighty Army, supra.*) Although the American Psychological Association expelled Cameron from its membership in 1983 after he failed to cooperate with an investigation into allegations that he misrepresented the work of others and used unsound methods (Herek, Paul Cameron Bio and Fact Sheet, University of California, Davis Psychology Department <http://psychology.ucdavis.edu/rainbow/html/facts_cameron_sheet.html> [as of January 14, 2009]), Cameron went on to publish numerous so-called “studies”, which Christian Fundamentalists all over the country continued to cite. (*A Mighty Army, supra.*)

¹³ The ISIS would later be renamed the Family Research Institute. (Kranish, *Beliefs drive research agenda of new think tanks*, Boston Globe (Jul. 31, 2005) p. A1.)

In 1983, communications director for President Reagan and future candidate for the Republican nomination for president, Pat Buchanan called AIDS, “nature’s revenge on gay men.” (White, Allen, *Reagan’s AIDS Legacy*, S.F. Chronicle (Jun. 8, 2004) p. B9.) That same year, Falwell’s Moral Majority sent out at least three mailings that highlighted the threats of homosexuality and AIDS (Hardisty, *Constructing Homophobia: Colorado’s Right-Wing Attack on Homosexuals* (March 1993) The Public Eye Magazine <<http://www.publiceye.org/magazine/v07n1/conshomo.html>> [as of January 14, 2009] (hereafter (Hardisty)) and repeatedly used the AIDS epidemic to craft new fundraising appeals. Falwell stated, “AIDS is the wrath of a just God against homosexuals.” (Noah, *Jerry Falwell’s Hit Parade* (May 15, 2007) Slate.com <<http://www.slate.com/id/2166220/>> [as of January 14, 2009].) Falwell called AIDS “the gay plague” (Moser, *supra*), and he was not the only religious leader to express this view. In 1985, Rev. Louis Sheldon¹⁴ personally suggested putting AIDS victims into “cities of refuge.” (Hardisty, *supra*.) A variation of this suggestion was put forth by Paul Cameron who, in 1985, told the Conservative Political Action Committee conference that “extermination of homosexuals” might be necessary in the

¹⁴ In 1986 and 1988, Sheldon endorsed the California antigay initiatives sponsored by Lyndon LaRouche. The initiatives sought to require quarantine for people with AIDS. (Hardisty, *supra*.)

coming years. (*A Mighty Army, supra.*) In 1985, amid this kind of rhetoric, voters in Houston, Texas passed – with 82% in favor – a resolution to repeal a gay civil rights ordinance enacted by the Houston City Council the prior year. (Reinhold, *AIDS Remark is at Issue in Houston Vote Today*, N.Y. Times (Nov. 5, 1985) p. B6.)

In 1986, Christian Fundamentalist leader Lon Mabon founded the Oregon Citizens Alliance (OCA), initially as a vehicle to challenge then-Senator Bob Packwood. (Wentz, *Homophobia Hits Home*, Willamette Week (1992) <http://wwweek.com/___ALL_OLD_HTML/25-1992.html> [as of January 14, 2009].) The base of the OCA's support was in Oregon's Christian churches, and the OCA was particularly active outside of the state's major metropolitan area. (Donovan et al., *Direct Democracy and gay rights initiatives after Romer* in *The politics of gay rights*, (Craig A. Rimmerman et al. edits., 2000) pp. 161-90 (hereafter Donovan).) In 1988, the OCA brought Measure 8 to the statewide ballot in Oregon to overturn their governor's executive order banning antigay discrimination in state hiring. (Gamble, *supra*, at p. 258.) Voters adopted Measure 8 by 52.7%, but the Oregon Court of Appeals overturned it in 1992 on the basis that it restricted state employees' freedom of speech. *Merrick v. Board of Higher Education* (Or.App. 1992) 841 P.2d 646. This defeat was only a temporary setback.

After Pat Robertson founded the Christian Coalition in 1989, the OCA returned, with funding from the Christian Coalition (Hardisty, *supra*), with another initiative (Measure 9) in 1992, this time to amend the Oregon state constitution to declare homosexuality “abnormal, wrong, unnatural, and perverse,” and to equate it with pedophilia. (*Id.*) When the Oregon voters rejected Measure 9, the OCA began a new strategy of passing less radical initiatives at the local level, focusing on the jurisdictions that had voted to approve Measure 9. (Gamble, *supra*, at p. 259.) The strategy worked; by the end of 1993, no fewer than sixteen (16) Oregon jurisdictions had voted to amend their local charters to bar any law that would prohibit discrimination on the basis of sexual orientation.¹⁵ (*Id.*) And Pat Robertson’s Christian Coalition used its involvement in direct democracy campaigns against gay rights to generate political capital among the membership. After supporting the 1990 political battle over a gay rights initiative in Broward County, Florida, the Christian Coalition took credit for “spearheading” the defeat of the initiative. (Hardisty, *supra*.) Christian Fundamentalists were reaping the benefits of political organization that came from using the initiative and referendum processes

¹⁵ Ultimately, all of these local changes were invalidated when Governor Barbara Rogers signed a law, passed by the Oregon Legislative Assembly, that prohibited cities and counties from implementing the antigay initiatives. (Gamble, *supra*, at p. 259.)

to achieve goals that were out of their reach through the legislative process of representative government.

After the San Francisco Board of Supervisors unanimously approved a domestic partnership law in 1989, the Catholic Church spearheaded a successful repeal of this law by a voter referendum.¹⁶ (Bailey, *Gay Politics, Urban Politics* (1998) p. 316.) That same year, voters in Irvine, California, with support from Sheldon's Traditional Values Coalition, used the initiative power to remove sexual orientation from Irvine's human rights ordinance. (Gamble, *supra*, at p. 259.) In October 1989, Sheldon led the "West Coast Symposium on Homosexuality and Public Policy Implications" in Orange County, California. (Hardisty, *supra*.) Two of the most prominent speakers at Sheldon's symposium were Roger Magnuson, author of *Are Gay Rights Right?*, and Congressman William Dannemeyer,¹⁷ author of *Shadow in the Land: Homosexuality in America*. (Hardisty, *supra*.) Sheldon's symposium was tremendously successful and received attention from Christian organizations all over the country. (*Id.*) In 1989, voters in Tacoma, Washington repealed a gay civil rights law that its city council had passed a few months earlier. (Gamble,

¹⁶ Two years later, San Francisco voters approved a weaker version of domestic partnerships. (Gamble, *supra*, at p. 259.)

¹⁷ Dannemeyer claimed that people with AIDS emit spores that have been known to cause birth defects. (*Board Ignores Logic on Public Health Issue*, L.A. Times (June 18, 1989) p. 8.)

supra, at p. 259.) Likewise, voters in Athens, Ohio similarly repealed a gay civil rights law that year. (Haider-Markel et al., *Lose, Win or Draw? A Reexamination of Direct Democracy and Minority Rights* (2007) 60(2) Political Research Quarterly 304, Supp. Appen. p. 4 (hereafter Haider-Markel).)

During the early 1990s, however, Christian Fundamentalists began to experience some mixed results at the ballot box,¹⁸ calling into question the long-term viability of their tactical mix of inflammatory rhetoric and radical ballot measures against gays and lesbians. With the political organization of Christian Fundamentalists fully formed and their movement up and running, Christian Fundamentalist theorists were searching for a new strategy to improve their electoral results, to move public opinion and to legitimize their political power.

4. The “Special Rights” Focus and Further Rights Elimination – the “Antigay Movement” in the 1990s through Today.

Despite the efforts of Christian Fundamentalists, polls showed rising public support for gay civil rights throughout the 1980s. (Moser, *supra*.) By the early 1990s, Christian Fundamentalists began to shy away

¹⁸ For example, during 1990 and 1991, antigay campaigns lost ballot measures in San Francisco, California, Seattle, Washington, and St. Paul, Minnesota, places where the earlier antigay campaigns had succeeded. (Haider-Markel, *supra*, at p. 3.)

from the inflammatory rhetoric of disease and seduction, and began to argue that gay rights were “special rights” demanded by a group that was already wealthy and politically powerful. (Herman, *supra*, at pp. 113, 116-119.) One of the most important Christian Fundamentalist theorists, Tony Marco, wrote in the 1990s:

What gives gay militants their enormous power are money and the *operative presumption that gays represent some kind of “oppressed minority.”* It is the fear that we may be “denying an ‘oppressed’ group rights” that has induced widespread enough guilt in the American people to allow for the progress of “gay rights” we have seen to date. If this is true, I conclude that (a) forcing gay activists to spend tons of money, and (b) demolishing the presumption that gays are an “oppressed minority” are the *only* means by which gay militants’ political power can be destroyed *at its roots*. All other approaches to opposing “gay rights” are doomed to failure. ... If this is so, as I believe it is, we need to immediately drop the “disgust” and “public health threat” arguments we have been depending on Besides being irrelevant to the issues gay militants are really raising, these arguments are no longer credible, appeal only to the “choir” and actually allow our opponents to once again tar us with the role of aggressors – and clumsy, lying ones at that.

(*Id.* at p. 114, quoting memorandum of Tony Marco, emphasis in original.)

This coded rhetoric of “special rights” is particularly powerful and permits Christian Fundamentalists to tap into deep reservoirs of resentment and anger about other antidiscrimination laws based on race and gender.

(Schacter, *Romer v. Evans and Democracy’s Doman* (1997) 50 Vand. L.Rev. 361, 374.) One of their earliest victories after honing the “no

special rights” rhetoric was achieved in the campaign for Colorado’s Amendment 2. (Hardisty, *supra*.) Colorado for Family Values, the organization that sponsored Amendment 2, made the “no special rights” slogan the centerpiece of its public campaign after the National Legal Foundation (a Christian Fundamentalist legal organization founded by Pat Robertson) sent it a letter in 1991 advising it to do so. (*Id.*) Although Amendment 2 would be overturned on equal protection grounds by the United States Supreme Court in *Romer v. Evans* (1996) 517 U.S. 620 (hereafter *Romer*), Maine’s Family Policy Council (an organization associated with Dobson’s Focus on the Family), would use the same “no special rights” rhetoric to successfully overturn a law promulgated by the Maine state legislature prohibiting discrimination based on sexual orientation in 1998. (Donovan, *supra*, at p. 167.) Similarly, Phil Burress’ organization, Citizens for Community Values (CCV) (an affiliate of James Dobson’s Focus on the Family) and its sister organization, “Equal Rights Not Special Rights”, launched a successful 1993 initiative in Cincinnati, Ohio to remove protections for gays and lesbians in municipal antidiscrimination ordinances and to prohibit the city council from passing new gay rights legislation.¹⁹ (Haider-Markel, *supra* at p. 3;

¹⁹ This law was upheld by the United States Court of Appeals for the Sixth Circuit in *Equality Foundation of Greater Cincinnati, Inc. v. City of*

<<http://www.ccv.org>> [as of January 14, 2009].) In 1993, gay civil rights would also be repealed by voter referenda in Lewiston, Maine and Tampa, Florida. (Haider-Markel, *supra*, at p. 4.)

In 1994, voters in Alachua County, Florida voted to both repeal their county's gay rights laws and to ban the county from ever enacting another gay rights law.²⁰ That same year, voters in Springfield, Missouri approved a referendum – by an over two-to-one margin – to repeal the inclusion of gays in the city's hate crimes law (Dunlap, *The 1994 Campaign: Homosexuality; Struggle over Gay Rights Moves to Statewide Level*, N.Y. Times (Nov. 6, 1994) p. A30), and voters in Austin, Texas also repealed their City Council-enacted recognition of domestic partner benefits. (*Ibid.*)

In 1998, voters in Fayetteville, Arkansas repealed the city's resolution that had added sexual orientation and familial status to the non-

Cincinnati (6th 1997) 128 F.3d 289 (distinguishing *Romer* on the grounds that Amendment 2 applied to the entire state whereas the *Cincinnati* measure applied only in *Cincinnati*). Thus, for eleven (11) years gay men and lesbians and their families lived in fear until they ultimately invested extraordinary sums of money and time to narrowly repeal this law in a voter referendum in 2004. (Resnick, *Issue 3 campaign was the most expensive in the city: Removing Article 12 broke the 1993 record set by its creation*, Gay Peoples Chronicle (Dec. 17, 2004) <<http://www.gaypeopleschronicle.com/stories04/december/04dec17/04dec17-st3.htm>> [as of January 14, 2009].)

²⁰ See Navarro, *Gay Rights Battle Flares in Florida*, N.Y. Times (Dec. 12, 1994) p. B8, quoting a woman who voted in favor of the measure to repeal the law saying the law gave homosexuals “special rights.”

discrimination policy for hiring public employees; a local group affiliated with the Christian Coalition organized the signature-gathering effort to put the referendum on the ballot. (National Gay and Lesbian Task Force Election 1998 Report, <<http://www.qrd.org/qrd/orgs/NGLTF/1998/final.election.update-11.04.98>> [as of January 14, 2009].) That same year, voters in Fort Collins, Colorado also approved – by 24 points – a referendum repealing that city’s gay civil rights law. (*Ibid.*)

When the Hawaii Supreme Court ruled in 1993 that the state’s refusal to issue marriage licenses to same-sex couples constituted sex discrimination under Hawaii law, Christian Fundamentalists secured the assistance of the Mormon Church, which had not been particularly active in earlier efforts. The Church developed a strategy to reverse the court’s decision through the legislature. (Letter to Mormon Church Elder M. Russell Ballard from Loren C. Dunn (Mar. 4, 1997) <<http://www.echols.info/Mormon%20Anti-Gay%20Game%20Plan%201997-2008.pdf>> [as of January 14, 2009] (hereafter Ballard letter).) This strategy included the formation of an organization called “Hawaii’s Future Today” that would be the public face of the anti-marriage equality effort and would hold rallies, write opinion pieces and advocate for a constitutional amendment banning marriage equality. (Crapo, Chronology of Mormon / LDS Involvement in Same-Sex Marriage Politics <[-34-](http://www.mormonsocialscience.org/files/Crapo-</p></div><div data-bbox=)

R1997-Chronology%20of%20LDS%20%20Involvement%20In%20Same-Sex%20Marriage%20Politics.pdf> [as of January 14, 2009].) Hawaii's Future Today placed political ads in Hawaii's newspapers and helped defeat the re-election of the chairman of the Hawaii Senate's judiciary committee who supported marriage equality. (*Ibid.*) Hawaii's Future Today also carefully crafted messages restating the Christian Fundamentalist position against marriage equality and urging support for Hawaii's Future Today. (Ballard letter, *supra.*) These efforts paid off as opposition to marriage equality grew in Hawaii: in November 1998, voters in Hawaii adopted a Constitutional amendment giving the Legislature the power to reserve marriage to opposite-sex couples. (Wetzstein, *Gays Can't Marry, '2 States Say*, Wash. Times (Nov. 5, 1998) p. A16 [reporting that the amendment passed by a vote of 69% to 30%.]) That same year, voters in Alaska also approved an amendment to the Alaska constitution that outlawed marriage equality (Haider-Markel, *supra.*, at p. 6), again with help from the Mormon Church, which donated \$500,000.00 to the Alaska Family Coalition, the group that ran the campaign for the marriage ban. (Ruskin, *Same-sex marriage foes given \$500,000*, Anchorage Daily News (Oct. 3, 1998) p. A1.)

After the successes in Hawaii and Alaska, the Mormon Church pleaded with its members to support Proposition 22 in California,²¹ and, in doing so, used the “no special rights” approach that had proven to be so successful in the 1990s. On February 13, 2000, the Mormon Church sent out a letter to be read to its entire California congregation and offered this quote from Mormon President Gordon B. Hinckley:

Some portray legalization of so-called same-sex marriage as a civil right. This is not a matter of civil rights, it is a matter of morality ... nevertheless, ... Our opposition to legalize [sic] same-sex marriage should never be interpreted as justification for hatred, intolerance, or abuse of those who profess homosexual tendencies.

(Letter from Mormon North America West Area Presidency to All Stake Presidents, bishops and Branch Presidents in California, February 13, 2000, quoting Mormon Church President Gordon B. Hinckley. <http://www.lds-mormon.com/mormon_proposition22.shtml> [as of January 14, 2009].)

On March 7, 2000, Proposition 22 passed with 61% of the vote.²² Voters in Nebraska and Nevada also passed marriage bans in 2000.

²¹ The Mormon Church also reportedly donated \$5 million to the organization run by California State Senator Pete Knight in support of that organization’s signature-gathering effort to put Prop. 22 on the ballot. (*Religion & Ethics Newsweekly*, California’s Proposition 22, aired February 25, 2000, Transcript of Episode no. 326 <<http://www.pbs.org/wnet/religionandethics/week326/news.html>> [as of January 14, 2009].)

²² Proposition 22 passed with 4,618,673 votes for versus 2,909,370 against. (California Secretary of State, Primary Elec. (Mar. 7, 2000) at <<http://primary2000.sos.ca.gov/returns/prop/00.htm>> [as of January 14, 2009].)

(Haider-Markel, *supra*, at p. 7.) In the fall of 2004, James Dobson’s political spin-off group, Focus on the Family Action, organized large rallies in six cities; three weeks before the 2004 election, about 150,000 people turned out for Dobson’s “Mayday for Marriage” rally in Washington, D.C. (Moser, *supra*.) In 2004, voters in thirteen (13) states passed constitutional amendments to ban marriage. (Haider-Markel, *supra*, at p. 8.) By 2008, forty (40) states had statutes excluding gay and lesbian people from the institution of marriage, and thirty (30) states would have amendments to their constitutions banning gay and lesbian people from marrying. (*Same Sex Marriage, Civil Unions and Domestic Partnerships*, National Conference of State Legislatures (Nov. 2008) <<http://www.ncsl.org/programs/cyf/samesex.htm>> [as of January 14, 2009].) The initiative campaigns for state constitutional amendments generally followed successful campaigns for statutory marriage exclusions in most states, including California, which passed Proposition 8 – by a margin of just over 2 percentage points – in November 2008.²³ Members of the Mormon Church reportedly gave the Yes on 8 Campaign \$20 million, representing over half of the campaign’s funding. (McKinley and Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. Times (Nov. 15, 2008) p. A1.)

²³ Florida and Arizona voters also passed constitutional marriage bans in November 2008. (McKinley and Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. Times (Nov. 5, 2008) p. A1.)

Of course, other significant donors to the Yes on 8 Campaign included many of the leading national antigay organizations, such as the American Family Association (\$500,000), Concerned Women for America (\$409,000), the Family Research Council (\$74,402), and Focus on the Family (\$544,431). (*Top Prop. 8 organizational donors*, Sacramento Bee (Nov. 12, 2008) <<http://www.sacbee.com/1098/v-print/story/1392908.html>> [as of January 14, 2009] (hereafter Sacramento Bee).) The reclusive billionaire, Howard F. Ahmanson, whose unincorporated Fieldstead & Co. donated over \$800,000 in support of Proposition 8, once said, “My goal is the total integration of biblical law into our lives.” (Blumenthal, *The Man Behind Proposition 8*, The Daily Beast.com (Nov. 3, 2008) <<http://www.thedailybeast.com/blogs-and-stories/2008-11-03/the-man-behind-proposition-8/full/>> [as of January 14, 2009].)

Although Christian Fundamentalists were generally focused on banning marriage since 2000, they also supported a successful initiative in Houston, Texas in 2001 that banned same-sex benefits and prevented affirmative action in hiring based on sexual orientation. (Haider-Markel, *supra*, at p. 7.) In fact, Focus on the Family supported the Arkansas Family Council’s successful ballot campaign to restrict adoption and foster parenting to only married couples in 2008. (*Early Voting in Arkansas Favors Article 1*, The Advocate (Nov. 4, 2008) <<http://>

election2008.advocate.com/2008/11/early-voting-in.html> [as of January 14, 2009].) This support is significant because, in 2004, Arkansas voters, led by the Focus on the Family-affiliated Arkansas Family Council, approved a constitutional marriage ban. (Haider-Markel, *supra*, at p. 8.) This progression (from marriage exclusion to restriction on adoption) in Arkansas emphasizes *Amicus*' concern as to what rights might be next on the agenda of Christian Fundamentalists and their allies.

The Christian Fundamentalists' use of direct democracy to eliminate the rights of gays and lesbians serves only to emphasize the Court's role as an institutional check on the "unfiltered majoritarian initiative process." (Miller, *Constraining Populism: The Real Challenge of Initiative Reform* (2001) 41 Santa Clara L.Rev. 1037, 1060 (hereafter *Populism*)).

IV. THE "LEGISLATIVE" PROCESS FAILS WHEN MINORITY RIGHTS ARE PUT TO A POPULAR VOTE

A. The Deliberative Safeguards of Representative Government

James Madison explained that one of the primary purposes of representative government is "to refine and enlarge the public views, by passing through the medium of a chosen body of citizens." (Madison, *The Federalist No. 10* (Nov. 22, 1787) <<http://www.constitution.org/fed/federa10.htm>> [as of January 14, 2009].) Madison further explained that: "It is of great importance in a republic, not only to guard the society against

the oppression of its rulers, but to guard one part of society against the injustice of the other part.” (Madison, The Federalist No. 51 (Feb. 6, 1788) <<http://www.constitution.org/fed/federa51.htm>> [as of January 14, 2009].)

Toward this end, Madison championed representative government:

[T]here are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or *mised by the artful misrepresentations of interested men*, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind.

(Madison, The Federalist No. 63 (Mar. 1, 1788) <<http://www.constitution.org/fed/federa63.htm>> [as of January 14, 2009] (emphasis added).)

By its nature, representative government has a moderating effect on lawmaking. In California, before a legislative bill is enacted into law, it must go through a numerous steps in the State Legislature to ensure that both houses of the legislature have carefully considered the ramifications of the bill. (Wilson and Ebbert, California’s Legislature (2006) p. 104-105.) First a bill is introduced into the Assembly by a Member or into the Senate by a State Senator and “read by title” by the respective legislative house (either the Assembly or Senate). (*Id.* at p. 104.) Then the rules committee

of the respective house assigns the bill to the appropriate committee of that body. (*Id.*) This may be either a policy committee or the appropriations committee. (*Id.*) A bill may not be heard or discussed in committee until 31 days after it has been introduced. (*Id.*) This provides 31 days for legislators to investigate the bill and conduct research as necessary. It also provides an opportunity for opponents of the bill to gather information. Once the bill is “in committee,” the committee listens to testimony on the bill from the author, citizens, experts, and lobbyists. (*Id.*) At this point, the committee votes on whether to recommend passage and, if so, sends it on to the main body of either the Assembly or the Senate, or may refer it to another committee for consideration. (*Id.*) Even after it goes back to the main body of the Assembly or Senate, the bill must go through two additional readings before it can be voted on. (*Id.*) At any point in the process, a bill can be amended or simply voted down. (*Id.*) Before either house may take a final vote on a bill, the bill along with any amendments must be printed and distributed to the members. (*Id.* at 105.) After a bill has passed one of the houses of the legislature, then it has to go through the entire process again in the other house. (*Id.*) By this process, which can take as much as two years, legislative bills are thoroughly discussed, facts are tested, and law is made through the process of debate and compromise.

Elected representatives “must debate and discuss issues along somewhat rational lines if they hope to be re-elected by the public.”

(Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey* (1970) 55 Cornell L. Rev. 881, 902 (hereafter Seeley).) Indeed, elected legislators are “expected to have the expertise and resources necessary to understand legislative measures and make informed decisions.” (Fountaine, *supra*, at p. 740.) Beyond this, “elected representatives have a duty to govern on behalf of all their constituents, even those in a minority. Moreover, deliberative bodies give minorities an opportunity to work directly with colleagues in the legislature. Elected representatives engage in continuing relationships with their colleagues necessarily make trade-offs and compromises.”

(Comment, *Anti-gay Initiatives: A Call for Heightened Judicial Scrutiny*, (1993) 41 UCLA L. Rev. 153, 193 (hereafter *Scrutiny*).) This is why courts defer to decisions of legislative bodies:

It is because legislators and administrators are properly concerned with balancing numerous considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.

Village of Arlington Heights v. Metropolitan Housing Development Corp. (1977) 429 U.S. 252, 265. This concern for “balancing numerous considerations” present in representative government is decidedly absent in the initiative process.

B. The Genesis of the Initiative Process in California

As people became increasingly dissatisfied with government in the 1890s and early 1900s, the Populist and Progressive Movements emerged, and with them, a series of reforms including the initiative process. (*A Brief History of the Initiative and Referendum Process in the United States*, Initiative and Referendum Institute, University of Southern California Law School <[http://www.iandrinstute.org/New IRI Website Info/Drop Down Boxes/Quick Facts/History of I&R.pdf](http://www.iandrinstute.org/New_IRI_Website_Info/Drop_Down_Boxes/Quick_Facts/History_of_I&R.pdf)> [as of January 14, 2009].) In California in particular, people were looking for a means to combat the stranglehold that Southern Pacific Railroad had on state government. (*California*, Initiative & Referendum Institute, (2008) <<http://www.iandrinstute.org/California.htm>> [as of January 14, 2009] (hereafter *California*.) Governor Hiram Johnson was a leader in this fight. (*Id.*) Indeed, in 1910, Johnson ran for Governor and won, bringing with him dozens of reformers into the legislature. (*Id.*) As a result, the California Constitution was amended in 1911 to provide for the initiative and referendum processes as means of allowing the electorate to directly enact legislation. (*Id.*)

“The initiative process was seen as a way to bypass the corruption and corporate control of state legislatures, and restore democratic self-governance in the people themselves.” (Manheim, *Symposium of the California Initiative Process* (1998) 31 Loy. L. A. L.Rev.

1161.) Gov. Johnson described the purpose of the initiative and referendum processes as follows:

And while I do not by any means believe the Initiative, the Referendum, and the Recall are the panacea for all our political ills, yet they do give to the electorate the power of action when desired, and they do place in the hands of The People the means by which to protect themselves.

(Hichborn, Story of the Session of the California Legislature of 1911 (1911) p. 93 n. 115.) As will be discussed in more detail below, the initiative process in California has gone far afield from Johnson's original intentions of curbing abuse in government. "Direct democracy is used comparatively infrequently to curb abuses in government or otherwise to control elected officials. Rather, intense interest is generated when the issues are seemingly clear-cut and often emotional such as liquor, gun control, pollution, pornography or race." (Bell, *The Referendum: Democracy's Barrier to Racial Equality* (1978) 54 Wash. L. Rev. 1, 18.) Such "intense interest", of course, now extends to initiatives dealing with the rights of gays and lesbians.

C. The Initiative Process

Theoretically at least, anyone can use the initiative process to attempt to enact a statute or amend the state Constitution. (Cal. Const., art. II, § 8.) The process is relatively straightforward: First, draft the language of the statute or amendment; second, conduct a petition drive to gather the

required number of signatures; and finally, conduct a political campaign to convince voters to approve the initiative. (Note, *The California Initiative Process: A Suggestion for Reform* (1975) 48 So.Cal. L.Rev. 922, 927 (hereafter *Reform*)).) If successful, the statute or constitutional provision may not be changed by the legislature. (*Id.*)

By contrast, the process for the legislature to amend or revise the Constitution requires that the legislature first put the proposal to a roll call vote of each house of the legislature, which must pass by a *two-thirds* majority. (Cal. Const., art. XVIII, § 1.) If passed, the amendment or revision is then presented to the voters for a vote in much the same manner as an initiative. (*Id.*)²⁴ Notably, however, an amendment or revision proposed to the electorate in this manner has had the benefit of the deliberative process *before* being put to a popular vote.

D. The Initiative and Referendum Industry

As the population increased after the introduction of the initiative, and an increasing number of signatures were required to qualify an initiative for the ballot, a new industry developed – the initiative and

²⁴ Votes on initiatives for either Constitutional amendments or revisions brought by the legislature have built-in deliberative protections. “[R]equiring supermajorities (or successive majorities in separate institutions) not only helps to protect a minority from the majority, but also encourages the majority to confer and compromise with those that hold different views.” (Haider-Markel, *supra*, at p. 305.)

referendum industry. As early as World War I, petitions were being circulated by paid signature gatherers. (*California, supra.*) The use of the initiative led to the creation of an entire industry that includes enormously profitable businesses, such as professional signature gathering companies, campaign consultants, and advertising agencies. (Fountaine, *supra*, at p. 737; Wolinsky, *Are Citizens Losing the Initiative?*, L.A. Times (Oct. 7, 1988) p. 1. (hereafter Wolinsky).)

The initiative process today provides a means for “entrepreneurial, non-mainstream politicians” to develop political resources, including media attention, an expanded base of contributors, and opportunities to frame public debate. (Donovan, *supra*, at p. 170.) The most well-known “initiative entrepreneur” in recent times is Howard Jarvis. Jarvis gained his notoriety with his 1978 property tax-cut initiative, which relied on the professional campaign industry and monied special interests. (*Id.* at p. 171.) Since 1978, “Jarvis and his associates [have] made a professional, profitable business out of ballot initiatives.” (*Id.*)

1. The Petition Drive

Before an initiative proposing to amend the state Constitution is placed on the ballot, eight percent of the voters must have signed a petition endorsing the proposed initiative. (Cal. Const., art. II, § 8.) At one time, this served a gate-keeping function for the initiative process: First, a proponent of an initiative must find people willing to gather signatures, and

then those gatherers must present the petition to enough voters to obtain the required number of signatures. (*Id.*)

Now, the signature gathering process is largely just a matter of money. Indeed, Lowenstein and Stern reported that in an interview with Mike Arno, owner of American Petition Consultants, Arno stated, “Yeah, I think that if you have enough money, you can get on the ballot.”

(Lowenstein and Stern, *The First Amendment and Paid Petition Circulators: A Dissenting View and a Proposal* (1989) 17 *Hasting Const. L.Q.* 175 (hereafter Lowenstein and Stern).) In 2006, paid signature collectors were paid as much as \$3.00 per signature. (Tuggle and Stauffer, *California Initiative Process Remains Confounding and Controversial*, Berkeley Graduate School of Journalist (Oct. 31, 2006) <http://journalism.berkeley.edu/projects/election2006/2006/10/california_initiative_process.php> [as of January 14, 2009].) The Associated Press reported that the median cost to qualify an initiative for the ballot in 2006 was nearly \$3 million. (*Facts About California's Initiative Process*, Intl. Herald Tribune (Oct. 29, 2008) <<http://www.iht.com/articles/ap/2008/10/29/america/Flawed-Initiatives-Glance.php>> [as of January 14, 2009] (hereafter *Facts*).)

With money as a powerful incentive, some paid signature gatherers have been found to forge signatures and deceive signers by covering the official portion of the petition with cards or labels containing

misleading descriptions of the nature of a petition or orally mis-describing the contents of a petition. (Lowenstein and Stern, *supra*, at pp. 188-191.) Legal – but deceptive and certainly unethical – means of obtaining signatures include not describing the petition at all, using the power of suggestion, peer pressure, and other sales tactics. (*Id.* at p. 197.)²⁵ Another technique used to obtain signatures is to tell potential signers that the petition is only to get a measure on the ballot. (*Id.* at 198.) These techniques are largely successful because people are busy. “When people are stopped by a petition circulator, they seem to be willing to sign nearly any petition presented to them, apparently because of peer pressure or because they do not want to take the time to think about the issue.” (*Reform, supra*, at p. 927.) Gathering signatures using these methods plainly defeats the purpose behind the petition drive as a gate-keeping mechanism.

2. Multi Million Dollar Advertising Campaigns

Once an initiative is on the ballot, millions are spent every election cycle to fund advertising campaigns. (Wolinsky, *supra*.) In 2006, \$154 million was spent on the fight over Proposition 87, and this was an initiative dealing with an oil tax to fund alternative energy projects. (*Facts,*

²⁵ These tactics are used by both paid and volunteer signature gatherers. (*Id.*)

supra.) Over \$74 million was spent in the fight over Proposition 8 – the most ever spent on a civil rights issue. (*Proposition 8: Tracking the Money*, L.A. Times (Nov. 6, 2008) <<http://www.latimes.com/news/local/la-moneymap,0,2198220.htmlstory>> [as of January 14, 2009].)

E. The Initiative Has Become a Tool of Special Interests.

In 1988, with twenty-nine statewide measures on the ballot, the Los Angeles Times reported that, “the system seems to have slipped away from the citizens it was invented to serve into the hands of the very kind of wealthy special interests it was meant to contain.” (Wolinsky, *supra*; see also California Comm’n on Campaign Financing, *Democracy by Initiative: Shaping California’s Fourth Branch of Government* (1992) pp. 39, 263-91 (wealthy interests control and manipulate the initiative process). This article quotes David Magleby, then-associate professor of political science at Brigham Young University as saying, “National interest groups understand what happens in California is almost certain to go to other states. That is why they are willing to basically write blank checks, spend what it takes.” (*Id.*) Big corporations and others special interests “are now to a great extent controlling the direct democratic process by using their resources to generate intense interest in issues such as alcohol abuse, gun control, pollution, pornography and racism.” (Fountain, *supra*, at p. 737.)

This is exactly what happened with Proposition 8. The Knights of Columbus spent \$1.4 million; the National Organization for Marriage

spent \$785,750; the American Family Association spent \$500,000; Concerned Women for America spent \$409,000; Focus on the Family spent \$544,431; and the Family Research Council spent \$74,402 (Sacramento Bee, *supra*), all to strip the right to marry from same-sex couples in California and to further their agenda to transform American law into their vision of Biblical law.

F. The Initiative Process Lacks Essential Safeguards of Representative Democracy

A simple comparison of the means by which an initiative become law and the means by which a law is enacted through the legislature reveals that in the initiative process there is no opportunity to scrutinize and discuss potential legislation, conduct hearings, collect evidence and compromise on the final language, as there is when a bill is put before the legislature. (Linde, *supra*, at p. 34.) The deliberativeness present in representative democracy serves as a moderating influence on legislation which is lacking in the initiative process. (*Scrutiny, supra*, at p. 194.) Moreover, while it can take two years for a bill to pass through the legislature, an initiative operates on a much shorter time frame: voter information pamphlets are distributed at most forty days before the date of the election, allowing very little time for even the most studious voter to consider a measure. (Cal. Elec. Code, §§ 13300(c), 13303(a) et seq.)

This lack of a deliberative process is why Christian Fundamentalists and their allies have chosen the initiative process as their go-to tool: it is easier to manipulate the discussion. Take, for example, the advice of Brian McCormack of the National Legal Foundation to Colorado for Family Values in framing the issues for Colorado's Amendment 2. McCormack advises that Colorado for Family Values "stay away from the 'no special rights' language in its legal formulations," which are subject to deliberation, but to use this language liberally in its public campaign, not subject to deliberation. (Hardisty, *supra*.)

Indeed, "[i]f the proponents [of an initiative] are confident that their proposal can win a simple majority of the electorate, they can ignore their opponents' interests with impunity and draft the initiative in the way that most serves their own interests." (*Populism, supra*, at p. 1053.) "Voters cannot vote on alternative bills nor attempt to amend the proposed legislation to make it more acceptable." (*Id.*)

Aside from the lack of a deliberative process itself, there are problems with the substance of many initiative campaigns, problems that were apparent in the campaign for Proposition 8.

- 1. The Initiative Process Has No Effective Safeguards Against False Claims Made During Campaigns.**

One of the basic requirements for good legislation is well informed decision-makers. (Fountaine, *supra*, at p. 738.) "The decision

makers need to have a thorough understanding of both sides of an issue in order to make a reasoned, rational decision.” (*Id.*) “When the electorate is not adequately informed, the potential for voter manipulation by political advertisements and the opinions of community leaders is dramatically increased. (*Id.*)

Indeed, “[c]itizens voting on initiatives are highly susceptible to misleading campaign advertising.” (*Scrutiny, supra*, at p. 192.) Voters are bombarded with political advertising designed to manipulate opinions by appealing to the voters’ emotions rather than to provide useful information on the issues.” (Fountaine, *supra*, at p. 741 [describing polling that shows that 61% of voters rely on television and newspapers for their information].)

One might argue that the marketplace of ideas adequately airs the pros and cons of any given initiative campaign. But with the misleading tactics used in multi-million dollar political advertising campaigns of today, the marketplace of ideas doesn’t stand a chance. Significantly, advertisers sway voters by appealing to their prejudices, “oversimplifying the issues and, and exploiting the voters’ legitimate concerns by promising simplistic solutions....” (*Id.*) Even the voters

themselves “complain about confusion due to misleading and deceptive advertising campaigns.” (*Construction, supra*, at p. 951.)²⁶

And the problem of misleading advertising is exacerbated when the issue to be decided is one about which electors may have deeply held and institutionally supported prejudice. (Adams, *Is It Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures* (1998) 34 Willamette L.Rev. 449, 454.) No matter the amount of money expended in a campaign, it is extremely difficult to overcome these deeply held prejudices, especially if misleading advertising inflames the prejudice. (*Id.*)

In the Proposition 8 campaign, the proponents aired false television ads and radio spots claiming that churches would lose their tax exempt status if those churches refused to marry same-sex couples. (Op-ed, *No on Proposition 8: Debunking the myths used to promote the ban on same-sex marriage*, L.A. Times (Nov. 2, 2008) <<http://www.latimes.com/news/print/edition/opinion/la-ed-prop8-2-2008nov02,0,7071124.story>> [as of January 14, 2009].) This did nothing to inform voters as to the choice before them, but rather served only to inflame emotions. The voting that

²⁶ The confusion is not addressed by the voluminous voter pamphlets containing statements of proponents and opponents – the voter pamphlets have been described as “impenetrable prose.” (*Construction, supra*, at p. 951.) Most voters do not use the voter pamphlet for decisions on propositions, but rather rely on advertising. (*Id.*)

results from this kind false advertising cannot accurately reflect the true will of the people, but simply measures the public's response to inaccurate information. (*St. Paul's Citizens for Human Rights v. City Council* (Minn. 1979) 289 N.W.2d 402, 407 [Wahl, J. dissenting, "An election campaign does not lend itself to explanations but to simple fact statements and slogans. As a result, voters may be confused and make decisions, not on a factual or philosophical basis, but for emotional or political reasons."].) As this kind of false information reinforces prejudice, it is very difficult, if not impossible, to counter.

2. The Initiative Process Has No Effective Safeguards Against Fear Tactics Used In Initiative Campaigns Aimed At Restricting Rights Of Minorities.

Further, there are no procedures and no effective recourse when an initiative campaign uses fear tactics to enforce its message. It is no secret that antigay measures have played on the fears of the populace and continue to do so. "The anti-gay ballot measures across the nation in November 1992 kindled acts of violence against supporters of gay rights." (*Scrutiny*, supra, at pp. 191-192; Haider-Markel, supra, at p. 313 ["[O]bservers have frequently pointed to evidence of increasing harassment and violence directed at minorities during ballot campaigns."].) During the Proposition 8 campaign, there were reports of supporters of Proposition 8 physically assaulting the measure's opponents. A Sacramento woman

reported: “While in my car at a red light, four men came up to my window and started yelling threats because of my No on 8 bumper sticker. One man yelled, ‘I will kill you, bitch. I will follow you home.’ I had to call the police, and they escorted me home.” (*Prop 8 Hurt My Family – Ask Me How*, Marriage Equality USA (January 2009)

<<http://www.marriageequality.org/uploads/>

REPORT%20TWO_PROP_8_HURT_MY_FAMILY_FINAL_VERSION.

pdf> [as of January 14, 2009].) A student from San Luis Obispo reported:

“A student in my class expressed homophobic fears, and a hate crime occurred on campus, visually threatening with a noose and confederate flag and warning students if they were black, queer or hippie that they were not welcome. It was disturbing.” (*Id.*) A teacher from San Bernardino

reported: “My employer received anonymous threats about me and implying personal risk for the children I teach. I was suspended with pay while the school district assessed the threat. My home was vandalized with anti-gay slogans and slurs. Our car was destroyed when someone put sugar in the tank. All this because of an article about our marriage.” (*Id.*) In

Bakersfield, the leader of the local “Yes on 8” campaign “kicked and punched” an opponent of Proposition 8 and tried to take “No on 8” signs.

(Doligosa, *Metler Scuffle with Protestor Caught on Video*, Bakersfield

Californian (Oct. 24, 2008) <http://www.bakersfield.com/hourly_news

/story/589951.html> [as of January 14, 2009].) This sort of violence,

particularly in the non-metropolitan areas of the state, limits the vocal opposition to antigay propositions. (Haider-Markel, *supra*, at p. 308.) This, in turn, makes it appear that most of the community is in favor, which only reinforces peer pressure to support the initiative. While the attackers can be reported to police, there are no safeguards in the initiative process to address either the chill on speech that results (and did result in the Proposition 8 campaign) from such actions or the resulting skewed voting.

There is an additional fear factor at play in initiative campaigns, which was seen in the campaign for the passage of Proposition 8. The proponents of Proposition 8 ran commercials on radio and television claiming that if Proposition 8 did not pass, schools would be forced to “teach homosexuality.” (*Everything to do with Schools*, ProtectMarriage.com (2008) <<http://www.protectmarriage.com/video/view/7>> [as of January 14, 2009].) While there was no truth to this advertising, this fear was used to directly tap into prejudice and animus toward sexual minorities. (*Populism*, *supra*, at pp. 1056-1057.) Again, there are no safeguards against this kind of fear-mongering, which directly affects the final vote.

G. Minorities Typically Lose When Their Rights Are Put To A Popular Vote Through The Initiative Process.

During emotion-laden campaigns, such as anti-gay campaigns, voters are *less* likely to take care in evaluating in the issues. (Gunn,

Initiatives and Referendum: Direct Democracy and Minority Interests

(1981) 22 Urb. L. Ann. 135, 141.) The results of studies on initiatives aimed at minorities demonstrate this point.

In a 1997 study of the outcomes of direct democracy examining results in public housing for minorities, gay civil rights, English language laws, and AIDS policy, minority interests lost in 78 percent of the contests. (Gamble, *supra*, at p. 253).²⁷

In a study comparing the results of legislation versus ballot measures for gay rights issues, the study found that 41.5% of legislative bills or amendments were anti-gay and 35% of these were adopted. (Haider-Markel, *supra*, at p. 307.) During the same time period, 79 percent of the gay-related measures placed on the ballot by initiative were anti-gay and 70 percent of those measures passed. (*Id.*) The study concluded that gay civil rights fare better with representative democracy than with direct democracy. (*Id.*)

“[B]ecause it enables the voters’ racial [and other] beliefs and fears to be recorded and tabulated in their pure form, the referendum has been a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day.” (Bell, *The*

²⁷ The results were different when the direct democracy is taking place in Switzerland. (Haider-Markel, *supra*, at p. 305.)

Referendum: Democracy's Barrier to Racial Equality (1978) 54 Wash. L.Rev. 1, 18.)

Another way in which gay and lesbian people lose when their rights are put to a popular vote is the psychological harm caused by the very fact of having their rights put to a vote. In addition to generating hostility towards gays and lesbians, it causes “stress and stigmatization for lesbians, gays and bisexuals.” (Russell, *Voted Out: The Psychological Consequences of Anti-gay Politics* (2000) p. 2.)

Because of this, it is imperative that this Court exercise its role as the sole institutional check on the tyranny of the special interest factions, here Christian Fundamentalists and their allies, who have manipulated the majority.

H. The Initiative Process Violates the Guaranty Clause of the U.S. Constitution.

Article IV, section 4 of the United States Constitution contains the “Guaranty Clause,” which provides that “the United States shall guarantee to every State in this Union a Republican Form of Government.” “The guaranty necessarily implies a duty on the part of the States themselves to provide such a government.” *Minor v. Happersett* (1874) 88 U.S. 162, 175. A “republican government” is one where the people participate through their elected representatives. (*Id.* at pp. 175-76; *see also In re Duncan* (1891) 139 U.S. 449, 461 [“[T]he distinguishing feature of

that form is the right of the people to ... pass their own laws in virtue of the legislative power reposed in representative bodies....”].)

Direct democracy through the initiative process “subverts the principle of representation” and hence violates the Guaranty Clause. (Fountaine, *supra*, at pp. 774-775; *see also* Linde, *supra*, at pp. 19-20.) The U.S. Supreme Court has refused to rule on this issue, finding that the enforcement of the Guaranty Clause is in the hands of the political branches rather than the federal courts. (Linde, *supra*, at p. 20 [citing *Pacific States Tel. & Tel. Co. v. Oregon* (1912) 223 U.S. 118].) Linde suggests that “it is explicitly the duty of state courts [to enforce the Guaranty Clause], because Article VI states that the judges in every state are bound by the Constitution as the supreme law of the land, ‘any Thing in the Constitution or laws of any State to the contrary notwithstanding.’” (*Id.*)

Amicus Marriage Equality USA does not suggest that this Court should invoke the Guaranty Clause in its analysis of Proposition 8. Rather, Marriage Equality USA respectfully urges this Court to carefully consider the reasons behind a republican form of government, as expressed by James Madison, when making its determination as to whether the Proposition 8 is an amendment or revision to the California Constitution. Marriage Equality USA agrees with the Petitioners that an initiative aimed at stripping fundamental rights from a protected minority constitutes a revision and not a mere amendment to the California Constitution. And

Marriage Equality USA agrees with the Attorney General that these fundamental rights are inalienable.

V. CONCLUSION

As discussed above, gays and lesbians in America have a long history of being discriminated against, hated and ostracized. In the 1970s, the gays, lesbians and bisexuals (later joined by transgender and intersex people) began to seek change through the political process, first working at the local level in City and County government and later statewide and nationally seeking equal treatment under the law. They did this by working with elected representatives, testifying at hearings, proposing legislation and using representative government in the manner which it was intended, by harmonizing majority rule with protection of minority rights.

By contrast, Christian Fundamentalists, who – in the name of religion – had previously fought against legislation aimed at providing equal treatment for Jews and African Americans (demonizing these groups and using them to generate fear, secure donations and convert followers) now turned to gay men and lesbians (and other sexual minorities) as the new specter they could use to raise money, incite fear and forward their not-so-Christian agenda.

Christian Fundamentalists used their antigay platform as a launching pad to become a strong national political force from which they could further their agenda of infusing their brand of Biblical law into every

aspect of American government. Finding that the deliberative processes of representative government were too slow or, well, deliberative, Christian Fundamentalists – and other organizations that occasionally joined their efforts – have, for the past three decades, used the initiative and the referendum as major tools to disenfranchise gay men and lesbians and enshrine discrimination against them.

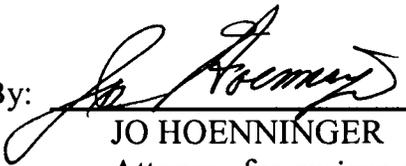
Christian Fundamentalists first used the misleading rhetoric and fear mongering reminiscent of their earlier anti-Semitic, anti-Catholic and anti-communist efforts in their campaigns against gays and lesbians. Their successful efforts resulted in denying basic rights and freedoms to gay men and lesbian across America. More recently, Christian Fundamentalists have moderated their rhetoric but still rely on falsehoods and fear to further their agenda. In this way, Christian Fundamentalists and their allies have been able to prevent gays and lesbians and other sexual minorities from achieving equal rights.

They were able to accomplish these goals because the initiative process lacks the deliberative safeguards of representative democracy. When the initiative process is used to amend constitutions to eliminate fundamental rights guaranteed to a protected minority group, it creates exceptions to the principle of equal protection that threatens not just the equality of gay men and lesbians, but the equality of every citizen. This

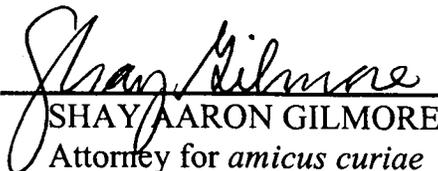
year it is the gays, next year another disfavored group. Truly, no one – including Christian Fundamentalists, Mormons or Catholics – is safe.

Because such a change to our state Constitution is fundamental and, thus, needful of more deliberative consideration which is necessarily lacking in the initiative process, *Amicus* Marriage Equality USA respectfully submits that such a change must by definition be accomplished by way of revision, rather than amendment. In the alternative, *Amicus* urges the Court to find, as explained by the Attorney General, that the proposition is “inconsistent with the guarantees of individual liberty safeguarded by article 1, sec. 1 of the Constitution.” (Atty. Gen. Br. at p. 90.)

DATED: January 15, 2009

By: 

JO HOENNINGER
Attorney for *amicus curiae*
Marriage Equality USA

By: 

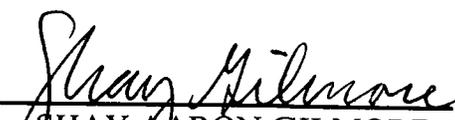
SHAY AARON GILMORE
Attorney for *amicus curiae*
Marriage Equality USA

CERTIFICATION RE: WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, we certify that this brief contains 13,742 words, as determined by the computer program used to prepare the brief.

Dated: January 15, 2009

By: 
JO HOENNINGER
Attorney for *amicus curiae*
Marriage Equality USA

By: 
SHAY AARON GILMORE
Attorney for *amicus curiae*
Marriage Equality USA

1 *Karen L. Strauss et al., Petitioners, v. Mark B. Horton et al., State Registrar of Vital*
2 *Statistics, etc., et al.,*
3 In The Supreme Court of the State of California, Action Nos. S168047/S168066/S168078

4 **PROOF OF SERVICE BY MAIL**

5 I declare that I am employed in the County of San Francisco, California. I am
6 over the age of eighteen years and not a party to the within cause; my business address is
7 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On January 15, 2009, I
8 served the enclosed:

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

14 on the parties in said cause (listed below) by enclosing a true copy thereof in a sealed
15 envelope and, following ordinary business practices, said envelope was placed for mailing
16 and collection (in the offices of Carroll, Burdick & McDonough LLP) in the appropriate
17 place for mail collected for deposit with the United States Postal Service. I am readily
18 familiar with the Firm's practice for collection and processing of
19 correspondence/documents for mailing with the United States Postal Service and that said
20 correspondence/documents are deposited with the United States Postal Service in the
21 ordinary course of business on the same day.

22 See Attached list

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

25 
26 _____
27 Carmen M. Tapia

SERVICE LIST
CALIFORNIA SUPREME COURT CASES S168047, S168066, and S168078

<p>Shannon Minter National Center for Lesbian Rights 870 Market Street, Suite 370 San Francisco, CA 94102 Telephone: (415) 392-6257 Facsimile: (415) 392-8442</p> <p>Gregory D. Phillips Munger, Tolles & Olsen, LLP 355 S. Grand Avenue, 35th Floor Los Angeles, CA 90071-1560 Telephone: (213) 683-9100 Facsimile: (213) 687-3702</p>	<p><i>Attorneys for Petitioners Karen L. Strauss et al. (S168047)</i></p>
<p>Gloria Allred Allred, Maroko & Goldberg 6300 Wilshire Blvd, Suite 1500 Los Angeles, CA 90048-5217 Telephone: (323) 653-6530 (323) 302-4773 Facsimile: (323) 653-1660</p>	<p><i>Attorneys for Petitioners Robin Tyler et al. (S168066)</i></p>
<p>Dennis J. Herrera City Attorney City Hall, Room 234 One Dr. Carlton B. Goodlett Place San Francisco, CA 94012-4682 Telephone: (415) 554-4708 Facsimile: (415) 554-4699</p>	<p><i>Attorneys for Petitioner City and County of San Francisco (S168078)</i></p>

SERVICE LIST
CALIFORNIA SUPREME COURT CASES S168047, S168066, and S168078

<p>Jerome B. Falk, Jr. Howard Rice Nemerovski Canady Falk & Rabkin Three Embarcadero Center, 7th Floor San Francisco, CA 94111-4024 Telephone: (415) 434-1600 Facsimile: (415) 217-5910</p>	<p><i>Attorneys for Petitioners City and County of San Francisco, et al. (S168078)</i></p>
<p>Ann Miller Ravel County Counsel Office of the County Counsel 70 West Hedding Street East Wing, 9th Floor San Jose, CA 95110-1770 Telephone: (408) 299-5900 Facsimile: (408) 292-7240</p>	<p><i>Attorneys for Petitioner County of Santa Clara (S168078)</i></p>
<p>Rockard J. Delgadillo City Attorney Office of the Los Angeles City Attorney 200 N. Main Street City Hall East, Room 800 Los Angeles, CA 90012 Telephone: (213) 978-8100 Facsimile: (213) 978-8312</p>	<p><i>Attorneys for Petitioner City of Los Angeles (S168078)</i></p>
<p>Raymond G. Fortner, Jr., County Counsel 648 Kenneth Hahn Hall of Administration 500 West Temple Street Los Angeles, CA 90012-2713 Telephone: (213) 974 1845 Facsimile: (213) 617-7182</p>	<p><i>Attorneys for Petitioner County of Los Angeles (S168078)</i></p>

SERVICE LIST
CALIFORNIA SUPREME COURT CASES S168047, S168066, and S168078

Richard E. Winnie County Counsel Office of County Counsel Hall of Justice and Records County of Alameda 1221 Oak Street, Suite 450 Oakland, CA 94612 Telephone: (510) 272-6700 Facsimile: (510) 272-5020	<i>Attorneys for Petitioner County of Alameda (S168078)</i>
Patrick K. Faulkner County Counsel 3501 Civic Center Drive, Room 275 San Rafael, CA 94903 Telephone: (415) 499-6117 Facsimile: (415) 499-3796	<i>Attorneys for Petitioner County of Marin (S168078)</i>
Michael P. Murphy County Counsel Hall of Justice & Records 400 County Center, 6 th Floor Redwood City, CA 94063 Telephone: (650) 363-1965 Facsimile: (650) 363-4034	<i>Attorneys for Petitioner County of San Mateo (S168078)</i>
Dana McRae County Counsel, County of Santa Cruz 701 Ocean Street, Room 505 Santa Cruz, CA 95060 Telephone: (831) 454-2040 Facsimile: (831) 454-2115	<i>Attorneys for Petitioner County of County Counsel, (S168078)</i>
Harvey E. Levine City Attorney 3300 Capitol Avenue Fremont, CA 94538 Telephone: (510) 284-4030 Facsimile: (510) 284-4031	<i>Attorneys for Petitioner City of Fremont (S168078)</i>

SERVICE LIST
CALIFORNIA SUPREME COURT CASES S168047, S168066, and S168078

<p>Philip D. Kohn City Attorney, City of Laguna Beach Rutan & Tucker, LLP 611 Anton Blvd., 14th Floor Costa Mesa, CA 92626-1931 Telephone: (714) 641-5100 Facsimile: (714) 546-9035</p>	<p><i>Attorneys for Petitioner City of Laguna Beach (S168078)</i></p>
<p>John Russo City Attorney Oakland City Attorney City Hall, 6 Floor 1 Frank Ogawa Plaza Oakland, CA 94612 Telephone: (510) 238-3601 Facsimile: (510) 238-6500</p>	<p><i>Attorneys for Petitioner City of Oakland (S168078)</i></p>
<p>Michael J. Aguirre City Attorney Office of City Attorney, City of San Diego Civil Division 1200 Third Avenue, Suite 1620 San Diego, CA 92101-4178 Telephone: (619) 236-6220 Facsimile: (619) 236-7215</p>	<p><i>Attorneys for Petitioner City of San Diego (S168078)</i></p>
<p>John G. Barisone City Attorney Atchison, Barisone, Condotti & Kovacevich Santa Cruz City Attorney 333 Church Street Santa Cruz, CA 95060 Telephone: (831) 423-8383 Facsimile: (831) 423-9401</p>	<p><i>Attorneys for Petitioner City of Santa Cruz (S168078)</i></p>

SERVICE LIST
CALIFORNIA SUPREME COURT CASES S168047, S168066, and S168078

<p>Marsha Jones Moutrie City Attorney Santa Monica City Attorney's Office City Hall 1685 Main Street, 3rd Floor Santa Monica, CA 90401 Telephone: (310) 458-8336 Facsimile: (310) 395-6727</p>	<p><i>Attorneys for Petitioner City of Santa Monica (S168078)</i></p>
<p>Lawrence W. McLaughlin City Attorney City of Sebastopol 7120 Bodega Avenue Sebastopol, CA 95472 Telephone: (707) 579-4523 Facsimile: (707) 577-0169</p>	<p><i>Attorneys for Petitioner City of Sebastopol (S168078)</i></p>
<p>Edmund G. Brown, Jr. Attorney General of the State of California 1300 I Street, Suite 125 Sacramento, CA 95814-2951 Telephone: (916) 322-6114 Facsimile: (916) 324-8835</p>	<p><i>Attorneys for Respondents Edmund G. Brown Jr., (S168047, S168066 and S168078) and for Respondent State of California (S168066)</i></p>
<p>Kenneth C. Mennemeier Mennemeier, Glassman & Stroud LLP 980 9th Street, Suite 1700 Sacramento, CA 95814-2736 Telephone: (916) 553-4000 Facsimile: (916) 553-4011</p>	<p><i>Attorneys for Respondents Mark B. Horton and Linette Scott (S168047, S168078)</i></p>

SERVICE LIST
CALIFORNIA SUPREME COURT CASES S168047, S168066, and S168078

<p>Andrew P. Pugno Law Offices of Andrew P. Pugno 101 Parkshore Drive, Suite 100 Folsom, CA 95630-4726 Telephone: (916) 608-3065 Facsimile: (916) 608-3066</p> <p>Kenneth W. Starr 24569 Via De Casa Malibu, CA 90265-3205 Telephone: (310) 506-4621 Facsimile: (310) 506-4266</p>	<p><i>Attorneys for Interveners Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, Mark A. Jansson, and Protectmarriage.com</i></p>
--	--