Case No.: _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Asian Pacific American Legal Center, California State Conference of the NAACP, Equal Justice Society, Mexican American Legal Defense and Educational Fund, and NAACP Legal Defense and Educational Fund, Inc.

Petitioners,

v.

Mark D. Horton, in his official capacity as State Registrar of Vital Statistics of the State of California and Director of the California Department of Public Health; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; and Edmund G. Brown, Jr., in his official capacity as Attorney General for the State of California,

Respondents.

PETITION FOR EXTRAORDINARY RELIEF, INCLUDING WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES
RELATED PETITIONS PENDING (S168047, S168078)

Raymond C. Marshall (No. 83717)
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
T: (415) 393-2000
F: (415) 393-2286

Tobias Barrington Wolff (pro hac vice application pending)
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, Pennsylvania 19104
T: (215) 898-7471
twolff@law.upenn.edu

ADDITIONAL COUNSEL LISTED ON NEXT PAGE

Attorneys For Petitioners Asian Pacific American Legal Center, California State Conference of the NAACP, Equal Justice Society, Mexican American Legal Defense and Educational Fund, and NAACP Legal Defense and Educational Fund, Inc.

Additional Attorneys For Petitioners Asian Pacific American Legal Center, California State Conference of the NAACP, Equal Justice Society, Mexican American Legal Defense and Educational Fund, and NAACP Legal Defense and Educational Fund, Inc.

Julie Su (No. 174279)
Karin Wang (No. 178803)
Asian Pacific American Legal Center
1145 Wilshire Blvd, 2nd Floor
Los Angeles, CA 90017
T: (213) 977-7500
F: (213) 977-7595

Eva Paterson (No. 67081)
Kimberly Thomas Rapp (No. 230636)
Equal Justice Society
220 Sansome Street, 14th Floor
San Francisco, CA 94104
T: (415) 288-8700
F: (415) 288-8787

Nancy Ramirez (No. 152629)
Cynthia Valenzuela Dixon (No. 186804)
Mexican American Legal Defense and Educational Fund
634 South Spring Street
Los Angeles, CA 90014
T: (213) 629-2512

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Petitioners hereby certify that they are not aware of any person or entity that must be listed under the provisions of California Rule of Court 8.208(e).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

PRELIMINARY AND JURISDICTIONAL STATEMENT

1. By this original Verified Petition for Writ of Mandate, Petitioners Asian Pacific American Legal Center, California State Conference of the NAACP, Equal Justice Society, Mexican American Legal Defense and Educational Fund, and NAACP Legal Defense and Educational Fund, Inc. (collectively, "Petitioners") hereby seek a writ of mandate pursuant to California Constitution Article VI, section 10 and California Code of Civil Procedure section 1085 enjoining State Registrar of Vital Statistics of the State of California and Director of the California Department of Public Health Mark B. Horton, MD, MSPH; Deputy Director of Health Information & Strategic Planning of the California Department of Public Health Linette Scott, MD, MPH; and California Attorney General Edmund G. Brown Jr., all in their official capacities (collectively, "Respondents") from enforcing, taking any steps to enforce, or directing any persons or entities to enforce Proposition 8, the initiative measure entitled "Eliminates the Right of Same-Sex Couples to Marry."
2. This Petition is brought on the grounds that Proposition 8 is invalid because it is a constitutional revision, not a constitutional amendment, and thus it may not be enacted by initiative under the California Constitution.
3. Petitioners have no other plain, speedy or adequate remedy at law. There are no administrative or other proceedings available to enjoin enforcement of Proposition 8.

4. Petitioners respectfully invoke the original jurisdiction of this Court pursuant to California Constitution, Article VI, section 10; California Code of Civil Procedure section 1085; and Rule 8.490 of the California Rules of Court. Petitioners invoke that jurisdiction because the issues presented here are of great public importance and should be resolved promptly. It is in the public interest to resolve the questions presented in this Petition to provide certainty regarding the validity or invalidity of Proposition 8 and whether the kind of constitutional change that Proposition 8 purports to make may be effected through the initiative process.

5. Petitioners represent citizens with a beneficial interest in the enforcement of a public duty and execution of the laws in a matter concerning a public right. (Code Civ. Proc., § 1086; *Green v. Obledo* (1981) 29 Cal.3d 126, 144; see also *California Homeless & Housing Coalition v. Anderson* (1995) 31 Cal.App.4th 450, 457-458.)

6. This Petition presents no questions of fact for the Court to resolve in order to issue the relief sought.

THE PARTIES

7. The Asian Pacific American Legal Center of Southern California ("APALC") is the nation's largest public interest law firm devoted to the Asian and Pacific Islander community. As a civil rights organization, APALC focuses on combating race and national origin discrimination in order to positively influence and impact Asian Pacific Americans and to create a more equitable and harmonious society. The Asian Pacific American Legal Center has a strong interest in ensuring that the distinction between a revision and an amendment under the California Constitution continues to be enforced and a strong interest in protecting the integrity of the core

constitutional principle of equal protection of the laws for all California citizens.

8. The California State Conference of the NAACP is part of a national network of NAACP affiliates. Founded in 1909 by a group of black and white citizens committed to social justice, the NAACP is the nation's largest and strongest civil rights organization. The NAACP's principal objective is to ensure the political, educational, social, and economic equality of minority citizens of the United States and to eliminate race prejudice. The California NAACP has a strong interest in ensuring that the distinction between a revision and an amendment under the California Constitution continues to be enforced and a strong interest in protecting the integrity of the core constitutional principle of equal protection of the laws for all California citizens.

9. Petitioner Equal Justice Society is a national organization of scholars, advocates and citizens that seek to promote equality and enduring social change, with a primary mission of combating the continuing scourge of racial discrimination and inequality in America. The Equal Justice Society has a strong interest in ensuring that the distinction between a revision and an amendment under the California Constitution continues to be enforced and a strong interest in protecting the integrity of the core constitutional principle of equal protection of the laws for all California citizens.

10. Petitioner Mexican American Legal Defense and Educational Fund ("MALDEF") is the leading national civil rights organization representing 48 million Latinos living in the United States through litigation, advocacy and educational outreach. MALDEF's mission is to safeguard the civil rights of Latinos living in the United States, including California, and MALDEF sets as a primary goal defending

the right of all Latinos to equal treatment under the laws. MALDEF has a strong interest in ensuring that the distinction between a revision and an amendment under the California Constitution continues to be enforced and a strong interest in protecting the integrity of the core constitutional principle of equal protection of the laws for all California citizens.

11. The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation founded in 1940 under the leadership of Thurgood Marshall. LDF's mission is to serve as America's legal counsel on issues of race. LDF pursues racial justice to move our nation toward a society that fulfills the promise of equality for all Americans. LDF has a strong interest in ensuring that the distinction between a revision and an amendment under the California Constitution continues to be enforced and a strong interest in protecting the integrity of the core constitutional principle of equal protection of the laws for all California citizens.

12. Respondent Mark B. Horton, MD, MSPH ("Horton") is the Director of the California Department of Public Health and, as such, is the State Registrar of Vital Statistics of the State of California. Horton is sued in his official capacity. It is Horton's legal duty to prescribe and furnish the forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate.

13. Respondent Linette Scott, MD, MPH ("Scott") is the Deputy Director of Health Information & Strategic Planning for the California Department of Public Health. Scott is sued in her official capacity. Upon information and belief, Scott reports to Respondent Horton, and is the California Department of Public Health official responsible for prescribing and furnishing the forms for the

application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate.

14. Respondent Edmund G. Brown Jr. ("Brown") is the Attorney General of the State of California. Brown is sued in his official capacity. It is Brown's legal duty to ensure that the laws of the State of California are uniformly and adequately enforced.

FACTS

15. Proposition 8 appears to have received a majority of "yes" votes in the November 4, 2008 election, based on the votes counted as of November 12, 2008. (See http://vote.sos.ca.gov/). Proposition 8 seeks to change the California Constitution by inserting a new section, Section 7.5, in Article I that would state: "Only marriage between a man and a woman is valid or recognized in California." According to the Official Title and Summary of Proposition 8 prepared by Respondent Brown the initiative measure would "[e]liminate the right of same-sex couples to marry in California."

16. Proposition 8 would create an exception to the requirement of strict scrutiny for laws that discriminate based on sexual orientation with respect to the fundamental right to marry. If a simple majority vote could carve out an exception to heightened scrutiny for one minority group, the rights of any group entitled to strict scrutiny under the California Constitution would be imperiled.

CLAIMS ASSERTED

17. Proposition 8 constitutes a revision of the California Constitution, rather than an amendment, because it provides for the discriminatory elimination of a fundamental right from a group defined by a suspect classification.

18. Petitioners believe that they are not required in this circumstance to plead demand and refusal. Without prejudice to this position, Petitioners allege that any demand to Respondents to act or refrain from taking action as described in Paragraph 1 in the Relief Sought below would have been futile if made, and that only a court order will cause Respondents to refrain from taking those actions.

RELIEF SOUGHT

Wherefore, Petitioners request the following relief:

19. That this Court issue a writ of mandate forthwith directing Respondents to take all necessary actions to ensure that marriage certificates will continue to be issued to same-sex couples who are otherwise eligible to marry; to desist from enforcing Proposition 8, giving effect to the terms of Proposition 8, or directing any other person or entity to enforce or give effect to the terms of Proposition 8; or in the alternative, to show cause before this Court at a specified time and place why Respondents have not done so; and

20. That this Court enter an order declaring that Proposition 8 is null and void in its entirety, and that Proposition 8 does not amend the California Constitution but instead attempts to revise the California Constitution without complying with the constitutionally mandated procedures for revision provided by Article XVIII of the California Constitution.

21. That, upon Respondents' return to the alternative writ, a hearing be held before this Court at the earliest practicable time so that the issues involved in this Petition may be adjudicated promptly, and, if this Court deems appropriate, pursuant to an expedited briefing and hearing schedule;

22. That, following the hearing upon this Petition, the Court issue a peremptory writ of mandate directing Respondents not to enforce or to direct any persons or entities to enforce Proposition 8;

23. That Petitioners be awarded their attorneys' fees and costs of suit; and

24. For such other and further relief as the Court may deem just and equitable.

VERIFICATION

I, Eva Paterson, declare:

I am the President of Equal Justice Society, a petitioner in the above-entitled action. I have read the foregoing Petition for Writ of Mandate and know the contents thereof. I am informed and believe, and, based on said information and belief, allege that the contents are true.

I declare under penalty of perjury that the foregoing is true and correct. Executed in San Francisco, California on November 14, 2008.

_____

Eva Paterson

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF, INCLUDING WRIT OF MANDATE

The question at the heart of these proceedings — whether Proposition 8 constitutes an impermissible revision of the California Constitution undertaken without the procedural safeguards required by sections 1 and 2 of article XVIII — requires this Court to decide whether the alteration that Proposition 8 effectuates is sufficiently "fundamental" and "substantial" to trigger these safeguards. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 354.) These terms are not self-defining and call for this Court's clear guidance in interpreting the boundaries of article XVIII. We therefore propose that the Court resolve this case by holding that (1) the discriminatory elimination of (2) a fundamental right from (3) a group defined by a suspect classification constitutes a revision requiring the deliberative process specified in sections 1 and 2.

The justification for this rule is simply stated. In drawing a distinction between amendment and revision, article XVIII requires this Court to decide which constitutional changes are appropriate for majority vote through the initiative process and which should require the full deliberative participation of the legislature or a constitutional convention. In other words, article XVIII requires this Court to determine which constitutional alterations should be subject to simple majority rule and which should not. And the equal protection clause of the California Constitution offers a clear answer to that question. The entire purpose behind the constitutional principle of equal protection would be subverted if the constitutional protection of unpopular minorities were subject to simple majority rule. It is the job of the judiciary to prevent majority sentiment from oppressing historically disfavored minority groups — a job that is all the more urgent when the selective discrimination involves fundamental

rights. If there is one constitutional principle that must be protected from the constant threat of alteration by a simple majority, it is the principle of equal protection that aims to protect disfavored minority groups from oppression. The equal protection clause of the California Constitution offers the most direct possible answer to the question that article XVIII poses.

The imperative for this Court to grant the relief Petitioners seek extends far beyond the merits of this litigation and speaks to the concerns that impel Petitioners to file separately for relief. This case is not simply about gay and lesbian equality. In holding that antigay discrimination is entitled to the same strict scrutiny that discrimination based upon race or sex provokes — a holding that Petitioners fully endorse — this Court has necessarily placed attempts to deprive gay people of their constitutional rights and attempts to take rights away from women or people of color on the same article XVIII footing. A finding that suspect classes of citizens can be selectively oppressed through the initiative process would jeopardize the rights of every member of a historically disfavored community in the State of California.

Despite the progress of recent years, Petitioners still carry a sober awareness of the discrimination and oppression that simple majorities sometimes direct against the communities we represent. We therefore ask this Court to adopt the proposed rule and reaffirm the protections that all historically disfavored minorities in California require.

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

The core function of equal protection is to protect minority groups within a community from being singled out and targeted with laws that the majority would not be willing to impose upon itself. Justice Jackson

offered the canonical statement of this proposition in a passage that this Court has since adopted as its own. "The framers of the Constitution knew," Jackson wrote, "that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." (*United States Steel Corp. v. Public Utilities Com.* (1981) 29 Cal.3d 603, 612 [citing *Railway Express v. New York* (1949) 336 U.S. 106, 112-113 (conc. opn. of Jackson, J.)].) Though every constitutional restraint may involve some frustration of the preferences of the majority, as Alexander Bickel famously observed in coining the phrase "counter-majoritarian" to describe the operation of a Constitution,[1] equal protection is distinctive. An equal protection clause does not merely "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials," as Justice Jackson has written elsewhere in describing a Bill of Rights generally. (*West Virginia v. Barnette* (1943) 319 U.S. 624, 638.) Equal protection aims specifically at those laws by which the majority selectively oppresses the minority. The counter-majoritarian purpose of an equal protection clause, in other words, is twofold. Like any constitutional provision, it sometimes requires that a higher value trump a democratically enacted measure. But unlike most other constitutional provisions, the higher value that an equal protection clause embodies is itself defined by the imperative to protect minorities from hostile majority sentiment.

These core imperatives of equal protection are at their most urgent when laws target historically disfavored minorities. As the Supreme Court of the United States has explained, in words that speak directly to the issue

[1] Bickel, The Least Dangerous Branch (2d ed. 1986) pp. 16-23.

before this Court, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities," hence calling for "more searching judicial inquiry." (*United States v. Carolene Prods.* (1938) 304 U.S. 144, 152 fn.4) The mandate of equal protection is at its apex when ordinary political processes are inadequate to protect unpopular minorities from what James Madison called "the superior force of an interested and overbearing majority." (Madison, The Federalist, No. 10 (Rossiter ed. 2003) p. 72; *see also City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 495–96 (plur. opn. of O'Connor, J.) [holding that, even in the case of remedial legislation aimed at undoing the effects of past discrimination, the "concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for . . . the application of heightened judicial scrutiny"]; *City of Cleburne v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 472 fn.24 (conc. and diss. opn. of Marshall, J.) [explaining that the strict scrutiny test under equal protection seeks to identify groups that may experience "a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs"].)

Article XVIII of the California Constitution draws a distinction between ordinary and extraordinary political processes that is directly responsive to this equal protection concern. Section 3 of article XVIII makes the process of amendment by initiative available for some constitutional alterations, but sections 1 and 2 require that revisions satisfy the more deliberative protections of republican government through the involvement of the legislature or a constitutional convention. In seeking to define which constitutional alterations require compliance with the more deliberative political process of a revision, this Court has used words such

as "fundamental" and "substantial" to identify relevant distinctions among constitutional values. (*Raven v. Deukmejian, supra*, 52 Cal.3d at p. 354.) This Court has also held that a revision is "a change in the . . . fundamental structure" of California government or "the foundational powers of its branches." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 509.) In this case, there is a clear path marked out for defining those distinctions. The suspect classification doctrine of the equal protection clause is designed to identify those situations in which the "political processes ordinarily to be relied upon to protect minorities" are inadequate and for which more robust safeguards are needed. (*United States v. Carolene Products Co., supra*, 304 U.S. at p.152 fn.4.) It thereby provides a direct answer to the question that article XVIII poses.

Justice Kennard summarized these principles well in her concurring opinion in the marriage litigation. "The architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups, and that the most effective remedy for this form of oppression is an independent judiciary charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 859–60 (conc. opn. of Kennard, J.)) These words apply as forcefully to the interpretation of article XVIII as they did to the original equal protection issue that was before this Court in the marriage cases.

The greater deliberative processes that article XVIII requires for constitutional revision offer protection of particular significance to disfavored minority groups, for those processes "offer[] time for reflection, exposure to competing needs, and occasions for transforming preferences." (Eule, *Judicial Review of Direct Democracy* (1990) 99 Yale L.J. 1503,

1527; see also Amar, Note, *Choosing Representatives by Lottery Voting* (1984) 93 Yale L.J. 1283, 1304 ["[While] we cannot force white voters to listen to blacks in their neighborhoods, . . . black legislators can interact with and influence their white colleagues."].) There is strong evidence in the social science literature that these constitutional principles reflect real differences in the outcomes that gay and lesbian people can expect when the processes of republican government, rather than the initiative process, govern matters involving their fundamental rights. (See Haider-Markel, Querze & Lindaman, *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights* (2007) 60(2) Pol. Research Q. 304–14.)

Petitioners make these arguments with the benefit of long experience, for we represent Californians who know all too well the danger of rendering the protection of disfavored minorities subject to simple majority rule. From the 1913 Alien Land Law that excluded Asian-Americans from owning property in this State (*see Fujii v. State* (1952) 38 Cal.2d 718 [declaring the prohibition unconstitutional]); to the segregation of Mexican-Americans within our public education system or the use of English-only laws to exclude them from the franchise (see Menchaca, The Mexican Outsiders: A Community History of Marginalization and Discrimination in California (1995) p.62 [citing California Assembly Journal, 6th Session, 1855, § 18:97-98] [exclusion from public education]; *Castro v. California* (1970) 2 Cal.3d 223 [denial of the franchise to voters literate in Spanish]); to the use of antimiscegenation laws to relegate African-Americans to second-class citizenship (*Perez v. Sharp* (1948) 32 Cal.2d 711); the history of California demonstrates with sobering clarity the potential for disfavored minorities to be subjected to oppression by hostile majorities.

And now, at a defining moment in the life of the California Constitution, a bare majority of the electorate has attempted to use the

initiative process to eliminate the protection that our state charter offers another group defined by a suspect classification from such selective oppression. Make no mistake: If article XVIII were to permit the use of simple majority politics to oppress historically disfavored minorities in such a fashion, then we would all be less safe. That is why a clear rule is needed. Petitioners do not come before this Court concerned only for those people of color who identify as lesbian, gay, bisexual or transgender, important as they are. We come to the bar of the Court concerned about our entire communities, all of whom would be imperiled by a rule that permits the rights of the minority to be selectively revised at any time by the caprice of the majority.

The availability of the U.S. Constitution as a further potential check on discriminatory government action does not cure the problem. First, the protections of the U.S. and California Constitutions are not coextensive, as this Court has frequently held. The California Constitution protects against sex-based discrimination more strictly than does its federal counterpart, for example (compare *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d. 1, 17, with *Craig v. Boren* (1976) 429 U.S. 190, 197-98.); and this Court has repeatedly stepped ahead of the federal courts in recognizing the constitutional significance of marriage in striking down oppressive laws aimed at disfavored communities. (See *Perez v. Sharp, supra,* 32 Cal 2d. at p.714; *In Re Marriage Cases, supra,* 43 Cal. 4th at pp. 814-15.)

Second, the availability of independent relief under the California Constitution is important for reasons extending beyond the document's substantive content. The vitality of the state Constitution enables the courts of California to play an active role in resolving questions of importance to the life of the community, rather than having federal courts always serve as the presumed forum for constitutional claims in civil cases.

Finally, the California Constitution is the charter of government for this State. Its content must be measured and its integrity preserved with reference to California law. (See *Raven v. Deukmejian*, *supra*, 52 Cal.3d at pp. 349–56 [reaffirming the independent role of the California Constitution in defining the rights of criminal defendants and rejecting an attempt to eliminate that independent role through the initiative process].) Indeed, the independent integrity of the California Constitution is particularly important in the case of article XVIII. In drawing a distinction between revision and amendment, article XVIII necessarily asks an internal question about the quality and nature of California's governing charter that demands an assessment of our Constitution on its own terms.

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

II. Consistent With This Court's Precedents, Proposition 8 Is A Qualitative Revision Of The California Constitution.

A holding that Proposition 8 must satisfy the procedural requirements of an article XVIII revision is not just analytically appropriate, it is practically sensible. The proposed rule draws meaningful distinctions between different proposed changes to the California

Constitution in the realm of fundamental individual liberties — distinctions that are consistent with this Court's precedents and give balanced effect to article XVIII.

This Court has spoken to the application of article XVIII in just two cases involving fundamental individual liberties: *People v. Frierson* (1979) 25 Cal.3d 142, and *Raven*. In *Frierson*, the Court found that an adjustment to the manner in which one fundamental right applies to all people — the right to be free from cruel and unusual punishment and the application of that right to the death penalty — constituted an amendment that could be accomplished through initiative. Central to that ruling was the Court's observation that the amendment preserved the ability of California courts to apply constitutional restraints to the death penalty in particular cases. (*People v. Frierson,* 25 Cal.3d at 187.) In *Raven*, this Court found that a proposed change that would have eliminated the independent role of the California Constitution altogether in defining the rights of criminal defendants constituted a revision. Central to that ruling was the Court's observation that the proposition "would vest all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court" (a change that the Court found qualitatively "devastating"). (*Raven v. Deukmejian, supra*, Cal.3d at pp. 351-52.)[2] Between *Frierson* and *Raven* lies an expansive terrain within which many fundamental rights might be placed in jeopardy if the initiative process were deemed available. Simply put, it cannot be the case that a repeal of fundamental rights as all-encompassing as that under review in *Raven* is necessary to render a

[2] There was some ambiguous language in the initiative under review in the *McFadden* case that might have had some impact upon the Declaration of Rights, but the Court did not find it necessary to resolve that ambiguity in deciding the case. (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 340–41.)

proposed change inappropriate for amendment through simple ballot initiative.

The relief Petitioners seek strikes an appropriate balance in applying article XVIII to a fundamental rights case. It recognizes the importance of an elimination of a fundamental right (as in *Raven*) rather than a mere adjustment (as in *Frierson*). It gives concrete meaning to *Raven*'s pronouncement that the purely qualitative impact of a constitutional change can render it a revision under article XVIII, regardless of the quantity of the language that the provision alters. (*See Raven, supra,* at 350.) And it offers a clear and well established principle — the suspect classification doctrine, which recognizes the distinct need to protect historically disfavored minorities from oppression by simple majority vote — that supplies the justification for imposing the mediating effect of republican government that sections 1 and 2 of article XVIII contemplate.

As this Court has explained, the initiative provision of article XVIII § 3 is designed to permit the citizens of California to make "change[s] within the lines" of their state charter; it is not a license to change the "underlying principles upon which it rests." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 222.) The suspect classification doctrine gives that distinction real and much needed meaning in the context of fundamental individual rights.

III. Conclusion

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

The Court's decision in these proceedings will affect the security of every member of a group defined by a suspect classification in the State of California. To resolve this case, this Court need do no more than hold that the discriminatory elimination of a fundamental right on a suspect basis is a revision of the California Constitution. That rule gives voice to the core principle of equal protection and affords the legal bulwark needed to prevent minority communities from being oppressed by simple majority vote. We respectfully urge this Court to grant the relief sought in the Writ Petition.

Dated: Nov. 14, 2008

Respectfully submitted,

By:

_____

Raymond C. Marshall

Attorneys for Petitioners Asian Pacific American Legal Center, California State Conference of the NAACP, Equal Justice Society, Mexican American Legal Defense and Educational Fund, and NAACP Legal Defense and Educational Fund, Inc.

CERTIFICATE OF WORD COUNT
PURSUANT TO RULES 8.204(c)(1) AND 8.490(b)(6)

Pursuant to California Rule of Court Rules 8.204(c)(1) and 8.490(b)(6), counsel for Petitioners hereby certifies that the number of words contained in this Petition For Extraordinary Relief, Including Writ Of Mandate And Request For Immediate Injunctive Relief; Memorandum Of Points And Authorities, including footnotes but excluding the Table of Contents, Table of Authorities, Verification, and this Certificate, is 4737 (four thousand, seven hundred and thirty-seven) words as calculated using the word count feature of the computer program used to prepare the brief.

By: _____
Erin S. Conroy

PROOF OF SERVICE

I, Jamie Paek, declare as follows:

I am over the age of 18, and not a party to this action. My business address is Three Embarcadero Center, San Francisco, California 94111.

On November 14, 2008, I served the following document:

PETITION FOR EXTRAORDINARY RELIEF, INCLUDING WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES

in the following manner:

[ ] **BY PERSONAL SERVICE:** I caused the document(s) to be delivered by hand.

[X] **BY OVERNIGHT DELIVERY:** I caused such envelopes to be delivered on the following business day by FEDERAL EXPRESS service.

[ ] **BY U.S. MAIL**: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

on the following persons at the locations specified:

Mark B. Horton, MD, MSPH
State Registrar of Vital Statistics of the State of California and
Director of the California Department of Public Health
1615 Capitol Avenue, Suite 73.720
P.O. Box 997377 MS 0500
Sacramento, CA 95899
(916) 558-1700

Linette Scott, MD, MPH
Deputy Director of Health Information and Strategic Planning of the
California Department of Public Health
1616 Capitol Avenue, Suite 74.317
Sacramento, CA 95814
(916) 440-7350

Edmund G. Brown, Jr.
California Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244
(916) 445-9555

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on November 14, 2008, at San Francisco, California.

_____

Jamie Paek