S168302

Case No.: _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Equal Rights Advocates and California Women's Law Center,

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 WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES

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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).

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PETITION FOR WRIT OF MANDATE

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 Equal Rights Advocates and California Women's Law Center (collectively, "Petitioners" or "Women's Rights Groups") hereby seek a peremptory writ of mandate pursuant to California Constitution article VI, section 10 and California Code of Civil Procedure section 1085 directing Respondents State Registrar of Vital Statistics Dr. Mark B. Horton, Deputy Director of Health Information & Strategic Planning of the California Department of Public Health Dr. Linette Scott, and Attorney General Edmund G. Brown Jr. (collectively, "Respondents") to refrain from implementing, enforcing or applying the initiative measure designated on the November 4, 2008 ballot as Proposition 8 ("Proposition 8").

2. This Petition is brought on the grounds that Proposition 8 is invalid because it constitutes a constitutional revision, not a constitutional amendment, and as such, the California Constitution provides that it may not be enacted by initiative.

3. 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. The issues presented by this Petition are of great public importance and should be resolved promptly. It is in the public interest to resolve the questions presented in this Petition, including whether Proposition 8 has in fact amended the Constitution, and whether the initiative process can legitimately narrow the scope of equal protection. Further, this Petition does not present any questions of fact that the Court must resolve before issuing the relief sought. Therefore, exercise of original jurisdiction is proper.

4. Petitioners have no adequate remedy at law. No other proceeding is available to Petitioners to obtain a speedy and final resolution of this constitutional challenge to Proposition 8.

THE PARTIES

5. Petitioner Equal Rights Advocates ("ERA") is a San Francisco-based women's rights organizations whose mission is to protect and secure equal rights and economic opportunities for all California women and girls through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases in both state and federal courts for the past thirty-three years. ERA has been dedicated to the empowerment of women through the establishment of their economic, social, and political equality. ERA brings this action to "procure the enforcement of a public duty." *Green v. Obledo*, 29 Cal. 3d 126, 144, 624 P. 2d 256, 172 Cal. Rptr. 206 (1981). Specifically, Petitioner seeks to

guarantee the right of California voters to a fair initiative process that complies with the state Constitution's procedural and substantive mandates and that does not allow a bare majority of voters to strip a politically unpopular group of the rights guaranteed by the state Constitution's equal protection clause. Petitioners seek to prevent Respondents from taking any action based on Proposition 8 because it was not lawfully enacted.

6. Petitioner California Women's Law Center ("CWLC"), founded in 1989, is dedicated to addressing the comprehensive and unique legal needs of women and girls. CWLC represents California women who are committed to ensuring that life opportunities for women and girls are free from unjust social, economic, legal, and political constraints. CWLC's Issue Priorities on behalf of its members are gender discrimination, women's health, reproductive justice, and violence against women. CWLC and its members are firmly committed to eradicating invidious discrimination in all forms. Petitioner CWLC brings this action to "procure the enforcement of a public duty." *Green*, 29 Cal. 3d at 144. Specifically, Petitioner seeks to guarantee that the initiative process cannot be used by a bare majority of voters to strip a politically unpopular group of the rights guaranteed by the state Constitution's equal protection clause. Petitioners seek to prevent Respondents from taking any action based on Proposition 8 because it was not lawfully enacted.

7. 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. As State Registrar, Horton is charged with providing instruction to and supervising local registrars; prescribing and furnishing vital statistics forms, including marriage license forms, for use by local registrars; and arranging and preserving all registered vital statistics licenses, including marriage licenses, in a comprehensive state index. He is sued herein solely in his official capacity.

8. Respondent Linette Scott, MD, MPH ("Scott") is the Deputy Director of Health Information & Strategic Planning for the California Department of Public Health. 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, and the marriage certificate. She is sued herein only in her official capacity.

9. Respondent General Edmund G. Brown Jr. is the Attorney General for the State of California ("Attorney General"). As Attorney General, he is charged with ensuring that the laws of the State of California are uniformly and adequately enforced. He is sued herein solely in his official capacity.

FACTS

10. On May 15, 2008, this Court held in *In re Marriage Cases*, 43 Cal. 4th 757, 183 P. 3d 384, 76 Cal. Rptr. 3d 683 (2008), that same-sex couples have a fundamental right to marry to the same extent as different-sex couples, and that portions of the Family Code that limited marriage to a man and a woman violated the rights of gay and lesbian individuals and couples to equal protection, privacy and due process under the California Constitution.

11. Proposition 8 is an initiative measure that seeks to fundamentally alter 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." The Official Title and Summary of Proposition 8, prepared by Respondent Brown, state that the measure would "[e]liminate the right of same-sex couples to marry in California." Different-sex couples would retain the right to marry. By its terms, Proposition 8 purports to strip a constitutionally protected minority group of the fundamental right to marry. Moreover, Proposition 8 requires unequal treatment of certain citizens despite the California Constitution's clear mandate that all the People are entitled to equal protection of the laws.

12. Proposition 8 appeared on the ballot for the November 4, 2008 election. Although the final outcome of the election is still uncertain, Proposition 8 received a majority of "yes" votes so far counted (6,190,409

"yes" votes to 5,676,144 "no" votes).[1] The allegations in this Petition assume that Proposition 8 has passed.

CLAIMS ASSERTED

13. Proposition 8 constitutes a revision, not an amendment, of the California Constitution because it severely compromises the core constitutional principle of equal protection of the law. The California Constitution does not permit voters by popular initiative and a bare majority vote to divest a politically unpopular group of the right to equal protection of the law.

14. Petitioners and the citizens of California will suffer irreparable injury and damage unless this Court intervenes and directs Respondents not to enforce, implement, or apply Proposition 8. Revising the California Constitution in this manner creates a clear and present danger for all politically unpopular groups (indeed, for all California citizens), and in particular threatens individuals who belong to groups that have historically suffered invidious discrimination—such as women—groups that this Court has guarded with heightened vigilance.

15. Petitioners believe that there is no requirement to plead demand and refusal under the circumstances presented in this case. Without prejudice to that position, Petitioners allege that any demand to

[1] This vote tally is available on the Secretary of State's website. *See* Election Results—November 4, 2008—California Secretary of State,

Respondents to act or refrain from taking action as described in this Petition would have been futile if made, and that only a court order will cause Respondents to refrain from implementing, enforcing or applying Proposition 8.

RELIEF SOUGHT

Wherefore, Petitioners request the following relief:

1. That this Court forthwith issue a writ of mandate directing Respondents to refrain from implementing, enforcing or applying Proposition 8 or, in the alternative, to show cause before this Court at a specified time and place why Respondents have not done so;

2. 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;

3. That, following the hearing upon this Petition, the Court forthwith issue a peremptory writ of mandate or other appropriate equitable relief directing Respondents not to implement, enforce or apply Proposition 8 and directing Respondents to take all actions necessary to ensure that county clerks and other local officials throughout the state, in performing their duty to enforce the marriage statutes in their jurisdictions, apply those provisions without regard to Proposition 8;

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http://vote.sos.ca.gov/Returns/props/59.htm (last visited Nov. 14, 2008).

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

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

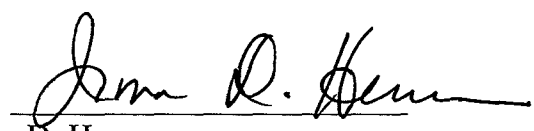
VERIFICATION

I, Irma D. Herrera, declare:

I am Executive Director for Petitioner Equal Rights Advocates 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 I allege that the contents therein are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 14, 2008 at San Francisco, California.

By: 

Irma D. Herrera
Executive Director
Petitioner Equal Rights Advocates

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

By stripping rights from an unpopular minority through simple popular vote—rights that are expressly granted in our Constitution and affirmed by the California Supreme Court—Proposition 8 would alter the very nature of our governmental plan.[2]

The question before the Court could not be more clear: will the Court endorse a radical abuse of the People's initiative power by validating a scheme in which a slim majority of voters may deny equal protection to any currently disfavored group? The stakes for our Constitutional system could not be higher: if allowed to stand, Proposition 8 provides a mechanism for future voting majorities to "amend" the Constitution so the objects of their disapprobation lose the right to equal treatment.

If that happens, women across California have much to fear, and even more to lose. Women have long struggled to achieve the equal protection of the laws and rely on the principle that equal protection is not a privilege in this state to be selectively revoked at will. It is a right that is fundamental to our social order and that must be preserved. It was only

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[2] The Attorney General has stated that Proposition 8 is not retroactive and the 18,000 same-sex marriage permits issued before November 5, 2008, will remain valid. Aurelio Rojas, *Same-Sex Marriage: Battle Isn't Over Yet*, Sacramento Bee, Nov. 6, 2008, at A1. Even so, Petitioners fully expect legal challenges—and uncertainty—for same-sex families in the coming months.

recently that women were given equal rights to employment.[3] It was only recently that courts rejected the legitimacy of differing property rights for women. And still women struggle to secure equal pay for equal work, to pursue equal opportunity in education, to obtain equal access to health care, and to live free of sexual violence and harassment. Throughout these struggles, women have turned to Constitution's promise of equality and the constant guardianship of the courts, sometimes against the will of the voting majority, for protection.[4] For equal protection to have any meaning, it cannot be up for grabs in the next election (and in every following election).

It is easy to see what harms will come from ceding to an emboldened voting majority the Court's power to interpret and apply the Constitution. The 1940's version of Proposition 8 would have constitutionalized discrimination against the Japanese. The 1960's version of Proposition 8 would have extinguished the burgeoning women's rights movement. The 1980s version of Proposition 8 would have required the

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[3] *See Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 19, 485 P. 2d 529, 95 Cal. Rptr. 329 (1971) (enumerating severe legal and social disabilities, such as the denial of the right to vote, the right to serve on juries, diminished employment and economic opportunities, and treatment as "inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts").

[4] *See, e.g., Arp v. Workers' Compensation Appeals Board*, 19 Cal. 3d 395, 400, 563 P. 2d 849, 138 Cal. Rptr. 293 (1977) ("Society is belated in its recognition of the baseless prejudices inherent in long-standing notions of woman's proper social and economic roles.").

forced segregation of people with AIDS. The 2001 version of Proposition 8 would have constitutionalized anti-Muslim and anti-Arab sentiment gripping the state in the aftermath of September 11.[5] In the years to come, the targets will change. Step by step, the Constitution's guarantees will narrow, and the equal protection clause will protect only those who can muster 50% plus one votes on election day.[6] Even if a politically disadvantaged group is able to defend itself at the polls from time to time, unchecked recourse to the initiative process empowers any person with the funds to gather sufficient signatures to divert the resources and energies of the less powerful to prevent their rights from being stripped away.[7]

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[5] Petitioner's fears are not unwarranted. Invidious discrimination against disfavored groups has been written into constitutions in the past. For instance, California's Constitution of 1879 contained a provision that forbade "native[s] of China" from voting. Cal. Const. of 1849 art. II, § 1 (repealed 1926) ("No native of China, no idiot, no insane person, or person convicted of any infamous crime . . . shall ever exercise the privileges of an elector in this State"). Similarly, until 1994, West Virginia's Constitution contained a provision requiring segregated schools. *See* W. Va. Const. art. XII, § 8. (repealed 1994) ("White and colored persons shall not be taught in the same school").

[6] All Californians should vigilantly guard against the easy diminution of basic rights that Proposition 8 portends. As Justice Kennedy cautioned, equal protection rights are "taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

[7] California is among the most expensive media markets in the country, and costs to oppose Proposition 8 reportedly reached nearly $40

The progressive dehumanization of segments of our society by a state-sanctioned system of Constitutional "amendment" is intolerable in a free society and prohibited by our Constitution. Here, that dehumanization materializes in the selective revocation of marital rights that this Court recently held to be "so integral to an individual's liberty and personal autonomy that they may not be eliminated by the Legislature or by the electorate through the statutory initiative process." *In re Marriage Cases*, 43 Cal. 4th 757, 781, 183 P. 3d 384, 76 Cal. Rptr. 3d 683 (2008). Further, the process of stigmatization and exclusion occurs without any rational deliberative process and would be substantively beyond judicial review. The equal protection clause by its nature empowers courts to protect minorities and other politically disenfranchised groups from unfair treatment by the voting majority. Indeed, while the other branches of government and the People have roles to play, our basic governmental plan envisions the courts as the ultimate check on injustice. Proposition 8 purports to arrogate that unique and well-settled judicial power.

With the apparent passage of Proposition 8, this Court is called on again to breathe meaning into the Constitution's equal protection guarantee. If Proposition 8 is allowed to stand, the status of the equal protection guarantee of our state Constitution will be reduced to a mere shadow,

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million. Jessica Garrison, *Angrier Response to Prop. 8 Arises*, L.A. Times, Nov. 13, 2008, at A1.

promising only that minorities will be protected from unfair majority encroachment until the majority votes otherwise. A decision to empower the voting majority to impose second-class status on a group of citizens who have suffered a history of irrational prejudice is so foreign to the history and values underlying our government structure that it could be accomplished only by a constitutional revision, not through an initiative like Proposition 8.[8]

JURISDICTION

Post-election challenges to ballot measures are appropriate for the exercise of the original jurisdiction of the California Supreme Court when they raise issues of "great public importance and should be resolved promptly." *Legislature v. Eu*, 54 Cal. 3d 492, 500, 816 P. 2d 1309, 286 Cal. Rptr. 283 (1991) (quoting *Raven v. Deukmejian*, 52 Cal. 3d 336, 340, 801 P. 2d 1077, 276 Cal. Rptr. 326 (1990)); *see also Brosnahan v. Brown*, 32 Cal. 3d 236, 241, 651 P. 2d 274, 186 Cal. Rptr. 30 (1982); *Amador Valley Joint Union High School Dist. v. State Board of Equalization*, 22 Cal. 3d 208, 219, 583 P. 2d 1281, 149 Cal. Rptr. 239 (1978). The question presented by this petition—whether 50% of persons, plus one, voting on an initiative may deny equal protection for a particular group—affects the

[8] Petitioners have read and wholly agree with the writ petitions already filed in *Strauss v. Horton* (Case No. S168047) and *City and County*

lives of all Californians, but in particular the members of minority and other disempowered groups, including women, who have endured a history of discrimination at the hands of political majorities.

Prompt resolution of this issue is necessary not least because of the immediate negative impact Proposition 8 would have on same sex couples and their families. Beyond this, intervention of the Court is necessary because if the Court declines to exercise its authority to protect the Constitution today, the principle that equal rights may be curtailed by a simple voting majority will become part of our constitutional framework tomorrow. Henceforth, emboldened majorities could simply position campaigns to strip the fundamental rights of unpopular minorities as constitutional amendments, and the affected citizens would have no recourse in the courts.

DISCUSSION

I. Article XVIII Of The California Constitution Prohibits Revision Of The Constitution By Initiative

In 1911, the People specified a procedure to make certain limited changes to the California Constitution through the initiative process. *McFadden v. Jordan*, 32 Cal. 2d 330, 332-33, 196 P.2d 787 (1948); Cal. Const. art. IV, § 1. Significantly, "[a]lthough the electors may amend the

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of San Francisco v. Horton (Case No. S168078).

Constitution by initiative, a revision of the Constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification, or by legislative submission of the measure to the voters." *Raven v. Deukmejian*, 52 Cal. 3d 336, 349, 340 801 P. 2d 1077, 276 Cal. Rptr. 326 (1990) (quoting Cal. Const. art. XVIII, §§ 1-3). As this Court has explained, "because a revision may not be achieved through the initiative process," were this Court to conclude that Proposition 8 "constituted a revision not an amendment, that would end [the Court's] inquiry; the initiative would be invalid for its failure to meet the constitutional requirements of a revision." *Amador Valley*, 22 Cal. 3d at 221. Because Proposition 8 effects a revision of the Constitution by subjecting the Constitution's fundamental equal protection guarantees to simple majority nullification, it must be held invalid.

While the Constitution itself does not define a revision or an amendment, this Court's cases have clarified the distinction. As early as 1894, in *Livermore v. Waite*, the Court held that certain "underlying principles" go to the core of the Constitution and must be guarded as such:

> The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument

> as will effect an improvement, or better carry out the purpose for which it was framed.

102 Cal. 113, 118-19, 36 P. 424 (1894).

In *Amador Valley*, the Court further distilled the *Livermore* principle, and explained that the "analysis in determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature." 22 Cal. 3d at 223; *see also Raven*, 52 Cal. 3d at 350 ("Substantial changes in either [quantitative or qualitative ways] could amount to a revision."). As relevant here, the Court held "even a relatively simply enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision." *Amador Valley*, 22 Cal. 3d at 223. For example, the Court explained, and the parties agreed, that "an enactment which purported to vest all judicial power in the Legislature would amount to a revision without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change." *Id.*; *see also McFadden*, 32 Cal. 2d at 332 (holding that an initiative that was substantively "far reaching and multifarious," was a revision rather than an amendment); *Raven*, 52 Cal. 3d at 351 (holding that an initiative which limited the California courts' power to interpret certain criminal rights differently than the United States Supreme Court's interpretation was a revision); *cf. People v. Frierson*, 25 Cal. 3d 142, 599 P. 2d 587, 158 Cal.

Rptr. 281 (1979) (holding that a provision limiting the reach of the cruel and unusual punishment clause was an amendment).

The purpose behind the differing procedural requirements of revisions and amendments is clear. Enactments that fundamentally alter the state Constitution or the rights and protections it grants, or those which affect the "substance and integrity of the state Constitution as a document of independent force and effect" must not be subject to the will of a simple majority. *Raven*, 52 Cal. 3d at 352. Rather, such changes must be made only after deliberation and consideration. In a representative democracy, the reason of the elected must at times calm the passions of the electors. As James Madison explained:

> [I]t may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. ...
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> [A republic, on the other hand, serves] to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

Madison, Federalist No. 10. *See also League of United Latin American Citizens v. Perry*, 548 U.S. 399, 469-70, 126 S. Ct. 2594; 165 L. Ed. 2d 609 (2006) ("[O]ur system of representative democracy is premised on the assumption that elected officials will seek to represent their constituency as a whole, rather than any dominant faction within that constituency.") (Stevens, J., concurring and dissenting).

Giving the power to strip basic equal protection rights of a historically disfavored group to a bare majority of the voting people, free from the constraints of judicial review to ensure equal protection, is a "far reaching change in the nature of" California's "basic governmental plan" such that it requires the deliberation and consideration demanded of Constitutional revisions. *Amador Valley*, 22 Cal. 3d at 223. Altering the Constitution's promise of equality in this way would render the equal protection provision neither equal nor protective. Moreover, it would undermine the power of the courts to interpret and apply the Constitution. Revocations of the Court's power, or limitations on its ability to protect the citizenry, are precisely the sort of changes to the Constitution's "underlying principles" that *Livermore* and its progeny required to be submitted to the Legislature before the People's approval.

II. Equal Protection Of The Laws Is Fundamental To California's Constitutional Structure

Proposition 8, if permitted to take effect, would subvert the

underlying principle of equal protection that lies at the heart of California's constitutional system. It would also divest the court of its traditional power to interpret and apply the fundamental guarantees of the equal protection clause.

There is no right more basic to California's constitutional scheme than equal protection. The right to equal protection has been part of the California Constitution from the inception of statehood. Cal. Const. art. I, §§ 1 & 11.1 (1849). The original drafters recognized the need for inalienable rights to protect not only individuals, but vulnerable minorities, from the tyranny of majority power. *See* Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution, in September and October, 1849,* at 409 (1850) ("My object is to provide for the protection of minorities—a principle which is so generally recognized under our system of government" (statement of Mr. Price)); *id.* at 22 ("The majority of any community is the party to be governed; the restrictions of law are interposed between them and the weaker party; they are to be restrained from infringing upon the rights of the minority." (statement of Mr. Gwin)); *id.* at 309 ("The object of the Constitution was to protect the minority" (statement of Mr. Botts)).

California's modern Constitution maintains this emphasis on the centrality of equal protection to our system of governance. This Court has described these equal protection provisions as "one feature of the

constitution more marked, [one] characteristic more pervasive than all others." *Darcy v. San Jose*, 104 Cal. 642, 645, 38 P. 500 (1894) (quoting with approval *Dougherty v. Austin*, 94 Cal. 601, 620, 29 P. 1092 (1892) (Beatty, J., concurring)).

The principle of equal protection is the *sine qua non* of this Court's fundamental rights and due process jurisprudence; that is, in this state, equal protection finds its significance not only in Article I, section 7, but it permeates all rights conferred by the Constitution. *Marriage Cases*, 43 Cal. 4th at 831 (holding that the constitutional right to marry incorporates a requirement of "equal dignity and respect."); *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 276 n.22, 625 P. 2d 779; 172 Cal. Rptr. 866 (1981) (explaining that when determining whether a law restricts a fundamental right in a "discriminatory manner," the Court's analysis "closely parallels" the requirements of equal protection); *People v. Ramirez*, 25 Cal. 3d 260, 267, 599 P. 2d 622; 158 Cal. Rptr. 316 (1979) (holding the right to due process incorporates a requirement that every person must be treated "as an equal, fully participating and responsible member of society.").

A. Proposition 8 Offends The Constitutional Scheme By Enabling Majority Oppression Of An Unpopular Group.

One primary purpose of equal protection is to protect groups that, based on a history of discrimination, are vulnerable to oppression by a

political majority. *Marriage Cases* at 43 Cal. 4th at 843 n.63; *see also Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 19, 485 P. 2d 529, 95 Cal. Rptr. 329 (1971). Underlying all suspect classifications is "the stigma of inferiority and second class citizenship associated with them." *Id.* Suspect classifications "irrespective of the nature of the interest implicated," "in and of themselves are an affront to the dignity and self-respect of the members of the class set apart for disparate treatment." *Molar v. Gates*, 98 Cal. App. 3d 1, 16, 159 Cal. Rptr. 239 (1979) (invalidating gender discrimination in prison rules). "Such classifications . . . violate 'the most fundamental interest of all, the interest in being treated by the organized society as a respected and participating member.'" *Id.* (quoting Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 33 (1977)).

Proposition 8 demands the government treat a stigmatized minority group differently *based on* a suspect classification. By eliminating the requirement of equal protection for a vulnerable minority seeking to exercise a fundamental right, Proposition 8 would remove an essential structural check on the exercise of majority power. As this Court explained in the *Marriage Cases*, the original purpose of enumerated Constitutional rights is to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . ." *Marriage Cases*, 43 Cal. 4th at 852 (citing *W. Va. State Bd. of Ed. v. Barnette*, 319

U.S. 624, 638, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)). Altering this foundational premise is nothing short of redefining our "basic governmental plan," and therefore must be deemed a revision. *Amador Valley*, 22 Cal. 3d at 223.

Because equal protection is a foundational principle of our constitutional scheme, the distinction between initiatives of general application and those that target specific groups is dispositive. No other initiative enacted by a bare voting majority of the people, without approval of two thirds of the legislature, and targeting only members of a suspect class for disfavored treatment, has ever survived to become part of our Constitution. *See Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527, 532 n.5, 102 S. Ct. 3211, 73 L. Ed. 2d 948 (1982) (noting that an initiative of general application affecting remedies for school segregation was approved by a two-thirds vote of each house of the state legislature before being submitted for popular vote); *Reitman v. Mulkey*, 387 U.S. 369, 377-81, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967) (invalidating a constitutional initiative that would have involved the state in private discrimination against members of any racial group on federal equal protection grounds without addressing whether initiative procedure was proper).

Similarly, the initiative deemed to be an amendment in *People v. Frierson* involved a provision of general application, not a law aimed at a suspect class and did not require this Court to abdicate its authority to

enforce the guarantee of equal protection. 25 Cal. 3d 142, 599 P. 2d 587, 158 Cal. Rptr. 281 (1979) (addressing effort to limit scope of the cruel and unusual punishment clause as to all defendants otherwise eligible for the death penalty).[9] The *Frierson* Court did not have an opportunity to consider whether an initiative providing that only men, or only the poor, or only minorities, or only Jews, or only gays would be eligible for the death penalty, would be an alteration so "insubstantial" as to be permitted to come into force through the initiative process, or whether such an initiative would so fundamentally alter the basic principles of governance such that the deliberative processes of a constitutional revision would have been required. The revulsion we necessarily feel at the thought of such an injustice answers the question before this Court today. And if instead we say that our society has learned from the past and would no longer rely on prejudice to cast out one group of citizens or another, we are faced with the reality that this is precisely what has happened with Proposition 8.

B. Proposition 8 Alters The Constitutional Scheme By Removing Equal Protection From Judicial Review.

The Constitution requires the Court to guarantee equal protection against the whims of the voting majority. *See Everson v. Board of Ed. of Ewing Township*, 330 U.S. 1, 28, 67 S. Ct. 504, 91 L. Ed. 711 (1947)

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[9] Notably, the scope of the cruel and unusual punishments clause necessarily depends on evolving standards of decency prevalent in the

(Jackson, J., dissenting) ("[T]he great purposes of the Constitution do not depend on the approval or convenience of those they restrain."); *Howard Jarvis Taxpayers' Ass'n v. Fresno Metro. Projects*, 40 Cal. App. 4th 1359, 1362, 48 Cal. Rptr. 2d 269 (1995) ("[S]ometimes the majority cannot impose its view because the Constitution restrains that action. This is because the Constitution is the ultimate social and legal contract. It allows the majority to promote its view so long as it does not interfere with the constitutional provisions guaranteed to the minority."). Unless the judiciary is vested with the ultimate power and responsibility to protect the rights of the minority against encroachment by the voting majority, equal protection is an empty concept. Of the various protections that the California Constitution entrusts to the judiciary to enforce, this Court has singled out equal protection: "Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority." *Bixby v. Pierno*, 4 Cal. 3d 130, 141, 481 P. 2d 242, 93 Cal. Rptr. 234 (1971); *see also United States Steel Corp. v. Public Utilities Com.*, 29 Cal. 3d 603, 611-12, 629 P. 2d 1381, 175 Cal. Rptr. 169 (1981) ("[T]here is no more effective practical guaranty against arbitrary and

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community. *E.g., Roper v. Simmons*, 543 U.S. 551, 560-61, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.") (quoting *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13, 69 S. Ct. 463, 93 L. Ed. 533 (1949) (Jackson, J., concurring)).

None of the other branches of government—and certainly not a bare majority of voters – is as capable as the Courts of protecting the rights of politically unpopular groups. As this Court explained with respect to the unique power of the judiciary in the context of discrimination against aliens: "[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, and which may call for a correspondingly more searching judicial inquiry." *Purdy and Fitzpatrick v. State*, 71 Cal. 2d 566, 579-80, 456 P. 2d 645, 79 Cal. Rptr. 77 (1969) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938)). Or, in the words of Justice Scalia, "[o]ur salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 300, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (Scalia, J., concurring).

Proposition 8 is dangerous and unprecedented in that it would—in addition to "[e]liminat[ing] the right of same-sex couples to marry in

California"—act to revise and limit the Article 1 guarantee of equal protection with respect to groups defined by a suspect classification. Previous initiatives to amend the Constitution were exercised without disturbing the power of the judiciary to require the equal protection of laws, because previous initiatives had a universal effect on voters. Such is not the case when a majority of voters, as with Proposition 8, seek to revoke equal protection rights of a distinct group. The members of the political majority do not put themselves at risk, because they are singling out only the unpopular minority for adverse treatment.

The 1911 amendment that added the initiative process to the state Constitution could not itself remove the power to interpret Article I from the judiciary, where it was originally vested, and place such power in the hands of the voting majority. To accomplish something so bold would itself have required a constitutional revision. But the 1911 amendment was adopted through the amendment process, not the revision process. *See* Joseph R. Grodin et al., *The California State Constitution: A Reference Guide* 69, 303 (1993). Therefore, the initiative power itself cannot be interpreted to negate the power of the courts to declare and require correction of equal protection violations or to grant to the people the power to remove equal protection from a suspect class. No mere amendment could have stripped the judiciary of its most essential role in guaranteeing the equal protection of the law.

C. Proposition 8 Dramatically Changes The Plain Text Of The Constitution's Equal Protection Clause

Comparing the text of Proposition 8 to the text of the Constitution's equal protection provisions renders inescapable the conclusion that, as a matter of simple textual analysis, Proposition 8 purports to revise those provisions.

Article I, Section 7(a) of the California Constitution plainly states: "A person may *not* be deprived of life, liberty, or property without due process of law or denied *equal* protection of the laws; . . ." (emphasis added). Article I, section 7(b) goes on to declare: "A citizen or class of citizens may *not* be granted privileges or immunities not granted on the same terms to all citizens." (emphasis added).

By mandating different treatment of certain Californians, Proposition 8, as to those Californians, effectively deletes the word "equal" from the very clause that prevents the government from denying "equal protection of its laws" to anyone. The nullification of the equal protection provisions can hardly be considered "an addition or change within the lines of the instrument." *Livermore*, 102 Cal. at 118-19. If core provisions of the California Declaration of Rights can have their operative words effectively deleted as to particular groups by mere "amendment," it is difficult to determine what would constitute a "revision." Would all of the words of the equal protection clause have to change? Would more than one group have to be excluded of its coverage?

Certainly no group hoping to mobilize a majority to strip the right to equal protection from a minority would bother to go through the more cumbersome procedure required to pass a valid revision when a mere amendment, passed by a bare majority of voters, will affect the desired change. *See Livermore*, 102 Cal. at 118 (holding that the text of Article XVIII "precludes the idea that it was the intention of the people, by the provision for amendments authorized in the first section of this article, to afford the means of effecting the same result which in the next section has been guarded with so much care and precision"); *cf. McFadden*, 32 Cal. 2d at 347 (explaining that the people of California purposefully "made amendment relatively simple but provided the formidable bulwark" of additional procedural gateways to prevent improvident passage of a revision). Accordingly, established law dictates that Proposition 8, and any majority-vote ballot initiative having the effect of stripping the core of equal protection rights from the Constitution, is a revision and cannot come into force.

III. A Fundamental Change In The Constitutional Scheme That Eliminates Reasonable Checks On The Oppression Of Politically Vulnerable Groups Would Pose A Threat, Not Only To Lesbian And Gay Persons, But Also To Other Disfavored Groups.

If the initiative process can be used to deny equal protection under the law to gay and lesbian persons because of their sexual orientation, then the same process could be used to deprive any number of other disfavored

groups of Californians of many or even all of their protected rights under the state Constitution. Efforts targeted at women could be close behind.

As a group that has historically been the target of invidious discrimination and unequal treatment, Petitioners are especially concerned that this Court reject the process used to promote the discrimination embodied in Proposition 8. *See Sail'er Inn*, 5 Cal. 3d at 19 (explaining that "[w]omen, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities" and collecting historical instances of sex discrimination, such as the denial of the right to vote, the right to serve on juries, diminished "employment and economic opportunities," and treatment as "inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts."). Women of color, in particular, may be among the most vulnerable groups to attacks on their right to equal protection through the initiative process, as they would be negatively affected by initiatives targeting women and racial or ethnic minorities for disfavored treatment. And, left undisturbed, the unprecedented framework established by Proposition 8 would preclude judicial enforcement of the suspect classification doctrine to protect these women.

California has a long and proud history of protecting women's rights under the equal protection clause. Since its ratification in 1879, California's modern Constitution has provided protections against

discrimination based on sex. Cal. Const. art. XX, § 18 (1879) ("No person shall, on account of sex, be disqualified from entering upon or pursuing a lawful business, vocation or profession."). As early as 1881, this Court sustained women's claims of sex discrimination under the California Constitution. In *In re Maguire*, 57 Cal. 604 (1881), the Court, relying on section 18, invalidated a San Francisco ordinance prohibiting women from waiting on customers between the hours of 6 p.m. and 6 a.m. in a place where liquor was sold. The Court held that the Constitution admitted of no exceptions, and "neither [the Court] nor any other power in the State have the right or authority to insert any, whether on the ground of immorality or any other ground." *Id.* at 608.

Notwithstanding the Constitution's express guarantee and this Court's established precedent, in the not so distant past, this Court was required to intervene to enforce the Constitution's promise of equality for women. In *Sail'er Inn, Inc. v. Kirby*, the Court invalidated a statewide law that prohibited women from tending bar unless they fit into narrow exceptions, a law remarkably similar to the ordinance at issue in *Maguire*. 5 Cal. 3d 1 (1971). In so doing, the Court held that legal classifications based on sex merit strict scrutiny under California's equal protection clause—six years before the federal court recognized heightened scrutiny for sex classifications – albeit in a more limited fashion. *See Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (holding

gender discrimination claims under the U.S. Constitution's equal protection clause subject to intermediate scrutiny).[10]

Since *Sail'er Inn*, this Court has reaffirmed its central holding that classifications based on sex are subject to strict scrutiny. *See Koire v. Metro Car Wash*, 40 Cal. 3d 24, 37, 707 P. 2d 195, 219 Cal. Rptr. 133 (1985) ("classifications based on sex are considered 'suspect' for purposes of equal protection analysis under the California Constitution"); *Arp v. Workers' Compensation Appeals Board*, 19 Cal. 3d 395, 400 (1977) ("the strict scrutiny/compelling state interest test must govern sex discrimination challenges under . . . the California Constitution"); *Catholic Charities of Sacramento, Inc. v. Sup. Ct.*, 32 Cal. 4th 527, 564, 85 P. 3d 67, 10 Cal. Rptr. 3d 283 (2004) ("We long ago concluded that discrimination based on gender violates the equal protection clause of the California Constitution (art. I, § 7, subd. (a)) and triggers the highest level of scrutiny."). The Constitution's protections against gender discrimination extend to dignitary

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[10] In fact, the U.S. Supreme Court had only 23 years earlier upheld a Michigan statute providing that in cities with a population over 50,000, no female could be licensed as a bartender unless she was the wife or daughter of the male owner. *Goesaert v. Cleary*, 335 U.S. 464, 69 S. Ct. 198, 93 L. Ed. 163 (1948). *Sail'er Inn* distinguished and criticized the holding in *Goesaert*, *see Sail'er Inn*, 5 Cal. 3d at 21-22, a position that was vindicated by the U.S. Supreme Court's subsequent decision in *Craig*, which overruled *Goesaert*. California's Constitution may still provide more robust protection against gender discrimination than the U.S. Constitution. *See Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 16, 31-32, 112 Cal. Rptr. 2d 5 (2001) (noting distinction between federal intermediate scrutiny and California strict scrutiny standards).

harms and official impositions of social stigma, not just financial interests. *See Bobb v. Mun. Ct.*, 143 Cal. App. 3d 860, 866, 192 Cal. Rptr. 270 (1983) (reversing contempt sanctions where only women were asked, as potential jurors, to answer questions about marital status). A hallmark of our equal protection clause is to guard against "second class citizenship." *Id.* at 866.

But in the face of a proposition like Proposition 8, even the Court's constitutionally required protection of equality for women is called into doubt. Just as strict scrutiny applies to gender-based discrimination, the Court has identified gays and lesbians as a suspect class entitled to heightened protection. *Marriage Cases,* 43 Cal. 4th at 844. While same-sex couples, rather than women, are the immediate targets of Proposition 8, the use of the initiative process to enact Proposition 8 threatens all minority and disadvantaged groups. If Proposition 8 stands, simple majorities could strip other minority groups of protection. Women's basic rights, like those of gays and lesbians, could be as ephemeral as the next election and subject to unending attack. Voting majorities could simply perpetuate through the initiative process the very conditions that have led this court to designate gender and sexual orientation as suspect classifications.

If Proposition 8 stands, no California constitutional barrier will exist to prevent the next constitutional initiative mandating discrimination. Will we have a world in which year after year we go to the polls to vote on a potentially endless array of propositions by which powerful groups seek to

limit the fundamental rights of the less powerful? Proposition 9 may require that a woman be prevented from marrying if she has ever had an abortion or been divorced. Proposition 10 may require that a woman provide evidence of her fertility before being allowed to marry. Proposition 11 may require that unmarried women or immigrant women be denied social services available to others. Although the federal equal protection clause may provide shelter from the most extreme abuses, federal protection is by no means assured. *See Nguyen v. INS*, 533 U.S. 53, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001) (holding that 8 U.S.C. § 1409, which makes it more difficult for a child born out of wedlock whose father is a citizen to prove U.S. citizenship than for one whose mother is a citizen, does not violate equal protection); *see also Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S. Ct. 2162, 2188, 167 L. Ed. 2d 982 (2007) (Ginsburg, J., dissenting) (stating that imposing a strict statute of limitations is "totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure."); *Gonzales v. Carhart*, 550 U.S. 124, 127 S. Ct. 1610; 167 L. Ed. 2d 480 (2007) (upholding a statute that restricted certain abortion procedures without an exception for maternal health); *cf. Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944) (holding that exclusion orders against Japanese-Americans did not violate equal protection). This Court

has an independent obligation to guard rights under the California Constitution.[11]

Woman must not once again be relegated to the status of "second class citizen[]" that the Constitution expressly prohibits. *Sail'er Inn*, 5 Cal. 3d at 19. Sustaining Proposition 8 creates precisely this risk.

CONCLUSION

Californians of all stripes rely on the courts and the Constitution as guarantors of equal protection. If, however, a mobilized majority can nullify such power, we have only equal protection politics, not equal protection law. Our common understanding that the Constitution and the courts can protect minorities will have been a naïve fantasy. Our history as Californians tells a different story. The equal protection clause is part of the foundation of our governance and it cannot be diminished to deprive a suspect class of a constitutional right absent constitutional revision.

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[11] The California Constitution "is, and always has been, a document of independent force" and the Court "cannot properly relegate [its] task to the judicial guardians of the federal Constitution, but instead must recognize [its] personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional

For the foregoing reasons, Petitioners respectfully ask this Court to grant the petition for writ of mandate and order Respondents to refrain from enforcing or effectuating Proposition 8.

DATED this 17th day of November, 2008.

Respectfully submitted,

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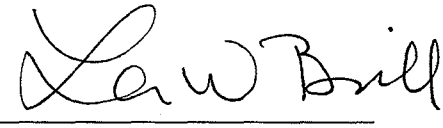
By: 
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provisions." *Committee to Defend Reproductive Rights*, 29 Cal. 3d at 261, 262 (1981).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the number of words contained in the foregoing memorandum of points and authorities, including footnotes but excluding the Table of Contents, Table of Authorities and this Certificate, is 6,579 words as calculated using the word count feature of the program used to prepare this brief.

By: _____
Richard M. Simon

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1800 Avenue of the Stars, Suite 900, Los Angeles, California 90067-4276.

On November 17, 2008, I served the foregoing document described as Petition for Writ of Mandate; Memorandum of Points and Authorities on each interested party, as stated on the attached service list.

[X] (BY EXPRESS MAIL) I placed a true copy of the foregoing document in a sealed envelope addressed to each interested party, as stated on the attached service list. I placed each such envelope, with Express Mail postage thereon fully prepaid, for collection and mailing at Irell & Manella LLP, Los Angeles, California. I am readily familiar with Irell & Manella LLP's practice for collection and processing of Express Mail to be sent by the United States Postal Service. Under that practice, the Express Mail would be deposited on that same day in the ordinary course of business in a post office, mailbox, sub-post office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service or receipt of Express Mail.

Executed on November 17, 2008, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Mark Kressel (Signature)

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