

Case No. S168047
In the Supreme Court of the State of California

KAREN L. STRAUSS, et al.,

Petitioners,

v.

MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,

Respondents;

DENNIS HOLLINGSWORTH et al., Interveners.

APPLICATION FOR LEAVE TO FILE AMICUS CURAIE BRIEF
AND BRIEF OF AMICI CURAIE SUSPECT CLASS CALIFORNIANS
IN SUPPORT OF PETITIONERS

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APPLICATION FOR LEAVE TO FILE AMICUS CURAIE BRIEF

Pursuant to Rule of Court 8.520(f), Californians Zakary Akin, Naomi Canchela, Terry Fong, Jessica Hirschfelder, Adrienne Loo, Carolyn Lott, Robert Lott, Quang Nguyen, Agata Opalach, Jeff Pilisuk, Shalini Ramachandran, Vidhya Ramachandran, Joseph Robinson, Lee Schneider and Nathan Wilcox (collectively "Amici") respectfully apply for leave to file the accompanying amicus curaie brief in support of Petitioners in the above-referenced original writ proceeding.

Amici are Californians who either are, or who have close friends and family members who are, members of a suspect class of persons for purposes of equal protection analysis. Amici thus have a vital interest in upholding the fundamental constitutional principle of equal protection of the laws, particularly with regard to strict scrutiny of measures affecting suspect classifications. Further, because religion is a suspect classification, any person can easily become a member of a suspect class simply by changing her or his religion. It is thus in the interest of all Californians that the foundational governmental principle of equal protection be preserved.

Amici are familiar with the questions involved in this case and believe there is necessity for additional argument. Specifically, discussion of this matter so far has been marked by confusion regarding the nature of the equal protection clause of the California constitution. Past court cases, as well as filings in the current case, have variously referred to the concept of equal protection as a "doctrine", "guarantee", "principle", "requirement", and "right". This conflicting terminology, and its irregular use in argument, has contributed to the uncertainty surrounding the question of whether Proposition 8 constitutes an amendment or revision of the California constitution. The accompanying brief clarifies the terminology and concepts involved in order to explain why Proposition 8 constitutes an improper revision of the California constitution.

INTRODUCTION

The primary question before this Court is whether an initiative constitutional change that explicitly denies a fundamental civil right to a suspect class of persons constitutes an amendment or revision of the California constitution. It is immaterial that the initiative measure at hand denies gay and lesbian citizens the right of marriage instead of denying women the right to own property. Interveners' continued mischaracterization of this measure as a simple definition of the institution of marriage contradicts this Court's findings in *In re Marriage Cases* (2008) 43 Cal.4th 757 and serves only to divert attention from the fundamental question that must be addressed. (Inter. Br. at p. 16 and other pages).

Central to this question is the nature of the equal protection clause in the California constitution. Past court cases, as well as filings in the current case, have variously referred to the concept of equal protection as a "doctrine", "guarantee", "principle", "requirement", and "right". This conflicting terminology, and its irregular use in argument, has contributed to the uncertainty surrounding the question of whether Proposition 8 constitutes an amendment or revision of the California constitution. This brief clarifies the terminology and concepts involved in order to explain why Proposition 8 constitutes an improper revision of the California constitution.

ARGUMENT

I. Equal Protection Is A Foundational Governing Principle, Not Just An Individual Right

Our nation, and the State of California, were founded upon the basic principle of equality of all citizens under the law. The Declaration of Independence states bluntly that "all men are created equal" (Declaration of Independence, para. 2 (U.S. 1776)). California's founding document, its first constitution, states just as clearly, "All laws of a general nature shall have a

uniform operation." (Cal. Const. of 1849, art.I, §11). This fundamental principle, strengthened and reworded over the course of the state's history, has been a critical and salient feature of the state's constitution and government ever since. Now known as "equal protection," the essence of this principle is that the state must apply the law equally and cannot give preference to one person or class of persons over another.

Far from being solely an individual right in and of itself, the equal protection principle, which provides that those rights that do exist must be granted equally to all people, encompasses all rights granted to the citizenry, whether these be among the fundamental inalienable rights guaranteed by the constitution, or other rights bestowed by the legislature or electorate. Equal protection is thus an underlying structural principle of government on a par with the basic tenet that inalienable rights exist at all, or the basic principle of representative government, or the nonestablishment of religion by the state.

A main source of confusion is that certain foundational governmental principles by their nature create individual or collective rights: the equal protection principle gives individuals the right to be treated equally under the law; a system of representative government necessarily confers the collective right of the people to elect representatives, and the nonestablishment of religion gives rise to the right to free exercise of religion.

As past cases have shown, individual or collective rights can be modified by initiative constitutional amendment; underlying principles, which form California's basic governmental framework, cannot. Determining when a limitation on a right strikes at the heart of the underlying principle from which it derives is the substance of the present question.

II. The Equal Protection Principle Is A Core Element Of California's Governmental Structure

Justice Kennard, in her concurring opinion in *In re Marriage Cases*, wrote "There is a reason why the words "Equal Justice Under Law" are inscribed above the entrance to the courthouse of the United States Supreme Court." The principle

of equal protection is a fundamental, enduring principle of our national government. It has been a fundamental, enduring principle of California's government as well. When California's constitution was rewritten in 1879, the clause mandating "uniform operation" of the laws was reworded as "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." (Cal. Const. of 1879, art.I, §21). In 1974, this principle was strengthened by the addition of the current language "A person may not be... denied equal protection of the laws" (Cal. Const., art.I, §7).

The foundational principle of equal protection is a distinguishing feature of our basic governmental plan. A governmental structure that includes separate branches of government with separation of powers, popular sovereignty and elected representatives, nonestablishment of religion, and certain inalienable rights is nonetheless profoundly deficient if these rights are not guaranteed to all with an equal protection principle. Indeed, one only needs to consider our own nation 200 years ago, when all of the above principles of government were in effect except the equal protection principle. Women and nonwhite men were completely denied equal status under the law, and as a direct result our society was radically different. It is through the gradual implementation of the equal protection principle over the last 200 years that we have been able to make such enormous progress toward a truly free and just society.

III. Proposition 8 Eviscerates The Equal Protection Principle

Proposition 8 devastates the equal protection principle by explicitly denying a fundamental right to a suspect class of persons, which is exactly what this principle was intended to prevent. The very substance of this principle does not provide for exceptions. To deny any fundamental right to any minority group effectively nullifies the equal protection principle. It is not possible for such a principle, whose essential meaning is equality for all, to be partially or approximately true.

Proposition 8 is equivalent to changing the equal protection clause to specify that all people are entitled to equal protection of the laws except that persons of Korean descent are not allowed to marry. Such a change constitutes the eradication of the original principle and its replacement by a new principle, that of unequal protection under the law (albeit in a configuration that is very close to equal protection).

It is crucial to distinguish between a limitation on a right and an assault on the underlying principle behind it. This distinction lies not in the "size" of the restriction (how many people are affected, or how much impact the restriction would have on their lives), but rather in whether the restriction directly contradicts or fundamentally subverts the express purpose or essential meaning of the principle. Thus, a provision forbidding the wearing of religious knives in public limits the free exercise of religion, but does not diminish the underlying principle of nonestablishment of religion. However, a prohibition on non-Christian religious services from 5:00pm to 5:10pm on December 25 would in fact strike at the very core of this principle.

Cases cited by the parties to this action are illustrative. In *Legislature v. Eu* (1991) 54 Cal.3d 492, Proposition 140, which among other provisions imposed term limits on legislators, was upheld as a valid initiative constitutional amendment. Term limits impose a restriction on the collective right of the people to elect representatives: they cannot elect a certain person to office more than a specified number of times, even if they unanimously agree that such person is the most suited of all candidates. However, this restriction does not substantially change the structure of the legislature or attack the fundamental principle of representative government. By contrast, an initiative proposition that sought to restrict this right by replacing a single elected legislator with a king, would.

In *Raven v. Deukmejian* (1990) 52 Cal.3d 336, this Court upheld as a legal amendment the portion of Proposition 115 that added to the constitution a provision denying a preliminary hearing to defendants charged by indictment, even after this Court had declared in a previous case (*Hawkins v. Superior Court*

(1978) 22 Cal.3d 584) that this constitutes a denial of equal protection rights. However, this modification of criminal procedure does not offend the foundational principle of equal protection because any person can be charged by either indictment or information and the unequal treatment in question is applied relative to the procedure, not the person charged. Thus, it no more strikes at this underlying principle than a law specifying that criminal defendants must appear in court while anyone not involved in a court case does not. These situations are easily distinguished from contrary examples such as the denial of preliminary hearings only to persons over six feet tall.

Intervenors cite numerous cases in which this Court upheld as valid amendments constitutional changes that diminished or even eliminated important fundamental rights, including equal protection rights. They cite no case in which an initiative constitutional amendment was allowed to modify, much less directly contradict, a foundational principle of California's government.

The manifestly subversive nature of Proposition 8 is absolutely clear. Proposition 8 cannot properly be viewed as simply limiting or defining the scope of equal protection rights. By expressly eliminating a fundamental right for only a particular group of people identified as a suspect class, Proposition 8 voids the equal protection principle entirely.

IV. The Alteration Of A Structural Principle of Government Constitutes A Revision Of The California Constitution

Recent cases have upheld this Court's historic finding in *Livermore v. Waite* (1894) 102 Cal. 113 that amendments cannot modify "the underlying principles" of the constitution. These cases are sufficiently discussed elsewhere (see for example Petitioners' Reply Brief at p.10-12) and are not treated further here.

As demonstrated above, by this test Proposition 8 is unquestionably a revision of the California constitution.

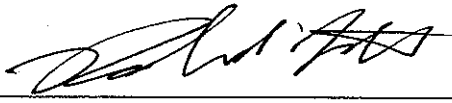
CONCLUSION

It is evident from a careful consideration of the distinction between foundational governing principles and the rights that they establish that Proposition 8 is an improper revision of the California constitution. This conclusion does not rest upon the assertion that equal protection rights "enjoy a special exemption from initiative amendments" (Inter. Br. at p.22). Nor does it focus exclusively on the issues of minority rights or suspect classifications, or rely in any way on forecasts of majoritarian tyranny that are conjectural or speculative.

For the reasons set forth above, this Court should declare that Proposition 8 is null and void.

Dated: January 14, 2009

Respectfully submitted,
Robert Lott
Attorney and amicus curiae

by: 

Robert Lott

CERTIFICATE OF WORD COUNT PURSUANT TO RULE OF COURT
8.520(c)

The number of words in this brief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 2102 as calculated by the computer program used to prepare the brief.

by: 
Robert Lott