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**APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE
BRIEF AND AMICUS CURIAE BRIEF OF CONSTITUTIONAL AND
CIVIL RIGHTS LAW PROFESSORS IN SUPPORT OF
PETITION FOR EXTRAORDINARY RELIEF**

Interveners.

Dennis Hollingsworth, et al.,

Respondents;

Mark B. Horton, as State Registrar of Vital Statistics, etc., et al.,

v.

Petitioners,

Karen L. Strauss, et al.,

STATE OF CALIFORNIA

IN THE SUPREME COURT OF THE
CLERK SUPREME COURT

JAN 15 2009

RECEIVED

Case No. S168047

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE
BRIEF AND STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to California Rule of Court 8.520(f), amici curiae hereby respectfully apply for permission to file an amicus curiae brief in support of Petitioners in this original writ proceeding. Amici urge this Court to grant the relief sought by Petitioners by declaring that Proposition 8 is null and void in its entirety.

Amici (listed below) are professors of law who teach at California law schools and/or are licensed to practice in the State of California. Amici's teaching, scholarship, and other work have been in the areas of constitutional law, civil rights, or the protection of rights belonging to members of groups against whom discrimination is constitutionally suspect. Collectively, amici's work reflects a deep respect and concern for the principles of equal protection, particularly as they apply to members of groups discriminated against on the basis of a classification warranting high levels of constitutional scrutiny. Amici have played a role in the development of constitutional and civil rights jurisprudence, and have an interest in the continuing cohesive and sound development of those laws. Amici therefore believe that their submission may aid the Court in assessing the petitions now before it.

No party or counsel for any party authored the attached amicus brief in whole or in part. Additionally, no party, counsel for any party, or any

other person or entity made any monetary contribution intended to fund the preparation or submission of the brief, other than the amici curiae or their counsel in this original writ proceeding.

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BRIEF OF AMICUS CURIAE
SUMMARY OF ARGUMENT

Proposition 8 represents the first time that the California initiative process has been wielded to abolish a fundamental freedom for an

unpopular minority group and to alter the Constitution so as to mandate

governmental discrimination against that group. In this way, Proposition 8

attempts to breach some of the most elemental textual and structural

promises of our state Constitution. It revokes a fundamental right that, in

the words of the Constitution, is "inalienable." It dismantles constitutional

equality for a single group of Californians – a group that, because of its

history of oppression and stigma, is entitled to the highest level of

constitutional protection against discrimination. Moreover, it overrides the

judiciary's core duty to test laws against the constitutional requirement of

equality by "smoking out" impermissible prejudice.

Such sweeping change in fundamental constitutional principles

cannot be made by way of simple majority vote. The California

Constitution is the written expression of the people's ground rules for how

we will govern ourselves, and what the government and its branches can

and cannot do. The Constitution itself, which is the ultimate expression of

¹ (*City of Richmond v. Croson* (1989) 488 U.S. 469, 493 (plur. opn. of O'Connor, J.))

the people's will, protects against simple majoritarian alteration of these

basic ground rules, for although it recognizes an avenue for direct

democracy, it also firmly dictates its limits. The Constitution limits the

initiative power to ensure that changes this fundamental may be

accomplished only through the multi-tiered process of debate, deliberation

and decision reflected in a legislative supermajority followed by electoral

approval, and never through unchecked majority rule. The requirements of

the revision process preserve the people's insistence on the protections of

formal discourse as a prerequisite of making momentous changes in our

basic form of governance.

As the Court repeatedly has recognized, even relatively simple

initiative enactments may substantially alter the underlying principles of the

Constitution or our system of government.² Proposition 8's impacts are

profound. If permitted to stand as an amendment, Proposition 8 would

establish that voters may freely use the initiative process to carve out

exceptions to the Constitution's equality principle for historically

stigmatized minorities, and to do so with regard to valued, important, and

personal fundamental rights – in this case, the right to marry the person of

² (See, e.g., *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 351-352; *Amador Valley J. Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 223; *People v. Frierson* (1979) 25 Cal.3d 142, 186-187.)

one's choice, (*In re Marriage Cases* (2008) 43 Cal.4th 757, 813-820)³ – thus abrogating inalienable rights so basic that “a government may [not] establish or abolish [them] as it sees fit.” (*Id.* at p. 818, fn. 41.) Such a conclusion would undermine bedrock constitutional concepts and materially impair – indeed, defeat – the judiciary’s unique and central role as the ultimate guardian of constitutional equality. Upholding Proposition 8 would tear the fabric of the equality principle itself, for it would validate the concept that vulnerable minorities have only a conditional and tentative entitlement to equality – an entitlement redeemable only unless and until a bare majority decides otherwise.

Over the last century, this Court has been called upon to evaluate asserted justifications for unequal treatment of certain disfavored minorities and to enforce the fundamental guarantees that protect the equal dignity and equal rights of vulnerable members of society. Repeatedly, the Court has exercised its “most fundamental” judicial role to analyze those concerns, to distinguish compelling need from irrational fear and prejudice, and to “preserve constitutional rights, whether of individual or minority, from obliteration by the majority.” (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.)

³ See Amicus Curiae Brief on Behalf of California Professors of Family Law.

