

Nos. S168047/S168066/S168078

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IN THE SUPREME COURT OF CALIFORNIA

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KAREN L. STRAUSS et al.,

*Petitioners,*

vs.

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

*Respondents.*

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ROBIN TYLER et al.,

*Petitioners,*

vs.

STATE OF CALIFORNIA et al.,

*Respondents.*

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CITY AND COUNTY OF SAN FRANCISCO et al.,

*Petitioners,*

vs.

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

*Respondents.*

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APPLICATION TO FILE BRIEF OF *AMICI CURIAE* CALIFORNIA  
COUNCIL OF CHURCHES, ET AL., PETITIONERS IN S168332; BRIEF  
OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS IN  
S1680471/S168066/S168078

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## APPLICATION TO FILE BRIEF OF *AMICI CURIAE*

The California Council of Churches, the Rt. Rev. Marc Handley Andrus, Episcopal Bishop of California, the Rt. Rev. J. Jon Bruno, Episcopal Bishop of Los Angeles, General Synod of the United Church of Christ, Northern California Nevada Conference of the United Church of Christ, Southern California Nevada Conference of the United Church of Christ, Progressive Jewish Alliance, Unitarian Universalist Association of Congregations, and Unitarian Universalist Legislative Ministry California as petitioners in *California Council of Churches, et al. v. Horton, et al.*, No. S168332, respectfully seek leave to file the accompanying brief of *amici curiae* supporting three petitions for a writ of mandate enjoining respondent officers of the State of California from giving effect to Proposition 8.

*Amici curiae* filed their own writ petition challenging Proposition 8 on November 17, 2008. On November 20, 2008 this court deferred action on that petition, and invited the petitioners “to file an application to file an *amicus curiae* brief, accompanied by the proposed brief,” in cases numbered S168047, S168066, and S168078. (*California Council of Churches v. Horton*, No. S168332, Order (Nov. 20, 2008).)

*Amici curiae* accordingly submit this application to file the accompanying brief of *amici curiae*, which is bound herewith.

## I. INTRODUCTION

*Marriage Cases* held that the right to marry is firmly grounded in rights declared “inalienable” by article I, section 1 of the California Constitution, and that depriving same-sex couples of this inalienable right violates the bedrock principle of equal protection of the laws protected by article I, section 7. (*In re Marriage Cases* (2008) 43 Cal.4th 757.)

Not even the electorate can take away these sacrosanct rights on a whim. At the very least, article XVIII of the California Constitution requires a two-thirds vote of the Legislature, or a constitutional convention, before a historically disfavored minority may be deprived of equal protection of the laws with regard to “inalienable” rights. Additionally, as the Attorney General asserts, an initiative that targets constitutionally “inalienable” rights must survive strict scrutiny if those rights are to amount to anything. This Proposition 8 cannot do.

Proposition 8, which passed by a relatively narrow margin on November 4, 2008, purports to do something unprecedented in California by changing our state Constitution to undermine a fundamental constitutional and human-rights principle – the right of all citizens to equal protection of the laws – by withdrawing that right from some of those citizens, in order to deprive them of a constitutionally inalienable right. The California Constitution, however, provides safeguards against such threats to equal protection: Under article XVIII, such a dramatic qualitative change is a “revision” which cannot

occur by initiative but instead requires a two-thirds vote of the Legislature, or a constitutional convention, followed by a vote of the people. In this way, the California Constitution insulates its guarantee of equal protection from the passions of popular prejudice that occasionally creep into the political process – much like the United States Constitution ensures the endurance of the federal guarantee of equal protection by requiring a three-fourths vote of state legislatures or conventions to amend the Bill of Rights. (See U.S. Const., art. V.)

*Amici curiae* religious institutions, their member congregations, and parishioners count on article XVIII to ensure that the California Constitution's guarantee of equal protection for *religious minorities* cannot be taken away without a deliberative process of the utmost care possible in a representative democracy. If Proposition 8 is upheld, however, that assurance will disappear – for, just as surely as same-sex couples could be deprived of equal protection by a simple majority vote, so too could religious minorities be deprived of equal protection – a terrible irony in a nation founded by people who emigrated to escape religious persecution. *Amici curiae* seek this court's invalidation of Proposition 8 because of past experience and fear for the future – the experience of historical persecution against religious minorities, and the fear that it could happen again, here in California, if a path is cleared for an initiative-based selective deprivation of equal protection.

## II. IDENTITY AND INTEREST OF *AMICI CURIAE*

As explained below, *amici curiae* have a profound interest in the continuing vitality and integrity of the equality guarantees of the California Constitution and of the safeguard against hasty or improvident changes to our state Constitution established by article XVIII, which prohibits the use of the initiative process for a constitutional change of the magnitude of Proposition 8.

### A. Identity of *Amici Curiae*

The identities of petitioners in No. S168322, seeking leave now to appear here as *amici curiae*, are as follows:

1. *Amicus curiae* **California Council of Churches** is an organization of California's Christian churches that traces its history to a gathering at San Francisco's Central Methodist Church where, on January 28, 1913, twenty delegates from several county and city church federations organized a statewide California Church Federation, with a constitution declaring: "In the providence of God, the time has come more fully to manifest the essential oneness of the Christian Churches of America in Jesus Christ as their Divine Lord and Savior, and to promote the spirit of fellowship, service and cooperation among them." The Council today is a leading voice representing the theological diversity in the state's mainstream and progressive communities of faith. Its membership includes 51 denominations and judicatories in California, representing over 4,000 congregations and more

than 1.5 million members drawn from the mainstream Protestant and Orthodox Christian communities, as well as allies from other faith traditions. They include: **American Baptist Churches** (American Baptist Churches of the West; Pacific Southwest Region); **African Methodist Episcopal Church** (Fifth Episcopal District); **African Methodist Episcopal Zion Church**; **Armenian Church of America** (Western Diocese of the Armenian Church); **Christian Methodist Episcopal Church** (Ninth Episcopal District); **Church of the Brethren** (Pacific Southwest District); **Christian Church (Disciples of Christ)** (Northern California-Nevada Region; Pacific Southwest Region); **Community of Christ**; **The Episcopal Church** (Episcopal Diocese of California; Episcopal Diocese of El Camino Real; Episcopal Diocese of Los Angeles; Episcopal Diocese of Northern California; Episcopal Diocese of San Diego; Episcopal Diocese of San Joaquin); **Ethiopian Orthodox Church**; **Evangelical Lutheran Church in America** (Pacifica Synod; Sierra Pacific Synod; Southwest California Synod); **Greek Orthodox Church** (Orthodox Diocese of San Francisco); **Independent Catholic Churches International**; **Moravian Church**; **National Baptist Convention**; **Presbyterian Church (U.S.A.)** (Presbytery of Los Ranchos; Presbytery of the Pacific; Presbytery of the Redwoods; Presbytery of Riverside; Presbytery of Sacramento; Presbytery of San Diego; Presbytery of San Fernando; Presbytery of San Francisco; Presbytery of San Gabriel; Presbytery of San Joaquin; Presbytery of San Jose; Presbytery of Santa Barbara; Presbytery of Stockton; Sierra Mission

