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FELLOW

November 10, 2008

VIA HAND DELIVERY

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

RE: *Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmond Wu, James Tolen and Equality California 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*
California Supreme Court Case No. S168047

**Amici Curiae Letter in Support of Petition for Extraordinary Relief,
Including Writ of Mandate and Request for Immediate Injunctive Relief**

To The Honorable Chief Justice and Associate Justices:

We write on behalf of the Bar Association of San Francisco (“BASF”), Legal Aid Society – Employment Law Center (“LAS-ELC”), Lawyers’ Committee for Civil Rights of the San Francisco Bay Area (“LCCR”), and the Impact Fund (collectively “amici”). Amici respectfully submit this letter to urge the Court to grant the Petition for a Writ of Mandate in the above-referenced case.

We write to emphasize the grave threat Proposition 8 poses to the future of our State’s constitutional guarantee of equal protection. There is no meaningful difference between permitting a majority of the State’s voters to pass an initiative that denies equal protection of the law to a class of individuals with respect to a fundamental right, and permitting the voters to

remove the equal protection guarantee from the Constitution altogether. The equal protection guarantee mandates equal treatment for all. Creating “exceptions” to this guarantee renders it meaningless—not only for gay and lesbian individuals, but for everyone. Consistent with our State’s Constitution, equal treatment cannot be rationed out only to groups favored by the majority of voters. In fact, the central purpose of the equal protection guarantee is to protect minority groups from the whims of the majority. Because Proposition 8 would eviscerate this “preexisting fundamental principle of constitutional jurisprudence” (*Raven v. Deukmejian* (1990) 52 Cal. 3d 336, 354) – that all individuals are entitled to equal protection under the law – it may not be enacted by a simple majority of the voters.

Proposition 8 would also “substantially alter[.]” California’s “preexisting constitutional scheme” in two other important aspects. *Id.* Proposition 8 would radically change the definition of a “fundamental right” as one enjoyed by all individuals to one enjoyed by some, as decided by the majority of voters. And Proposition 8 would strip the courts of their ability to enforce the guarantee of equal protection with respect to a fundamental right belonging to a protected class. This encroachment on the courts’ role offends the core principle of separation of powers that is embedded in our State’s Constitution.

Because Proposition 8 would shatter existing principles of equal protection and fundamental rights, as well as the judicial branch’s role as final arbiter of these constitutional guarantees, it constitutes a revision of the Constitution. As such, it may not be enacted by a simple majority of the voters.

Interest of the Amici Curiae

Amici are familiar with the issues in this case and wholeheartedly support the position and the arguments of the Petitioners. Amici are primarily organizations of lawyers, who regularly rely on the courts to enforce the Constitution’s guarantee of equal protection and fundamental rights for their clients and have a particular interest in insuring the vitality of the courts’ continued role in enforcing the constitutional guarantee of equal protection.

BASF is a nonprofit voluntary membership organization of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, BASF enjoys the support of more than 7,500 individuals, as well as 400 sponsor firms, corporations, and law schools. BASF’s interest in having courts ensure equal protection under the law is central to its mission. Through its board of directors, its committees, and its volunteer legal services programs and other community efforts, BASF has worked actively to promote and achieve equal justice for all and to oppose discrimination in all its forms, including, but not limited to, discrimination based on race, sex, disability, and sexual orientation. BASF provides a collective voice for public

advocacy and pioneers constructive change in society. It filed *amicus curiae* briefs with this Court in *In re Marriage Cases*, Case No. S147999, and *Bennett v. Bowen*, Case No. S164520.

LCCR is a civil rights and legal services organization dedicated to advancing the rights of people of color, low-income people, immigrants and refugees, and other minority groups and individuals. Founded in 1968 by leading members of the San Francisco bar, the Committee is the local affiliate of the national Lawyers' Committee for Civil Rights under Law, which was founded in 1963 at the behest of President Kennedy. The Lawyers' Committee has, since its inception, been actively involved in promoting the principles of equal protection and ensuring the protection of minority rights. It has litigated numerous discrimination and equal protection cases, often as co-counsel with the private bar. In addition, the Lawyers' Committee has advocated at the local, state, and national levels for legislation and policies that promote equal opportunity for all. It filed an *amicus curiae* brief with this Court in *Bennett v. Bowen*, Case No. S164520.

LAS-ELC is a non-profit public interest law firm that advocates to improve the working lives of disadvantaged people. Since 1970, LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, lesbian, gay, bisexual and transgendered people, and the working poor. In representing the interests of these groups, LAS-ELC frequently relies upon the fundamental rights afforded individuals and minorities found in Article I of the State Constitution. Accordingly, LAS-ELC has a long-standing interest in preserving these core protections, which should be upheld in the face of majoritarian power. LAS-ELC has appeared before this Court, and the United States Supreme Court, on numerous occasions, both as counsel for plaintiffs as well as in an *amicus curiae* capacity. LAS-ELC filed an *amicus curiae* brief with this Court in *Bennett v. Bowen*, Case No. S164520.

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country, assisting in civil rights cases. It offers training programs, advice and counseling, and *amicus* and direct representation. The Impact Fund often represents individuals who are relying on the courts to ensure that they are accorded equal protection under the law. It has appeared in numerous cases before this Court, including *Frye v. Tenderloin Housing Clinic* (2006) 38 Cal.4th 23, and *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319. It is a California State Bar Legal Services Trust Fund Support Center, providing services to legal services projects across the state. It filed an *amicus curiae* brief with this Court in *Bennett v. Bowen*, Case No. S164520.

**Proposition 8 Is a Revision of the State Constitution that
May Not Be Enacted Through the Initiative Process.**

The California Constitution may be revised only through a constitutional convention and popular ratification, or by approval of a two-thirds majority of the Legislature followed by popular ratification. (Cal. Const., art. XVIII, §§1-3.) A proposition revises the Constitution where it “accomplish[es] . . . far reaching changes in the nature of our basic governmental plan.” *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 223. Where, as does Proposition 8, an initiative “substantially alters the preexisting constitutional scheme or framework,” and contradicts well-established principles of constitutional jurisprudence (*Raven*, 52 Cal.3d at 354-55), it is a revision of the Constitution that may not be enacted by a simple majority vote.

Amici do not repeat the many meritorious arguments made by Petitioners regarding why Proposition 8 must be regarded as a fundamental revision, rather than a mere amendment, to the California Constitution. We join in those arguments, and here make three brief points regarding the profound effect that Proposition 8 would have on the nature of our Constitution and on the role of the courts as the branch of government charged with ensuring equal protection under the law.

I. Proposition 8 Would Eviscerate the Constitutional Guarantee of Equal Protection.

If Proposition 8 is permitted to take effect, it would eviscerate the California Constitution’s fundamental guarantee of equal protection under law.

There can be no doubt that an initiative that sought to repeal the Constitution’s equal protection guarantee entirely would be deemed a “revision” of the Constitution and could not be enacted by a simple majority vote. Yet there is no conceptual difference between such a measure and one that denies equal protection to a class of individuals with respect to a fundamental right.

As detailed in Petitioners’ opening brief, and in the brief of petitioners in *City and County of San Francisco, et al. v. Horton, et al.*, Case No. S168078, the guarantee of equal protection is fundamental to the California Constitution. Article I, section 7(a) of the Constitution provides that a person may not be “denied equal protection of the laws” Article I, section 7(b) provides that “[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.” The principle that a minority group may not be subject to laws that are not applicable to all is a cornerstone of the Constitution:

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“The framers of the Constitution knew, and we should not forget today, 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*. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.”

Hays v. Wood (1979) 25 Cal.3d 772, 786-87 (quoting *Railway Express v. New York* (1949) 336 U.S. 106, 112-13 (Jackson, J., conc. op.) (emphasis added); see also *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 902-03 (Lucas, C. J., concurring) (role of Constitution is to “safeguard[] individual rights and liberties”).

Proposition 8 would add language to the California Constitution that denies the fundamental right of marriage to a minority group – gay and lesbian individuals. This Court has already held that a statutory provision, with language identical to that of Proposition 8, violated the Constitution’s guarantee of equal protection. *In re Marriage Cases* (2008) 43 Cal. 4th 757, 856-57. Proposition 8 would thus embed in our State’s Constitution a requirement that a class of individuals be treated differently than others with respect to a fundamental right.

Proposition 8’s requirement of disparate treatment for gay and lesbian individuals cannot be reconciled with the guarantee of equal protection. The very nature of the equal protection guarantee is that all individuals – including those belonging to minority groups – must be treated equally in the eyes of the law. Proposition 8 eviscerates the core of the equal protection guarantee by attempting to carve out an exception for a particular minority group, when the very essence of equal protection brooks no exceptions.

Respondents may argue that the people should be permitted to define the scope of the Constitution’s equal protection clause, just as the voters were able to define the scope of the prohibition on cruel and unusual punishment and reinstate the death penalty in *People v. Frierson* (1979) 25 Cal.3d 142, 186-87. But the proposition at issue in *Frierson* did not target a suspect classification or terminate a fundamental right, nor did it eliminate the prohibition on cruel and unusual punishment, but merely defined its scope. And “[c]ruelty’ is not definable with precision. It is in the eye of the beholder: what may be perceived as cruelty by one person is seen as justice by another. Thus, this court, in ascertaining the permissible limits of punishment, must look in the first instance to those values to which the people of our state subscribe.” *Frierson*, 25 Cal. 3d at 189 (Mosk, J., conc.). Equality is not such a malleable concept. The right of gay and lesbian individuals to equal protection is not dependent on society’s increasing

acceptance of them. *In re Marriage Cases*, 43 Cal. 4th at 822. And no reasonable interpretation of Proposition 8 can deny that it treats gay and lesbian individuals differently, and less equally, than others, by denying them the fundamental right to marry the person they love. *See id.* at 831, 839-40. Because the core promise of the equal protection guarantee is that all individuals will be treated the same, creating an exception for a particular minority group makes illusory the equal protection clause for all of us.

Finally, we note that it is no answer to suggest that the federal constitution's equal protection clause will somehow fill the hole Proposition 8 makes in the State Constitution's guarantee of equal protection. California's "state equal protection provisions, while substantially the equivalent of the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality," and, "in a given case," the state provisions "may demand an analysis different from that which would obtain if only the federal standard were applicable." *Serrano v. Priest* (1976) 18 Cal.3d 728, 764; *see also People v. Brisendine* (1975) 13 Cal.3d 528, 549-50 ("[T]he California Constitution is, and always has been, a document of independent force. Any other result would contradict not only the most fundamental principles of federalism but also the historic bases of state charters."). For example, the State Constitution examines certain classifications under the lens of strict scrutiny that are accorded only intermediate scrutiny in federal equal protection analysis. *In re Marriage Cases*, 43 Cal. 4th at 843-44.

If Proposition 8 is allowed to stand, it would devastate the principle of equal protection that is at the core of our State's constitutional scheme. Such a ground-altering change may not be accomplished through a simple majority vote, and must be subject to the more deliberative process reserved for constitutional revisions.

II. Proposition 8 Would Alter Radically the Constitutional Principle that Fundamental Rights Must Be Guaranteed to *All* Individuals.

Proposition 8 would not only alter the fundamental principle of equal protection of the law, but it would do so by denying gay and lesbian individuals a right that this Court has deemed "fundamental." *See In re Marriage Cases*, 43 Cal. 4th at 781 (identifying marriage as "one of the fundamental constitutional rights embodied in the California Constitution").

As this Court recently explained, the very nature of a fundamental right is that it cannot be "withheld from a class of persons" (*id.* at 824); instead, it must be guaranteed to "*all.*" *Id.* at 820 (emphasis in original). Thus, under the Constitution, none of the protections set forth in the Declaration of Rights are limited to any particular class of people; nor do any of the existing rights exclude particular individuals from their protection.

Proposition 8 would eviscerate this core principle by making a fundamental right available only to a circumscribed group of people. The immediate impact of Proposition 8 would be to deny gays and lesbians the fundamental right to marry the person of one's choice. But permitting such an amendment without the more deliberative process required for revisions of the Constitution would alter the very nature of the Declaration of Rights: any person or group could be stripped of fundamental rights by a simple majority vote. See *In re Marriage Cases*, 43 Cal.4th at 852 (describing the Bill of Rights as "plac[ing] [certain subjects] beyond the reach of majorities") (internal quotation marks omitted); see also Peter J. Galie and Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process* (1996) 1 Hofstra L. & Pol'y Symp. 27, 46 (warning that the initiative process risks becoming a "mechanism allowing a tyrannous majority, inflamed by prejudice or temporary hysteria, to deprive minorities of basic rights"). Proposition 8 would thus strike at the core "underlying principles" of the Constitution (*McFadden v. Jordan* (1948) 32 Cal. 2d 330, 333), and may only be enacted as a revision to the Constitution.

III. Proposition 8 Would Substantially Alter the State Constitutional Scheme, Which Provides that the Judiciary is the Final Arbiter of the Constitutional Guarantees of Equal Protection and Fundamental Rights.

Proposition 8 would radically encroach on the powers vested in the judicial branch by the California Constitution. Our government is a majoritarian one, but one that relies on a system of "checks and balances to protect any one branch against the overreaching of any other branch." *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141. "The judiciary, from the very nature of its powers and means given it by the Constitution, must possess the right to construe the Constitution in the last resort" *Raven*, 52 Cal.3d at 354 (quoting *Nogues v. Douglass* (1858) 7 Cal. 65, 69-70). The judiciary must be permitted to exercise independent judgment in construing and enforcing the Constitution. *Id.*

One of the most "fundamental" protections is the courts' authority to "preserve constitutional rights, whether of individual or minority, from obliteration by the majority." *Bixby*, 4 Cal.3d at 141. As early as 1899, this Court explained:

The same constitution that lays down the fundamental law of our state and prohibits legislatures from going outside the powers and limitations therein contained, created the courts, and provided that they should stand as the guardians of the people, and lay their restraining hands upon the legislature in all cases where it has plainly violated the provisions of the people's charter of rights.

Johnson v. Goodyear Min. Co. (1899) 127 Cal. 4, 7.

It is this Court's duty to consider whether classifications offend the equal protection clause of the California Constitution. Where a classification involves a "suspect classification[]" or touch[es] on 'fundamental interests[,]'. . . courts adopt 'an attitude of active and critical analysis, subjecting the classifications to strict scrutiny.'" *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 480 (quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 17); *see also Kasler*, 23 Cal.4th at 515 (Kennard, J., dissenting op.) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts must ascertain] the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause.") (quoting *Romer v. Evans* (1996) 517 U.S. 620, 632).

Proposition 8 would prevent the courts from fulfilling their constitutional role of scrutinizing suspect classifications and protecting fundamental rights. The removal of these tenets that are so central to our constitutional system from the courts' purview is an encroachment on the judicial powers that may not be effected through a simple constitutional amendment.

In *Raven*, this Court held that a proposition was a revision where it would have removed from the judiciary the right to construe the Constitution in criminal cases with respect to certain rights. 52 Cal.3d at 354-55. The proposition in *Raven* provided that, with respect to criminal defendants only, the State Constitution could not be interpreted to provide greater rights than those afforded by the United States Constitution. *Id.* at 352. The Court found that the amendment was a "broad attack on state court authority to exercise independent judgment" in construing rights guaranteed under the State Constitution. *Id.* at 355. As such, the proposition was an invalid revision, and could not be enacted by popular vote. *Id.* at 355-56.

Although Proposition 8 does not so explicitly constrain the courts' independent judgment, it has the exact same effect, and commands courts to read an exception into the equal protection guarantee with respect to the fundamental right to marriage of gay and lesbian individuals. By stripping the courts of the authority to interpret and enforce the Constitution's guarantee of equal protection and fundamental rights, Proposition 8 alters the balance of powers between the branches of government required by the Constitution. That it does so with respect to a minority group that this Court has ruled must be afforded strict scrutiny, and with respect to a right this Court deemed fundamental, only more starkly demonstrates why this is a significant alteration in the State's constitutional scheme.

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Conclusion

For the foregoing reasons, amici respectfully urge this Court to grant the relief sought in the Petition for Extraordinary Relief.

Dated: November 10, 2008

Respectfully submitted,

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PROOF OF SERVICE

I, Sally Mendez, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 177 Post Street, Suite 300, San Francisco, CA 94108. On November 10, 2008, I served the document listed below on the interested parties in this action in the manner indicated below:

Amici Curiae Letter in Support of Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief

[X] **BY 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.

SEE ATTACHED SERVICE LIST

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 10, 2008, at San Francisco, California.



Sally Mendez

SERVICE LIST

Strauss v. Horton

California Supreme Court Case No. S168047

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