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NEWS RELEASE

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Herrera Joined by Los Angeles, Santa Clara Counterparts in Suing to Invalidate Prop 8

Leader of S.F.'s original constitutional challenge says amendment 'if allowed to stand…devastates the principle of equal protection'

SAN FRANCISCO (Nov. 5, 2008)—City Attorney Dennis Herrera today joined Los Angeles City Attorney Rocky Delgadillo and Santa Clara County Counsel Anne C. Ravel in filing a petition for a writ of mandate with the California Supreme Court to invalidate Proposition 8, an initiative constitutional amendment that intends to strip gay and lesbian citizens of their fundamental right to marry in California. The ##-page suit filed with the high court in San Francisco this afternoon argues that the California Constitution's equal protection provisions do not allow a bare majority of voters to use the amendment process to divest politically disfavored groups of constitutional rights. Such a sweeping redefinition of equal protection would require a constitutional revision rather than a mere amendment, the petition argues. Article XVIII of the California Constitution provides that a constitutional revision may only be accomplished by a constitutional convention and popular ratification, or by legislative submission to the electorate.

Today's civil action by city and county governments follows a similar action filed earlier in the day by the National Center for Lesbian Rights on behalf of same-sex couples. Herrera pledged to lead an aggressive effort to enlist additional support in the civil litigation from other California cities and counties.

"The issue before the court today is of far greater consequence than marriage equality alone," Herrera said. "Equal protection of the laws is not merely the cornerstone of the California Constitution, it is what separates constitutional democracy from mob rule tyranny. If allowed to stand, Prop 8 so devastates the principle of equal protection that it endangers the fundamental rights of *any* potential electoral minority—even for protected classes based on race, religion, national origin and gender. The proponents of Prop 8 waged a ruthless campaign of falsehood and fear, funded by millions of dollars from out-of-state interest groups. Make no mistake that their success in California has dramatically raised the stakes. What began as a struggle for marriage equality is today a fight for equality itself. I am confident that our high court will again demonstrate its principled independence in recognizing this danger, and in reasserting our constitution's promise of equality under the law."

Herrera represented the City and County of San Francisco as a lead plaintiff in the original legal challenge that resulted in the landmark state Supreme Court decision earlier this year recognizing marriage as a fundamental right guaranteed to all Californians, "whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples." More than simply toppling a marriage exclusion that discriminated against millions of gay men and lesbians, the high court's May 15, 2008 ruling established gays and

[MORE]

lesbians as a suspect class under the California Constitution's equal protection clause, including it among protected classes subject to a standard of strict scrutiny for judicial review.

The City and County of San Francisco was the first government entity in American history ever to sue for marriage equality, asserting in its March 2004 constitutional challenge a broad societal interest to strike down the marriage exclusion in California statutes. By the time the marriage cases were finally decided by the state high court more than four years later, fully twenty-one California cities and counties had joined San Francisco in support of marriage equality for same-sex partners. In total, some 7 of the state's 8 largest cities united for the successful effort: Los Angeles, San Diego, San Jose, San Francisco, Long Beach, Sacramento and Oakland. Herrera has pledged a similar effort in the lawsuit filed today by San Francisco, Santa Clara County and the City of Los Angeles to enlist additional support and participation from other California cities and counties.

# # #

SUPREME COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, THE COUNTY OF SANTA CLARA, and THE CITY OF LOS ANGELES, Petitioners, vs. MARK B. HORTON, in his official capacity as State Registrar of Vital Statistics, LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning of the California Department of Public Health, and EDMUND G. BROWN JR., in his offficial capacity as Attorney General for the State of California Respondents.	Case No.

PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KAREN HONG YEE

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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 the California Rule of Court 8.208(e).

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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 the City and County of San Francisco, the County of Santa Clara, and the City of Los Angeles (collectively, "Petitioners") hereby seek a peremptory writ of mandate 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 measure designated on the November 4, 2008 ballot as Proposition 8 ("Proposition 8").

2. This Petition is brought on the ground that the California Constitution does not allow a bare majority of voters to divest a politically unpopular group of rights conferred by the equal protection clause. Thus, Proposition 8 is not a valid constitutional amendment.

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. As explained more fully in the accompanying Memorandum of Points and Authorities, the issues presented by this Petition are of great public importance and should be resolved promptly. 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 the City and County of San Francisco ("San Francisco") is a charter city and county organized and existing under the Constitution and laws of the State of California.

6. Petitioner the County of Santa Clara ("Santa Clara") is a charter county organized and existing under the Constitution and laws of the State of California.

7. Petitioner the City of Los Angeles ("Los Angeles") is a charter city organized and existing under the Constitution and laws of the State of California.

8. Respondent Dr. Mark B. Horton ("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.

9. Respondent Dr. Linette Scott ("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.

10. 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

11. On May 15, 2008, this Court issued its opinion in *In re Marriage Cases*, 43 Cal. 4th 757 (2008). That decision held that the 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. This Court concluded that gay and lesbian couples have a fundamental right to marry to the same extent as opposite-sex couples.

12. Proposition 8 appeared on the ballot for the November 4, 2008 election. As of the morning of November 5, 2008, news reports indicate that California voters narrowly approved Proposition 8. Although the final outcome of the election is still uncertain, the allegations in this Petition assume that Proposition 8 has passed.

13. Proposition 8 alters Article I of the California Constitution by adding: "SEC. 7.5. Only marriage between a man and a woman is valid or recognized in California." By its terms, Proposition 8 purports to strip a constitutionally protected minority group of the fundamental right to marry even though that right was previously conferred by the equal protection clause of the California Constitution.

CLAIMS ASSERTED

14. Proposition 8 is invalid under the California Constitution because the initiative power does not permit voters to divest a politically unpopular group of rights conferred by the equal protection clause. A transfer of the final authority to enforce the equal protection clause from the judiciary to a political majority can only occur by revision. The Constitution, however, has never been revised to remove final authority to enforce the equal protection clause from the judiciary. Hence, Respondents have a ministerial legal duty to continue to administer the marriage laws in conformance with the Court's judgment in *In re Marriage Cases*, and not to implement, enforce, or apply Proposition 8.

15. 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. Petitioner San Francisco faces inconsistent obligations under state law because it cannot comply with Proposition 8 without violating the equal protection rights of its residents. In addition, denial of the right of same-sex couples to marry would have an adverse financial impact on San Francisco. Finally, San Francisco is on the forefront of the struggle for equality for gay and lesbians and would be harmed if required to act in contravention of lesbian and gay rights. San Francisco thus has a beneficial interest in Respondents' compliance with their ministerial duty not to implement, enforce, or apply Proposition 8.

16. Petitioner Santa Clara has a beneficial interest in Respondents' compliance with their ministerial duty not to implement, enforce, or apply Proposition 8. If implemented, Proposition 8 would force Santa Clara to violate the constitutional rights of its residents by denying

them marriage licenses. Santa Clara has an interest in protecting the rights of its residents and would be harmed if required to act in contravention of the rights of its lesbian and gay residents.

17. Petitioner Los Angeles has a beneficial interest in Respondents' compliance with their ministerial duty not to implement, enforce, or apply Proposition 8. Los Angeles has an interest in protecting the rights of its residents and would be harmed if required to act in contravention of the rights of its lesbian and gay residents.

18. 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 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 an alternative 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;

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, Therese M. Stewart, declare:

I am an attorney for the City and County of San Francisco in the above-entitled action. I have read the foregoing Petition for Writ of Mandate and know the contents thereof. I am informed, believe and allege based on said information and belief that the contents are true.

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

Executed on November 5, 2008 at San Francisco, California.

Signed: _____

THERESE M. STEWART

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

There is arguably no aspect of our constitutional democracy more deeply rooted than equal protection of the laws. And central to that principle is a neutral judiciary that protects minority groups from adverse treatment by political majorities. Without a judiciary that has the final word on equal protection, there simply is *no such thing* as equal protection.

Against this backdrop, Proposition 8 seeks to overturn this Court's ruling that the denial of marriage licenses to same-sex couples violates their right to equal protection. Accordingly, this case presents a question of first impression: whether the California Constitution allows a bare majority of voters to divest a politically unpopular group of rights conferred by the equal protection clause. The answer is no.

Respondents may argue that when the Constitution was changed in 1911 to create the initiative power, this gave a bare majority of voters the power to trump the will of the judiciary on matters of equal protection. It is certainly true that, in the wake of the 1911 change, a simple majority may take away *some* constitutional rights. For example, a popular majority has amended the Constitution to restore the death penalty, reversing this Court's prior holding that the death penalty violates the cruel and unusual punishment clause. However, the cruel and unusual punishment clause *requires* the judiciary to assess popular opinion when determining if a punishment is "cruel" or "unusual." Therefore, a rule allowing a bare majority to give meaning to that clause is not inherently incongruent with our constitutional structure.

Equal protection, on the other hand, exists to protect minorities against the whims and prejudices of political majorities. It is, by its very definition, countermajoritarian and uniquely dependent on judicial review for its enforcement. Giving a bare political majority final say over the meaning of the equal protection clause would eviscerate it. And that would be inconsistent with the constitutional structure established long ago in this State. Thus, for Proposition 8 to be upheld as a valid enactment, this Court would have to conclude that, at some point in California's history, our Constitution was *revised* to change equal protection from a countermajoritarian principle enforceable by a neutral judiciary to a vehicle for expression of the majority's will. A revision, as opposed to a mere amendment, cannot be adopted simply by majority vote. Because revisions involve structural changes to our constitutional system, they "require more formality, discussion and deliberation than is available through the initiative process." *Raven v. Deukmejian*, 52 Cal. 3d 336, 350 (1990).

The 1911 amendment to the Constitution cannot be construed to have eviscerated the principle of equal protection, because it was adopted through the amendment process, not the revision process. Nor at any other point in history has our Constitution been revised to eviscerate equal protection. On the contrary, it has always been the case in California that the judiciary is the final arbiter of equal protection rights – and that it exercises independence in applying our state equal protection provisions – fulfilling its critical role as the final bulwark against discrimination. If that were not true, a bare majority could have amended the Constitution to overturn this Court's decisions in *Sail'er Inn v. Kirby*, 5 Cal. 3d 1 (1971), protecting women from discrimination in employment, *Gay Law Students Association v. Pacific Telephone & Telegraph Co*., 24 Cal. 3d 458 (1979),

protecting lesbians and gay men from discrimination in employment, *Butt v. State of California*, 4 Cal. 4th 668 (1992), protecting children in public schools from being denied equality in education, or any number of its other equal protection rulings. To suggest that our system allows a bare majority of voters to veto the rulings of this Court on these critical equal protection questions is to degrade the California judiciary's long and proud history of protecting the rights of minorities.

In sum, the Constitution does not presently authorize a bare political majority to take away equal protection rights of unpopular minorities. Under our current system, equal protection is guaranteed by reserving to the judiciary – because of its capacity to withstand political opposition – the final say in interpretation and enforcement of the principle of equal protection. If the people of California wish to upend our system of justice so as to make a bare majority, rather than the courts, the final arbiter of equal protection rights, they must *revise the Constitution to make such a change*. A revision of this kind is a necessary precursor to the enactment of measures like Proposition 8. Because no such revision has yet taken place, and because Proposition 8 seeks to deny a politically unpopular group the cherished right to marry in defiance of this Court's equal protection ruling, *see In Re Marriage Cases*, 43 Cal. 4th 757, 831-47 (2008), it is an invalid exercise of the initiative power.

JURISDICTION

Post-election challenges to ballot measures are appropriate for resolution through the exercise of this Court's original jurisdiction when they raise issues of "great public importance and should be resolved promptly." *Legislature v. Eu*, 54 Cal. 3d 492, 500 (1991) (quoting *Raven*, 52 Cal. 3d at 340). *See also Brosnahan v. Brown*, 32 Cal. 3d 236, 241

(1982); *Amador Valley Joint Union High School Dist. v. State Board of Equalization*, 22 Cal. 3d 208, 219 (1978). This case satisfies that standard. It raises questions of great public importance about the very structure of our constitutional democracy. Does the judiciary retain the power to guard the equal protection rights of unpopular groups in the face of popular opposition? Or has the principle of equal protection been transformed from the final bulwark against discrimination to merely a mechanism for the expression of the popular will? The public importance of this question extends to the lives of all who are, or might become, members of any minority group, in this generation and in future ones.

These issues are best resolved promptly because Proposition 8 eliminates the opportunity for same-sex couples to exercise the cherished right to marry. As stated by Justice Kennard back in 2004, "[i]ndividuals in loving same-sex relationships have waited years, sometimes several decades, for a chance to wed, yearning to obtain the public validation that only marriage can give." *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1132 (2004) (Kennard, J., concurring and dissenting). That statement is no less true now than it was then, as evidenced by the thousands of same-sex couples who rushed to marry in San Francisco before the election, and the joy and emotion they experienced in doing so. *See generally* Declaration of Karen Hong Yee in Support of Petition for a Writ of Mandate. Taking this right away from future would-be spouses inflicts devastating personal harm upon them, because it is "likely to be viewed as reflecting an official view that their committed relationships are of lesser stature than the comparable relationships of opposite-sex couples." *In re Marriage Cases*, 43 Cal. 4th 757, 784 (2008). Such an official statement of discrimination by the government should not be allowed to

stand during the years that the normal process of judicial review would likely take.

DISCUSSION

I. EQUAL PROTECTION OF THE LAWS IS A FOUNDATIONAL PRINCIPLE OF OUR CONSTITUTIONAL SYSTEM.

Our nation was founded on the principle that "all men are created equal." The Declaration of Independence, para. 2 (U.S. 1776). Our country's founders understood "that turbulence, violence, and abuse of power by the majority trampling on the rights of the minority, have produced factions[,] commotions, [and] . . . despotism" that destroyed "ancient and modern republics." James Madison, Speech at the Virginia Convention to Ratify the Federal Constitution (June 6, 1788). Acknowledging the "diversity of sentiment which pervades [our country's] inhabitants," they expressed the fear that, without protection against discrimination by the majority, our nation would suffer a similar fate. *Id*. As Thomas Jefferson put it:

> All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable, that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.

Thomas Jefferson, First Inaugural Address (March 4, 1801).

The principle of equal protection of the laws holds a special place in our state constitutional tradition as well. Our first Constitution contained several sections that established a right to equal treatment, providing, in turn: that "[a]ll men are by nature free and independent, and have certain inalienable rights" including "defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness," 1849 Cal. Const. art. I, § 1; that "[n]o person shall be . . .

deprived of life, liberty or property without due process of law," *id*. § 8; and that "[a]ll laws of a general nature shall have uniform operation," *id*. § 11.[1] These provisions preceded the Fourteenth Amendment to our federal Constitution, which augmented the promise of equality in the original Bill of Rights, making federal equal protection principles applicable to the states.[2] As California Governor F.F. Low's recommendation in favor of ratification of the Fourteenth Amendment reflects, equality was a familiar and incontestable principle of California's democracy by that time: "This section declares 'equality before the law' for all citizens, in the solemn and binding form of a constitutional enactment, to which no reasonable objection can be urged." Cal. Sen. J. 49 (1867-68).

At the state constitutional convention that followed our ratification of the Fourteenth Amendment, we strengthened our commitment to equal protection by adding two additional sections: a ban on special legislation, 1879 Cal. Const. art. IV, § 25, and a privileges and immunities clause, 1879 Cal. Const. art. I, § 21. A constitutional amendment in 1974 added language tracking the federal equal protection provision, but did not change the substance or analysis of equal protection law in California. Cal. Const., art. I, § 7(a) ("A person may not be . . . denied equal protection of the laws; . . . "). This Court has described these equal protection provisions as "one feature of the constitution more marked, [one] characteristic more pervasive

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[1] *See also id*. § 17 ("Foreigners who are or who may hereafter become bona fide residents of this State shall enjoy the same rights, in respect to the possession, enjoyment, and inheritance of property, as native born citizens.").

[2] In the Bill of Rights, equal protection was guaranteed against federal government encroachment by the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

than all others." *Darcy v. San Jose*, 104 Cal. 642, 645 (1894) (quoting with approval *Dougherty v. Austin*, 94 Cal. 601, 620 (1892) (Beatty, J., concurring)).

To a degree far greater than for most other constitutional rights, equal protection *depends* on judicial review. Unless the judiciary is vested with the *ultimate* power and responsibility to protect the rights of the minority against encroachment by the majority, equal protection is an empty concept. This Court early on undertook to fulfill that responsibility, striking down legislative enactments that violated state equal protection provisions. *E.g.*, *Ex parte Westerfield*, 55 Cal. 550 (1880); *Miller v. Kister*, 68 Cal. 142 (1885); *Pasadena v. Stimson*, 91 Cal. 238 (1891); *Darcy*, 104 Cal. at 648-49; *Ex parte Jentzsch*, 112 Cal. 468 (1896); *Britton v. Board of Election Comm'rs*, 129 Cal. 337 (1900).

Discussing the various protections that the California Constitution entrusts to the judiciary to enforce, the Court singled out equal protection in *Bixby v. Pierno*: "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*." 4 Cal. 3d 130, 141 (1971) (emphasis added). *See also United States Steel Corp. v. Public Utilities Com.*, 29 Cal. 3d 603, 611-12 (1981) ("[T]here 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.") (quoting *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)).

There was good reason for the Court to state that the power of the judiciary to promote equal protection of the laws is "probably the most fundamental . . . ." *Bixby*, 4 Cal. 3d at 141. None of the other entities of government – not the Executive, not the Legislature, and certainly not a majority of electors – is similarly capable of protecting the rights of politically unpopular groups. This Court explained the unique power of the judiciary in the context of discrimination against aliens:

> . . . a special mandate compels us to guard the interests of 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 (1969) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153 & fn. 4 (1938)).

As Professor Choper has put it, by protecting the individual rights of unpopular groups, "the Court is performing its vital role in American democratic society – the role for which it is peculiarly suited and for which all other government institutions are not." Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 167 (1980). If we "[r]emove this avenue for protection of the constitutional rights of the individual . . . the fight, inherently incapable of being waged in the legislative halls [or at the ballot box], has only one remaining battleground. That is the streets." Choper, *On the Warren Court and Judicial Review*, 17 Cath. U. L. Rev. 20, 43 (1967).

The power of the judiciary to enforce equal protection retains its fundamental importance in California's system of government, and the initiative power to amend the Constitution is exercised in every election

without disturbing the core role that equality plays in our constitutional system. There is a natural check on political majorities when they contemplate altering constitutional protections that are enjoyed by everyone, because if the voters decide to diminish such protections, they put *themselves* at risk, not merely others. This, in itself, is a check on arbitrary or discriminatory conduct by a political majority. For example, if the voters amended the Constitution to outlaw physician-assisted suicide in the event of incurable illness, they would be imposing the same rule on everyone, themselves included.

That is not the case when the voters seek to revoke equal protection rights. The members of the political majority do not put themselves at risk, because they are singling out an unpopular minority for adverse treatment. That is why equal protection, by its very definition, requires a neutral governing body that has the final word on equal protection rights – one that cannot be trumped by a political majority. As Justice Scalia so aptly put it, "[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 (1990) (Scalia, J., concurring). This salvation is destroyed if the judiciary lacks the final word on the rights of unpopular minorities.

II. THE CONSTITUTION HAS NEVER BEEN REVISED TO TRANSFER FINAL AUTHORITY OVER EQUAL PROTECTION RIGHTS FROM THE JUDICIARY TO A BARE POLITICAL MAJORITY.

When the people gave themselves the power to enact constitutional amendments in 1911 through the adoption of Article IV, Section 1 of the Constitution, this did not include the power to veto the judiciary's rulings

upholding the equal protection rights of unpopular minorities. As discussed above, the principle of equal protection – and the accompanying power of the judiciary to enforce equal protection – is a foundational aspect of our constitutional democracy. Accordingly, to make a bare majority the final arbiter of equal protection rights would have constituted a "revision" to the Constitution.[3] The 1911 provision, however, was adopted as a mere *amendment* to the Constitution, not a revision. *See McFadden v. Jordan*, 32 Cal. 2d 330, 333 (1948); *see also* Senate Constitutional Amendment No. 22, Proposition 7, October 10, 1911, special election. Therefore, it cannot possibly be construed as allowing a bare majority of voters to strip unpopular groups of rights previously conferred by the equal protection clause. Nor is there any other moment in our constitutional history that could be construed as effectuating such a fundamental change.

A. A Change To The Constitution Is A "Revision" If It Diminishes The Foundational Powers Of A Branch Of Government Or If It Alters The Structure Of Our Basic Constitutional System.

Although the California Constitution may be amended by simple majority vote, a more deliberative process is required for a constitutional revision. Revision involves a two-step process: (1) a two-thirds vote by the Legislature or a constitutional convention; and then (2) popular ratification

[3] The original California Constitution distinguished between revisions and amendments and the processes to be employed for accomplishing either. *See* Joseph R. Grodin *et al*., The California State Constitution: A Reference Guide 302 (1993). In 1911 a revision required a constitutional convention, whereas a mere amendment required only that the Legislature submit the proposed amendment to the voters and the voters ratify it. *See id*., *see also Livermore v. Waite*, 102 Cal. 113, 117 (1894) (describing the amendment and revision processes established by the 1879 Constitution).

by the voters. Cal. Const. art. XVIII, §§ 1-4. The distinction between amendment and revision is critical. As this Court explained long ago:

> 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.

Livermore v. Waite, 102 Cal. 113, 118-19 (1894). In other words, if we are to contemplate changing one of the "permanent and abiding" principles of our system – if we are to effect a change that will have lasting implications for the ordering of society – the Constitution requires that we do so deliberately and with solemn consideration.

If a measure alters the separation of powers upon which our constitutional democracy depends, it must be considered a revision. A ballot measure "infringing on the power of the state judiciary to protect California citizens from arbitrary or capricious legislation" is clearly a revision, as is one that "subordinate[s] the constitutional role assumed by the judiciary in the governmental process." *Eu*, 54 Cal. 3d at 507, 509. To put it more simply, a revision occurs if it alters "the foundational powers" of a branch of California government. *Id*. at 509.

B. A Transfer Of The Final Authority To Enforce The Equal Protection Clause From The Judiciary To A Bare Political Majority May Only Occur By Revision.

Given the foundational nature of the equal protection principle, which by definition includes the power of the judiciary to enforce it, if Californians wished to transfer final authority over the equal protection rights of unpopular groups from the judiciary to a bare political majority,

they would have had to accomplish this goal by revision rather than amendment.

This Court's rulings on the distinction between revision and amendment confirm this point. For example, in *Raven*, the Court inquired whether an initiative precluding the courts from interpreting the California Constitution more expansively than the U.S. Constitution in areas of criminal procedure was a revision or an amendment. The Court held it was a revision because it sought to "vest all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court," 52 Cal. 3d at 352, thereby involving a "fundamental change in our preexisting governmental plan." *Id*. at 355. In contrast, *Eu* involved an initiative that imposed term limits and budgetary constraints on the Legislature. The Court held this was not a revision because it was not similarly foundational: "Term and budgetary limitations may affect and alter the particular legislators and staff who participate in the legislative process, but the process itself should remain essentially as previously contemplated by our Constitution." 54 Cal. 3d at 508.

The *Eu* Court's explanation of the difference between the criminal procedure initiative and the term limits initiative is on point here. The Court emphasized that the criminal procedure initiative "would have fundamentally changed and subordinated the constitutional role assumed by the judiciary in the governmental process." *Eu*, 54 Cal. 3d at 508-09. It would have effectuated a change in "the foundational powers" of a branch of government. *Id*. In contrast, with the term limits initiative, "[n]o legislative power is diminished or delegated to other persons or agencies. The relationships between the three governmental branches, and their respective powers, remain untouched." *Id*. Obviously, transferring final

authority over equal protection of the laws from the judiciary to a bare majority would also "fundamentally change[] and subordinate[] the role assumed by the judiciary in the governmental process." *Id*. It would infringe "on the power of the state judiciary to protect California citizens from arbitrary or capricious legislation." *Id*. at 507.

In *People v. Frierson*, 25 Cal. 3d 142 (1979), the Court held that a popular majority may declare that the death penalty does not constitute cruel or unusual punishment even after the judiciary has held to the contrary. Respondents may argue that if the California Constitution permits a bare majority to restore the death penalty, it must also permit a bare majority to revoke equal protection rights. However, the Court's holding in *Frierson* is relatively unremarkable given the nature of the cruel or unusual punishment clause – after all, the protections conferred by that clause are *largely dependent on popular sentiment*. *See, e.g., Frierson*, 32 Cal. 3d at 187 (recognizing that the "belief of a substantial majority of our citizens in the necessity and appropriateness of the ultimate punishment" prevented a conclusion that the death penalty was cruel or unusual); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008) (judicial determination whether punishment is "cruel" or "unusual" is largely influenced by the existence of societal "consensus" on that point). Accordingly, giving a majority of voters the ability to alter rights conferred by the cruel or unusual punishment clause is not inconsistent with that clause, or with the foundational principles of our constitutional democracy.

In contrast, because equal protection is countermajoritarian by nature, *i.e.*, because it has force only because a neutral judiciary is charged with enforcing its principles *against* the prejudices of a political majority, to give a political majority power to trump the judiciary on the equal

protection rights of unpopular groups is to alter fundamentally our constitutional democracy. Far from an "improvement" of equal protection or "better carry[ing] out" the "purposes for which it is framed," *Livermore*, 102 Cal. at 119, allowing the voters to abrogate equal rights for an unpopular minority would obliterate equal protection. It would mean that a bare majority could amend the California Constitution to declare that children of undocumented immigrants shall not receive government benefits, or that Muslims may not use public facilities or ride public transportation without first obtaining a special permit. The electorate could mandate that deprivations of freedom for immigrants from certain countries in the name of fighting terrorism be subject to no judicial review at all. It could provide that laws claimed to discriminate against women are subject only to intermediate scrutiny, or that laws discriminating against lesbians and gay men are subject only to rational basis review. Indeed, imagine if *Perez v. Sharp*, 32 Cal. 2d 711 (1948), striking down California's ban on interracial marriages, had been decided on state constitutional grounds rather than federal constitutional grounds. And imagine if a bare majority had attempted to overturn that landmark ruling by enshrining the ban into the Constitution. Would Respondents argue that all of this is currently permitted under the California Constitution?[4]

[4] One need only look at the historical use of the initiative process to realize that these are not idle concerns. *See, e.g., Mulkey v. Reitman*, 64 Cal. 2d 529, 542 (1966) (striking down an initiative measure that would have repealed legislation prohibiting race discrimination in housing and enshrined the right to discriminate against racial minorities in the California Constitution); *In re Guardianship of Yano*, 188 Cal. 645 (1922) and *Sei Fujii v. State*, 38 Cal. 2d 718, 735 (1952) (striking down provisions of initiative measure adopted to prevent Japanese from owning agricultural land in California).

Respondents may argue that these concerns are of no moment, because the federal Constitution would presumably shield at least some of these hypothetical victims from any attempt by a bare majority to strip them of their right to equal protection. This, however, would ignore the vitality of the State Constitution as an independent source of constitutional rights and the independence this Court has shown in interpreting that instrument, in particular its equal protection provisions. And it would ignore the teachings of *Raven*, which rejected an analogous argument that the federal Constitution provided a sufficient backstop to justify allowing a bare majority to strip the California judiciary of the power to protect certain rights. Such an approach, the Court held, "would substantially alter the substance and integrity of the state Constitution as a document of independent force and effect." 52 Cal. 3d at 352. For example, if the U.S. Supreme Court "were to rule that public torture or maiming of persons convicted of minor misdemeanors did not offend federal due process, equal protection or cruel and unusual punishment clauses, presumably the California courts interpreting similar state constitutional guarantees would be compelled to agree . . ." *Id*. That, as the Court held, is a structural change that must withstand the rigors of the revision process to be effective. The same is true here. The fact that the U.S. Constitution today would protect many groups against the whims of political majorities is no basis for holding that the California judiciary lacks independent power to protect against discrimination, whether or not it is directed against groups that have enjoyed the same protection under federal law.[5]

[5] Indeed, the history of discrimination against other unprotected minorities provides an important lesson here. In the past, bare majorities have fought back, vigorously, against constitutional rulings protecting

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In sum, the transfer of final authority over the equal protection rights of unpopular groups from the judiciary to a bare political majority may only be accomplished by revision.

C. The 1911 Constitutional Provision Granting Voters The Power To Amend The Constitution Was Not Enacted Through The Revision Process.

Respondents may argue that when the Constitution was changed in 1911 to give the voters the power to amend the Constitution by initiative, this implicitly gave a political majority the power to divest unpopular groups of rights conferred under principles of equal protection. However, the 1911 provision was not enacted as a revision – it was enacted as an amendment. And its purpose was not to strip the judiciary of its foundational power to enforce equal protection of the laws. Rather, the primary purpose of the 1911 change was "to enable the people of this state, on the local level and statewide, to reclaim the *legislative power* from the influence of what in contemporary parlance is called the 'special interests.'" *DeVita v. County of Napa*, 9 Cal. 4th 763, 795 (1995) (emphasis added).

Accordingly, the 1911 provision cannot be construed as effecting such a foundational change in our system of justice. Rather, it must be

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African Americans from discrimination. But the judiciary, thankfully, exercised its constitutional role to prevent such attacks from rendering equal protection meaningless. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 17 (1958) ("the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation . . ."). *Cf. Mulkey*, 64 Cal. 2d at 542 (voters could not act by initiative to achieve the goal of racial discrimination in housing).

construed as "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." *Livermore*, 102 Cal. at 118-19.

This is not to say, of course, that it was inappropriate for the 1911 provision to be enacted by amendment rather than revision. In the vast run of cases, when the Constitution is amended, the amendment is not even in tension with our foundational governing principles, let alone in conflict with them. *See, e.g.,* Cal. Const. art. XIX B, § 1 (Proposition 1A, 2006) (setting aside funding for transportation projects); Cal. Const. art. XI, § 15 (Proposition 1A, 2004) (relating to the protection of local government revenues); Cal. Const. art. I, § 3 (Proposition 59, 2004) (right of access to public records and meetings); Cal. Const. art. II, § 5 (Proposition 60, 2004) (guaranteeing right of winning primary candidate to participate in general election); Cal. Const. art. III, § 9 (Proposition 60A, 2004) (use of proceeds from sale of surplus property); Cal. Const. art. XXXV (Proposition 71, 2004) (stem cell research); Cal. Const. art. VI, §§ 5, 6, 8, 10, 15, 23. (Proposition 48, 2002) (deleting reference in Constitution to obsolete municipal courts). And even in those rare cases when a bare majority seeks to overturn a judicial ruling interpreting a constitutional provision, *that* will generally not be inconsistent with our structural framework. As discussed above, some constitutional provisions, such as the cruel and unusual punishment clause, seek to embody societal norms, which means that allowing the voters to give meaning to those provisions will not necessarily be antithetical to their underlying purpose. To this extent, a rule allowing the voters generally to amend the Constitution is indeed nothing more than "an addition or change within the lines of the original instrument." *Livermore*, 102 Cal. at 118-19. However, to interpret the 1911 provision as

obliterating the equal protection clause by allowing bare majorities to take away equal protection rights is to permit by amendment what can only be accomplished by revision. Because the 1911 provision was not enacted as a revision, it cannot be interpreted to effectuate such a foundational change.

D. Case Law From Other Jurisdictions Does Not Address The Question Presented By This Petition.

Respondents may cite case law from other jurisdictions to contend that, in California, a bare majority does indeed have the power to strip unpopular groups of equal protection rights. In Alaska and Oregon, courts have held that initiative measures denying marriage equality to lesbians and gay men were amendments to those states' constitutions. *See Bess v. Ulmer*, 985 P.2d 979, 982 (1999); *Martinez v. Kulongoski*, 185 P.3d 498 (2008); *Lowe v. Keisling*, 130 Ore. App. 1 (1994). To be sure, those cases were wrongly decided, even on their own limited terms.[6] However, those

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[6] In *Bess*, the Alaska Supreme Court failed to recognize that the judiciary's foundational powers were diminished by a measure that stripped a minority group of equal protection rights. Moreover, the case is distinguishable on several grounds. First, it does not stand for the proposition that a bare political majority can take away from the judiciary the final word on equal protection rights, because in Alaska, a proposed amendment to the constitution "must be passed by a two-thirds vote of each legislative house *and then* approved by a majority of the voters." 985 P. 2d at 982 (emphasis added). In other words, the process for *amending* Alaska's constitution is the same as the process for *revising* the California Constitution. Thus, the case has little bearing on whether a bare political majority can strip lesbians and gay men of the fundamental right to marry.

Bess is also distinguishable on the ground that lesbians and gay men do not constitute a suspect class in Alaska. If Alaskans sought to amend their constitution to prevent members of a suspect class from receiving equal protection of the laws, this would constitute a revision by subverting the judiciary's foundational power to protect the rights of a discrete group that the Alaska constitution recognized as requiring special judicial vigilance. In California, lesbians and gay men constitute a suspect class. *In*

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cases just beg the question here, because they merely inquired whether the challenged initiative *itself* was a constitutional revision. This petition presents a different question – a question that is threshold in nature: whether, here in California, the foundational principle of equal protection *has ever been revised* to allow a bare majority to veto the equal protection rulings of the judiciary.

None of these out-of-state cases discussed whether, under their states' constitutional democracies, measures by the majority reinterpreting the equal protection rights of minority groups were permitted under their

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re Marriage Cases 43 Cal. 4th at 841-42. And the factors that led to this conclusion have been recognized by the California judiciary for a long time. *Id*.

Similarly, the decisions of the Court of Appeals of Oregon in *Martinez* and *Lowe*, while holding that anti-gay ballot measures did not constitute revisions, did not confront the question whether a majority of voters may strip a suspect class of equal protection rights, and on that basis they are inapposite. Furthermore, in *Martinez*, the more recent of the two cases, the court concluded that it was bound by the earlier *Lowe* decision. *Martinez*, 185 P. 3d at 505. But *Lowe* involved an initiative which precluded lesbians and gay men from seeking legislative protection against discrimination. *Lowe*, 130 Ore. App. at 5. Although the *Lowe* court felt that a provision of this kind did not alter the constitutional structure, the United States Supreme Court has reached the opposite conclusion in a federal equal protection challenge to a similar ballot measure. *See Romer v. Evans*, 517 U.S. 620, 627, 630-31 (1996) (describing similar Colorado initiative as effecting a "sweeping and comprehensive" change that violated the structural principles of the federal equal protection clause). The *Martinez* court should have revisited *Lowe* given *Romer*'s lesson about the structural consequences of embedding into the constitution discrimination against an unpopular group. But it did not do so. For that reason its analysis is incomplete and its conclusion is faulty. At the time of this writing, a petition for review of the *Martinez* decision is pending before the Oregon Supreme Court.

constitutions in the first place. Perhaps this stems from the fact that this question was not presented, or perhaps those states simply have different constitutional traditions. In any event, *California's* constitutional democracy has a long, proud tradition of equal protection of the laws, which includes by definition the power of the judiciary to utter the final word on the equal protection rights of minority groups. This tradition has never been upended by a constitutional revision.[7]

III. BECAUSE THE CONSTITUTION DOES NOT AUTHORIZE A BARE MAJORITY TO ENACT MEASURES LIKE PROPOSITION 8, THE COURT MUST STRIKE IT DOWN.

Through Proposition 8, an exceedingly slim majority of voters seeks to overturn this Court's ruling that the State's denial of marriage licenses to same-sex couples violates their equal protection rights. In so doing, these voters have targeted a group that is not merely "unpopular." They have targeted a group – lesbians and gay men – that constitutes a suspect class within the meaning of equal protection doctrine, based on its historical and continuing vulnerability. What's more, they have sought to deprive lesbians and gay men of one of the most cherished rights imaginable – the right to marry. Neither in 1911 nor at any other time in history was the principle of equal protection revised to allow a bare majority to divest such an

[7] Nor can Proposition 8 *itself* be construed as fundamentally altering the principle of equal protection to allow a bare majority to veto the equal protection rulings of the judiciary, because it includes no language to that effect. And even if it did include such language, that language would have to be inserted into the Constitution by revision, not amendment. Since the proponents of Proposition 8 neither purported to change our basic equal protection principles to allow voters to have the final word on minorities' rights nor followed the process for revising the constitution in that manner, Proposition 8 cannot effect the revision that would be necessary for the elimination of equal protection rights by simple majority vote.

unpopular group of such a cherished right, in direct contravention of a ruling by the highest court of the State. Because a constitutional revision is a necessary precursor to the enactment of measures like Proposition 8, and because no such revision has yet taken place, Proposition 8 is not a valid exercise of the initiative power.

CONCLUSION

The Court should grant the petition for a writ of mandate and order Respondents to refrain from enforcing or effectuating Proposition 8.

Dated: November 5, 2008

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 7,634 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 5, 2008.

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