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Brief of Amici Curiae Alameda County Bar Association, Bar Association of San Francisco, Los Angeles County Bar Association, Marin County Bar Association, Santa Clara County Bar Association, et al. Supporting Petitioners

Attorneys for Amicus Curiae

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No. S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, *et al.*,

Petitioners,

v.

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

Respondents;

DENNIS HOLLINGSWORTH, *et al.*,

Intervenors.

**BRIEF OF AMICI CURIAE ALAMEDA COUNTY BAR
ASSOCIATION, BAR ASSOCIATION OF SAN FRANCISCO,
LOS ANGELES COUNTY BAR ASSOCIATION, MARIN
COUNTY BAR ASSOCIATION, SANTA CLARA COUNTY
BAR ASSOCIATION, ET. AL. SUPPORTING PETITIONERS**

Elizabeth J. Cabraser (SBN 083151)
Kelly M. Dermody (SBN 171716)
Allison S. Elgart (SBN 241901)
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
(415) 956-1000 • (415) 956-1008

ATTORNEYS FOR AMICI CURIAE

TABLE OF CONTENTS

	<u>Page</u>
STATEMENTS OF INTEREST OF THE AMICI CURIAE AND SOURCE OF AUTHORITY TO FILE	2
SUMMARY OF THE ARGUMENT	26
I. PROPOSITION 8 IS A REVISION OF THE STATE CONSTITUTION THAT MAY NOT BE ENACTED THROUGH THE INITIATIVE PROCESS	28
II. PROPOSITION 8 WOULD EVISCERATE CALIFORNIA’S CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION	29
III. PROPOSITION 8 WOULD ALTER RADICALLY CALIFORNIA’S CONSTITUTIONAL PRINCIPLE THAT FUNDAMENTAL RIGHTS MUST BE GUARANTEED TO <i>ALL</i> INDIVIDUALS	33
IV. 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	35
CONCLUSION.....	38
CERTIFICATE OF COMPLIANCE.....	40
CERTIFICATE OF SERVICE.....	41

TABLE OF AUTHORITIES

Page

CASES

<i>Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization</i> (1978) 22 Cal. 3d 208.....	28
<i>Baker v. Vermont</i> , 170 Vt. 194, 744 A.2d 864 (1999)	14
<i>Bixby v. Pierno</i> (1971) 4 Cal. 3d 130.....	35
<i>Frye v. Tenderloin Housing Clinic</i> (2006) 38 Cal. 4th 23	14
<i>Goodridge v. Dep't of Public Health</i> , 440 Mass. 309, 798 N.E.2d 941 (2003)	14
<i>Hays v. Wood</i> (1979) 25 Cal. 3d 772.....	30
<i>In re Marriage Cases</i> (2008) 43 Cal. 4th 757	30, 32, 33, 34
<i>Johnson v. Goodyear Min. Co.</i> (1899) 127 Cal. 4.....	35
<i>Kasler v. Lockyer</i> (2000) 23 Cal. 4th 472	36
<i>Kerrigan v. Dep't of Public Health</i> , 289 Conn. 135, 957 A.2d 407 (2008)	14
<i>McFadden v. Jordan</i> (1948) 32 Cal. 2d 330.....	34
<i>People v. Brisendine</i> (1975) 13 Cal. 3d 528.....	32
<i>People v. Frierson</i> (1979) 25 Cal. 3d 142.....	31
<i>Raven v. Deukmejian</i> (1990) 52 Cal. 3d 336.....	passim
<i>Sands v. Morongo Unified School Dist.</i> (1991) 53 Cal. 3d 863.....	30
<i>Sav-On Drug Stores, Inc. v. Superior Court</i> (2004) 34 Cal. 4th 319	14
<i>Serrano v. Priest</i> (1976) 18 Cal. 3d 728.....	32

OTHER AUTHORITIES

Cal. Const., art. XVIII, §§ 1, 3	28
--	----

TABLE OF AUTHORITIES
(continued)

Page

TREATISES

Peter J. Galie and Christopher Bopst, <i>Changing State Constitutions: Dual Constitutionalism and the Amending Process</i> (1996) 1 Hofstra L. & Pol'y Symp. 27	34
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COUNTY BAR ASSOCIATION, SANTA CLARA COUNTY
BAR ASSOCIATION, ET. AL. SUPPORTING PETITIONERS**

The Alameda County Bar Association, Bar Association of San Francisco, Los Angeles County Bar Association, Marin County Bar Association, Santa Clara County Bar Association, AIDS Legal Referral Panel, Asian American Bar Association of the Greater Bay Area, Asian American Justice Center, Asian Pacific American Bar Association of Los Angeles County, Bay Area Lawyers for Individual Freedom, California Employment Lawyers Association, California Rural Legal Assistance, Inc., Central California Legal Services, Inc., Charles Houston Bar Association,

Consumer Attorneys of San Diego, East Bay La Raza Lawyers Association, Fred T. Korematsu Center for Law and Equality, Gay & Lesbian Advocates & Defenders, Impact Fund, Japanese American Bar Association of Greater Los Angeles, Korean American Bar Association of Northern California, Korean American Bar Association of Southern California, Latina Lawyers Bar Association, Law Foundation of Silicon Valley, Lawyer's Club of San Francisco, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Legal Aid Society – Employment Law Center, Lesbian and Gay Lawyers Association of Los Angeles, Mexican American Bar Association, Minority Bar Coalition, National LGBT Bar Association, National Asian Pacific American Bar Association, National Lawyers Guild San Francisco Bay Area Chapter, Public Justice, Queen's Bench Bar Association of the San Francisco Bay Area, San Francisco Trial Lawyers Association, South Asian Bar Association of Northern California, South Asian Bar Association of San Diego, Tom Homann Law Association, and the Transgender Law Center (collectively "amici") respectfully submit this *amici curiae* brief in support of Petitioners Karen L. Strauss., *et al.*

STATEMENTS OF INTEREST OF THE AMICI CURIAE
AND SOURCE OF AUTHORITY TO FILE

Amici are familiar with the issues in this case and unreservedly 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 ensuring the vitality of the courts' continued role in enforcing the constitutional guarantee of equal protection.

Alameda County Bar Association ("ACBA"), established in 1877, is a nonprofit voluntary membership organization of 2,200 attorneys, judges, paralegals, law students, and other professionals in Alameda County. ACBA has a strong interest in having courts ensure equal protection under the law for all people. One of the core tenets of the ACBA mission is to promote civil rights and the fair and equitable administration of justice. In response to Proposition 8 and its threat to the basic constitutional guarantee of equal protection to all the people of California, the ACBA board of directors, on September 4, 2008, passed a resolution affirming its support of the California Supreme Court decision regarding same-sex marriage and urging its constituent groups to join the ACBA in efforts to defeat Proposition 8. Through the work of its board of directors, committees, sections and its court appointed and pro bono programs, the ACBA has worked to promote access to justice for all people, oppose discrimination in all forms, and advocate for the protection of the fundamental rights of all people.

The Bar Association of San Francisco ("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.

With more than 26,000 members, the Los Angeles County Bar Association ("LACBA") is the largest voluntary local bar association in the United States. For more than 130 years, LACBA has represented the interests of its members, encouraged legal reform, promoted the administration of justice and supported the independence of the judiciary in California. LACBA opposes discrimination and supports the protection of fundamental rights. It joined in an *amicus curiae* brief filed with this Court in *In re Marriage Cases* (Case No. S147999) supporting marriage equality for same-sex couples, and opposed the passage of Proposition 8. LACBA joins in this *amicus curiae* brief to protect California's core constitutional

principles of equal protection and inalienable rights, and to support this Court's role as final arbiter of those constitutional guarantees.

The Marin County Bar Association (the "MCBA") is a voluntary organization of almost 700 attorney members practicing in Marin and surrounding counties. A primary mission of the MCBA is to promote the sound administration of justice, which includes supporting an independent judiciary and educating the public on the importance of the judicial system. Since its establishment in 1957, the MCBA has declined to take any position or action that might be considered political in nature or that involves an issue before the electorate. Proposition 8 changed that. The importance of the civil rights issues raised by Proposition 8 prompted our organization to adopt a formal position in opposition to the proposition, a position approved both by board action and a full membership vote. Proposition 8 raises the fundamental question of whether a majority of voters can eliminate a fundamental right guaranteed by our state constitution. The MCBA believes that the answer to this question is a resolute and resounding *no*. At least absent a compelling interest, not present here, a majority of voters should not be entitled to strip any group of California citizens of a fundamental civil right.

Founded in 1917, the Santa Clara County Bar Association ("SCCBA") is a nonprofit membership association of approximately 3400 legal professionals. The SCCBA is committed to promoting full and equal

access to the legal system by all individuals, and is a leader in opposing discrimination against gay men and lesbians. In 2005, the SCCBA adopted a resolution in opposition to proposed constitutional amendments seeking to preclude gay and lesbian individuals from marrying. In 2007, the SCCBA supported a resolution sponsored by the American Bar Association's Section of Individual Rights and Responsibilities to include persons of differing sexual orientations and gender identities in order to promote full and equal participation in the legal profession. The SCCBA filed an *amicus curiae* brief with this Court in *In re Marriage Cases*, Case No. S147999, supporting marriage equality. Subsequently, it adopted a resolution opposing Proposition 8 as an unconstitutional infringement of the inalienable, fundamental right of all citizens to marry the person of their choosing, regardless of gender. The SCCBA, in support of the legal positions advanced by this amicus brief, advocates the positions that (1) Proposition 8 undermines so fundamentally the protection of inalienable rights guaranteed by Article I, Sec. 1, of the California Constitution that Proposition 8 must be invalidated as an unconstitutional revision of the California Constitution and (2) that it should have no retroactive effect.

The AIDS Legal Referral Panel ("ALRP") is a non-profit legal services agency that advances the legal and civil rights of low-income, immigrant, African American, Latino, Asian/Pacific American, female, lesbian/gay/bisexual/transgender, and persons living with HIV/AIDS

through litigation, direct legal services, and education. ALRP has a strong interest in protecting the integrity of the core constitutional principles of equal protection and fundamental rights, and ensuring the courts' role as final arbiter of these constitutional guarantees.

The Asian American Bar Association of the Greater Bay Area ("AABA"), founded in 1976, is a non-profit professional membership organization of Asian American lawyers. AABA is the largest, and one of the oldest, local Asian American bar associations in the nation, and is one of the largest minority bar associations in California. AABA provides a vehicle for the unified expression of opinions and positions on matters of concern to all Asian American attorneys, encourages and promotes the professional growth of its members, serves the Asian American and minority community, and fosters the exchange of ideas and information among its members and the legal community at large. AABA was born from its founders' commitments to civil rights and community service, and over the years, AABA has played an important role in various civil rights cases and social issues affecting Asian Americans, including the *Korematsu v. United States* case, the Japanese-American redress and reparations movement, and the Wen Ho Lee case. AABA's interest in having courts ensure equal protection under the law is central to its mission. Through its board of directors, committees, and community efforts, AABA has worked

to promote the core constitutional principles of equal protection and fundamental rights, and to oppose discrimination in all forms.

The Asian American Justice Center (“AAJC”) is a national nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal, public policy, advocacy, and community education on discrimination issues. AAJC and its affiliates have a long-standing interest in discrimination issues that have an impact on the Asian American community, and this interest has resulted in AAJC’s participation in a number of amicus briefs before the courts.

The Asian Pacific American Bar Association of Los Angeles County (“APABA”) is a member organization comprised of attorneys, judges, commissioners and law students throughout Los Angeles County and serves as a voice for issues of concern to the Asian and Pacific Islander (API) community. APABA provides legal education and assistance to underserved API communities and also sponsors programs in professional development, community education, and law student mentorship. As an API organization, APABA well knows the history of discrimination against Asians and Pacific Islanders and its activities seek to ensure access and justice for those without a voice. As an organization that believes in civil

rights, APABA believes that protecting marriage equality furthers the civil rights interests of not only members of the API community but all Americans. APABA's interest in having courts ensure equal protection under the law is central to its mission.

Bay Area Lawyers for Individual Freedom ("BALIF") is the nation's oldest and largest association of lesbian, gay men, bisexual and transgendered (LGBT) persons in the field of law. BALIF serves to take action on questions of law and justice that affect the LGBT community; to strengthen professional and social ties among LGBT members of the legal profession; to build coalitions with other legal organizations to combat all forms of discrimination; to promote the appointment of LGBT attorneys to the judiciary, public agencies and commissions in the Bay Area; and to provide a forum for the exchange of ideas and information of concern to members of the LGBT legal community. BALIF has a strong interest in protecting the integrity of the core constitutional principles of equal protection and fundamental rights, and ensuring the courts' role as final arbiter of these constitutional guarantees.

The California Employment Lawyers Association ("CELA") is a non-profit employee rights organization whose mission is to advance the rights of working people and the lawyers who represent them. CELA advances the legal and civil rights of all workers, including low-income, immigrant, African American, Latino, Asian/Pacific American, male and

female, lesbian/gay/bisexual/transgender, and other traditionally underrepresented clients through litigation and education. CELA has a strong interest in protecting the integrity of the core constitutional principles of equal protection and fundamental rights, and ensuring the courts' role as final arbiter of these constitutional guarantees.

California Rural Legal Assistance, Inc. ("CRLA") seeks to ensure that all low-income rural, farm worker communities in California have access to justice and the provision of basic human rights. Each year, CRLA provides more than 40,000 low-income rural Californians with free legal assistance and a variety of community education and outreach programs. CRLA serves a significant number of people of color and women, as well as an increasingly visible lesbian and gay population. An estimated 136,000 self identified lesbian, gay, and bisexual persons live in the rural counties served by CRLA, and roughly one-third of this population lives in poverty. CRLA established Proyecto Poderoso to improve legal services for low-income lesbian and gay people on issues ranging from family law to employment discrimination, and to change hostile anti-gay attitudes in our rural communities. Our clients represent a cross section of individuals and disfavored groups that have benefited from robust constitutional jurisprudence guaranteeing equal protection and fundamental rights. We share a deep interest in protecting the integrity of core constitutional principles of equality and fundamental rights, and preserving the courts'

role as the final arbiter of these constitutional guarantees.

Central California Legal Services, Inc. (“CCLS”) is a non-profit law firm which provides free civil legal assistance to low-income residents in six counties in central California. The mission of CCLS is to advance justice and empower people. Since 1966, CCLS has worked to protect the constitutional rights of low-income individuals and communities through education, litigation and advocacy. We represent African Americans, Latinos, immigrants, refugees, lesbian/gay/bisexual/transgender, elderly and youth clients in our efforts to realize the constitutional promise of equal justice for all and to overcome discrimination.

The Charles Houston Bar Association (“CHBA”) is a non-profit professional membership organization founded in 1955 which represents the interests of African American attorneys, judges, and law students throughout Northern California. The organization is committed to working within the African American community to facilitate access to the legal system and promote equal opportunities under the law. CHBA’s mission dictates that it ensures equal protection under the law for all people. CHBA has also been involved in litigation aimed at protecting the legal rights of the African American community. CHBA has a strong interest in protecting the integrity of the constitutional principles of equal protection and fundamental rights, and ensuring the courts’ role as final arbiter of these constitutional guarantees. Consequently, the Board of Directors of

the Charles Houston Bar Association has voted to support the efforts to defeat Proposition 8.

The Consumer Attorneys of San Diego (“CASD”) is a non-profit organization of more than 700 attorneys who represent working people, families, and consumers as plaintiffs in various types of legal matters involving consumer rights. CASD promotes access to justice and equal rights for all under the law through support services for our members, continuing legal education, and community outreach. CASD has a strong interest in protecting the integrity of the core constitutional principles of equal protection and fundamental rights, and ensuring the courts’ role as final arbiter of those constitutional guarantees.

Founded in 1978, East Bay La Raza Lawyers Association (“EBLRLA”) is the county bar association of Latina/o lawyers in Alameda and Contra Costa counties. Dedicated to expanding legal access to the Latina/o community, the EBLRLA provides annual scholarships to Latina/o law students, supports Latina/o attorneys with a local professional network, and advocates for increased Latina/o representation in the judiciary. As a professional association of Latina and Latino lawyers, judges, law students and other legal workers, EBLRLA’s interest in having courts ensure equal protection under the law is central to its mission. Through its board of directors, committees, and membership, the EBLRLA promotes the core

constitutional principles of equal protection and fundamental rights, and opposes discrimination in all forms.

The Fred T. Korematsu Center for Law and Equality (“Korematsu Center”) is a nonprofit organization based at Seattle University School of Law that works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by “military necessity.” Fred Korematsu went on to successfully challenge his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all, and believes that protecting marriage equality furthers the civil rights of everyone. Further, it has a strong interest in protecting the integrity of the core constitutional principles of equal protection and fundamental rights, and ensuring the courts’ role as final arbiter of these constitutional guarantees. We note that the Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

Gay & Lesbian Advocates & Defenders (“GLAD”) is New England’s leading legal rights organization dedicated to ending

discrimination based upon sexual orientation, HIV status, and gender identity and expression. In addition to GLAD's litigation on workplace discrimination, parenting issues, access to health care, public accommodations and services, and myriad other legal issues, GLAD has sought marriage equality in cases in several states. Most notably, these cases include GLAD's role as counsel in *Baker v. Vermont*, 170 Vt. 194, 744 A.2d 864 (1999); *Goodridge v. Dep't of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003); and *Kerrigan v. Dep't of Public Health*, 289 Conn. 135, 957 A.2d 407 (2008). GLAD has also appeared as amicus in other marriage-related litigation throughout the United States.

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.

The Japanese American Bar Association of Greater Los Angeles

("JABA") is one of the oldest Asian Pacific American bar associations in the country and consists of a diverse membership of nearly 300 attorneys, judicial officers, and law students of Japanese and Asian Pacific Islander ancestry in the greater Los Angeles area, including some who are gay or lesbian. With a deep appreciation of the unique history of Japanese Americans in the United States and the failure of constitutional protections that led to their internment during World War II, JABA has a proud history of actively advocating and devoting resources to issues of civil rights and social justice, especially for those members of society who continue to suffer from discrimination and unequal treatment.

The Korean American Bar Association of Northern California

("KABANC") is a professional membership organization of Korean American lawyers. KABANC's interest in having courts ensure equal protection under the law is central to its mission. Through its board of directors, committees, and community efforts, KABANC has worked to promote the core constitutional principles of equal protection and fundamental rights, and to oppose discrimination in all forms.

The Korean American Bar Association of Southern California

("KABASC") is a non-profit professional membership organization of Korean American lawyers. KABASC's interest in having courts ensure equal protection under the law is central to its mission. Through its

community efforts, KABASC has worked to promote the core constitutional principles of equal protection and fundamental rights, and to oppose discrimination in all forms.

The Latina Lawyers Bar Association is a non-profit legal organization that is dedicated to the advancement of Latinas in the legal field and the community at large. The Latina Lawyers Bar Association has a strong interest in protecting the integrity of the core constitutional principles of equal protection and fundamental rights, and ensuring the courts' role as final arbiter of these constitutional guarantees.

The Law Foundation of Silicon Valley is a non-profit public interest organization that advances the civil rights of low-income, immigrant, African American, Latino, Asian/Pacific American, female, lesbian/gay/bisexual/transgender, and other clients through litigation, direct legal services, and education. The Law Foundation has a strong interest in protecting the integrity of the core constitutional principles of equal protection and fundamental rights, and ensuring the courts' role as final arbiter of these constitutional guarantees.

The Lawyer's Club of San Francisco is a non-profit voluntary association of lawyers, primarily but not exclusively, in practice in San Francisco. The membership historically and at present represents the multi-ethnic, racial, and religious diversity of San Francisco. Throughout its history and for well more than half a century, the Lawyer's Club has had a

distinguished history of active participation in a full range of public activities affecting lawyers and the legal profession. Among the Club's leadership have been Presidents of the State Bar of California, Judges of the Federal and State Courts, leaders of major law firms, elected officials at State and Municipal levels, as well as a full breadth of lawyers serving the public in every area in which the law affects the rights of individuals. The guiding principal of this association is a strong interest in protecting the integrity of the core constitutional principles of equal protection and fundamental rights, and ensuring the courts' role as final arbiter of these constitutional guarantees.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("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.

The Legal Aid Society – Employment Law Center (“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 Lesbian and Gay Lawyers Association of Los Angeles (“LGLA”) is a non-profit voluntary membership bar association of attorneys, law students, and legal professionals in the greater Los Angeles

area. LGLA is an affiliate of the Los Angeles County Bar Association. Founded in 1979, LGLA continues its mission of providing a strong leadership presence of and for lesbian, gay, bisexual, and transgendered (LGBT) persons in the legal profession and in the community at large, through education, legal advocacy, and participation in political and civic activities and social functions. LGLA has fought for equal justice for all persons without regard for their sexual orientation for almost thirty years. LGLA's interest in having the California Constitution continue to guarantee equal protection under the law to LGBT persons is central to its mission.

The Mexican American Bar Association ("MABA") is a non-profit professional membership organization of Latino attorneys and others involved in the legal profession. MABA is committed to the advancement of Latinos in the legal profession and the empowerment of the Latino community through service and advocacy. MABA is also committed to promoting constitutional principles of equal protection and fundamental rights, and to opposing discrimination in all forms.

The Minority Bar Coalition ("MBC") is a coalition of more than 20 Bay Area mainstream, specialty, ethnic and minority bar associations working together on issues of law and social justice. The MBC deals with issues specifically impacting the minority lawyer. The MBC takes the lead in speaking out with a unified voice on issues impacting minority communities such as diversity, the death penalty, and marriage equality.

The MBC hosts an annual conference and awards reception to address legal issues impacting the minority legal community and to recognize individual lawyers in the Bay Area minority legal community who have done the most to advance the causes of diversity and service to the community. At present, the Minority Bar Coalition includes, among other bar associations: Asian American Bar Association of the Greater Bay Area, Asian Pacific Bar Association of Silicon Valley, Bay Area Association of Muslim Lawyers, Bar Association of San Francisco, Bay Area Lawyers for Individual Freedom, Charles Houston Bar Association, Filipino Bar Association of Northern California, Korean American Bar Association of Northern California, Queen's Bench Bar Association, South Asian Bar Association of Northern California, and Vietnamese American Bar Association of Northern California. MBC has a strong interest in protecting the integrity of the core constitutional principles of equal protection and fundamental rights, and ensuring the courts' role as final arbiter of these constitutional guarantees.

The National LGBT Bar Association ("NLGBTBA") (formerly National Lesbian Gay Law Association), founded in 1988, is the nation's only professional bar association of lesbian, gay, bisexual, transsexual, and straight allies. Members include prominent lawyers, judges and other legal professionals as well as law students, activists and over 26 affiliated local, state, and regional LGBT voluntary bar associations across the nation, and

over 100 LGBT law student organizations. The NLGBTBA is the bar association that educates the profession about issues of concern to LGBT legal professionals and students. NLGBTBA works to promote diversity and justice in and through the legal profession for the LGBT community by supporting affiliated political and legal advocacy organizations; disseminating public information on legal issues of concern to LGBT people and their straight allies; convening the only national annual LGBT legal issues continuing legal education conference; and hosting the only annual national career fair for LGBT law students. Since its inception, NLGBTBA has advocated for the equal protection of all LGBT people, including the ability to participate fully in the institution of civil marriage. As NLGBTBA's interest in having courts ensure equal protection under the law is central to its mission, it strongly advocates for the California judiciary to be deemed the final arbiter of constitutional legal issues. Moreover, the judiciary must remain an independent and authoritative arm of government, subject to principles of *stare decisis*, in order to ensure protections for the California citizenry, even when the passions of a slim majority may disagree.

The National Asian Pacific American Bar Association ("NAPABA") is the national association of Asian Pacific American attorneys, judges, law professors, and law students, providing a national network for its members and affiliates. NAPABA advocates for the legal needs and interests of the

Asian Pacific American community and represents the interests of over 40,000 attorneys and approximately 57 affiliate Asian Pacific American bar associations. NAPABA members work variously in solo practices, large firms, corporations, legal services organizations, non-profit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has been at the forefront of national and local activities in the areas of civil rights. As advocates for justice, equity and opportunity for Asian Pacific Americans, NAPABA is committed to achieving marriage equality in California.

The National Lawyers Guild San Francisco Bay Area Chapter (“NLGSF”) is a membership organization that brings together lawyers, law students and legal workers to collaborate in the process of using the law for political, economic, and social justice. The NLGSF actively seeks to eliminate discrimination and to maintain and protect civil rights and liberties in the face of persistent attacks upon them. Through public education projects and litigation support, the NLGSF has consistently supported the rights of individuals in the LGBT community to be free from discrimination on the basis of sexual orientation and gender identity.

Public Justice, P.C. (“Public Justice”) is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable in court. Public Justice specializes in precedent-setting and socially significant individual and class action litigation, and, for twenty-

five years, has prosecuted cases intended to advance civil rights and civil liberties, the preservation of the civil justice system, and the protection of the poor and powerless. Public Justice has created several litigation projects specifically intended to protect the public's right to their day in court and to preserve the courts' role in ensuring justice for disadvantaged individuals and communities. The firm has also litigated numerous constitutional claims and statutory discrimination suits on behalf of members of disfavored minority groups. This work has convinced Public Justice of the importance of preserving equal protection and fundamental rights for all. Public Justice strongly believes that fundamental rights of any sort – including, but not limited to, the right to marry – cannot validly be eliminated at the whim of the majority. Rather, the elimination or restriction of such a right may only be accomplished via the process for "revisions" set forth in the California Constitution, which requires approval by a Constitutional Convention or two-thirds of the California state legislature followed by public ratification.

Queen's Bench Bar Association of the San Francisco Bay Area

("Queen's Bench") is a non-profit voluntary membership organization made up of attorneys, judges, and law students. Queen's Bench was formed in 1921 by a group of women lawyers frustrated by the resistance of male lawyers to their participation in the local bar association. Queen's Bench seeks to advance the interests of women in law and society, and

plays an integral part in furthering the progress of women in the legal profession. Central to Queen's Bench's mission is having the courts ensure equal protection under the law. Through its board of directors, committees and community efforts, Queen's Bench has worked to promote the core constitutional principles of equal protection and fundamental rights, and to oppose discrimination in all forms.

San Francisco Trial Lawyers Association ("SFTLA") is a professional membership organization of trial attorneys, now from a broad range of backgrounds, although this was not always the case. SFTLA developed a strong mission statement embracing and promoting diversity within the organization. SFTLA's interest in having courts ensure equal protection under the law is central to its mission. Through its Board of Directors, community outreach, legal and social events, publications and continuing education programs, SFTLA has worked to promote the core constitutional principles of equal protection and fundamental rights, and to oppose discrimination in all forms.

The South Asian Bar Association of Northern California ("SABA-NC") is proud to serve as an advocate for the South Asian community in Northern California and beyond. As part of that mission, SABA-NC has promoted the core constitutional principles of equal protection and fundamental rights, and has opposed discrimination in all forms. SABA-NC recognizes that minority communities often face similar challenges at

various points throughout their histories. The South Asian community has felt the burden of laws and policies that limit their marriage rights in its past. For several decades starting at the beginning of the 20th century, South Asian immigrants and their progeny in California were relegated to second-class citizen status by virtue of anti-miscegenation laws popular throughout the United States, which prevented them from marrying the partner of their choice regardless of race. In 1948, the California Supreme Court took the bold step of becoming the first high court in the nation to strike down an anti-miscegenation statute in the landmark decision *Perez v. Sharp*. Today, SABA-NC stands with the gay and lesbian community – both inside and outside the South Asian community – as they face similar discrimination, and together we ask that the courts not allow discrimination to be written into our Constitution on a mere majority vote.

The South Asian Bar Association of San Diego (“SABA-SD”) is a voluntary bar association dedicated to the advancement and development of attorneys and law students interested in issues affecting the South Asian community. Part of SABA-SD’s mission is to support the provision of legal services to the South Asian community, and to serve as an advocate for the concerns and opinions of South Asians in the community generally, and in the legal profession in particular. SABA-SD has a strong interest in protecting the integrity of the core constitutional principles of equal protection and fundamental rights, and ensuring the courts’ role as final

arbiter of these constitutional guarantees.

The Tom Homann Law Association is a non-profit public interest organization that advances the legal and civil rights of lesbian/gay/bisexual/transgender members of the legal community and the community at large. The Tom Homann Law Association has a strong interest in protecting the integrity of the core constitutional principles of equal protection and fundamental rights, and ensuring the courts' role as final arbiter of these constitutional guarantees.

The Transgender Law Center is a non-profit civil rights organization that advances the civil rights of transgender clients throughout California through direct legal services, litigation, and public education. The Transgender Law Center has a strong interest in protecting the integrity of the core constitutional principles of equal protection and fundamental rights, and ensuring the courts' role as final arbiter of these constitutional guarantees.

Pursuant to Rule 8.520(f) of the California Rules of Court, this brief is filed with an accompanying Application for Leave to File.

SUMMARY OF THE ARGUMENT

Amici submit this brief 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.

I. 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 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), as does Proposition 8, 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.¹

II. PROPOSITION 8 WOULD EVISCERATE CALIFORNIA'S 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"

¹ While this brief specifically urges the Court to recognize that Proposition 8 constitutes a revision to California's Constitution, amici's interests in the Constitution's inalienable rights and principles of equality and liberty are in line with the interests of the Attorney General, and their respective positions arise from a common understanding of the underlying principles of equality in the California Constitution.

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:

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 people.

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. *See Catholic Charities of Sacramento, Inc. v. Superior Ct.* (2004) 32 Cal. 4th 527, 564; *Darces v. Woods* (1984) 35 Cal. 3d 871, 888-93.

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.

III. PROPOSITION 8 WOULD ALTER RADICALLY CALIFORNIA’S 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. 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.

IV. **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.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to grant the relief sought by the Petitioners.

Dated: January 14, 2009

LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP

By: 
Elizabeth J. Cabraser

Elizabeth J. Cabraser
Kelly M. Dermody
Allison S. Elgart
LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Attorneys For Amici Curiae Alameda County Bar Association, Bar Association of San Francisco, Los Angeles County Bar Association, Marin County Bar Association, Santa Clara County Bar Association, AIDS Legal Referral Panel, Asian American Bar Association of the Greater Bay Area, Asian American Justice Center, Asian Pacific American Bar Association of Los Angeles County, Bay Area Lawyers for Individual Freedom, California Employment Lawyers Association, California Rural Legal Assistance, Inc., Central California Legal Services, Inc., Charles Houston Bar Association, Consumer Attorneys of San Diego, East Bay La Raza Lawyers Association, Fred T. Korematsu Center for Law and Equality, Gay & Lesbian Advocates & Defenders, Impact Fund, Japanese American Bar Association of Greater Los Angeles, Korean American Bar Association of Northern California, Korean American Bar Association of Southern California, Latina Lawyers Bar

Association, Law Foundation of Silicon Valley, Lawyer's Club of San Francisco, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Legal Aid Society – Employment Law Center, Lesbian and Gay Lawyers Association of Los Angeles, Mexican American Bar Association, Minority Bar Coalition, National LGBT Bar Association, National Asian Pacific American Bar Association, National Lawyers Guild San Francisco Bay Area Chapter, Public Justice, Queen's Bench Bar Association of the San Francisco Bay Area, San Francisco Trial Lawyers Association, South Asian Bar Association of Northern California, South Asian Bar Association of San Diego, Tom Homann Law Association, and the Transgender Law Center

CERTIFICATE OF COMPLIANCE

Pursuant to the California Rules of Court Rule 8.204(c)(1), counsel for *Amici curiae* hereby certifies that this Brief of Amici Curiae Supporting Petitioners is proportionately spaced, had a typeface of 13 points in Times New Roman font, and contains 8,319 words, including footnotes but excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service, as counted by the word processing program used to generate the document.

Dated: January 14, 2009

LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP

By: _____


Elizabeth J. Cabraser

Elizabeth J. Cabraser
Kelly M. Dermody
Allison S. Elgart
LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Attorneys For Amici Curiae

CERTIFICATE OF SERVICE

I, Ramil Calip, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 275 Battery Street, 30th Floor, San Francisco, California 94111-3339.

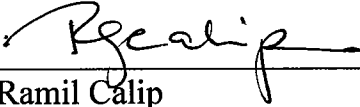
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Brief Of Amici Curiae Supporting Petitioners

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Ramil Calip

**SERVICE LIST
CALIFORNIA SUPREME COURT CASES
S168047, S168066, and S168078**

<p>Andrew P. Pugno Law Offices of Andrew P. Pugno 101 Parkshore Drive, Suite 100 Folsom, CA 95630-4726 Telephone: 916-608-3065 Facsimile: 916-608-3066 E-mail: andrew@pugnolaw.com</p>	<p>Attorneys for Interveners Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, Mark A. Jansson, and Protectmarriage.com</p>
<p>Kenneth W. Starr 24569 Via De Casa Malibu, CA 90265-3205 Telephone: 310-506-4621 Facsimile: 310-506-4266</p>	
<p>Gloria Allred Michael Maroko John Steven West Allred, Maroko & Goldberg 6300 Wilshire Blvd, Suite 1500 Los Angeles, CA 90048-5217 Telephone: 323-653-6530 & 302-4773 Facsimile: 323-653-1660</p>	<p>Attorneys for Petitioners Robin Tyler and Diane Olson (S168066)</p>
<p>Dennis J. Herrera, City Attorney Therese M. Stewart Danny Chou Kathleen S. Morris Sherri Sokeland Kaiser Vince Chhabria Erin Bernstein Tara M. Steeley Mollie Lee City Hall, Room 234 One Dr. Carlton B. Goodlett Place San Francisco, CA 94012-4682 Telephone: 415-554-4708 Facsimile: 415-554-4699</p>	<p>Attorneys for Petitioner City and County of San Francisco (168078)</p>

**SERVICE LIST
CALIFORNIA SUPREME COURT CASES
S168047, S168066, and S168078**

<p>Jerome B. Falk, Jr. Steven L. Mayer Amy E. Margolin Amy L. Bomse Adam Polakoff Howard Rice Nemerovski Canady Falk & Rabkin Three Embarcadero Center, 7th Floor San Francisco, CA 94111-4024 Telephone: 415-434-1600 Facsimile: 415-217-5910</p>	<p>Attorneys for Petitioners City and County of San Francisco, Helen Zia, Lia Shigemura, Edward Swanson, Paul Herman, Zoe Dunning, Pam Grey, Marian Martino, Joanna Cusenza, Bradley Akin, Paul Hill, Emily Griffen, Sage Andersen, Suwanna Kerdkaew and Tina M. Yun (S168078)</p>
<p>Ann Miller Ravel, County Counsel Tamara Lange Juniper Lesnik Office of the County Counsel 70 West Hedding Street East Wing, 9th Floor San Jose, CA 95110-1770 Telephone: 408-299-5900 Facsimile: 408-292-7240</p>	<p>Attorneys for Petitioner County of Santa Clara (S168078)</p>
<p>Rockard J. Delgadillo, City Attorney Richard H. Llewellyn, Jr. David J. Michaelson Office of the Los Angeles City Attorney 200 N. Main Street City Hall East, Room 800 Los Angeles, CA 90012 Telephone: 213-978-8100 Facsimile: 213-978-8312</p>	<p>Attorneys for Petitioner City of Los Angeles (S168078)</p>

**SERVICE LIST
CALIFORNIA SUPREME COURT CASES
S168047, S168066, and S168078**

<p>Raymond G. Fortner, Jr., County Counsel Leela A. Kapur Elizabeth M. Cortez Judy W. Whitehurst Office of Los Angeles County Counsel 648 Kenneth Hahn Hall of Administration 500 West Temple Street Los Angeles, CA 90012-2713 Telephone: 213-974-1845 Facsimile: 213-617-7182</p>	<p>Attorneys for Petitioner County of Los Angeles (S168078)</p>
<p>Richard E. Winnie, County Counsel Brian E. Washington Claude Kolm Office of County Counsel County of Alameda 1221 Oak Street, Suite 450 Oakland, CA 94612 Telephone: 510-272-6700 Facsimile: 510-272-5020</p>	<p>Attorneys for Petitioner County of Alameda (S168078)</p>
<p>Patrick K. Faulkner, County Counsel Sheila Shah Lichtblau 3501 Civic Center Drive, Room 275 San Rafael, CA 94903 Telephone: 415-499-6117 Facsimile: 415-499-3796</p>	<p>Attorneys for Petitioner County of Marin (S168078)</p>
<p>Michael P. Murphy, County Counsel Brenda B. Carlson Glenn M. Levy Hall of Justice & Records 400 County Center, 6th Floor Redwood City, CA 94063 Telephone: 650-363-1965 Facsimile: 650-363-4034</p>	<p>Attorneys for Petitioner County of San Mateo (S168078)</p>

**SERVICE LIST
CALIFORNIA SUPREME COURT CASES
S168047, S168066, and S168078**

<p>Dana McRae County Counsel, County of Santa Cruz 701 Ocean Street, Room 505 Santa Cruz, CA 95060 Telephone: 831-454-2040 Facsimile: 831-454-2115</p>	<p>Attorneys for Petitioner County of Santa Cruz (S168078)</p>
<p>Harvey E. Levine, City Attorney Nellie R. Ancel 3300 Capitol Avenue Fremont, CA 94538 Telephone: 510-284-4030 Facsimile: 510-284-4031</p>	<p>Attorneys for Petitioner City of Fremont (S168078)</p>
<p>Rutan & Tucker, LLP Philip D. Kohn City Attorney, City of Laguna Beach 611 Anton Blvd., 14th Floor Costa Mesa, CA 92626-1931 Telephone: 714-641-5100 Facsimile: 714-546-9035</p>	<p>Attorneys for Petitioner City of Laguna Beach (S168078)</p>
<p>John Russo, City Attorney Barbara Parker Oakland City Attorney City Hall, 6th Floor 1 Frank Ogawa Plaza Oakland, CA 94612 Telephone: 510-238-3601 Facsimile: 510-238-6500</p>	<p>Attorneys for Petitioner City of Oakland (S168078)</p>
<p>Michael J. Aguirre, City Attorney Office of City Attorney, Civil Division 1200 Third Avenue, Suite 1620 San Diego, CA 92101-4178 Telephone: 619-236-6220 Facsimile: 619-236-7215</p>	<p>Attorneys for Petitioner City of San Diego (S168078)</p>

**SERVICE LIST
CALIFORNIA SUPREME COURT CASES
S168047, S168066, and S168078**

<p>Atchison, Barisone, Condotti & Kovacevich John G. Barisone Santa Cruz City Attorney 333 Church Street Santa Cruz, CA 95060 Telephone: 831-423-8383 Facsimile: 831-423-9401</p>	<p>Attorneys for Petitioner City of Santa Cruz (S168068)</p>
<p>Marsha Jones Moutrie, City Attorney Joseph Lawrence Santa Monica City Attorney's Office City Hall 1685 Main Street, 3rd Floor Santa Monica, CA 90401 Telephone: 310-458-8336 Facsimile: 310-395-6727</p>	<p>Attorneys for Petitioner City of Santa Monica (S168078)</p>

**SERVICE LIST
CALIFORNIA SUPREME COURT CASES
S168047, S168066, and S168078**

<p>Lawrence W. McLaughlin, City Attorney City of Sebastopol 7120 Bodega Avenue Sebastopol, CA 95472 Telephone: 707-579-4523 Facsimile: 707-577-0169</p>	<p>Attorneys for Petitioner City of Sebastopol (S168078)</p>
<p>Edmund G. Brown, Jr., Attorney General of the State of California James M. Humes Manuel M. Mederios David S. Chaney Christopher E. Krueger Mark R. Beckington Kimberly J. Graham Office of the Attorney General 1300 I Street, Suite 125 Sacramento, CA 95814-2951 Telephone: 916-322-6114 Facsimile: 916-324-8835 E-mail: Kimberly.Graham@doj.ca.gov</p> <p>Edmund G. Brown, Jr. Office of the Attorney General 1515 Clay Street, Room 206 Oakland, CA 94612 Telephone: 510-622-2100</p>	<p>State of California; Edmund G. Brown, Jr.</p>
<p>Kenneth C. Mennemeier Andrew W. Stroud Kelcie M. Gosling Mennemeier, Glassman & Stroud LLP 980 9th Street, Suite 1700 Sacramento, CA 95814-2736 Telephone: 916-553-4000 Facsimile: 916-553-4011 E-mail: kcm@mgsllaw.com</p>	<p>Attorneys for Respondents Mark B. Horton, State Registrar of Vital Statistics of the State of California, and Linette Scott, Deputy Director of Health Information and Strategic Planning for CDPH</p>

**SERVICE LIST
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<p>Eric Alan Isaacson Alexandra S. Bernay Samantha A. Smith Stacey M. Kaplan 655 West Broadway, Suite 1900 San Diego, CA 92101 Telephone: 619-231-1058 Facsimile: 619-231-7423 E-mail: eisaacson@csgrr.com</p>	<p>Attorneys for Petitioners California Council of Churches, the Right Reverend Marc Handley Andrus, Episcopal Bishop of California, the Right Reverend 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 (S168332)</p>
<p>Jon B. Eisenberg Eisenberg and Hancock, LLP 1970 Broadway, Suite 1200 Oakland, CA 94612 Telephone: 510-452-2581 Facsimile: 510-452-3277 E-mail: jon@eandhlaw.com</p>	

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S168047, S168066, and S168078**

<p>Raymond C. Marshall Bingham McCutchen LLP Three Embarcadero Center San Francisco, CA 94111-4067 Telephone: 415-393-2000 Facsimile: 415-393-2286</p>	<p>Attorneys for Petitioners Asian Pacific American Legal Center, California State Conference of the NAACP, Equal Justice Society, Mexican American Legal Defense and Educational Fund, and NAACP Legal Defense and Education Fund, Inc. (S168281)</p>
<p>Tobias Barrington Wolff (pro hac vice pending) University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104 Telephone: 215-898-7471 E-mail: twolff@law.upenn.edu</p>	
<p>Julie Su Karin Wang Asian Pacific American Legal Center 1145 Wilshire Blvd., 2nd Floor Los Angeles, CA 90017 Telephone: 213-977-7500 Facsimile: 213-977-7595</p>	
<p>Eva Paterson Kimberly Thomas Rapp Equal Justice Society 220 Sansome Street, 14th Floor San Francisco, CA 94104 Telephone: 415-288-8700 Facsimile: 415-288-8787</p>	
<p>Nancy Ramirez Cynthia Valenzuela Dixon Mexican American Legal Defense and Educational Fund 634 South Spring Street Los Angeles, CA 90014 Telephone: 213-629-2512 Facsimile: 213-629-0266</p>	<p>Attorneys for Petitioners Asian Pacific American Legal Center, California State Conference of the NAACP, Equal Justice Society, Mexican American Legal Defense and Educational Fund, and NAACP Legal Defense and Education Fund, Inc. (S168281)</p>

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CALIFORNIA SUPREME COURT CASES
S168047, S168066, and S168078**

<p>Irma D. Herrera Lisa J. Leebove Equal Rights Advocates 1663 Mission Street, Suite 250 San Francisco, CA 94103 Telephone: 415-621-0672 ext. 384 Facsimile: 415-621-6744</p>	<p>Attorneys for Petitioner Equal Rights Advocates (S168302)</p>
<p>Vicky Barker California Women's Law Center 6300 Wilshire Blvd., Suite 980 Los Angeles, CA 90048 Telephone: 323-951-1041 Facsimile: 323-951-9870</p>	<p>Attorneys for Petitioner California Women's Law Center (S168302)</p>
<p>Laura W. Brill Moez J. Kaba Richard M. Simon Mark A. Kressel Irell & Manella LLP 1800 Avenue of the Stars, Suite 900 Los Angeles, CA 90067 Telephone: 310-277-1010 Facsimile: 310-203-7199</p>	<p>Attorneys for Petitioners Equal Rights Advocates and California Women's Law Center (S168302)</p>