Case No. S168047

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert, Eilenn Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmund Wu, James Tolen and Equality California,

Petitioners,

v.

Mark D. Horton, in his official capacity as State Registrar of Vital Statistics of the State of California and Director of the California Department of Public Health; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; and Edmund G. Brown, Jr., in his official capacity as Attorney General for the State of California,

Respondents;

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# APPLICATION TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER'S CHALLENGING OF THE CONSTITUTIONALITY OF PROPOSITION 8 AND STATEMENT OF INTEREST OF *AMICUS CURIAE* C. EDWIN BAKER, ROBERT A. BURT AND KERMIT ROOSEVELT III

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Application to File an *Amicus Curiae* Brief in Support of Petitioner's Challenging of the Constitutionality of Proposition 8 and Statement of Interest of *Amicus Curiae*

Amici are a group of law professors who teach and write in the area of constitutional law and share a strong professional interest in issues of equality and constitutional change. We seek to provide this Court with our perspective on these issues as they relate to the Court's decision in *In re Marriage Cases,* 43 Cal.4th 757 (2008), and the enactment of Proposition 8.

**Preliminary Statement**

This brief, submitted by C. Edwin Baker, Robert A. Burt, and Kermit Roosevelt III as *amicus curiae*, will avoid a recapitulation of the facts and the legal backdrop to this case, which are fully presented in the briefs submitted to this Court by the petitioners and the Attorney General. It will also not repeat the arguments comprehensively advanced in those briefs, which have considerable merit. Rather, this brief focuses on a point that we believe no party has yet addressed, namely, that Proposition 8 is invalid because Senate Amendment 22, which created the initiative-amendment procedure, could not have authorized it.

What Proposition 8 purports to do is to strip a fundamental right—indeed, one the California Constitution pronounces "inalienable"—from a class that this Court has already identified as suspect for purposes of equal protection.[1] It operates with respect to the most important kind of individual right, and in the area where majoritarian politics is least to be trusted. The initiative-amendment process created by Senate Amendment

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[1] See *In Re Marriage Cases*, 43 Cal.4th 757 (2008) (identifying suspect class and fundamental right); Cal. Const. art. I, § 1 (pronouncing liberty inalienable).

22 in 1911 did not and could not have conferred the power to enact such amendments by a bare majority of voters. It did not do so because the creation of an unlimited amendment power, wielded by a simple majority of voters, would have made such "far reaching changes in the nature of our basic governmental plan," *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization,* 22 Cal. 3d 208, 223 (1978), as to amount to a revision of the California constitution.

This argument does not turn on whether, as petitioners claim, Proposition 8 is itself such a dramatic change as to amount to a revision, or whether, as the Attorney General claims, some rights enjoy a privileged status under the California Constitution.[2] Instead, it proceeds from the undisputed fact that Senate Amendment 22 was an amendment and not a revision. The argument is that no mere amendment such as Senate Amendment 22 could have empowered a bare majority to enact future changes of the nature of Proposition 8.

As discussed below, judicial decisions enforcing equality guarantees have typically followed a standard historical and jurisprudential pattern, whereby judicial intervention to protect a minority from discrimination at the hands of the majority meets initial resistance, but then comes to be accepted over time. This pattern would be altogether meaningless, however, if such decisions were subject to overrule by a simple majority vote. Vesting a simple majority with the power to strip fundamental rights from unpopular minorities would work an enormous change in the allocation of power under any constitution, including the

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[2] Amici believe that petitioners and the Attorney General share the same underlying view that bare majorities cannot strip fundamental rights from suspect classes. Amici agree with that basic proposition, but they offer the Court a different and possibly narrower ground on which to decide the case.

California constitution. It would essentially take judges out of the business of protecting unpopular minorities. Such a dramatic change would amount to a revision and therefore could not have been accomplished by an amendment like Senate Amendment 22.

The crux of the argument outlined below is that the power conferred on a bare majority of voters by Senate Amendment 22 must have limits. Some kinds of constitutional changes cannot be effected by initiative-amendment. While this brief does not attempt to identify the precise lines that distinguish permissible from impermissible initiative-amendments, the suggestions made by the petitioners and the Attorney General, in our view, both constitute reasonable attempts to identify the difference between a permissible and an impermissible initiative-amendment. However the line is drawn, Proposition 8 clearly falls on the wrong side.

## Argument

### I. The Path of Equality

Like the California Constitution, the federal Constitution contains an equality guarantee, in the Fifth and Fourteenth Amendments. Over the years, federal courts have applied the federal equality guarantee to protect the rights of vulnerable groups and the courts' experience in this regard is instructive.

In general, federal decisions enforcing equality have tended to be intensely controversial when handed down. Most of them, at the time, have gone against the wishes of majorities at either the national or the state level. But in the end they are accepted.

This pattern is fairly consistent. At one point, a certain form of discrimination is so widely accepted that it seems obviously justified, in a sense simply part of the inherent nature of things. In terms of popular opinion, it enjoys the support of a supermajority. Judges are not likely to act against such discrimination, and if they do, the backlash might well be strong enough to meet the supermajority requirements for a federal constitutional amendment.

As time passes, however, the discrimination becomes controversial. It still enjoys majority support, at least in some states; otherwise it would quite likely be eliminated through the ordinary political process. But it is no longer accepted by a supermajority. It is at this time that judges tend to act, striking the practice down as unjustified discrimination. The decision may be intensely controversial. It may even be the target of majority disapproval. But because there is no longer a supermajority that can amend the Constitution, the decision is safe.

Later still, the discriminatory practice comes to seem outrageous. The initial judicial decision will no longer be controversial. It has been proved correct in the judgment of history, and law students reading it in school are puzzled how anyone could ever have accepted the arguments for the other side.

This pattern has repeated itself over and over again in the history of the federal constitution. Notably, while some of the Supreme Court's interventions in the name of liberty have failed,[3] and some remain intensely controversial today,[4] its equality-rooted decisions have all fared

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[3] See, e.g., *Lochner* v. *New York*, 198 U.S. 45 (1905).

[4] See, e.g., *Roe* v. *Wade*, 410 U.S. 113 (1973); *Furman* v. *Georgia*, 408 U.S. 238 (1972).

well in the judgment of history. As the following sections show, equality-based decisions have ultimately come to win public acceptance without exception.

A. Race discrimination

Race discrimination has historically been the central focus of the constitutional struggle for equality. The Fourteenth Amendment guaranteed blacks formal legal equality, but it took decades for this promise to become a reality. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Supreme Court upheld a Louisiana law mandating racial segregation of railroad cars. Such segregation was not stigmatizing or oppressive, the Court ruled—or, if it was, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.* at 551.

Some of the supporters of segregation probably did not care if it was stigmatizing, or indeed desired it for that reason. Others may have believed in good faith that it was not invidious, but rather a reasonable and appropriate responses to the obvious differences between the races. Even the first Justice Harlan, dissenting on the ground that the social meaning of segregation was stigmatic, added that "the white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power." *Id.* at 559 (Harlan, J., dissenting).

By 1954, however, the true social meaning of segregation was more evident. Twenty-one states mandated or permitted segregation,[5] but the Supreme Court was willing to identify segregated schooling as

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[5] See Luthor A. Huston, *1896 Ruling Upset: 'Separate but Equal' Doctrine Held Out of Place in Education*, The New York Times, May 18, 1954.

stigmatic and to state that the Fourteenth Amendment prohibited it. "Separate educational facilities," Chief Justice Warren wrote for the Court in *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954), "are inherently unequal."

*Brown* provoked a fierce reaction from opponents and the Supreme Court was denounced for its "activism." See generally Kermit Roosevelt III, The Myth of Judicial Activism 66-67 (2006). Even supporters of *Brown* were hardly enthusiastic. Constitutional authorities including the eminent Herbert Wechsler lauded the result on policy grounds, but pronounced themselves incapable of justifying it. *Id.* Nowadays, of course, *Brown* is unquestioned and all but unquestionable. It is obvious to the modern eye that excluding black children from white schools is stigmatizing and unequal.

B. Interracial Marriage

The pattern is the same with respect to racial discrimination in areas other than segregation. Even after *Brown*, the idea of interracial marriage was so inflammatory that the federal Supreme Court repeatedly declined to hear cases presenting constitutional challenges to bans on the practice.[6] In 1954, the Supreme Court of Alabama upheld the conviction of a black woman for her relationship with a white man. *Jackson* v. *State*, 260 Ala. 698 (Ala. 1954). In 1955, the Supreme Court of Virginia likewise affirmed the state's antimiscegenation law. *Naim v. Naim*, 197 Va. 80 (Va. 1955). "The institution of marriage," the court wrote, is "a relation basic and vital to the permanence of the State" which "may be maintained in

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[6] See generally Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860's-1960's*, 70 Chi-Kent L. Rev. 371, 415-419 (1994).

accordance with established tradition and culture and in furtherance of the physical, moral and spiritual well-being of its citizens." *Id.* at 89. The federal Supreme Court declined to hear the cases. See *Jackson* v. *Alabama*, 348 U.S. 888 (1954); *Naim* v. *Naim*, 350 U.S. 985 (1956).

The opinions of the state Supreme Courts probably commanded supermajority support within those states. Nationwide, popular support was also strong; in 1955, more than half of the states had laws against interracial marriage. See *Naim*, 197 Va. At 85, 87. But by 1967, the social climate had changed. Between 1952 and 1967, fourteen states repealed their bans and one, California, saw it struck down by the state high court years before, in 1948. See *Loving* v. *Virginia*, 388 U.S. 1, 6 n.5 (1967). When *Loving* was decided, sixteen states still had such laws. See *Id.* at 6. But the Supreme Court was willing then to pronounce the justifications offered by opponents of interracial marriage illegitimate. "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this distinction." *Id.* at 11.

In contrast to *Brown*, *Loving* met much less resistance than the Justices apparently feared. Nowadays, the defenses put forth by the state courts that upheld antimiscegenation laws seem almost comically outrageous. The state has legitimate interests, the Virginia Supreme Court wrote in *Naim*, in preserving "the racial integrity of its citizens" and preventing the evils that would flow from interracial marriage: "the corruption of blood," "a mongrel breed of citizen," and "the obliteration of racial pride." *Naim*, 197 Va. at 90. The trial court in *Loving* went further still, observing that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. ... The fact that he separated the races shows that he did not intend for the races to mix."

*Loving*, 388 U.S. at 3 (quoting trial court). None of these arguments would now be taken seriously by courts or legislators.[7]

C. Sex discrimination

Race is of course not the only area in which history has seen a march towards equality. As it did with race, conventional wisdom once held that sex-based differences were so extreme that differential treatment was the natural and reasonable response. In 1873 Myra Bradwell brought suit to challenge the Illinois ban on women lawyers. The Supreme Court rejected her claim. *Bradwell* v. *Illinois*, 83 U.S. 130 (1872). Concurring, Justice Bradley wrote that "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. ... The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Id.* at 141 (Bradley, J., concurring).

That sentiment appears to have been the dominant opinion at the time. Justice Bradley was not censured or impeached for adding those phrases to the United States Reports. As late as 1948, the Court upheld a Michigan law prohibiting women from bartending unless they were the wife or daughter of the male owner of the bar. See *Goesaert* v. *Cleary*, 335 U.S. 464 (1948). "The fact that women may now have achieved the virtues that men long claimed as their prerogatives, and now indulge in the vices that men have long practiced," Justice Felix Frankfurter wrote for the

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[7] As it has done in other cases, the California Supreme Court reached the *Loving* result well in advance of the federal Supreme Court. See *Perez v. Sharp*, 32 Cal. 2d 711 (1948). The federal Supreme Court frequently relies on state court decisions as indicators of societal values. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 570-71 (2003) (noting state supreme court decisions striking down same-sex sodomy bans).

majority, "does not preclude the States from drawing a sharp line between the sexes ... ." *Id.* at 466.

By 1973, views had changed. Congress had included sex in the list of prohibited bases for discrimination in Title VII of the Civil Rights Act of 1964, and the Equal Rights Amendment had been passed by Congress and submitted to state legislatures for ratification. See *Frontiero* v. *Richardson*, 411 U.S. 677, 687 (1973). *Frontiero* quoted Justice Bradley's words from *Bradwell* in order to reject them; it pronounced discrimination on the basis of sex "inherently suspect." *Id.* at 688 (plurality op.). Nowadays, of course, the grosser forms of sex discrimination seem absurd. No one could quote Justice Bradley with a straight face, and the Supreme Court's ruling that sex discrimination must meet a heavy burden of justification is generally accepted.

D. Sexual orientation discrimination

Most recently, we have seen similar developments with respect to discrimination on the basis of sexual orientation. In 1986, the federal Supreme Court upheld a Georgia law criminalizing sodomy. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Writing for the majority, Justice White proclaimed the petitioner's argument "at best, facetious." *Id.* at 194. The dismissive tone was in keeping with the spirit of the times, or at least of the immediately preceding decades. Sodomy bans were supported, at one point, not by a mere supermajority but by unanimity among the states. Before 1961, "all 50 states had outlawed sodomy." *Lawrence* v. *Texas*, 539 U.S. 558, 572 (2003). In 1978, dissenting from a denial of certiorari, then-Justice William Rehnquist argued, based on "expert psychological testimony," that allowing a college gay students club to meet to express opposition to sodomy bans was similar to allowing "those suffering from

measles ... in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge a repeal of a state law providing that measles sufferers be quarantined." *Ratchford* v. *Gay Lib*, 434 U.S. 1080, 1083-84 (1978) (Rehnquist, J., dissenting from denial of certiorari). And until 1973, the American Psychiatric Association included homosexuality in the Diagnostic and Statistical Manual of Mental Disorders. See Herb Kutchins & Stuart Kirk, Making Us Crazy 55-99 (2003).

But again, as time passed, attitudes changed. "Over the course of the last decades," the Court noted in *Lawrence*, "States with same-sex prohibitions have moved toward abolishing them." *Lawrence*, 539 U.S. at 570 (citations omitted). In the years between *Bowers* and *Lawrence*, public opinion shifted from majority support for sodomy bans to majority support for repeal.[8] In 1996, the federal Supreme Court struck down a Colorado referendum-amendment that restricted the ability of gays and lesbians to obtain protection under state and local antidiscrimination laws. *Romer v. Evans*, 517 U.S. 620 (1996). And in *Lawrence*, the Court rejected *Bowers*, stating that "[t]he petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.* at 578.

Although there was a backlash immediately after the decision, *Lawrence* is now generally accepted. See Michael Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 Mich. L. Rev. 431, 459 (2005). Support

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[8] Gallup's Pulse of Democracy, *Homosexual Relations*, http://www.gallup.com/poll/1651/Homosexual-Relations.aspx

for gay rights returned to its prior level quickly, and opposition to sodomy bans is again the majority view.[9]

E. Same-sex Marriage

There has not, of course, yet been a federal decision recognizing a right to marriage equality for same-sex couples. But the example of Massachusetts shows that the same pattern applies. In 2003, the Supreme Judicial Court of Massachusetts recognized a right to same-sex marriage under the state constitution. *Goodridge* v. *Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003). Predictably, the decision inspired a backlash against purported "judicial activism," and opponents began the process of seeking a constitutional amendment to overturn it.

Massachusetts requires proposed amendments to win legislative approval in two consecutive sessions. Mass. Const. Art. XLVII § IV cl. 4-5. The proposed amendment to overturn *Goodridge* prevailed in 2004, but in 2005 was defeated by the decisive margin of 157 to 39. See Roosevelt, Myth, at 107. The backlash was able to muster majority support immediately after the decision but not to sustain it.

California seems to be in the midst of transition similar to that of Massachusetts. Eight years ago, 61% of the population supported the same-sex marriage ban struck down by this Court in *In Re Marriage Cases*. By the time of the enactment of Proposition 8, the margin of the majority had shrunk to a razor-thin 52%. The decision in *In Re Marriage Cases*, then, fits the pattern described above, and there is every reason to believe that it would win public acceptance if it were allowed to stand. As time passes, equality enforcing decisions have universally been accepted for a

[9] Gallup's Pulse of Democracy, *Homosexual Relations*, http://www.gallup.com/poll/1651/Homosexual-Relations.aspx

simple reason. People have the chance to see that the consequences they feared do not materialize, and that the evils they predicted were based on stereotype and ignorance. Tolerance follows. As Massachusetts state senator Jarrett Barrios said, explaining the failure of the anti-*Goodridge* amendment in 2005, "We've got a world that hasn't changed." Roosevelt, Myth, at 107.

## II. Eliminating Supermajority Protection for the Fundamental Rights of a Suspect Class Requires a Revision

The pattern described above is the standard course for equality-enforcing decisions. While a supermajority supports a form of discrimination, courts tend not to act. When that support has shrunk to majority status, courts intervene. And eventually a new majority coalesces behind the decision.

Things would be very different, however, if the rights the courts protected in these cases could be put to a majority vote at the time that the decision was rendered. Judicial interventions in defense of minorities would simply not succeed; they would be reversed whenever a majority disapproved. Indeed, judicial attempts to protect minorities would likely be counterproductive, since the last-gasp backlash would not merely undo the judicial decision but entrench the discrimination. The balance of power between the courts and a bare majority of voters would be drastically recalibrated.

What all this means is simple. There is an enormous structural difference between a constitution that allows a bare majority to take fundamental rights away from suspect classes and one that does not. A constitutional system in which decisions like *Brown*, *Loving*, *Frontiero*, and

*Lawrence* could be immediately overturned by a simple majority vote is wildly different from the system under which we live.

It follows then that changing from a system with a supermajority check on amendments that take fundamental rights from suspect classes to one that has no such check is momentous. It essentially takes courts out of the business of protecting minorities, which this Court has described as "the most fundamental" of their duties under the constitution. See *Bixby v. Pierno,* 4 Cal. 3d 130, 141 (1971). It affects "the foundational powers" of the judicial branch and, even more clearly, its power relative to voters; it "fundamentally change[s] and subordinate[s] the constitutional role assumed by the judiciary in the governmental process." See *Legislature of Cal.* v. *Eu*, 54 Cal. 3d 492, 508-09 (1991). It is a "far reaching change[] in the nature of our basic governmental plan." *Amador Valley*, 22 Cal. 3d. at 223.

By means of illustration, if Senate Amendment 22 had prescribed that the Governor could amend the Constitution at will, it would obviously have been a change of revision magnitude. See *id.* (noting that "an enactment which purported to vest all judicial power in the Legislature would amount to a revision without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change"). The change that Senate Amendment 22 made was less obvious, but with respect to the fundamental rights of suspect classes, equally significant. As far as the California Constitution is concerned, eliminating a supermajority requirement, at least with respect to amendments stripping fundamental rights from suspect classes, is not an amendment. It is a revision.

## III. Senate Amendment 22 Was Not a Revision

The history of the initiative-amendment process is well described in the Attorney General's brief, and we will not repeat it in detail. For present purposes, a few simple points suffice. Before 1911, the California Constitution did not allow amendment by a bare majority of voters. Instead, Article XVIII, § 1 of the 1878 Constitution required that an amendment be proposed by a branch of the legislature, and if it achieved two-thirds majority in both branches, be submitted to the people for ratification by a majority of voters.

In 1911, Senate Amendment 22 created the initiative-amendment process, allowing a bare majority of voters to enact constitutional amendments. Did it authorize any sort of amendment, including one that takes fundamental rights from a suspect class? The Attorney General argues that this was not the purpose of Senate Amendment 22. "The initiative power," he contends, "could never have been intended to give the voters an unfettered prerogative to amend the Constitution for the purposes of depriving a disfavored group of rights determined by the Supreme Court to be part of fundamental human liberty." Respondent's Br. at 76.

That is doubtless true. Senate Amendment 22 was intended to allow voters to bypass a foot-dragging legislature, not to oppress vulnerable groups or strip courts of their traditional role of protecting minority rights. See *Amador Valley*, 22 Cal.3d at 228-229. Indeed, if this had been Senate Amendment 22's intent, it would be questionable on federal constitutional grounds, which is a reason to read it to exclude such amendments. See *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating initiative-amendment that encourages discrimination).

But there is a more fundamental point to be made, which depends not on intent, but on authority. Senate Amendment 22 *could not* have created the "unfettered prerogative" to which the Attorney General refers because, as the preceding section argued, the creation of such a power would have required a revision. Senate Amendment 22 was not a revision; it was an amendment. As the Attorney General points out, in 1911, revisions could be accomplished only by convening a constitutional convention. The Legislature did not gain authority to propose revisions until 1962. See Respondent's Brief at 11-15, 84 n.21. It therefore follows that Senate Amendment 22 could not have authorized a bare majority to take fundamental rights away from suspect classes.

## IV. Proposition 8 is Invalid

Eliminating the protection that a supermajority amendment requirement gives to the fundamental rights of unpopular minorities requires a revision, and Senate Amendment 22 was only an amendment. It follows that the initiative power cannot be entirely unfettered. There must be some limits to the kind of amendments that can be enacted by simple initiative. Finding those limits is a matter of construing the initiative-amendment power to stay within the bounds of the California Constitution—that is, construing it so that the change worked by Senate Amendment 22 does not stray into the realm of revision. As this Court wrote in *Mulkey v. Reitman,* 64 Cal. 2d. 529, 533-34 (1966), *aff'd* 387 U.S. 369 (1967), "A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective and ultimate effect."

Identifying the limits with precision is surely no easy task. The arguments of the Petitioners and the Attorney General offer reasonable

suggestions as to what lines this Court might draw. The Attorney General argues that some rights enjoy a privileged status and should be immune from revision by initiative-amendment. See Respondent's Br. at 75-90. Petitioners, in turn, focus on the question of discrimination, arguing that the structural problem arises with respect to initiative-amendments affecting suspect classes.

What Petitioners and the Attorney General agree on is that an amendment stripping a fundamental right from a suspect class must fall outside the lines, however they are drawn. It is precisely in the case of the suspect class that the supermajority check is most important, and it is in the case of fundamental rights that the deprivation is most grievous. Senate Amendment 22 could not have authorized such changes, and therefore Proposition 8 is invalid.

## Conclusion

For the reasons stated above, Amici respectfully urge this Court to grant the relief sought in the Petitioners' Amended Writ Petition.

Dated: New York, New York
January 14, 2009

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

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CERTIFICATE OF COMPLIANCE

CALIFORNIA RULES OF COURT, RULE 8.204 SUBDIVISION (c)(1)

I hereby certify that:

Pursuant to California Rules of Court, Rule 8.504 subdivision (c)(1), in reliance upon the word count feature of the software used, I certify that this brief, filed on January 15, 2009, used a 13 point Times New Roman font, and contains 4,294 words, including footnotes.

Dated: January 14, 2009

Walter Rieman

AFFIDAVIT OF SERVICE BY FIRST CLASS MAIL

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Alex C. Souza, being duly sworn, deposes and says:

1. I am not a party to this action, am over 18 years of age and am employed by Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, New York 10019.

2. On January 14, 2009, I served true copies of the attached APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS CHALLENGING PROPOSITION 8 AND STATEMENT OF INTEREST OF AMICUS CURIAE C. EDWIN BAKER, ROBERT A. BURT, AND KERMIT ROOSEVELT III, MOTION FOR ADMISSION PRO HAC VICE TO THIS COURT OF ROBERTA A. KAPLAN, LETTER TO THE STATE BAR RE: APPLICATION FOR ADMISSION PRO HAC VICE OF ROBERTA A. KAPLAN, and LETTER TO THE CLERK OF SUPREME COURT on the following:

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Sacramento, CA 95814-2951

Kenneth C. Mennemeier
Mennemeier, Glassman & Stroud LLP
980 9th Street, Suite 1700
Sacramento, CA 95814-2736

3. I made such service by personally enclosing true copies of the aforementioned documents in a properly addressed, prepaid wrapper and depositing it into an official depository under the exclusive custody and care of the United States Postal Service within the State of New York.

Alex C. Souza

Sworn to before me this
14th day of January, 2009

Notary Public

SYLVIA ANDREEV
Notary Public, State of New York
No. 01AN6119735
Qualified in Queens County
Certificate Filed in New York County
Commission Expires December 6, 2012