NOS. S168047, S168066, S168078

IN THE

SUPREME COURT OF CALIFORNIA

KAREN L. STRAUSS, et al.

Petitioners,

vs.

MARK D. HORTON, et al.,

Respondents;

DENNIS HOLLINGSWORTH, et al.,

Intervenors.

PROFESSOR KARL M. MANHEIM'S APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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PROFESSOR KARL M. MANHEIM'S APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

Pursuant to California Rule of Court 8.200(c)(1), Professor Karl M. Manheim respectfully requests leave to file the attached amicus curiae brief in support of petitioners.

Professor Manheim is a Professor of Law at Loyola University in Los Angeles, where his teaching concentrations include constitutional law and civil rights law. He is the author of numerous published works, including *A Structural Theory of the Initiative Process in California*, 31 Loyola L.A. L. Rev. 1165 (1998) (co-authored with amicus counsel Edward P. Howard). This article provides the framework for the analysis set forth in the attached amicus brief.

In addition to his involvement in the development of constitutional and civil rights law in this state, Professor Manheim has appeared as counsel of record in a number of the state's most significant cases involving challenges to the initiative process, including *League of United Latin American Citizens v. Wilson* (C.D. Cal. 1998) (Prop. 187); *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997) (Prop. 209); *Gregorio T. v. Wilson*, 59 F.3d 1002 (9th Cir. 1995) (Prop. 187); *20th Century Insurance Co. v. Garamendi*, 8 Cal. 4th 213 (1994) (Prop. 103); and *CalFarm Insurance Co. v. Deukmejian*, 48 Cal.3d 805 (1989) (Prop 103).

Professor Manheim is familiar with the issues in this case and the scope of their presentation. He believes that further briefing will be helpful to the Court with respect to

the structural underpinnings of the initiative process, particularly as it relates to the rule of the judiciary in determining whether a challenged initiative is a permissible constitutional amendment or a prohibited constitutional revision.

For these reasons, Professor Manheim respectfully requests that he be granted leave to file the accompanying Amicus Curiae Brief in Support of Petitioners.

Dated: January 15, 2009

Respectfully submitted,

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I. INTRODUCTION

The Court must seek to honor the ultimate expression of the people's will. On that much, Petitioners and Interveners agree. But, by urging deference to Proposition 8, Interveners improperly attribute the ultimate expression of the people's will to the initiative power when in fact it resides in the state Constitution. Indeed, acting as the state's "ultimate sovereigns," California's citizens forged a constitutional scheme and bound themselves to its rules. Under this governing scheme, the people recognized the challenge of permitting flexibility to make needed changes to the scheme while also protecting it against significant alterations made without proper deliberation. Accordingly, the people embedded within the Constitution's structure the tools necessary to protect its core principles by, among other things, distinguishing two political acts – the right of the people, in furtherance of their ultimate political power exercised at convention, to revise their foundational document, and the distinct and lesser right of the people to exercise legislative power via constitutional amendment. Revisions, which change the very underlying foundations of the Constitution, are appropriately more difficult to enact than amendments, which can only improve or carry out existing constitutional provisions and may not alter core constitutional precepts. The people, through their exercise of foundational political power, have limited their own legislative

power to substantially alter the Constitution or the fundamental governing principles it enshrines.

As a constitutional provision, this revision-amendment distinction, a core constitutional provision in itself, is left to the judiciary to interpret and enforce. In carrying out this interpretive duty, the courts, while mindful of the importance of the democratic process, conduct a searching, independent review to determine what constitutes a revision under the Constitution. Without this scrutiny, there would be no meaningful limitations on the initiative power and no means to police the clear distinctions the people themselves placed in the Constitution.

A thorough review of Proposition 8 makes pellucidly clear that it improperly attempts to revise the Constitution by taking the unprecedented step of singling out a suspect class and depriving that class – and only that class – of a fundamental right. To characterize this sweeping change as an amendment is to ignore its effect on the Constitution it seeks to rewrite and to severely compromise the judiciary's ability to protect suspect classes under equal protection, a core underlying principle of our governmental scheme. The commands of equality, long recognized by the people of California, lose all force if they are relegated to mere advisory statements subject to popular whim. As that is the ultimate effect of Proposition 8, it must not be allowed to stand.

II. LEGAL ANALYSIS

A. The Initiative Amendment Power Is Distinguishable From And Subordinate To The Sovereign Power.

Interveners offer a superficially appealing argument, namely, that the initiative power represents the definitive expression of the will of the people. This understanding however, belies the history and structure of the state Constitution. For while the initiative process is due great respect, it remains subordinate to the Constitution, the fundamental compact that embodies the people's will as sovereign. The following section illuminates the history of the revision and amendment processes and the role of the Constitution in regulating each.

1. As A Legislative Power, An Initiative Can Only Enact Only Amendments And Not Revisions To The Constitution.

Only the people as sovereign may execute *political power* – i.e., the essential sovereign power of self-governance. No institution of lesser delegated authority may do so. "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." Cal. Const., art. II, sec.1.

This power found its expression in the constitutional conventions of 1849 and 1879, where the people exercised their sovereignty to create and

regulate their government institutions. A constitutional convention embodies the people's sovereign power at its apogee, as observed by delegates to the 1878-1879 convention:

> [T]he convention work[s] on a different level than the "every-day operations" of the executive, legislative, or judicial branches. Rather, a convention "outranks them all; it is their creator, and fixes limits to their spheres of action, and boundaries to their powers. It is occasional, exceptional, brief, and peculiar; it represents the people in their primary capacity, and forms the organic, fundamental, and paramount law of state."

Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 Rutgers L.J. 945, 993 (1994) (footnote omitted) (hereinafter "Fritz"). In creating a written constitution, the people exercised their political power, not merely to create and limit the institutions of government, but also to "set bounds to their own power, as against the sudden impulses of mere majorities." *Duncan v. McCall*, 139 U.S. 449, 461 (1891).

The initiative process, added to the California Constitution in 1911, is "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Cal. Const. art. II, § 8(a). Case law uniformly holds the initiative power "of the electors" to be a legislative power. *See McFadden v. Jordan,* 32 Cal. 2d 330, 333 (1948) (holding that "[t]he initiative power reserved by the people by amendment to the

Constitution in 1911 (art. IV, § 1) applies only to the proposing and the adopting or rejecting of 'laws and amendments to the Constitution' and does not purport to extend to a constitutional revision"); *Dwyer v. City Council of Berkeley*, 200 Cal. 505, 513 (1927) ("By the enactment of initiative and referendum laws the people have simply withdrawn from the legislative body and reserved to themselves the right to exercise a part of their inherent legislative power."); *DeVita v. County of Napa*, 9 Cal. 4th 763, 775 (1995) (holding, with respect to initiatives and referenda at the local level, that "the local electorate's right to initiative and referendum . . . is generally co-extensive with the legislative power of the local governing body").

The initiative is a "reserved" power derived from the political power that the people have retained. Despite the initiative's superficial resemblance to the popular exercise of political power at a constitutional convention, they are not the same. Political power is always greater than the initiative power. It was through the political power – as the expression of popular sovereignty – that the initiative power was both created and constrained. *See Livermore v. Waite*, 102 Cal. 113, 117 (1894) ("If, upon its submission to the people, [the Constitution] is adopted, it becomes . . . the organic law of the state, to which every citizen must yield an acquiescent obedience"). Accordingly, while the exercise of the political power may restrain or eliminate the power of the electorate to initiate

legislation, the reverse is not true. The initiative power – (notwithstanding the deference duly afforded its exercise) – may not encumber the political power, as expressed in the Constitution's foundational provisions.

2. The California Constitution Prohibits The "Amendment" Of Core Principles Of Equality.

While an amendment may be directly enacted by initiative, a revision – or call for a constitutional convention – must first be approved by two-thirds of the Legislature before a vote by the people. Cal. Const. art. XVIII, secs1-3. This cumbersome revision process serves a purpose. More than 100 years ago, this Court held that the protections against the Constitution's revision "indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature." *Livermore v. Waite*, 102 Cal. at 118-19. Amendments, on the other hand, stay "within the lines of the original instrument" and "effect an improvement, or better carry out the purpose for which it was framed." *Id.*

Livermore recognized that while amendments can alter certain provisions in the Constitution, only revisions can rework its foundational principles.[1] For that reason, the Constitution requires more "formality,

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[1] Legislative provisions now comprise more than 75% of the Constitution. *See* Pat Ooley, *State Governance: An Overview of the History of Constitutional Provisions Dealing with State Governance*, http://library.ca.gov/california/CCRC/reports/html/hs_state&uscore;governance.html.

discussion and deliberation" in enacting a revision than is mandated in the initiative process. *Raven v. Deukmejian*, 52 Cal. 3d 336, 350 (1990) (citing Note, *Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 Cal. L. Rev. 1216, 1224 (1983)); *see also* Stanley Mosk, *Raven and Revision*, 25 U.C. Davis L. Rev. 1, 4 (1991) (Justice Mosk noting, with respect to his concurrence in *Raven*, that the Constitution itself "precludes the idea that it was the intention of the people, by the provision for amendments authorized in the first section of this article, to afford the means of effecting the same result which in the next section has been guarded with so much care and precision").

Equality has existed as an "underlying principle" Livermore, 102 Cal. At 118-19 of the California Constitution, and as "a central aim o our entire judicial system" since 1849. See Corrected Reply in Support of Petition for Extraordinary Relief filed by Karen L. Strauss, et al. (dated 12/7/08) ("Reply Br.") (citing *In re Sade* C., 13 Cal. 4th 952, 966 (1996)). Article I, Section I, provides that "[a]ll people are by nature free and independent, and entitled to inalienable rights," a declaration that has always been a part of the Constitution. *See* Reply Br. at 7 (citing *Max Factor & Co. v. Kunsman*, 5 Cal. 2d 446, 458 (1936)) (noting that California Constitution promises not "absolute liberty" but "equal liberty"). Equality has thus existed as an "underlying principle" of the California Constitution (*see Livermore*, 102 Cal. at 118-19), and as "a central aim of

our entire judicial system," since 1849. *See* Corrected Reply in Support of Petition for Extraordinary Relief filed by Karen L. Strauss, et al. (dated 12/7/08) ("Reply Br.") (citing *In re Sade C.*, 13 Cal. 4th 952, 966 (1996)). Because Proposition 8 strips a disfavored minority of a fundamental right guaranteed by the principle of equality, it directly attacks a foundational tenet of our constitutional structure.

For these reasons, Proposition 8 constitutes a revision of the Constitution that cannot be enacted by the legislative initiative power. *See* Reply Br. at 8 (addressing case law upholding proposition that fundamental rights must apply equally to all, citing *In re Marriage Cases*, 43 Cal. 4th 757, 824 (2008); *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 284 (1981); *Ex Parte Jentzsch*, 112 Cal. 468, 471-72 (1896)). The equal protection clause – well-established in the Constitution – is a foundational principle beyond the reach of an initiative amendment. It entered the Constitution by revision in 1974 (via the California Constitution Revision Commission), based on principles already framed at the 1849 and 1879 conventions. Proposition 8, in purpose and effect, undoes this oft-affirmed foundational principle, but it can do so only in full compliance with the Constitution's guidelines: a two-thirds vote in the Legislature followed by either a majority popular vote or a constitutional convention. Cal. Const. Art. XVIII, §§1-3. Because this did not occur, the mechanism

by which Proposition 8 was enacted violates the Constitution, and the initiative cannot stand.

B. The Court Should Not Defer To The Electorate When Refereeing The Distinction Between A Constitutional Amendment And A Revision; The Question Is One Of Core Judicial Competence And Is Therefore Reviewed Independently.

1. The People Have Charged The Judiciary With Maintaining The Clear And Meaningful Distinction Between A Revision And An Amendment.

As this Court has long recognized, there is "a real difference" between a revision and an amendment under the state Constitution. *McFadden*, 32 Cal.2d at 347. As described in *McFadden*:

> The differentiation required is not merely between two words; more accurately it is between two procedures and between their respective fields of application. . . . Each of the two words, then, must be understood to denote, respectively, not only a procedure but also a field of application appropriate to its procedure. The people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision. . . . [T]he distinction appears to be scrupulously preserved by the express declaration in the [initiative] amendment [of 1911] . . . that the power to propose and vote on "amendments to the Constitution" is reserved directly to the people in initiative proceedings, while leaving unmentioned the power and the procedure relative to constitutional revision [found in] section 2 of article XVIII.

Id. at 347-48.

Given the importance of this distinction, and despite the acknowledged right of the people to amend the Constitution by initiative and the well-known judicial deference to the exercise of that right, this Court has consistently ruled that the initiative legislative power is subject to important and fundamental limitations. Accordingly, the Court has historically undertaken a searching, independent review when determining whether a change to the Constitution constitutes a revision or an amendment. It has never allowed the principle of deference to serve as a talismanic "blank check" that insulates an initiative from legitimate challenge. *Cf. Senate of the State of Calif. v. Jones*, 21 Cal. 4th 1142, 1157-58 (1999) (acknowledging "importance of not improperly restricting the initiative power" but also noting need to "preserv[e] the integrity" of the process through established limits because an initiative is not a "blank check" for its proponents). The Court has instead followed its constitutional duty to police and maintain the "real difference" between revisions and amendments, and has not hesitated to strike down initiatives that violate the constitutional limitations governing the revision and amendment processes. *See, e.g.*, *Raven*, 52 Cal. 3d at 354 (finding Proposition 115 to be a revision); *Senate of the State of Calif. v. Jones*, 21 Cal. 4th at 1167 (invalidating Proposition 24 under single subject rule). In these cases, the Court has not allowed its justifiably deep respect for the initiative process

to trump the need for an independent scrutiny of a challenged initiative to determine whether a proposed change is tantamount to a revision.

The crux of the distinction between an amendment and a revision rests not on a policy judgment animating a proposed change to the Constitution, but rather on the effect and fit of that change on the governmental scheme outlined in the Constitution. Accordingly, the determination whether a change revises or amends the Constitution is ultimately a question of legal interpretation. *See Redevelopment Agency of the City of Long Beach v. County of Los Angeles*, 75 Cal. App. 4th 68 (1999) (holding that "[t]he proper interpretation of statutory [or constitutional] language is a question of law which this court reviews de novo"). This determination requires the expertise of the judiciary, which alone possesses the ultimate power to interpret and expound on the Constitution's meaning and requirements. *See Raven*, 52 Cal.3d at 354 (holding that Proposition 115 "directly contradicts the well-established jurisprudential principle that, '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 . . . .'" (citations omitted).

From its earliest days, this Court has embraced its constitutional duty. In *Livermore*, decided before the initiative power was even added to the Constitution, this Court carefully examined a constitutional amendment proposed by the Legislature, and determined that the changes it sought

exceeded the scope of the Legislature's amending power. 102 Cal. at 123-24. Moreover, while acknowledging the power of the Legislature to propose constitutional amendments, the court declined to defer to that body's pronouncement that its proposal was merely an amendment, not a revision. *Id.* A half-century later, in *McFadden v. Jordan*, 32 Cal. 2d 330, 334 (1948), the Court again confronted a proposed constitutional change that would have added and deleted thousands of words from the Constitution. This time, however, the proposed change was not a product of the Legislature but of the people's initiative process. Despite the acknowledged power of the people to amend the Constitution, the Court nonetheless conducted a thorough and independent review to determine whether the proposed initiative was a revision. *Id.* at 345-50. Once again, in undertaking this review, the Court did not consider either the wisdom or efficacy of the significant policy changes the initiative sought to implement, but determined, as a matter of law, that the provision was in the nature of a revision, and therefore improperly brought. *Id.* at 351.

The requirement that the Court must conduct a comprehensive, independent review was made even more explicit in *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208 (1978), in which the Court held for the first time that "in determining whether a particular constitutional enactment is a revision or an

amendment," the Court's analysis "must be both quantitative and qualitative in nature":

> For example, an enactment which is so extensive in its provisions as to change directly the "substantial entirety" of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also. In illustration, the parties herein appear to agree 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.

Id. at 223. Although ultimately holding that Proposition 13 did not effect an impermissible revision of the Constitution, and did not otherwise violate the rules governing initiatives, the Court did so only after an extensive and fact-specific inquiry notable for its omission of any reference to principles of judicial deference.

Applying the *Amador Valley* two-part test in *Raven v. Deukmejian*, *supra*, this Court examined whether Proposition 115, which enacted various pro-victim reforms to California's criminal justice system, was an amendment or a revision. In particular, the Court focused on a portion of the measure dictating that California courts construe equal protection and due process for criminal defendants "in a manner consistent with the Constitution of the United States." 52 Cal. 3d at 350. The Court acknowledged the general principle that reasonable doubts about an

initiative's validity must be resolved in favor of its proponents, and questioned neither the wisdom nor the policy behind the people's vote. But as in *Livermore* and *McFadden*, in determining the constitutional question, the Court looked only to whether the initiative, in eliminating the traditional role of state courts in interpreting the state Constitution, had made "comprehensive changes" to the Constitution that "require more formality, discussion and deliberation than is available through the initiative process." *Id.* Without a further nod to judicial deference, the Court found that by tethering the California judiciary's construction of state constitutional protections to a federal standard, Proposition 115 "would vest all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court." *Id.* at 352 (emphasis in original omitted). That wholesale delegation of authority undermined the "independent force and effect of the California Constitution" (*id.* at 352) and "substantially alter[ed] the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by the courts in interpreting and enforcing state constitutional protections." *Id.* at 354. Accordingly, because the qualitative effect of the proposition was to revise rather than amend, the initiative was struck down. *Id.* at 355. In so holding, the Court made plain that the judiciary is uniquely and singularly qualified to evaluate the manner in which the people exercised its initiative power. *Id.* at 340-341, 349-350.

2. The Court Reviews Independently Questions Involving The Constitutional Legitimacy Of Legislative Enactments.

The principles found in the amendment/revision cases discussed above rest comfortably within this Court's handling of a variety of constitutionally imposed limitations on challenges to legislative authority. In these cases, the Court confronted situations involving the interpretation of legislative enactments and calibrated its level of deference to the nature of the inquiry, deferring to the wisdom of the legislative branch in matters of policy while submitting questions of constitutional authority to independent legal review. In *People's Advocate, Inc. v. Superior Court*, 181 Cal. App. 3d 316 (1986), for example, the petitioners challenged the Legislative Reform Act of 1983, which purported to amend certain internal rules of the Assembly and Senate governing the selection of officers and employees, the selection and powers of committees, and the content of future budget legislation. Before embarking on its analysis, the court described the task before it as follows:

> It is well to be clear at the outset what this case is and is not about. First, *the issue before this court is one of law, not policy; it is whether the Act is constitutional, not whether it is necessary or wise*. We address that issue and that issue alone. Second, this case is *not about whether the will of the people shall be heeded.* The Act is not the only relevant expression of popular sentiment in this case. (See *Fair Political Practices Com. v. State Personnel Bd.* (1978) 77 Cal.App.3d 52, 56, 143 Cal.Rptr. 393.) The provisions of the California Constitution (art. IV, § 7) which empower the houses of the Legislature to govern their own proceedings were first

> enacted almost 150 years ago and have twice been reenacted by the electorate. They are part of a constitutional structure of government by which the people have made statutes – even initiative statutes – subordinate to the Constitution, and have empowered the courts of this state in the exercise of the judicial power to interpret the state's fundamental charter. We are not presented with a conflict between the voice of the people expressed directly and through their elected representatives, but between two conflicting directives from the electorate: the Act and the California Constitution.

Having thus framed the issue as one of constitutional boundaries, the court invalidated the portions of the Act that would have conflicted with Article IV, section 9 of the California Constitution, which provides that "[e]ach house shall determine the rules of its own proceedings."

The Court in *Amwest Surety Insurance Co. v. Wilson*, 11 Cal. 4th 1243 (1995), applied a similar analysis. In that case, the Court considered a challenge to a legislative amendment exempting surety insurance from voter-approved Proposition 103, which imposed an insurance rate rollback and required that any subsequent rate increase be approved by the Insurance Commissioner. Like many initiatives, Proposition 103 stipulated that "'[t]he provisions of this act shall not be amended by the Legislature except to further its purposes.'" *Id.* at 1247. Though the amendment's proponents urged deference to the Legislature's power to amend statutes, the Court declined: "The issue before us is whether the Legislature exceeded its authority. The 'rule of deference to legislative interpretation' of the California Constitution, therefore, has no application in the present

case." *Id.* at 1253. Emphasizing the limited nature of its inquiry, the Court noted that it was not questioning the content of the amendment or the Legislature's wisdom in enacting it. "The question before us," the Court observed, "is not whether exempting surety insurance from some of the provisions of Proposition 103 furthers the public good, but rather whether doing so furthers the purposes of Proposition 103." *Id.* at 1265. Having thus conducted an independent examination of the nature and character of the challenged amendment, the Court ruled it unconstitutional because it did not further the purposes of the initiative. *Id.* at 1265; *see also Huening v. Eu*, 231 Cal. App. 3d 766, 770-80 (1991) (rejecting deference to the Legislature's pronouncements of what does and does not constitute an "amendment" and reviewing as a matter of law the question of whether Elections Code section 3564.1 was an "amendment").

A similar situation is presented in cases examining the electorate's power to enact advisory legislation. In *AFL-CIO v. Eu*, 36 Cal. 3d 687 (1984), this Court granted a writ prohibiting the Secretary of State from placing on the ballot a proposed initiative purporting to compel the Legislature to adopt a resolution urging the United States Congress to amend the United States Constitution to require a balanced budget. The petitioner argued the proposed initiative exceeded the people's initiative power as defined in Article II, section 8. *Id.* at 707. The Court, in turn, framed the issue as a legal one: "The question we face is whether the

Balanced Budget Initiative proposes to adopt a 'statute' within the meaning of article II of the California Constitution." *Id.* at 708.

The Court's approach to that question illustrates its unique role in protecting constitutional boundaries and emphasizes its willingness to conduct independent review of questions involving constitutional authority. While acknowledging the traditional "'duty of the courts to jealously guard' the people's right of initiative and referendum," (*id.* (quoting *Martin v. Smith*, 176 Cal. App. 2d 115, 117 (1959), the Court made clear: "Even under the most liberal interpretation . . . the reserved powers of initiative and referendum do not encompass all possible actions of a legislative body. Those powers are limited, under article II, to the adoption or rejection of 'statutes'." *AFL-CIO*, 36 Cal. 3d at 708. After thoroughly analyzing decades of case law construing the term "statute," the Court issued a writ prohibiting the Balanced Budget Initiative from being placed on the ballot. *Id.* at 715-16. In its holding, the Court emphasized that it viewed the matter as a constitutional boundary dispute: "[T]he function of the initiative under the California Constitution is to enact (or repeal) statutes. . . . [A]n initiative which seeks to do something other than enact a statute – *which seeks to render an administrative decision, adjudicate a dispute, or declare by resolution the views of the resolving body* – is not within the initiative power reserved by the people." *Id.* at 713-14 (emphasis added).

There is simply no merit to the argument that legislative enactments of the people (including constitutional amendments), wielded through the initiative process, overwhelm a searching judicial review of such enactments when they might exceed their constitutionally-imposed boundaries. While this Court has consistently demonstrated a profound and abiding respect for the initiative process, it has likewise carefully and independently scrutinized initiatives for constitutional infirmity when called upon to do so, out of an equally abiding respect for the Constitution itself. Any claim to the contrary ignores the controlling judicial authorities in this state.

This argument also ignores the fact that it was the "people" themselves who enshrined the revision-amendment distinction into the Constitution, and the Court must accordingly follow its constitutional duty to referee the boundaries between revisions and amendments.

In this case, as well, the electorate was not asked to, and did not, address the central and purely legal issue here – whether Proposition 8 constitutes an amendment or a revision. As to this issue, the people have not spoken. It was not a part of the initiative text, nor the ballot arguments. It was not a part of the campaign. Accordingly, even if this Court were required to give judicial deference to the outcome of the election, in this instance there is nothing to defer to. It is, in any case, not a policy question that can be resolved legislatively because to do so would be circular: the

question itself is the constitutional limit on the legislative power (as opposed to the sovereign, revisory political power).

Finally, finding that Proposition 8 does not pass constitutional muster does not silence the voice of the people; if the majority continues to wish to change California's Constitution to ban same-sex marriage, they may seek to do so through a revision to the Constitution. What they may not do is seek to avoid the safeguards and scrutiny inherent in the revision process by means of an initiative purporting to amend the Constitution.

C. Petitioners Present A Logical, Unambiguous And Exceptionally Narrow Rule, Whereas Interveners Advocate A Radical Change In The Judicial-Legislative System Checks And Balances.

1. The Initiative Process Is Central To The Legislative Process In California.

For decades, Californians have governed as much by initiative as by legislatively-enacted laws. Indeed, the state now resolves many of the most significant issues of the day through initiative campaigns rather than through the deliberation of its representative Legislature.[2]

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[2] "The initiative, created by the California Progressives in the first decade of the 20th Century . . . [has] become not an alternative, but the very essence of major policy-making in California." Schrag, "What If Jarvis Had Never Been Born," *California Journal* 34 (June 2003). The initiative process has thus become "a major if not the principal generator of important state policy, while state government often sits as an understudy responding to initiatives in a supplemental and reactive fashion." Center for Governmental Studies, *Democracy by Initiative in California* (http://www.cgs.org/index.php?option=com_content&view=article&id=164:PUBLICATIONS&catid=39:all_pubs&Itemid=72, at p. 56). Since the

In light of the central role of the initiative process in California lawmaking, the Court's decision in this case represents a choice between two fundamentally divergent visions of the California Constitution. Petitioners advocate a narrow rule that preserves the proper spheres of judicial action and the initiative process. Interveners argue for a broad understanding of the initiative power, and a correspondingly constricted view of the fundamental principle of equal protection and the role of the courts in enforcing that guarantee. Interveners' view, however, necessarily conflicts with a constitutional vision that sees the founding document as "an instrument of a permanent and abiding nature[.]" *Livermore*, 102 Cal. at 118-19 (holding that the constitution "can be neither revised nor amended except in the manner prescribed by itself, and the power which it has conferred upon the legislature in reference to proposed amendments, as well as to calling a convention, must be strictly pursued"). Thus, Petitioners must prevail if the parties' competing interpretations of the Constitution are measured by whether they embrace limiting principles that can provide clear, common-sense guidance to Californians and future courts while faithfully hewing to constitutional principles and precedent.

"historic passage" of Proposition 13 in 1978, "156 measures have qualified for the ballot, a number nearly matching all qualified initiatives over the prior 60 years. Of those 156 initiatives, California voters approved 62, tackling issues across virtually every area of statewide public policy." *Id.* at 57.

2. Interveners' Argument Presents a Constitutional Paradox in that it Subjects the Court's Exclusive and Definitive Constitutional Interpretive Power to a Legislative-Initiative Veto.

As a practical matter, Interveners argue that it is constitutionally permissible to leave the fate of a suspect class's rights to the "considered judgment and good will of the people of this state." *See* Interveners' Opposition Brief ("Inter. Br.") at 23. Under this view of California's Constitution, the electorate may legislate by simple majority amendments that impair the fundamental rights of suspect classes, whatever those fundamental rights may be and no matter the identity of the suspect class.

A central component of the California courts' power is their ability, acting as interpreters of the constitution, to identify suspect classes or fundamental rights, fashion levels of review, and strike down invidiously discriminatory laws. Interveners argue that the electorate without limitation may, through initiative-passed constitutional amendments, legislatively veto or even place micro-conditions on this judicial power. For example, interveners assert that since "[gays and lesbians] continue to enjoy all the rights of free speech, religion, assembly, privacy, due process, property, and so forth," the deprivation of a single fundamental right – marriage – is permitted". Inter. Br. at 23. Because Proposition 8 "leaves undisturbed all other rights affecting gays and lesbians," Interveners claim, the initiative is sufficiently "limited." *Id.*

Contrary to Interveners' apparent belief that this repeal-by-initiative does not constitute a revision of the Constitution, the reality is that such an expansive interpretation of the initiative power would make the judiciary's constitutional authority to interpret the equal protection clause both practically and doctrinally subservient to the dictates of legislative action, including the electors' exercise of the initiative-amendment power. Indeed, by Interveners' logic, the electorate could pass any number of laws depriving Californians of fundamental rights on the basis of sexual orientation. While Interveners argue that the possibility of such incremental elimination of protections based on sexual orientation is "both theoretical in the extreme and improperly dismissive of the considered judgment and good will of the people of this state" (Inter. Br. at 23), the fact is that across the country – and within California – many groups have promoted initiatives with precisely that goal in mind.[3] Under California law, gay and lesbian citizens currently have protection against discrimination in employment, housing, and public accommodations (Gov't Code § 12920; Civ. Code § 51; *see also* AB 14, Civil Rights Act of 2007);

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[3] "[F]rom the days of Anita Bryant to the turn of the millennium, the [lesbian, gay, bisexual, and transgender] community lost more than two-thirds of antigay ballot measures every year, the vast majority of them repeals of basic nondiscrimination laws like the one targeted by Bryant in Miami-Dade County. Until very recently, the history of antigay ballot measures paints a stark picture of American attitudes towards gays and lesbians, let alone transgender people." National Gay and Lesbian Task Force, "Anti-LGBT Ballot Initiatives," at http://www.kintera.org/site/c.nlI2IeN1JyE/b.1742455/k.5AA2/AntiLGBT_Ballot_Measures.htm.

the right to enter into domestic partnerships (Fam. Code § 297, et seq.); the right to build families through second-parent adoption (Fam. Code § 9000(b)); and the right to be safe from discrimination at school (Educ. Code § 220). Although Proposition 8 itself seeks only to deprive gay and lesbian citizens of their right to marry, Interveners' argument would establish a rule of state constitutional law that opens the door to the elimination of these rights by ballot initiative as well.

When a court identifies a suspect class and a fundamental right, it exercises a unique and definitive power: the power to interpret the equality guarantee in the state Constitution and deploy judicially-made levels of review to enforce that core requirement of our constitutional democracy. *See Raven v. Deukmejian*, 52 Cal. 3d 336, 354 (1990) ("It [is a] well-established jurisprudential principle that, '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 . . . .'") (quoting *Nogues v. Douglass*, 7 Cal. 65, 69-70 (1858)); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (interpreting and applying the Constitution is "the very essence of judicial power"); *Marin Water, etc. Co. v. Railroad Comm'n*, 171 Cal. 706, 711-12 (1916). No statute or express provision of the State Constitution says that judges will employ strict scrutiny to analyze legislation that impairs the fundamental rights of suspect classes. It is simply what courts do, operating in their own spheres

of power, to accomplish their core, constitutionally-grounded interpretive mission.[4]

Interveners' understanding of constitutional jurisprudence conditions these fundamental judicial powers on subsequent legislative initiative campaigns. This is the paradox at the heart of the Interveners' view of California's equal protection guarantee: According to this Court, a law depriving same-sex couples of the right to marry violates a fundamental right and invidiously discriminates against a suspect class. Yet if Proposition 8 stands, then the California Constitution's guarantee of equal protection – put in place to protect politically-vulnerable minorities from legislative discrimination – will be, in effect, subject to selective repeal by popular initiative. This Court therefore cannot uphold Proposition 8 without first reasoning that the sovereign power that enshrined the equal protection guarantee in the Constitution contemplated such a paradox; one rendering such equal protection guarantees, in effect, merely advisory on the legislating electorate it was designed to restrain. It is hard to avoid the

[4] "Both the federal and the state Constitutions guarantee to all the 'equal protection of the laws' (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7), and it is the particular responsibility of the judiciary to enforce those guarantees. The architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups, and that the most effective remedy for this form of oppression is an independent judiciary charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection." *In re Marriage Cases*, 43 Cal. 4th 757, 860 (Kennard, J., concurring).

conclusion that such a paradox is a "comprehensive change[] to the Constitution" that should "require more formality, discussion and deliberation than is available through the initiative process." *Raven*, 52 Cal. 3d at 350.

Moreover, if, as a practical matter, the judiciary is no longer the last word on identifying and protecting suspect classes against the selective deprivation of fundamental rights based upon constitutional principles—if an exercise of initiated legislative power can override and even micromanage what has always been a quintessentially judicial function—then the loss of independent interpretive power for the judiciary is at least equal to that jeopardized in *Raven*. In *Raven*, the legislating electorate sought to "vest all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court." *Id.* at 352 (emphasis in original omitted). This outsourcing of California judicial authority undermined the "independent force and effect of the California Constitution" (*id.* at 352) and "substantially alter[ed] the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by the courts in interpreting and enforcing state constitutional protections." (*Id* at 338).

Wallace v. Zinman, 200 Cal. 585, 593 (1927) ("We have a state government with three departments, each to check upon the others, and it would be subversive of the very foundation purposes of our government to

permit an initiative act of any type to throw out of gear our entire legal mechanism."); *Crowley v. Freud*, 132 Cal. 440, 443-44 (1901) (noting that changes that are "so revolutionary as to be destructive of a republican form of government" must be accomplished, if at all, "through a general revision by a constitutional convention").

There is no way this Court can uphold Proposition 8 under Interveners' theory without ceding to the legislative power the interpretive "last word" on the equal protection clause's meaning and scope. This alone represents a fundamental and "revolutionary" change "in three departments," and their ability to "check upon the others." Thus, only if equal protection suspect classes enjoying fundamental rights are for some reason less central to our constitution than the constitutional provisions at risk in *Raven* can Proposition 8 survive.

3. Petitioners' Suggested Rule in this Case of First Impression is Appropriately Narrow and Limited. Interveners' Rule Is Wide-Reaching and Undermines the Judiciary's Equal Protection Authority.

Petitioners advocate a clear, narrow and limited rule: that "[a]ny measure that selectively withdraws a fundamental right only from the members of a group defined by a suspect classification is a revision." (Pet. Reply Brief at 15). Importantly, this rule could not be applied to overturn any other initiative previously upheld against a revision-amendment challenge, with the possible, and appropriate, exception of the racially

discriminatory initiative struck down on federal equal protection grounds in *Mulkey v. Reitman*, 64 Cal. 2d 529 (1966). It also gives due respect to the judicial findings of fact, history, and law that underpin this Court's holding that gays and lesbians are a suspect class.

Interveners' argument, in contrast, renders the equal protection guarantee little more than hortatory and effects a broad radical change in the court's power to enforce the principle. It substitutes the balance of powers with a constitutional paradox. What weight does the judiciary retain if its interpretations of the equal protection clause to protect historically disadvantaged minorities are subject to a *de jure* or *de facto* veto or control by the very legislative power that the constitution's "underlying principle" (*Livermore*, 102 Cal. at 118-19) of equal protection aims to constrain in order to protect the most essential premise of our democracy? For this reason, Proposition 8 cannot survive unless the fundamental principles of the California constitution that seek to safeguard our basis governmental plan by restraining majoritarianism and, in particular, protecting suspect classes against selective deprivations of fundamental rights are turned upside down. *See* Inter. Br. at 19 n.4.

III. CONCLUSION

Proposition 8 violates the California Constitution. Therefore, for all the reasons set forth above, Amicus respectfully urges this Court to declare the Proposition null and void in its entirety.

Dated: January 15, 2009

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The text of this brief, including footnotes, consists of 6525 words as calculated by the Microsoft Word word processing program used to generate the brief.

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PROOF OF SERVICE

I, Sandra Richey, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 650 California Street, 19th Floor, San Francisco, California. On January 15, 2009, I served the document listed below on the interested parties in this action in the manner indicated below:

PROFESSOR KARL M. MANHEIM'S APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

PROFESSOR KARL M. MANHEIM'S AMICUS CURIAE BRIEF OF IN SUPPORT OF PETITIONERS

[X] **BY MAIL**: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

[X] **INTERESTED PARTIES:**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on January 15, 2009, at San Francisco, California.

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