Nos. S168047, S168066, S168078

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., Interveners

ROBIN TYLER et al., Petitioners
v.
THE STATE OF CALIFORNIA et al., Respondents;
DENNIS HOLLINGSWORTH et al., Interveners

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners
v.
MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al., Respondents;
DENNIS HOLLINGSWORTH et al., Interveners

Application for Leave to File Amicus Curiae Brief and Amicus Curiae Brief In Support of Petitioners the City and County of San Francisco and Karen L. Strauss

By The City of Berkeley, City of Cloverdale, City of Davis, Town of Fairfax, County of Humboldt, City of Long Beach, City of Palm Springs, County of Sonoma, and City of West Hollywood

---

Michael Jenkins SBN 81997
J. Stephen Lewis SBN 176080
City of West Hollywood Legal Services Division
8300 Santa Monica Boulevard, West Hollywood, CA 90069
Telephone: (323) 848-6301
Facsimile: (323) 848-6567

Attorneys for the above-named municipal and county governments

Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Other Authorities

Application for Leave to File Amicus Curiae Brief

To the Honorable Chief Justice Ronald M. George and Associate Justices of the California Supreme Court:

Under California Rule of Court 8.200(c)(1), amici curiae request permission to file the accompanying brief in support of the City and County of San Francisco and the Strauss Petitioners.

a. Identification of Amici Curiae

The City of Berkeley, City of Cloverdale, City of Davis, Town of Fairfax, County of Humboldt, City of Long Beach, City of Palm Springs, County of Sonoma, and City of West Hollywood are California local governments. Most of the local governments submitting this brief also together filed a brief in *In re Marriage Cases*. Many additional local governments who participated in that briefing have joined the City and County of San Francisco as petitioners in this case, and do not join this brief for that reason alone.

Although amici are not a formal coalition, we have in common that we are legal subdivisions of the State of California under California Constitution article XI. As such, we share an obligation to ensure that we accord each of our residents equal treatment under the law, and that our interactions with our constituents are consistent with the rights guaranteed to them under the federal and state constitutions. We all

share the core value of not only protecting and defending the Constitution of the State of California, but also of recognizing and supporting our peoples' civil rights and fundamental human dignity.

b. Statement of Amici Curiae's Interest

County amici have a direct interest in the outcome of this litigation. As counties, they are charged with processing applications for marriage licenses and granting or denying those applications as the law dictates. Before November 5, counties issued marriage licenses to all eligible applicant couples without regard to race, religion, ancestry, sexual orientation, or other suspect classification. With Proposition 8's passage by a bare majority of votes, counties are now required to discriminate against their residents on the basis of the suspect classification of sexual orientation. If Proposition 8 was not valid, as amici believe that it was not, counties are thus placed in the untenable position of being forced to engage in discrimination against a group of Californians on the basis of a suspect classification, in violation of the Constitution and in violation of their core values as legal subdivisions of this state. And, by this unconstitutional discrimination, they are forced to deny a subset of this state's people the fundamental civil and human right to marry—a right that this court and many others have held to be an essential component of human dignity.

Although they do not issue marriage licenses, the interest of the municipal government amici in this litigation is no less real. California municipal governments

were pioneers in the legal recognition of same-sex relationships, enacting domestic-partnership legislation in recognition that gay and lesbian relationships were entitled to societal respect and dignity but were often denied it. In many cases the legislation, enacted at the height of the AIDS epidemic, was borne at least in part of the indignity that our gay and lesbian residents suffered by being denied, on the ground of their lack of marital status alone, the right to visit their partners as they lay dying in the hospital.

The state eventually followed municipal governments' lead and enacted a state-wide domestic-partnership registry, and even eventually extended the bundle of strictly legal rights that had been available to married heterosexual couples alone to same-sex domestic partners as well. By doing so, the state created a parallel, but nonetheless different, recognition of same-sex family relationships.

Although the municipal governments that had pioneered domestic partnerships applauded the state's domestic-partnership registry as significant progress toward granting to gay and lesbian couples the full measure of equality to which the California Constitution—to say nothing of their humanity—entitled them, we believed that the state's provision of that registry was not enough to satisfy the Constitution's injunction that the state provide all Californians the equal protection of the laws. We believed, as we argued in our amicus brief in *In re Marriage Cases* that:

> . . . it is insufficient merely to move toward the goal of true equality, to move 'closer' to the goal of realizing the promise of actual equality for all Californians and all California families. For equality before the law is not a mere aspiration; it is a constitutional guarantee. It is a right held by all Californians that cannot, without doing violence to that guarantee, be delayed or parceled out bit by

> bit through legislative gradualism. Our state constitution guarantees not near equality, but equality itself.[1]

This Court agreed with that argument and, in its opinion in In re Marriage Cases, held that denying gay and lesbian Californians the right to marry violated the state constitutional equal-protection guarantee.

Six months later, by a bare majority, the voters purported to change the California Constitution to forbid gay and lesbian couples to marry, and by doing so once again deprived them of the equal protection of the laws. Because municipal amici continue to believe in the constitutional imperative of what they started—the full societal recognition of gay and lesbian Californians as persons entitled to the basic civil and human right to marry—we deplore Propositon 8's leap back from the realization that all Californians are, and of right ought to be, full and equal citizens. We deplore it all the more because it was, we believe, accomplished in violation of California Constitution article XVIII, §§ 1 and 2, which requires that such a fundamental change in our Constitution must be made, if at all, by process more deliberative than a bare majority vote.

Accordingly, amici respectfully ask this Court to grant leave to file the attached amicus curiae brief.

---

[1] Amicus Curiae Brief In Support of the City and County of San Francisco, filed in *In re Marriage Cases*, p. 33

Argument

I. Introduction

The California Constitution prescribes two means by which it may be changed: changes that are consistent with the Constitution's existing framework—amendments—may be made by popular vote alone. More far-reaching changes which alter the Constitution's underlying principles—revisions—may be made only through a more deliberative process.

The question posed by the Petitioners in this case is whether Proposition 8, which purports to effect a constitutional change stripping gay and lesbian Californians of their previously-existing right to marry, is an amendment or a revision. The question, in other words, is whether a change that deprives gay and lesbian Californians of their right to equal protection of the laws, due process, and personal privacy with respect to the fundamental human and civil right to marry is a change within the constitution's existing framework or an alteration of its underlying principles.

Appellate courts in two other states, Alaska and Oregon, have published opinions suggesting that such a change is a mere amendment, consistent with those states' constitutional principles. But one of those two opinions was issued in 1999, at a time when it was still erroneously thought constitutionally permissible to criminalize same-sex sexual conduct. The other opinion was based entirely on a 1994 state appellate opinion whose reasoning was implicitly rejected by the United States

Supreme Court in 1996. And unlike California, those states' highest courts had not, and still have not, considered or decided whether sexual orientation is a suspect classification; nor have they found that the right to marry is a fundamental human and civil right for all persons, regardless of sexual orientation. Moreover, this Court consistently has held that the California Constitution is a document of force and effect independent of both the United States Constitution and the constitutions of other states, particularly in the area of individual liberties.[2]

Nonetheless, Interveners have argued that this Court should follow the Alaska and Oregon courts' opinions in deciding this case. To help the Court evaluate that argument, this amicus brief, filed on behalf of a coalition of California local governments, addresses the narrow question of whether the Alaska and Oregon opinions are persuasive precedent that this Court should follow. This brief will show that they are not.

Contrary to the conclusions reached by the Alaska and Oregon courts, under this Court's own precedent and under the fundamental notion that all Californians are full and equal citizens, a constitutional change stripping gay and lesbian persons of their right to marry is not consistent with the California Constitution's existing framework. Rather, it is an alteration of the Constitution's underlying principles. Such a change is, therefore, a revision and not an amendment; it cannot be brought about by popular vote alone, but may be brought about, if at all, only by a more deliberative process.

---

[2] *Fashion Valley Mall, LLC v. N.L.R.B. (2007) 42 Cal.4th 850*, 863 (citing to this Court's earlier opinion in *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 498 – 490

The Attorney General argues that the constitution can never be changed to strip from some Californians their fundamental and inalienable right to equality before the law based on a suspect classification, no matter how deliberative the process by which that change purports to be made. The California local governments submitting this brief in support of the Petitioners agree with the Attorney General on this point. But because we believe that this case can be decided on the narrow ground that Proposition 8 would change the Constitution's underlying principles, and therefore could not validly be enacted by popular vote alone, that narrower ground is our focus.

The city and county governments submitting this brief also agree with the Petitioners and the Attorney General that all marriages validly performed before November 5 remain valid today; under this Court's previous decisions governing the retroactivity of statutory and constitutional changes, Proposition 8 operates prospectively only. But because we have nothing to add to the arguments that have already been advanced by the Petitioners and the Attorney General, we provide no further argument on this point here.

//

//

//

II. Because Californians' entitlement to the equal protection of the law is a foundational principle of the California Constitution and is fundamental to the structure of California government, that entitlement cannot be altered by popular vote alone.

That all persons are entitled to due process of law[3] and personal privacy are among the fundamental principles on which both our national and state governments are based.[4] In California, the entitlement to personal privacy is so fundamental that our state constitution describes the right as "inalienable."[5] But an even more fundamental principle—the bedrock principle on which our government is based—is that all persons are equal before the law; the government must not only secure to its citizens such fundamental rights as due process of law and personal privacy, but must secure them to all citizens on an equal footing.

This idea of equal protection of the law, which is included in the California Constitution's Declaration of Rights, is one of the most basic principles of our constitutionally-ordered system of government. It is "[o]ur salvation [because] it requires the democratic majority to accept for themselves and their loved ones what they would impose on you and me."[6] It is, as this Court has said, "a central aim of our

---

[3] See, *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281 ("The term 'due process of law' asserts a fundamental principle of justice . . .")

[4] *Griswold v. Connecticut* (1965) 381 U.S. 479

[5] See, *Tavernetti v. Superior Ct* (1978) 22 Cal.3d 187, 194 ("There is another fundamental principle involved . . .: the public policy favoring protection of privacy rights. The California Constitution has been amended to include among the inalienable rights of all people the right to pursue and obtain privacy.")

[6] *Cruzan v. Mo. Department of Health* (1990) 497 U.S. 261, 300, concurring opn. of Scalia, J.

entire judicial system."[7] Because it is so basic, it should be changed only cautiously, if at all.

Our California Constitution is, by its very nature, a document expressing the basic idea of who we are as a people and as a state.[8] It is not a mere reflection of the popular will of the moment, but something that is to stand for the ages. So even if some aspects of the Constitution may easily be amended as the public's political priorities change, the fundamental principles that underlie it are not of that character but are, rather, intended to endure. As this Court noted as early as the nineteenth century, in *Livermore v. Waite*:

> The very term "constitution" implies an instrument of permanent and abiding nature, and . . . the underlying principles on which it rests . . . shall be of a like permanent and enduring nature.[9]

Because Californians' entitlement to equal protection of the laws is so basic to our Constitutional system, that entitlement is intended to be permanent. It cannot be abrogated, or even limited, without diminishing the Constitution itself as an instrument of permanent and enduring nature.

This is not to say that our underlying constitutional principles are immutable. They are not. Subject (at least) to limitations imposed by the United States Constitution, it is possible that the principles underlying the state constitution can be changed. But certain foundational constitutional principles are so basic that they may

---

[7] *In re Sade C.* (1996) 13 Cal.4th 952, 966
[8] See, Constitution of the State of California, Preamble, Article 1 Declarations of Rights
[9] *Livermore v. Waite* (1894) 102 Cal. 113, 118

be changed, if at all, only through a thoughtful and deliberative process that is in accord with the weightiness of those principles and the gravity that the change of such weighty principles necessarily entails.

By enacting California Constitution Article XVIII, §§ 1 and 2, the People have provided such a process. The Legislature may call for a constitutional convention, or the Legislature may, by two-thirds vote of each house, propose a constitutional revision; if the convention or Legislature votes to propose a revision, that revision is then submitted to the electors. Thus, any change to our Constitution's underlying principles may occur only after it is proposed in the Legislature or at a constitutional convention, thoroughly debated and voted on by the people's representatives, and then—after the issues surrounding the proposed change have been fully explored and debated at convention in the Legislature—subject to a new round of exploration and debate by the people themselves.

This process may be slow, establishing as it does certain hurdles that must be overcome before the Constitution may be revised; but it is appropriate that it be so. For this process ensures that we do not mistakenly lessen or otherwise improvidently alter the constitutional expression of our fundamental principles. It ensures that if we do choose to alter those principles, we do so not in a rush of popular passion but only after due deliberation.

It is with this in mind that we, as California local governments, support the City and County of San Francisco and the Strauss petitioners in their claim that Proposition

8 is invalid and was ineffective to change the California Constitution. That Proposition, by a bare popular vote occurring without Legislative consideration and subject only to the emotionally-charged rhetorical debate of an impassioned election campaign, purported to pare away the guarantees of due process of law and personal privacy as they apply to gay and lesbian Californians—and to them alone—with respect to the fundamental human and civil right to marry. Because we understand the guarantee that all Californians are to be treated equally to be fundamental to our system of ordered, constitutional government, we believe that that guarantee cannot properly be amended by a simple popular vote. Rather, we understand that it must be limited, if at all, only by means of the careful, deliberative process that the Constitution prescribes for its revision.

Two sister-state appellate courts have issued opinions suggesting a contrary conclusion, holding that denying same-sex couples the right to wed is not a constitutional revision, but is instead a mere amendment that can be achieved by popular vote alone. But in each case, the appellate court that reached that conclusion did so without recognizing, or even acknowledging, the radical nature of enshrining in a state constitution the idea that some citizens may be marked out as forever beneath the dignity and respect which the constitution is intended to preserve for all persons. And in each case the appellate court based its opinion on a body of law that is very different from the law of California as it exists today.

a. This Court should not follow the two other states' appellate court opinions that have determined that adding a provision to a constitution barring marriage between same-sex couples is an amendment, rather than a revision.

In May 2008, this Court invalidated both the Legislature-enacted and the voter-enacted prohibition on same-sex couples' right to marry. In doing so, this Court did not purport to create a new right for gay and lesbian Californians—a right to "same-sex marriage." Rather, it held that the right to marry the person of one's choice, whether that person be male or female, is a fundamental civil right, and a basic *human* right that has always existed, even if it had long been denied.[10] It held that the marriage right cannot be denied gay and lesbian couples merely because they are gay and lesbian without violating state constitutional right to equal protection of the law.[11] Thus, this Court lifted the oppression that is inherent in denial of such a basic right to reveal what had always been there: a right for gay and lesbian Californians to be accorded basic human dignity; the right to be treated equally under the law by being allowed the fundamental human and civil right to marry to the same extent as their heterosexual fellow citizens.

In finally recognizing gay and lesbian couples' right to marry, this Court also recognized "the historic disparagement of and discrimination against gay persons," and concluded that that historical animosity toward gay and lesbian persons, and the denial of the marriage right resulting from it, may partly have explained *why* gay and lesbian

---

[10] *In Re Marriage Cases (2008)* 43 Cal.4th 757, 811, 818 – 819

[11] *In Re Marriage Cases*, 43 Cal.4th at 829, 843

persons had for so long been denied their basic human and civil rights, but did not—and under our constitutional principal that all persons are to be treated with equal dignity under the law, could not—justify the denial. [12]

Six months after this Court recognized same-sex couples' right to be treated fairly, equally, and with basic human dignity under our state constitution, a slight majority of electors voted for Proposition 8, purporting to change the constitution to reattach the stamp of inequality by which gay and lesbian relationships historically had been marked. That Proposition carves out of the California Constitution's privacy guarantee, its due-process guarantee, and its equal-protection guarantee an exception for gay persons: they, and they alone, are specifically to be branded by the Constitution as persons who are not entitled to the constitutional right of equal protection when it comes to the basic civil and human right to marry. And they are denied that basic civil and human right that heretofore had been the birthright of all Californians because the majority of voters were persuaded in an emotionally-charged election campaign that same-sex relationships are in some way wrong, and that those who would engage in them must be, at least partly, strangers to our Constitution.

This Court must now decide whether this change—this carving out of a hole in four basic and fundamental constitutional rights, through which gay persons must now fall unprotected—is a mere amendment to the Constitution or a more serious revision. If this change is intended only to improve the functioning of our state government

---

[12] *In Re Marriage Cases*, 43 Cal.4th at 846

within the Constitution's existing lines, [13] then it is an amendment that was appropriately enacted based on voters' possibly emotional responses provoked in the impassioned heat of a popular election. But if this change is one that alters the California Constitution's "underlying principles" or effects a "far-reaching change[] in the nature of our governmental plan," [14] then it is a revision, which can only be accomplished through a more thoughtful and deliberative process.

While this is a question of first impression in California, the local governments supporting this amicus brief recognize that appellate courts in Alaska and Oregon have considered this same question under their own state constitutions, which have provisions for amending or revising their constitutions. As the Hollingsworth Interveners point out in their opposition brief, the Alaska and Oregon courts concluded that changes to their states' constitutions barring gay and lesbian persons from marrying were amendments (not revisions) that could properly be enacted by popular vote alone.

But the local governments supporting this brief do not believe that the reasoning behind the Alaska and Oregon courts' opinions is persuasive for the decision that this Court is now called upon to make. Those cases were decided, or were based on other cases that had been decided, at a time when the legal landscape was radically different than it is today. Moreover, the Alaska and Oregon opinions include almost no analysis

---

[13] *Livermore v. Waite* (1894) 102 Cal. 113, 118 – 119

[14] *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 223

explaining why those courts decided that a constitutional change barring marriage equality for gay and lesbian persons is an amendment rather than a revision; so even if the legal landscape had not changed, those opinions would be of little persuasive value.

1. **The Alaska Supreme Court's opinion in *Bess v. Ulmer* is of no value as precedent because it was decided at a time when it was erroneously thought permissible to criminalize certain intimate conduct between same-sex couples and because the opinion offers no analysis explaining the basis for its conclusion.**

The Alaska Supreme Court opinion, *Bess v. Ulmer*,[15] was decided in 1999, at a time when it was still thought permissible under the United States Constitution to actually criminalize intimate relationships between persons of the same sex;[16] it therefore could not have seemed a serious matter to change a state constitution to forbid gay people to marry. In 2003, in *Lawrence v. Texas*, the United States Supreme Court held that the United States Constitution forbids states to criminalize gay sexual conduct because it is protected by the liberty and privacy interests that are included within the federal due process guarantee.[17] And in doing so, the Court concluded that the state has no rational reason to concern itself with gay couples' intimate activities.

But *Lawrence v. Texas* was still four years away when the Alaska Supreme Court decided *Bess v. Ulmer*. It was perhaps for this reason that Alaska's *Bess v. Ulmer* court offered no explanation whatsoever for its conclusion that a proposed

---

[15] *Bess v. Ulmer* 895 P.2d 979 (1999)
[16] *Bowers v. Hardwick* (1986) 478 U.S. 186 (finding constitutional the outlawing of gay sexual behavior)
[17] *Lawrence v. Texas* (2003) 539 U.S. 558 (2003)

marriage ban for gay couples was an amendment rather than a revision, other than to say, in a terse and conclusory passage totaling a mere 49 words " . . .this proposed ballot measure is sufficiently limited in both quantity and effect of change as to be a proper subject for a constitutional amendment. Few sections of the Constitution are directly affected, and nothing in the proposal will 'necessarily or inevitably alter the basic governmental framework' of the Constitution."[18]

The Alaska court offered no explanation about how it reached its conclusion that "few sections" of the Alaska constitution would be directly affected by a constitutional change denying gay and lesbian Alaskans the right to marry, nor about how it reached its conclusion that the change would not alter "the basic governmental framework" of the Alaska constitution. The Court instead simply stated those conclusions as self-evident. And perhaps they were, coming as they did at a time when it was thought constitutionally permissible to actually criminalize the same-sex sexual conduct that might be thought inherent in a marriage between a same-sex couple.

But now that the legal landscape has changed, the conclusions are no longer self-evident, but require at least some analysis. Because the Alaska court provided none, its opinion is of no value as a guide to how this Court should decide the cases now before it.

//

[18] *Bess v. Ulmer*, (1999) 985 P.2d 979, 988

2. The Oregon Court of Appeals' opinion in *Martinez v. Kulongoski* is of no value as precedent because many of its principal conclusions have been rejected by the United States Supreme Court and because it offers no analysis explaining its ultimate conclusion that a constitutional change barring marriage equality is an amendment rather than a revision.

The first relevant Oregon Court of Appeals opinion suffers from defects similar to those that make *Bess v Ulmer* of no precedential value here. That 1994 opinion, *Lowe v. Keisling,* considered a constitutional change that would not only bar gay and lesbian Oregonians from the right to marry, but would also have barred them from holding any form of marital benefit and forbidden them generally from seeking legal protection against discrimination by participation in the political process.[19] The *Lowe* court held that this change, which entirely disenfranchised gay people from the law's protection, was only a minor, quasi-technical change to the Oregon Constitution. That opinion is rendered of dubious persuasive value for two basic reasons.

First, like Alaska's *Bess v. Ulmer*, *Lowe* was decided at a time when it was still (erroneously) thought permissible to criminalize same-sex intimate relationships.

Second, the *Lowe* opinon's soundness was called into serious doubt, at least, by the United States Supreme Court's opinion in *Romer v. Evans.*[20] In *Romer*, decided in 1996 two years after *Lowe*, the United States Supreme Court considered a nearly identical change to the Colorado constitution and held that it violated the most basic principles of equal protection, and thus was at odds with one of the most fundamental principles of American government. In *Lowe*, the Oregon Court of Appeal described

[19] *Lowe v. Keisling* 130 Or.App. 1, 882 P.2d 91 (1994)
[20] *Romer v. Evans* (1996) 517 U.S. 620

the proposed constitutional change before it as "not so far reaching as to constitute a revision," but like a narrow change merely limiting changes in tax rates.[21] The United States Supreme Court in *Romer* described an essentially identical provision as a "sweeping and comprehensive"[22] elimination of "protections against exclusion from an almost unlimited number of transactions and endeavors that constitute the ordinary civil life in a free society."[23] While the Oregon Court of Appeal found in 1994 that a constitutional change disenfranchising gay and lesbian citizens from the law would not be a "kind of fundamental change in the constitution"[24] the United States Supreme Court found in 1996 that such a constitutional change altered fundamental principles at the root of our Constitutional scheme of government and was contrary "to the idea of the rule of law and to our own Constitution's guarantee that government and each of its parts remain on impartial terms to all who seek its assistance."[25]

Because *Romer v. Evans* was decided two years after *Lowe*, the *Lowe* court did not have the benefit of *Romer*'s reasoning and holding. And the Oregon Supreme Court did not review the Court of Appeals' *Lowe* opinion because the issue presented by that case had become moot before it had the opportunity to do so.[26]

In 2008, the Oregon Court of Appeals was confronted, in *Martinez v. Kulongoski*, with a constitutional change substantively identical to the one at issue here,

---

[21] *Lowe v. Keisling*, supra, 130 Or.App. at 13
[22] *Romer v. Evans*, 517 U.S. at 627
[23] *Romer v. Evans*, supra, 517 U.S. at 631
[24] *Lowe v. Keisling*, supra, 130 Or.App. at 13
[25] *Romer v. Evans*, supra, 517 U.S. at 633
[26] *Lowe v. Keisling* (1995) 130 Or. 570

enshrining in the Oregon Constitution a statement that same-sex couples cannot get married, and that, if they purport to do so, their marriages will not be recognized as marriages.[27] The Oregon Court of Appeals held that this, too, was a mere amendment.

But in doing so, it relied exclusively on its now-suspect opinion in *Lowe*, writing:

> Bluntly, if, as we held in *Lowe*, the proposed measure there [denying gay people any ability to seek redress for discrimination] was not a revision, Measure 36 [dealing with the narrower issue of forbidding marriage to same-sex couples] cannot be a revision. Conversely, if . . . Measure 36 is a "revision" under their qualitative formulation, the proposed measure in *Lowe* must, contrary to our holding, have been a revision. ¶ In sum, to [conclude that Measure 36 is a revision,] we would have to overrule *Lowe*. Giving due and "decent respect [to] the principle of *stare decisis*, we decline to do so.[28]

This was the only reason that the Oregon Court of Appeals gave for its determination that a constitutional change barring gay and lesbian Oregonians from the right to marry was a narrow "amendment" to their state constitution rather than a revision: that because it had previously decided that a more extensive deprivation of gay persons' civil rights was an amendment, changing the constitution to deny gay persons the right to marry could be no more than an amendment, because it is a less extensive deprivation of basic civil rights.

Left unexamined was whether the earlier decision (that depriving gay and lesbian citizens of any number of basic civil rights, and declaring as a constitutional matter than gay and lesbian persons—and they alone—could be

---

[27] *Martinez v. Kulongoski* (2008) 220 Or.App. 142
[28] *Martinez v. Kulongoski* (2008) 220 Or.App. at p. 155

barred from even participating in the political process to rectify that deprivation) was actually correct. In view of the United States Supreme Court's holding in *Romer v. Evans*, which at a minimum casts doubt on the soundness of the earlier decision's logic, the *Martinez* court's reliance on its earlier *Lowe* opinion, without any analysis whatsoever, renders *Martinez* of no persuasive value.

Even if the Alaska and Oregon opinions were of some persuasive value here (and they are not) those opinions would not be authority in California that any court is bound to follow because the interpretation of California law is up to the courts of this state, and is not dependent on the opinion of the courts of other states.[29] This is especially true with respect to foreign jurisdictions' opinions relating to constitutional principles.[30] Indeed, this Court has specifically rejected the Oregon Supreme Court's interpretation of the same Constitutional article at issue here, article XVIII, albeit in connection with that article's "separate vote" provision.[31]

Nonetheless, such opinions may be persuasive to the extent that they construe a statute identical or similar to a California statute.[32] But to the extent that such opinions have value it is for their *reasoning*, not for their mere conclusion; and when their reasoning is unsound, the California courts will not

---

[29] *Acco Contractors, Inc. v. McNamara and Peep Lumber Co.* (1976) 63 Cal.App.3d 292
[30] *Fashion Valley Mall, LLC v. N.L.R.B.*, supra, 42 Cal.4th at 863
[31] *Californians For an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 738
[32] *People v. Hayne* (1890) 83 Cal. 111

follow it.[33] In the case of the Alaska's *Bess v. Ulmer* and Oregon's *Martinez v. Kulongoski*, it is not merely the case that their reasoning is unsound—there is no reasoning at all. There is thus nothing in those opinions for this Court reasonably to follow.

b. Proposition 8 is a constitutional revision, not an amendment, because it alters the California Constitution's fundamental principles by enshrining in the Constitution the idea that members of a particular minority are lesser citizens.

Even if the Alaska and Oregon courts' opinions had included some reasoning to justify their conclusion that their states' marriage bans were amendments rather than revisions, those opinions would have been of only minimal value here. This is because the California Constitution is an instrument of "independent force and effect."[34] No foreign court's opinion can do more than suggest an interpretation of a California Constitutional provision that is any more than one possible interpretation among many.

Here, the Alaska and Oregon courts provided no reasoning in support of their conclusions at all. Because there appears to be no court other than those two—state or federal—to have considered whether a constitutional change barring same-sex couples from participating in the fundamental civil and human right to marry is a constitutional amendment or a revision, there is no out-of-state persuasive authority relevant to the question that is presently before this Court.

---

[33] *People v. Dorsey* (1867) 32 Cal. 296

[34] *Fashion Valley Mall, LLC v. N.L.R.B.*, supra, 42 Cal.4th at 863

Thus, this Court is left to rely only on the foundational principles behind our California Constitution and this Court's own precedent applying those principles in its resolution of this case. Under those principles and that precedent, a constitutional change purporting to strip from an identified group of Californians, based on a suspect classification, their fundamental civil and human right to marry—and in doing so stripping from them the right to be treated equally under the law—must be found to be a revision.

This is so because Proposition 8 purports not only to strip away from gay and lesbian Californians the fundamental human and civil right to marry; it purports to enshrine in our state constitution the idea that gay and lesbian Californians are second-class citizens.

We as local governments are aware of no instance—certainly no instance from 1926[35] onward—when, rather than declaring individual rights and protecting personal dignity, our state Constitution has declared that certain fundamental rights are off limits, entirely or partly, to a specific group of our fellow citizens merely because that group is unpopular.

And we do not believe that it is a mere coincidence that such negative declarations have been absent from our constitution for most of its existence. Rather, we believe that they have been absent because they are antithetical to any constitution's—and specifically our California constitution's—purpose. The Attorney

[35] It was in 1926 that the California Constitution was amended to repeal a provision denying persons of Chinese ancestry the right to vote.

General in his Answer Brief, and the Strauss Petitioners in their reply, very effectively make this point about limits on government's ability, even by constitutional change, to divest individuals of those rights that are inherent in their very humanity.[36]

Until Proposition 8, there had only ever been one instance in the history of our state Constitution when a disfavored minority was singled out for special legal disability, and it was placed in the Constitution by constitutional convention, not by amendment. That was the provision, in Article XIX of the Constitution of 1879, declaring that persons of Chinese ancestry were forbidden to vote in California, and prohibited from working except as required to engage in forced labor as punishment for a crime. It is now universally accepted that that Constitutional provision was a disgraceful moment in our state's constitutional history. And it is recognized as disgraceful not merely because it was a clear violation in our state constitution of even the barest modicum of civil rights granted by the federal constitution, but because the disenfranchisement did what no constitution should ever do: declare that some persons, merely because they are feared, misunderstood, or otherwise disfavored by the majority, are, by reason of their unpopularity alone, barred from the full rights of the citizenship that is their birthright.[37]

---

[36] Attorney General's Answer Brief, in *CCSF v. Horton* pp. 75 – 90; Petitioners' Corrected Reply in Support of Petition for Extraordinary Relief, in *Strauss v. Horton*, p. 3

[37] Gordon Lloyd, *The 1849 California Constitution: An Extraordinary Achievement by Ordinary, Dedicated People* included in Connor and Hammons, ed., (2008) The Constitutionalism of the American States, p. 725 ("The 1879 Constitution is an excellent example of what a constitution should not look like. [It] constitutionalized the politics of class and race and was less liberal than [the original state constitution].")

Proposition 8 does exactly that. For the first time in our state's history, Proposition 8 purports to amend the Constitution to mark some Californians as lesser citizens, making the change by popular vote alone. We believe that it would never be right to include in our state Constitution a declaration that gay and lesbian Californians, and they alone, can never marry. But if such a declaration can be imposed on the California Constitution, the Constitution itself—to say nothing of respect for those principles of fairness and equality that we have declared to be at the root of who we are as Californians—requires that it be imposed only after the more thoughtful and deliberative revision process. It cannot be imposed, as Proposition 8 was, by no process more deliberative than a highly contentious popular election in which the public's passions were enflamed by television, radio, internet, and print advertising depicting gay and lesbian Californians as an undeserving minority not worthy of equality with their heterosexual fellow citizens.

The Hollingsworth Interveners argue in their Opposition Brief that no one is harmed by Proposition 8—that any claim that, by enacting Proposition 8, the voters have "singled out and targeted a vulnerable minority for denial of basic rights . . . is wildly wrong."[38] They likewise assert in their response to a portion of the Attorney General's Answer brief that "[t]his is emphatically not the case of the majority in any

[38] Interveners' Opposition Brief in Strauss pp. 16 – 17

manner tyrannizing a vulnerable minority. Any such description of Proposition 8 would be wildly inaccurate and grossly unfair."[39]

But the arguments advanced for Proposition 8's passage, and the historical reasons for excluding gay and lesbian persons from the right to marry, belie the falsity of that claim. Proposition 8 is, at bottom, an effort to radically alter many of the foundational principles on which our California Constitution rests—most fundamentally, the idea that all Californians are equal before the law, and equally entitled to its protection. It seeks, for the first time ever, to amend the Constitution to include a declaration that some Californians are entitled to a lesser recognition of constitutional status than others.

1. Proposition 8 was premised on the idea that gay and lesbian Californians are lesser citizens whose relationships, by virtue of their second-class status, are not worthy of the same dignity and legal recognition as those of other Californians.

The arguments in support of Proposition 8 that were included in the official voter guide asserted that "we should not accept a court decision that may result in public schools teaching our kids that gay marriage is okay;" and that "voting YES protects our children."[40]

---

[39] Intervener's Response to Pages 75 – 90 of the Attorney General's Answer Brief, p. 15
[40] http://www.voterguide.sos.ca.gov/argu-rebut/argu-rebutt8.htm

These statements, and their reiteration in the various promotional materials urging voters to vote for Proposition 8,[41] suggested that it was necessary to take away the right of gay and lesbian Californians to marry in order to prevent the supposed moral confusion that our children would have suffered were the state to continue to sanction marriages between same-sex couples and by doing so suggest that such marriages are healthy and sound, when in fact (according to Proposition 8 proponents) they are not.

To understand the full import of this suggestion, it is necessary to understand its historical context. That context is a history, stretching back over hundreds of years, if not thousands, in which gay men and women have been treated as not only beneath the law's dignity, but as a social malignity that the law must actively suppress.

2. Modern laws depriving gay men and women from the right to marry are the successors to legal discrimination against them stretching back over centuries.

The suggestion by Proposition 8's proponents that same-sex relationships are in some way inferior to opposite-sex ones is not a new one. It is as old as the idea that gay and lesbian persons themselves are inferior, a suggestion that may be found even in ancient religious texts written during the time of the Roman Empire.[42]

---

[41] http://whatisprop8.com/same-sex-marriage-will-be-taught-in-public-schools.html; http://protectmarriage.com/video/view/9; http://www.yeson8.info/

[42] See, e.g. The Bible (New King James Version), Timothy 1:9-10 (comparing gay persons to murderers, kidnappers, and liars

Such views are not in their essence religious, but are a reflection of similar views that have been adopted by civil society for centuries, marking gay and lesbian persons as second-class citizens and societal outcasts. Societal antipathy toward gay men in particular was formalized as early as 342 A.D., when the Emperors Constantius II and Constans decreed that they were to be executed.[43] Roughly half a century later, the Emperor Theodosius decreed that gay men were not only to be killed, but were to be burned alive in the public squares, on the ground that "effeminacy" would weaken the state and was against Roman tradition.[44] In the 6th Century A.D., the Emperor Justinian justified this treatment of gay people by declaring them to be the cause of "famines, earthquakes, and pestilence."[45] The state-sanctioned torture and execution of gay people (or people thought to be gay) continued through the centuries; 151 Knights Templar were burned alive together in 1307 on the grounds of their allegedly being gay.[46]

By the 19th Century, most of Western Civilization ceased to sanction the actual torturing and killing of gay people, but still criminalized them. Among the first legislative acts of the new nation of Germany in 1871 was the enactment of Paragraph 175, which made it a crime for a man to be gay.[47] It was this law under which Nazi Germany justified arresting and imprisoning tens of thousands of gay men, and sending

---

[43] Crompton, Homosexuality and Civilization (Harvard University Press 2003), p. 132
[44] Code Theod. 9.7.6; Crompton, Homosexuality and Civilization (2003), p. 133
[45] Fone, Homophobia: A History (Picador, 2000) pp. 115 – 115
[46] Malcolm Barber, Trial of the Templars (1978)
[47] Berg & Geyer, ed. Two Cultures of Rights: The Quest for Inclusion and Participation in Modern America and Germany (Cambridge University Press 2002)

thousands of them to die in concentration camps; and it was under this law, which continued in effect after the toppling of the Nazi regime, that gay concentration camp survivors were required to serve out the remainder of their concentration-camp terms in criminal prison, denied reparations, and in many cases rearrested by the post-Nazi government as "repeat offenders."[48] It was under a similar law in Britain that, in 1895, Oscar Wilde was imprisoned for the "gross indecency" of having loved another man.[49] Such laws continued in effect in Europe and the Americas—including the United States—through the end of the 20th Century.[50]

Today, laws criminalizing gay and lesbian persons are less common. Such laws still are far from rare, however; of 193 United Nations member states, almost half criminalize gay conduct or gay status. In many such nations, the punishment is imprisonment. In seven nations, being gay remains punishable by death.[51] But even where laws criminalizing gay persons have been repealed, throughout the West, and in the United States in particular, state-sanctioned antipathy toward gay and lesbian citizens continues as heterosexual majorities have enacted laws allowing, and even

---

[48] Plant, The Pink Triangle (1986) pp. 105 – 149; Moeller, West Germany Under Construction: Politics, Society, and Culture in the Adenauer Era (1997) pp. 252 – 253

[49] Coates, The Trials of Oscar Wilde: Transcript Excerpts from the Trials at the Old Bailey, London, During April and May 1985 (2001)

[50] See, e.g., *Bowers v. Hardwick* (1986) 478 U.S. 186

[51] *State-Sponsored Homophobia: A world survey of laws prohibiting same sex activity between consenting adults.* (2008) An International Gay and Lesbian Association report by Daniel Ottoson, available at http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf

requiring, gay and lesbian persons to be discriminated against and specially marked as lesser citizens.

In March 2000, for example, California voters enacted Proposition 22, changing the state's marriage statutes to explicitly exclude gay couples from the right to marry. As explained by Anthony Pugno, one of its primary proponents and co-counsel for the Hollingsworth Interveners here, Proposition 22's purpose was not merely to prevent gay and lesbian Californians from marrying, but to signal societal disapproval of gay and lesbian persons generally, and ensure that "people who have moral objections to the idea of same-sex marriage [are not] compelled to participate through their government in sanctioning and promoting *a kind of lifestyle they don't feel comfortable with.*"[52]

In light of this history, it is simply too facile to say, as Proposition 8's proponents and the Hollingsworth Interveners do, that Proposition 8 is innocuous because it is "about restoring and maintaining the traditional definition of marriage."[53] And in view of the nearly explicit argument by Proposition 8's primary proponents, that Proposition 8 was necessary in order to make clear to our children that the historical animosity toward gay and lesbian persons is well-founded because they are

---

[52] Oral statement of Anthony Pugno on the television program The Wedding Zinger: The Definition of Marriage, a segment of "Uncommon Knowledge," produced by the Hoover Institution in conjunction with KTEH-TV, San Jose. Filmed March 28, 2008 (Emphasis added)

[53] Intervener's opposition brief in Strass, p. 16

by definition in some way wrong, it is too facile to say that it is innocuous because it does nothing more than state the voting public's majority will.[54]

It must be understood that Proposition 8 inserts into our state Constitution something that had never before been there: a statement that gay and lesbian Californians are not full and equal citizens. It is a statement that gay and lesbian Californians are not entitled to the fundamental human right to marry that is the birthright of all other Californians. It is a statement that gay and lesbian Californians, and they alone, are a special class of citizen for whom the right to be treated equally under the law—the right, in short, to be treated by the state as all Californians are entitled to be treated by virtue of their humanity alone—does not fully apply.

And this statement has been inserted into our California Constitution on the basis of the argument that our gay brother-citizens and our lesbian sister-citizens are in some way bad people—because, as the official voter guide put it, it was necessary to "protect[ ] our children" from the notion that gay and lesbian Californians are entitled to the dignity of marriage.

This is something that is radical and new in our constitutional history. Again, not since 1926 has the California Constitution singled out a class of our fellow citizens for special disability. And *never* in our history has the Constitution purportedly been amended by popular vote to do so.

---

[54] Id.

Rather, as all parties to this litigation agree, the Constitution has always (the ignominious mistreatment of Chinese Californians at the end of the 19th Century excepting), sought to "secure and perpetuate [freedom's] blessings"[55] for our people. No part of the Constitution does this to a greater extent that the Declaration of Rights, which guarantees Californians our rights as individuals.

That Declaration secures to *all* Californians the right to equal treatment under the law. It has done so, at least, until now. Proposition 8 purports to change that. The Attorney General has offered a powerful argument that such a change can never be made, that it is not within the government's power to strip the individual of those rights that inhere in his or her fundamental humanity, and the local governments supporting this amicus brief agree that that is true.[56] But if we are wrong about that—if that fearsome power is within the sovereign's grasp—there is only one thing that stands between the popular passions that from time to time may strain the bonds of affection between us, and the better angels of our nature that emerge on cooler reflection. That thing is the impediment to constitutional change that the People, in their foresight, long ago erected: a process for revising the Constitution that allows the time and space for those better angels to emerge.

It is that process, and that process alone, by which gay and lesbian Californians may be stripped of their right to full and equal citizenship, if that can be accomplished

---

[55] Constitution of the State of California, Preamble
[56] Attorney General's Answer Brief, pp. 75–90

at all. Because Proposition 8 was not enacted through that process, it is necessarily invalid.

III. Conclusion

If our constitution is to be altered as Proposition 8 purports to alter it, that change cannot appropriately be brought about by popular vote alone. For, as this Court has declared time and again, sovereignty in this state resides in the People; but in the exercise of that sovereignty, even the People must adhere to the Constitution as they have framed it. And as they have framed it, the Constitution's fundamental principles can be changed, if at all, only by the deliberative process prescribed for its revision.

Until now, the idea that the laws and the government of this state are the laws and the government of all Californians equally—the idea that no Californian, either as an individual or as a member of a group, is beneath the law's recognition or dignity—has been part of the bedrock on which our entire constitutional system of government is built. If this bedrock principle were to change, our Constitution and the government based on it would be radically altered.

Proposition 8 purports to alter this bedrock principle, and thus to alter our entire Constitution and system of government, by declaring that one group of Californians, and they alone, are not entitled to the same fundamental human and civil rights as their fellow citizens. And all that defines that group is the suspect classification of sexual orientation. Under Proposition 8, some Californians, merely because they belong to a

historically disfavored group, can no longer marry, a right that this Court and countless others have described as among the most fundamental rights of humankind.

It is not at all clear that our Constitution could ever be changed in this way without, at a minimum, undermining the Constitution's own legitimacy. But if the Constitution can be changed to strip some Californians of their fundamental human and civil rights, based only on a suspect classification, that change cannot be brought about by popular vote alone. If it can legitimately be brought about at all, it must be by the thoughtful and deliberative process prescribed for the Constitution's revision. Because Proposition 8 purported to circumvent that process, and to radically alter our Constitution's underlying principles by popular vote alone, it is invalid.

Dated January 14, 2009

Respectfully submitted

By: _____
J. Stephen Lewis, attorney for
The City of Berkeley
City of Cloverdale
City of Davis
Town of Fairfax
County of Humboldt
City of Long Beach
City of Palm Springs
County of Sonoma
City of West Hollywood

Certificate of Compliance with California Rule of Court 8.204(c)(1)

I hereby certify that, as counted by our word-processing system, this Amicus Curiae Brief contains 7,689 words, exclusive of tables, signature block, and this Certification.

Executed on the 14th day of January 2009 at West Hollywood, California.

By: _____
J. Stephen Lewis

Proof of Service

I, Eddie T. Robinson, declare: I am a resident of the State of California and over the age of eighteen, and not a party to this action. My business address is West Hollywood City Hall, 8300 Santa Monica Boulevard, West Hollywood, CA 90069.

On January 14, 2009, I served the following document:

Application for Leave to File Amicus Curiae Brief
and
Amicus Curiae Brief in Support of Petitioners the City and County of San Francisco and Karen L. Strauss

on the interested parties in this action, by placing a true copy thereof in sealed envelopes addressed as follows:

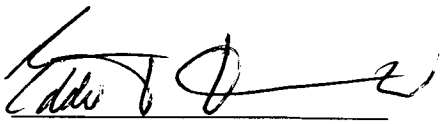
Please see attached service list

The document was served by mail. I am readily familiar with the office's practice of collection and processing of correspondence for mailing. Under that practice, correspondence is deposited with the United States Postal Service on the same day, with postage thereon prepaid at West Hollywood, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date for postage meter date is more than one day after the date of deposit for mailing as set forth in the proof of service.

Executed on January 14, 2009, at West Hollywood, California.

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

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



Eddie T. Robinson

Service List
For Cases S168047, S168066, and S168078

Shannon Minter National Center for Lesbian Rights 870 Market Street, Suite 370 San Francisco, CA 94102	Gloria Allred Allred, Maroko & Goldberg 6300 Wilshire Blvd., Suite 1500 Los Angeles, CA 90048
Dennis J. Herrera, City Attorney Therese M. Stewart, Deputy City Attorney City Hall, Room 234 One Dr. Carlton B. Goodlett Place San Francisco, CA 94102-4699	Jerome B. Falk, Jr. Howard Rice Nemerovski Canady Falk & Rabkin A Professional Corporation Three Embarcardero Center, 7th Floor San Francisco, CA 9411-4024
Ann Miller Ravel County Counsel Office of the County Counsel 70 West Hedding Street East Wing, Ninth Floor San Jose, CA 95110-1770	Rockard J. Delgadillo City Attorney Office of the Los Angeles City Attorney 200 N. Main Street City Hall East, Room 800 Los Angeles, CA 90012
Raymond G. Fortner, Jr. County Counsel 648 Kenneth Hahn Hall of Administration 500 West Temple Street Los Angeles, CA 90012-2713	Richard E. Winnie County Counsel County of Alameda 1221 Oak Street, Suite 450 Oakland, CA 94612
Patrick K. Faulkner County Counsel 3501 Civic Center Drive, Room 275 San Rafael, CA 94903	Michael P. Murphy County Counsel Hall of Justice and Records 400 County Center, 6th Floor Redwood City, CA 94063
Dana McRae County Counsel, County of Santa Cruz 701 Ocean Street, Room 505 Santa Cruz, CA 95060	Harvey E. Levine City Attorney 3300 Capital Avenue Fremont, CA 94538

Service List

For Cases S168047, S168066, and S168078

Philip D. Kohn Rutan & Tucker, LLP City Attorney, City of Laguna Beach 611 Anton Boulevard, Fourteenth Floor Costa Mesa, CA 92626-1931	John Russo Oakland City Attorney City Hall, 6th Floor 1 Frank Ogawa Plaza Oakland, CA 94612
Michael J. Aguirre City Attorney Office of the City Attorney, City of San Diego Civil Division 1200 Third Avenue, Suite 1620 San Diego, CA 92101-4178	John G. Barisone Atchison, Barisone, Condotti & Kovacevich City Attorney, City of Santa Cruz 333 Church Street Santa Cruz, CA 95060
Marsh Jones Moutrie City Attorney Santa Monica City Attorney's Office City Hall 1685 Main Street, 3rd Floor Santa Monica, CA 90401	Lawrence W. McLaughlin City Attorney City of Sebastopol 7120 Bodega Avenue Sebastopol, CA 95472
Edmund G. Brown, Jr. Christopher E. Krueger Mark R. Beckington Office of the Attorney General 1300 I Street, Suite 125 Sacramento, CA 95814-2951	Andrew P. Pugno Law Offices of Andrew P. Pugno 101 Parkshore Drive, Suite 100 Folsom, CA 95630
Kenneth W. Starr 24569 Via De Casa Malibu, CA 90265-3205	