Case No. _____

IN THE SUPREME COURT OF CALIFORNIA

ROBIN TYLER, an individual and DIANE OLSON, an individual,

Petitioners,

v.

THE STATE OF CALIFORNIA, a political body acting in its own right and/or through EDMUND G. BROWN, in his capacity as Attorney General, and/or DEBRA BOWEN, in her capacity as Secretary of State,

Respondents.

PETITION FOR WRIT OF MANDAMUS, PROHIBITION OR OTHER EXTRAORDINARY RELIEF AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

IMMEDIATE STAY REQUESTED

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

INTRODUCTION AND PARTIES

1. Petitioners Robin Tyler and Diane Olson are females who are voters in and residents of the State of California, and who are lesbians. They were among the successful plaintiffs in the In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (2008), decision by the California Supreme Court. By virtue of that decision, they were finally able to marry after years of deep commitment to one another. Having married following the Supreme Court's decision, and seeking to preserve their marriage under law, the petitioners are persons beneficially interested in the issuance of the writ sought herein.

2. The Respondent is the State of California, a political body. The State acts through, inter alia, EDMUND G. BROWN, in his capacity as Attorney General, who is responsible for uniform and adequate enforcement of the the laws of the State and/or DEBRA BOWEN, its Secretary of State, who is responsible for certifying election results received from each of the State's counties.

3. On November 8, 2008 voters in the State of California passed an initiative known as Proposition 8, which was submitted for ballot pursuant to Article II, Section 8, of the California Constitution. Proposition 8 purports to "amend" the California Constitution by adding a new "Section 7.5" to the Constitution to provide as follows: "Only marriage between a man and a woman is valid or recognized in California."

4. The Petitioners have invoked the original jurisdiction of the California Supreme Court in

this mandamus/prohibition matter relating to their marriage and right to marry. Under Article 6, Section 10 of the California Constitution, the Supreme Court and its judges have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The Supreme Court has recognized that it is appropriate for that jurisdiction to be exercised in cases in which the issues presented are of great public importance and must be resolved promptly. San Francisco Unified School Dist. v. Johnson, 3 Cal.3d 937, 944, 92 Cal.Rptr. 309, 312 (1971).

5. This Petition presents important issues relating to restrictions imposed by Proposition 8 upon the right to marry, one of the most fundamental personal rights afforded to individuals under the California Constitution. Those restrictions effectively re-write the Equal Protection Clause of that Constitution, creating two classes of citizens for marriage purposes.

6. The issues arising out of the adoption of Proposition 8 require prompt resolution so that the many thousands of individuals in same sex relationships who have married, and the many thousands more individuals who would marry in same sex relationships if given the choice, can ascertain their rights in light of drastic, substantive, structural changes imposed upon our Constitution under the guise of an ordinary ballot initiative.

FACTS

7. By way of background, on May 15, 2008, the California Supreme Court issued its decision in In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (2008), in which the Supreme Court held, inter alia, that definitions of marriage which "draw a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation

of marriage...are unconstitutional." In arriving at that holding, the Supreme Court expressly recognized:

a. That the "constitutional right to marry is one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution,"

b. That the "right to marry must be understood to encompass the core set of basic substantive legal rights and attributes traditionally associated with marriage that are so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process,"

c. That "these core substantive rights include, most fundamentally, the opportunity of an individual to establish - with the person with whom the individual has chosen to share his or her life - an officially recognized and protected family possessing mutual rights and responsibilities,"

d. That "the substantive right...to establish an officially recognized family...constitutes a vitally important attribute of the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society,"

e. That statutory definitions which restrict marriage to opposite sex couples "treat persons differently on the basis of sexual orientation,"

f. That "sexual orientation [is] a suspect classification,"

g. That "the distinction ...between the designation of the family relationship available to opposite-sex couples and the designation available to same-sex couples impinges upon the fundamental interest of same-sex couples in having their official family relationship

accorded dignity and respect equal to that conferred upon the family relationship of opposite-sex couples,"

h. That "the state interest in limiting the designation of marriage exclusively to opposite-sex couples... cannot properly be considered a compelling state interest for equal protection purposes," and

i. That definitions of marriage which "draw a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation of marriage...are unconstitutional."

8. Between May 15, 2008 and November 8, 2008, the Petitioners and many thousands of other individuals in same sex relationships also entered into duly solemnized marriages under the laws of the State of California as interpreted by the Supreme Court in the Marriage Cases.

CLAIMS ASSERTED

9. Proposition 8, if allowed to stand, would deprive homosexuals of the fundamental constitutional and human right to marry the person of their choice regardless of sex. If allowed to stand, Proposition 8 might also deprive same sex married couples such as the Petitioners of the rights they acquired when they were finally able to marry following the Supreme Court's decision in the Marriage Cases, supra.

10. By its terms, Proposition 8 contemplates such a far-reaching change as to amount to a qualitative re-writing of the California Constitution, and the negation of numerous decisions of the Supreme Court. In particular, Proposition 8 and new section 7.5 of the Constitution would destroy equal protection for homosexuals who desire same sex marriage, would insert distinctions based upon sexual orientation to our constitution, would strip the Petitioners and

thousands like them of fundamental legal rights and attributes traditionally associated with marriage that are integral to personal liberty and personal autonomy.

11. Notwithstanding the passage of Proposition 8, California has never abrogated its constitutional Equal Protection provision, which is set forth in Article I, Section 7 of the California Constitution, and which provides: "A person may not be . . . denied equal protection of the laws . . . " Under the Equal Protection Clause, "persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'" Creighton v. Regents of University of California, 58 Cal.App.4th 237, 246, 68 Cal.Rptr.2d 125, 130 (1997). Thus, "a law which confers particular privileges or imposes peculiar disabilities upon an arbitrarily selected class of persons who stand in precisely the same relation to the subject matter of the law as does the larger group from which they are segregated constitutes a special law which is tantamount to a denial of equal protection." California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools, 272 Cal.App.2d 514, 527, 77 Cal.Rptr. 497, 509 (1969).

12. Following the passage of Proposition 8, there is an irreconcilable constitutional conflict in the law concerning the right to marry. Our state Constitution still contains an Equal Protection Clause, and the Supreme Court held in the Marriage Cases (a) that "sexual orientation [is] a suspect classification," (b) that marriage is a fundamental right rooted in the fundamental interest in liberty and personal autonomy secured by the California Constitution, and (c) that a distinction in the right to marry between same sex couples and opposite-sex couples violates the Equal Protection Clause. On the other hand, new section 7.5 (Proposition 8) provides that homosexual (same sex) couples are barred from marriage, and that marriage is restricted to opposite sex couples. Thus, under Proposition 8, suspect classifications have, by initiative, been inserted into

our California Constitution.

13. As long as there is an Equal Protection Clause under our Constitution, and as long as marriage is regarded as a fundamental right, same sex couples must enjoy the same right to marry as opposite sex couples. Thus, under Equal Protection analysis, either both forms of couples should be permitted to marry, or neither form of couple should be permitted to marry and all couples, regardless of composition, should be limited to registered domestic partnership.

14. By virtue of the foregoing, new section 7.5 of the Constitution (Proposition 8) works such fundamental and far reaching changes to our Constitution and its interpretation as to constitute a true constitutional revision.

15. Proposition 8 was an initiative measure which, according to its terms, was submitted to the people in accordance with the provisions of Article II, Section 8, of the California Constitution. Article II, Section 8, of the California Constitution provides that such initiatives can be "approved by a majority of votes."

16. On its face Proposition 8 states that it "amends the California Constitution by adding a section thereto." In reality, the change that it brings is tantamount to a substantial revision of, among other things, the Equal Protection clause of the constitution. Notwithstanding the passage of Proposition 8, there is no compelling state interest sufficient to distinguish between same-sex couples and opposite sex couples for purposes of restricting the right to marry under California law. The distinction drawn by Proposition 8 either violates the Equal Protection Clause of the Constitution of the State of California, or substantially revises the fundamental meaning of that Clause.

17. "[A] revision of the Constitution may be accomplished only by a constitutional

convention and popular ratification (art. XVIII, § 2) or by legislative submission of the measure to the electorate (art. XVIII, § 1)." California Assn. of Retail Tobacconists v. State of California, 109 Cal.App.4th 792, 833, 135 Cal.Rptr.2d 224, 257 (2003). Neither (a) a constitutional convention and related popular ratification, nor (b) a legislative submission of a constitutional revision measure to the electorate have taken place with respect to new section 7.5 (Proposition 8). As a result, the California Constitution has effectively been revised without the two thirds vote of each house of the Legislature that is required for either a constitutional convention to revise the constitution or a legislative submission of a measure to revise the constitution.

18. By virtue of the foregoing, Proposition 8 impermissibly revises our State Constitution in a way which deprives the Petitioners (a)of the fundamental right to marry, (b) of an individual's liberty and personal autonomy, and (c)of equal protection which is guaranteed under the Constitution.

19. Proposition 8 also violates the separation of powers doctrine embodied in the California Constitution. "From its inception, the California Constitution has contained an explicit provision embodying the separation of powers doctrine. (Cal. Const. of 1849, art. III, § 1, now art. III, § 3.) Article III, section 3, provides: 'The powers of State government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.'" Superior Court v. County of Mendocino , 13 Cal.4th 45, 52, 51 Cal.Rptr.2d 837, 841 (1996).

20. Under the separation of powers doctrine, "the Legislature may not undertake to readjudicate controversies that have been litigated in the courts and resolved by final judicial judgment." Superior Court v. County of Mendocino, 13 Cal.4th 45, 53, 51 Cal.Rptr.2d 837, 842

(1996).

21. The power of the electorate in the initiative process is the constitutional power of the electors "to propose statutes ... and to adopt or reject them" (Cal. Const., art. II, § 8, subd. (a)), and "is generally coextensive with the power of the Legislature to enact statutes." Santa Clara County Local Transportation Authority v. Guardino, 11 Cal.4th 220, 253, 45 Cal.Rptr.2d 207, 228 (1995). Thus, the initiative process violates the separation of powers doctrine when it is used to readjudicate controversies that have been litigated and settled by the courts.

22. Prior to the passage of Proposition 8, the Supreme Court decided In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (2008), in which that Court held, inter alia, that definitions of marriage which "draw a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation of marriage...are unconstitutional" because (1) the right to marry is one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution, (2) the right to marry and the traditional attributes of marriage are so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process, (3) that statutory definitions which restrict marriage to opposite sex couples "treat persons differently on the basis of sexual orientation," (4) that "sexual orientation [is] a suspect classification,"(5) that "the distinction ...between the designation of the family relationship available to opposite-sex couples and the designation available to same-sex couples impinges upon the fundamental interest of same-sex couples in having their official family relationship accorded dignity and respect equal to that conferred upon the family relationship of opposite-sex couples," (6) that there is no compelling state interest in distinguishing between same-sex couples and opposite-sex

couples in terms of eligibility to marry, and (7) that definitions of marriage which draw a distinction between opposite-sex couples and same-sex couples violate equal protection under the California Constitution.

23. In adopting Proposition 8, which denies same sex couples the right to marry, electors purport to overturn the decision of the California Supreme Court in In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (2008), in which that Court held, inter alia, that the right to marry and the traditional attributes of marriage are so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process, that "sexual orientation [is] a suspect classification," that there is no compelling state interest in distinguishing between same-sex couples and opposite-sex couples in terms of eligibility to marry, and that definitions of marriage which draw a distinction between opposite-sex couples and same-sex couples violate equal protection under the California Constitution.

24. By virtue of the foregoing, Proposition 8 violates the separation of powers doctrine by purporting to readjudicate constitutional controversies that were litigated before and settled by the Supreme Court.

25. Petitioners have no plain, speedy and adequate remedy in the ordinary course of law. In particular, it would take years for this matter to wind its way through the Superior Court and Court of Appeal levels, only to wind up before the Supreme Court. In the meanwhile, the status of the Petitioners' marriage, and the right of same sex individuals to marry, would be uncertain.

26. Monetary damages are inadequate to compensate for the denial of a fundamental civil right such as marriage. Moreover, ordinary legal remedies do not address the denials of equal

protection inherent in the definition of marriage adopted in Proposition 8. Those denials are of significant public importance.

RELIEF SOUGHT

WHEREFORE, Petitioners pray as follows:

1. That the Court issue an alternative or peremptory writ of mandamus or prohibition commanding the State of California to desist from adopting, recognizing the validity of, certifying, enforcing, disseminating, or maintaining section 7.5 of the Constitution as adopted in Proposition 8 as the law of this State, and to continue to issue marriage licenses to same-sex couples who are otherwise qualified to issuance of such licenses as if Proposition 8 had not been adopted;

2. That in the alternative, show cause on the earliest possible specified time and date why the State should not do so, and

3. That pending any hearing ordered by the Supreme Court, an immediate stay be issued by which the State of California is to desist from from recognizing the validity of, enforcing or maintaining section 7.5 of the Constitution, as adopted in Proposition 8, and shall continue to issue marriage licenses to same-sex couples who are otherwise qualified to issuance of such licenses; and

4. For costs of suit, including reasonable attorneys fees under the Private Attorney General theory, according to proof;

5. For such other and further relief as the Court may deem just and proper.

DATED: November 5, 2008

ALLRED, MAROKO & GOLDBERG
GLORIA ALLRED
MICHAEL MAROKO
JOHN STEVEN WEST

_____
GLORIA ALLRED
Attorneys for Petitioners ROBIN TYLER and DIANE OLSON

VERIFICATION

I, Robin Tyler, do hereby declare:

I am a Petitioner in the foregoing action. I have read the foregoing Petition for Writ of Mandamus, Prohibition or Other Extraordinary Relief and know the contents thereof. The facts alleged in the Petition are true to my own knowledge.

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

Executed at Los Angeles, California on this __ day of November, 2008

_____
ROBIN TYLER

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioners Robin Tyler and Diane Olson are two females who were among the successful plaintiffs in the In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (2008), decision by the California Supreme Court. By virtue of that decision, they were finally able to marry after years of deep commitment to one another.

On November 8, 2008 voters in the State of California passed an initiative known as Proposition 8, which was submitted for ballot pursuant to Article II, Section 8, of the California Constitution. Proposition 8 purports to "amend" the California Constitution by adding a new "Section 7.5" to the Constitution to provide as follows: "Only marriage between a man and a woman is valid or recognized in California."

If enforced, Proposition 8 and new section 7.5 of the Constitution would destroy equal protection for homosexuals who desire same sex marriage, would insert distinctions based upon sexual orientation to our constitution, and would strip the Petitioners and thousands like them of fundamental legal rights and attributes traditionally associated with marriage that are integral to personal liberty and personal autonomy.

As will be shown in the discussion to follow, Proposition 8 is not a mere amendment to the Constitution. In fact, it amounts to a qualitative revision of the Equal Protection Clause of the California Constitution which was not adopted in accordance with the required process for constitutional revision. At the same time,

Proposition 8 violates the constitutional separation of powers doctrine by effectively overruling key holdings of In re Marriage Cases.

II. ORIGINAL JURISDICTION OF THE SUPREME COURT

The Petitioners have invoked the original jurisdiction of the California Supreme Court in this mandamus/prohibition matter. Under Article 6, Section 10 of the California Constitution, the Supreme Court and its judges have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.

The Supreme Court has recognized that it is appropriate for its original jurisdiction to be exercised in cases in which the issues presented are of great public importance and must be resolved promptly. San Francisco Unified School Dist. v. Johnson, 3 Cal.3d 937, 944, 92 Cal.Rptr. 309, 312 (1971). This Petition presents precisely those kinds of issues in that it arises out of restrictions imposed by Proposition 8 upon an individual's right to marry the person of his or her choice, regardless of that person's gender.

It is beyond dispute that the right to marry the individual of one's choice, regardless of gender, is one of the most fundamental personal rights afforded under the California Constitution. Indeed, that right is so important that it was the subject of the Supreme Court's own very recent and heralded decision in In re Marriage Cases, supra, which recognized the constitutional right of same sex couples to

marry (i.e., the constitutional right of an individual to marry the person of his or her choice without regard for gender).

Following the Supreme Court's decision in In re Marriage Cases, supra, the Petitioners, who have been in a stable and committed relationship for many years, were finally able to marry. Many thousands of same sex couples followed suit, and many thousands more undoubtedly would like to do so.

Now, the status of the Petitioners' marriage, and the marriages of the thousands of same sex couples, are called into question. Many thousands more cannot marry, all by virtue of Proposition 8.

Proposition 8 plainly revises the Equal Protection Clause of our Constitution in the context of the fundamental right to marry. As a result of its passage, two classes of citizens are created for marriage purposes. In the post-Proposition 8 constitutional environment, an individual who wants to marry another of the opposite sex has every right to do so. Conversely, someone who wants to marry another of the same sex has no right to marry the person of his choice.

As will be shown in the discussion to follow, Proposition 8 substantially revises the Equal Protection Clause of our State Constitution, but fails to comply with the constitutionally required process for revising the Constitution. The Petitioners will also show that Proposition 8 violates the separation of powers doctrine embodied in our Constitution.

The issues arising out of the adoption of Proposition 8 require prompt resolution so that the Petitioners, the many thousands of individuals in same sex relationships who have married, and the many thousands more individuals who would marry persons of the same sex if given the choice, can ascertain their rights in light of drastic, substantive, structural revisions imposed upon our Constitution under the guise of an ordinary ballot initiative.

III. PROPOSITION 8 AMOUNTS TO A SUBSTANTIVE REVISION OF OUR STATE CONSTITUTION

Notwithstanding the passage of Proposition 8, California has never abrogated its constitutional Equal Protection provision, which is set forth in Article I, Section 7 of the California Constitution as follows: "A person may not be . . . denied equal protection of the laws . . . " Under the Equal Protection Clause, "persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'" Creighton v. Regents of University of California, 58 Cal.App.4th 237, 246, 68 Cal.Rptr.2d 125, 130 (1997). Thus, "a law which confers particular privileges or imposes peculiar disabilities upon an arbitrarily selected class of persons who stand in precisely the same relation to the subject matter of the law as does the larger group from which they are segregated constitutes a special law which is tantamount to a denial of equal protection." California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools, 272 Cal.App.2d 514, 527, 77 Cal.Rptr. 497, 509 (1969).

On May 15, 2008, the California Supreme Court issued its decision in In re

Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (2008), holding, inter alia, that definitions of marriage which "draw a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation of marriage...are unconstitutional." 43 Cal.4th at 856, 76 Cal.Rptr.3d at 764. At the heart of that decision lies the recognition that the "constitutional right to marry is one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution." 43 Cal.4th at 781, 76 Cal.Rptr.3d at 700.

According to the Supreme Court, the constitutionally rooted right to marry, along with a "core set of basic substantive legal rights and attributes traditionally associated with marriage" are so integral to an individual's "liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process." Id.

Proposition 8, however, eliminates the right of an individual to marry someone of the same gender. Yet, in In re Marriage Cases our Supreme Court specifically held that the "core substantive rights" associated with marriage "include, most fundamentally, the opportunity of an individual to establish - with the person with whom the individual has chosen to share his or her life - an officially recognized and protected family possessing mutual rights and responsibilities" Id.

Thus, while Proposition 8 forbids same sex marriage in California, our Supreme Court specifically held that statutory definitions which restrict marriage to opposite sex

couples "treat persons differently on the basis of sexual orientation," 43 Cal.4th at 840, 76 Cal.Rptr.3d at 751, that "sexual orientation should be viewed as a suspect classification for purposes of the California Constitution's equal protection clause," 43 Cal.4th at 841, 76 Cal.Rptr.3d at 751, and that "the distinction ...between the designation of the family relationship available to opposite-sex couples and the designation available to same-sex couples impinges upon the fundamental interest of same-sex couples in having their official family relationship accorded dignity and respect equal to that conferred upon the family relationship of opposite-sex couples." 43 Cal.4th at 847, 76 Cal.Rptr.3d at 756.

After concluding that that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California's former marriage statutes - (retaining the traditional and well-established definition of marriage) "cannot properly be viewed as a compelling state interest for purposes of the equal protection clause, or as necessary to serve such an interest," 43 Cal.4th at 784, 76 Cal.Rptr.3d at 703, the Supreme Court concluded that definitions of marriage which "draw a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation of marriage...are unconstitutional," 43 Cal.4th at 785, 76 Cal.Rptr.3d at 703, because they violate equal protection. 43 Cal.4th at 856, 76 Cal.Rptr.3d at 764.

Following the passage of Proposition 8, there is an irreconcilable constitutional conflict in the law concerning the right to marry. Our state Constitution still contains an Equal Protection Clause, and the Supreme Court held in the Marriage Cases (a) that

sexual orientation a suspect classification, (b) that marriage is a fundamental constitutional right rooted in the fundamental interest in liberty and personal autonomy, and (c) that a distinction in the right to marry between same sex couples and opposite-sex couples violates the Equal Protection Clause. On the other hand, new section 7.5 (Proposition 8) provides that same sex couples (i.e., homosexual individuals) are barred from marriage, and that marriage is restricted to opposite sex couples. Thus, under Proposition 8, suspect classifications have, by initiative, been inserted into our California Constitution.

As long as there is an Equal Protection Clause under our Constitution, and as long as marriage is regarded as a fundamental right, same sex couples must enjoy the same right to marry as opposite sex couples.[1] By virtue of the foregoing, new section 7.5 of the Constitution (Proposition 8) works such fundamental and far reaching changes to our Constitution and its interpretation as to constitute a true constitutional revision. Likewise, Proposition 8 works such a fundamental change in the role of the judiciary as the interpreter of our constitution as to impose a fundamental change in the basic governmental plan of our state (See Section V, infra.).

[1] Thus, under Equal Protection analysis, either both forms of couples should be permitted to marry, or neither form of couple should be permitted to marry and all couples, regardless of composition, should be limited to registered domestic partnership.

IV. PROPOSITION 8 MUST BE INVALIDATED AS AN IMPROPER REVISION OF FUNDAMENTAL PROVISIONS OF THE CALIFORNIA CONSTITUTION WHICH FAILS TO COMPLY WITH THE REQUIRED PROCEDURES FOR A CONSTITUTIONAL REVISION

When the effect of a ballot initiative "would be so far reaching as to amount to a constitutional revision," it "is beyond the scope of the initiative process." Raven v. Deukmejian, 52 Cal.3d 336, 351, 276 Cal.Rptr. 326, 335 (1990). "[E]ven a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision." Id., 52 Cal.3d at 351-352, 276 Cal.Rptr. at 336.

Proposition 8 was an initiative measure which, according to its terms, was submitted to the people in accordance with the provisions of Article II, Section 8, of the California Constitution. Article II, Section 8, of the California Constitution provides that such initiatives can be "approved by a majority of votes."

On its face Proposition 8 states that it "amends the California Constitution by adding a section thereto." In reality, the change that it brings is tantamount to a substantial revision of, among other things, the Equal Protection clause of the constitution (See Section III) and of the doctrine of separation of powers (See Section V). As discussed

elsewhere in this Memorandum, Proposition 8 (a) violates the Equal Protection Clause of the Constitution of the State of California, or substantially revises the fundamental meaning of that Clause by creating two classes of individuals for purposes of the fundamental right to marry, and (b) reverses the decision of the California Supreme Court in a manner that violates separation of powers.

"[A] revision of the Constitution may be accomplished only by a constitutional convention and popular ratification (art. XVIII, § 2) or by legislative submission of the measure to the electorate (art. XVIII, § 1)." California Assn. of Retail Tobacconists v. State of California, 109 Cal.App.4th 792, 833, 135 Cal.Rptr.2d 224, 257 (2003). Neither (a) a constitutional convention and related popular ratification, nor (b) a legislative submission of a constitutional revision measure to the electorate have taken place with respect to new section 7.5 (Proposition 8). As a result, the California Constitution has effectively been revised without the two thirds vote of each house of the Legislature that is required for either a constitutional convention to revise the constitution or a legislative submission of a measure to revise the constitution. Thus, Proposition 8 impermissibly revises our State Constitution.

V. PROPOSITION 8 VIOLATES THE SEPARATION OF POWERS DOCTRINE

Proposition 8 also violates the separation of powers doctrine embodied in the California Constitution. "From its inception, the California Constitution has contained

an explicit provision embodying the separation of powers doctrine. (Cal. Const. of 1849, art. III, § 1, now art. III, § 3.) Article III, section 3, provides: 'The powers of State government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.'" Superior Court v. County of Mendocino , 13 Cal.4th 45, 52, 51 Cal.Rptr.2d 837, 841 (1996). Under the separation of powers doctrine, "the Legislature may not undertake to readjudicate controversies that have been litigated in the courts and resolved by final judicial judgment." Superior Court v. County of Mendocino, 13 Cal.4th 45, 53, 51 Cal.Rptr.2d 837, 842 (1996).

The separation of powers issue begins with the notion that power of the electorate to pass initiatives derives from the constitutional power of the electors "to propose statutes ... and to adopt or reject them" set forth in the California Constitution, Article II, section 8 (a). That power "is generally coextensive with the power of the Legislature to enact statutes." Santa Clara County Local Transportation Authority v. Guardino, 11 Cal.4th 220, 253, 45 Cal.Rptr.2d 207, 228 (1995). Since the the initiative process is co-extensive with the power of the Legislature to propose statutes, the separation of powers doctrine is violated an initiative effectively readjudicates controversies that were litigated and settled by the courts. Superior Court v. County of Mendocino, supra.

It is beyond dispute that before Proposition 8 was passed, the Supreme Court's opinion in In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (2008) decided that

definitions of marriage which draw a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation of marriage are unconstitutional because (1) the right to marry is a basic, inalienable civil right under the California Constitution, (2) the right to marry is so integral to an individual's liberty and personal autonomy that it cannot be abrogated by the Legislature or by the electorate through the statutory initiative process, (3) that statutory definitions which restrict marriage to opposite sex couples treat persons differently on the basis of sexual orientation, (4) that sexual orientation is a suspect classification, (5) that there is no compelling state interest in distinguishing between same-sex couples and opposite-sex couples in terms of eligibility to marry, and (6) that definitions of marriage which draw a distinction between opposite-sex couples and same-sex couples violate equal protection under the California Constitution.

Thus, in adopting Proposition 8, the electors (1) make the right to marry subject to popular whim instead of the inalienable civil right it has been held to be, (2) abrogate the right to marry by the statutory initiative process despite the holding that it would be impermissible to abrogate that right by that process, (3) treat persons differently on the basis of sexual orientation, (4) ignore the holding that sexual orientation is a suspect classification, and (5) ignore the holding that there is no compelling state interest in distinguishing between same-sex couples and opposite-sex couples for purposes of eligibility to marry. In doing so, the electors have ignored the Supreme Court’s role in

interpreting equal protection and other rights under the California Constitution, and re-written the Court's decision on constitutional controversies that were previously settled.

VI. CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petitioners are entitled to issuance of the writ and immediate stay that they seek in this proceeding.

DATED: November 5, 2008

ALLRED, MAROKO & GOLDBERG
GLORIA ALLRED
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JOHN STEVEN WEST

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GLORIA ALLRED
Attorneys for Petitioners ROBIN TYLER and DIANE OLSON

CERTIFICATE OF WORD COUNT (CRC RULE 8.204)

I hereby certify that the number of words in the foregoing brief, as counted by the word counter in the Corel WordPerfect X3 word processing program, is 5745.

November 5, 2008

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GLORIA ALLRED,
Attorneys for Petitioners ROBIN TYLER and DIANE OLSON

CERTIFICATE OF INTERESTED PERSONS (CRC RULE 8.208)

I hereby certify that the I know of no person or entity that has a financial or other interest in the outcome of the foregoing proceeding that should be considered by the Justices of the Supreme Court in determining whether to disqualify themselves.

November 5, 2008

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GLORIA ALLRED,
Attorneys for Petitioners ROBIN TYLER and

DIANE OLSON

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ORIGINAL JURISDICTION OF THE SUPREME COURT.....2

III. PROPOSITION 8 AMOUNTS TO A SUBSTANTIVE REVISION OF OUR STATE CONSTITUTION 4

IV. PROPOSITION 8 MUST BE INVALIDATED AS AN IMPROPER REVISION OF FUNDAMENTAL PROVISIONS OF THE CALIFORNIA CONSTITUTION WHICH FAILS TO COMPLY WITH THE REQUIRED PROCEDURES FOR A CONSTITUTIONAL REVISION.....8

V. PROPOSITION 8 VIOLATES THE SEPARATION OF POWERS DOCTRINE 9

VI. CONCLUSION.....12

TABLE OF AUTHORITIES

CASES:

California Assn. of Retail Tobacconists v. State of California,109 Cal.App.4th 792, 135 Cal.Rptr.2d 224 (2003) 9

California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools,272 Cal.App.2d 514, 77 Cal.Rptr. 497 (1969) 4

Creighton v. Regents of University of California,58 Cal.App.4th 237, 68 Cal.Rptr.2d 125 (1997) 4

In re Marriage Cases,43 Cal.4th 757, 76 Cal.Rptr.3d 683 (2008) 1-6, 10

Raven v. Deukmejian,52 Cal.3d 336, 276 Cal.Rptr. 326 (1990) 8

San Francisco Unified School Dist. v. Johnson,3 Cal.3d 937, 92 Cal.Rptr. 309 (1971) 2

Santa Clara County Local Transportation Authority v. Guardino,11 Cal.4th 220, 45 Cal.Rptr.2d 207 (1995) 10

Superior Court v. County of Mendocino,13 Cal.4th 45, 51 Cal.Rptr.2d 837 (1996) 10

STATUTES:

California Constitution Article 6, Section 10 2

California Constitution Article I, Section 7 4

California Constitution Article II, Section 8 8

California Constitution Section 7.5 ..... 1, 7, 9

Proposition 8 ..... 1, 3-5, 7-9