S168047/S168066/S168078

IN THE SUPREME COURT OF CALIFORNIA

KAREN L. STRAUSS, et al., Petitioners,

v.

MARK D. HORTON, et al., State Registrar of Vital Statistics, etc., Respondents; DENNIS HOLLINGSWORTH et al., Interveners.

ROBIN TYLER et al., Petitioners,

v.

STATE OF CALIFORNIA et al., Respondents; DENNIS HOLLINGSWORTH et al., Interveners.

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners,

v.

MARK B. HORTON, et al., State Registrar of Vital Statistics, etc., Respondents; DENNIS HOLLINGSWORTH et al., Interveners.

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND PROPOSED BRIEF OF LEGISLATIVE *AMICI CURIAE* IN SUPPORT OF PETITIONERS STRAUSS, ET AL.

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APPLICATION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONERS AND STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to California Rules of Court, rule 8.520, subdivision (f), Amici Curiae current and former California Legislators hereby respectfully apply for leave to file an amici curiae brief in support of the Petitioners. The proposed amici curiae brief is attached to this Application. The proposed Amici are familiar with the questions presented by this case. They believe that there is a need for further argument, as discussed below.

STATEMENTS OF INTEREST

Proposed Amici are sixty-five members and former members of the California State Legislature, including Senate President Pro Tempore Darrell Steinberg, past Senate President Pro Tempore Don Perata, Speaker of the Assembly Karen Bass, Assembly Speaker Emeritus Fabian Nunez, and Senators Elaine Alquist, Ron Calderon, Gilbert Cedillo, Ellen Corbett, Mark DeSaulnier, Loni Hancock, Christine Kehoe, Sheila Kuehl, Mark Leno, Alan S. Lowenthal, Jenny Oropeza, Alex Padilla, Fran Pavley, Mark Ridley-Thomas, Gloria Romero, Joe Simitian, Patricia Wiggins, and Lois Wolk, and Assemblymembers Tom Ammiano, Jim Beall, Jr., Patty Berg, Marty Block, Bob Blumenfield, Julia Brownley, Anna M. Caballero, Charles Calderon, Wesley Chesbro, Joe Coto, Mike Davis, Kevin de Leon, Mike Eng, Noreen Evans, Mike Feuer, Warren T. Furutani, Felipe Fuentes,

Mary Hayashi, Edward P. Hernandez, Jerry Hill, Jared Huffman, Dave Jones, Betty Karnette, Paul Krekorian, John Laird, Lloyd E. Levine, Sally J. Lieber, Ted Lieu, Fiona Ma, Gene Mullin, William Monning, John A. Pérez, V. Manuel Perez, Anthony J. Portantino, Curren Price, Ira Ruskin, Mary Salas, Lori Saldana, Nancy Skinner, Jose Solorio, Sandre R. Swanson, Tom Torlakson, and Mariko Yamada (collectively "the Legislative Amici").

The issues addressed by this brief and the petition lie at the heart of California's constitutional structure. Upholding and preserving this structure and the constitutionally-assigned responsibilities and roles of this Court, the Legislature, and the People, is of particular interest to the Legislative Amici given their sworn duty to uphold California's Constitution and the constitutional rights of their constituents.

In addition, many of the Legislative Amici were part of a majority of California legislators that passed the Religious Freedom and Civil Marriage Protection Act, Assembly Bill 43, in the Legislature's 2007-2008 regular session. Assembly Bill 43 recognized the importance of the institution of civil marriage in promoting stable relationships and protecting the civil rights of individuals in those relationships, as well as their children or dependents and members of their extended families. By eliminating gender-specific language limiting marriage to a civil contract between a

man and a woman, Assembly Bill 43 intended to extend to same-sex couples the fundamental right of marriage. Simply put, it sought to "end the pernicious practice of marriage discrimination in California." (Assem. Bill No. 43 (2007-2008 Reg. Sess.) § 3(*l*); see also Assem. Bill No. 849 (2005-2006 Reg. Sess.) § 3(k).)

California's Legislators have also taken up issues that are directly relevant to those currently before the Court, including Senate Resolution No. 7, which opposes Proposition 8 because it is an improper revision, not an amendment, of the California Constitution (see Sen. Res. No. 7 (2009-2010 Reg. Sess.), at <http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sr_7_bill_20081218_amended_sen_v98.pdf> [as of Jan. 15, 2009]), and House Resolution No. 5, which would find that "the Assembly opposes Proposition 8 because it is an improper revision, not an amendment, of the California Constitution and was not enacted according to the procedures required by Article XVIII of the California Constitution." (see Assem. Res. No. 5 (2009-2010 Reg. Sess.), at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/hr_5_bill_20081202_introduced.pdf> [as of Jan. 15, 2009].)

Accordingly, through their involvement in the legislative process and their active support of relevant bills and resolutions, the Legislative Amici are familiar with the issues addressed by the Petitions, and they

support the position and arguments set forth by the Petitioners. As discussed below, the Legislative Amici urge the Court to preserve the fundamental constitutional structure of government set forth by the framers of California's Constitution, and to preserve the fundamental right to equal protection of the law for all Californians.

The Legislative Amici are familiar with the issues before the Court. Legislative Amici believe that further briefing is necessary to address the matters described above, which are not fully addressed by the parties' briefs. Specifically, Legislative Amici will set forth, and will explain:

1. The significance of the fact that the People entrusted the Legislature with the responsibility to initiate revision of the California Constitution; and

2. How Proposition 8 makes far reaching changes in California's governmental plan and underlying constitutional principles, and thus revises the Constitution without undergoing the constitutionally mandated process for such revisions.

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For the foregoing reasons, *Amici Curiae* current and former California legislators respectfully request leave to file the attached brief.

Dated: January 15, 2009

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
Ethan D. Dettmer

Attorneys for Proposed *Amici Curiae* Senate President Pro Tempore Darrell Steinberg, past Senate President Pro Tempore Don Perata, Speaker of the Assembly Karen Bass, Assembly Speaker Emeritus Fabian Nunez, and Senators Elaine Alquist, Ron Calderon, Gilbert Cedillo, Ellen Corbett, Mark DeSaulnier, Loni Hancock, Christine Kehoe, Sheila Kuehl, Mark Leno, Alan S. Lowenthal, Jenny Oropeza, Alex Padilla, Fran Pavley, Mark Ridley-Thomas, Gloria Romero, Joe Simitian, Patricia Wiggins, and Lois Wolk, and Assemblymembers Tom Ammiano, Jim Beall, Jr., Patty Berg, Marty Block, Bob Blumenfield, Julia Brownley, Anna M. Caballero, Charles Calderon, Wesley Chesbro, Joe Coto, Mike Davis, Kevin de Leon, Mike Eng, Noreen Evans, Mike Feuer, Warren T. Furutani, Felipe Fuentes, Mary Hayashi, Edward P. Hernandez, Jerry Hill, Jared Huffman, Dave Jones, Betty Karnette, Paul Krekorian, John Laird, Lloyd E. Levine, Sally J. Lieber, Ted

Lieu, Fiona Ma, Gene Mullin, William Monning, John A. Pérez, V. Manuel Perez, Anthony J. Portantino, Curren Price, Ira Ruskin, Mary Salas, Lori Saldana, Nancy Skinner, Jose Solorio, Sandre R. Swanson, Tom Torlakson, and Mariko Yamada

Table of Contents

Table of Authorities

Page(s)

Cases

Constitutional Provisions

Rules

Legislative Materials

Other Authorities

I. INTRODUCTION

Proposition 8 breaks a basic promise of California's Constitution—that all Californians must be treated equally under the law—by depriving a small minority of Californians of a fundamental constitutional right, and by preventing the courts from exercising their constitutional responsibility to protect against such an abuse. Proposition 8 is void because it improperly seeks to make far-reaching changes to our system of government and its underlying principles without first having undergone the constitutionally-required scrutiny of legislative debate, deliberation and approval.

The history of California's Constitution reflects its framers' core belief that fundamental changes to the Constitution, and to California's government, should not be based on a majority vote of the electorate alone. Instead, the framers of California's Constitution and architects of California's government—the People themselves—recognized that fundamental changes to the state's Constitution and government should require the participation of both the People's elected representatives in the Legislature, and the People by popular vote or through constitutional convention.

Throughout the nearly 160 years of California's Constitutional history, the Legislature has been assigned the sole responsibility for initiating any fundamental change to the structure of California's Constitution and its government. Even during periods of great popular

discontent with California's government and the Legislature in particular, when the People revisited their constitutional structure, they nevertheless kept with the Legislature the duty and responsibility to commence any fundamental change in the Constitution through the revision process. In 1962, the People again changed the process for revising the Constitution, and again reserved for the Legislature the responsibility to begin any revision to the Constitution. In so doing, the People recognized the unique deliberative role of the Legislature, and the advantages of using the tools of bicameralism, legislative debate, investigation, study and compromise to carefully assess fundamental changes to the Constitution. Accordingly, it is, and has always been, the Legislature's role to initiate fundamental changes to California's Constitution.

Proposition 8 works two such fundamental changes to California's Constitution and our system of government. First, Proposition 8 breaks the Constitution's promise of equal protection to all Californians by depriving a disfavored minority—and only that minority—of a fundamental constitutional right based on a simple majority vote. Second, it strips the Court of its core constitutional responsibility to protect the rights of a protected minority of Californians.

Because Proposition 8 changes underlying principles upon which the California Constitution is based, and because it effects far-reaching changes

in California's basic governmental plan, it is a revision—not an amendment—to the Constitution. Because Proposition 8 sidestepped the Legislature's constitutional role of debating, deliberating on, and commencing this process of revising the Constitution, Proposition 8 is invalid.

II. LEGISLATORS' INTEREST

Pursuant to California Rule of Court 8.520(f) and this Court's November 19, 2008 Order, amici curiae respectfully submit this brief in support of Petitioners in the above-referenced original writ proceeding. Amici are sixty-five members and former members of the California State Legislature, including Senate President Pro Tempore Darrell Steinberg, past Senate President Pro Tempore Don Perata, Speaker of the Assembly Karen Bass, Assembly Speaker Emeritus Fabian Nunez, and Senators Elaine Alquist, Ron Calderon, Gilbert Cedillo, Ellen Corbett, Mark DeSaulnier, Loni Hancock, Christine Kehoe, Sheila Kuehl, Mark Leno, Alan S. Lowenthal, Jenny Oropeza, Alex Padilla, Fran Pavley, Mark Ridley-Thomas, Gloria Romero, Joe Simitian, Patricia Wiggins, and Lois Wolk, and Assemblymembers Tom Ammiano, Jim Beall, Jr., Patty Berg, Marty Block, Bob Blumenfield, Julia Brownley, Anna M. Caballero, Charles Calderon, Wesley Chesbro, Joe Coto, Mike Davis, Kevin de Leon, Mike Eng, Noreen Evans, Mike Feuer, Warren T. Furutani, Felipe Fuentes, Mary

Hayashi, Edward P. Hernandez, Jerry Hill, Jared Huffman, Dave Jones, Betty Karnette, Paul Krekorian, John Laird, Lloyd E. Levine, Sally J. Lieber, Ted Lieu, Fiona Ma, Gene Mullin, William Monning, John A. Pérez, V. Manuel Perez, Anthony J. Portantino, Curren Price, Ira Ruskin, Mary Salas, Lori Saldana, Nancy Skinner, Jose Solorio, Sandre R. Swanson, Tom Torlakson, and Mariko Yamada (collectively "the Legislative Amici").

The issues addressed by this brief and the petition lie at the heart of California's constitutional structure. Upholding and preserving this structure and the constitutionally-assigned responsibilities and roles of this Court, the Legislature, and the People, is of particular interest to the Legislative Amici given their role in upholding California's Constitution and the constitutional rights of their constituents, as well as their constitutionally assigned responsibility to protect our charter against imprudent revision.

In addition, many of the Legislative Amici were part of a majority of California legislators that passed the Religious Freedom and Civil Marriage Protection Act, Assembly Bill 43, in the Legislature's 2007-2008 regular session. Assembly Bill 43 recognized the importance of the institution of civil marriage in promoting stable relationships and protecting the civil rights of individuals in those relationships, as well as their children or

dependents and members of their extended families. By eliminating gender-specific language limiting marriage to a civil contract between a man and a woman, Assembly Bill 43 intended to extend to same-sex couples the fundamental right of marriage. Simply put, it sought to "end the pernicious practice of marriage discrimination in California." (Assem. Bill No. 43 3(*l*) (2007-2008 Reg. Sess.) § 3(*l*); see also Assem. Bill No. 849 (2005-2006 Reg. Sess.) § 3(k).)

California's Legislators have also taken up issues that are directly relevant to those currently before the Court.

First, on December 18, 2008, the California Senate passed Senate Resolution No. 7, which opposes Proposition 8 because it is an improper revision, not an amendment, of the California Constitution. (See Sen. Res. No. 7 (2009-2010 Reg. Sess.), at <http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sr_7_bill_20081218_amended_sen_v98.pdf> [as of Jan. 15, 2009].) In passing Senate Resolution No. 7, the Senate made official findings regarding Proposition 8 and matters that are currently at issue before the Court in this case. The Senate resolved, in part, as follows:

> WHEREAS, Proposition 8 purports to amend the California Constitution to eliminate a fundamental right only for a particular minority group on the basis of a suspect classification, while permitting the majority to retain that fundamental right; and
>
> WHEREAS, Proposition 8 would severely undermine the foundational principle of equal protection by establishing that any disfavored minority can be targeted to have its

> fundamental rights stripped away by a simple majority vote; and
>
> WHEREAS, Proposition 8 would substantially alter our basic governmental plan by eliminating equal protection as a structural check on the exercise of majority power and by permitting majorities to force groups defined by suspect classifications to fight to protect their fundamental rights under the California Constitution at every election; and
>
> WHEREAS, Proposition 8 would violate the separation of powers doctrine by stripping courts of their core, constitutionally mandated function and traditional authority to enforce equal protection to prevent government discrimination against minority groups and the selective denial of fundamental rights on suspect bases; and
>
> WHEREAS Proposition 8 would also violate the separation of power doctrine by intruding on the vital role of the Legislature in vetting revisions to the California Constitution and by sidestepping the constitutionally required rigors of the legislative process; now, therefore, be it
>
> *Resolved by the Senate of the State of California*, That the Senate opposes Proposition 8 because it is an improper revision, not an amendment, of the California Constitution and was not enacted according to the procedures required by Article XVIII of the California Constitution. . . .

(*Ibid.*)

Second, a parallel Resolution with essentially identical findings is pending in the Assembly. House Resolution No. 5 would also find, on the same grounds that the Senate found, that Proposition 8 "is an improper revision, not an amendment, of the California Constitution and was not enacted according to the procedures required by Article XVIII of the California Constitution . . . ." (Assem. Res. No. 5 (2009-2010 Reg. Sess.),

at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/hr_5_bill_20081202_introduced.pdf> [as of Jan. 15, 2009].)

Accordingly, through their involvement in the legislative process and their active support of relevant bills and resolutions, the Legislative Amici are familiar with the issues addressed by the Petitions, and they support the position and arguments set forth by the Petitioners. As discussed below, the Legislative Amici urge the Court to preserve the fundamental constitutional structure of government set forth by the framers of California's Constitution by preserving the right to equal protection of the law and the judiciary's role of protecting that right for all Californians.

III. THE PEOPLE ENTRUSTED THE LEGISLATURE WITH THE RESPONSIBILITY TO INITIATE REVISION OF THE CONSTITUTION

Since the beginning of California's statehood, California's Constitution has specified that the duty to initiate revisions to the Constitution is entrusted to the Legislature. Over the course of nearly 160 years and three relevant changes to the Constitution—in 1879, 1911, and 1962—the People of California have entrusted the Legislature with this responsibility. The People's decision to entrust the power to initiate constitutional revisions with the Legislature reflects the People's determination that decisions of such magnitude must involve *both* the sovereign voice of the People—whether expressed through a popular vote or a constitutional convention—*and* the Legislature's ability to deliberate,

debate, and hold hearings regarding the inevitable tradeoffs involved in a revision between different constitutional values and concerns.

By sidestepping the crucial test of legislative debate, deliberation, and analysis, the proponents of Proposition 8 tried to undercut the will of the People as articulated over many years in California's Constitution.

A. The Constitutions of 1849 And 1879 Prohibited Any Change—Whether By Amendment Or Revision—That Was Not Initiated By The Legislature

From its beginning, the California Constitution has provided for the powers of constitutional revision and amendment. Both article X of the Constitution of 1849 and article XVIII of the Constitution of 1879 specified that the Legislature had the sole power to initiate amendments and revisions to the Constitution. (Cal. Const. of 1849, art. X, § 1; Cal. Const. of 1879, art XVIII, § 1.)[1] Under both of these Constitutions, the Legislature began

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[1] The Constitution of 1849 set out the following framework for amendment and revision:

> Sec. 1. Any amendment . . . may be proposed in the Senate or Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendments, shall be . . . referred to the Legislature then next to be chosen . . . . And if, in the Legislature next chosen . . . shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment . . . to the people . . . .
>
> Sec. 2. And if, at any time two-thirds of the Senate and Assembly shall think it necessary to revise and change this

[Footnote continued on next page]

the process of amendment or revision by a two-thirds vote in favor of the change, followed by ratification by a majority of voters (in the case of an amendment) or by a constitutional convention (in the case of a revision). (*Ibid.*) But no change to the Constitution, whether by amendment or revision, could be made by popular vote alone.

[Footnote continued from previous page]

> entire Constitution, they shall recommend to the electors, at the next election for members of the Legislature, to vote for or against the convention; and if it shall appear that a majority of the electors voting at such election have voted in favor of calling a convention, the Legislature shall, at its next session, provide by law for calling a convention . . . .

(Cal. Const of 1849, art. X, §§ 1-2.)

The Constitution of 1879 provided:

> Sec. 1. Any amendment . . . may be proposed in the senate or assembly, and if two-thirds of all the members elected to each of the two houses shall vote in favor thereof, such proposed amendment . . . shall be entered in their journals . . . and it shall be the duty of the legislature to submit such proposed amendment . . . to the people . . . .
>
> Sec. 2. Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to revise this constitution, they shall recommend to the electors to vote at the next general election for or against a convention for that purpose, and if a majority of the electors voting at such election on the proposition for a convention shall vote in favor thereof, the legislature shall, at its next session, provide by law for calling the same.

(Cal. Const. of 1879, art. XVIII, §§ 1-2.)

B. More Direct Participation By The People In Changing The Constitution Did Not Alter The Legislature's Duty To Propose Any Revisions To The Constitution

In both 1879 and 1911, the People reacted to the serious political, social, and economic discontent in California, in part by changing the Constitution to provide for a more direct popular voice in the process of amending or revising the Constitution.[2] Nevertheless, the People maintained in the Legislature the sole constitutional responsibility of initiating any revision to the Constitution.

1. The 1879 Constitution Required The Legislature To Initiate Amendments Or Revisions To The Constitution, Despite Widespread Distrust In The Political Process

In the 1870s, Californians suffered extensive unemployment and homelessness, aggravated by a spread of business failures, mortgage foreclosures, and bank closings. (Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution* (1989) 17 Hastings Const. L.Q. 35, 36-37 (hereafter Scheiber); see generally Swisher, Motivation and Political Technique in the California Constitutional Convention, 1878-79 (1930) pp. 8-16.) The widespread suffering and

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[2] Specifically, the Constitution of 1879 required each amendment proposed by the Legislature to be proposed separately to the People, and in 1911, the People provided for constitutional amendments through the initiative process.

social dislocation that resulted from these social and economic problems led to "a sense that something had gone terribly wrong with political process, rather than a concern solely with economic distress and its causes." (Scheiber, *supra*, 17 Hastings Const. L.Q. at p. 37.) Further, the state legislature of the time was unabashedly corrupted by the influence of the Central Pacific Railroad, the giant land and cattle companies, and other corporate interests, and the state judiciary was seen as incapable of rendering impartial judgments. (See *id.* at p. 38.) Notwithstanding this severe political discontent, the 1879 Constitution provided that the Constitution could neither be amended nor revised without the Legislature initiating the process of amendment or revision.

2. The 1911 Changes To The Constitution Preserved The Legislature's Responsibility To Propose Revisions In The Face Of Severe Discontent With Government

Similar forces led to a change in the California Constitution in 1911, after years of governance by a Legislature that was popularly believed to be unresponsive to the People and beholden to corporate interests. (See Grodin et al., The California State Constitution: A Reference Guide (1993) p. 16 (hereafter Grodin).) In the face of growing frustration, the People amended the Constitution to "reserve" their powers of initiative and referendum. (*Ibid.*) At the time, the Central Pacific-Southern Pacific Railroad was the largest landowner in the state, and with a near monopoly

on the state's transportation facilities, it wielded enormous economic power. (*Ibid.*) It translated this power into control over the various organs of state and local government, influencing politicians in both parties and controlling much of the state judiciary. (Mowry, The California Progressives (1951) pp. 12-16 (hereafter Mowry).)

As a result, "in the thirty years following adoption of the 1879 constitution, not a single bill opposed by the Southern Pacific Railroad was enacted in Sacramento." (Manheim & Howard, *A Structural Theory of the Initiative Power In California* (1998) 31 Loyola L.A. L.Rev. 1165, 1184, citation omitted.) Resentment of the railroad's political dominance sparked a demand for reform that ultimately coalesced around the Progressive movement. (See Grodin, *supra*, at p. 17.) In 1910, Hiram Johnson, the Progressive Republican gubernatorial candidate, won the election and sought to enact an agenda centered on dismantling the political power of the special interests. (See Mowry, *supra*, at pp. 133-135.)

The initiative, one of many measures introduced as part of the Progressive agenda, provided a means by which the People could take the act of legislating into their own hands. (See Grodin, *supra*, at p. 17.) Introduced as part of Senate Constitutional Amendment 22 on February 20, 1911, it reaffirmed that "[t]he legislative power of this state shall be vested in a senate and assembly" but reserved to the People "the power to propose

laws and amendments to the constitution . . . independent of the legislature . . . ." (Sen. Const. Amend. No. 22, Stats. 1911 (1911 Reg. Sess.) ch. 22, p. 1655.) The effect of the Amendment was to "give to the electorate the power of action when desired," and to "place in the hands of the people the means by which they may protect themselves" from a government beholden to corporate interests. (Hiram W. Johnson, Governor of Cal., Inaugural Address (Jan. 3, 1911) p. 5.)

But the 1911 Amendment is also notable for the changes it *did not* make in the Constitution. Although the 1911 Amendment originated at the peak of the Progressive movement and popular frustration with government in California, and although the People reserved the right of proposing both laws and amendments to the Constitution, the People did not alter the preexisting distinction between constitutional amendment and revision. Similarly, the People did not alter the Legislature's exclusive role in initiating revisions to the Constitution by calling a constitutional convention.

This decision to reserve the power of amendment to themselves, but still require that the Legislature initiate any revision to the Constitution, underscores the importance of preserving the integrity of the architecture of the Constitution, and the fundamental structural protections it provides all Californians. (See, e.g., *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349-

350 (hereafter *Raven*); *McFadden v. Jordan* (1948) 32 Cal.2d 330, 347 (hereafter *McFadden*).)

C. The 1962 Amendment Allowed The People's Direct Vote On A Revision Proposed By The Legislature, But The Revision Still Had To Be Proposed By The Legislature

The Legislature's role in revising the Constitution was thoroughly examined in the early 1960s. The Legislature believed that the "study of the peoples [*sic*] basic charter should be conducted under the direction of citizens[,]" (Ernest A. Engelbert & John G. Gunnell, State Constitutional Revision in California: An Analysis Prepared for The Citizen's Legislative Advisory Commission (Jan. 1961) p. 100 (hereafter Englebert)), and therefore authorized the Citizens' Legislative Advisory Commission, a group of private citizens, to analyze the Legislature's role in the constitutional revision process. The Citizens' Commission held public hearings and published reports, in part based on scholarly analysis of constitutional history, to analyze how the Legislature could best advance constitutional reform after commentators had observed "a growing conviction among various groups in California that a constitution adopted over three quarters of a century ago warrant[ed] basic review." (*Id.* at p. 28.) The Legislature had also determined that the Constitution was "in need of a fundamental review." (*Id.* at p. 1, citation omitted.)

As a result of the work of the Citizens' Commission, Assembly Constitutional Amendment 14 (Assem. Const. Amend. No. 14, Stats. 1961

(1961 Reg. Sess.) res. ch. 222, pp. 5013-5014) was placed on the November 6, 1962 General Election ballot as Proposition 7 (hereafter, the "1962 Amendment"). Prior to 1962, the Constitution could only be revised if the Legislature called a constitutional convention. (Engelbert, *supra*, at p. iii.) To streamline this process of constitutional revision, the 1962 Amendment authorized the Legislature, by a two-thirds vote of each house, to propose complete or partial revisions to the Constitution for approval or rejection by the People. (Cal. Const., art. XVIII, §§ 2-3.) But the Legislature was, and still is, required to initiate the process of revision in the first instance. (*Ibid.*)[3]

D. The Legislature's Duty To Initiate The Process Of Constitutional Revision Is Supported By Its Unique Deliberative Role And Capabilities

In proposing that the Legislature be able to take revisions directly to the People as an alternative to convening a constitutional convention, the Citizen's Commission observed that "in recent years the people have demonstrated increasing faith in the value of legislatures as deliberative bodies" and that "[l]egislative proposals for constitutional revision do not violate democratic principles, particularly since the recommendations of the

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[3] Article XVIII of the Constitution provides, "The Legislature . . . two-thirds of the membership of each house concurring, may propose an amendment or revision of the Constitution . . . ." (Cal. Const., art. XVIII, § 1.)

Legislature must be approved by the people." (Citizen's Legis. Advisory Com., Final Rep. and Recommendations to the Joint Com. on Legislative Organization (Mar. 9, 1961) p. 8 (hereafter "Report and Recommendations").)

The Commission recognized that formality, deliberation, and access to resources underpin the legislative revision process. (See *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 791 (conc. opn. of Moreno, J.) ["Thus, a revision, as contemplated by those who drafted and enacted Proposition 7, is typically the product of the study and deliberation of a constitutional revision commission or equivalent commission or legislative committee, which reports to the Legislature with proposals that the latter then accepts, rejects or modifies."].) Proposed revisions to the Constitution, as proposed by a two-thirds vote of each house of the Legislature and then submitted to the People by convention or direct vote, are "coordinated," and allow the Legislature to "make possible the use of techniques best suited to a particular time and a particular set of political circumstances[,]" as well as the use of "the services of constitutional experts and other competent individuals who could be relatively free from outside pressures and appointed on a nonpartisan basis." (Report and Recommendations, *supra*, at p. 8, quoting Engelbert, *supra*, at p. 93.)

Using the legislative process to craft and debate proposed constitutional revisions also allows for the harmonization or compromise of the views of different constituencies and allows a revision to "be subjected to criticism by public bodies generally [such that the] Legislature can have the benefit not only of [its own] work, but criticism of it, and may take all the time that is necessary to effect a satisfactory revision." (Assem. Interim Com., Rep. on Const. Amends. to the Cal. Legislature (Nov. 15, 1960) p. 31 (hereafter "Interim Com. Report"), quoting from a report of the 1929 Constitutional Commission authorized by the 1929 Legislature on the topic of submitting its proposal for a coordinated revision.)

Finally, the legislative process of deliberation and analysis allows for a full study and review of competing constitutional concerns. It is often the case that a proposed constitutional reform may have significant effects on other constitutional values and priorities that are not suitable to discussion in the initiative process. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 506 ["[T]he revision provision is based on the principle that 'comprehensive changes' to the Constitution require more formality, discussion and deliberation than is available through the initiative process."].) In this case, for instance, equal protection of the laws, especially as it may apply to vulnerable minorities, is just such a constitutional value that requires the formal analysis and consideration of

the legislative process before potential changes are considered by the voters.

Indeed, the very purpose of the constitutional right of equal protection of the law is to protect targeted minorities from having their rights stripped from them by a majority while the majority continues to enjoy the right denied to the minority. (See *Cruzan v. Director, Missouri Dep't of Health* (1990) 497 U.S. 261, 300 (conc. opn. of Scalia, J.) ["Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."].) While most citizens will agree to the principle of equal protection of the law in the abstract, other competing concerns may overshadow this basic principle. For that reason, when a specific right is taken from a minority—and from that minority only—by a majority of voters who will not themselves be affected, legislative debate and deliberation regarding constitutional values and the structure of the government provide an important safeguard to the preservation of ordered liberty for all.

The Interveners assert that, "as a valid constitutional amendment, Proposition 8 has now moved the democratic conversation [about same-sex marriage] to its highest level." (See Interveners' Response to Pages 75-90 of the Atty. Gen.'s Answer Br. at p. 18.)

But the "democratic conversation . . . at its highest level" occurs when the People speak through constitutional *revision*, not through constitutional *amendment*: "[t]he people of this state . . . made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision." (*McFadden*, *supra*, 32 Cal.2d at p. 347.) In claiming that a simple majority of the voters can eliminate a minority's fundamental constitutional right, the Interveners are not protecting the "democratic conversation," but instead undermining the very foundation of that "democratic conversation" and of our system of government—the guarantee that each and every citizen has certain fundamental rights that cannot be taken away as a result of a majority vote alone. (Cal. Const., art. I, § 7; see also Thomas Jefferson, First Inaugural Address (Mar. 4, 1801) ["All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression."].) The process of constitutional revision protects this fundamental guarantee underlying the "democratic conversation."

IV. PROPOSITION 8 MAKES FAR-REACHING CHANGES IN CALIFORNIA'S GOVERNMENTAL PLAN AND UNDERLYING CONSTITUTIONAL PRINCIPLES, AND IS THEREFORE A REVISION

A. This Court Has Defined An "Amendment" As A Change "Within The Lines Of The Original Instrument," And A "Revision" As A Change To The Constitution's "Underlying Principles"

This Court explored and defined the difference between an amendment and a revision in 1894. (*Livermore v. Waite* (1894) 102 Cal. 113, 117-119 (hereafter *Livermore*).) In *Livermore*, this Court considered whether a constitutional amendment authorizing the relocation of the capitol from Sacramento to San Jose if certain preconditions were met violated article XVIII of the Constitution, which dictated how the Constitution could be amended or revised. (*Id.* at pp. 114-115.)

The Court observed that the Constitution could "be neither revised nor amended except in the manner prescribed by itself . . . ." (*Id.* at p. 117.) Because the Constitution created two distinct methods by which changes could be effected, the Legislature would not be authorized to "assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment . . . ." (*Id.* at p. 118.) To do so would render meaningless the framers' efforts to create a separate revision process. (*Ibid.*) This Court therefore held that an "amendment implies such an addition or change within the

lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (*Id.* at pp. 118-119.)

In contrast, the Court held that the Legislature could not make changes to the "underlying principles" or the "substantial entirety" of the Constitution unless it followed the procedures discussed above for revising the instrument. (*Id.* at p. 118; see also *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 222 (hereafter *Amador Valley*).) The Court held that a revision seeks to change "the underlying principles upon which [the California Constitution] rests" by effecting "far reaching changes in the nature of our basic governmental plan." (*Amador Valley*, *supra*, 22 Cal.3d at pp. 222, 223.) Such principles, this Court held, were meant to be "of a permanent and abiding nature" and could not be altered without reconvening a convention for that purpose. (*Livermore*, *supra*, 102 Cal. at p. 118.)[4] The structure of the Constitution makes clear that this principle holds equally true when the People exercise the power of initiative to modify the Constitution. Changes affecting "the

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[4] The Legislative Amici agree with the discussion of the distinctions between an amendment and revision set forth by the Petitioners. (See *Karen L. Strauss, et al. v. Mark B. Horton, et al. (S168047),* Amended Petn. for Ex. Relief at pp. 18-20; and *City and County of San Francisco, et al. v. Mark B. Horton, et al. (S168078)*, Amended Petn. for Writ of Mandate at pp. 17-23.)

nature of our basic governmental plan" can only be accomplished through the means set forth in the Constitution for revisions.

B. Proposition 8 Improperly Restricts The Essential Role Of The Judiciary And The Rights Guaranteed To All People By The Constitution

The framers of both the United States and California Constitutions assigned to the judicial branch the function of interpreting the fundamental rights reserved to the People by the Constitution. (*Davis v. Passman* (1979) 442 U.S. 228, 241; *In re Marriage Cases* (2008) 43 Cal.4th 757, 860 (conc. opn. of Kennard, J.) (hereafter *Marriage Cases*).) The judiciary's role, in this context, is to protect the People's fundamental constitutional rights from infringement by the majority. Nowhere has this Court exercised that function more scrupulously than in interpreting the fundamental constitutional guarantee of equal protection of the laws. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141-143.) This power of the judiciary is fundamental to the proper functioning of our democracy. As this Court has explained, one of the judiciary's most fundamental responsibilities "lies in the power of the courts to . . . preserve constitutional rights, whether of individual or minority, from obliteration by the majority." (*Id.* at p. 141.)

Indeed, the Court has repeatedly relied on its interpretation of the equal protection clause to protect the rights of vulnerable minority groups. The Court overturned the 1913 Alien Land Law that prevented Asian-Americans from owning property (*Fujii v. State* (1952) 38 Cal.2d 718), the

antimiscegenation laws that prohibited Caucasians from marrying African Americans (*Perez v. Sharp* (1948) 32 Cal.2d 711), and prohibited the state from conditioning the right to vote on English literacy (*Castro v. State* (1970) 2 Cal.3d 223). In each case, this Court interpreted the equal protection guarantee to shield the rights and interests of the minority group from discriminatory laws passed by the majority.

1. Proposition 8 Prevents The Judiciary From Exercising Its Responsibility To Interpret The Equal Protection Clause

Proposition 8 seeks to strip equal protection of the laws from a vulnerable minority, striking at the heart of the judiciary's constitutional duty to interpret and protect the guarantee of equal protection. It effectively nullifies the judiciary's power to make sure that the laws of this state apply equally to its citizens, and thus alters a foundational constitutional principle. This Court has previously invalidated a revision that was enacted as an amendment because, like Proposition 8, that amendment attempted to change the underlying principles of the Constitution by taking away a core aspect of the judiciary's essential role. (*Raven, supra,* 52 Cal.3d at pp. 354-355.)

In *Raven*, this Court considered whether a portion of Proposition 115, which prohibited the state's courts from interpreting the constitutional rights of criminal defendants more expansively than the corresponding federal constitutional rights, effectively revised rather than amended the

Constitution. (*Id.* at pp. 350-351.) This Court concluded that the proposed constitutional amendment was not "so extensive" as to amount to a quantitative revision (see *id.* at p. 351, citation omitted), but it held that "[i]n essence and practical effect, [the relevant provision of Proposition 115], would vest all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court." (*Id.* at p. 352, original italics.) Because this provision of Proposition 115 would violate the Declaration of Rights' establishment of the California Constitution as "a document of independent force and effect[,]" (see Cal. Const., art. I, § 24), its effect was "devastating." (*Id.* at p. 352.)

As Justice Mosk observed in a contemporaneous law review article, Proposition 115 also improperly revised article VI by prohibiting "the courts from treating [the state criminal rights at issue] as having any substance whatever beyond that which their federal constitutional analogues possess[ed]." (Mosk, *Raven and Revision* (1991) 25 U.C. Davis L.Rev. 1, 17 (hereafter *Raven and Revision*).) This infringement on the constitutionally granted power of the judiciary worked a change to the preexisting governmental plan that amounted to an impermissible constitutional revision. (*Raven*, *supra*, 52 Cal.3d at p. 355.)

Likewise, Proposition 8 would, "in essence and practical effect," improperly revise the Constitution by allowing a simple majority of voters,

through exercise of their reserved power, to remove from a disfavored minority rights guaranteed to *all* citizens by the Constitution's Declaration of Rights. (See Cal. Const., art. I.) As Justice Mosk observed, "[t]he declaration is fundamental to our organic law. It assumes that all government power in the state, together with the branches that wield that power, is subject to the rights declared by the people" within that provision. (*Raven and Revision, supra*, 25 U.C. Davis L.Rev. at p. 10.) As such, the rights guaranteed by article I, including the right to equal protection of the laws guaranteed by the equal protection clause in article I, section 7 (see *Marriage Cases, supra*, 43 Cal.4th at pp. 809, 831), so central to our constitutional scheme, may not be destroyed by an amendment.

Allowed to stand, Proposition 8 would not only result in oppression of a minority by the majority, but it would also create a precedent suggesting that no vulnerable minority group in California will be protected from the loss of its fundamental rights in the future. Any decision by this Court that accords the same rights enjoyed by the majority to an unpopular minority on equal protection grounds could be undone by an initiative amending the Constitution to carve out the disfavored minority from this umbrella of protection. But a "citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." (*Lucas v. Forty-Fourth Gen. Assem. of Colo.* (1964) 377 U.S. 713, 736-

737.) Indeed, that is why the interpretation of these constitutional rights and protections is the core function of the judicial branch.

Simply put, by declaring equal protection under the law "off limits" to same-sex couples with respect to the fundamental right of marriage, Proposition 8 impermissibly intrudes upon the judiciary's core function to interpret and enforce that protection.

2. Proposition 8 Proponents' Arguments Misapprehend The Danger In Denying The Court Its Constitutional Role

The proponents of Proposition 8 assert that since its passage, "equal protection no longer requires same-sex marriage." (Opp. Br. of Interveners at p. 25.) By this argument, the proponents of Proposition 8 admit that they intend to deny the fundamental constitutional right of equal protection of the law by allowing a fundamental right to be stripped away by a simple majority vote. But allowing a minority's equal enjoyment of a fundamental right to be taken away by a simple majority vote is, in effect, a repeal of equal protection with respect to this minority group. This cannot be done by means of an initiative. (See, e.g., *Marriage Cases*, *supra*, 43 Cal.4th at pp. 859-860 (conc. opn. of Kennard, J.) ["Both the federal and the state Constitutions guarantee to all the 'equal protection of the laws' [citations] . . . , and it is the particular responsibility of the judiciary to enforce those guarantees."].) As the U.S. Supreme Court has explained and this Court recently reiterated:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

(*West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 638, also quoted in *Marriage Cases*, *supra*, 43 Cal.4th at p. 852.)

The Attorney General points to *People v. Frierson* (1979) 25 Cal.3d 142 (hereafter *Frierson*) to suggest that the People of California have the authority through the initiative process to overrule a judicial determination. (Atty. Gen.'s Answer Br. at pp. 31, 40, 56.) This is true so far as it goes, but it does not address the specific issue raised here, which is whether a simple majority of voters may change a structural principle of our government by stripping a constitutionally-protected class of citizens of a fundamental constitutional right, and preventing the judiciary from addressing such abuse. *Frierson* is distinguishable from the instant case for at least two reasons.

First, the *Frierson* plurality opinion noted that the judiciary retained the ability to protect defendants against unconstitutional applications of the death penalty. (*Frierson*, *supra*, 25 Cal.3d at p. 187.) In other words, a conviction or sentence that violated other provisions of the Constitution, including the equal protection clause, could still be struck down on those

grounds. (*Ibid.*) In the case of marriage by same-sex couples, however, no other constitutional protection remains—Proposition 8 deprives same-sex couples of the right to marry, and they are deprived of this fundamental right with no constitutional recourse.

Second, as Justice Mosk observed in *Frierson*, California's prohibition on cruel or unusual punishment at issue in that case depends upon the values of the majority in this state. (Cf. *Roper v. Simmons* (2005) 543 U.S. 551, 561 [applying an "evolving standards of decency" test to invalidate the juvenile death penalty under the Eighth Amendment].) Because the meaning of "cruelty" is based on the "values to which the people of our state subscribe[,]" this Court found that giving effect to an initiative sanctioning the death penalty as neither cruel or unusual did not violate the separation of powers. (*Frierson*, *supra*, 25 Cal.3d at p. 187 (conc. opn. of Mosk, J.).) Indeed, the very test adopted by this Court for determining whether a punishment is "cruel or unusual" under the Constitution considers the popular view. (*Id.* at p. 189 (conc. opn. of Mosk, J.) [noting the importance of "current mores" to the assessment of a punishment under the "cruel or unusual" provision].) Thus, it is not inconsistent with the protection against cruel and unusual punishment for the People to express their view on what punishments violate the People's values.

In stark contrast to the protection against cruel and unusual punishment, the very purpose of the equal protection clause is to protect the fundamental rights of minorities when those rights would be infringed by the application of "majority values." This Court is best positioned to fulfill the function of protecting minority rights. (See *Marriage Cases*, *supra*, 43 Cal.4th at p. 860 (conc. opn. of Kennard, J.); see also *Bixby*, *supra*, 4 Cal.3d at p. 141 [observing the judiciary's "enduring and equitable influence in safeguarding fundamental constitutional rights"].) Indeed, submitting the fundamental rights of disfavored minorities to popular vote is contrary to the very purpose of the equal protection clause, and would, as a practical matter, destroy any ability of that clause and of this Court to protect the fundamental rights of protected minorities from elimination by a majority.

The Attorney General's reliance on *In re Lance W.* is even more misplaced. (Atty. Gen.'s Answer Br. at pp. 32, 40.) In that case, this Court held that the fact that the People, acting through the initiative process, placed a limit on "a judicially created remedy for violation of the [right to be free from unreasonable searches and seizures], [could not] be considered such a sweeping change either in the distribution of powers made in the organic document or in the powers which it vests the judicial branch as to constitute a revision of the Constitution within the contemplation of article

XVIII." (*In re Lance W.* (1985) 37 Cal.3d 873, 892.) That decision also provides no guidance in the instant case.

First, although it implicates a constitutional right, "[t]he right of people to be secure . . . against unreasonable seizures and searches" under section 13 of article I (see *id.* at p. 884, fn. 2, citation omitted), the provision at issue in *Lance W.* did not repeal that constitutional right, or overrule decisions interpreting it, but rather limited the application of the exclusionary rule, which is simply a particular remedy for that violation. Second, the Court observed, as the basis for its holding, that the Legislature, and "a fortiori, the people acting through either the reserved power of statutory initiative or the power to initiate and adopt constitutional amendments[,]" had long been entrusted with the power to regulate the procedure and evidentiary rules of the courts. (*Id.* at p. 891.) Therefore, the provision at issue in *Lance W.* did not usurp a traditional function of the courts as does Proposition 8, but rather exercised authority in an area traditionally reserved to the Legislature. Unlike Proposition 8's change to the fundamental guarantee of equal protection, such legitimate exercise of lawmaking authority by the People through initiative does not revise the structure of our government.

V. PROPOSITION 8 IMPERMISSIBLY CHANGES THE CONSTITUTIONAL FRAMEWORK WITHOUT UNDERGOING THE CONSTITUTIONALLY MANDATED PROCESS FOR SUCH REVISIONS

Changes to the "underlying principles" or the "substantial entirety" of the Constitution are constitutional revisions that may be accomplished only through the framework set forth in the Constitution. (*Livermore*, *supra*, 102 Cal. at p. 118.) By taking away the judiciary's power to act as the final arbiter on questions of equal protection of the law, and by paradoxically placing the equal protection clause in the hands of a simple majority of voters, Proposition 8 perpetrates "such far reaching changes in the nature of our basic governmental plan as to amount to a revision." (See *Raven*, *supra*, 52 Cal.3d at pp. 354-355, quoting *Amador Valley*, *supra*, 22 Cal. 3d at p. 223; see also *Livermore*, *supra*, 102 Cal. at pp. 118-119.) But a constitutional revision may only be accomplished through a process initiated by the Legislature; it may not be done by the People through an initiative alone. Indeed, the very nature of a constitution demands that changes of the type imposed by Proposition 8 must be accomplished by constitutional revision, if at all. (*Livermore*, *supra*, 102 Cal. at p. 118 ["The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests . . . shall be of a like permanent and abiding nature."].)

The Legislature has the power to, among other things, hear testimony, call experts, and write reports in connection with its open deliberation and analysis of proposed constitutional revisions. (See generally Interim Com. Report, *supra*, at p. 32.) This deliberative process insures that any fundamental change to our Constitution would be fully debated and vetted before it is enacted. (*Id.* at p. 31.) Further, as it is the Legislature's sworn duty to uphold the Constitution (see Cal. Const., art. XX), the Legislature's analysis and deliberation regarding a proposed revision of the Constitution would necessarily involve consideration of the impact of any proposed revision on other important constitutional values, including the core value of equal protection of the law.

VI. CONCLUSION

Proposition 8 alters the nature of California's government by allowing a simple majority of voters to deprive a minority of a fundamental right and takes away the power of the judiciary to protect against such deprivations of constitutional rights. In so doing, it impermissibly bypasses the constitutionally-assigned duty of the Legislature to begin any process of revising the Constitution. Today, proponents of Proposition 8 seek to deny same-sex couples the fundamental right of marriage. Tomorrow, any other constitutionally-protected group could be similarly deprived.

Because Proposition 8's far-reaching changes to our constitutional structure cannot be accomplished through mere amendment, it was enacted in violation of the Constitution, and is therefore void.

DATED: January 15, 2009

Respectfully submitted,

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January 15, 2009

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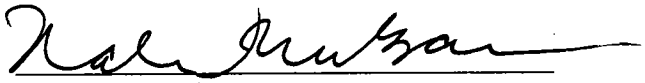
I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s) were printed on recycled paper, and that this Certificate of Service was executed by me on January 15, 2009, at San Francisco, California.



Robin McBain