No. S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, *et al.*,

Petitioners,

v.

MARK D. HORTON, as State Registrar of Vital Statistics, etc., *et al.*,

Respondents;

DENNIS HOLLINGSWORTH, *et al.*,

Interveners.

APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; BRIEF FOR CALIFORNIA TEACHERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS; DECLARATION OF BARBARA J. CHISHOLM IN SUPPORT OF *AMICUS CURIAE* BRIEF FOR CALIFORNIA TEACHERS ASSOCIATION

(Volume I of II)

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APPLICATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, the California Teachers Association ("CTA") respectfully requests permission to file the attached *amicus curiae* brief in the above-captioned writ proceeding. This brief supports petitioners Karen L. Strauss, *et al.*, in Case No. S168047, and the City and County of San Francisco, *et al.* in Case No. S168078.

CTA represents more than 340,000 California public school teachers, counselors, psychologists, librarians, education support personnel, and other certificated personnel. CTA is affiliated with the 3.2 million-member National Education Association. CTA believes that the State's initiative-amendment process is an invaluable constitutional tool, and one that CTA has frequently used, to ensure that the State Constitution and laws conform to the will of the people. But CTA recognizes, as this Court has recognized, that the initiative power is not an unlimited one. Rather, certain fundamental changes in our State's constitutional framework must be accomplished only by the more formal, deliberative and supermajoritarian process for constitutional revisions.

Amicus is familiar with the issues in this case and unreservedly supports the positions and arguments of the Petitioners. Amicus does not repeat arguments previously submitted. The attached brief focuses on the history of the initiative process and its role in our State's democracy, as well as the significant and necessary limitations on that power. The brief further demonstrates that Proposition 8, as compared to every other constitutional amendment previously adopted by initiative, is unique in the devastating

effect it would have on our constitutional democracy and the Constitution's fundamental principle of equality. While past cases delineating the difference between a constitutional revision and amendment serve as a useful guide, none focus on the issue of first impression presented here: whether a bare majority may amend the Constitution to deprive a suspect class of equal protection with respect to a fundamental right. The brief urges the Court to find that a change to the Constitution that would selectively deprive a disfavored group of fundamental rights must be subject to the rigors of the constitutional revision process.

CTA respectfully requests permission to file the accompanying brief because the outcome of this case will implicate the very nature of our democratic government and the ability of our Constitution to safeguard the fundamental rights of all people.

Dated: January 15, 2009

Respectfully submitted,

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Petitions before this Court present questions of first impression that affect the very nature of our democracy: whether the people's initiative-amendment power reaches so far as to allow a bare majority to deny a disfavored class of individuals the right to enjoy fundamental rights and thereby eviscerate the Constitution's guarantee of equal protection of the law.

Amicus California Teachers Association ("CTA") has been an active participant in this State's initiative-amendment process, a process that affords its membership an ability to advocate for the greater good and to engage in direct democracy. Over the course of its long history, CTA has used the initiative-amendment process to secure vital public education reforms including the addition of kindergarten to our schools and the provision of funding for our schools and community colleges. But CTA recognizes, as has this Court, that the people's power to amend the Constitution by way of an initiative is not an unlimited one, and does not extend so far as to allow the people to strip away from a single suspect class fundamental rights guaranteed and protected by the Constitution.

That there is a distinction to be made between constitutional amendments by a bare majority of the people, and constitutional revisions cabined in by the more deliberative and restrictive process of a legislative supermajority followed by a vote of the people or a constitutional convention, is self-evident. There would be no reason to have two separate procedures for changing the Constitution, one more restrictive than the other, if the same result could be achieved through either; the less-restrictive initiative-amendment process would render superfluous the more deliberative revision process. This Court has recognized as much in its

decisions grappling with the Constitution's distinction between the initiative-amendment process and the revision process.

The purpose of this brief is to explain that none of the initiative-amendment measures previously reviewed by this Court, and indeed none of the initiative-amendment measures previously adopted in California, have even come close to doing what Proposition 8 purports to do – to strip away a fundamental right from a suspect class thereby eviscerating the core constitutional principle of equality. The issue before the Court for decision thus does not call on the Court to restrict the initiative-amendment process in a manner that would in any way jeopardize the prior amendments enacted by way of initiatives. Nor does this case present the Court with the occasion to restrict in any significant way the people's right to pursue constitutional amendments by way of initiatives. Rather, this case presents the extreme and unprecedented situation in which the initiative amendment process has been used to purport to rewrite the fundamental constitutional framework by stripping away a fundamental right from a suspect class. CTA urges the Court to recognize that the initiative-amendment power cannot reach so far and that such a fundamental change in our constitutional framework may be accomplished, if at all, only by the more restrictive and deliberative constitutional revision process.

II. ARGUMENT

A. The Scope of the People's Power to Amend the Constitution by Way of an Initiative Is Limited By the Revision Provision and Other Fundamental Constitutional Guarantees.

"Although the legislative power under our state Constitution is vested in the Legislature, 'the people [have] reserve[d] to themselves the powers of initiative . . . .'" *Legislature of the State of California v. Eu*

(1991) 54 Cal.3d 492, 501 (quoting Cal. Const., art. IV, §1) (hereinafter "*Eu*"). Over the last century, the people's reservation of the initiative-amendment power has allowed California's citizens to play an active role in shaping and modifying the State's Constitution. As this Court has recognized, and as detailed in the Petitioners' briefs, however, the initiative-amendment power is not unfettered, but instead is limited by the "revision" process, which provides for greater "formality, discussion and deliberation than is available through the initiative process." *Eu*, 54 Cal.3d at 506; *see also* Reply of City and County of San Francisco, *et al.*, Case No. S168078 (hereinafter "CCSF Reply") at pp. 17-21; Corrected Reply in Support of Pet. for Extraordinary Relief, Case No. S168047 (hereinafter "Strauss Reply") at pp. 23-25. The initiative-amendment power is further limited by other provisions of the Constitution, insofar as the Constitution must be read as a whole and its provisions read in harmony with one another. *City & County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563.

1. Origins of the initiative-amendment power

Both the 1849 Constitution and the 1879 Constitution, as originally adopted, provided for distinct procedures for modifying the Constitution: amendment and revision. The amendment procedures, as initially included in the Constitutions, required legislative approval before proposed amendments could be presented to the people for a vote. Under the 1849 Constitution, the Constitution could be amended only upon a majority vote of both houses of the Legislature in two successive legislative sessions, followed by a majority vote of the people. Cal. Const. of 1849, art. X, §1. In 1879, this amendment procedure was somewhat relaxed to permit submission of an amendment to the people after approval by two-thirds of

both houses of the Legislature (without the successive legislative sessions requirement). Cal. Const., former art. XVIII, §1.

In 1911, the Legislature proposed and the voters approved a constitutional amendment that added the initiative-amendment power, thus reserving this "legislative power" to the people. *See Eu*, 54 Cal.3d at 501; *see also* Cal. Const., art. IV, §1 ("The legislative power of this State is vested in the California Legislature . . ., but the people reserve to themselves the initiative and referendum."). The 1911 amendment reflected the influences of historical movements in the late nineteenth century and early twentieth century that advocated for an increase in "direct democracy." Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform* (2001) 41 Santa Clara L. Rev. 1037, 1039-40. One, the Populist movement, was primarily concerned with notions of individual "political equality" and sought to restrict the Legislature's discretion to a maximum degree. *Id.* at 1040, 1042. The subsequent Progressive movement sought to make government "more responsive and accountable to the electorate through expanded suffrage, direct primaries, and direct election of senators, as well as through the new mechanisms of initiative, referendum, and recall." *Id.* at 1041-42. The 1911 amendment embodied these ideals by holding government accountable to the people while reserving to the people the legislative power to act when the Legislature fails to do so.

The 1911 amendment provided for a "direct initiative," whereby an initiative "proposing a law or amendment to the Constitution" could be placed on the ballot, without legislative approval. Cal. Const., former art. IV, §1. It also provided for an "indirect initiative," whereby a statutory change could be presented to the Legislature and, in the event of legislative

inaction, submitted to the voters. *Id.* Today, only the power of direct initiative remains and is found in Article XVIII, section 3, which provides that "[t]he electors may amend the Constitution by initiative."

2. The initiative-amendment power is limited by the constitutional revision process.

The scope of the amendment power is necessarily limited by its companion, the provision for constitutional revision. Both the 1849 and 1879 Constitutions distinguished between amendments and revisions, and both envisioned that the revision procedure would be more deliberative, requiring supermajority approval by the Legislature before submission of any proposed revision to a constitutional convention. Cal. Const. of 1849, art. X, §2; Cal. Const., former art. XVIII, §2. And even after the revision procedure was modified in 1962 to permit ratification of a revision by popular vote instead of a constitutional convention, the requirement of supermajority approval by the Legislature remained. Both houses of the Legislature must approve a proposed revision by a two-thirds vote before a revision is presented to the voters. Thus, today, although the people may amend the Constitution by initiative, a "revision" of the Constitution may be accomplished only by convening a constitutional convention upon a two-thirds vote of both houses of the Legislature and obtaining popular ratification of the proposal to call the convention (Cal. Const., art. XVIII, §§1, 2), or by legislative submission of a proposed revision to the voters, again upon a two-thirds vote of both houses of the Legislature (*id.*, §§1, 4).

As early as 1894, this Court recognized the significance of the distinction the Constitution's drafters drew between an amendment and a revision. In *Livermore v. Waite* (1894) 102 Cal. 113, 118-19, the Court concluded that the authority to change the State's Constitution was necessarily constrained by the two methods for modifying the Constitution

set forth in the Constitution. The revision procedures, which at that time required a constitutional convention and a vote of the people, demonstrated the "care and precision" with which the Constitution was intended to be guarded. *Id.* at 118. Significantly, the Court held that the distinction between a revision and amendment demonstrated the "will of the people that the underlying principles upon which [the Constitution] rests . . . shall be of a . . . permanent and abiding nature." *Id.* at 118. In contrast, the amendment power, which at that time was granted to the Legislature (and only later reserved to the people) encompassed the power to make "addition[s] or change[s] 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 118-19.[1]

As set forth in detail in the Petitioners' briefs, this Court's precedents provide some guidance as to the contours of the amendment/revision distinction, although none of the existing precedent come close to answering the difficult issues presented by this case, as no prior amendment by initiative has attempted to rework the fundamental constitutional framework in the manner Proposition 8 does. *See* Am. Pet. for Extraordinary Relief, Mem. of Points & Authorities, Case No. S168047, at pp. 19-20; Am. Pet. for Writ of Mandate, Mem. of Points & Authorities, Case No. S168078 (hereinafter "CCSF Br.") at pp. 17-18. As a starting point, the Court has explained that the analysis must assess both the "quantitative and qualitative effects of [a] measure on our constitutional scheme." *Raven v. Deukmejian* (1990) 520 Cal.3d 336, 350; *see also*

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[1] Subsequently, in *McFadden v. Jordan* (1948) 32 Cal.2d 330, 334, the Court noted that the 1911 amendment reserving the amendment-initiative power to the people must "be understood to have been drafted in the light of the *Livermore* decision."

Amador Valley Joint Union High School District v. State Board of Equalization (1978) 22 Cal.3d 208, 223. A "substantial" effect on the constitutional scheme, whether it be quantitative or qualitative one, may "amount to a revision." *Raven*, 520 Cal.3d at 350.

This Court has further instructed that "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision . . . ." *Amador Valley*, 22 Cal.3d at 223; *see also Eu*, 54 Cal.3d at 506 (quoting *Amador Valley*). Similarly, in *Raven*, in striking down an initiative amendment as an invalid revision, the Court reaffirmed that "revisions involve changes in the 'underlying principles' on which the Constitution rests." *Raven*, 52 Cal.3d at 355 (citing *Livermore*, 102 Cal. at 118-19).

The broad brushstrokes painted by this Court's previous decisions thus reveal that the Constitution's revision provision must be understood as limiting the initiative-amendment power and mandating a more deliberative procedure, one including the safeguards of a supermajority vote of the Legislature, before our fundamental constitutional framework is upended.

3. The initiative-amendment power is limited by other provisions of the Constitution.

A basic tenet of constitutional interpretation is that the Constitution's provisions should, where possible, be read in harmony. *City & County of San Francisco*, 10 Cal.4th at 563. Thus, in determining the scope of the initiative-amendment power granted to the people, and in defining the amendment/revision distinction, this Court must consider how the initiative-amendment power is reconciled with other constitutional provisions such as the equal protection guarantee (Cal. Const., art. I, §7), and the right of all

people to freedom and liberty (*id.*, art. I, §§1, 7). One constitutional provision should not and cannot be read to eclipse the others.

B. Proposition 8 Significantly Affects the Core Constitutional Guarantee of Equal Protection.

Petitioners' briefs, as well as the briefs of many *amici*, explain in detail why Proposition 8 significantly affects core principles of our constitutional democracy that were intended to be of a "permanent and abiding nature." *Livermore*, 102 Cal. at 118. Proposition 8 would render hollow the core constitutional guarantee of equal protection by selectively depriving a disfavored group of a fundamental right. Upholding Proposition 8 as a proper exercise of the initiative-amendment power would mean that a political majority could deny fundamental and inalienable rights to a constitutionally protected class of individuals.[2] This would be a massive sea-change for our Constitution and our constitutional democracy. No longer would the principle of majority rule be tempered by the basic principle that all people are created equal and thus entitled *equally* to enjoy fundamental rights. There can be no question that Proposition 8, if upheld as a legitimate use of the initiative-amendment power, would not only conflict with the Constitutional guarantee of equal protection and fundamental rights, but would undermine the very structure and intent of our Constitution to preserve and protect individuals' inalienable rights despite the vicissitudes of majority sentiment.

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[2] Nothing in Proposition 8 undermines this Court's holding that the right to marry the person of one's choice is a fundamental right guaranteed by the State Constitution. *See In re Marriage Cases* (2008) 43 Cal.4th 757, 781 (holding that marriage is "one of the fundamental constitutional rights embodied in the California Constitution").

C. No Previous Initiative Amendment Has Resulted in a Qualitative Change to the California Constitution That Conflicted with the Core Constitutional Principle of Equality.

The people have exercised the initiative-amendment power for close to 100 years, and historically have done so in a way that has not eviscerated core constitutional principles such as equal protection and liberty. Never before has this Court been asked to determine whether an initiative-amendment that selectively grants fundamental rights to some and denies them to others constitutes a revision of our Constitution and its core principles. Nor have other amendments enacted by the people come close to the sort of far-reaching and fundamental changes that Proposition 8 would work in our constitutional scheme of government. Accordingly, while this Court will be guided by the precedent describing the amendment/revision distinction, the decision in this case will necessarily tread unchartered waters.

1. None of the initiatives upheld by this Court as valid exercises of the initiative-amendment power have infringed upon the fundamental constitutional principle of equality.

The initiative amendments that this Court has upheld against claims that they were revisions have modified existing rights or procedures provided for by the Constitution, but have done so in a manner that preserves what is arguably the most basic and fundamental democratic principle reflected in the Constitution, the right of all people *equally* to enjoy certain fundamental and inalienable rights. Certainly none of the initiative-amendments upheld by the Court have presented the difficult question of whether the initiative-amendment power encompasses the right

of the majority to deprive a disfavored minority group of fundamental rights otherwise guaranteed by the Constitution. Nor has this Court previously considered a constitutional amendment that would selectively deprive some, but not others, of a fundamental right.

(a) Proposition 13 (1978). In *Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208, the Court upheld Proposition 13 as a valid constitutional amendment. The petitioners argued that Proposition 13 had a substantial qualitative effect that should be deemed a revision because it undermined the "home rule" of local governments and interfered with the ability of local governments to control and finance local affairs. 22 Cal.3d at 224-25. However, the Court found that the "mere imposition of tax limitations" did not rise to the level of a revision. *Id.* The Court concluded that the amendment would "neither destroy[] nor annul[] the taxing power of local agencies," noting that the limitations imposed by Proposition 13 were similar to other existing constitutional limitations on home rule such as the Legislature's right to provide maximum property tax rates and bonding limits for local governments, to provide similar limits for school districts, and to grant certain classes of property exemptions from real property taxation. *Id.* at 225-26.

The Court also rejected an argument that the taxation provisions would resulted in a "republican" instead of "democratic" form of governance. *Id.* at 227. The Court explained that, "[o]ther than in the limited area of taxation, the authority of local government to enact appropriate laws and regulations remains wholly unimpaired." *Id.* at 227. The Court noted that an existing constitutional provision already required a supermajority requirement, requiring the assent of two-thirds of electors for

the State to incur certain additional indebtedness. *Id.* at 228. The Court held that the people could validly "accomplish a new system of taxation which may provide substantial tax relief for our citizens," even if they accomplished this through an initiative process that "'is in essence *a legislative battering ram*. . . .'" *Id.* (quoting Key & Crouch, The Initiative and the Referendum in Cal. (1939) p. 485, italics added in *Amador Valley*). This battering ram "'may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end.'" *Id.* And although "'[i]t is deficient as a means of legislation in that it permits very little balancing of interests or compromise . . .[,] it was designed primarily for use in situations where the ordinary machinery of legislation had utterly failed in this respect.'" *Id.*

Although history may have shown that Proposition 13 had effects beyond those discussed in *Amador Valley*, the Court's analysis focused on the right of the people to legislate and to by-pass the Legislature and institute what the Court viewed as a "relatively narrow" taxation system. *Id.* at 228. The power that the people exercised in adopting Proposition 13 was quintessentially legislative and implemented changes within the existing constitutional framework without undoing the foundational principles of home rule or representative government.

(b) Proposition 17 (1972). *People v. Frierson* (1979) 25 Cal.3d 142, involved a criminal defendant's appeal of a death sentence. The defendant argued that the Court should hold the death penalty to be cruel or unusual punishment under the State Constitution, and that Proposition 17, which reinstated the death penalty, was an invalid constitutional revision. 25 Cal.3d at 184. Proposition 17 declared that "'[t]he death penalty provided for under those statutes shall not be deemed to be, or to constitute, the

infliction of cruel or unusual punishments . . . nor shall such punishment . . . be deemed to contravene any other provision of this constitution.'" *Id.* (quoting Proposition 17, enacted as Cal. Const., art. I, §27). In a brief discussion, the Court held that the initiative measure was not an invalid revision because it did not accomplish any "sweeping" or fundamental constitutional change. *Id.* at 187. Specifically, the Court noted that the judiciary "retain[ed] broad powers of judicial review of death sentences to assure that each sentence has been properly and legally imposed and to safeguard against arbitrary or disproportionate treatment." *Id.* The Court also focused on the right of the people to legislate in this arena, just as the people had a right to legislate for "local tax relief" in *Amador Valley*. *Id.*

Frierson thus recognized the legislative power of the people to define the parameters of "cruel or unusual punishment." As Petitioners explain, this is not surprising given the weight of the case law holding that this constitutional standard is one that generally should reflect majoritorian views. CCSF Br. at 20; CCSF Reply Br. at 42 n.14. *Frierson* did not eliminate the Constitution's prohibition on cruel or unusual punishment. And certainly nothing in *Frierson* suggests that the prohibition on cruel or unusual punishment could be discriminatorily applied, or that the people (or the Legislature) could decide, for example, that "the death penalty . . . is not cruel or unusual punishment for gays and lesbians."[3] Thus, *Frierson* does

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[3] Interveners contend that Proposition 17's provision that the death penalty should not be "deemed to contravene any other provision of this Constitution" forbade any inquiry into whether imposition of the death penalty disproportionately affects minorities, in possible contravention of the equal protection guarantee. Interveners' Opp. Br. at pp. 18-19. Not only does this contradict the express statement by the Court that it retained the power to guard against disproportionate application of the death penalty, but Proposition 17 specified only that the death penalty "provided for under

not support Interveners' position that an initiative-amendment may selectively deprive a disfavored minority of fundamental rights in contravention of the Constitution's core equality principle.

(c) Proposition 8 (1982). Both *Brosnahan v. Brown* (1982) 32 Cal.3d 236, and *In re Lance W.* (1985) 37 Cal.3d 873, considered the validity of 1982's Proposition 8, also known as "The Victims' Bill of Rights." The proposition repealed a constitutional provision relating to the right to bail, and added a new section to the Constitution that, among other things, provided for restitution to victims of crime, declared the right of public school students and staff to attend safe schools, provided that "relevant evidence . . . not be excluded in . . . criminal proceeding[s]," mandated that public safety considerations be given priority in setting bail, and permitted the use of prior felony convictions for impeachment or sentence enhancement. *See* Cal. Const., art. I, §28; *see also Brosnahan*, 32 Cal.3d at 242-45. In *Brosnahan*, the petitioner argued that these changes to the Constitution constituted an invalid revision because they would have significant qualitative consequences, namely "the inability of the judiciary to perform its constitutional duty to decide cases, particularly *civil* cases," and "the abridgement of the right to public education." 32 Cal.3d at 261 (emphasis added). The Court found these predicted consequences to be "wholly conjectural" and "based primarily upon essentially unpredictable

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those statutes" could not be deemed to violate other constitutional provisions. No statute permits or requires the death penalty to be imposed in an unequal manner, and nothing in *Frierson* or any subsequent case has interpreted Proposition 17 to preclude challenging the death penalty on grounds that it is, in practice, imposed disproportionately in violation of the Constitution's equal protection guarantee.

fiscal or budgetary constraints." 32 Cal.3d at 261.[4]

The provision of the Victims' Bill of Rights that eliminated the exclusionary rule was again challenged in *In re Lance W.*, 37 Cal.3d 873. This time, in upholding the provision, the Court reasoned that the people had the authority to exercise their legislative power to prescribe rules of evidence, and that such rules in no way compromised the authority of the judicial branch. *Id.* at 891. The Court thus concluded that the measure made no "sweeping change" in "the distribution of powers made in the organic document or in the powers which it vests in the judicial branch. . . ." *Id.* at 892. As in *Brosnahan*, the Court's holding was not based on an analysis of the measure's effect on citizens' core constitutional rights. And nothing in the decision sheds light on whether the initiative-amendment power may be exercised to selectively deprive a disfavored class of individuals of fundamental rights protected by the Court.

(d) Proposition 140 (1990). Proposition 140 was adopted by the voters at the 1990 general election and added Article IV, Section 1.5 to the Constitution. Its stated purpose was to "'restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office' by limiting 'the powers of incumbency.'" *Eu*, 54 Cal.3d at 499-500. The initiative measure called for restriction of legislators' retirement benefits, limitations on the number of terms that may be served by State legislators and constitutional officers, and limitations on total state expenditures for the Legislature's staff and operating expenses. *Id.* at 500.

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[4] The Court also rejected an argument that the measure's reference to statutory provisions rendered it invalid, noting that there was no rule against "the Constitution incorporating by reference the terms of an existing statute." 32 Cal.3d at 261.

In *Legislature of the State of California v. Eu*, petitioners contended that Proposition 140, and particularly its term and budgetary limitations on the Legislature, was a constitutional revision rather than an amendment because it would change the structure of the Legislature. 54 Cal.3d at 506. However, the Court noted that the measure did not alter the content of the laws to be enacted by the Legislature, or the process of their adoption, and that "[n]o legislative power is diminished or delegated to other persons or agencies." *Id.* at 509. In short, placing limits on how long an individual could remain in office had no effect on the Legislature's ability to exercise its core legislative functions.

(e) Proposition 35 (2000). Proposition 35, enacted in 2000, "expressly removed a constitutional restriction on the ability of governmental entities to contract with private firms for architectural and engineering services on public works projects." *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1023. In *Professional Engineers*, the Court held that the measure was not an improper revision of the Constitution because the Legislature had not "been stripped of authority to regulate private contracting but, rather . . . a permissible legislative decision ha[d] been made to remove previous limitations on the ability of public agencies to contract" for certain services. *Id.* at 1048.

As the foregoing summaries demonstrate, the current case is one of first impression: this Court has never before been faced with a voter-passed initiative that purports to amend the Constitution by stripping a fundamental right from a historically disfavored minority group.

2. Other initiative-amendments enacted by the people have not conflicted with the basic constitutional principal of equality.

Since the enactment of the initiative-amendment power in 1911, the voters have adopted more than 40 initiative-amendments to the Constitution. The majority of these amendments have not been challenged in the courts as invalid revisions masquerading as amendments, because they were not; instead, they were valid amendments that did not change the fundamental principles of the Constitution. A review of these initiative amendments confirms that the people consistently have exercised the initiative-amendment power in a way that has not undermined or threatened the fundamental notion of equal protection. Only once, in 1966, did the people adopt an amendment that would have violated the principles of equality so as to adversely affect the rights of a suspect class. That amendment, however, was struck down in *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 542-45, as a violation of the Fourteenth Amendment of the U.S. Constitution.[5]

When the people have legislated by initiative-amendment, they generally have done so in a way intended to improve governmental functioning; that is, they have made "addition[s] or change[s] within the lines of the original instrument as will effect an improvement, or better

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[5] The initiative measure at issue in *Mulkey* provided that "'Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease, or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.'" *Mulkey*, 64 Cal.2d at 532-33. The Court noted that the primary effect of the measure was to "overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right." *Id.* at 534-35.

carry out the purpose for which [the Constitution] was framed." *Livermore*, 102 Cal. at 118-19. Exercising their legislative power, the citizens have, for example, called for improvements to public education, for tax reform and new taxes, and for regulation of alcohol.

A brief survey of the constitutional amendments enacted by initiative since the people obtained the initiative-amendment power in 1911 demonstrates that none of the previously enacted initiative amendments undermine the core constitutional guaranties of equal protection and liberty in the way that Proposition 8 does.

(a) *Education.* A number of initiative amendments, including several in which CTA has played a leading role, have made reforms to our public education system. Proposition 16 in 1920, among other things, added kindergartens to public schools, increased state aid to the schools, and increased teachers' salaries.[6] Proposition 9, enacted in 1944, increased financial support for elementary schools. In 1946, Proposition 3 sought to raise the quality of education by establishing minimum teacher salaries and minimum school funding requirements. In 1988, Proposition 98 directed a specific amount of state funding for school and community college districts. In 1998, Proposition 10 created early childhood development programs. And in 2000, Proposition 39 changed the voting threshold for passage of local school bonds.

The quality of our State's school system is a matter of great public importance and it is no surprise that the people have exercised their

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[6] The full text of each of the initiative amendments cited in this section is available at <http://library.uchastings.edu/library/california-research/ca-ballot-measures.html#ballotprops>. For the Court's convenience, we also provide an appendix containing the text of each of the cited initiative amendments. *See* Decl. of Barbara J. Chisholm, attaching Appendix.

legislative power by way of initiative amendments to expand educational opportunities for the children of the State and to call for financial support of our public school system. In doing so, the people have acted to improve the functioning of our government. These amendments in no way conflict with the fundamental constitutional principles of equality and liberty.

(b) *Taxes and Expenditures.* Several citizen-sponsored amendments have eliminated or restricted taxes. In 1914, Proposition 10 eliminated the poll tax. In 1952, a property tax exemption was extended to property used for certain non-profit schools. In 1988, Proposition 99 imposed a new cigarette and tobacco tax, directing the money toward tobacco and health-related research and initiatives. In 1992, Proposition 163 prohibited state or local taxes on food products. And in 1998, Proposition 10 increased the tobacco tax.

The people have also exercised the initiative-amendment power to impose standards on State expenditures and appropriations. In 1922, Proposition 1 ratified and validated two 1921 acts designed to provide aid to veterans. In 1948, the people passed an amendment changing the standards and amount of aid provided to the blind and elderly (Proposition 4, enacted in 1948), although this amendment was repealed the following year by way of another amendment. In 1979, the people enacted Proposition 4, which limited the permitted growth of appropriations for state and local government entities.

In eliminating and imposing taxes, and in regulating State expenditures and appropriations, the people exercise a quintessential legislative function intended to improve the functioning of the government. The amendments that the people have adopted to regulate taxes and

spending have not threatened the Constitution's core guarantees of equality and liberty.

(c) *Alcohol.* Several initiative amendments address prohibition and the sale of alcohol. Thus, Proposition 39 in 1914 would have delayed implementation of a prohibition amendment that was also on the ballot, in the event that it passed (which it did not). Proposition 2 in 1932 provided that the California Legislature would be permitted to regulate the sale of liquor in the event that prohibition laws were repealed. And Proposition 2, enacted in 1934, liberalized liquor laws and permitted sale and consumption of liquor in certain places.

The regulation of alcohol was certainly a matter of great public significance during the time of Prohibition, and yet these early initiative amendments demonstrate that the people were particularly conscious and solicitous of the federal constitutional restraints, as well as the state statutory authority, bearing on these issues. In legislating in this arena, the people in no way undermined the constitutional guarantee of equal protection.

(d) *Qualifications of Legislators, Election Procedures, and Legislative Districts.* Citizen-enacted amendments have also dealt with requirements for holding legislative office and election procedures. In addition to the term limits imposed by Proposition 140 (1990), described above, in 1916 the people adopted an initiative-amendment providing that no legislator may simultaneously hold a position in the executive branch. (Proposition 6, enacted 1916). In 1952, Proposition 7 amended the Constitution to require that candidates' party affiliations be listed on the ballot.

In 1926, the people enacted a legislative reapportionment intended to redraw districts in such as way as to ensure districts were contiguous and "as nearly equal in population may be." (Proposition 28, enacted 1926). In 2008, the people passed an initiative that, among other things, amended the Constitution to permit a Citizens Redistricting Commission to draw new district lines, while maintaining the requirement that districts have "reasonably equal population." (Proposition 11, enacted 2008).

In exercising their legislative power to impose limitations on legislators and the represented districts, and to regulate the listing of candidates on the ballot, the people have acted to further the State's representative form of government. Moreover, the redistricting amendments advance equality principles by requiring districts of reasonably equal population.

(e) *Municipal Government.* In 1914, two initiative-amendments addressed the process for forming municipal governments. Proposition 19 (1914) made changes to the Constitution that regulated the merger of city and county governments, and Proposition 25 (1914) set forth procedures for chartering city governments. There can be no question that these amendments sought to make an improvement within the original lines of the Constitution and did not conflict with any core constitutional principles.

(f) *Criminal Procedures.* In addition to the initiative-amendments at issue in *Frierson*, *Brosnahan*, and *In re: Lance W.*, the people have enacted other amendments identifying the procedures and protections that should be provided to criminal defendants. In 1934, Propositions 5 and 6 enacted provisions relating to the right of the court and counsel to comment on a defendant's failure to testify and the right of a defendant to plead guilty before a Magistrate Judge. As with The Victims' Bill of Rights enacted in

1982, these propositions redefined certain rights afforded to criminal defendants, but (and in contrast to Proposition 8) did not apportion these rights in a discriminatory manner.

Additionally, in 1990, Proposition 139 provided that private entities may enter into contracts for inmate labor. This amendment does not conflict with the Constitution's equality principle.

(g) *Official State Language.* In 1986, Proposition 63 amended the Constitution to declare the English language the official language of California. Nothing in the amendment sanctions discrimination of any kind. Indeed, the amendment expressly provides that it is "intended . . . not to supersede any of the rights guaranteed to the people by this Constitution." Proposition 63 (1986) (enacting Cal. Const., art. III, §6(a)). Thus, the amendment does not conflict with the Constitution's guarantee of equal protection.

(h) *Prohibition on Discrimination.* Proposition 209, adopted in 1996, amended the Constitution to provide that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." (Cal. Const., art. I, §31(a)). The amendment thus forbids discrimination; it does not require discrimination as does Proposition 8.

(i) *Other Subjects of Initiative-Amendments.* Other topics of citizen-enacted amendments have included the creation of the State Highway Finance Board (Proposition 9, enacted in 1920); an amendment making the office of Attorney General a full-time position, declaring the Attorney General the State's chief law officer, and empowering the Attorney General to supervise local enforcement officers (Proposition 4, enacted in 1934);

amendments establishing and authorizing the State Lottery (Proposition 37, enacted in 1984, and Proposition 17, enacted in 2000); an amendment prohibiting the use of certain kinds of fishing nets (Proposition 132, enacted in 1990); an amendment granting the board of a public retirement system authority over investment decisions and administration of the system (Proposition 162, enacted in 1992); an amendment providing for funding of stem cell research (Proposition 71, enacted in 2004); and an amendment imposing limitations on the exercise of eminent domain (Proposition 99, enacted in 2008).

All of these citizen-enacted initiatives made additions or changes to the Constitution "within the lines of the original instrument," and were intended to "effect an improvement, or better carry out the purpose for which [the Constitution] was framed." *Livermore*, 102 Cal. at 118-19. And none of the amendments undermined the "permanent and abiding nature" of the Constitution's "underlying principles." *Id.* at 118. This is in stark contrast to the havoc that Proposition 8 would wreak on the foundational principles of the Constitution: Proposition 8 can in no way be said to be intended to "improve[]" or "better carry out the purpose" of the California Constitution in ensuring that all people are treated equally and all people are guaranteed the right to enjoy liberty and happiness.

D. This Court Must Interpret the People's Initiative-Amendment Power in Harmony with the Constitutional Guarantee of Equal Rights and Equal Protection.

Ultimately, in this case of first impression, it is for this Court to decide how to fill out the contours of the terms "amendment" and "revision." The meaning of these terms should reflect the overall intent of the Constitution, which – as a whole – embodies the will of the people.

Those terms must thus be defined in harmony with the entire Constitution. Although CTA recognizes the special value of the initiative-amendment power, the dangerously expansive vision of that power propounded by Interveners simply cannot be reconciled with our Constitution's guarantee of inalienable rights such as liberty and happiness (Const., art. I, §1), and the guarantee of equal protection of the law (*id.*, art. I, §7).[7]

The principles of equal protection of the law and the right of *all* people, not only those in the majority, to enjoy the fundamental rights guaranteed by our Constitution are central to our constitutional form of governance. These foundational principles impose a structural check on the power of the Legislature and the power of the people exercising that legislative power. The very structure of our constitutional democracy would be irreparably harmed if a majority of the people could deny fundamental rights to a minority without the more deliberative supermajoritarian process required for a revision to the Constitution.

This Court should interpret the term "amendment" to avoid the otherwise inevitable conflict between the initiative-amendment power and the principles of equality and fundamental rights.

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[7] Although CTA supports the Attorney General's argument that the initiative-amendment power must yield to the inalienable right to liberty, we submit that the Court may resolve the tension between these two constitutional provisions by defining the term "amendment" in a manner that does not permit a simple majority of the people to eviscerate the right of a minority to enjoy fundamental rights guaranteed by the liberty clause.

III. CONCLUSION

For the foregoing reasons, California Teachers Association respectfully urges this Court to grant the relief sought in the Petitions for Extraordinary Relief.

Dated: January 15, 2009

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 8.204(c)(1)

Pursuant to California Rule of Court 8.204(c)(1), counsel for *amicus curiae* California Teachers Association hereby certifies that the number of words contained in this Brief for California Teachers Association as *Amicus Curiae* in Support of Petitioners, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 6,033 words as calculated using the word count feature of the computer program used to prepare the brief.

By: _____
Barbara J. Chisholm

PROOF OF SERVICE

I, Sally Mendez, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 177 Post Street, Suite 300, San Francisco, CA 94108.

On January 15, 2009, I served the document listed below on the interested parties in this action in the manner indicated below:

1. APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; BRIEF FOR CALIFORNIA TEACHERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS; AND
2. DECLARATION OF BARBARA J. CHISHOLM IN SUPPORT OF *AMICUS CURIAE* BRIEF FOR CALIFORNIA TEACHERS ASSOCIATION; APPENDIX OF BALLOT INITIATIVES

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

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