Case Nos. S168047, S168066, S168078

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS et al., Petitioners,
v.
MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,
Respondents;
DENNIS HOLLINGSWORTH et al., Interveners.

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

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners,
v.
MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,
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APPLICATION TO FILE BRIEF AMICUS CURIAE; BRIEF AMICUS CURIAE OF THE FIDELIS CENTER FOR LAW AND POLICY IN SUPPORT OF INTERVENERS

ANGELA C. THOMPSON
(Bar No. 238708)
3800 Watt Ave., Ste. 101
Sacramento, CA 95821
Telephone: (916) 486-5900
Facsimile: (916) 486-5959

PATRICK GILLEN
(MI Bar No. 47456)*
3475 Plymouth Road
Ann Arbor, MI 48105
Telephone: (734) 827-8042
Facsimile: (734) 622-0757

Attorneys for Proposed Amicus
Amicus Curiae Fidelis Center
for Law and Policy

* *Pro hac vice* motion pending

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INTRODUCTION

The Petitioners' effort to void Proposition 8 by limiting the initiative power recognized by the Constitution of the State of California is utterly inconsistent with the root premise of the constitution, *i.e.*, that "[a]ll political power is inherent in the people ... [g]overnment is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." (Cal. Const. art. I, § 1.) As this Court has long acknowledged, the initiative procedure employed by the people to amend the constitution by popular vote is a direct expression of the sovereignty of the people, who simply delegate power to public officials to be used as permitted by the constitution. As this Court resolves the dispute at bar, it must bear in mind, first and foremost, that the Petitioners' effort to constrain the power of initiative strikes at the root of one of the greatest reform movements in the history of this state and our great nation, *i.e.*, the Progressive Movement. This amicus is confident that a Court that has demonstrated such an appreciation for the importance of the initiative and such solicitude for government by the people will avoid this drastic course.

In this regard, this amicus is confident that the Court will also reject the Petitioners' mistaken effort to pit the separation of powers against the initiative power because the Petitioners' arguments along these lines are insupportable. As this Court has recognized, the "reason and policy"

behind the separation of powers is to protect citizens from concentrations of the power in the hands of public officials because such concentrations of power foster tyranny. (*People ex rel. Attorney General v. Provines* (1868) 34 Cal. 520, 536-37.) The Progressive Era reforms of initiative, referendum, and recall serve that very same purpose by allowing the people to exercise their sovereign power directly when necessary. Thus it makes no sense to argue that a structural provision designed to protect the people from abuse of authority by governmental officials can be turned against the very people it was designed to protect.

For these reasons, explained further below, this amicus respectfully requests that this Court observe its traditional deference to the will of the people expressed through their exercise of the initiative power set forth in Articles II and XVIII of the Constitution of the State of California and deny the relief requested by the Petitioners.

ARGUMENT

The people of California have affirmed the great foundational principles of our nation from the very beginning. When California entered the union, its constitution of 1849 began with a Declaration of Rights that acknowledges the rights of the people and, in the same breath, states that "[a]ll political power is inherent in the people ...[g]overnment is instituted for the protection, security, and benefit of the people; and they have the right to alter or reform the same, whenever the public good may require it."

(Cal. Const. 1849, art. I, § 1.) In service of that goal, the first state constitution provided for a separation of powers between the legislative, executive, and judicial branches (*id.*, at art. III) and it provided for constitutional amendments proposed by the legislative branch and ratified by the people. (*Id.*, at art. X.)

The constitution of 1879, as amended, reflects continued allegiance to these great truths of our national experience. The preamble reiterates the bedrock premise of popular sovereignty, beginning as it does with the statement that "[w]e, the People of the State of California ... do establish this Constitution." Article II, which addresses voting, initiative, referendum, and recall, makes explicit the vital connection between the legitimacy of government and the delegation of power from the people to their representatives by reiterating that "[a]ll political power is inherent in the people ... [g]overnment is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." (Cal. Const., art. I, § 1.)

Article II implements the constitutional commitment to popular sovereignty by empowering the people to propose and adopt statutes and amendments by initiative as well as empowering the people to approve or reject statutes. (Cal. Const., art. II, §§ 8-9.) And it leaves no doubt about the ultimate sovereignty of the people insofar as it confirms their right to recall an elective officer who fails to observe the popular will as reflected in

the law laid down either through representatives of the people or by the people themselves who have acted by means of initiative and referendum. (*Ibid.*)

Further, in keeping with the bedrock notion that government must serve the people, the next article of the constitution of 1879, like its predecessor, specifies that the "powers of state government are legislative, executive, and judicial," and provides that "[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const. art. III, § 3.) To that same end, the articles of the constitution addressing the power to make law by legislation and amendment likewise recognize the ultimate sovereignty of the people. Here, the foundational document of the commonwealth provides that the "legislative power of this State is vested in the California Legislature ...but the people preserve to themselves the powers of initiative and referendum." (Cal. Const., art. IV, § 1.) And in an implicit recognition that it is popular consent that gives the constitution its legitimacy, Article XVIII provides that electors may amend the constitution by initiative. (Cal. Const., art. XVIII, § 3.). In this regard, it bears noting that the decision of the people to provide for constitutional amendment by initiative makes plain the commitment to direct democracy even in cases where constitutional provisions were seen as impeding needed reform.

There are the elements of continuity and change between California's constitutions that are relevant to the case at bar. While both the constitutions of 1849 and 1879 contained provisions requiring a separation of powers, this Court has noted that the constitution of 1879 was amended in the early twentieth century to provide for initiative and referendum. As this Court has recognized, the provisions allowing initiative and referendum were part of a national reform movement known as the Progressive Era. (*Associated Home Builders etc., Inc. v. City of Livermore*, (1976) 18 Cal.3d 582, 591, footnote omitted).

These Progressive Era reforms are pertinent to the issue now before this Court because while historians continue to search for the unifying principle of the "Progressive Movement" that swept through America at the beginning of the twentieth century, there is consensus that one of the defining characteristics of this reform effort—and one of its lasting achievements—was a renewed commitment to direct democracy. (*See* Tindall & Shi, America: A Narrative History (W.W. Norton & Company 2007) p. 893.) In the political arena, the hallmark achievements of progressives were state reforms allowing for initiative, referendum, and recall. (*Ibid.*) Alongside this familiar trio of progressive reforms reflected in the Constitution of California, progressive reformers passed laws requiring the direct primary and the direct election of United States Senators secured by the Seventeenth Amendment. (*Ibid.*) These reforms represented

the progressive notion that "the cure for the ills of democracy [was] not less democracy ... but more democracy." (Henretta et al., America's History (Dorsey Press 1987) p. 561.)

This amicus respectfully submits that as it considers the case at bar, this Court should remember that when historians survey American history, California enjoys pride of place as a shining example of progressivism by reason of its commitment to progressive era reforms, including the initiative, referendum, and recall. By reason of the state's commitment to progressive reform, California's Governor Hiram Johnson makes the list of progressive luminaries alongside Woodrow Wilson, Theodore Roosevelt, Robert LaFollette, and Charles Evans Hughes. (*See e.g.*, Current et al., American History (Alfred A. Knopf 1987) pp. 608-612.) In our day, when political scientists study the initiative and referendum, California enjoys pride of place as one of the great successes of the effort to reform government by empowering the people to act directly through initiative and referendum. (*See e.g.*, Braustein, Initiative and Referendum Voting: Governing Through Direct Democracy in the United States (LFB Scholarly Publishing LLC, New York 2004) pp. 26-30.) And when students of government look to the future use of initiative and referendum to effect direct democracy in the twenty-first century, they consider the past as prologue and focus on California as one example of a robust direct democracy. (*See e.g.*, McCuan & Stambough, Initiative-Centered Politics:

The New Politics of Direct Democracy, (Carolina Academic Press 2005) pp. 260-61.)

From its very beginning, progressivism in California was linked to support for direct democracy and the means advanced to achieve that end, *i.e.,* initiative, referendum, and recall. In fact, the first success of these progressive measures occurred as early as 1902, when Los Angeles became the first city in the United States to add these measures to its charter and the first city to actually recall a public official. (*See* Allswang, The Initiative and Referendum in California, 1898-1998 (Stanford University Press 2000), p. 11 (hereinafter Allswang, Initiative).) When Hiram Johnson allied himself with the Progressive Movement in California and was elected governor in 1910, he endorsed the initiative, referendum, and recall in his inaugural address, and amendments adding these features to the constitution of 1879 were passed out of the legislature and approved by the voters in 1911. (*Id.* at pp. 11-17.)

While historians of progressivism in California continue to search for a unifying theme that might unite the disparate reform movements that coalesced into the "Progressive Movement," there is no doubt that "[d]irect legislation was very much a part of the ideas and interests of progressivism and became one of its most enduring legacies." (Allswang, Initiative, at p. 30). One historian of progressivism in California has explained the tight link between the mechanisms of direct democracy (initiative, referendum,

and recall) and the progressive movement by noting that for progressives these measures were "a structural improvement on the representative political system which expanded democracy and ... a moral improvement as well, predicated on the assumption that the rule of 'the people' was the noblest aim of democracy, and that these political devices were a path to fulfilling that ideal." (Allswang, Initiative, at pp. 30-31.)

Of course, neither the origins of the constitutional provisions giving the people the powers of initiative, referendum, and recall, nor the implications these powers have for governmental legitimacy have been lost on this Court. Recently this Court emphatically restated its longstanding appreciation for the importance of these provisions as follows:

> The amendment of the California Constitution in 1911 to provide for initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900s. Drafted in light of the theory that all power resides in the people, the amendment speaks of initiative not as a right granted to the people, but as a power reserved by them.

(*Independent Energy Producers Assoc. v. McPherson* (2006) 38 Cal.4th 1020, 1032, internal citations and quotations omitted.)

Likewise, this Court has evinced an appropriate appreciation for the implications that these observations necessarily have for judicial review.

More specifically, this Court has forthrightly acknowledged that precisely because the initiative and referendum articulate

> one of the most precious rights of our democratic process ... it has long been ... judicial policy to apply a liberal construction to this power whenever it is challenged in order that the right be not improperly annulled. If doubts can be reasonably resolved in favor of the use of this reserve power, courts will preserve it.

(*Independent Energy Producers Assoc. v. McPherson, supra,* 38 Cal.4th at p. 1032, internal quotations omitted, citations omitted in original.) In another admirable display of judicial restraint, this Court has acknowledged that "[i]n response to this broad constitutional reservation of power in the people, the courts have consistently held that the initiative and referendum provisions of the constitution should be liberally construed to maintain maximum power in the people. Any doubts should be resolved in favor of the exercise of these rights." (*Ibid.*)

Both history and precedent establish that the Petitioners' effort to void Proposition 8 based on its supposed violation of the separation of powers is wholly untenable. Petitioners equate the use of an initiative to amend the constitution with legislation and then assert that the use of the initiative to enact an amendment is inconsistent with this Court's decision in *In re Marriage Cases* (2008) 43 Cal.4th 757. They would have this Court find that the amendment to the constitution effected by Proposition 8 violates the separation of powers because it represents a "legislative"

attempt to circumvent a decision of this Court that violates the separation of powers provided for by Article III. (*See* Petition of Tyler, et al., at pp. 9-11 (separation of powers); Petition of Strauss, et al., at pp. 17 (checks and balances), 36 (separation of powers), 40-41 (separation of powers/allocation of powers); Petition of City and County of San Francisco, et al., at p. 18 (separation of powers).)

The Petitioners' effort to turn the separation of powers against the initiative is wholly misplaced because both provisions arise from the same source (the people), and are ordered toward the same objective, *i.e.*, to ensure that the government reflects the will of the people. It is true of course that both the constitutions of 1849 and 1879 embodied a separation of powers designed to limit the power exercised by each branch of government, legislative, executive, and judicial. But Petitioners fail to see that the separation of powers arose from Montesquie's observation that "[t]here can be no liberty where the legislative and executive powers are united in the same person or body of magistrates or if the power of judging be not separated by from the executive and legislative powers." (Rossiter, Federalist No. 47, The Federalist Papers (Penguin Group 1961) p. 267.) Put simply, the separation of powers was designed to protect the people from tyranny by officials who were entrusted with power that rested ultimately on the consent of the governed; it was not designed to limit the exercise of sovereign power by the people themselves.

This Court has already recognized that the separation of powers is designed to protect the people from abuse of authority by government officials. Over one hundred and forty years ago, this Court noted that the "reason and policy" which produced the separation of powers was a realization that the union of executive and judicial power in the Crown "led to frequent abuses, with which the framers of American Constitutions were familiar, and against which they therefore sought to provide a safeguard by separating the judicial from the executive and legislative powers, so far as it could be done without stripping either of the latter of such judicial powers as are indispensable to the proper and efficient workings of their own more appropriate functions." (*People ex rel. Attorney General v. Provines, supra*, 34 Cal. at pp. 536-37. Indeed, one historian has noted that as early as the 1830s some states began to transfer more power directly to the people in order to avoid abuse of powers entrusted to one branch of government, usually the legislature. (*See* Tarr, *Interpreting the Separation of Powers in State Constitutions* (2003) 59 N.Y.U. Ann. Surv. Am. L. 329, 334.). Of course, this shows that measures transferring power directly to the people being employed as a remedy for abuse of power by public officials who were not checked by a separation of powers. And here again we see the idea that the remedy for the ills of democracy is not less democracy but

more of it, a proposition that makes eminently good sense in a nation born of the recognition that government rests upon the consent of the governed.

California's adoption of the initiative, referendum, and recall had a parallel aim. As John Dinan has noted, "[w]hereas previous generations had relied upon the executive and judicial branches to prevent the hasty passage of partial or misguided laws, in the early twentieth century the view began to take hold that governors and judges were acting to thwart the enactment of a number of well-intended statutes." (Dinan, *Framing A "People's Government": State Constitution-Making In The Progressive Era* (1999) 30 Rutgers L.J. 933, 946.) Dinan quotes none other than Hiram Johnson for the proposition that obstruction of reform efforts in California led progressives to the conviction that the people "should indeed build upon the fundamental idea that this government belongs to all the people and should be restored to those to whom it thus belongs." (*Id.* at p. 947, footnote omitted.) Once again, measures implementing direct democracy were employed to remedy abuse of power by public officials.

Seen in this light, it is clear that the Petitioners' effort to undermine an initiative approved by the people based upon the separation of powers makes no sense. The separation of powers and related doctrine of checks and balances are designed to protect the people against tyranny by public officials. The progressive era measures of initiative, referendum, and recall are likewise designed to prevent tyranny by ensuring that government

serves—rather than dictates to—the people. The Petitioners' misguided effort to pit the separation of powers against the initiative does nothing but pit this Court against one of the hallmark reforms of one of the greatest fruits of the Progressive Era, and the will of the people to whom the initiative gives voice. This amicus urges this Court to reject that invitation to ignominy.

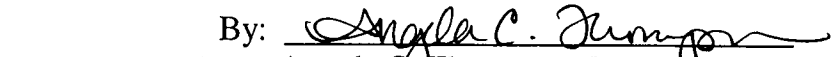
CONCLUSION

The Petitioners' effort to void Proposition 8 by limiting the initiative power is utterly inconsistent with the root premise of the constitution, *i.e.*, that "[a]ll political power is inherent in the people ... [g]overnment is instituted for their protection, security, and benefit; and they have the right to alter or reform it when the public good may require." (Cal. Const. art. I, § 1.) Indeed, the Petitioners' arguments strike at the very root of democratic government and a mechanism of direct democracy that represents one of the greatest achievements of one of the greatest reform movements in the history of this great state and our great nation. This amicus respectfully requests that this Court observe its traditional deference to the will of the people expressed through their exercise of the initiative power, and uphold the people's decision to provide constitutional status to the natural family, the union of one man and one woman in marriage, upon which the stability of society and the future of this state and our nation

depend. To that end, this amicus urges this Supreme Court to deny the relief requested by the Petitioners.

DATED: January 15, 2009

Respectfully submitted,

By: 

Angela C. Thompson (Bar No. 238708)
3800 Watt Ave., Ste. 101
Sacramento, CA 95821
Telephone: (916) 486-5900
Facsimile: (916) 486-5959

Patrick Gillen (MI Bar No. 47456)*
3475 Plymouth Road
Ann Arbor, MI 48105
Telephone: (734) 827-8042
Facsimile: (734) 622-0757

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Fidelis Center for Law and Policy

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