

**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., Intervenors.

---

ROBIN TYLER et al., Petitioners,

v.

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

---

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., Intervenors.

---

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

---

**GIBSON, DUNN & CRUTCHER LLP**

Frederick Brown, SBN 065316

Ethan Dettmer, SBN 196046

Sarah Piepmeier, SBN 227094

Rebecca Justice Lazarus, SBN 227330

Enrique Monagas, SBN 239087

Kaiponanea Matsumura, SBN 255100

555 Mission Street, Suite 3000

San Francisco, California 94105

Telephone: (415) 393-8200

Facsimile: (415) 393-8306

**GIBSON, DUNN & CRUTCHER LLP**

Douglas Champion, SBN 246515

Heather Richardson, SBN 246517

Lauren Eber, SBN 246519

Lindsay Pennington, SBN 249879

333 South Grand Avenue

Los Angeles, California 90071

Telephone: (213) 229-7000

Facsimile: (213) 229-7520

*Attorneys for Amici Curiae,  
Current and Former California Legislators*

**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](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](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.

//

//

//

//

//

//

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

	<u>Page(s)</u>
I. INTRODUCTION .....	1
II. LEGISLATORS' INTEREST .....	3
III. THE PEOPLE ENTRUSTED THE LEGISLATURE WITH THE RESPONSIBILITY TO INITIATE REVISION OF THE CONSTITUTION .....	7
A. The Constitutions of 1849 And 1879 Prohibited Any Change—Whether By Amendment Or Revision—That Was Not Initiated By The Legislature .....	8
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 .....	10
1. The 1879 Constitution Required The Legislature To Initiate Amendments Or Revisions To The Constitution, Despite Widespread Distrust In The Political Process .....	10
2. The 1911 Changes To The Constitution Preserved The Legislature's Responsibility To Propose Revisions In The Face Of Severe Discontent With Government ....	11
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 .....	14
D. The Legislature's Duty To Initiate The Process Of Constitutional Revision Is Supported By Its Unique Deliberative Role And Capabilities .....	15
IV. PROPOSITION 8 MAKES FAR-REACHING CHANGES IN CALIFORNIA'S GOVERNMENTAL PLAN AND UNDERLYING CONSTITUTIONAL PRINCIPLES, AND IS THEREFORE A REVISION .....	20
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" .....	20

B.	Proposition 8 Improperly Restricts The Essential Role Of The Judiciary And The Rights Guaranteed To All People By The Constitution.....	22
1.	Proposition 8 Prevents The Judiciary From Exercising Its Responsibility To Interpret The Equal Protection Clause .....	23
2.	Proposition 8 Proponents’ Arguments Misapprehend The Danger In Denying The Court Its Constitutional Role.....	26
V.	PROPOSITION 8 IMPERMISSIBLY CHANGES THE CONSTITUTIONAL FRAMEWORK WITHOUT UNDERGOING THE CONSTITUTIONALLY MANDATED PROCESS FOR SUCH REVISIONS .....	31
VI.	CONCLUSION.....	32

## Table of Authorities

	<u>Page(s)</u>
<b>Cases</b>	
<i>Amador Valley Joint Union High School Dist. v. State Bd. of Equalization</i> (1978) 22 Cal.3d 208.....	21, 31
<i>Bixby v. Pierno</i> (1971) 4 Cal.3d 130.....	22
<i>Californians for an Open Primary v. McPherson</i> (2006) 38 Cal.4th 735.....	16
<i>Castro v. California</i> (1970) 2 Cal.3d 223.....	23
<i>Cruzan v. Director, Mo. Dep't. of Health</i> (1990) 497 U.S. 261.....	18
<i>Davis v. Passman</i> (1979) 442 U.S. 228.....	22
<i>Fujii v. State</i> (1952) 38 Cal.2d 718.....	22
<i>In re Lance W.</i> (1985) 37 Cal.3d 873.....	30
<i>In re Marriage Cases</i> (2008) 43 Cal.4th 757.....	passim
<i>Legislature v. Eu</i> (1991) 54 Cal.3d 492.....	17
<i>Livermore v. Waite</i> (1894) 102 Cal.113.....	20, 21, 31
<i>Lucas v. Forty-Fourth Gen. Assem. of Colo.</i> (1964) 377 U.S. 713.....	26
<i>McFadden v. Jordan</i> (1948) 32 Cal.2d 330.....	14, 19
<i>People v. Frierson</i> (1979) 25 Cal.3d 142.....	27, 28
<i>Perez v. Sharp</i> (1948) 32 Cal.2d 711.....	23
<i>Raven v. Deukmejian</i> (1990) 52 Cal.3d 336.....	14, 23, 31

<i>Roper v. Simmons</i> (2005) 543 U.S. 551 .....	28
<i>West Virginia State Board of Education v. Barnette</i> (1943) 319 U.S. 624 .....	27

**Constitutional Provisions**

Cal. Const. of 1849, art. X, § 1 .....	8
Cal. Const. of 1879, art XVIII, § 1 .....	8
Cal. Const., art. I .....	25
Cal. Const., art. I, § 24 .....	24
Cal. Const., art. I, § 7 .....	19
Cal. Const., art. XVIII, §§ 2-3 .....	15

**Rules**

Cal. Rules of Court, rule 8.520(f) .....	3
--	---

**Legislative Materials**

Assem. Bill No. 43 (2007-2008 Reg. Sess.) § 3(l) .....	5
Assem. Bill No. 849 (2005-2006 Reg. Sess.) § 3(k) .....	5
Assem. Const. Amend. No. 14, Stats. 1961 (1961 Reg. Sess.).....	15
Assem. Interim Com., Rep. on Const. Amends. to the Cal. Legislature (Nov. 15, 1960) .....	17
Assem. Res. No. 5 (2009-2010 Reg. Sess.) .....	6
Citizen’s Legis. Advisory Com., Final Rep. and Recommendations to the Joint Com. on Legislative Organization (Mar. 9, 1961) .....	16
Sen. Const. Amend. No. 22, Stats. 1911 (1911 Reg. Sess.) .....	13
Sen. Res. No. 7 (2009-2010 Reg. Sess.) .....	5

**Other Authorities**

Ernest A. Engelbert & John G. Gunnell, State Constitutional Revision in California: An Analysis Prepared for The Citizen’s Legislative Advisory Commission (Jan. 1961).....	14, 15, 16
Hiram W. Johnson, Governor of Cal., Inaugural Address (Jan. 3, 1911)...	13

Manheim & Howard, <i>A Structural Theory of the Initiative Power In California</i> (1998) 31 Loyola L.A. L.Rev. 1165 .....	12
Mosk, <i>Raven and Revision</i> (1991) 25 U.C. Davis L.Rev. 1 .....	24, 25
Mowry, <i>The California Progressives</i> (1951) .....	12
Scheiber, <i>Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution</i> (1989) 17 Hastings Const. L.Q. 35 .....	10, 11
Swisher, <i>Motivation and Political Technique in the California Constitutional Convention, 1878-79</i> (1930) .....	10
Thomas Jefferson, <i>First Inaugural Address</i> (Mar. 4, 1801).....	19

## 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](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

