

S 168047
S 168066
S 168078

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, et al.,
Petitioners,

v.

MARK B. HORTON, et al., as State Registrar of Vital Statistics, etc.,
Respondents.

ROBIN TYLER, et al.,
Petitioners,

v.

STATE OF CALIFORNIA, et al.,
Respondents.

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

v.

MARK B. HORTON, et al., as State Registrar of Vital Statistics, etc.,
Respondents.

PROPOSITION 8 OFFICIAL PROPONENTS, et al.,
Real Parties in Interest in all three matters.

APPLICATION TO FILE AMICUS CURIAE BRIEF;
[PROPOSED] BRIEF IN SUPPORT OF PETITIONERS
FROM AMICUS CURIAE JAMES T. LINFORD

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SUPREME COURT OF CALIFORNIA

Strauss v. Horton;)
Tyler v. California;)
CCSF v. Horton.)
Proposition 8 Proponents,)
RPI in all matters)
_____)

APPLICATION FOR LEAVE
TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA:

I, the undersigned applicant, respectfully request leave to file the attached “Amicus Curiae Brief in Support of Petitioners” in the above-captioned matters.

I am familiar with the material posted on the Supreme Court website dedicated to the Proposition 8 litigation, notably the Order to Show Cause and the superb briefing: the Petitions, the Returns of the remaining Respondents, the two opposition briefs of the interveners, and the Replies of the three remaining Petitioners. I am also familiar with the other briefing and amicus letter-writing that preceded the Order to Show Cause.

I believe that the court may find useful the relatively narrow focus of the proposed amicus brief, namely, the implication for the separation-of-powers issue of acknowledging that the electorate’s amendatory initiative power is a legislative power. I believe I have usefully expanded upon the discussion of separation-of-powers doctrine and the core zones of the judicial function in Petitioner CCSF’s Reply of January 5th, notably at pages 17-21 [“The Limits of the Initiative

Process"] and pages 31-32 ["Any Separation of Powers Infringement Fundamentally Alters the Governmental Structure and Therefore Constitutes a Revis.on"].

My interest in these matters flows

- from my identity as an officer of the court committed to defending the judiciary and its prerogatives,
- from my personal commitment to human rights.
- from my friendships with same-sex couples who were insulted by Proposition 8, and
- from my concern that my children reach maturity in a state that refuses to stigmatize on the basis of sexual orientation.

Pursuant to California Rules of Court, Rule 8.520(f)(4), I certify that I am the sole author of the proposed amicus brief and that it was produced entirely *pro bono*.

Respectfully submitted,

January 15, 2009

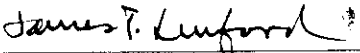

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INTRODUCTION

“All political power is inherent in the people” (Cal. Const, Art. II, § 1.) But this guiding principle leaves the real challenge unmet: how to devise structures and institutions for the exercise of the ideal “popular will.” Pure, direct democracy cannot exist beyond small groups, for example, in an iconic small town meeting that everyone attends. The closest our democracy can get to “direct” is the electorate. The electorate never includes all “the people.” It is never all of us, and can thus only partially represent all of us. A “popular vote” can only give an approximation of “the popular will,” but we take it as a given that it is a better approximation than any other.

The usual role of an electorate in our system is to designate its representatives. In California, the electorate has also reserved legislative powers to make and unmake law through initiatives and referenda and to impeach through recall. Initiatives, whether statutory or amendatory, are exercised by the electorate of a **direct legislative power**.

Unless our organic law were to be fundamentally changed, the rule of separation of powers (Cal. Const. Art. III, § 3) prohibits the electorate from exercising any power in the judicial domain unless the legislature could do the same. Thus, when the Prop 8 Proponents evoke a purported “people’s bedrock power ... to overturn judicial interpretations they deem unwise” (Intervenors’ Opposition Brief, p. 16), their expression lacks precision. “The people” are clearly an abstraction here. They probably do not wish for judicial “direct democracy.” (To what extent would the legislative “direct democracy” of a

small-town meeting find its judicial equivalent in a lynch mob?) However, by talking about “the people,” the Prop 8 Proponents are able to overlook the fact that when the electorate uses its initiative power, it is exercising a direct legislative power that should be just as subject to judicial review as any other exercise of legislative power.

BACKGROUND

At issue are two initiative enactments of identically-worded provisions, one a statutory initiative from 2000, the other an amendatory initiative from last November, 2008. The identical wording is, “Only marriage between a man and a woman is valid or recognized in California.” The problem presented is not explicit in the wording but rather derives from what happened in this court last May, 2008, when it held that the statutory language is an unconstitutional infringement of equal protection guaranteed by the California Constitution. (*In re Marriage Cases* (2008) 43 Cal.4th 757)

The practical issue presented in this litigation is whether or not the Prop 8 Proponents’ amendatory initiative will be able to resist the challenge of unconstitutionality that felled their statutory initiative.

I: THE ELECTORATE’S INITIATIVE POWER IS A LEGISLATIVE POWER

Article IV of the California Constitution is devoted to Legislative powers. Its first section classifies the electorate’s initiative power as a legislative power:

The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the power of initiative and referendum.

Cal. Const., art. IV, § 1.

A: This court has clearly held that the electorate's initiative power is a legislative power

In *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016 (“*Professional Engineers*”) this court observed that when the electorate acts through its amendatory initiative power, it is “a constitutionally-empowered legislative entity” (at 1045). For all practical purposes, its actions are indistinguishable from those of the Legislature. Thus, the “standards for analyzing whether a statute has been impliedly repealed by constitutional amendment or another statute are the same.” (*Professional Engineers* at 1039)

“Our role as a reviewing court is to simply ascertain and give effect to the electorate’s intent guided by the same well-settled principles we employ to give effect to the Legislature’s intent when we review enactments by that body.” (*Professional Engineers* at 1043)

And finally, in response to a separation of powers challenge, this court held that there was “no separation of power violation simply because the electorate, rather than the Legislature, exercised its constitutional authority as a legislative entity to make policy in this area.” (*Professional Engineers* at 1045)

If the separation of powers doctrine applies to amendatory initiatives in the same way it applies to enactments by the legislature, then both should be equally subject to judicial review.

B: The historical background of the electorate's initiative power implies that it is a legislative power

The creation of the initiative power in California has its origin in at the end of the nineteenth century when California evinced a “generalized distrust of the Legislature.”(Joseph R. Grodin, *et al.*, *The California State Constitution: A Reference Guide*, Greenwood Press, 1993, pp. 14-15.) Some of the distrust of the Legislature came from its being in the pocket of the railroad political machine. (*Op. cit.*, 16-17, 69.) The 1910 victory of Progressive governor Hiram Johnson gave him the opportunity to lead efforts to “institute a system of direct legislation” (*Op. cit.*, 17.) that was overwhelmingly approved by the electorate in 1911 (*Op. cit.*, 69.).

That the legislature was the institutional target of the California initiative process is emphasized by the peculiarity of California's initiative provisions. It is one of the rare states that allow constitutional amendment by initiative and the only state that prohibits the legislature from modifying or superseding a statutory initiative unless the initiative provision so provides. (Cal. Const. Art II, §§ 8 and 10(c); Grodin, *supra*, 69, 72.) In California, both statutory and amendatory initiatives place the legislative action of the electorate beyond the reach of the legislature. This disempowering of the legislature by the electorate was the goal of the initiative process, of its taking back legislative power from the Legislature.

One of the most telling descriptions of the initiative process remains the following:

It has long been recognized that "the initiative is in essence a legislative battering ram which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end." (Key & Crouch, *The Initiative and the Referendum in California* (1939) p. 458) Although lawmaking by the Legislature and lawmaking by the people are different in process, they are, of course, identical in substance and effect.

Raven v. Deukmejian (1990) 52 Cal.3d 336, 357 [Mosk conc & dis.]

C: The legislative history of the electorate's initiative power demonstrates that it is a legislative power

The 1911 enactment of initiative and referendum provisions made no distinction between statutory and amendatory initiatives

-
- i: Governor Hiram Johnson, a prime-mover in the creation of the electorate's initiative power, called it "direct legislation."

Governor Hiram Johnson classified initiatives and referenda as **legislation**, specifically as "**direct legislation.**" (*1910 Inaugural Address*, page 3 of Exhibit 4, Respondent Attorney General's Request for Judicial Notice ["AG-RJN" below.]) Presumably, legislation passed by the electorate's representatives in the legislature were indirect since elected representatives were interposed between the electorate and the legislation. Governor Johnson made no distinction between statutory and amendatory initiatives.

- ii: The 1911 Voter Information Pamphlet had nothing to say about any difference between statutory and amendatory initiatives.

In the 1911 initiative and referendum voter information pamphlet, the argument setting forth “*Advantages of the initiative*” made no mention whatsoever of the amendatory initiative, but only discussed the pressure that any initiative would put on the legislature to be influenced by general public welfare rather than by special interests. (*1911 Voter Information Pamphlet, Proposition 7 [creating the rights of initiative and referendum]*, page 2 of Exhibit 5, AG-RJN.) According to the proponents, the over-arching intent of the creation of these powers was to rein in the legislature:

It is not intended and will not be a substitute for legislation, but will constitute that safeguard which the people should retain for themselves, to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact; and to hold the legislature in check, and veto or negative such measures as it may viciously or negligently enact.

(*Op. cit.* p. 3)

There is no explicit discussion of any advantages of the amendatory initiative, only that it is a possible form of the initiative power. Although the amendatory initiative is obviously an initiative, the proponents’ argument characterizes the “procedure for amending our state constitution by submitting the same to a vote of the people is one of the oldest and highest forms of the referendum.” (*Op. cit.*, page 3.) This leaves the clear impression that the amendatory initiative may have been an afterthought of sorts, perhaps an

excess of prudence, a sort of belt-and-suspenders provision to supplement the main focus, statutory initiative and referendum.

Interestingly, in the 2007 case *Professional Engineers* the amendatory initiative functioned as a referendum on restrictions on private contracting derived from Article VII of the Constitution. Thus, California's fluidity between statutory and constitutional provisions may also have been responsible for the inclusion of the amendatory initiative in the over-all scheme. Perhaps not everything in the Constitution is part of the fundamental organic law of the state, and perhaps the framers of the initiative provisions assumed that the amendatory initiative would only be used for non-fundamental constitutional provisions..

- iii: The argument by the opponents of the initiative enactment saw no difference between statutory and amendatory initiatives.

Nor does the opponents' argument posit any difference between the effects of statutory and amendatory initiatives, arguing that **neither** would be subject to constitutional review:

(a) The right of our courts to pass upon the constitutionality of all statutes is firmly established by necessary inference from language employed in the federal constitution, and by the decisions of Chief Justice Marshall. Section 2 of article I of the state constitution provides that all political power is inherent in the people. If, in the exercise of their power, they reserve to themselves the right to pass laws the statutes so passed will possess the same force and have the same dignity as the constitution itself. The right to determine the constitutionality of a legislative act or statute is vested in the courts, and is one of the

safeguards enjoined by the minority against the tyranny of the majority. It is doubtful if a statute enacted by the people, in whom all political power is vested, could be declared null and void as being in conflict with any provision of the state constitution. Thus, the safeguard enjoyed by the minority would, so far as the initiative [b.f. *sic*] and referendum statutes are concerned, be wiped out.

(*Op. cit.*, p. 5)

Of course, if the opponents' apprehensions had been borne out, the present matters would not be before the court: The opponents feared that because initiatives were voted by a sovereign "people" that was also the fount of legitimacy for the constitution itself, the courts would be somehow divested of any authority to subject that sovereign's enactments to judicial review. These ill-founded apprehensions applied as much to statutory initiatives as to amendatory initiatives. What is essential here to understanding the legislative history is that the writer saw no difference in effect between statutory and amendatory initiatives.

iv: There was no procedural difference between statutory and amendatory initiatives

Finally, at their inception there was no procedural distinction between statutory and amendatory initiatives since they required the same number of petition signatures for placement on the ballot and the same number of votes for passage. The current difference in required signatures came about in 1966 in an effort to encourage the use of statutory over amendatory initiatives (Grodin, *supra*, pp. 69-70), presumably to avoid cluttering up the constitution.

v: A 1970 revision may have reaffirmed the identity of statutory and amendatory initiatives

In 1970 a constitutional revision that principally addressed the modalities for calling a constitutional convention provided that if multiple constitutional ballot measures on the same ballot happen to conflict, the measure with the most votes would prevail, regardless of the origin of the measure, whether revising or amending the constitution, whether by legislative amendment or amendatory initiative. Although this peculiarity was pointed out in the General Analysis of the voter information pamphlet, it was neither elucidated by the General Analysis nor commented upon by either the pro or con argument. (1970 Voter Information Pamphlet, pp. 27-28, Exh. 8, AG-RJN.) It clearly would have been helpful to point out the low procedural threshold of an amendatory initiative compared to a legislatively initiated amendment or revision. Again, the amendatory initiative seems to have slipped beneath the radar.

D: It is questionable that an amendatory initiative could cancel a fundamental constitutional right

Given the apparently off-handed inclusion of the amendatory initiative power in the 1911 provisions and given its lack of procedural safeguards, it is troubling that this court has suggested, albeit in *obiter dictum*, that such a summary amendatory initiative procedure might be sufficient to cancel an Article-I, fundamental right, namely, the right to be free from unreasonable search and seizure. (*In re Lance W.* (1985) 37 Cal.3d 873, 892.) Certainly the

current understanding of Legislative competence regarding the elaboration of rules of evidence would have sufficed for that particular case.

The weight to be given to fundamental rights is the focus of the last section of the Attorney General's Return (pages 75 through 88). Of particular interest is the Attorney General's using reasoning from *Marriage Cases, supra*, 43 Cal.4th at 852, especially the observation that the Constitution is the ultimate embodiment of the "People's will." The question may remain how immutable is the expression of that will with respect to fundamental rights, no doubt, the more immutable the better.

In its criticism of this section, the Proposition 8 Proponents' special opposition appears to focus on natural law issues. However, this focus may be misplaced. First, as the Attorney General has demonstrated, the fundamental rights of, notably, Article I, are positive law in California. Second, the Lockean presumptions of nineteenth century jurisprudence illuminate the drafters' intent in fashioning the initiative power. It is likely they simply did not conceive that an amendatory initiative would ever be used to infringe a fundamental liberty.

The Attorney General's position is apparently that no constitutional change – presumably even a revision – should be able to abrogate a fundamental right without a compelling interest. Petitioner CCSF has provided an incremental solution by suggesting that any invasion of a core zone of the function of another branch should be deemed a revision, and inappropriate for initiative enactments.

II: THIS COURT SHOULD FIND UNENFORCEABLE AN AMENDATORY INITIATIVE THAT USURPS A JUDICIAL CORE FUNCTION UNDER THE SEPARATION OF POWERS DOCTRINE.

Article II, § 3 of the California Constitution makes the doctrine of separation of powers part of our fundamental law. The doctrine of separation of powers is a necessary counterpart to the doctrine of checks and balances. As this court explained,

. . . the substantial interrelatedness of the three branches' actions is apparent and commonplace: the judiciary passes upon the constitutional validity of legislative and executive actions, the Legislature enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings, and the Governor appoints judges and participates in the legislative process through the veto power. Such interrelationship, of course, lies at the heart of the constitutional theory of "checks and balances" that the separation of powers doctrine is intended to serve.

(*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53, cited in *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 25 ("Marine Forests")) .

The separation of powers doctrine helps keep checks and balances working by defining core functions for each of the three branches.

The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch."

(*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297 ("Carmel Valley"), cited in *Marine Forests*, 36 Cal.4th at 25.)

Specifically with regard to the Legislature,

The founders of our republic viewed the legislature as the branch most likely to encroach upon the power of the other branches. The principle of separation of powers limits any such tendency. First, it prohibits the legislative branch from arrogating to itself core functions of the executive or judicial branch.

(*Carmel Valley*, 25 Cal.4th at 289.)

A: Each branch has its core functions.

The core functions of the legislative branch include enacting statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings, passing laws, levying taxes, and making appropriations. (*Superior Court v. Mendocino*, *supra*, 13 Cal.3d at 53, *Carmel Valley*, *supra*, 25 Cal.4th at 289.)

The core functions of the executive branch include the ability of an appointed officer to perform authorized executive functions independently, without legislative coercion or interference (*Marine Forests*, *supra*, 36 Cal.4th at 15).

Examples of “core judicial zones” include the adjudication of litigated disputes, especially as concerns immutability of completed adjudication (*Mandel v. Myers* (1981) 29 Cal.3d 531, 547-550), judicial review of the constitutionality of legislative and administrative enactments (Cal. Const. Art III, § 3.5; *In re Marriage Cases*, *supra*, 43 Cal.4th at 849-850; *Lockyer v. CCSF* (2004) 33 Cal.4th 1056), attorney discipline (*Hustedt v. Workers' Comp.*

Appeals Bd. (1981) 30 Cal.3d 329, 339-341, *Obrien v. Jones* (2000) 23 Cal.4th 40, 63) and, we should add, the protection of fundamental rights.

B: The judiciary is particularly well-suited to protecting fundamental rights, and that function should be a core judicial function.

Because of its independence and long tenure, the judiciary probably can exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority

Bixby v. Pierno (1971) 4 Cal.3d 130, 141

CONCLUSION

The initiative process is a legislative battering ram that can tear through the exasperating tangle of traditional legislative procedure and strike directly toward a desired end. It is a legislative tool, not some sacred expression of a popular will that steamrolls the constitution. It is the electorate reining in the legislature, not a plebiscitary path to revelation of a mythical “general will.”

This brief has argued that there is no substantial difference between a statutory initiative and an amendatory initiative. If this point be well-taken, there is no reason for this court not to proceed exactly as it did in *Marriage Cases*:

. . . under "the constitutional theory of 'checks and balances' that the separation-of-powers doctrine is intended to serve" (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53), a court has an *obligation* to enforce the limitations that the California Constitution imposes upon legislative measures, and a court would shirk the responsibility it owes to each member of the public were it to consider such statutory provisions to be insulated from judicial review.

In re Marriage Cases, supra, 43 Cal.4th at 849-850

This brief has also argued that the amendatory initiative, Prop 8, is an impermissible intrusion into the core judicial zone by a legislative actor. On this ground as well, this court is urged to invalidate Prop 8.

Respectfully submitted,

January 15, 2009

James T. Linford (SBN 104639)

Amicus Curiae in propria persona

PROOF OF SERVICE
[pursuant to CCP § 1013a(2)]

I am an active member of the State Bar of California, SBN 104639, am not a party to any of the causes, and I have today at San Francisco, California, properly served by mail copies of the foregoing "Application to File Amicus Curiae Brief; [Proposed] Brief in Support of Petitioners from Amicus Curiae James T. Linford" in pending Proposition 8 petitions, namely, *Strauss v. Horton*, S168047; *Tyler v. State of California*, S168066; and *CCSF v. Horton* by depositing them in the U.S. Mail with fully prepaid postage and addressed as follows:

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