CASE NO. 10-16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, *et al.*,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants,

and

DENNIS HOLLINGSWORTH, *et al.*,
Defendants-Intervenors-Appellants

BRIEF OF AMICUS CURIAE JON B. EISENBERG IN SUPPORT OF PLAINTIFFS-APPELLEES

Appeal From The United States District Court
for the Northern District of California,
Civil Case No. 09-CV-2292 VRW, Hon. Vaughn R. Walker

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STATEMENT OF INTEREST OF AMICUS CURIAE

JON B. EISENBERG

Amicus Curiae, Jon B. Eisenberg, is an attorney specializing in appellate law and a founding partner at Eisenberg & Hancock LLP in Oakland, California. Mr. Eisenberg has three decades of experience in appellate litigation and has argued dozens of cases in the California Courts of Appeal and Ninth Circuit and eleven cases in the California Supreme Court. Mr. Eisenberg is a widely published author on appellate matters, a frequent commentator on topics of state constitutional law, and the principal co-author of the leading treatise on California appellate procedure. Mr. Eisenberg teaches California Appellate Process at Hastings College of the Law and has served as a court-appointed mediator for the First Appellate District's appellate mediation program.

Mr. Eisenberg has a unique interest in the particular subject matter of this brief—the intersection between the serious federal constitutional arguments raised in this litigation and the overall constitutionality (under California law) of the initiative process that established Proposition 8. Mr. Eisenberg has been involved in litigation involving the lesbian, gay, bisexual and transgender community, including representing respondent Guadalupe Benitez before the State Supreme Court in a case about equal access to health care for gays and lesbians in *North Coast Women's Medical Care Group et al. v. Superior Court of San Diego*, 44

Cal. 4th 1145 (2008). Mr. Eisenberg also represented the California NAACP in the *Marriage Cases* and a group of faith leaders in *Strauss v. Horton* as amici curiae before the California Supreme Court. In his practice and scholarship, Mr. Eisenberg has been a strong advocate for constitutionalism, the institutional integrity of the federal courts, and principles of fairness and equality protected by the U.S. and California Constitutions.

This brief of Amicus Curiae is filed pursuant to F.R.A.P. Rule 29(a) with the consent of all parties to the case.

I. INTRODUCTION

When a slender majority of California voters used the initiative process to enact Proposition 8 in 2008, the initiative process became a tool to stigmatize and inflict real harm on a small minority of Californians who have faced persistent discrimination from governmental and private forces since the State of California came into being. Plaintiffs/Appellees have persuasively demonstrated that Proposition 8 violates the Equal Protection and Due Process Clauses of the United States Constitution. Gay men and lesbians, like their heterosexual friends and families, have the capacity and desire to love and be loved. Like straight people, many gay people wish to form life-long relationships, which the State will solemnize and dignify to promote stability and family life. Many gay people are raising children. Many gay teenagers need a vision of the future in which they are full participants in the life of their families and communities. And many gay men and lesbians have a fundamental longing to know that as they pass through their days, their lives will not go unnoticed. The State recognizes these basic human feelings for heterosexuals, and before the passage of Proposition 8, the California Constitution protected gay people as well, recognizing their fundamental right to marry.

The fifty-two percent of 2008 California voters who enshrined discrimination in California's Constitution had no rational reason, much less a substantial or important reason for doing so. These are among the reasons that the State itself does not defend Proposition 8 and why it must be struck down.

The question of how a bare majority of voters could, on a suspect ground, strip a vulnerable minority of the basic rights secured by the state Constitution can be answered with reference to the peculiar psychology of discrimination against gay people, including its unique combination of individual ignorance, personal insecurity, and the undeveloped capacity for empathy that prevented so many voters from appreciating the harms their votes would cause. It also has an answer, however, in the unique structure of California government and the initiative process.

California's initiative process was put in place by a simple "amendment" to the California Constitution; it passed both houses of the Legislature and was submitted to a direct vote of the people in 1911. It was not the result of the more deliberative process used for constitutional "revisions," which required not just supermajority approval of both houses of the legislature, but also a full constitutional convention.

Senate Amendment 22, which created the initiative process, was known to be "radical" from the start, and indeed has had the effect of turning California from

a State enjoying a republican form of government into a direct democracy which the Chief Justice of California describes as "dysfunctional." The initiative system has turned the State Constitution from a document of lasting value, meant as a repository of basic values, which would establish a lasting structure of governmental checks and balances, into a bloated instrument, constantly subject to further amendment, in which formerly fundamental values, as well as the governmental plan itself, could be changed at the whim of a bare majority of voters.

In *Strauss v. Horton*, 46 Cal. 4th 364 (2009), the California Supreme Court determined that Proposition 8 fell on the "amendment" side of the revision/amendment divide. *Strauss* left unanswered, however, the more fundamental question whether the initiative process itself could properly have been enacted as an "amendment," rather than a "revision" to the State Constitution. In *Strauss*, the California Supreme Court carefully reviewed the revision/amendment dichotomy and all the Court's prior decisions analyzing the distinction between these two methods of altering the California Constitution. *Id.* at 412-440. After analyzing the prior cases, the Court explained that a change to the Constitution must be enacted by the process for "revision," and not mere "amendment," if it amounts to "'a change in the basic plan of the California government,'" that is, "'a change in [the] fundamental [governmental] structure or the foundational powers

of its branches.'" *Id.* at 438 (quoting *Legislature v. Eu*, 54 Ca1. 3d 492, 508-509 (1991)); *see also Strauss*, 46 Cal. 4th at 427, 430-445, 452.

That the initiative process changed the basic plan of California government is undeniable. Under the prior California Constitution, the powers of the state government were expressly defined and vested in three departments: legislative, executive, and judicial. The 1879 revision to the California Constitution provided that "[t]he legislative power of this State shall be vested in a senate and assembly, which shall be designated the legislature of the State of California." Cal. Const. 1879, Art. II. The legislative power at the time was not exercised by a direct vote of the electors. The initiative measure, Senate Amendment 22, purported to "amend" the grant of legislative power to read as follows: "The legislative power of this state shall be vested in a senate and assembly which shall be designated 'The legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the constitution, and to adopt or reject the same, at the polls independent of the legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the legislature." It is hard to describe as anything less than "fundamental" such a sweeping structural change to California government. Yet the initiative process itself was never adopted through the process of constitutional revision under California law.

The California Supreme Court has never ruled on whether the initiative process was validly enacted by amendment, but has ruled invalid uses of the amendment process to change in less dramatic ways the structure of state government and the power of its branches. The State's resolution of this question could obviate the need for a resolution of the serious federal constitutional claims that the Plaintiffs in this case have raised. Principles of judicial restraint, as well as a proper deference to the ability of the State to remedy deficiencies in its own laws, call for a resolution regarding the questionable constitutionally of the initiative process under California law before reaching the very important federal constitutional questions at issue in this appeal. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (question of state law concerning initiative measure should have been certified to the Arizona Supreme Court); California Rule of Court 8.548 (allowing federal appeals courts to certify questions of state law to the California Supreme Court).

II. ARGUMENT

A. There Is A Serious Question Whether The Amendment Purporting To Create The Initiative Process By Which Proposition 8 Was Enacted Is Valid As A Matter Of State Law.

Proposition 8 was enacted as an amendment to the California Constitution through the initiative process established in California in 1911. *Strauss v. Horton*

held that Proposition 8 did not so change the fundamental governmental plan of California as to render Proposition 8 a constitutional "revision" that would have had to be enacted, if at all, only though more deliberative processes. The decision in *Strauss*, however, left unanswered the more fundamental question whether the initiative process itself, which was also adopted as an amendment, rather than a revision, did so change the fundamental nature of state government so as to render the entire initiative process invalid.

At the time the amendment creating the initiative process was adopted, under the California Constitution (1) all legislative power was vested in the Legislature; (2) the Constitution itself could not be changed without the participation of the Legislature; and (3) major changes to the Constitution could be adopted only by revision, through a constitutional convention, and not by the less deliberative processes available for less significant changes that do not affect the essential character of the Constitution, the fundamental plan of government, or the powers of the existing branches. The 1911 amendment through which the initiative process was created changed each of these fundamental aspects of California's governmental plan and should have been enacted, if at all, only as a revision to the state Constitution, and not a mere amendment.

1. Prior To 1911, All Legislative Power Was Vested In The Legislature.

Prior to 1911, all legislative power in California was vested in the Legislature. The California Constitution of 1879 provided: "The powers of the Government of the State of California shall be divided into three departments – the legislative, executive and judicial, and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted." Cal. Const. 1879, Art. III. The 1879 Constitution provided further: "The legislative power of this State shall be vested in a Senate and Assembly, which shall be designated the Legislature of the State of California." *Id.* Art. IV. The legislature had exclusive power not just to enact laws, *id.*, but also to propose, through supermajority vote of both houses, either amendments or revisions to the Constitution. *Id.* Art. XVIII.

As controlling judicial decisions of the time made clear, the power of the Legislature was exceptionally broad. *Ross v. Whitman*, 6 Cal. 361, 365 (1856) ("the power of the Legislature is supreme, except where it is expressly restricted."); *id.* at 364 ("Where any of the duties or powers of one of the departments of the State Government are not disposed of, or distributed to particular officers of that department, such powers or duties are left to the disposal of the Legislature."); *Beals v. Amador*, 35 Cal. 624, 630 (1868) ("The Legislative

Department of our State Government is not, like the 'Congress of the United States,' restricted in its sphere of action by a fixed chart of delegated powers. Its power represents the independent sovereignty of the people of the State, and is supreme and unlimited in all legitimate subject-matters of legislation, and controlled only by such restrictions as are imposed by the organic law of the State."); *People v. Seymour*, 16 Cal. 332, 342 (1860) ("The Legislature, representing the mass of political powers, is only restrained by express limitations or restrictions in the Constitution."); *Ex parte Wall*, 48 Cal. 279, 313 (1874) ("The power to make laws conferred by the Constitution on the Legislature cannot be delegated by the Legislature to the people of the State, or to any portion of the people."); *id.* at 314 (California is a "representative republic"; warning of dangers of direct democracy), *overruled in part on other grounds*, *Ex parte Beck*, 162 Cal. 701, 704-05 (1912) (distinguishing *Wall* and stating: "It is elementary, of course, as said in [*Wall*,] that 'the power to make laws conferred by the Constitution on the Legislature cannot be delegated by the Legislature to the people of the state or to any portion of the people.'"); *Mitchell v. Winnek* 117 Cal. 520, 525 (1897) (equating power of California Legislature to that of the British Parliament); *Sheehan v. Scott*, 145 Cal. 684, 686-87 (1905) (Constitution is not a grant of power, but a restriction upon the power of the Legislature, and the Legislature has the entire legislative power of the state not prohibited to the Legislature or

conferred upon some other body), *overruled in part on other grounds, Zeilenga v. Nelson*, 4 Cal.3d 716 (1971).

2. Prior To 1911, The State Constitution Was Meant To Be A "Permanent and Abiding" Instrument, And All Constitutional Changes Required Participation By The Legislature.

The Constitution of 1879 was intended to be a long-lasting instrument that provided for the structure of state government and could be changed only with an extensive deliberative process. Article XVIII of the 1879 Constitution provided the exclusive means for amending or revising the Constitution. Both amendments and revisions could be proposed only upon a vote of two thirds of both houses of the Legislature. In the case of an amendment, the proposed change would then be submitted directly to the people. *Id.* § 1. More fundamental changes to the Constitution, those that could be enacted only as revisions, required first, a two-thirds majority of both Senate and Assembly; second, popular approval by the electors of a constitutional convention; third, another election in which the electors would vote for delegates to represent them in connection with such a revision; fourth, the drafting of revisions by the delegates; and fifth, submission of the new constitution to the people, for their ratification or rejection at a special election. *Id.* § 2.[1]

[1] Article X of the original 1849 Constitution, contained one section concerning "amendments" to the Constitution and one addressing the process for "revis[ing]

In *Livermore v. Waite*, 102 Cal. 113 (1894), the California Supreme Court considered the validity of a constitutional change, adopted by amendment in 1893, to move the State Capital from Sacramento to San Jose. The taxpayer action contended that the change was invalid because it required a constitutional revision, rather than a mere amendment. In concluding that the change, while invalid, was not significant enough to require the use of the revision process, the California Supreme Court explained the differences between the two procedures, making clear that the Constitution was intended to be "abiding and permanent," and that the revision process was intended for changes of significance with respect to the "character," "underlying principles," or "extent" of the Constitution, while the amendment process was appropriate for changes of a less sweeping or fundamental nature:

> Article XVIII of the constitution provides two methods by which changes may be effected in [the Constitution. . . .] It can be neither revised nor amended except in the manner prescribed by itself, and the power which it has conferred upon the legislature in reference to proposed amendments, as well as to calling a convention, must be strictly pursued. Under the first of these methods [i.e., revision] the entire sovereignty of the people is represented in the convention. The *character and extent* of a constitution that may be framed by that body is freed from any limitations other than those contained in the

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and chang[ing] this entire constitution." As in the 1879 Constitution, the latter required a constitutional convention, while the former could be adopted through a less cumbersome procedure, but one that still involved meaningful deliberation. The modifying language "and changing this entire constitution" were omitted from the article concerning amendments and revisions in the 1879 Constitution.

constitution of the United States. If, upon its submission to the people, it is adopted, it becomes the measure of authority for all the departments of government, the organic law of the state, to which every citizen must yield an acquiescent obedience. The power of the legislature to initiate any change in the existing organic law is, however, of greatly less extent, and, being a delegated power, is to be strictly construed under the limitations by which it has been conferred. In submitting propositions for the amendment of the constitution, the legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power conferred upon it by the people, and which might with equal propriety have been conferred upon either house, or upon the governor, or upon a special commission, or any other body or tribunal. The extent of this power is limited to the object for which it is given, and is measured by the terms in which it has been conferred, and cannot be extended by the legislature to any other object, or enlarged beyond these terms. The legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment, nor can it submit to their votes a proposition which, if adopted, would by the very terms in which it is framed be inoperative. The constitution itself has been framed by delegates chosen by the people for that express purpose, and has been afterwards ratified by a vote of the people, at a special election held for that purpose, and the provision in article XVIII that it can be revised only in the same manner, and after the people have had an opportunity to express their will in reference thereto, precludes the idea that it was the intention of the people, by the provision for amendments authorized in the first section of this article, to afford the means of effecting the same result which in the next section has been guarded with so much care and precision. *The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature*. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.

Id. 102 Cal. at 117-119 (emphases added).

The principle established in *Livermore* that the revision process is to be used for fundamental changes to the "character" or "underlying principles" of the Constitution, as well as to changes that affect a great many provisions simultaneously, survives to this day in modern cases addressing the validity under the state Constitution of changes adopted through the amendment process as it is currently practiced. Constitutional changes that alter the fundamental governmental plan or structure of government may be enacted only by revision, not by amendment. *Raven v. Duekmejian*, 52 Cal. 3d 336, 349 (1990) (revision provision is based on principle that "comprehensive changes" to the Constitution require more formality, discussion and deliberation than is available through the initiative process"); *McFadden v. Jordan*, 32 Cal. 2d 330, 334-346 (1948) ("far reaching and multifarious" changes altered the "basic plan of government" and were required to be adopted pursuant to revision process); *Strauss v. Horton*, 46 Cal. 4th 364, 382 (2009) (a proposed change to the California Constitution is a "revision" and not an "amendment," when, even if it does not alter a large number of provisions, it nonetheless "involves a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational power of its branches."); *Legislature v. Eu*, 54 Cal. 3d 491, 506 (1991) (explaining that comprehensive changes to the state's governmental structure "require more

formality, discussion and deliberation than is available through the initiative process.").

Even changes that do not affect a great number of provisions must be enacted by the revision process if the changes they purport to make are fundamental to the structure of government. In *Raven*, for example, the California Supreme Court invalidated an amendment to the California Constitution that would have required California courts to defer to the U.S. Supreme Court's interpretation of the federal Constitution in construing certain rights of criminal defendants set forth in the California Constitution. 52 Cal. 3d at 342-346, 350. In so ruling, the California Supreme Court explained that the proposition was properly characterized as a "revision," not an "amendment," because it "vest[ed] a critical portion of state judicial power" in the federal courts and "substantially alter[ed] the substance and integrity of the state Constitution as a document of independent force and effect." *Id.* at 352, 355. "From a qualitative standpoint," the *Raven* Court explained, "the effect of [the amendment] is devastating" to our preexisting governmental plan. *Id*.

3. The 1911 "Amendment" To The California Constitution Creating The Initiative Process Changed The "Character" And "Underlying Principles" Of The State Constitution And The Fundamental Government Plan, Including The Structure Of Government And Powers Of Its Branches

In 1911, Senate Constitutional Amendment 22 ("Amendment 22") was placed on the ballot and approved by the voters of California. Amendment 22 established for the first time the "initiative," then a new concept under the California Constitution. The initiative power created by Amendment 22 purported to "reserve" to the people of California the right to propose and adopt new laws, independently of the Legislature. The initiative power created by Amendment 22 also purported to reserve to the people of California the right to make amendments to the California Constitution independently of the Legislature.

Amendment 22, through the creation of the initiative power, explicitly redefined the scope and nature of the legislative power of the State of California, significantly constraining the power of the state Legislature and eliminating the "permanent and abiding" character of the state Constitution. Specifically, Amendment 22 amended Article IV, Section 1 of the 1879 Constitution so that it no longer vested the full legislative power of the state in the Legislature. Instead, under Amendment 22, Article IV provides that "[t]he legislative power of this state shall be vested in a senate and assembly which shall be designated 'The legislature of the State of California,' but the people reserve to themselves the power to

propose laws and amendments to the constitution, and to adopt or reject the same, at the polls independent of the legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the legislature."

Under Amendment 22, a constitutional amendment or new statute could be proposed by an "initiative petition," signed by electors equal to eight percent of the total vote for Governor in the previous gubernatorial election. The statute or constitutional amendment proposed by the initiative petition (the "initiative ballot measure") would then be submitted for a popular vote in the next general election (or in a special election called by the Governor).

Following Amendment 22, and until the present day, the California Constitution has included a provision reserving the initiative as a power held by the people such that an initiative ballot measure – whether a statutory or constitutional change – that is approved by a majority of the voters in a duly-held election becomes the law of California and cannot be amended or repealed by the Legislature. Nor can the initiative power be restrained by the Governor's veto power.

Since the passage of Amendment 22, the details of the initiative process have been modified, by statute and constitutional amendment, but the basic initiative power in California remains the same power formerly "vested" in the

Legislature but then "reserved" to the people by Amendment 22. The changes brought about by Amendment 22 were sweeping by any measure.

1. Amendment 22 made it possible to amend the Constitution without any role of the Legislature whatsoever, whereas formerly such amendments required the approval of two thirds of both the Assembly and Senate.
2. Amendment 22 also forbade the Legislature from modifying, altering, or repealing any statute or amendment established through an initiative ballot measure, unless the initiative ballot measure itself expressly allowed for legislative modification. That prohibition has remained as part of the California Constitution until this day. Currently, Article II, Section 10(c) of the California Constitution requires that any change to a statute originally enacted as an initiative ballot measure must be approved by popular vote at an election, except in cases where the initiative ballot measure expressly provides for legislative modification. Similarly, the Legislature currently has no unilateral right to modify a constitutional amendment enacted as an initiative ballot measure, and any modification or change to a constitutional amendment requires approval by a popular vote. Indeed, California is the only state in the United States in which the Legislature is completely prohibited from modifying a statute enacted through the initiative process. *See* Joe Mathews and Mark Paul, *California Crackup: How Reform Broke the Golden State and How We Can Fix It*, at 44 (2010).
3. Amendment 22 forbade the Governor from vetoing or otherwise modifying any statute established through an initiative ballot measure.

> That prohibition has remained as part of the California Constitution until this day; the Governor currently has no power to veto or modify a statute established through an initiative ballot measure.

The proposed Amendment 22 was recognized at the time it was enacted for exactly what it was: a "radical" alteration of the State Constitution, which would change the State of California from a representational form of government to a direct democracy. *See* Ballot Pamphlet, SCA 22 (Argument Against) (describing "this radical departure from the government established by our fathers"); *id.* (argument in favor) ("The initiative will reserve to the people the power to propose and to enact laws which the legislature may have refused or neglected to enact, and to themselves propose constitutional amendments for adoption.").[2] The initiative process has remained substantively unchanged since its inception in 1911. *Cf.* Proposition 1A Pamphlet Argument (1966) (technical revision to "put[] the Constitution into modern, concise and easily understandable language").

Under the California case law recently reaffirmed in *Strauss*, the California Supreme Court could reasonably determine that the changes in the Constitution made by Amendment 22 in 1911 constituted "'a change in the basic plan of the

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[2] A copy of the Ballot Pamphlet for Amendment 22, including the full text of the proposed amendment and the arguments for and against may be found on the California Ballot Propositions Database published online by the U.C. Hastings College of the Law Library, available at http://holmes.uchastings.edu/library/california-research/ca-ballot-measures.html#ballotprops (last viewed October 25, 2010).

California government,'" and "'a change in [the] fundamental [governmental] structure or the foundational powers of its branches.'" *Strauss*, 46 Cal. 4th at p. 438 (*quoting Legislature v. Eu* 54 Ca1.3d 492, 508-509 (1991)). The fundamental nature of the Legislative Power was dramatically altered and diminished, and what commentators have described as California's "Fourth Branch" of government was created. *See* Center for Governmental Studies, *Democracy By Initiative: Shaping California's Fourth Branch of Government* (2d ed. 2006). It is difficult to conceive of how eliminating the Legislature's longstanding ability to act as California's sole law-making body and restricting its power with respect to future constitutional amendments, and instead "reserving" broad legislative authority for direct vote of the people, could be thought of as anything less than a change in the basic plan of California government and to its fundamental structure and the power of its branches.

Since the passage of Amendment 22, the power of the initiative has often been exercised by California voters. Between 1911 and 2006, a total of 312 initiative ballot measures were proposed to California voters, and voters approved 104 of them. *See id.* at 59. Among the amendments were additional changes that further devastated the power of the State Legislature. For example, Proposition 13 (passed in 1978) required a two-thirds majority of the Legislature to enact a tax increase; Proposition 4 (passed in 1979) restricted the growth of the state budget;

and Proposition 98 (passed in 1988) mandated that at least 41% of the State's total budget be spent on education. These amendments and others like them have dramatically restricted the California Legislature's ability to govern the State.

And, of course, it was the initiative process, and the "tyranny" of direct democracy that it represents, that led to the enactment of Proposition 8 in the first place. *Ex parte Wall*, 48 Cal. 279 at 314 (criticizing "tyranny" of "simple democracy," and explaining the virtues of deliberative process of republican form of government). Proposition 8 illustrates how Senate Amendment 22 effectively placed the Fourth Branch of government in a supreme position above the network of checks and balances that was previously part of California's governmental plan: A simple majority of voters overturned the California Supreme Court's earlier decision that the California Constitution protected gay men and lesbians with respect to the right to marry.

The problems that have resulted from Amendment 22 have led the Chief Justice of California to condemn the state government as "dysfunctional." Address of Hon. Ronald George to the American Academy of Arts and Scientists, Oct. 10, 2009 (condemning effects of initiative process on state government: without reform "we shall continue on a course of dysfunctional state government, characterized by a lack of accountability on the part of our officeholders as well as the voting public."), available at http://www.courtinfo.ca.gov/reference/

speech101009.htm, visited Oct. 9, 2010. A copy of Chief Justice George's address is attached hereto as Appendix A.

B. The State Law Issues Should Be Decided Before The Federal Question

"In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" *Arizonans*, 520 U.S. at 75. "When anticipatory relief is sought in federal court against a state [law,] respect for the place of the States in our federal system calls for close consideration of that core question." *Id.*

California, like many states, has enacted rules allowing federal appellate courts to certify to the State Supreme Court unsettled questions of state law for decision. Under California Rule of Court 8.548(a), the California Supreme Court may decide a question of California law certified to it by a federal appellate court if: "(1) The decision could determine the outcome of a matter pending in the requesting court; and (2) There is no controlling precedent."

Certification procedures "allow[] a federal court faced with a novel state law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans*, 520 U.S. at 76 (citation omitted). "Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save "time, energy, and resources and hel[p] build a

cooperative judicial federalism." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974); *see also Arizonans*, 520 U.S. at 77.

"Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law." *Arizonans*, 520 U.S. at 79. A federal court "risks friction-generating error" when it addresses the constitutionality of a state law under the U.S. Constitution, when the injuries caused by the state measure could be addressed through adjudication of state law questions. *Id.* Taking advantage of certification made available by a State may "greatly simplif[y]" an ultimate adjudication in federal court." *See Bellotti v. Baird*, 428 U.S. 132, 151 (1976). *Cf. Bush v. Gore*, 531 U.S. 98, 135-139 (2000) (Ginsburg, J., dissenting) (addressing benefits of certification process and deference to state court views of state law).

C. The California Supreme Court's Decision Upon Certification Could Determine The Outcome Of This Appeal

Here, should the California initiative process be invalidated, the Ninth Circuit as well as the United States Supreme Court would be relieved of the burden of considering the innumerable constitutional issues spawned by California's direct democracy process. A decision on the state law question could therefore greatly simplify, narrow, or entirely eliminate the need for a decision on the questions of federal law addressed in the decision of the district court.

In the *Marriage Cases*, the California Supreme Court squarely ruled that Family Code § 308.5, providing that "[o]nly marriage between a man and a woman is valid or recognized in California," violated the equal protection guarantees of the California Constitution. 43 Cal. 4th 757, 857 (2008). Proposition 8 resuscitated that unconstitutional law, word for word, by designating it an amendment to the state Constitution, and passing it with a simple majority. Such a constitutional runaround would not have been possible in the system of governance existing prior to the 1911 amendment, when the state Constitution could be changed only with the initial approval of two thirds of each house of the legislature. *Livermore v. Waite*, 102 Cal. 113, 117-119 (1894). If the enactment of Proposition 8 as an initiative amendment is held to be procedurally unconstitutional, it follows that the proposition itself is a substantive violation of the California Constitution, and California courts clearly have the equitable authority to craft an appropriate remedy. *See, e.g., People v. Calloway*, 29 Cal. 3d 666, 673 (1981) (wide discretion in crafting appropriate remedy for constitutional violation); *Oceanside Community Assn. v. Oceanside Land Co.*, 147 Cal.App. 3d 166, 177 (1983) (a court in equity has "broad powers to fashion a remedy" and "may create new remedies to deal with novel factual situations"); Constitution, Article VI, Section 10 (grant of jurisdiction to Supreme Court to issue writs of mandate); *Baker v. State*, 744 A.2d

864, 886 (Vt. 1999) (allowing legislative action to remedy unconstitutional discrimination against same-sex couples).

While the precise remedies that will flow from a state court review of the validity of the initiative process may be uncertain, it is clear that the California government, once restored to the proper balance of power under an abiding Constitution, has the tools and mandate to undo Proposition 8. And in the interim, an order lifting this Court's stay of the district court ruling on the state grounds addressed in this brief will provide an effective and immediate remedy to the plaintiffs in this case.

III. CONCLUSION

For all these reasons, it is appropriate to resolve the question whether the California initiative process enacted by amendment in 1911 is constitutionally invalid as a matter of state law before this Court addresses the federal constitutional questions now before it. This Court should certify to the California Supreme Court the question whether the initiative process enacted in Senate Amendment 22 is invalid under the California Constitution.

Dated: October 25, 2010 KENDALL BRILL & KLIEGER LLP

By: /s/ Laura W. Brill
Laura W. Brill
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Jon B. Eisenberg

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rule 32(b), I certify that the foregoing brief is proportionally spaced, has a type face of 14 points or more, and has 5,751 words, as counted by Microsoft Word, excluding the Table of Contents and the Table of Authorities and Certificates.

Dated: October 25, 2010 KENDALL BRILL & KLIEGER LLP

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CERTIFICATE OF SERVICE

I hereby certify that October 25, 2010, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the Appellate CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all registered CM/ECF participants and parties hereto. Service is accomplished thru the Appellate CM/ECF system.

Dated: October 25, 2010 KENDALL BRILL & KLIEGER LLP

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APPENDIX A

INDUCTION CEREMONY AMERICAN ACADEMY OF ARTS & SCIENCES
THE PERILS OF DIRECT DEMOCRACY: THE CALIFORNIA EXPERIENCE
REMARKS BY: CHIEF JUSTICE RONALD M. GEORGE
CAMBRIDGE, MASSACHUSETTS OCTOBER 10, 2009

It is an honor to speak as a representative of the new class of Academy members. I would like to share some thoughts with you on a matter that has been of recent and continued professional concern to me, but that I believe may be of general interest to members of the Academy, because it fundamentally implicates how we govern ourselves. This is the increasing use of the ballot Initiative process available in many states to effect constitutional and statutory changes in the law, especially in the structure and powers of government.

A not-too-subtle clue to my point of view is reflected in the caption I have chosen for these remarks - "The Perils of Direct Democracy: The California Experience." Although two dozen states in our nation permit government by voter Initiative, in no other state is the practice as extreme as in California.

By the terms of its Constitution, California permits a relatively small number of petition signers - equal to at least 8% of the voters in the last gubernatorial election - to place before the voters a proposal to amend any aspect of our Constitution. (The figure is only 5% for a proposed non-constitutional statutory enactment.) If approved by a simple majority of those voting at the next election, the Initiative measure goes into effect on the following day.

The legislature (by two-thirds vote of each house) shares with the voters the power to place proposed constitutional amendments before the electorate. California, however, is unique among all American jurisdictions in prohibiting its legislature, without express voter approval, from amending or repealing even a statutory measure enacted by the voters, unless the Initiative measure itself specifically confers such authority upon the legislature.

The process for amending California's Constitution thus is considerably easier than the amendment process embodied in the United States Constitution, under which an amendment may be proposed either by a vote of two-thirds of each house of Congress or by a convention called on the application of the legislatures of two-thirds of the states. It can be ratified only by the legislatures of (or by conventions held in) three-quarters of the states.

The relative ease with which the California Constitution can be amended is dramatically illustrated by the frequency with which this has occurred. Only 17 amendments to the United States Constitution (in addition to the Bill of Rights, ratified in 1791) have been adopted since that document was ratified in 1788. In contrast, more than 500 amendments to the California Constitution have been adopted since ratification of California's current Constitution in 1879.

Former United States Supreme Court Justice Hugo Black was known to pride himself on carrying in his pocket a slender pamphlet containing the federal Constitution in its entirety. I certainly could not emulate that practice with California's constitutional counterpart.

One Bar leader has observed: "California's current constitution rivals India's for being the longest and most convoluted in the world . . . . [W]ith the cumulative dross of past voter initiatives incorporated, [it] is a document that assures chaos."

Initiatives have enshrined a myriad of provisions into California's constitutional charter, including a prohibition on the use of gill nets and a measure regulating the confinement of barnyard fowl in coops. This last constitutional amendment was enacted on the same 2008 ballot that amended the state Constitution to override the California Supreme Court's decision recognizing the right of same-sex couples to marry. Chickens gained valuable rights in California on the same day that gay men and lesbians lost them.

Perhaps most consequential in their impact on the ability of California state and local government to function are constitutional and statutory mandates and prohibitions - often at cross-purposes - limiting how elected officials may raise and spend revenue. California's lawmakers, and the state itself, have been placed in a fiscal straitjacket by a steep two-thirds-vote requirement - imposed at the ballot box - for raising taxes. A similar supermajoritarian requirement governs passage of the state budget. This situation is compounded by voter Initiative measures that have imposed severe restrictions upon increases in the assessed value of real property that is subject to property tax, coupled with constitutional requirements of specified levels of financial support for public transportation and public schools.

These constraints upon elected officials - when combined with a lack of political will (on the part of some) to curb spending and (on the part of others) to raise taxes - often make a third alternative, borrowing, the most attractive option (at least until the bankers say "no").

Much of this constitutional and statutory structure has been brought about not by legislative fact-gathering and deliberation, but rather by the approval of voter Initiative measures, often funded by special interests. These interests are allowed under the law to pay a bounty to signature-gatherers for each signer. Frequent amendments - coupled with the implicit threat of more in the future - have rendered our state government dysfunctional, at least in times of severe economic decline.

Because of voter Initiatives restricting the taxing powers that the legislature may exercise, California's tax structure is particularly dependent upon fluctuating types of revenue, giving rise to a "boom or bust" economic cycle. The consequences this year have been devastating to programs that, for example, provide food to poor children and health care for the elderly disabled. This year's fiscal crisis also has caused the Judicial Council, which I chair, to take the reluctant and unprecedented step of closing all courts in our state one day a month. That decision will enable us to offset approximately one-fourth of the more than $400 million reduction imposed by the other two branches of government on the $4 billion budget of our court system.

The voter Initiative process places additional burdens upon the judicial branch. The court over which I preside frequently is called upon to resolve legal challenges to voter Initiatives. Needless to say, we incur the displeasure of the voting public when, in the course of performing our constitutional duties as judges, we are compelled to invalidate such a measure.

On occasion, we are confronted with a pre-election lawsuit that causes us to remove an Initiative proposal from the ballot because, by combining insufficiently related issues, it violates our state Constitution's single-subject limitation on such measures. At other times, a voter Initiative - perhaps poorly drafted and ambiguous, or faced with a competing or "dueling" measure that passed at the same election - requires years of successive litigation in the courts to ferret out its intended meaning, and ultimately may have to be invalidated in whole or in part.

One thing is fairly certain, however. If a proposal, whatever its nature, is sufficiently funded by its backers, it most likely will obtain the requisite number of signatures to qualify for the ballot, and - if it does qualify - there is a good chance

the measure will pass. The converse certainly is true - poorly funded efforts, without sufficient backing to mount an expensive television campaign - are highly unlikely to succeed, whatever their merit.

This dysfunctional situation has led some to call for the convening of a convention to write a new Constitution for California to replace our current 1879 charter, which in turn supplanted the original 1849 document. Yet, although a recent poll reflects that 79% of Californians say the state is moving in the wrong direction, only 33% believe that the state's Constitution requires "major" changes and approximately 60% are of the view that decisions made by Californians through the Initiative process are better than those made by the legislature and the governor.

Add to this mix a split among scholars concerning whether a constitutional convention, if called, could be limited in the subject matter it is empowered to consider. Some argue that a convention would be open to every type of proposal from any source, including social activists and special interest groups. There also is controversy over the most appropriate procedure for selecting delegates for such a convention.

A student of government might reasonably ask: Does the voter Initiative, a product of the Populist Movement that reached its high point in the early 20th century in the mid-west and western states, remain a positive contribution in the form in which it now exists in 21st century California? Or, despite its original objective - to curtail special interests, such as the railroads, that controlled the legislature of California and of some other states - has the voter Initiative now become the tool of the very types of special interests it was intended to control, and an impediment to the effective functioning of a true democratic process?

John Adams - who I believe never would have supported a voter Initiative process like California's - cautioned that "democracy never lasts long . . . . There is never a democracy that did not commit suicide." The nation's Founding Fathers, wary of the potential excesses of direct democracy, established a republic with a carefully crafted system of representative democracy. This system was characterized by checks and balances that conferred authority upon the officeholders of our three branches of government in a manner designed to enable them to curtail excesses engaged in by their sister branches.

Perhaps with the dangers of direct democracy in mind, Benjamin Franklin gave his much-quoted response to a question posed by a resident of Philadelphia after the adjournment of the Constitutional Convention in 1787. Asked the type of government that had been established by the delegates, Franklin responded: "It would be a republic, if you can keep it." And, as Justice David Souter recently observed in quoting this exchange, Franklin "understood that a republic can be lost."

At a minimum, in order to avoid such a loss, Californians may need to consider some fundamental reform of the voter Initiative process. Otherwise, I am concerned, we shall continue on a course of dysfunctional state government, characterized by a lack of accountability on the part of our officeholders as well as the voting public.

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