No. S189476

IN THE SUPREME COURT OF CALIFORNIA

KRISTIN M. PERRY et al., Plaintiffs and Respondents,

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, Intervenor and Respondent,

v.

EDMUND G. BROWN, JR., as Governor, etc. et al., Defendants,

DENNIS HOLLINGSWORTH et al., Defendants, Intervenors and Appellants.

Question Certified from the U.S. Court of Appeals for the Ninth Circuit
The Honorable Stephen R. Reinhardt, Michael Daly Hawkins,
and N. Randy Smith, Circuit Judges, Presiding
Ninth Circuit Case No. 10-16696

APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS AND [PROPOSED] AMICI CURIAE BRIEF OF JON B. EISENBERG AND PROFESSOR LAURIE L. LEVENSON

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APPLICATION TO FILE BRIEF AS AMICI CURIAE

Pursuant to rule 8.520(f) of the California Rules of Court, Jon B. Eisenberg and Laurie L. Levenson (together, "amici") respectfully request leave to file the attached brief, in support of respondents, to be considered in the above-captioned case. This application is timely made pursuant to the briefing schedule set forth by the court.

A. 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. He received California Lawyer magazine's 2010 "Attorney of the Year" award in constitutional law.

Mr. Eisenberg has a unique interest in the subject matter of this brief—the extent to which Proponents may rely on this court's unexamined dicta concerning the initiative process in arguing that they have standing to appeal.

Mr. Eisenberg has been involved in litigation involving the lesbian, gay, bisexual and transgender community, including representing Guadalupe Benitez before the California Supreme Court in a case about equal access to health care for gays and lesbians, *North Coast Women's Medical Care Group et al. v. Superior Court of San Diego* (2008) 44 Cal. 4th 1145. 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, and he submitted an amicus curiae brief in the United States Court of Appeals for the Ninth Circuit in this case.

B. Laurie L. Levenson

Amicus curiae Laurie L. Levenson is the David W. Burcham Chair in Ethical Advocacy at Loyola Law School. Professor Levenson has written extensively on California criminal law and procedure and legal ethics and is an author of leading treatises such as *California Criminal Law*, *California Criminal Procedure*, and the

Federal Criminal Rules of Procedure Handbook. Professor Levenson has published numerous articles and has commented frequently on the California court system and criminal justice. In her scholarship Professor Levenson has frequently addressed the vital importance of a legal system that respects the constitutional balance of powers.

Professor Levenson has served as an attorney representative to the United States Court of Appeals for the Ninth Circuit and to the United States District Court for the Central District of California. She has been a member of the Los Angeles County Bar Association's Judiciary and Judicial Appointments Committees, as well as a Director of Bet Tzedek Legal Services and the Levitt & Quinn Family Law Center. Professor Levenson also serves as a special master for the Los Angeles County Superior Court and the United States District Court.

Prior to joining the faculty of Loyola Law School, Professor Levenson was a federal prosecutor for many years as an Assistant United States Attorney, Criminal Section. In the U.S. Attorney's Office, Professor Levenson served as a senior trial attorney, assistant division chief, and chief of the appellate section. Additionally, while working in the U.S Attorney's Office, Professor Levenson taught as

an adjunct professor at Southwestern University Law School. Professor Levenson joined the Loyola faculty in 1989 and served as Loyola's associate dean for academic affairs from 1996–99. She has taught as a visiting law professor at the USC Law Center, UCLA School of Law and Pepperdine School of Law.

C. Interests of Amici Curiae

This proceeding raises important issues regarding the constitutional status of California's initiative system, particularly the respective powers and responsibilities of initiative proponents and those of California's Attorney General. In both their practice and their scholarship, Mr. Eisenberg and Professor Levenson have been strong advocates for constitutionalism, the institutional integrity of the court system, and the principles of fairness and equality protected by the California and United States Constitutions.

For these reasons, amici have a substantial interest in the present case.

D. Need For Further Briefing

Amici are familiar with the issues before the court and the scope of their presentation. Amici believe that further briefing is necessary to provide detailed discussion of certain authorities and

arguments that the parties did not have the opportunity to address fully. Specifically, amici will explain how the validity of the initiative process itself is subject to serious constitutional doubt, and argue that as a consequence the court should disregard dicta concerning the popular initiative on which Proponents rely in seeking to justify their purported authority to upend the constitutional balance and supplant the judgment of elected officials who are fully accountable to the people of this state.

Dated: May 2, 2011 KENDALL BRILL & KLIEGER LLP

By: 

Laura W. Brill
Attorneys for Amici Curiae

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I. INTRODUCTION

Proposition 8 sought to strip gay and lesbian Californians of their right to act as full participants in the life of their families and communities by removing their fundamental right to marry.

Following a full trial and judgment on the merits holding that Proposition 8 violates the United States Constitution, the state defendants exercised their discretion to accept the judgment and end the dispute rather than appeal, increase the state's exposure, and prolong the damage that Proposition 8 has caused to gay and lesbian Californians and to the state as a whole.

Plaintiffs-Respondents ("Plaintiffs"), the City and County of San Francisco ("San Francisco"), and Ninth Circuit amicus curiae Equality California have persuasively argued that California law provides no basis for allowing the proponents of Proposition 8 to supersede the judgment of elected officials who exercise their constitutional authority not to appeal an adverse judgment against the state.

This brief addresses an additional reason as to why the court must answer in the negative that portion of the Certified Question that asks the court whether "the official proponents of an initiative

measure . . . possess the authority to assert the State's interest in the initiative's validity [through] an appeal [of] a judgment invalidating the initiative." (*Perry v. Schwarzenegger* (9th Cir. 2011) 628 F.3d 1191, 1193.) Defendants-Intervenors-Appellants ("Proponents") argue at length that giving initiative proponents authority to appeal where the state declines to do so is necessary to protect and preserve the initiative process, which they characterize as a "fundamental" "right" of Californians. (Opening Brief of Proponents ("Proponents' Br."), 2–3.) Proponents do not rely on any language within the California Constitution or other law that would confer upon them such right. Instead, Proponents argue that a grant of authority to initiative proponents to appeal on behalf of the state, while not set forth in the text of either the state Constitution or Proposition 8, can nonetheless be inferred from the authority of "the people" under California's initiative system to control California government. (See *id*. at p. 3 ["At bottom, the ability of official proponents to defend initiatives they have sponsored when public officials refuse to do so – whether as Proponents or as real parties in interest – provides a vitally important means of vindicating 'the sovereign people's initiative power' and thus preserving 'the people's rightful control over their

government'"], citing *Strauss v. Horton* (2009) 46 Cal.4th 364, 421, 453 [93 Cal.Rptr.3d 591, 207 P.3d 48] (hereafter *Strauss*).)

Proponents' argument is flawed. California's initiative process gives Proponents no such authority, and the validity of the initiative process itself is subject to serious constitutional doubt. California's initiative process was originally 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.

Because the initiative process changed the fundamental structure of California government, the power of its branches, and the overall governmental plan, applying the standards most recently set forth in *Strauss*, *supra*, 46 Cal.4th at page 364, a substantial argument exists that the initiative process was unconstitutional when originally added to the California Constitution because such sweeping changes in state governance could be enacted only as a "revision," and not as a mere amendment to the California Constitution. Because of these doubts as to the validity of the initiative process, Proponents'

argument for authority to appeal, based on the purported importance of the initiative process, cannot be sustained. A ruling conferring such authority would allow Proponents to usurp the Attorney General's exclusive right to exercise discretion on this matter and would further alter the structure of California government and the power of the elected branches. Proponents' reliance on dicta from this court and the Court of Appeal concerning the initiative process – from cases that did not raise the potential constitutional infirmity of the initiative process – should be given no weight now.[1]

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[1] Amici wish to be clear about the limited scope of the argument in this brief. Amici do not ask the court to make any ultimate determination as to the constitutionality of the initiative system. That issue, and the related question of how to tailor an appropriate remedy were a constitutional violation ever to be found, are beyond the scope of this brief and unnecessary for the court to address in this case. Were the court ever faced with such issues, suffice it to say that courts of equity have the power to narrowly tailor appropriate relief by, for example, making certain aspects of a remedy prospective only so that measures previously passed by initiative may remain intact but be subject to future legislative amendment (E.g., *Claxon v. Waters* (2004) 34 Cal.4th 367, 378 [18 Cal.Rptr.3d 246, 96 P.3d 496], and/or staying other aspects of a ruling so that democratic processes, including the potential enactment of a reformed initiative process, may run their course (*Baker v. State* (Vt. 1999) 744 A.2d 864, 886; *Goodridge v. Dep't of Pub. Health* (Mass. 2003) 798 N.E.2d 941, 969–70). Such concerns, however, should not make the court wary of the far more limited argument presented here, i.e., that because unresolved questions exist as to the validity of the initiative process, this

II. ARGUMENT

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

In *Strauss*, this court examined at length the distinction between "amendments" and "revisions" to the California Constitution, examining all of the court's prior decisions analyzing the distinction between these two methods of altering the California Constitution. (*Strauss, supra*, 46 Cal.4th at pp. 412–440.) After analyzing the prior cases, this 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 p. 438, italics omitted, quoting *Legislature v. Eu* (1991) 54 Ca1. 3d 492, 508–509 [286 Cal.Rptr. 283, 816 P.2d 1309] (hereafter *Eu*); see also *Strauss, supra*, 46 Cal.4th at pp. 427, 430–445, 452.) If a change to

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court should proceed with caution when asked to expand the powers of initiative proponents, rather than merely accepting unexamined dicta on which Proponents here rely.

the fundamental structure of California government is enacted by amendment, and not revision, it is invalid. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349 [276 Cal.Rptr. 326, 801 P.2d 1077] (hereafter *Raven*); *McFadden v. Jordan* (1948) 32 Cal.2d 330, 334–346 [196 P.2d 787].)

Based on these standards, reaffirmed by this court fewer than two years ago, there is a serious question as to whether the initiative process itself was, at its origin, improperly included within the California Constitution. Addition of the initiative process to the Constitution indisputably was a change in the basic plan of California government and the foundational powers of its branches.

Proposition 8 was enacted as an amendment to the California Constitution through the initiative process established in California in 1911. *Strauss* held that Proposition 8 did not so change the fundamental governmental plan of California as to render Proposition 8 a constitutional "revision," required 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 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 – *i.e.*, those affecting the essential character of the Constitution, the fundamental plan of government, or the powers of the existing branches – could be adopted only by revision, through a constitutional convention, and not by the less deliberative processes reserved for more modest changes. The 1911 amendment through which the initiative process was created changed each of these fundamental aspects of California's governmental plan and could only have been enacted, if at all, 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. of 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, § 1.) 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* (1856) 6 Cal. 361, 36 ["the power of the Legislature is supreme, except where it is expressly restricted"]; *Beals v. Amador* (1868) 35 Cal.624, 630 [the powers of the Legislature "represent[] the independent sovereignty of the people of the State"]; *Ex parte Wall* (1874) 48 Cal. 279, 313 ["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

p. 314 [California is a "representative republic"; warning of dangers of direct democracy], overruled in part on other grounds by *Ex parte Beck* (1912) 162 Cal. 701, 704–05 [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* (1897) 117 Cal. 520, 525 [equating power of California Legislature to that of the British Parliament].)

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 which provided for the structure of state government and could be changed only with an extensive deliberative process. Article XVIII of the 1879 California 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. (*Ibid.*) In the case of an amendment,

the proposed change would then be submitted directly to the people. (*Id*., art. XVIII, § 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*., art. XVIII, § 2.)[2]

In *Livermore v. Waite* (1894) 102 Cal. 113 (hereafter *Livermore*), this 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

[2] Article X of the original 1849 California Constitution contained one section concerning "amendments" to the Constitution and one addressing the process for "revis[ing] 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 procedure which was less cumbersome, but which still involved meaningful deliberation. The modifying language "and changing this entire constitution" was omitted from the article concerning amendments and revisions in the 1879 Constitution.

than a mere amendment. In concluding that the change, while invalid, was not significant enough to require the use of the revision process, this 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 constitution of the United States. . . . . 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 . . . . 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. at pp. 117–119, italics 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*, *supra*, 52 Cal.3d at p. 349–350 [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 (1948) 32 Cal.2d at pp. 334–346 ["far reaching and multifarious" changes altered the "basic plan of government" and were required to be adopted pursuant to revision process]; *Strauss*, *supra*, 46 Cal.4th at p. 382 [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"]; *Eu*, *supra*, 54 Cal.3d at p. 506 [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 they are fundamental to the structure of government. In *Raven*, for example, this court invalidated a purported initiative amendment to the California Constitution which 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. (*Raven*, *supra*, 52 Cal.3d at pp. 342–346, 350.) In so ruling, this court explained that the initiative 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 pp. 352, 355.) "From a qualitative standpoint," *Raven* explained, "the effect of [the amendment] is devastating" to our preexisting governmental plan. (*Id.* at p. 352.)

3. The Amendment 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 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,' *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.*" (Italics added.)

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 be approved by popular vote at an election, except in cases where the initiative ballot measure expressly provides for legislative modification. Similarly, the Legislature lacks the power 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 Mathews & Paul, California Crackup: How Reform Broke the Golden State and How We Can Fix It (2010) p. 44.)

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 Pamp., Special Elec. (Oct. 10, 1911), argument against Senate Constitutional Amendment 22 [Prop. 7] [describing "this radical departure from the government established by our fathers"]; *id.*,

argument in favor of Amendment 22 ["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"].[3] The initiative process has remained essentially unchanged since its inception in 1911. (Cf. Ballot Pamp., General Elec. (Nov. 8, 1966), argument in favor of Prop. 1A, p. 2 [technical revision to "put[] the Constitution into modern, concise and easily understandable language"].)[4]

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[3] 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 <http://library.uchastings.edu/cgi-bin/starfinder/22763/calprop.txt> & <http://traynor.uchastings.edu/ballot_pdf/1911g.pdf> at p. 6 [as of April 27, 2011].

[4] The 1966 revisions to the California Constitution, accomplished by a reenactment which included the provisions pertaining to the initiative process, cannot be said to have cured the constitutional doubts regarding the adoption of Amendment 22. The voters were never informed that the 1966 revisions were designed to have any such effect. Rather, "The 1966 constitutional revision was intended *solely* to shorten and simplify the Constitution, deleting unnecessary provisions; *it did not enact any substantive change in the power of the Legislature and the people*." (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 595, fn. 12[135 Cal.Rptr. 41, 557 P.2d 473], italics added (hereafter *Associated Home Builders*); see also *People ex rel. S.F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 538 [72 Cal.Rptr. 790, 446 P.2d 790] ["The elimination of such surplusage, which was one of the primary tasks of

Under the California case law recently reaffirmed in *Strauss*, this 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 California government,'" and "'a change in [the] fundamental [governmental] structure or the foundational powers of its branches.'" (*Strauss*, *supra*, 46 Cal.4th at p. 438 [quoting *Eu, supra*, 54 Ca1.3d at pp. 508–509].) 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 anything less than a change in the basic plan of California

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the [California Constitution Revision Commission], . . . has no substantive significance"].)

government and to its fundamental structure and the power of its branches.

B. Dicta Concerning The Initiative Process Is Not a Basis For Conferring Standing On Proponents, Because This Court Has Never Considered The Constitutionality Of The Initiative Process Itself.

Proponents' argument that they have authority to appeal on behalf of the state relies on judicial dicta about the nature and the role of the initiative in California history. Proponents assert that they must be granted authority to appeal because case law describes the initiative process as "important," "favored," or "fundamental." (See, e.g., Proponents' Br., *supra*, at pp. 20–21 ["In all events, this conclusion – that the official proponents may represent the People's interest in defending the validity of successful initiatives when public officials refuse to do so – follows ineluctably from the 'important and favored status' that 'the initiative process occupies . . . in California's constitutional scheme'"], citing *Senate v. Jones* (1999) 21 Cal.4th 1142, 1157 [90 Cal.Rptr.2d 810, 988 P.2d 1089]; *id*. at p. 2 ["a citizen's exercise of the initiative powers enshrined in the California Constitution is a 'fundamental right'"], citing *Costa v. Superior Court*

(2006) 37 Cal.4th 986, 1007 [39 Cal.Rptr.3d 470, 128 P.3d 675]; *id.* at pp. 20–22 [citing additional dicta].)

However, the dicta cited by Proponents is just that – dicta. This court has never considered the constitutional validity of the initiative process itself, and general statements made about the initiative process that did not seriously consider its constitutional validity or role in the overall structure of California government should not be the basis for granting Proponents the power to defend initiatives and effectively nullify the executive discretion vested in state officials. (See *People v. Soto* (2011) 51 Cal.4th 229, 247 & fn. 2 [119 Cal.Rptr.3d 775, 245 P.3d 410] [disapproving numerous decisions that had been based on this court's dicta 27 years earlier, and noting that decisions based on such dicta could not comprise an alleged "virtually unbroken line of authority"]; *Klein v. U.S.* (2010) 50 Cal.4th 68, 71 [112 Cal.Rptr.3d 722, 235 P.3d 42] [rejecting court's earlier dictum because, when drafted, it was "unnecessary to the decision"]; *People v. Scheid* (1997) 16 Cal.4th 1, 17 [65 Cal.Rptr.2d 348, 939 P.2d 748] ["Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for

a proposition not therein considered"], quoting *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 [39 Cal.Rptr. 377, 393 P.2d 689].)

A close examination of the cases cited by Proponents, and the history of this court's jurisprudence on the initiative and referendum, reveals that the dicta upon which the Proponents rely was not based upon any reasoned consideration of the validity of the initiative process itself. Indeed, it is telling that the first case cited by the Proponents in support of their contentions about the favored status of the initiative process is a decision from the Court of Appeal dating from 1959 – or more than 45 years after the initiative was originally (and questionably) added to the Constitution. (Proponents' Br., *supra*, at p. 21 citing *Martin v. Smith* (1959) 176 Cal.App.4th 232, 234 [97 Cal.Rptr.3d 555] .)

The first California appellate decision to comment upon the overall effect of the initiative process was *McClure v. Nye* (1913) 22 Cal.App. 248, 251. That case dealt with the timing by which certain legislative enactments went into effect, a subsidiary measure that had been enacted as part of Amendment 22. (*Ibid.*) In that case, in which the underlying validity or importance of the initiative process was not in any way considered, the Court of Appeal merely noted the

common-sense proposition that "[t]his amendment to the constitution provides a scheme for the exercise of what is known as the initiative and referendum and, of course, if possible, the language should be construed so as to make effective this reservation of power on the part of the people." (*Ibid.*) In other words, the Court of Appeal simply took at face value the language of Amendment 22 itself and expressed its duty to make effective the language of that Amendment – it did not assert any broader interpretation of the importance or overall validity of the initiative process itself.

That same limited, common-sense interpretation of the initiative process was expressed throughout decisions from this court and the Court of Appeal in the early years of the initiative process. In numerous early initiative cases, which dealt primarily with the local initiative scheme that was part of Amendment 22 and is now found at article II, section 11 of the Constitution, this court issued decisions making clear that, while the process of initiative and referendum had reserved a "part" of the legislative power to the people, the existence of the initiative and referendum process was *not* to be broadly construed as infringing on *other* areas reserved to the legislative or executive branches. (See *Newsom v. Bd. of Sup'rs of Contra Costa*

County (1928) 205 Cal. 262, 271 [holding that the local initiative process could not extend to procedures for granting licenses to erect and maintain toll bridges, and finding that "A determination that direct legislation was not intended to apply to all actions of subordinate governmental bodies involving in part the exercise of the legislative function is not new in this state"]; *Hyde v. Wilde* (1921) 51 Cal.App. 82, 86 [limiting use of the local initiative process imposed by Amendment 22]; *Hurst v. City of Burlingame* (1929) 207 Cal. 134, 141–142 [local initiative invalidated], overruled by *Associated Home Builders*, *supra*, 18 Cal.3d at p. 588 [overruled on grounds that zoning act did not conflict with the initiative process]; *Chase v. Kalber* (1915) 28 Cal.App. 561, 563 [steps necessary to be taken for the improvement of streets were not intended to come within either the power of either the initiative or the referendum]; *Starbuck v. City of Fullerton* (1917) 34 Cal.App. 683, 684–85 [same].)

Even in cases in which the power to enact legislation by initiative was upheld, this court expressed only a limited vision of the initiative process, one that emphasized that the people, while reserving to themselves a portion of the legislative power, had reserved only a "part" of that power. (*Dwyer v. City Council of*

Berkeley (1927) 200 Cal. 505, 513.) In *Dwyer*, this court held that the City of Berkeley could enact by referendum a zoning ordinance that the Berkeley City Council would indisputably have had the power to enact by ordinary legislation. (*Ibid.*) This court made no mention of the broader constitutionality of the initiative process itself. In *Ley v. Dominguez* (1931) 212 Cal. 587, 593, this court addressed whether or not signatures needed to place certain referendums for a ballot election in the City of Los Angeles had been properly tabulated by the clerk; the *Ley* court said simply that election statutes dealing with the initiative and referendum should be given the same construction given to election statutes generally, noting that the power of initiative and referendum was framed by the language of Amendment 22 as being a power reserved by the people, not a grant of power to them. Nothing in this court's early jurisprudence suggests a broader conclusion regarding the nature or constitutional status of the initiative process – while the court held that initiative measures should be construed in the same manner as other electoral statutes, the court said nothing about the overall validity or importance of the initiative process.

In subsequent decades, certain decisions of this court and the Court of Appeal amplified the rhetoric concerning the initiative

process, but never with a citation to underlying authority, and never in a case in which this rhetoric was necessary to the court's holding. For example, in *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332, the court noted in passing that "[t]he right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter," but the actual holding of that case was that a proposed initiative must be stricken from the ballot as it was clearly an attempt at an improper revision of the Constitution. In two Court of Appeal cases that have been cited by this court, *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117 (hereafter *Martin*), and *Mervynne v. Acker* (1961) 189 Cal.App.2d 558 (hereafter *Mervynne*), this rhetoric was amplified, but again on the basis of bare assertion—without any analysis whatsoever of the role of the initiative in California history or the validity of its enactment. (See *Martin, supra,* 176 Cal.App.2d at p. 117 [stating, without analysis, that it is "the duty of the courts to jealously guard the rights of the people]; *Mervynne, supra,*189 Cal.App. 2d at p. 563 [initiative is "one of the most precious rights of our democratic process"].) These opinions, in turn, were cited in *Associated Home Builders*, which described Amendment 22 as "one of the outstanding achievements of

the progressive movement of the early 1900's," and this same unexamined rhetoric has been used by this court in subsequent decisions. (*Associated Home Builders, supra*,18 Cal.3d at p. 591; see *Independent Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020, 1032 [44 Cal.Rptr.3d 644] [citing *Associated Home Builders*].) And it is precisely these cases – and this same unsupported dicta that does *not* reflect a considered analysis of the nature of the initiative process – that Proponents cite in their brief. (See Proponents' Br. at pp. 20–22; *Senate v. Jones* (1999) 21 Cal.4th 1142, 1156 [90 Cal.Rptr.2d 810, 988 P.2d 1089] [describing the "cherished" role of the initiative in the constitutional system]; *Strauss, supra,* 46 Cal.4th at p. 463 [discussing initiative system].) Notably absent from Proponents' brief and the cited cases is any discussion of whether the initiative system itself was validly enacted by amendment to the California Constitution.

Recently, this court has considered at length the unique California requirement restricting the Legislature from amending statutes enacted by initiative. (*People v. Kelly* (2010) 47 Cal.4th 1008, 1030–1041 [103 Cal.Rptr.3d 733].) *Kelly* makes clear the dubious constitutional status of the initiative process created through

an amendment, rather than a revision, to the Constitution, by highlighting the extent to which the initiative process effected a structural change in California government. (*Id.* at p. 1036 [noting that California, "more strictly than any other state (then or now) . . . withheld all independent authority from the Legislature to take any action on measures enacted by initiative, unless the initiative measure itself specifically authorized such action"].) *Kelly* did not, however, consider the underlying question of whether California could have adopted such a far-sweeping change in its governance by use of a constitutional amendment, as opposed to a revision.

In short, dicta notwithstanding, this court has never considered whether the initiative process was validly enacted into the California Constitution.

While this case does not raise a direct challenge to the initiative process, the constitutionally questionable status of the initiative process itself suggests at least two reasons why Proponents' standing arguments should fail. First, the court need not, and should not, reach any conclusion whatsoever about Proponents' entitlement to standing based on mere dicta concerning the role of the initiative. That dicta

was written without full consideration of the constitutional implications of the initiative process.

Second, giving Proponents standing to represent the state in constitutional litigation when nothing in the California Constitution provides for such authority, and when the elected officials who do have that authority have exercised their discretion not to act, would make the questions about the validity of the initiative process even more serious. The conferral of such authority would represent even more of a change in the fundamental structure of California government and the power of its branches and would therefore create additional constitutional implications that the court should strive to avoid. (See *In re Klor* (1966) 64 Cal.2d 816, 821 [51 Cal.Rptr. 903, 415 P.2d 791] ["A fundamental canon of statutory interpretation requires that a statute be construed to avoid unconstitutionality if it can reasonably be so interpreted"].)

Third, despite Proponents' arguments, nothing fundamental within the initiative process itself could confer upon Proponents an extra-constitutional and extra-statutory right to take the place of the Attorney General in representing the interests of the State of California in federal constitutional litigation. And the creation of any

such a power in unelected and unaccountable initiative proponents would render California's system of governance even more "dysfunctional" than it is today. (See Chief Justice Ronald M. George, Remarks at the American Academy of Arts and Sciences Induction Ceremony (Oct. 10, 2009), The Perils of Direct Democracy: The California Experience <http://www.courts.ca.gov/7884.htm> [as of April 27, 2011] [condemning effects of initiative process on state government and predicting that 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"].)[5]

III. CONCLUSION

As shown above, the validity of the initiative process itself is subject to serious constitutional doubts, which no prior decision of this court has examined. The court should disregard dicta on which Proponents rely in seeking to justify their authority to upend the

[5] Additionally, construing the populist language of Amendment 22 to transfer executive power and discretion to a small faction, and out of the hands of elected officials, would have the ironic consequence of diminishing the sovereignty the people purported to reserve to themselves through that amendment.

constitutional balance and supplant the judgment of elected officials who are fully accountable to the people of this state. The court should answer the Certified Question in the negative.

Dated: May 2, 2011 KENDALL BRILL & KLIEGER LLP

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I certify that the foregoing brief is double-spaced and printed in 14-point Times New Roman font. It is 32 pages long and contains 6,502 words (excluding the cover, the application to file, the tables, this certificate, and the proof of service). In preparing this certificate, I relied upon the word count generated by Microsoft Word 2007.

Dated: May 2, 2011

KENDALL BRILL & KLIEGER LLP

By: Ashlee R. Lynn

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PROOF OF SERVICE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 10100 Santa Monica Blvd., Suite 1725, Los Angeles, California 90067.

On May 2, 2011, I served true copies of the following document(s) described as **APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS AND [PROPOSED] AMICIE CURIAE BRIEF OF JON B. EISENBERG AND PROFESSOR LAURIE L. LEVENSON** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope addressed to each interested party at the address indicated above or on the attached service list. I placed each such envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Kendall Brill & Klieger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 2, 2011, at Los Angeles, California.

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