No. S168047

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, et al.,

Petitioners,

vs.

MARK D. HORTON, as State Registrar of Vital Statistics, et al.,

Respondents;

DENNIS HOLLINGSWORTH, et al.,

Interveners

APPLICATION FOR PERMISSION TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF; [PROPOSED] BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

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APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE

Pursuant to Rule 8.200(c)(1) of the California Rules of Court, Erin Figueroa, Morgan Oliveira and Christina Demuth (collectively, the "Figueroa Amici") respectfully submit this application for permission to file the accompanying amicus curiae brief in support of the Petitions filed by Karen L. Strauss, et al., Robin Tyler, et al., The City and County of San Francisco, et al., The Asian Pacific American Legal Center, et al., Equal Rights Advocates and The California Women's Law Center, and The California Council of Churches, et al. (collectively "Petitioners").

I. STATEMENT OF INTEREST.

Erin Figueroa and Morgan Oliveira are a same-sex couple who were married on October 29, 2008 in San Francisco, California. On November 4, 2008, California voters passed Proposition 8, which purports to eliminate the right of same-sex couples to marry in California. Following the passage of Proposition 8, Petitioners filed actions seeking to stay and overturn Proposition 8. On November 19, 2008, this Court denied Petitioners' requests for a stay, but certified three issues for briefing, including the issues of whether Proposition 8 is a valid amendment to the California Constitution and whether Proposition 8 should apply retroactively. Ms. Figueroa and Ms. Oliveira have a direct interest in this matter as the rights and privileges that accompany their marriage are at risk if this Court determines that Proposition 8 is both valid and retroactive.

Christina Demuth is an unwed gay female who would like the opportunity to marry an individual of her choosing at some time in the

future. Ms. Demuth has a direct interest in this matter as the rights and privileges that accompany her legal ability to marry a woman of her choosing are at risk if this Court determines that Proposition 8 is valid.

II. HOW THE PROPOSED BRIEFING WILL ASSIST THE COURT.

The Figueroa Amici endorse the arguments advanced by Petitioners in support of their request that this Court overturn Proposition 8 on the grounds that it constitutes an invalid revision of the California Constitution. The purpose of this brief, however, is not to repeat those well-made arguments for the Court. Instead, the Figueroa Amici have focused their brief on analyzing the primary precedent relied upon by the California Attorney General (the "Attorney General") and Dennis Hollingsworth, et al. ("Interveners") to support the argument that Proposition 8 was properly submitted to the electorate as a simple ballot initiative. The Figueroa Amici contend that the precedential value of these authorities is overstated by the Attorney General and the Interveners and does not bind this Court to find that Proposition 8 was a valid amendment to the California Constitution. Simply put, none of these cases hold that a simple ballot initiative can be used to deprive Californians of their *substantive* constitutional rights—including the right of all Californians to marry the person of their choice.

III. CONCLUSION.

For the foregoing reasons, the Figueroa Amici respectfully request that the Court accept the enclosed brief for filing and consideration.

Dated: January 15, 2009

HAUSFELD LLP
Christopher L. Lebsock
Jon T. King

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By: _____
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I. INTRODUCTION.

The issue of whether Proposition 8 constitutes a revision or an amendment to the California Constitution has been thoroughly briefed by both the proponents and opponents of Proposition 8. The Figueroa Amici endorse all of Petitioners' arguments against the validity of Proposition 8. In particular, they support Petitioners' equal protection argument that the electorate may not use the initiative-amendment process to strip a minority group defined by a suspect classification of a fundamental constitutional right.

The purpose of this amicus brief, however, is not to reiterate Petitioners' compelling arguments. Rather, it is to closely examine the distinction between a constitutional amendment and a constitutional revision as articulated in certain prior Supreme Court opinions that are heavily relied upon by the California Attorney General (the "Attorney General") and Dennis Hollingsworth, et al. ("Interveners") to support their contention that the initiative-amendment process can be used to deprive California citizens of *substantive* constitutional rights. The Figueroa Amici believe that the Attorney General and Interveners misconstrue and overstate the views expressed by the Court in these opinions. By limiting the focus of their brief, the Figueroa Amici hope to provide this Court with additional legal analysis that will be useful in determining that Proposition 8 is an invalid revision of the California Constitution.

The analysis that follows demonstrates that none of the primary authorities relied upon by the Attorney General and Interveners have directly addressed the situation presently before the Court—whether a

simple ballot initiative can eliminate *substantive* constitutional rights of California's citizenry.

II. THE RELEVANT AUTHORITIES RELIED UPON BY THE ATTORNEY GENERAL AND THE INTERVENERS DO NOT SUPPORT A CONCLUSION THAT PROPOSITION 8 IS A VALID AMENDMENT TO THE CALIFORNIA CONSTITUTION.

A. *People v. Frierson.*

In 1979, the California Supreme Court decided *People v. Frierson*, 25 Cal.3d 142 (1979) ("*Frierson*"). The *Frierson* case concerned an appeal following the trial court's imposition of a death penalty sentence for first-degree murder. The California Supreme Court reversed the defendant's murder conviction because the "defendant was deprived of adequate and effective representation during both the guilt and penalty phases of his trial . . . ." *Id.* at 151. Nevertheless, the Court analyzed and then rejected a number of additional arguments made by the defendant, including an argument that Cal. Const., art. I, §27 (reintroduction of the death penalty by initiative-amendment) constituted an improper revision of the California Constitution.[1]

The Attorney General and the Interveners rely on *Frierson* to argue that fundamental constitutional rights can be taken away via the initiative-amendment process. Their argument is built on a series of events that took

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[1] Because the defendant's conviction was reversed, Justice Mosk has noted that the balance of the *Frierson* opinion should not be viewed as binding precedent. *See Legislature v. Eu,* 54 Cal.3d 492, 541 (1991) (conc. & dis. opn. of Mosk, J.) (stating that in *Frierson* "a plurality of the court considered in dictum whether a 1972 initiative measure was amendatory or revisory").

place over the course of seven years during the 1970s. The Attorney General and the Interveners first note that in 1972, the California Supreme Court held that the death penalty was deemed to be an unconstitutionally cruel form of criminal punishment. *See People v. Anderson*, 6 Cal.3d 628 (1972) ("*Anderson*"). Shortly thereafter, an initiative was introduced and passed by the people of California to reverse that decision. In 1977, more than two-thirds of both houses of the Legislature voted to revise the manner in which death sentences could be imposed. In 1978, the death penalty statute was amended once again by an initiative passed by the electorate. *See Frierson*, 25 Cal.3d at 173-175, 186. Finally, in the 1979 *Frierson* decision, this Court elected to "uphold the death penalty statute" despite a challenge that it effectuated an unlawful constitutional revision. *Id.* at 151, 186. From this series of events, the Attorney General and Interveners conclude that *Frierson* stands for the proposition that fundamental constitutional rights, such as the right to be free of the death penalty, can be revoked by a simple majority vote at the ballot box. *See, e.g.*, Interveners' Response to Pages 75-90 of the Attorney General's Answer Brief at 16-18; Attorney General's Answer Brief in Response to Petition for Extraordinary Relief at 41 and 91. This overly simplistic analysis ignores two important factual and procedural aspects of the *Frierson* case that substantially undermine its precedential value in resolving the validity of Proposition 8.

First, the defendant in *Frierson* argued that an impermissible constitutional revision had been effectuated because his right to "judicial review" of his death sentence had been eliminated. *Frierson*, 25 Cal.3d at 186. The Court rejected this argument, explaining that a revision had not

occurred because "we retain broad powers of judicial review of death sentences to assure that each sentence has been properly and legally imposed." *Id.* at 187. Consequently, the Court held "that the constitutional change...is not so broad as to constitute a fundamental constitutional revision." *Id.* That is not the case with respect to Proposition 8, however, because the Court would no longer have *any authority* to protect the substantive right of gays and lesbians to marry the individual of their choice.

Second, although the *Frierson* Court affirmed the constitutionality of the death penalty, it did so only after concluding that the procedural requirements for a constitutional *revision* had been substantially satisfied in the years since *Anderson* was decided. A revision to the California Constitution is permissible where there is an approval of two-thirds of both houses of the Legislature and ratification by a majority of the electorate. *See* Cal. Const., art. XVIII, §§ 1, 4. In upholding the constitutionality of the death penalty, the *Frierson* Court determined that each of these requirements for a permissible constitutional revision had occurred:

> We think it significant that the Legislature adopted the 1977 legislation over the Governor's veto, necessitating the concurrence of not less than two-thirds of the membership of each house...Furthermore, just last year the people of California, again through an initiative and by an even larger majority than in 1972, extended the class of special circumstances which may invoke the [death] penalty.

25 Cal.3d at 186.

While *Frierson* recognized that the requirements for a constitutional revision had been fulfilled regarding the imposition of the death penalty, the

opposite is true with respect to Proposition 8's intent to ban same-sex marriage. Indeed, in recent years the California Legislature has twice passed legislation that would have amended California's Family Code to *allow* same-sex couples to marry, once in 2005 and again in 2007. *See In re Marriage Cases*, 43 Cal.4th 757, 797 n.17 (2008) ("*Marriage Cases*"). Thus, unlike the proposition at issue in *Frierson*, the debate over Proposition 8 does not involve facts that would warrant recognizing a *de facto* revision to the California Constitution.

B. *Brosnahan v. Brown* and *In re Lance W.*

In 1982, the electorate passed Proposition 8 (1982), a ballot initiative that altered certain procedural rights and evidentiary rules provided by the California Constitution. In *Brosnahan v. Brown*, 32 Cal.3d 236 (1982) ("*Brosnahan*"), the California Supreme Court was called upon to decide whether these changes constituted an improper revision of the Constitution (an "article XVIII challenge"), and ultimately decided that relatively minor changes regarding the bail system, the right to victim restitution and certain evidentiary rules did not qualify as a constitutional revision. *Id.* at 260.

Three years later, the California Supreme Court decided *In re Lance W.*, 37 Cal.3d 873 (1985) ("*Lance W.*"), another case involving a challenge to Proposition 8 (1982). In the case at bar, the Attorney General has suggested that dicta from *Lance W.* might be construed to allow "the people" to amend the California Constitution by repealing an entire section of the Declaration of Rights, particularly the right to be free from unlawful searches and seizures set forth in art. I, §13.[2] *See* Attorney General's

[2] California Constitution, art. 1, § 13 provides: "The right of the people to be secure in their persons, houses, papers, and effects against

Answer Brief in Response to Petition for Extraordinary Relief at 41. *Lance W.*, however, did not hold that such a drastic change could be effectuated simply by ballot initiative and was decided on much more limited grounds.[3]

Specifically, *Lance W.* concerned an article XVIII challenge to Proposition 8 (1982). The Supreme Court framed the article XVIII issue by explaining the function of Proposition 8 (1982) as follows:

> What Proposition 8 does is to eliminate a judicially created *remedy* for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled.

Lance W., 37 Cal.3d at 886-887 (emphasis in original).

Thus, the proposition at issue in *Lance W.* merely eliminated a judicially created evidentiary limitation, not *substantive rights* protected by the California Constitution. *Id.* at 887 ("The fact remains, however, that [Proposition 8] relate[s] to remedy rather than the scope of substantive rights protected by either Constitution").

Unlike the rights at issue in *Brosnahan* and *Lance W.*, the right of same-sex couples to marry the person of their choosing is a *substantive*

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unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

[3] Removing an entire section of the Declaration of Rights from the Constitution and thereby leaving it to the Legislature to regulate the nature and extent of those rights seems to be precisely the type of "fundamentally disruptive" ballot measure that could not be properly enacted without a formal "revision" of the Constitution. *See Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208, 223-224 (1978) ("*Amador*") (suggesting that transferring judicial powers to the Legislature would be "fundamentally disruptive," requiring a formal revision of the Constitution).

right protected by the California Constitution. *See Marriage Cases*, 43 Cal.4th at 820 ("In light of the fundamental nature of the substantive rights embodied in the right to marry—and their central importance to an individual's opportunity to live a happy, meaningful, and satisfying life as a full member of society—the California Constitution properly must be interpreted to guarantee this basic civil right to *all* individuals and couples, without regard to their sexual orientation.").

C. *Raven* and *Bowens.*

Two additional Supreme Court cases relied upon by the Attorney General and Interveners concern changes wrought by Proposition 115 (also known as the "Crime Victims Justice Reform Act"). *See Raven v. Deukmejian*, 52 Cal.3d 336 (1990) ("*Raven*") and *Bowens v. Superior Court*, 1 Cal.4th 36 (1991) ("*Bowens*"). Proposition 115 effectuated a package of changes to the criminal statutes and the Constitution, purportedly to restore "balance and fairness to our criminal justice system." *Raven*, 52 Cal.3d at 340.

In *Raven*, an article XVIII challenge was made to Proposition 115 on the ground that the constitutional changes provided for in the ballot measure necessitated a formal revision to the Constitution. While summarily upholding some of the constitutional changes, the Court noted:

> Petitioners' arguments focus primarily on a single provision of Proposition 115, namely, the amendment to article I, section 24, of the state Constitution relating to the independent nature of certain rights guaranteed by that Constitution. (The additional constitutional changes effected by Proposition 115, involving such isolated matters as postindictment preliminary hearings, joinder of cases, use of

> hearsay, reciprocal discovery, and the People's right to due process and a speedy, public trial, cannot be deemed matters which standing alone, or in the aggregate, substantially change our preexisting governmental framework.)

Id. at 350.

The Court then proceeded to invalidate the portion of Proposition 115 relating to the purported changes to article I, §24 on the ground that it constituted an improper revision to the Constitution because "Proposition 115 contemplates a . . . qualitative change. In essence and practical effect, new article I, section 24, would vest all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court. From a qualitative standpoint, the effect of Proposition 115 is devastating." *Id.* at 352 (emphasis in original).

With respect to the remaining constitutional changes that were not the "focus" of the article XVIII challenge, none of them concerned *substantive* constitutional rights. Instead, these provisions concerned mere procedural rights and ancillary evidentiary rules. For example, one of the rights affected by Proposition 8 (1982), the right to a post-indictment preliminary hearing, has been described by this Court as a procedural rather than a substantive right. *See Hawkins v. Superior Court*, 22 Cal.3d 584, 587 (1978), *overruled on other grounds* (describing the right to a preliminary hearing as a procedural right). Indeed, *Raven* itself describes the constitutional changes effectuated by Proposition 115 as procedural rights. *See Raven*, 52 Cal.3d at 347.

Like *Raven*, the *Bowens* opinion concerned an analysis of Proposition 115, but *Bowens* did not involve an article XVIII challenge and

is, therefore, of little guidance here. In sum, when taken together, neither *Raven* nor *Bowens* can fairly be read to stand for the proposition that *substantive* constitutional rights can be stripped from California's citizens through a simple ballot measure.

D. The Court's Prior Decisions Suggest That Substantive Constitutional Rights May Not Be Eliminated By A Simple Majority Vote.

Although the above discussed cases do not have the precedential force that the Attorney General and Interverners suggest, this Court's prior decisions do provide guidance in evaluating Petitioners' article XVIII challenge to Proposition 8. As the Court has previously noted:

> Many years ago, in *Livermore v. Waite* (1894) 102 Cal. 113, 118-119 . . . we described the fundamental distinction between revision and amendment as follows: "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.*"

Amador, 22 Cal.3d at 222 (emphasis added).

Proposition 8's exclusion of our gay and lesbian neighbors from exercising the substantive right to marry the person of their choice is not simply a change "within the lines" of the existing framework of article I. To the contrary, preventing California's citizens from freely exercising the right to choose whom to marry is a violation of their *substantive*

constitutional rights. *See Marriage Cases*, 43 Cal.4th at 820 (same-sex marriage is a substantive constitutional right); *see also Lance W.*, 37 Cal.3d at 887 (explaining that the amendment at issue did not limit the "scope of substantive rights protected by either Constitution"). When it comes to eliminating substantive constitutional rights, including the right to marry the person of one's own choosing, such a change cannot legitimately be said to occur by ballot measure alone.

III. CONCLUSION.

Notwithstanding the contentions by the Attorney General and the Interveners, the relevant case law does not hold that voters can use the initiative-amendment process to eliminate substantive rights. In fact, existing precedent stands to the contrary. For the reasons set forth above, the Figueroa Amici join with Petitioners in requesting that the Court invalidate Proposition 8.

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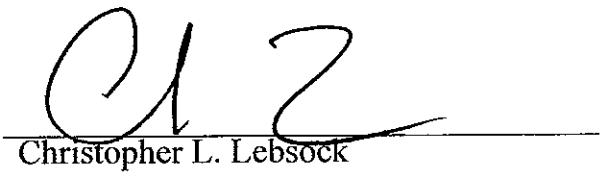
Dated: January 15, 2009

Respectfully Submitted,



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CERTIFICATION OF WORD COUNT

I, Christopher L. Lebsock, certify:

1. I am employed by Hausfeld LLP in the County of San Francisco, State of California. My business address is 44 Montgomery Street, Suite 3400, San Francisco, CA 94104.

2. The total word count of the document entitled:

[PROPOSED] BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 15, 2009, at San Francisco, California.

Christopher L. Lebsock

PROOF OF SERVICE BY MAIL

I, Kathleen Vance, declare:

1. I am over the age of 18 and not a party to the within cause. I am employed by Hausfeld LLP in the County of San Francisco, State of California. My business address is 44 Montgomery Street, Suite 3400, San Francisco, CA 94104.

2. On January 15, 2009, I served a true copy of the attached document entitled:

APPLICATION FOR PERMISSION TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF; [PROPOSED] BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

by placing it in addressed, sealed envelopes clearly labeled to identify the persons being served at the addresses set forth on the attached service list, and placed said envelopes in my firm's Office Services outgoing U.S. mailbox tray for collection and deposit with the United States Postal Service, on this same day, following ordinary business practices.

3. I am familiar with Hausfeld LLP's practice for collection and processing correspondence for mailing with the United States Postal Service with first class postage thereon fully prepaid on the same day it is placed for collection and mailing.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 15, 2009, at San Francisco, California.

Kathleen Vance

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