

Nos. S168047/S168066/S168078

IN THE SUPREME COURT OF CALIFORNIA
En Banc

KAREN L. STRAUSS et al., Petitioners,
v.
MARK B. HORTON et al., State Registrar of Vital Statistics, etc.,
Respondent;
DENNIS HOLLINGSWORTH et al., Intervenors.

SUPREME COURT
FILED

ROBIN TYLER, et al., Petitioners,
v.
STATE OF CALIFORNIA et al., Respondents,
DENNIS HOLLINGSWORTH et al., Intervenors.

JAN 15 2009

Frederick K. Ohlrich Clerk
Deputy

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners,
v.
MARK B. HORTON et al., as State Registrar of Vital Statistics, etc.,
Respondent;
DENNIS HOLLINGSWORTH et al., Intervenors.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS
FILED ON BEHALF OF

CALIFORNIA FEDERATION OF LABOR, AFL-CIO
NATIONAL FEDERATION OF FEDERAL EMPLOYEES
SCREEN ACTORS GUILD
UNITE HERE!
ALAMEDA LABOR COUNCIL, AFL-CIO
FRESNO-MADERA-TULARE-KINGS COUNTIES CENTRAL LABOR
COUNCIL, AFL-CIO
LOS ANGELES COUNTY FEDERATION OF LABOR, AFL-CIO
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SAN FRANCISCO LABOR COUNCIL, AFL-CIO
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CALIFORNIA FEDERATION OF TEACHERS, AMERICAN
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CALIFORNIA FACULTY ASSOCIATION
CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES
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AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL
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EMPLOYEES, LOCAL 3299, AFL-CIO
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL
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INTRODUCTION

The California Federation of Labor, AFL-CIO, and the 52 other organizations filing this brief represent more than two million working men and women in California.¹ These amici curiae [“Amici” or “Labor Amici”]

¹ California Federation of Labor, AFL-CIO; National Federation of Federal Employees; Screen Actors Guild; UNITE HERE!; Alameda Labor Council, AFL-CIO; Fresno-Madera-Tulare-Kings Counties Central Labor Council, AFL-CIO; Los Angeles County Federation of Labor, AFL-CIO; Sacramento Central Labor Council, AFL-CIO; San Mateo County Central Labor Council, AFL-CIO; San Francisco Labor Council, AFL-CIO; South Bay Labor Council, AFL-CIO; California Federation of Teachers, American Federation of Teachers, AFL-CIO; California Faculty Association; California Nurses Association/National Organizing Committee; American Federation of State, County, and Municipal Employees, District Council 57, AFL-CIO; American Federation of State, County, and Municipal Employees, Local 2019, AFL-CIO; American Federation of State, County, and Municipal Employees, Local 2428, AFL-CIO; American Federation of State, County, and Municipal Employees, Local 3299, AFL-CIO; American Federation of State, County, and Municipal Employees, Local 3916, AFL-CIO; American Federation of Teachers, Local 6119, Compton Council of Classified Employees, AFL-CIO; American Federation of Teachers, Local 6157, San Jose/Evergreen Faculty Association, AFL-CIO; El Camino College Federation of Teachers, Local 1388, California Federation of Teachers, American Federation of Teachers, AFL-CIO; United Educators of San Francisco, AFT/CFT Local 61, AFL-CIO, NEA/CTA; University Council-American Federation of Teachers; Association of Flight Attendants-CWA; Communications Workers of America District 9, AFL-CIO; Association of Flight Attendants-CWA, Council 97; Association of Flight Attendants-Cwa, Council 99; Communications Workers of America, Local 9000, AFL-CIO; Communications Workers of America, Local 9503, AFL-CIO; Communications Workers of America, Local 9505, AFL-CIO; Communications Workers of America, Local 9421, AFL-CIO; Communications Workers of America, Local 9575, AFL-CIO; District Council of Ironworkers of the State of California and Vicinity; Jewish Labor Committee Western Region; Maintenance Cooperation Trust Fund; National Federation of Federal Employees, Local 1450; Operative Plasterers’ and Cement Masons’ Local 300, AFL-CIO; Operative Plasterers’ and Cement Masons’ Local 400, AFL-CIO; Pride at Work, AFL-CIO; SEIU California State Council; SEIU Local 521; SEIU Local 721; SEIU Local 1000; SEIU Local 1021; SEIU Local 1877; SEIU United Healthcare Workers West; Teamsters Joint Council 7, International Brotherhood of Teamsters; Teamsters Local 853, International Brotherhood of Teamsters; United Food and Commercial Workers, Local 5; UNITE HERE Local 19; United Steelworkers, Local 5, Martinez, CA; University Professional and Technical Employees, Communications Workers of America, Local 9119, AFL-CIO;

support Petitioners in these actions. Labor Amici assert that any change to the California Constitution that takes away fundamental rights or that divides citizens into suspect classes must be accomplished by a “revision” of the Constitution, and not the simple “amendment” employed in Proposition 8. Labor Amici assert that all marriages in California must be given equal respect and dignity.

I.
IF A FUNDAMENTAL RIGHT IS TO BE TAKEN AWAY
IT MUST BE DONE BY “REVISION” OF THE CONSTITUTION

Proposition 8, if upheld, would strip one class of citizens of a fundamental right – the freedom to marry “the person of one’s choice.” *Perez v. Sharp* (1948) 32 Cal.2d 711, 717;² *In re Marriage Cases* (2008) 43 Cal.4th 757.³ If a simple majority of voters can take away one fundamental right, it can take away another. If it can deprive one class of citizens of their rights, it can deprive another class, too. Today it is gays and lesbians who are singled out. Tomorrow it could be trade unionists.⁴

The California Supreme Court has held:

Labor organizing activities, including picketing, are . . .
protected by the free speech provisions of our State
Constitution.

² “Marriage . . . is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective. . .” 32 Cal.2d at 714.

³ “[T]he right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution.” 43 Cal.4th at 809.

⁴ German Pastor Martin Niemoller said, “They came first for the Jews, and I didn’t speak up because I wasn’t a Jew. Then they came for the trade unionists, and I didn’t speak up because I wasn’t a trade unionist. Then they came for the Catholics, and I didn’t speak up because I was a Protestant. Then they came for me – and there was no one left to speak up for me.” The pastor could have added gay people to his list since they, too, were “come for”. There are many versions of this famous passage. *See, e.g.,* quotation in Martin Mayer, *They Thought They Were Free*, 1955.

United Farmworkers of America, AFL-CIO v. Superior Court (William Buak Fruit Co., Inc.) (1975) 14 Cal.3d 902, 912. Labor unions have the right, for instance, to picket a store in one of California's ubiquitous shopping malls. *Fashion Valley Mall, LLC v. National Labor Relations Board* (2007) 42 Cal.4th 850. The same right does not exist under the federal Constitution. *Hudgens v. NLRB* (1976) 424 U.S. 507. Thus, if a majority of California voters decides that it prefers placid shopping to the right of workers to organize, it could change the state Constitution and diminish those workers' rights.

It is not only unions that are vulnerable, but all Californians who wish to speak in public places. Proponents of Proposition 8, for instance, undoubtedly collected many petition signatures in shopping malls and in front of supermarkets. That is their right under the California Constitution – and amici support that right. *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 (1979), *aff'd sub nom., Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74. If Proposition 8 supporters had tried to gather signatures in, say, Mississippi or Texas, they could have been arrested for trespass. They have no protection under the federal Constitution. *Lloyd Corp., Ltd. v. Tanner* (1972) 407 U.S. 551. The California Constitution's protection of free speech is "more definitive and inclusive than the First Amendment." *Robins v. Pruneyard, supra*, 23 Cal.3d at 908; *Fashion Valley, supra*, 42 Cal.3d at 963. And that is a very good thing for all of us in California.

Taking away a right guaranteed by the California Constitution requires, of course, a change in the Constitution. In California there are two sorts of change: "revision" and "amendment". *Constitution*, Article XVIII. The Constitution itself does not define "revision" or "amendment,"

or explain the difference between the two. We know that a “revision” requires a 2/3 vote of the Legislature, followed by a majority vote of the electorate. *Id.*, Section 1. An “amendment,” by contrast, requires only a simple majority in a single election. *Id.*, Section 3. The Constitution was designed to make a “revision” more difficult.

This Court has stated somewhat cryptically that a “revision” accomplishes “far reaching changes in the nature of our governmental plan. . .” *Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208, 223. But what is a “far reaching change in the nature of our governmental plan”? In the present case this Court will necessarily give further explanation in the context of a fundamental right.

The interest of Labor Amici is to protect their own rights, the rights of their members, and the rights of all Californians under the California Constitution. We assert that the lower standard of “amendment” is appropriate when voters wish to deal with workaday matters of governance such as, for instance, taxation, as in *Amador Valley, supra*, or criminal procedure, as in *Brosnahan v. Brown* (1982) 32 Cal.3d 236. We assert that when voters wish to take away free speech rights – or otherwise to make changes that affect the personal autonomy of individual citizens or divide citizens into suspect classes – then the higher standard is appropriate. Such a change should be considered a “revision”.

If we citizens decide that we want to deprive Catholics or Mormons of their right to worship, or trade unionists or employers of their right to speak, or Asian or African Americans of their right to vote, then we can work such a deprivation through a change in the state and federal constitutions. Constitutions can, in the end, be changed. But voters should

not be able to make a change of that magnitude in a single election by a simple majority.

II.
IF CITIZENS ARE TO BE DIVIDED INTO
SUSPECT CLASSIFICATIONS
IT MUST BE DONE BY “REVISION” OF THE CONSTITUTION

The labor unions which are amici here represent more than two million working men and women in California. Some of these men and women are gay or lesbian. Some have married or wish to marry a person of the same sex. Some have married or wish to marry a person of the opposite sex. Some have no wish to marry. Amici recognize them all as union members and as persons deserving equal respect and dignity.

We support full economic justice, social and political rights for all people, whatever their race, color, creed, ethnicity, national origin, sex, sexual orientation, gender identity, age, or physical disability.

California Labor Federation, *Policy Statements 2008*, page 53.

We were proud to work for the passage of the Domestic Partner legislation in California, which extended more rights for domestic partners. We oppose efforts to amend the constitution at the state or federal level to ban marriage equality. This change would be a serious abuse of the constitution to promote an intolerant political agenda. We support those measures that would equally confer all civil rights and responsibilities upon every Californian.

Id., page 56.

Labor Amici therefore join Petitioners and the Attorney General in opposing Proposition 8.

More than forty years ago the Attorney General opposed another initiative – Proposition 14. *Mulkey v. Reitman* (1966) 64 Cal.2d 529, *aff’d. sub nom., Reitman v. Mulkey* (1967) 387 U.S. 369. In that case a majority of voters added a provision to the California Constitution:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

64 Cal.2d at 532-533. A landlord could, if he wished, refuse to rent an apartment to black people, or Jews, or to any other object of his hatred, scorn, or fear. In practical effect – “in terms of its immediate objective, its ultimate effect, and its historical context,” 387 U.S. at 373 – Proposition 14 not only permitted private discrimination but encouraged it. It gave the State’s stamp of approval, so speak, to bigotry. It therefore violated the Equal Protection clause of the United States Constitution.

Where Proposition 14 restricted the right of Californians to buy a house or rent an apartment, Proposition 8 restricts our right to marry whom we choose. Proposition 8 states, “Only a marriage between a man and a woman is valid or recognized in California.”⁵ This Court construed those exact words in *In re Marriage Cases* (2008) 43 Cal.4th 757. Amici agree with this Court’s holding that the words

must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents - like gender, race, and religion - a constitutionally suspect basis upon which to impose differential treatment, and

. . . the differential treatment at issue impinges upon a same-sex couple's fundamental interest in having their family relationship accorded *the same respect and dignity* enjoyed by an opposite-sex couple.

Id., at 784 (emphasis added).

⁵ *Compare*, “All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void.” Former California Civil Code section 60, which was struck down in *Perez v. Sharp* (1948) 32 Cal.2d 711.

Proponents argue that “Proposition 8 is about traditional marriage . . .” *Official Voter Information Guide* (Nov, 4, 2008), page 57. It is quite true that “traditional” marriage has been between persons of the opposite sex. It is also true that “traditional” marriage has been between persons of the same race. Some people today are shocked and offended by a marriage between a man and a man, or a woman and a woman. Our grandparents might have been shocked by a marriage between a black person and a white person. But “fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.” *In re Marriage Cases*, 43 Cal.4th at 824.

“Traditionally” women have been considered inferior by the state. But times change and rights advance. *See, e.g., Taylor v. Louisiana* ((1975) 419 U.S. 522, holding that women cannot be excluded from juries;⁶ *United States v. Virginia* (1996) 518 U.S. 515, 557-558, holding that women must be admitted to the Virginia Military Institute.⁷ The California Supreme Court recognized sex as a “suspect classification” several years before the United States Supreme Court did. *Sail’er Inn, Inc. v. Kirby* (1971), 5 Cal.3d 1, holding that the State cannot prevent women from tending bar.⁸

The fact that gay people have been “traditionally” despised and discriminated against is no argument for continuing that practice. If “tradition” prevailed over fairness, every struggle for equality would be

⁶ “If it was ever the case that women were unqualified to sit on juries. . . that time has long since passed.” 419 U.S. at 537.

⁷ “[T]he “history of our Constitution. . . is the story of the extension of constitutional rights and protections to people once ignored or excluded. . . Our comprehension of ‘We the People’ [has] expanded.” 518 U.S. at 557-558.

⁸ “Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship. . .” 5 Cal.3d at 19.

defeated from the start. The struggle of gay people for equality – for instance, in the workplace – has been a struggle against long-held prejudice. *See, e.g., Morrison v. State Board of Education* (1969), 1 Cal.3d 214; *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458.

Opposite-sex couples are not affected when same-sex couples are also married.

Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.

Goodridge v. Department of Public Health (2003) 440 Mass. 309, 337, 798 N.E.2d 941, 965; *In re Marriage Cases*, supra, 43 Cal.4th at 825.

Amici do not seek greater rights for gay people than straight people any more than we seek greater free speech rights for labor unions than others. *See, e.g., Thomas v. Collins* (1945) 323 U.S. 516, 538. Amici do seek equality and fairness across the board.

Amici understand that many Californians hold strong personal views, often based on their moral or religious principles, against same-sex marriage. But we assert that all marriages – both opposite-sex and same-sex – are entitled to the same dignity and respect. Proponents of Proposition 8 are of course entitled to their opinions – but they are not entitled to *impose* their opinions on their fellow citizens. Or, to put it more accurately, before they may impose their opinions through a change in the Constitution – before they may take away a fundamental right from one

group of citizens – they must go through the full process of a constitutional
“revision”.

Dated: January 12, 2009

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**CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 8.204(c)(1)**

Pursuant to California Rule of Court 8.204(c)(1), counsel for all 53 Amici Curiae listed herein hereby certifies that the number of words contained in this Brief of Amici Curiae in Support of Petitioners and Filed on Behalf of the 53 Amici Curiae listed, including footnotes, but excluding the Table of Contents, Table of Authorities, and this Certificate, is 1,911 words as calculated using the word count feature of the computer program used to prepare the brief.

Respectfully submitted this 12th day of January 2009.

WEINBERG, ROGER & ROSENFELD
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By: William A Sokol
WILLIAM A. SOKOL

PROOF OF SERVICE

The undersigned certifies:

That I am employed in the office of a member of the Bar of this Court at whose direction the service is made. My business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On January 13, 2009, I served upon the following parties in this action:

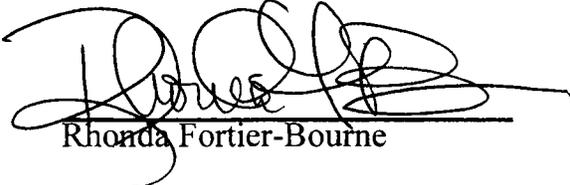
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By mail I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

DATED January 13, 2009


Rhonda Fortier-Bourne

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