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November 17, 2008

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CLERK SUPREME COURT

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Letter in Support of Petitioners in:
***Strauss v. Horton*, Case No. S168047;**
***Tyler v. State of California*, Case No. S168066; and**
***City of County of San Francisco v. Horton*, Case No. S168078**

To the Chief Justice and the Honorable Associate Justices of the Supreme Court:

In *Board of Education v. Barnette* (1943) 319 U.S. 624, 638, the United States Supreme Court stated:

> **"One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."**

Based on this maxim, the placement of the ballot initiative Proposition 8 -- under the guise of being a constitutional amendment as opposed to a constitutional revision -- was a subversion of California's constitutional process. Those seeking to eliminate the fundamental rights of their fellow citizens realized that it was not possible to do so in the constitutional manner as this would have required a roll call vote entered in the journal and two-thirds of the membership of each house concurring on ballot before the matter could be submitted to the electorate. Being unable to obtain such relief, the proponents of Proposition 8 performed an end-run around this Court's determination that the fundamental right to marriage should be extended to all citizens and the process for a

constitutional revision. This reactionary step constitutes a dangerous deprivation of the civil rights of tens of thousands of citizens.

Interest of the *Amicus Curiae*

Amicus curiae THE SOUTHERN POVERTY LAW CENTER is internationally known for its tolerance education programs, its legal victories against white supremacist groups and its tracking of hate groups. Founded by Morris Dees and Joe Levin, two attorneys who shared a commitment to racial equality, the SPLC has worked to make the nation's Constitutional ideals a reality by fighting all forms of discrimination. As a long-standing leader in the civil rights movement, *amicus curiae* submits that just as the Equal Protection Clause and right of privacy mandate the freedom to marry a person of one's own choice cannot be infringed by the State based on race, neither can the State seek to infringe this important constitutional right based on one's gender or sexual orientation.

Amicus curiae submits that the California electorate's passage of Proposition 8 is antithetical to well-established notions of equal protection and results in the denial of the fundamental right to marry to a suspect class of citizens. Petitioners have raised serious concerns regarding whether this initiative was properly before the voters as well as whether a slim majority of voters may pass provisions which deny fundamental rights and equal protection of the law to other citizens.

The proper resolution of these issues constitutes one of the most significant legal issues before this Court since California's inception. Given that thousands of California's citizens are currently in legal limbo -- unsure of the status of their marriages which were lawfully performed at the time -- time is of the essence. These citizens cannot wait for four years for a final determination of the status of their marriages as these issues wind themselves through lower courts.

Accordingly, *amicus curiae* writes today to urge this Court to: (1) exercise **original jurisdiction** over this issue; and (2) just as it did four years ago when the propriety of the issuance of same-sex marriage licenses was first addressed, to **immediately issue a stay** to preserve the status quo ante (which, at this time, would be to afford full recognition and equal rights to same-sex couples until this Court can determine the constitutionality of a voter initiative which seeks to deny these rights). Finally, and

ultimately, *amicus curiae* submits that the fundamental right to marry the person of one's choice cannot be infringed by the State by way of an improper ballot initiative.

1. THIS COURT SHOULD EXERCISE ORIGINAL JURISDICTION OVER THIS CASE AS THE VALIDITY OF A BALLOT INITIATIVE WHICH SEEKS TO ELIMINATE THE FUNDAMENTAL RIGHTS OF A SUSPECT CLASS IS A MATTER OF GREAT PUBLIC IMPORTANCE AFFECTING TENS OF THOUSANDS OF CITIZENS AS WELL AS CALIFORNIA BUSINESSES, AND INSURERS, THAT SIMPLY CANNOT WAIT FOUR YEARS FOR A FINAL DETERMINATION BY THIS COURT

The California Constitution provides that the Supreme Court has "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." (Cal. Const., art. VI, § 10.) Such original jurisdiction is reserved for cases in which "the issues presented are of great public importance and must be resolved promptly." (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845.) The past exercise of such original jurisdiction included analyzing the qualification of an initiative for ballot,[1] the validity of assessment procedures,[2] the constitutionality of requiring two-third majority in bond elections,[3] and the constitutionality desegregation procedures.[4]

Like the issues described above, the issues presented in this case are of staggering importance: may a simple majority of the electorate vote to enact a ballot initiative which would strip the fundamental rights of a suspect class of its citizens where an identically worded-state statute was held unconstitutional?

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[1] *Perry v. Jordan* (1949) 34 Cal.2d 87, 90-91; *Farley v. Healey* (1967) 67 Cal.2d 325, 326-327.

[2] *County of Sacramento v. Hickman, supra,* 66 Cal.2d at p. 845; *State Board of Equalization v. Watson* (1968) 68 Cal.2d 307, 310-311.

[3] *Westbrook v. Mihaly* (1971) 2 Cal.3d 765.

[4] *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 945, superseded by statute on other grounds as recognized in *Crawford v. Huntingon Beach Union High School Dist.* (2002) 98 Cal.App.4th 1275, 1286.

The importance of this case cannot be over-emphasized. Tens of thousands of individuals in the State are directly affected as their relationships remain in a state of legal limbo. Businesses are affected as they struggle to determine their rights and responsibilities under the new scheme. Insurers are affected as they attempt to come to grips with the impact of these provisions on coverage issues. These are issues which simply cannot wait four years for the cases to work their way up through the lower courts.

Finally, it cannot go unmentioned that in voting to enact a ballot initiative which precisely mirrors language which this Court found to result in an unconstitutional interference with the fundamental rights of a suspect class, this case involves extraordinarily unique legal issues and is suspect from its inception. As this Court noted in *San Francisco Unified Sch. Dist. v. Johnson, supra*, 3 Cal.3d at p. 953, "Although at this point we analyze the statute upon its face, state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective . . . and for its ultimate effect." (Internal quotations and citations omitted.)

Indeed, contrary to the wishes of the proponents of Proposition 8, the Declaration of Independence should not be red-lined to provide:

> **"We hold these truths to be ~~self-~~ relatively-evident: that ~~all men~~ all people except homosexuals are created equal; that they are endowed by ~~their Creator~~ the electorate with certain ~~unalienable~~ rights subject to the whim of the majority; that among these are life, liberty, and the pursuit of happiness, but not marriage."**

Here, the express stated purpose behind the ballot initiative was to circumvent this Court's prior holding that a suspect class was entitled to equal protection under the law. This is a disturbing issue which could lead to frightening consequences which need to be addressed immediately. For example, in the next election, could 50.1% of the electorate vote to hold that marriage was between a man and a woman of the Christian faith? Or limited to people of child-bearing years? Or that people who were incapable of having children did not enjoy the same right to marry as others?

In sum, whether the constitutional rights are subject to the vote of a simple, transient, and reactionary majority is a matter of the highest importance warranting immediate Supreme Court attention by way of the exercise of its right to original jurisdiction. Indeed, if this Court were disinclined to exercise such discretion in this case, it is difficult to envision a situation in which it would be appropriate.

2. THIS COURT SHOULD ISSUE AN IMMEDIATE STAY OF A BALLOT INITIATIVE WHICH SEEKS TO "AMEND" THE CALIFORNIA CONSTITUTION BY CODIFYING EXPRESS DISCRIMINATION AND REVOKING FUNDAMENTAL CONSTITUTIONAL RIGHTS UNTIL THE VALIDITY OF THIS MEASURE CAN BE ADDRESSED

California has a history of staying the implementation of voter initiatives while the courts determine their validity. (See, e.g., *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 814 [Proposition 103]; *Legislature v. Eu* (1991) 54 Cal.3d 492, 500 [temporary stay of operation of section 5 of Proposition 115].) Here, the implementation of Proposition 8 presents such fundamental constitutional questions, both as to its procedural and substantive viability, that an immediate stay of its implementation should issue. The absence of a stay will irreparably harm fundamental rights of married same-sex couples and of same-sex couples who have not yet married, whereas temporarily staying implementation of Proposition 8 works no harm on California citizens whose franchise was protected at time of election.

A. A STAY SHOULD ISSUE BECAUSE PROPOSITION 8 RAISES PROFOUND CONSTITUTIONAL ISSUES

The constitutional problems presented by Proposition 8 were foreshadowed in Massachusetts when its Supreme Judicial Court addressed procedural questions arising out of attempts to amend the Massachusetts Constitution to eliminate the constitutional rights of same-sex couples to marry. (*Schulman v. Attorney General* (Mass. 2006) 447 Mass. 189, 198-199 [conc. opn. Greany, J.] (*Schulman*).) In his concurring opinion, Justice Greany observed:

> There can be no doubt after the *Goodridge* decision that the Massachusetts Constitution protects the right of a couple who wish to marry ... regardless of gender. It is equally clear that the proposed initiative is directed toward withdrawing this right from a distinct segment of our community, thereby prohibiting, as a matter of constitutional law, same-sex couples from committing to civil marriage and from attaining the multitude of legal rights, and financial and social benefits, that arise therefrom. The proposed initiative cannot be said to further a proper legislative objective (as was categorically decided by the *Goodridge* court, there is none). The only effect of a positive vote will be to make same-sex couples, and their families, unequal to everyone else; this is discrimination in its rawest form. Our citizens would, in the future, be divided into at least three separate and unequal classifications: heterosexual couples who enjoy the right to marry; same-sex couples who were married before the passage of the amendment (but who, if divorced, would not be permitted to remarry someone of the same sex); and same-sex couples who have never married and, barring the passage of another constitutional amendment on the subject, will be forever denied that right. (*Id.*, 447 Mass. at pp. 198 [conc. opn. Greany, J.].)

Justice Greany further observed, there was "no Massachusetts precedent discussing, or deciding, whether the initiative procedure may be used to add a constitutional provision that purposefully discriminates against an oppressed and disfavored minority of our citizens in direct contravention of the principles of liberty and equality protected by Article 1 of the Massachusetts Declaration of Rights. ... Put more directly, the *Goodridge* decision may be irreversible because of its holding that no rational basis exists, or can be advanced, to support the definition of marriage proposed by the initiative and the fact that the *Goodridge* holding has become part of the fabric of the equality and liberty guarantees of our Constitution." (*Schulman, supra*, 447 Mass. at pp. 198-199 [conc. opn. Greany, J.].)

California's Constitution, article I, section 1, provides that certain rights are inalienable: "All people are by nature free and independent and have *inalienable rights*. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, *happiness*, and *privacy*." (Cal. Const., art. I, §1 [emphasis added].) California and federal law recognizes that the

constitutional right of marriage arises out of the fundamental right of privacy and equal protection clauses. (See, *In re Marriage Cases* (2008) 43 Cal.4th 757, 829 (*In re Marriage Cases*) [the right to marry is embodied in Article I, sections 1 and 7 of the California Constitution]; *Griswold v. Connecticut* (1965) 381 U.S. 479, 486; *Zablocki v. Redhale* (1978) 434 U.S. 374, 383-385.) As a proffered change to the California Constitution, Proposition 8 seeks to eliminate an insular minority from the fundamental right of marriage by providing, "*Only marriage between a man and a woman is* ***valid*** *or* ***recognized*** *in California.*" (Ballot Pamp., Gen. Elec. (Nov. 4, 2008), pp. 54 [title] and 128 [text].) In effect, it means that while marriage is supposed to be inalienable right of all people under the California Constitution, same-sex couples are alienated from that inalienable right.

Proposition 8 also acts to effectively abrogate the equal protection clause of article I, section 7, subdivision (b) of the California Constitution. California Constitution, article I, section 7 provides, "(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." At a minimum, Proposition 8 would create an internal inconsistency in our state constitution, as Justice Greany recognized, by creating at least three classes of citizens.

B. A STAY SHOULD BE ISSUED BECAUSE PROPOSITION 8 PLACES INTO QUESTION CALIFORNIA'S ABILITY TO "RECOGNIZE" EXISTING SAME-SEX MARRIAGES OF CALIFORNIA CITIZENS

California Constitution, article I, section 9 provides that "A bill of attainder, *ex post facto law, or law impairing the obligation of contracts may not be passed.*" (Cal. Const., art. I, §9 [emphasis added]; and see U.S. Const., art I, §9 [¶3].) To ensure laws, including voter initiatives, do not run afoul of the proscription against ex post facto laws, they are presumed to operate prospectively. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 [Proposition 115].) However, a law applied prospectively may nevertheless violate constitutional prohibitions against ex post facto laws where its prospective application alters existing rights. (See *People v. Smith* (1983) 34 Cal.3d 251, 259-260 [citing U.S. Supreme Court authority recognizing that alteration of a substantial right even in a seemingly procedural form constitutes an invalid ex post facto law – "it is the effect, not the form, of the law that determines whether it is ex post facto"].)

Proposition 8 operates as an ex post facto law altering existing substantive rights even with prospective application. Proposition 8's language tracks the prior Proposition 22 language of "*Only marriage between a man and a woman is* ***valid*** *or* ***recognized*** *in California.*" (Compare Ballot Pamp., Gen. Elec. (Nov. 4, 2008), p. 128 [text, Proposition 8] with Ballot Pamp., Primary Elec. (Mar. 7, 2000), p. 132 [text, Proposition 22][emphasis added].) As recognized by this court in *In Re Marriage Cases*, the words "valid" and "recognized" are intended to ensure "that California will not *legitimize* or recognize same-sex marriages ...." (*In re Marriage Cases*, 43 Cal.4th at p. 799.) So, even if Proposition 8's constitutional change is applied prospectively it would operate to eliminate existing marital rights and obligations of same-sex couples because the State of California would be precluded from recognizing or otherwise providing validity to those marriages.

C. A STAY SHOULD ISSUE BECAUSE PROPOSITION 8 VIOLATES FEDERAL CONSTITUTIONAL RIGHTS

Justice Greany's concurring opinion also suggested a Constitutional amendment eliminating the fundamental right of same-sex couples to marry might violate federal law as well. "A positive vote on the proposed initiative may be vulnerable on grounds of Federal constitutional law as well." (*Schulman, supra*, 447 Mass. at p. 199, n. 3 [conc. opn. Greany, J., citing *Romer v. Evans* (1996) 517 U.S. 620, 633 (striking down constitutional amendment to Colorado Constitution purporting to withdraw protection of State's anti-discrimination statutes from homosexuals; amendment created unequal classifications of citizenry) and *Reitman v. Mulkey* (1967) 387 U.S. 369, 373 (affirming California Supreme Court holding that voter approved constitutional amendment erasing statutory protection against racial discrimination in housing denied equal protection of laws under Fourteenth Amendment to the United States Constitution)].)

3. A BRIEF WORD ON THE MERITS

Each of the petitioners in the three-related actions raise several issues concerning the validity of Proposition 8. Although *amicus curiae* believes that these issues are adequately addressed in the three petitions, several issues warrant a brief discussion.

First, proponents of Proposition 8 were aware of the fact that the California Legislature passed a measure to let same-sex couples marry in 2005 and another in 2007 (both measures were vetoed by Governor Schwarzenegger). However, since that time, this Court concluded that the ban on same-sex marriage was unconstitutional and even the Governor opposed Proposition 8. In fact, the Governor went so far as to state that its passage was "unfortunate, obviously, but it's not the end . . . . I think that we will again maybe undo that [ban], if the court is willing to do that, and then move forward from there and again lead in that area." (Rothfeld and Barboza, *Schwarzenegger Tells Backers of Gay Marriage: Don't Give Up*, L.A. Times (Nov. 10, 2008).)

Thus, all three branches of California's government have concluded that same-sex couples should be afforded the same fundamental right to marry the person of one's choice as is enjoyed by all of society.

Proposition 8, however, seeks to circumvent this unanimous vision by writing discrimination into the California Constitution. Such action is unprecedented in the State and constitutes worse than insidious prejudice. Indeed, when one harbors hateful feelings toward an individual of a minority community, he or she is considered to be prejudiced. When one acts upon this prejudiced belief to the detriment of another, he or she is discriminating. But when an entire segment of society bands together to codify legislation for the express purpose of denying equal rights to a minority segment of a society, it surpasses mere prejudice or discrimination and constitutes a human rights violation. Such concerted efforts to subjugate minorities to the caprice of a majority is repugnant to fundamental notions of freedom as embodied in the Magna Carta, the Bill of Rights and, more recently, the Universal Declaration of Human Rights.

Finally, *amicus curiae* cannot help but notice the comparison between the present matter that the 1960 classic movie *Inherit the Wind*, in which Spencer Tracy, playing the part of Henry Drummond stated:

> "***[F]anaticism and ignorance is forever busy, and needs feeding. And soon, your Honor, with banners flying and with drums beating we'll be marching backward, BACKWARD, through the glorious ages of that Sixteenth Century when bigots burned the man who dared bring enlightenment and intelligence to the human mind.***"

Simply stated, *amicus curiae* agrees with this Court's prior holding, that "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (*In re Marriage Cases, supra*, 43 Cal.4th p. 852, citing *Barnette, supra*, 319 U.S. at p. 638.) Any attempt to circumvent this ruling is antithetical to fundamental constitutional notions.

4. CONCLUSION

Consequently, *amicus curiae* urges this Court to: (1) exercise **original jurisdiction** over this issue; and (2) just as it did four years ago when the propriety of the issuance of same-sex marriage licenses was first addressed, to **immediately issue a stay** to preserve the status quo ante (which, at this time, would be to afford full recognition and equal rights to same-sex couples until this Court can determine the Constitutionality of a voter initiative which seeks to deny these rights).

Respectfully submitted,

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is One California Street, Suite 1100, San Francisco, CA 94111.

On November __, 2008, I served the document described as **AMICUS LETTER IN SUPPORT OF PETITIONERS** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

☒ **(BY MAIL)** I caused such envelope to be deposited in the mail at Irvine, California. The envelope was mailed with postage thereon fully prepaid.

I placed such envelope with postage thereon prepaid in the United States mail at Irvine, California.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 17, 2008, at Irvine, California.

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