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Honorable Chief Justice and Justices of the California Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Amicus Curiae Letter re Tyler, et al v. California et al. (S168066)*

To the Honorable Ronald M. George, Chief Justice of California, and the Honorable Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.500(g), as amicus curiae, I humbly submit this letter in support of the Amended Plaintiffs' Petition in *Tyler*.

I write for myself, and only to provide Your Honors discussion concerning what, I submit, are outcome determinative matters not discussed in the many cases and amici briefs now before this court concerning the validity and interpretation of Proposition 8.

As per the Supreme Court's Order of November 20, 2008 with regard to the various Proposition 8 cases, I send this letter with respect to *Tyler* but understand that the issues presented will be considered in the context of the entire nexus of issues raised in regard to Proposition 8. I selected *Tyler* as I felt that petition provided the most direct launching point for the argument I will present.

I thank you for your patience, for your consideration, and for your service to California.

Sincerely,

Joseph Decker
November 26, 2008

**Amicus Curiae Letter of Joseph Decker in Support of the Amended Plaintiffs' Petition in
Tyler, et al v. California, et al (S168066)**

November 26, 2008

To the Honorable Ronald M. George, Chief Justice of California, and the Honorable Justices of the California Supreme Court:

STATEMENT OF INTEREST

Amicus is an artist and activist, legally married for twenty-four years and nine days in the state of California, and has long personal experience with the rights and responsibilities of marriage. Amicus is not now, nor has ever been, employed as a lawyer, paralegal or legal assistant, nor to his knowledge, in any other litigation-related field, a fact which makes writing this letter extremely humbling. Amicus sincerely hopes and expects that this will be not just the first, but also the last time he feels called upon to write the Court.

As a legally married person, amicus is deeply aware that he is intentionally leading the Court through an argument that, if accepted in part but not in whole, might conceivably invalidate legal recognition of his own, deeply-valued marriage, and potentially end the very significant federal tax benefits he receives as a result. With respect and deliberate consideration, amicus and his spouse have concluded that we would rather the Court withhold the designation of marriage from all Californians, *ourselves included*, than to stain Californian's inalienable, fundamental right to equal treatment under the law. With or without legal recognition, we are certain that our marriage will continue with strength and joy for the rest of our lives, but without a government that can provide "equal justice for all", we are lost; when our government becomes "destructive of these ends", we are surely lost.

Amicus addresses the court in support of the amended plaintiffs' petition in *Tyler et al v. State of California* (S168066, filed November 5), in support of the argument that Proposition 8 requires treatment as a Constitutional revision, not amendment. We add a new branch to the analysis in that argument, strengthening the case for considering Proposition 8 a revision. We additionally argue for a far different conclusion should the Court uphold Proposition 8 as a lawfully-enacted amendment than we've seen proposed in the lawsuits to date.

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ARGUMENT

I. STATEMENT: CALIFORNIA'S EQUAL PROTECTION CLAUSE REQUIRES DOMESTIC PARTNERSHIP BE TREATED THE SAME AS MARRIAGE

At point 13 on page 6, the *Tyler (Id.)* petition states:

As long as there is an Equal Protection Clause under our Constitution, and as long as marriage is regarded as a fundamental right, same sex couples must enjoy the same right to marry as opposite sex couples. Thus, under Equal Protection analysis, either both forms of couples should be permitted to marry and¹ [sic] all couples, regardless of composition, should be limited to registered domestic partnership.

This Court has clearly expressed the same dichotomy itself, the majority opinion in *In re Marriage Cases* (2008) 43 Cal.4th 757 [76 Cal.Rptr.3d 683, 183 P.3d 384], 119 states, *inter alia*::

When a statute's differential treatment of separate categories of individuals is found to violate equal protection principles, a court must determine whether the

¹ We believe that it is clear from context and the use of the word "either" that the Tyler petition intends the word "or" before the word "couples" here, not "and."

constitutional violation should be eliminated or cured by extending to the previously excluded class the treatment or benefit that the statute affords to the included class, or alternatively should be remedied by withholding the benefit equally from both the previously included class and the excluded class..

II. CONCLUSION: PROPOSITION 8, IF UPHELD, DOES NOT AMEND OR REVOKE CALIFORNIA'S EQUAL PROTECTION CLAUSE

Note that nothing in Proposition 8 explicitly removes or amends California's Equal Protection Clause. Nothing prevented the authors of Proposition 8 from making such a revocation or amendment explicit, yet they did not do so.

We conclude that the passage of Proposition 8 provides no indication that the voters intended to amend or revoke this inalienable Constitutional protection. In fact, many voters clearly believed that domestic partnership provided identical rights to marriage. The official ballot argument in favor of Proposition 8 states, *inter alia*:

Under California law, "domestic partners shall have the same rights, protections, and benefits" as married spouses. (Family Code § 297.5.) There are NO exceptions. Proposition 8 WILL NOT change this.

Whether the precise wording of this statement is factually accurate or not, this statement, and others like it provide cause to believe that many voters do believe that domestic partners "have the same rights" as marriage, which in turn casts significant doubt on voter intent to amend or abolish California's Equal Protection Clause. Voters reading this argument might easily believe (and in our experience, some do in fact believe) that domestic partnership and marriage do provide entirely equal benefits, and thus assume that there's no violation of Equal Protection.

The official ballot rebuttal to the argument against Proposition 8 confirms this even more clearly. It states, *inter alia*:

Under California law gay and lesbian domestic partnerships are treated equally; they already have the same rights as married couples. Proposition 8 does not change that.

We note that this Court has already found this inaccurate, the *In Re Marriage Cases* decision documents nine ways (footnote 24, pages 42-44) in which domestic partnerships are treated unequally. We believe that this ballot statement fragment above is inaccurate or misleading to the point of preventing voters from being able to make an informed choice. This statement specifically and unequivocally leads voters, *contrary to fact*, to believe that domestic partnership and marriage affords the same protections, it comes as close as humanly possible to say "Look, this presents no Equal Protection issue." without coming out and saying it, and lacking any legislative analysis to counter the "Yes it does. No it doesn't." rhetoric of the ballot arguments, we are certain that many voters were left misled on this point.

(At this point we digress to ask the Court to invalidate Proposition 8 on this basis alone-- shouldn't the altering of core Constitutional rights require the greatest degree of care in insuring

those changes are consistent with voter intent? In any case, we understand that the Court might not do so without a fuller examination of the breadth of ballot materials, advertisements and other materials regarding Proposition 8 available to voters--and we recognize with humility and sadness that litigating that issue completely is beyond our resources.)

The statement "Proposition 8 does not change that." provides specific and unambiguous reassurance to voters in an official setting that Proposition 8 will treat "gay and lesbian domestic partnerships" equally. For this Court to find that Proposition 8 *does* amend or annul California's guarantee of Equal Protection, to uphold Proposition 8 in name without treating gay and lesbian domestic partnerships equally would surely be to specifically decide *against* the intent of those voters who voted for Proposition 8 in reliance of this and other similar assurances that equal rights would be available to all.

To summarize, the text of Proposition 8 must not amend or annul California's Equal Protection Clause. There is no evidence in the law's text or in the official legislative analysis of Proposition 8 that most voters intended to amend or annul Equal Protection. There is clear, unambiguous evidence in the official ballot arguments that proponents of Proposition 8 reassured voters in official ballot materials that gay and lesbian couples would be "treated equally," an argument whose repetition lends credence to the theory that Equal Protection was a key concern of some voters, and the theory that voters were misled on that same issue.

This raises a critical question: Is there a way in which the Court can both uphold and interpret Proposition 8 without amending or revoking Equal Protection, or, instead, are the two necessarily incompatible?

III. STATEMENT: PROPOSITION 8 IS NOT INCOMPATIBLE WITH CALIFORNIA'S EQUAL PROTECTION CLAUSE

The operative text Proposition 8 adds to the Constitution is:

Only marriage between a man and a woman is valid or recognized in California.

This text limits marriage; it does not guarantee marriage or increase access to marriage for anyone. It simply requires that marriages be considered invalid and unrecognized by the state unless the marriage consists of precisely one man and one woman. This is entirely consistent with the withholding of the designation of marriage from all Californians, and this Court has already found that Equal Protection is compatible with that option as well, as we cited in section I of this document above.

Thus it is possible for the Court can both uphold and interpret Proposition 8 without amending or revoking Equal Protection.

IV. CONCLUSION: CALIFORNIA'S EQUAL PROTECTION CLAUSE MUST STAND INTACT

Proposition 8 does not explicitly seek to amend or revoke the Equal Protection Clause. The ballot arguments provide evidence against the idea that voters understood that it would make such a change, as we have shown in section II above. No inherent conflict can be found between Proposition 8 and the Equal Protection Clause, as they need not conflict, as shown in section III above.

Thus, there are absolutely no legal grounds for allowing Proposition 8 to revoke or amend California's Equal Protection Clause, and thus, that clause must stand.

And as Equal Protection stands, so must nearly all of the analysis of *In Re Marriage Cases* decision, including the finding that sexual orientation is a suspect class, and in fact every part of the *In Re Marriage Cases* decision continues to hold until we reach the discussion of remedy in section VI of that the majority opinion of that decision.

V. CONCLUSION: THE RECONCILIATION OF PROPOSITION 8 WITH EQUAL PROTECTION REQUIRES WITHHOLDING THE DESIGNATION OF MARRIAGE FROM ALL CALIFORNIANS

As there is no inherent conflict between Proposition 8 and California's Equal Protection Clause, there is no justification for annulling or amending *either* on the basis of any putative conflict between the two. The Court's first judicial responsibility is to try and interpret the laws as written. If Proposition 8 is upheld, it must be upheld in a manner consistent with Equal Protection. This court has already indicated, in essence, that "there are precisely two ways to resolve equal protection and the segregation of domestic partnership from marriage", and Proposition 8 does have an effect at this point in the analysis, an effect of prohibiting one of those two possible remedies but not the other. Thus the Court is left with only a single way to consistently interpret and uphold both laws.

The effect of Proposition 8 being upheld must be the withholding of the designation of marriage from all Californians.

VI. CONCLUSION: THE WITHHOLDING OF MARRIAGE FROM CALIFORNIANS REQUIRES A REVISION TO THE CONSTITUTION, NOT SIMPLY AN AMENDMENT, AND THEREFORE THE COURT SHOULD OVERTURN PROPOSITION 8

Having reached the controversial conclusion that upholding Proposition 8 must require withholding the designation of marriage from all Californians, we are certain others can make this last leg, the leg that such a change would require a Constitutional revision, and do so more clearly than we ever could. We are satisfied if the Court is led clearly enough to understand the previous sections of our argument--that upholding Proposition 8 requires withholding the designation of marriage from all Californians, and that there is no basis in the passage of Proposition 8 for amending or revoking Equal Protection.

While leaving the revision argument to others, we will conclude by stating our position: It is obvious that this withholding of marriage from all Californians would be a change so broad that it would easily pass both the qualitative *and* the quantitative tests to be considered a revision, not an amendment to the California Constitution. Additionally, we believe Court might find that the unexpected result of this analysis so clearly would violate voter intent as to allow Proposition 8 to be overturned on that basis as well.

With Gratitude,

Joseph Decker
November 26, 2008

PROOF OF SERVICE BY MAIL

I am over the age of 18 and am not a party to this action. I am a resident of and self-employed in Santa Clara County, where the document described below was mailed. My business address is 1733 Hudson Drive, San Jose, CA 95124-1737. I served the document described below on the interested parties in this action by placing a true and correct copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, and mailed it from the US Post Office at 1750 Meridian Avenue, San Jose, California, 95125 during business hours on November 26, 2008. I declare this under penalty of perjury.

Document: Amicus Curiae Letter of Joseph Decker in Support of the Amended Plaintiff's Petition in *Tyler, et al v. California, et al* (S168066)

Signed,

Joseph Decker
November 26, 2008

SERVICE LIST

Respondents

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