

No. 10-16696

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

On Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

**BRIEF *AMICUS CURIAE* FOR THE CALIFORNIA TEACHERS
ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEES
REQUEST TO AFFIRM THE DISTRICT COURT'S RULING**

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INTEREST OF AMICUS CURIAE

This brief of *Amicus Curiae* is filed pursuant to Fed. R. App. P. 29(a), with the consent of all parties in this case to its filing. Defendant-Intervenor-Appellants' Notice of Consent to Amicus Briefs, (Sept. 9, 2010); Plaintiff-Appellees' Notice of Consent to the Filing of *Amicus Curiae* Briefs, (Sept. 13, 2010); Appellees' City and County of San Francisco Notice of Consent to the Filing of *Amicus Curiae* Briefs, (Sept. 13, 2010).

The California Teachers Association ("CTA") was founded in 1863 and is one of the strongest advocates for educators in the country. The CTA has over 300,000 members including teachers, counselors, school librarians, social workers, psychologists, and nurses working in over 1,000 school districts. These educators in the K-12 school system are joined in the CTA by community college faculty, California State University faculty, and education support professionals. The CTA is affiliated with the 3.2 million member National Education Association.

CTA's mission is to protect the interests of its members, to improve conditions of teaching and learning; to advance the cause of free, universal and quality education; to ensure that human dignity and civil rights of all children and youth are protected; and to secure a more just, equitable and democratic society. Its goals include the execution of programs designed to enhance the quality of education for students; strengthening its role as a preeminent voice for public

education in California; to influence state and federal legislation and actions by state and federal agencies, and to promote human and civil rights.

The CTA submits this brief to this Court in furtherance of its mission.

SUMMARY OF THE ARGUMENT

Many of the arguments advanced in support of Proposition 8 (“Prop. 8”) during the course of the campaign by Defendant-Intervenors-Appellants, the official proponents of Proposition 8 under California election law (“Proponents”), purposefully do not focus on the persons whose marriages are directly affected by Prop. 8, but instead focus on a perceived broader effect on society generally.

Among the most pernicious of these arguments is that state-sanctioned same-sex marriages will cause California’s public schools to teach young children to believe that gay and lesbian relationships are as valuable as heterosexual relationships through a curriculum mandated by the California Education Code.

These arguments substantially distort the relevant educational criteria established by the California legislature. The plain facts are that California law only requires an educational curriculum that teaches tolerance of and respect for those with diverse backgrounds, including differences based on sexual orientation. This policy requirement furthers an important state and federal interest – one that is directly undermined by the passage of Prop. 8 - the promotion of student safety and well-being and the prevention of harassment and bullying of young people during a

stage in life that makes them particularly vulnerable to physical and emotional abuse. The California Education Code further permits – but does not require – instruction concerning comprehensive sexual education, which generally includes respect for the institution of marriage and committed relationships, among other things. By law, the sexual education curriculum must be age appropriate and non-biased, and it must be grounded in facts, not advocacy. At bottom, nothing about the formal recognition of same-sex marriages will change the *currently existing* curriculum of California public schools.

The CTA submits this brief to set the record straight on what the California Education Code requires to be taught in public schools, and to further express its support of Plaintiff-Appellees’ efforts to have this Court affirm the District Court’s Order enjoining Prop. 8. Equal treatment of children and their parents, and respect for their differing family structures, is a critical component of a child’s success in school. Even under a rational basis review, Prop. 8 violates the Fourteenth Amendment’s guarantee of equal protection to all people under the law because California has no legitimate basis in perpetuating discriminatory attitudes against gays and lesbians and their same-sex relationships, particularly when doing so is antithetical to overriding state and federal interests in protecting gay and lesbian children from discrimination, harassment and bullying.

ARGUMENT

I. Prop. 8 Will Not Change The Public School Curriculum in Any Way.

A. Supporters of Prop. 8 justify the measure on the ground that, in its absence, school children will be instilled with views about marriage that are contrary to some parents' private moral beliefs.

Prop. 8 amended the California Constitution so that “only marriage between a man and a woman is valid or recognized in California.” The group behind the Prop. 8 campaign, ProtectMarriage.com-Yes on 8, a Project of California Renewal (“Protect Marriage”), consists of a coalition of individuals and organizations including the Church of Jesus Christ of Latter-Day Saints, the California Catholic Conference, and a number of evangelical churches. ER 94. Protect Marriage’s Prop. 8 campaign message was arrived at through “countless focus groups and surveys” conducted by Schubert Flint Public Affairs, the firm behind their campaign strategy. SER 350. This message included the argument that the right of couples of the same sex to marry (referred to in the materials as “same-sex marriage” or “gay marriage”) would be “inculcated in young children through the public schools” and was prominently featured in campaign literature and advertisements. *Id.* The ballot argument in favor of Prop. 8 submitted to voters summarizes the argument:

“It protects our children from being taught in public schools that “same-sex marriage” is the same as traditional marriage.....

The narrow decision of the California Supreme Court isn't just about "live and let live." State law may require teachers to instruct children as young as kindergarten about marriage (Education Code § 51980). If the gay marriage ruling is not overturned, **TEACHERS COULD BE REQUIRED** to teach young children there is no difference between gay marriage and traditional marriage.

We should not accept a court decision that may result in public schools teaching our kids that gay marriage is okay. That is an issue for parents to discuss with their children according to their own values and beliefs. *It shouldn't be forced on us against our will.*"

See ER 1026.

A Protect Marriage FAQ distributed to potential voters strongly emphasized that without Prop. 8 teaching about same-sex marriage would be mandatory:

If Proposition 8 does not pass, will my children be forced to learn about gay marriage at school? Yes. In health education classes, state law requires teachers to instruct children as young as kindergarteners about marriage. (Education Code §51980.) If the same-sex marriage ruling is not overturned, teachers will be required to teach young children there is no difference between gay marriage and traditional marriage.

See ER 1035.¹

A Yes on 8 faux news video states "one concern for many Christians is the impact of a culturally triumphant homosexual movement upon children – if traditional marriage goes by the wayside, then in every public school children will be indoctrinated with a message that is absolutely contrary to the values that their family is attempting to teach them at home." See SER 676. See also PX0540B

¹ Many other Protect Marriage campaign materials contained the same or similar messages. See e.g. SER 317; PX0012; SER 322; PX0126.

(warning that if Proposition 8 passes, children will be taught “that gay marriage is not just a different type of a marriage, they’re going to be taught it’s a good thing.”); PX0391 (“It’s all about education, and how it will be completely turned over, not just incrementally now, but whole hog to the other side.”).

In its amicus brief, the Hausvater Project (“Hausvater”) cites two sections of the California Comprehensive Sexual Health and HIV/Aids Education Prevention Act, Cal Educ. Code §§51930, *et seq.* (the “Act”) to support these arguments advanced by the campaign. Section 51930(b)(2) states that one of the goals of the Act is “to encourage a pupil to develop healthy attitudes concerning adolescent growth and development, body image, gender roles, sexual orientation, dating, marriage and family.” Section 51933(b)(7) requires any school that teaches comprehensive sexual health education to include “instruction and materials that teach respect for marriage and committed relationships.” Hausvater suggests that these code sections operate to require schools “to instill identical attitudes concerning same-sex marriage and opposite-sex marriage as early as ‘kindergarten.’” Hausvater Brief at 14.²

² Protect Marriage also contends this is required by Code Section 51980. *See* Cal. Educ. Code § 51980(1)(D) (“Pupils will receive instruction to aid them in making decisions in matters of personal, family, and community health, to include the following subjects... Family health and child development, including the legal and financial aspects and responsibilities of marriage and parenthood.”); ER 1035.

B. California law does not (and will not) require public schools to instill private moral values regarding same-sex marriage in children if Prop. 8 is enjoined.

These assertions of mandatory indoctrination are simply untrue. As an initial matter, it is optional for school districts to teach comprehensive sexual health education. Cal. Educ. Code § 51933(a) (“School districts *may* provide comprehensive sexual health education, consisting of age-appropriate instruction, in any kindergarten to grade 12, inclusive, using instructors trained in the appropriate courses.”) (Emphasis added).

Moreover, even in those districts where comprehensive sexual health is part of the curriculum, a parent or guardian can choose to remove his or her child from participation in the program or any portion of the program found to be objectionable. Cal. Educ. Code § 51938. Under the Act, a parent or guardian must be notified at the beginning of the school year about the planned education, be given an opportunity to review the teaching materials, and be given an opportunity to request in writing that his or her child not participate in the instruction. *Id.*; Overview of SB 71: the Comprehensive Sexual Health and HIV/AIDS Prevention Act, Cal. Dept. of Education, Oct. 30, 2003.³ Students cannot be subjected to discipline, sanction or other penalty resulting from the absence. Cal. Educ. Code § 51939(a), (b).

³ <http://crahd.phi.org/sb71overview.pdf>.

For children who participate in the program, there are certain safeguards built into the curriculum to insure instruction is appropriate. For instance, the Act requires that age-appropriate instruction and materials be used. Cal. Educ. Code §51933(b)(1). Also, the information provided must also be factual, medically accurate and objective. *Id.* at § 51933(b)(2). The Act clearly seeks to include parents and guardians in the educational process, to respect their wishes regarding their children’s education, and to recognize parents and guardians as the ultimate authority for teaching *values* concerning sexuality to their children. Cal. Educ. Code § 51937 (“The Legislature recognizes that while parents and guardians overwhelmingly support medically accurate, comprehensive sex education, parents and guardians have the ultimate responsibility for imparting values regarding human sexuality to their children.”). The Act also requires that the instruction and materials “encourage a pupil communicate with his or her parents or guardians regarding human sexuality.” Cal. Educ. Code §51933(b)(6).

In addition, public school teachers are prohibited from giving instruction, and school districts are prohibited from sponsoring any activity, which adversely reflects upon persons because of their race, religion, disability, gender, sexual orientation, handicap, national origin, or ancestry. Cal. Educ. Code §§ 51500; 220; 51933(b)(4). To the extent information about same-sex marriage is disseminated

to students it is impermissible for schools to do so in a manner that is biased for or against one's sexual orientation or one's religious beliefs. *Id.*

Thus, contrary to the arguments advanced by supporters of Prop. 8, it is clear from the plain language of these code sections that they do not impose any requirement to "instill" values concerning gay and lesbian relationships in the youth of California at the expense of the private and moral views of some parents. In fact, neither *In re Marriage Cases*,⁴ the California Supreme Court decision that recognized same-sex couples' right to marry, or Prop. 8, which purports to deny that right, changed California's public school curriculum in any way.

II. Prop. 8 Violates the Equal Protection Clause of the Fourteenth Amendment by Undermining Important State and Federal Interests in Reducing the Amount of Harassment and Violence in California Public Schools Without Any Countervailing Legitimate State Purpose.

As shown above, the carefully crafted arguments of Protect Marriage and its supporters rely on discriminatory suggestions that same-sex relationships are inferior to heterosexual relationships, and on fears that children exposed to the concept of same-sex marriage may become gay or lesbian.⁵ ER 140-143. These messages were designed to inflame an historical fear of homosexuality that is founded upon a certain segment of society's moral and religious beliefs. *See* PX0168 ("Legalizing same-sex 'marriage' would convey a societal approval of a

⁴ 183 P. 3d 184 (2008).

⁵ *See also* PX0099 (Television commercial in which young girl tells her mother she learned in school that "a prince can marry a prince, and I can marry a princess.")

homosexual lifestyle, which the Bible calls sinful and dangerous both to the individuals involved and to society at large”); PX0771 (“The Bible clearly teaches that homosexual behavior is an abomination and shameful before God.”).

Indeed, Yale University Professor George Chauncey testified in the District Court that the Protect Marriage campaign conveyed a message that gay people are inferior and that children need to be protected from exposure to gay people and their relationships. Transcript 427:19-428:1; 429:15-430:8, 431:17-432:11, 436:25-437:15. He testified that the campaign relied on a cultural understanding that gays and lesbians were dangerous to children, stemming from pervasive stereotypes of gays and lesbians as criminals and child molesters; and that the fear of homosexuals as child molesters or as recruiters “continues to play a role in debates over gay rights, with particular attention to gay teachers, parents and married couples, people who might have close contact with children.” Transcript 407:8-408:4; 424:18-425:5.

These messages are commonly understood to have adverse consequences on gay and lesbian students. For example, a recent public opinion poll conducted by Public Religion Research Institute in partnership with Religion News Service from October 14-17, 2010, found that 72% of Americans believe that messages from houses of worship contribute to negative views of gays and lesbians and 65%

believe that these messages contribute to higher rates of suicides by gay and lesbian youth.⁶

Indeed, statistics indicate more than 200,000 students in California each year report being bullied based on actual or perceived sexual orientation, and nearly 109,000 school absences at the middle and high school levels in California are due to harassment based on sexual orientation. PX0810. Harassment based on sexual orientation costs California school districts at least \$39.9 million each year.

Id.

The recent suicides of a number of youths subjected to harassment vividly illustrate the continuing problem of discrimination leveled at gay and lesbian youths and the devastating consequences that can result.⁷ In October, U.S.

⁶ See <http://www.publicreligion.org/objects/uploads/fck/file/October%20PRRI-RNS%20Topline.pdf> ; <http://www.publicreligion.org/research/>.

⁷ Curwen, Thomas, "Teen's Suicide a Hard Reminder", *Charlotte Observer* , (Oct. 10, 2010) <http://www.charlotteobserver.com/2010/10/10/1750901/teens-suicide-a-hard-reminder.html> ; Drew, Naomi, "Because Each Life is Precious, Teach Respect, Compassion," *Times of Trenton* (Oct. 10, 2010) <http://www.nj.com/opinion/times/oped/index.ssf?/base/news-1/1286689535242470.xml&coll=5>; "Suicides make anti-bullying policies essential", *Dayton Daily News* (Oct. 9, 2010) <http://www.daytondailynews.com/news/ohio-news/suicides-make-anti-bullying-policies-essential-972986.html>; Dotinga, R. and Mundell, E.J., "For Many Gay Youth, Bullying Exacts a Deadly Toll", *Business Week*, (Oct. 8, 2010) <http://www.businessweek.com/lifestyle/content/healthday/644051.html>; McKinely, Jesse, "Suicide put light on pressures of Gay teenagers", *New York Times* (Oct. 3, 2010) http://www.nytimes.com/2010/10/04/us/04suicide.html?_r=1&scp=5&sq=teen%20suicide&st=cse.

Secretary of Education Arne Duncan was prompted to release a statement addressing this recent spate of suicides and calling on all people to speak out against intolerance. In the statement, Secretary Duncan said:

This week, we sadly lost two young men who took their own lives for one unacceptable reason: they were being bullied and harassed because they were openly gay or believed to be gay. These unnecessary tragedies come on the heels of at least three other young people taking their own lives because the trauma of being bullied and harassed for their actual or perceived sexual orientation was too much to bear. This is a moment where every one of us - parents, teachers, students, elected officials, and all people of conscience - needs to stand up and speak out against intolerance in all its forms. Whether it's students harassing other students because of ethnicity, disability or religion; or an adult, public official harassing the President of the University of Michigan student body because he is gay, it is time we as a country said enough. No more. This must stop.

The California Student Safety and Violence Prevention Act of 2000⁸, the Safe Place to Learn Act, Cal. Educ. Code § 234, *et seq.*, and other amendments to state education codes were passed to respond to and prevent bias-related incidents and acts of hate-violence “occurring at an increasing rate in California’s public schools.” Cal. Educ. Code §201(d). These acts recognize that “[t]here is an urgent need to teach and inform pupils in the public schools about their rights, as guaranteed by the federal and state constitutions, in order to increase pupils' awareness and understanding of their rights and the rights of others, with the

⁸ http://info.sen.ca.gov/pub/99-00/bill/asm/ab_05010550/ab_537_bill_19991010_chaptered.pdf

intention of promoting tolerance and sensitivity in public schools and in society as a means of responding to potential harassment and hate violence” and that California public schools have an affirmative obligation to combat discrimination and bias and “undertake educational activities to counter discriminatory incidents on school grounds, and within constitutional grounds, to minimize and eliminate a hostile environment ...that impairs the access of pupils to equal opportunity.” Cal. Educ. Code § 201(b), (e), (f).

These same policies are reflected in federal law. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (“*Romer*”) (state constitutional amendment that discriminates on basis of sexual orientation violates Equal Protection Clause of the Fourteenth Amendment); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1132 (9th Cir. 2003) “students are entitled under the Equal Protection Clause of the Fourteenth Amendment to protection from sexual orientation harassment”); *Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090, 1095 (C.D. Cal. 2003) (“It is clearly established in the Ninth Circuit that discrimination on the basis of sexual orientation is a violation of the Equal Protection Clause”).

At its core, Prop. 8 attempts to enshrine in California’s constitution an express and implied legitimacy to the notion that committed homosexual relationships are not quite (and never can be) equal to their heterosexual counterparts. But California simply has no legitimate interest in fostering

discriminatory attitudes about gay and lesbian relationships, and therefore Prop. 8's change in state constitutional policy is contrary to Fourteenth Amendment guarantees of equal protection. *Romer*, 517 U.S. at 631 ("Government action that discriminates against discrete class of people "must bear a rational relationship to some legitimate end."). In fact, the undisputed evidence establishes that Prop. 8 clearly undermines important state and federal interests in fostering a truly tolerant educational environment for all, including gay and lesbian students and students whose families are headed by same-sex couples. Under the circumstances, Prop. 8 cannot stand.

CONCLUSION

The CTA respectfully requests that this Court affirm the opinion of the District Court enjoining Prop. 8 on the ground that the ballot initiative violates equal protection guarantees set forth in the Fourteenth Amendment because there is simply no legitimate State interest in fostering discriminatory attitudes toward gays and lesbians and their same-sex relationships.

Dated October 25, 2010

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. Rule App. P. 32(a)(7)(B) because this brief has 3,411 words, excluding the portions of the brief excepted by 32(a)(7)(B)(iii).

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