No. 12-144

In The
Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
Petitioners,
v.
KRISTIN M. PERRY, ET AL.,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE CALIFORNIA TEACHERS ASSOCIATION AND THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1863, the California Teachers Association ("CTA") is one of the largest organizations of educators in this country, currently representing over 300,000 teachers, counselors, school librarians, social workers, psychologists, and nurses, working in over 1,000 school districts in the state of California. CTA advocates for its members' interests, seeking on behalf of educators both the workplace conditions conducive to effective teaching, as well as the education and social policies integral to student success.

The National Education Association ("NEA"), of which CTA is an affiliate, is the largest education organization in the country, representing over three million educators nationwide who are committed to providing a great public school to every student. Institutionalized discrimination, such as that wrought by Proposition 8, undermines the efforts of NEA members everywhere to teach our children to treat one another with respect and dignity.

CTA and NEA are keenly aware that education does not take place in a vacuum. The public education system's promise of equal educational opportunity for all is necessarily limited

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[1] The parties have provided consents to the filing of *amicus* briefs and these consents are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part and no person other than *amici curiae* and its counsel have made any monetary contribution to fund the preparation or submission of this brief.

by the broader social and economic realities that affect students and their families. For that reason, advancing the human dignity and civil rights of all students, as well as their families, is an essential component of the CTA and NEA missions.

In recent decades, the members of CTA and NEA have become increasingly concerned about the pernicious effects of discrimination against gays and lesbians on the school environment. Discrimination on the basis of sexual orientation has made school uncomfortable, even unsafe, for many students, encouraged antisocial bullying behavior by others, and distracted students from the primary task at hand, learning. By codifying historical stigma into constitutional law, Proposition 8 has heightened these impacts, and made the task of creating a safe and inclusive learning environment that much more difficult for California's educators. The commitment of *Amici* to providing students with such an environment is demonstrated by, among other things, the extensive anti-bullying work of NEA, including its national *Bully Free: It Starts with Me* campaign as well as its national peer-to-peer training program that has provided thousands of educators with the resources and skills to create safe and supportive learning environments for gay and lesbian students.

Amici CTA and NEA submit this brief to bring their members' experience and expertise to bear on the discussion of the educational impacts of Proposition 8. *Amici* urge this Court to affirm the judgment of the Ninth Circuit Court of Appeals and to strike down Proposition 8 as lacking a rational

basis, and therefore prohibited by the Equal Protection Clause of the United States Constitution.

SUMMARY OF ARGUMENT

Arguments about how marriage between same-sex couples might impact public school curriculum, specifically what public school teachers will teach students about marriage and sexuality, have played a surprisingly central role in the debates surrounding Proposition 8. In the campaign to enact Proposition 8, supporters claimed that a constitutional amendment reserving marriage to opposite-sex unions was necessary to protect children "from being taught in public schools that 'same-sex marriage' is the same as traditional marriage." J.A. Exh. 56; *see, also* J.A. Exh. 62; J.A. Exh. 70. Similarly, throughout the course of this litigation, Proposition 8 supporters have argued that Proposition 8 is rationally related to a purported state interest in preventing students from being taught about same sex marriage over the objections of their parents.

This argument positing an educational basis for Proposition 8 does not withstand constitutional scrutiny. First, the purported educational interest Proposition 8 supporters assert, namely to ensure that public school children are not taught to treat marriage between two men or two women as the moral or legal equivalent of marriage between a man and a woman—is not a legitimate state interest. It is merely animus by proxy. As the Ninth Circuit reasoned below, the desire to regulate lessons is little different than the desire to regulate the world

itself, and Proposition 8 supporters' attempt to justify one on the basis of the other is a tautology.

Secondly, even if Proposition 8 supporters had identified a legitimate state interest, it is clear that Proposition 8 bears no relationship to that interest. Proposition 8 in no way alters the carefully-calibrated California Education Code provisions that regulate how public school educators address the topics of marriage and sexuality in school. The Education Code makes clear that parents are the sole authority as to values concerning human sexuality, and at the same time prohibits educators from discriminating on the basis of sexual orientation or from treating any form of committed relationship as either superior or inferior to any other—*and Proposition 8 changes nothing about this careful balance*.

Unfortunately, amidst the focus on Proposition 8's potential impact on what children will learn about marriage, scant attention has been paid to the actual effects of Proposition 8 on the educational environment. As the members of NEA and CTA have experienced first-hand, Proposition 8 has heightened tensions related to sexual orientation within schools by lending official sanction to discriminatory attitudes towards gay and lesbian students. The California Education Code requires teaching tolerance of, and respect for, those with diverse backgrounds, including differences based on sexual orientation, in order to foster a welcoming classroom environment conducive to learning. But Proposition 8, by converting animus into

constitutional amendment, has directly undermined these educational goals.

Because Proposition 8 lacks any rational basis[2] and interferes with the effective provision of public school education to all students regardless of sexual orientation, CTA and NEA urge the Court to affirm the decision below.

ARGUMENT

I. PROPOSITION 8 IS NOT RATIONALLY RELATED TO ANY LEGITIMATE STATE INTEREST CONCERNING PUBLIC EDUCATION

Predominant among the arguments put forth in support of Proposition 8, both during the 2008 political campaign and before the courts, is that the amendment is necessary to regulate what children in public school will be taught regarding marriage between couples of the same sex. For instance, the ballot argument submitted to voters in support of Proposition 8 claimed that, because of the California Supreme Court's recent decision striking down the legislative ban on marriage equality, "[s]tate law may require teachers to instruct children as young as kindergarten about marriage . . . [and] TEACHERS COULD BE REQUIRED to teach young children there is no difference between gay marriage and traditional marriage. . . ." J.A. Exh. 56

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[2] *Amici* CTA and NEA agree with Respondents that analysis of Proposition 8 should be subject to heightened security, but believe that it fails even the less rigorous rational basis test.

(emphasis in original). Proposition 8, the statement continued, "*protects our children* from being taught in public schools that 'same-sex marriage' is the same as traditional marriage." *Id.* (emphasis in original); *see also* J.A. Exh. 66. Drawing from these political arguments, some Proposition 8 supporters have argued that the amendment is rationally related to an interest in preserving parental authority over children's education regarding human sexuality in public schools. As shown below, this rationale for Proposition 8 does not withstand scrutiny for at least two reasons.

A. THE ALLEGED INTEREST IN PROTECTING CHILDREN FROM BEING TAUGHT THAT MARRIAGE BETWEEN PERSONS OF THE SAME SEX IS EQUIVALENT TO MARRIAGE BETWEEN A MAN AND A WOMAN IS BASED ON DISCRIMINATORY ANIMUS

Proposition 8 supporters' asserted interest in protecting children from being taught about marriage among same-sex couples is illegitimate—it is essentially nothing more than moral disapproval by proxy. In seeking to justify the prohibition against same-sex marriage based on the desire to regulate what children learn about the issue, Proposition 8 supporters have created the ultimate tautology, claiming the state has an interest in prohibiting gays and lesbians from marrying because of the state's interest in ensuring children do not think of marriage between two men or two women as equivalent to marriage between a man and a woman. Petitioners never explain why the state should be

concerned, other than because of their own disapproval of same-sex relationships.

Petitioners and their supporters disclaim any animus towards gays and lesbians, and contend that their opposition to same-sex marriage is about an opposition to the characterization of the relationship. But to say "Proposition 8 does not express disapproval of homosexuals as persons but plainly expresses disapproval only of considering their relationships to be marriage"[3] is a distinction without a difference. The important point for the purpose of government regulation is that there must be a rational reason for making marriage available only to one sub-segment of society. No such reason animated the passage of Proposition 8. Nor does such a reason animate the claimed interest here in ensuring public schools teach children that the institution of marriage is legitimate only for opposite-sex couples.

Notably, the District Court found that the Proposition 8 campaign exploited fears that children taught that same-sex marriage is a legal, socially-acceptable option may become gay or lesbian themselves. Pet. App. 279a-280a. Evidence for the court's finding included the testimony of historian George Chauncey that an advertisement used in the campaign "implie[d] that the very exposure to the idea of homosexuality threatens children and threatens their sexual identity, as if homosexuality were a choice." *Id.* at 282a; J.A. 501, 509. Chauncey

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[3] Brief of The Lighted Candle Society ("TLCS") *Amicus Curiae* In Support of Petitioners at p. 35 [hereinafter TLCS Brief].

further explained that the campaign conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable, and that children need to be protected from exposure to gay people and their relationships. Pet. App. at 284a; J.A. 486-487. Similar arguments continue to be advanced by supporters of Proposition 8, including before this Court. *See* TLCS Brief, *supra* note 3, at 19 ("[T]his very message [that children should consider same-sex relationships as socially acceptable] is in fact now being delivered to our five-year-olds…. The lesson includes the message that marrying someone of the same gender is a 'good thing.'").

Ultimately, as the Ninth Circuit recognized, "to protest the teaching of these facts is little different from protesting their very existence." Pet. App. 83a. "[I]t is like opposing the election of a particular governor on the ground that students would learn about his holding office, or opposing the legitimation of no-fault divorce because a teacher might allude to that fact if a course in societal structure were taught to graduating seniors." *Id.* at 83a-84a. It is well-settled that "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)); *see also* Brief of *Amicus Curiae* The Anti-Defamation League in Support of Respondents. Equal protection under the law demands that state discriminatory treatment must rest on more than

the naked desire to pass on such moral disapproval to the next generation through the public school curriculum.

B. IN ANY EVENT, PROPOSITION 8 WILL NOT ALTER CALIFORNIA'S PUBLIC SCHOOL CURRICULUM

Even if Proposition 8 supporters had identified a legitimate educational interest, however, the fact is that Proposition 8 would bear no relationship to it. Proposition 8 has had, and was designed to have, *no impact* on the laws regulating public school curriculum in California. As the Ninth Circuit correctly noted, "[b]oth before and after Proposition 8, schools have not been required to teach anything about same-sex marriage. . . . Both before and after Proposition 8, schools have control over the content of such lessons. . . .[B]oth before and after Proposition 8, schools and individual teachers have been prohibited from giving any instruction that discriminates on the basis of sexual orientation." Pet. App. 83a.

Both before and after the passage of Proposition 8, the California Education Code has regulated what public school educators may teach students about marriage and sexuality. The scheme strikes a carefully-calibrated balance among multiple interests: providing essential information to students concerning human sexuality and forms of relationship, preserving parental authority over morals and values concerning human sexuality, and promoting a tolerant educational environment for students of all sexual orientations. Proposition 8

alters none of these Education Code provisions.

To begin with, under California law, it is optional for school districts to teach 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). But, if a district does provide sexual health education to its children, California law ensures that parents have the option 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. 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.* It is also required that the instruction and materials "encourage a pupil [to] communicate with his or her parents or guardians regarding human sexuality." Cal. Educ. Code § 51933(b)(6). This is because California law recognizes that parents and guardians are 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.").

At the same time, the California Education

Code has strict antidiscrimination requirements. 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, handicap, national origin, ancestry, or *sexual orientation*. Cal. Educ. Code §§ 51500; 220; 51933(b)(4). And, to the extent information about marriage is provided to students, it is impermissible for schools to do so in a manner that reflects biases based on sexual orientation or religion. *Id.* School districts and their employees are prohibited from in any way suggesting that certain forms of committed relationships, whether between two men, two women, or a man and a woman, are either inferior or superior to any others. *Id.*; Pet. App. 83a.

Thus, contrary to the claims of Proposition 8 supporters, Proposition 8 does nothing to preserve parental authority over sexual morality, because California law is already clear on that point. Conversely, Proposition 8 does not, as its supporters suggest, ensure that opposite-sex marriage is treated as superior to all other forms of committed partnerships; the California Education Code explicitly requires educators to treat all such relationships as equal, and Proposition 8 does nothing to change that either. The sum of the matter is this: Proposition 8 lacks any relationship to any purported interest in regulating what children learn in public schools regarding marriage and sexuality.[4]

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[4] And, of course, prohibiting same-sex marriage in California does not alter the fact that same-sex marriage exists elsewhere

As a result, Proposition 8 fails the most basic requirement of the Equal Protection Clause, which is that it "must find *some* footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (emphasis added).

II. THE PRIMARY EDUCATIONAL IMPACT OF PROPOSITION 8 IS TO FURTHER STIGMATIZE GAY AND LESBIAN STUDENTS, AND TO UNDERMINE EDUCATOR EFFORTS TO FOSTER AN INCLUSIVE LEARNING ENVIRONMENT FOR ALL STUDENTS

Although Proposition 8 does not have the educational impacts its supporters assert, our members' experience is that it has had a significant impact on the school environment. By codifying animus into law, Proposition 8 lends legitimacy to the view that discrimination on the basis of sexual orientation is socially acceptable, further aggravating existing social tensions within schools. Children hear condemnation of homosexuality from politicians, including the strident comparisons "to

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in the United States and abroad. Many countries including Argentina, The Netherlands, Spain, Belgium, Canada, South Africa, Norway, Sweden, Portugal, Iceland and Denmark have given legal recognition to same-sex marriage, as have the states of Massachusetts, Maine, Maryland, Connecticut, Iowa, Vermont, New Hampshire, New York, Washington, and the District of Columbia. Further, as Proposition 8 is not retroactive and did not invalidate the marriages of same-sex couples that occurred prior to its passing, there remain approximately 18,000 same-sex couples legally married in California.

incest, bestiality, even violent crime" and "[t]his trickles down into the schools, where bullying occurs."[5]

These problems are, unfortunately, pervasive, in California and nationwide. Statistics indicate that 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.[6] These absences result in lost instruction time and lost academic opportunities for tens of thousands of students. Moreover, students subject to harassment based on sexual orientation report weaker connections to schools and communities and are at greater risk for depression and suicide.

Because of these concerns, in 2011, the California Legislature passed AB9, also known as Seth's Law, named after Seth Walsh, a thirteen-year-old student who committed suicide "after years of relentless harassment based on his sexual orientation and gender expression."[7] Seth's Law follows the California Student Safety and Violence

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[5] Kenneth Miller, "Gay Teens Bullied to the Point of Suicide," Ladies Home Journal, http://www.lhj.com/relationships/family/raising-kids/gay-teens-bullied-to-suicide/.

[6] California Safe Schools Coalition, "The Economic Costs of Bullying at Schools," http://www.casafeschools.org/FactSheet5rev2.pdf.

[7] Equality California et al., Seth's Law Fact Sheet, http://www.equalrights.org/campaigns/4-AB9FactSheet.pdf

Prevention Act of 2000 (AB 537)[8] the Safe Place to Learn Act, Cal. Educ. Code § 234*, et seq.*, and other amendments to state education codes that were passed to respond to and prevent bias-related incidents "occurring at an increasing rate in California's public schools." Cal. Educ. Code § 201(d). These statutes recognize "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 intention of promoting tolerance and sensitivity in public schools . . . ." Cal. Educ. Code § 201(e). Under these laws, 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).

This epidemic of bullying based on sexual orientation extends beyond California's borders, affecting school children and NEA's members nationwide. A 2011 national survey of gay and lesbian students found that 84.9% frequently or often heard the word "gay" used in a derogatory way at school, and 71.3% heard other homophobic slurs.[9]

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[8]Student Safety and Violence Prevention Act of 2000 (AB 537), http://info.sen.ca.gov/pub/99-00/bill/asm/ab_05010550/ab_537_bill_19991010_chaptered.pdf

[9] Gay, Lesbian, & Straight Education Network (GLSEN), The 2011 National School Climate Survey Executive Summary at 5

The same study found that "63.5% felt unsafe because of their sexual orientation." *Id.* Over eighty percent of surveyed students were verbally harassed, and nearly forty percent reported some level of physical harassment based on their sexual orientation at school within the past year. *Id.* Children of gay and lesbian couples are also targets, with nearly a quarter (23%) reporting feeling unsafe at school, forty-two percent reporting being verbally harassed at school due to their parents' sexual orientation, and slightly more than a third (36%) reporting that their school did not acknowledge their family by refusing to treat their parents in the same manner as other children's parents.[10]

This chronic bullying leads to adverse consequences in classrooms nationwide. Nationally, school absences for students experiencing high levels of sexual orientation-based bullying "were three times as likely to have missed school in the past month than those who experienced lower levels."[11] Consequently, frequently-harassed students had lower grade point averages than their peers and "were more than twice as likely to report that they did not plan to pursue any post-secondary

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(2011), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/002/2106-1.pdf.

[10] Joseph G. Kosiw & Elizabeth Diaz, Involved, Invisible, Ignored: The Experiences of Lesbian, Gay, Bisexual and Transgender Parents and Their Children in Our Nation's K-12 Schools at xvi, 52, 64 (2008), *available at* http://www.familyequality.org/_asset/5n43xf/familiesandschools.pdf.

[11] GLSEN, 2011 Executive Summary, *supra note* 9, at 7; Kosiw, *supra note* 10, at 54.

education."[12] In recent years, the horrific problem of suicides among gay youth harassed by their peers has commanded national attention. In 2010, U.S. Secretary of Education Arne Duncan released a statement addressing the recent spate of suicides and calling on all people to speak out against intolerance, stating: "[t]his 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."[13]

A recent survey by NEA of a representative sample of its members confirms the depth and breadth of the bullying problem.[14] Nearly one in five educators expressed specific concerns about bullying based on students' perceived sexual orientation, with

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[12] GLSEN, 2011 Executive Summary, *supra note* 9, at 9.
[13] Press Release, U.S. Sec'y of Educ. Arne Duncan, Statement by U.S. Sec'y of Educ. Arne Duncan on the Recent Deaths of Two Young Men (Oct. 1, 2010), *available at* http://www.ed.gov/news/press-releases/statement-us-secretary-education-arne-duncan-recent-deaths-two-young-men.
[14] *See* Catherine P. Bradshaw et al., Findings from the National Education Association's Nationwide Study of Bullying: Teachers' and Education Support Professionals' Perspectives (2011), *available at* http://www.nea.org/assets/docs/Nationwide_Bullying_Research_Findings.pdf (reporting results of representative survey of over 5,000 NEA members including both teachers and education support professionals).

an equal number of teachers labeling it a moderate or major problem at their school. *Id.* at 11–12. In a separate study, over eighty percent of teachers agreed that they have an obligation to ensure the safety and well-being of elementary school students who may be homosexual or who may have homosexual parents.[15] However, among the various types of bullying that occur in our school buildings, NEA's study found that educators were least comfortable addressing sexual orientation-based bullying in the classroom,[16] with nearly sixty percent of teachers desiring more training in dealing with this form of bullying. *Id.* at 16-17.

The continued institutionalization of discrimination on the basis of sexual orientation, through the enactment of measures such as Proposition 8, exacerbates the already difficult task educators and others face in attempting to address and remedy the epidemic of bullying against gay and lesbian students.[17] To succeed in school, children must be safe and must be taught in an environment that treats all of them as equals, whatever their family structure, whatever their sexual orientation.

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[15] GLSEN, Playgrounds and Prejudice: Elementary School Climate in the United States 68, 91 (2011), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/002/2027-1.pdf.

[16] Bradshaw, *supra* note 14, at 12.

[17] *See* Playgrounds and Prejudice, *supra* note 15, at 87, 89 (finding that while over half of elementary teachers believe fellow teachers and administrators in their own schools would support efforts specifically designed to support students with gay or lesbian parents, only forty percent believe that their school board and parents in their community would be similarly supportive).

Denying same-sex couples the right to marry sends a message to children and to society at large that same-sex relationships are inherently inferior to those of opposite-sex couples, and in turn that the children of such unions, and gay and lesbian students are less worthy of respect and fair treatment than their counterparts. This result is entirely inconsistent with the philosophy underlying public education, and with its mandate to provide equal educational opportunity to all.

CONCLUSION

For the foregoing reasons, *Amici* CTA and NEA urge this Court to affirm the ruling of the Ninth Circuit holding Proposition 8 unconstitutional under the Equal Protection Clause of the United States Constitution.

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