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 HAUSVATER PROJECT IN SUPPORT OF DEFENDANT-INTERVENORS-APPELLANTS FOR REVERSAL OF THE DISTRICT COURT'S RULING

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AUTHORITY TO FILE

The Hausvater Project has authority to file this brief *amicus curiae* pursuant to Fed. R. App. P., Rule 29(a), in view of the fact that all parties have consented to receive all briefs from all *amici*:

1. Defendant-Intervenor-Appellants' Notice of Consent to the Filing of *Amicus Curiae* Briefs, submitted by Brian W. Raum, counsel for Defendant-Intervenor-Appellants (Sept. 9, 2010).

2. Plaintiff-Appellees' Notice of Consent to the Filing of *Amicus Curiae* Briefs, submitted by Theodore B. Olson, *et al*., counsel for Plaintff-Appellees (Sept. 13, 2010).

3. Appellees City and County of San Francisco Notice of Consent to the Filing of *Amicus Curiae* Briefs, submitted by Dennis J. Herrerra, *et al*., counsel for Appellees (Sept. 13, 2010).

CORPORATE DISCLOSURE STATEMENT

The Hausvater Project is a Minnesota nonprofit corporation registered as a public charity under 26 U.S.C. § 501(c)(3). It has no parent corporation, subsidiary, nor affiliate, nor any 10% or greater owner corporation, as defined in Fed. R. App. P., Rule 26.1(a).

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Miscellaneous

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INTEREST OF *AMICUS*[1]

The Hausvater Project ("Hausvater"[2]), a Minnesota nonprofit corporation registered as a public charity under 26 U.S.C. § 501(c)(3), files this brief to show that Proposition 8 ("Prop. 8") serves to safeguard the Fourteenth Amendment right of parents to determine their children's education—a state interest that Hausvater exists to promote, Vision Statement, in Appendix at A-1, *infra*. Hausvater has a nationwide constituency consisting of clergy and laity who are affiliated with a variety of religious denominations. These denominations include the Lutheran Church Missouri Synod ("LCMS"), which operates one of the nation's largest parochial school systems. The district court specifically labeled LCMS as a religious organization fostering bigotry against homosexual persons, ER138, and based its injunction against Prop. 8, in part, on the claim that Prop. 8 lacks a legitimate state interest and instead serves primarily to promote bigotry, ER167. Hausvater maintains that Prop. 8 does not reflect bigotry and in fact safeguards parents' fundamental rights—a most legitimate state interest.

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[1] Credit for authorship of this brief is principally due Ryan C. MacPherson, Ph.D. (History and Philosophy of Science, University of Notre Dame, 2003), founding president of The Hausvater Project (*www.hausvater.org*).

[2] A German word for "head of household," pronounced *HAUS-fah-ter*.

STANDARD OF REVIEW

Amicus Hausvater adopts and herein incorporates defendant-intervenors-appellants' Standard of Review. *See* Opening Brief at 18. In any event, the scholarly sources herein cited present facts worthy of judicial notice under any standard of review.

SUMMARY OF THE ARGUMENTS

Parents have a fundamental right to determine their children's education, protected under the Fourteenth Amendment's Due Process clause. California citizens voting in favor of Prop. 8 ("Prop. 8 Supporters") had, and on their behalf the defendant-intervenors-appellants ("Prop. 8 Proponents") in this case continue to have, good reason to regard Prop. 8 as a safeguard of that fundamental constitutional right. Since the safeguarding of a constitutional right properly serves the state's interest, the district court erred in concluding that Prop. 8 serves no legitimate or compelling state interest. Moreover, parents' fundamental right to determine their children's education should take priority over the competing claims of plaintiffs-appellees Kristin Perry *et al*./same-sex couples ("Prop. 8 Opponents") who plea for Equal Protection and Due Process rights to same-sex marriage. Therefore, the district court's decision should be reversed and the injunction against Prop. 8 should be lifted.

ARGUMENTS

I. THE SUPREME COURT HAS REPEATEDLY RECOGNIZED PARENTS' FUNDAMENTAL RIGHT TO DIRECT THEIR CHILDREN'S EDUCATION.

A. Nine Decades Of Case Law Bear Strong Witness To Parents' Fundamental Right To Direct Their Children's Education.

The Supreme Court has long recognized and recently reaffirmed parents' rights to determine their children's education:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights … to direct the education and upbringing of one's children. … The Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."

Washington v. Glucksburg, 521 U.S. 702, 720, 721 (1997) (internal citations omitted; emphasis original).

The Court's recognition of this fundamental right dates at least as far back as the 1920s. In *Meyer v. State of Nebraska*, 262 U.S. 390, 399 (1923), the Court acknowledged that "it is the natural duty of the parent to give his children education suitable to their station in life" and sustained the right of immigrant parents desiring to have their children instructed in the language of their ancestral homeland. Two years later, the Court reinforced the parental rights doctrine:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not

> the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). In recent decades, too, the Court has re-affirmed the primacy of parental rights:

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (internal citations omitted). Indeed, the Court has identified "the interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Court accordingly has called for strict scrutiny before permitting state interposition into parents' custodial rights over children. *See also Parham v. J. R.*, 442 U.S. 584, 602, 603 (1979) ("The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State").

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B. Parents' Fundamental Right To Direct Their Children's Education Has A More Enduring Constitutional Foundation Than The Purported Right Of Prop. 8 Opponents To Attain Same-Sex Marriage.

The case law supportive of parents' right to determine their children's education has not established a new entitlement, but rather has testified to a primordial right intrinsic to human nature and embodied naturally in the parent-child relationship. "The liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'" *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (internal citation omitted). Supreme Court precendents testify unambiguously that parents' rights receive Fourteenth Amendment protection. "[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel,* at 66; *cf.* at 91-93 (Scalia, J., dissenting) (identifying "a right of parents to direct the upbringing of their children" as "among the 'inalienable Rights' with which the Declaration of Independence proclaims 'all men … are endowed by their Creator,'" and affirming that the people through the legislative process have authority to delineate and protect such natural rights, even more so than judges).

As a safeguard of the natural rights of humankind, the application of the Due Process clause to parental rights has the character Thomas Jefferson identified for the Virginia statute he authored in protection of a closely related fundamental right, liberty of conscience: "[T]he rights hereby asserted are of the natural rights of mankind, and … if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right." A Bill for Establishing Religious Freedom, §3, in Merril D. Peterson, ed., *The Political Writings of Thomas Jefferson* 42, 44 (1993).

The same cannot, however, be said for the claim of Prop. 8 Opponents that same-sex couples have a fundamental right to marriage. Despite the shared acknowledgment by the district judge and Opponents' counsel during closing argument[3] that the *Griswold-Roe-Casey-Lawrence*[4] lineage would make for an unstable foundation upon which to construct a right to same-sex marriage, the judge nonetheless stood atop that foundation to issue an injunction against Prop. 8. ER43, 96, 145-47, 149, 155, 163, 168.

But in *Lawrence*, at 578, 585, the Supreme Court made clear that its holding did not extend to a right to same-sex marriage. Therefore, the district court lacked authority to extract from the Fourteenth Amendment a right to same-sex marriage.

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[3] Transcript, in Appendix, at A-2, *infra*.

[4] *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southwestern Pa. v. Casey*, 505 U.S. 833 (1992) ("*Casey*"); *Lawrence v.* Texas, 539 U.S. 558 (2003).

An asserted right to same-sex marriage cannot compete legitimately with, much less pre-empt, the fundamental right of parents to direct their children's education, given the enduring basis upon which the Court has for so long recognized that natural right. In practice, however, experiments with same-sex marriage in this nation already have manifestly resulted in the curtailment of parental rights. *See* sections II.B, III.C, and IV.C, *infra*. Here, too, the district court's sanctioning of same-sex marriage, resting as it does upon the expansion of a privacy right constructed in *Griswold*, ironically perpetuates a "jurisprudence of doubt," *Casey*, at 844. Prop. 8 Supporters justly demand a more stable foundation for family law.

II. THE CAMPAIGN FOR PROP. 8 APPEALED TO PARENTS SEEKING TO PRESERVE THEIR CONSTITUTIONAL RIGHT TO DIRECT THEIR CHILDREN'S EDUCATION.

A. The District Court Acknowledged That The Campaign For Prop. 8 Appealed To Parents Seeking To Preserve Their Constitutional Right To Direct Their Children's Education.

The district court's ruling refers to *at least eight distinct plaintiff trial exhibits* ("PX") as evidence that the campaign for Prop. 8 warned voters that without that proposition parents' rights to direct their children's education would be compromised:

1. PX0011, *California Voter Information Guide, California General Election, Tuesday, November 4, 2008*, ER41-42;

2. PX0557, Frank Schubert and Jeff Flint, "Passing Prop 8," *Politics* 45 (Feb. 2009) ("Shubert-Flint"), discussed *infra*;

3. PX0015, Video, *Finally the Truth*, ER141;

4. PX0016, Video, *Have You Thought About It?*, ER141;

5. PX0091, Video, *Everything to Do With Schools*, ER141;

6. PX0391, Video, *Ron Prentice Addressing Supporters of Prop. 8, Part II*, ER142;

7. PX0008, Memorandum, *Protect Marriage, New YouTube Video Clarifies Yes on 8 Proponents' Concerns: Education and Protection of Children is [sic] at Risk* (Oct. 31, 2008), ER144,

8. PX1565, News Release, *Protect Marriage, First Graders Taken to San Francisco City Hall for Gay Wedding* (Oct 11, 2008), ER144.

B. The District Court Quoted Selectively From The Record To Construe The Campaign For Prop. 8 As A Disingenuous Attempt To Misinform And Frighten Voters Into Supporting Prop. 8.

One clear example suffices to demonstrate the district court's misconstrual of the record. The judge painted a picture of a marketing ploy fabricating a scenario that without Prop. 8 children would be indoctrinated to accept the homosexual lifestyle. The judge did so by quoting quite selectively from the lead strategists' self-reflective account, Shubert-Flint:

> "We strongly believed that a campaign in favor of traditional marriage would not be enough to prevail." "We probed long and hard in countless

> focus groups and surveys to explore reactions to a variety of consequences our issue experts identified" and they decided to create campaign messaging focusing on "how this new 'fundamental right' would be inculcated in young children through public schools."

ER141, excerpting from Shubert-Flint, 45-47.

The elided text, however, suggests a different account. The campaign strategists recognized that the elevation of a "gay couple" to "'protected class' legal status" would lead to same-sex couples' rights prevailing over other rights.

> We settled on three broad areas where this conflict of rights was most likely to occur … religious freedom … freedom of expression … and in how this new 'fundamental right' would be inculcated in young children through the public schools. And we made sure that we had *very concrete examples* we could share with voters *of things that had actually occurred*.

Shubert-Flint, at 45, emphasis added. The district court cited expert testimony from the trial in support of the claim that Prop. 8 Supporters "relied on stereotypes to show that same-sex relationships are inferior," including this extended quotation from historian George Chauncey:

> The most striking image is of the little girl who comes in to tell her mom that she learned that a princess can marry a princess, which strongly echoes the idea that mere exposure to gay people and their relationships is going to lead a generation of young people to become gay, which voters are to understand as undesirable.

Quoted in ER143. The pertinent trial exhibit, however, offers a far different perspective:

> We ran an ad featuring a young Hispanic girl coming home from school, explaining how she had learned in class that a prince could marry another prince, and she could marry a princess! This ad was *based on the actual*

> *experience in Massachusetts, the only state in the nation where gay marriage had been legalized long enough to see how it would be handled by the public school system*. … What they [disfavorable editorialists] never did do, because they couldn't do, was contest the *accuracy of what had happened in Massachusetts*.

Shubert-Flint, at 46, 47, emphasis added. Indeed, Shubert-Flint relied on *two litigated situations* in Massachusetts: *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (involving one family's child exposed to the kindergarten story about a prince marrying the prince, and another family's child exposed to material favoring same-sex marriage in second grade). Clearly, then, the Prop. 8 campaign did not parade speculations to incite unreasonable fear, but offered a rational argument from analogy.

Fortuitously for Prop. 8 Supporters, a San Francisco public school confirmed that analogy by taking first graders on a field trip to "witness the wedding of their lesbian teacher … Now we not only had an example of something that *had happened* in California (*as opposed to might happen*), we had *video footage to prove it*." Shubert-Flint, at 47, emphasis added. If that was not enough to alarm parents desiring to direct their children's education in keeping, if the parents so prefer, with the time-honored definition of marriage, a Hayward, California, school "celebrated 'coming out week' while urging kindergartners to sign pledge cards promising to be an ally of gay students," Shubert-Flint, at 47.

One would be narrow-minded to conclude that parents who do not wish their kindergartners to becoming card-carrying gay rights activists necessarily desire them to be five-year-old bigots instead. Many middle roads of tolerant accommodation can be traveled by those wishing to raise their children in the codes of civility, which, let us trust, is true of most parents regardless of their politics or religion. Prop. 8 Supporters reasonably worried that their government might not long continue to permit them to seek those middle paths, hence their desire for a state constitutional amendment in defense of the natural law of marriage.

III. VOTERS SUPPORTING PROP. 8 HAD GOOD REASON TO BELIEVE THAT PROP. 8 WOULD SAFEGUARD THEIR CONSTITUTIONAL RIGHT TO DIRECT THEIR CHILDREN'S EDUCATION.

A. Controversies Abound Nationwide Concerning School Curricula Pertaining To Matters Of Sexuality And Marriage.

Few American parents today can claim to be unaware of the intense debates surrounding public school curricula with respect to matters of sexuality and marriage. See, for example, Allen Quist, *America's Schools: The Battleground for Freedom* (2005), at 147 ("Quist") (contrasting progressive elementary school curricula in which "two-parent families are rarely included" and "[d]ifferences between males and females are viewed as being the result of conditioning only"—versus traditional education in which "[t]he complementary nature of gender roles

is recognized" and "[m]arriage is viewed as being the oneness of a man and a woman … forming the ideal basis for the family.").

Debate focuses not only on public school curricula, but also on the curricula of parochial schools and homeschools, Quist, chap. 15. The scrutiny placed upon religiously conservative homeschool families does not, however, necessarily indicate the unreasoning *animus* asserted by the expert witnesses for Prop. 8 Opponents, ER34-171 (*passim*), concerning Prop. 8 Supporters. A more balanced sociological analysis suggests that significant critical thinking is involved, by both parents and their children, in cultivating even the most conservative of values within their private homes. Robert Kunzman, *Write These Laws on Your Children: Inside the World of Conservative Christian Homeschooling*, at 36 (2009) ("Kunzman") ("While [homeschooled child] Carly hasn't thought through all the details of these complicated questions, I'm [i.e., researcher Kunzman] encouraged to see that even though she holds some strong conservative opinions (for example, abortion and homosexuality are wrong), she is nonetheless willing to consider other perspectives and the need to make room for them in our pluralistic society."). But regardless of who is open-minded and who is not, controversy rages on, an important contextual clue for properly evaluating the constitutional merits of Prop. 8.

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B. Recent California Education Code Reform Has Heightened The Concerns Of Parents Seeking To Direct Their Children's Education.

Californians engaged in significant debate during the 2007 legislative session, when Senate Bill 777 was enacted to reform the state's Education Code by mandating curricula that forbids gender-specific language that might be construed as a bias against homosexuality.[5] Following the heels of this education reform, *In re Marriage Cases,* 183 P.3d 384 (Cal. 2008) (*"Marriage Cases"*), legalized same-sex marriage. The response of California voters in enacting Prop. 8 should, therefore, be understood within this context.

C. *Marriage Cases* Substantially Changed California's Curriculum Mandate Concerning The Value Of Marriage, Which Change Prop. 8 Sought To Remedy.

Prior to the May 2008 *Marriage Cases* ruling, California had always defined marriage as the union between a man and a woman. *Marriage Cases*, at 407. Proposition 22 (adopted Nov. 2000) solidified this common law consensus by enacting Cal. Family Code, § 308.5 ("Only marriage between a man and a woman is valid or recognized in California."). Aside from a short-lived and unlawful issuing of marriage licenses to same-sex couples in San Francisco, which licenses were later revoked, *Lockyer v. City of San Francisco*, 95 P3d 459 (Cal. 2004), the

[5] Bob Unruh, "California 'Mom,' 'Dad' Ban Garners International Scorn: World Congress of Families Condemns Promotion of 'Polymorphous Perversion,'" *World News Daily*, Oct. 17, 2007, *http://www.wnd.com/?pageId=44064* (accessed Sept. 17, 2010).

"a man and a woman" definition remained until *Marriage Cases*. It was during the pre-*Marriage Cases* era that California's legislature amended its education code to include mandatory instruction regarding the value of marriage.

Enacted in 2003, Cal. Education Code, § 51930(b)(2), requires that teachers "encourage a pupil to develop healthy attitudes concerning … marriage," and § 51933(b)(7) requires that "Instruction and materials shall teach respect for marriage and committed relationships." *See* Appendix, at A-3, *infra*. Despite the law's allowance for schools to opt out of the curriculum mandate, the California Department of Education reports that 96% of the state's public schools participate[6], creating a *de facto* universal curriculum. Prior to *Marriage Cases*, the value of marriage between a man and a woman would be taught. After *Marriage Cases*, with "marriage" now being redefined by court order, schools would be required to instill identical attitudes concerning same-sex marriage and opposite-sex marriage, as early as "kindergarten," § 51933(a). The First Circuit has so ruled in an analogous circumstance, *Parker*, at 16 ("Given that Massachusetts has recognized gay marriage under its state constitution, it is entirely rational for its schools to educate their students regarding that recognition.").

[6] California Dept. of Education, Frequently Asked Questions, *www.cde.ca.gov/ls/hese/faq.asp* (last retrieved Sept. 13, 2010) ("Dept. of Educ. FAQs").

True, parents have the opportunity to withhold active or passive consent, Dept. of Educ. FAQs, but such a safeguard, while it may satisfy *de minimis* parental rights requirements, does not ensure optimal protection. Prop. 8, in restoring marriage as "[o]nly … between a man and a woman," Cal. Const., art. I, § 7.5, serves parents' interests in directing their children's education in a manner consistent with that definition of marriage. It is not unreasonable to assume that Prop. 8 Supporters included a substantial number of parents desiring to exercise their right to direct their children's education concerning marriage.

D. The District Court Erred In Claiming That Prop. 8 Supporters Had No Legitimate State Interest In Mind.

Obviously, the safeguarding of a constitutional right that the Supreme Court repeatedly has identified as fundamental, section I.A, *supra*, is a state interest under the Fourteenth Amendment. Indeed, were the nation's, or California's, founding fathers to suddenly awake in this brave new world, like Rip Van Winkel after sleeping for twenty years, they surely would be shocked that it is not *marriage* remaining intact unless and until a competing interest can be shown to be compelling, narrowly tailored, and least obstructive (a strict scrutiny test), but rather marriage must be *re-defined beyond recognition* and the people of the State of California may not be permitted to restore it unless and until they provide a compelling state interest, narrowly tailored, and least obstructive, to disallow same-sex couples from claiming themselves to be married.

Even if Prop. 8 Supporters must be on the defensive, they can readily identify a legitimate state interest in the protection of parents' Fourteenth Amendment right to determine their children's education—a right which is itself fundamental and deserving of further scrutiny before this court permits its incremental displacement to continue one more step. The district court therefore erred in claiming Prop. 8 serves no legitimate or compelling state interest.

IV. PROP. 8 PROPONENTS HAVE GOOD REASON TO FEAR THAT A JUDICIAL NULLIFICATION OF PROP. 8 WILL FOSTER LIMITATIONS UPON CONSTITUTIONAL LIBERTIES, DESPITE ASSURANCE TO THE CONTRARY IN *MARRIAGE CASES*.

A. *Marriage Cases* Reasoned That State Recognition of Same-Sex Marriage Would Not Constrain Religious Liberties, But Was Silent With Respect To Other Constitutional Protections.

The district court asserted, "Prop. 8 does not affect any First Amendment right or responsibility of parents to educate their children," ER164. The court here relied upon *Marriage Cases*, at 451-452 ("[A]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.").

Marriage Cases did not, however, specifically mention parents' right to determine their children's education, nor did it address other fundamental rights,

such as Free Association or Free Speech, beyond religious contexts. It is doubtful that the *Marriage Cases* doctrine will suffice to protect the full range of the First and Fourteenth Amendment rights of Prop. 8 Supporters and other parties. Troubling implications for Free Association will be discussed in section B, *infra*; for Free Speech, in section C, *infra*.

B. Recent Case Law Developments Suggest That The *Marriage Cases* Doctrine That Preserves Religious Free Association Is Likely To Be Challenged.

California Lutheran High School, a parochial school affiliated with a church body that identifies homosexuality as a sin, recently endured a lawsuit for expelling two students on charges of lesbian behavior. A California appellate court ruled in favor of the school, but on narrow statutory grounds, not addressing the tension between the students' statutory anti-discrimination claims and the school's constitutional Expressive Association claim. The court also declined to address parents' right to determine their children's education through expressive association. *Doe v. California Lutheran High School*, 170 Cal. App. 8th 828 (2009). The constitutional arguments that future defendants in California Lutheran's situation might wish to raise would apparently be weakened in view of the present district court's insistence, at ER165, that nothing short of religiously motivated bigotry against a protected class could motivate opposition to same-sex marriages.

The Supreme Court held quite recently that a public university's commitment to a "viewpoint neutral" policy justifies its withholding of official recognition from a student organization that seeks to limit its membership to those who adhere to an organizational mission statement, including, in that case, a biblical prohibition of homosexual as well as heterosexual fornication. *Christian Legal Society v. Martinez*, 561 U.S. __, slip op., at 29 (2010) ("*CLS*"). The Court rejected the student organization's First Amendment pleas for Free Speech and Expressive Association. The nation has thus been launched on a trajectory in which "viewpoint neutral" means that groups desiring to establish a recognized organization committed to a particular viewpoint, in both word and deed, in a freely competing marketplace of ideas among other groups, sponsoring other ideas, may not do so.

If the district court's ruling stands, more families from among Prop. 8 Supporters likely will retreat into the privacy of their home to educate their children. But homeschoolers, too, were under fire in California during the Prop. 8 campaign, noted not merely in local but national news.[7] What began as allegations of child abuse in one particular family mushroomed into a ruling that implicated the families of some 200,000 home-schooled children in California. In addressing

[7] Kristin Kloberdanz, "Criminalizing Homeschoolers," *Time*, Mar. 7, 2008, *http://www.time.com/time/nation/article/0,8599,1720697,00.html* (last accessed Sept. 22, 2010).

the charges of abuse, the court concluded in a February 28, 2008, ruling that California case law forbids homeschooling, except by parents who have teaching licenses. *In re Rachel L.*, 160 Cal. App. 4th 624 (2008). The court superseded this finding by a grant of rehearing; in an August 8 ruling, the court reversed in part, concluding that California parents generally may homeschool without a license by registering as a private school. *Jonathan L. v. Superior Court (Los Angeles County Dept. of Children and Family Services)*, 165 Cal. App. 4th 1074 (2008).

During the months between the *In re Rachel L.* and *Jonathan L.* rulings, some Prop. 8 Supporters no doubt worried that their rights to direct their children's education would be squished into oblivion: *Marriage Cases* meant that public school curricula would teach the "value" of same-sex marriage, whereas *In re Rachel L.* apparently had foreclosed the option of homeschooling. Some "breathing room" was restored as parents reasonably foresaw, in Prop. 8, a reversal of the curriculum reform entailed by *Marriage Cases,* and when *Jonathan L.* re-asserted parents' rights to homeschool in California. Nevertheless, Prop. 8 Supporters continue to have reason to fear curtailment of their rights, whether by a "chilling effect" upon Free Speech (section C, *infra*) or by an incremental strategy involving many subtle factors (Part V, *infra*).

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C. The Judicial Repeal Of Prop. 8 Would Have A "Chilling Effect" On Religious Liberty And Other First Amendment Rights.

The district court insinuated that Prop. 8 Supporters acted merely or primarily out of "bigotry" or "animus." The judge frequently quoted expert witnesses' references to "stigma," "prejudice," "stereotypes," and "discrimination." ER34-171 (*passim*). Beyond doubt, some homosexual individuals and couples have been targeted with hatred, and beyond doubt, hatred toward them is wrong. The remedy the district court provided, however, cannot forge a lasting peace. Rather, it alienates Prop. 8 Supporters from the public square. The district court failed to exhibit a capacity to contemplate a moderate middle ground in which a person may have reasonable objections to homosexuality while still desiring to act compassionately toward gays and lesbians. Instead, the judge labeled the convictions of Prop. 8 Supporters as categorically unacceptable to the social sciences, to the law, and to civic respectability. If such *dicta vindictiva* do not deter Free Speech, then it never snows in Minnesota.

The Supreme Court "has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights," *Tatum v. Laird*, 408 U.S. 1, 11 (1972). A judicial mandate that same-sex marriages be performed by state officials—coupled with legislation requiring the state's teachers to instill a corresponding transformation of family

values into children's minds—contributes to an abridgement of parents' substantive right to direct their children's education, particularly in view of the First Circuit's recent ruling, *Parker*, at 16, that parents who object to same-sex marriage lack any constitutional claim to parental consent safeguards once the state legalizes such marriages.

If the district court's caricature of Prop. 8 Supporters were to be sustained in this court's ruling, then it would seem to follow that parochial schools maintaining the Prop. 8 definition of marriage thereby endanger the children whom parents have entrusted to their care. Far from furthering a state interest, such religious organizations would be in opposition to a state interest, at least insofar as one accepts the district court's own identifications of the state's interest and the religious groups' motivations. This is not small potatoes. The targeted groups include church bodies that operate substantial networks of parochial schools—notably the Roman Catholic Church and the Lutheran Church Missouri Synod. ER137-38. Moreover, many families choose to homeschool precisely to preserve for the next generation a set of values including, *inter alia*, both the identification of homosexual acts as sinful and an emphasis upon God's forgiveness in Christ for this and any other sin. Kunzman, at 36 and *passim*. The *animus* in the district court's ruling, if this court fails to check it, not only would have a chilling effect upon the First Amendment liberties of those schools and homes, but also would set

in motion an incremental logic, the terminus of which can stop nothing short of the abolition of parochial schools and homeschooling. Nor does such an extrapolation introduce any new ideas; as the next section demonstrates, advocates for same-sex marriage already have rehearsed these plans most deliberatively.

V. SUBSTANTIAL OBJECTIVE EVIDENCE IDENTIFIES INCREMENTAL STRATEGIES CONNECTING STATE RECOGNITION OF SAME-SEX MARRIAGE TO CONSTRAINTS OF PARENTS' RIGHT TO DIRECT THEIR CHILDREN'S EDUCATION.

A. Openly Acknowledged Incremental Strategies Seek To Effect Radical Changes In The Relationship Between Family, Society, And Government, Thereby Displacing Parental Rights.

One need not be a social scientist to recognize the manifest contraction of parental rights occasioned by incremental strategies to legalize same-sex marriage.

In an article simultaneously published by two prominent law journals, University of Chicago Law Professor Mary Anne Case has suggested constitutional arguments that would curtail parents' rights to determine their children's education in order to ensure that American boys and girls grow up believing that biological sex is entirely irrelevant to civic, social, and family life. Professor Case openly advocates "feminist fundamentalism," which she defines as "an uncompromising commitment to the equality [identity?] of the sexes." She proposes that public and private schools, as well as homeschooling parents, be forbidden from providing instruction in distinctive gender roles; each of these

educational spheres should instead be required to "challenge sex stereotypes," ensure androgynous role outcomes, and celebrate lesbian parenting as more conducive than heterosexual couples to instilling androgynous values. Mary Anne Case, "Feminist Fundamentalism on the Frontier between Government and Family Responsibility for Children," 2 *Utah Law Review* 381, 382, 393, 398 (2009), 11 *Journal of Law and Family Studies* 332, 333, 345, 350 (2009).

Another incremental strategy already has begun to run its course in California. This strategy begins with discrimination reform, progresses through adoption and tax reform, then recognizes the "rights and obligations of same-sex couples who form[] common-law marriages," and finally culminates in same-sex marriage. Such was the course traveled by Canada. Amanda Alquist, "The Migration of Same-Sex Marriage from Canada to the United States: An Incremental Approach," 30 *University of La Verne Law Review* 200, 213 (2008).

To accommodate the ascendancy of same-sex households, replete with non-biological ties to children, the American Law Institute ("ALI") has proposed conflating biological and legally adoptive parents, on the one hand, with *de facto* parents and "parents by estoppel," on the other hand.[8] The movement toward same-sex marriage, both before and upon the state creation of such an institution, has thus occasioned sweeping transformations in family law that involve a shift of

[8] ALI, *Principles of the Law of Family Dissolution,* chap. 2 (2002).

authority from natural parents toward, for example, same-sex ex-partners who desire custody or visitation rights, or authority to determine a child's religious training or medical treatment.[9] The resulting expansion of state-recognized family forms (*de facto* domestic partnerships, *de facto* parenthood, etc.) leads not to less, but to more, government "intru[sion] into relational privacy. It dramatically expands state control over private life. Despite the liberal rhetoric that cloaks its illiberal character, the ALI proposal offers nothing more—or less—than a dramatic expansion of state paternalism and coercion."[10]

Now the plea of same-sex-couples to receive marriage recognition in California has come before this appellate court, which sets precedent for several states beyond California, all of which have, like California, acted to preserve marriage as the union of a man and a woman. Alaska, Arizona, Idaho, Montana, Nevada, and Oregon have each adopted constitutional amendments substantially identical to Prop. 8, while Washington and Hawaii have done so by statute.[11]

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[9] For sample scenarios, *see* Mary Coombs, "Insiders and Outsiders: What the American Law Institute Has Done for Gay and Lesbian Families," 8 *Duke Journal of Gender Law and Policy* 87 (2001); Robin Fretwell Wilson, "Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents," in Robin Fretwell Wilson, ed., *Reconceiving the Family: Critiques on the American Law Institute's* Principles of the Law of Family Dissolution 90 (2006).

[10] Marsha Garrison, "Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal," in Robin Fretwell Wilson, ed., *Reconceiving the Family* 305, 328 (2006).

[11] Defendant-Intervenors-Appellants Opening Brief, at 67n23-68n24 [ECF] (Sept. 17, 2010).

Nor are such measures superfluous. ALI recommendations frequently serve as surrogates in the *absence* of relevant statutory or case law.[12] ALI's authority has even been invoked *against both statutory and case la*w, most notably in *Lawrence*, at 572 (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986) and striking down state anti-sodomy statutes in favor of a 1955 *draft* of ALI's Model Penal Code); *cf.* at 598 (Scalia, J., dissenting) (alarmed both that ALI could trump the vast array of state legislatures who maintained anti-sodomy laws and that the deployment of ALI's model as "an emerging awareness" somehow could satisfy the "deeply rooted" criterion for a fundamental right). Prop. 8, like the similar measures adopted by all other states in this circuit plus most other states throughout the nation, sends a clear signal that ALI should not have the last word in re-defining family law.

B. Judicial Nullification Of Prop. 8 Contributes To A Redefinition Not Only Of Marriage But Also Of Parenthood And Hence Of Parental Rights.

A ruling from this court *against Prop. 8* may greatly accelerate the displacement of legal parents from their children in other states as well as forestall efforts in California to restore parents' rights to determine their children's education. On the other hand, a ruling from this court *to uphold Prop. 8*,

[12] *For example*, *Rideout v. Riendeau*, 761 A.2d 291, 307 (2000); *Weinstein v. Weinstein*, no. 17425, 280 Conn. Sup. 15 (Jan. 2, 2007); *Osterkamp v. Stiles*, nos. S-13297, S-13317, Sup. Ct. Alaska (June 25, 2010).

particularly if such a ruling were to include a declaration of parental rights consistent with pre-*Troxel* case law and reflective of the natural law of the family, would, of course, send a more encouraging message to the nation's biological and legally adoptive parents. It also would permit both the people and their locally representative assemblies in the various states to continue to seek the common good of men, women, and children, through the reform and refinement of family law.

In holding the line where California voters have drawn it with Prop. 8, this court also would be protecting the interests of naturally procreative parents in other jurisdictions who do not wish to surrender their rights to a new post-family order in which *de facto* parents and "parents by estoppel" compete with, and at times pre-empt, their fundamental rights to direct their children's education or otherwise act as what nature has made them: parents. When a water pipe leaks, the prudent homeowner does not wait until the entire basement floods before calling a plumber. Prop. 8 represents a timely—or perhaps belated, but not irrationally presumptive—response to an incremental displacement of parental rights.

The nation's debate over same-sex marriage encompasses more than the two people desiring to make public their private commitment to one another; it also impacts the children of other families, since it requires a legal redefinition of all families in order to make room for innumerable new possibilities. "Being entirely a

creation of the state, [same-sex marriage] is an institution that needs to be coddled, and which demands cocooning to protect it. … The need for same-sex unions to be culturally coddled also increases the likelihood that the state will use public education for this end." Seanna Sugrue, "Soft Despotism and Same-Sex Marriage," in Robert P. George and Jean Bethke Elshtain, eds., *The Meaning of Marriage: Family, State, Market, and Morals*, 172, 190 (2006).

Rather than dealing with exceptional cases as exceptions, as adoption and custody law formerly did, the same-sex marriage revolution forges new rules that marginalize the old standard beyond the pale of normativity. Whether intended by the plaintiffs or not, the case for Prop. 8 Opponents necessarily remains incomplete and unstable until this incremental strategy runs its full course.

A tremendous burden falls now to this court as to whether those asserting the freedom to chose a spouse of the same sex can secure that socially constructed status apart from denying, with increasing tenacity, the fundamental right of a man and a woman to direct the education of the children whom nature calls their own. The social engineers of incremental strategies favoring same-sex marriage have themselves answered the question in the negative. Whatever disappointment a reversal of the district court's decision may bring to the particular homosexual couples who originated the complaint, at least they will be liberated from serving

as pawns in a larger scheme that ultimately would constrain not only their neighbors' liberties, but also their own.

CONCLUSION

For the reasons stated above, the district court's order deeply imperils parents' long-recognized natural liberties. The decision should be reversed and the injunction against Prop. 8 should be lifted; the order is a most pernicious attack upon English liberties.

DATED: September 24, 2010.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,099 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 word processing software in 14-point Times New Roman font.

DATED: September 24, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, pursuant to Fed. R. App. P., Rule 25(a)(2)(B):

1. I electronically filed the foregoing opening brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

2. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: September 24, 2010.

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APPENDIX

INDEX:

Vision Statement of The Hausvater Project

> … that the natural family be recognized to consist of one man and one woman united in marriage for life—and their children, whether begotten or adopted … that parents take active and primary roles in the Christian upbringing and general education of their children … that society be recognized to originate from natural families serving one another (society does not create and cannot redefine the natural family) … that civil governments promote peace and justice—protecting citizens' rights to life, property, and liberty (especially religious liberty) … that civil governments' promotion of the common good serve as a supplement to, not a replacement for, similar work performed by families, and ultimately aim to strengthen the ability of families to perform such tasks on their own.

www.huasvater.org/about (2008).

Trial Transcript (Excerpt)

> **The Court:** [I]sn't the danger, perhaps not to you and perhaps not to your clients, but the danger to the position that you are taking is not that you're going to lose this case, either here or at the Court of Appeals or at the Supreme Court, but that you might win it?
>
> And, as in other areas where the Supreme Court has ultimately constitutionalized something that touches upon highly-senstitive social issues, and taken that issue out of the political realm, that all that has happened is that the forces, the political forces that otherwise have been frustrated, have been generated and built up this pressure, and have, as in a subject matter that I'm sure you're familiar with, plagued our politics for 30 years, isn't the same danger here with this issue?
>
> **Mr. Olson [Counsel for Prop. 8 Opponents]:** I think the case that you're referring to has to do with abortion.
>
> **The Court:** It does, indeed.
>
> **Mr. Olson:** And the cases upon which we rely, in which the courts have responded to the needs of the civil rights of our citizens, have been entirely different cases [whereupon Mr. Olson turned to *Loving v. Virginia*, 388 U.S. 1 (1967)].

Closing Rebuttal, Tr. 3095.

Cal. Education Code (SB 71, signed Oct. 1, 2003)

51930. (a) This chapter shall be known and may be cited as the California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act.

(b) The purposes of this chapter are as follows:

(1) To provide a pupil with the knowledge and skills necessary to protect his or her sexual and reproductive health from unintended pregnancy and sexually transmitted diseases.

(2) To encourage a pupil to develop healthy attitudes concerning adolescent growth and development, body image, gender roles, sexual orientation, dating, marriage, and family. …

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.

(b) A school district that elects to offer comprehensive sexual health education pursuant to subdivision (a), whether taught by school district personnel or outside consultants, shall satisfy all of the following criteria:

(1) Instruction and materials shall be age appropriate.

(2) All factual information presented shall be medically accurate and objective.

(3) Instruction shall be made available on an equal basis to a pupil who is an English learner, consistent with the existing curriculum and alternative options for an English learner pupil as otherwise provided in this code.

(4) Instruction and materials shall be appropriate for use with pupils of all races, genders, sexual orientations, ethnic and cultural backgrounds, and pupils with disabilities.

(5) Instruction and materials shall be accessible to pupils with disabilities, including, but not limited to, the provision of a modified curriculum, materials and instruction in alternative formats, and auxiliary aids.

(6) Instruction and materials shall encourage a pupil to communicate with his or her parents or guardians about human sexuality.

(7) Instruction and materials shall teach respect for marriage and committed relationships. …

California Legislature Statutory Record, 1999-2008, *http://www.leginfo.ca.gov/statutory-recordhtml/StatutoryRecord1999-2008.html#edc* (last accessed Sept. 17, 2010).