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LAW OFFICES OF ANDREW P. PUGNO

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October 8, 2008

Station Managers  
California Broadcast and Cable Television Stations

**Re: ProtectMarriage.com – Yes on 8 TV ad  
“It’s Already Happened”**

Dear Station Managers:

The undersigned serves as general counsel for the official proponents of Proposition 8 and *ProtectMarriage.com – Yes on 8*, a Project of California Renewal. This letter provides the basic substantiation for the campaign’s television advertisement, entitled *It’s Already Happened*. Additional information and documentation is available upon request.

The ad states:

“When Massachusetts legalized gay marriage, schools began teaching second graders that boys can marry boys. The courts ruled parents had no right to object.

“Under California law, public schools instruct kids about marriage. Teaching children about gay marriage will happen here ...unless we pass Proposition 8.”

These claims are based on three facts: (1) As recognized by the U.S. Court of Appeals, First Circuit, gay marriage has been taught to children as young as second grade in Massachusetts public schools, following that state’s legalization of gay marriage, and parents who complained were held to have no legal right to object; (2) Under California law, marriage is a topic taught to children in almost all most public schools; and (3) Education Code statutes banning sexual orientation bias in classroom instruction will not allow teachers to continue presenting marriage as only between a man and a woman.

**1. It has already happened in Massachusetts.**

On November 18, 2003, a divided Supreme Judicial Court of Massachusetts held, in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003), that the state constitution mandates the recognition of same-sex marriage. In a recent court decision involving the teaching

of gay marriage in public schools after it was legalized in that state, the 1<sup>st</sup> Circuit Court of Appeals noted:

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.*

(*Parker v. Hurley* (1<sup>st</sup> Cir.2008) 514 F.3d 87, 95 (emphasis added).)

In that case, a teacher in the Estabrook Elementary School in Lexington, Massachusetts, read aloud to her classroom of second-grade students *King and King*, a children's book that depicted the celebration of a gay marriage between a prince and another prince:

This picture book tells the story of a prince, ordered by his mother to get married, who first rejects several princesses only to fall in love with another prince. A wedding scene between the two princes is depicted. The last page of the book shows the two princes kissing, but with a red heart superimposed over their mouths.

(*Id.*, 514 F.3d at p. 93.)

The parents of one of the students in that class, Joey Wirthlin, requested but were denied both notice of such instruction *and* even an opportunity to exempt their child from such instruction about gay marriage. The Court said:

Joey has a more significant claim, both because he was required to sit through a classroom reading of *King and King* and because that book affirmatively endorses homosexuality and gay marriage. It is a fair inference that the reading of *King and King* was precisely *intended* to influence the listening children toward tolerance of gay marriage.

(*Parker v. Hurley* (1<sup>st</sup> Cir.2008) 514 F.3d 87, 106 (emphasis in original).)

Ultimately, the court in *Parker* ruled that the state's interest in educating public school children about gay marriage outweighed the religious freedoms and parental rights of parents who object to same-sex marriage on moral grounds. In particular, the Court ruled that Joey Wirthlin's parents had no right to advance notice or to withdraw their child from such instructions in the public schools. (*Id.*, 514 F.3d at pp. 106-107.)

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## 2. Under California law, public schools instruct kids about marriage.

The California Comprehensive Sexual Health and HIV/AIDS Prevention Act (Educ. Code, §§ 51930 *et seq.*) provides for both comprehensive sexual health education and HIV/AIDS prevention instruction. The HIV/AIDS component is mandatory, but comprehensive sexual health education is optional. However, a study commissioned by ACLU of Northern California, the results of which are cited and relied upon by the California Department of Education, finds that **96%** of California school districts provide comprehensive sexual health education. (*Sex Education in California Public Schools* (PB Consulting and ACLU Northern California, 2003).)<sup>1</sup>

These 96% of school districts that offer comprehensive sexual health education are required to comply with the requirements of the state law, which state: "**Instruction and materials shall teach respect for marriage** and committed relationships." (Educ. Code, § 51933(b)(7).)<sup>2</sup> The Department of Education's website confirms that "school districts are not required to provide comprehensive sexual health education, **but if they choose to do so, they shall comply with all of the requirements**" of Section 51933. (Emphasis in original.)<sup>3</sup>

Pursuant to these statutes, the State Board of Education has adopted Health Education Content Standards that also include instruction on "Essential Concepts" regarding marriage. (See Health Education Content Standards for California Public Schools, Standard HS.1.G.3: "*Discuss the characteristics of healthy relationships, dating, committed relationships, and marriage.*" Adopted March 2008.)<sup>4</sup> The CDE's Health Curriculum Framework similarly calls for instruction on the legal, social and emotional aspects of marriage. (Health Framework for California Public Schools, Kindergarten Through Grade Twelve, page 136.)<sup>5</sup>

It is beyond dispute that marriage *is* taught in almost all public schools.

## 3. Teaching children about gay marriage will happen here unless we pass Proposition 8.

New legislation effective January 1, 2008 legally requires teachers to present both traditional and same-sex marriage as equal when giving instruction that in any way involves marriage, at least so long as gay marriage is legal in California.

The new legislation provides that: "No teacher shall give instruction nor shall a school district sponsor any activity that promotes a discriminatory bias because of a characteristic listed in Section 220." (Educ. Code, § 51500, as amended by Stats. 2007, ch. 569 (S.B. 777), § 29.)

<sup>1</sup> See [http://www.aclunc.org/docs/reproductive\\_rights/sex\\_ed\\_in\\_ca\\_public\\_schools\\_2003\\_full\\_report.pdf?ht=](http://www.aclunc.org/docs/reproductive_rights/sex_ed_in_ca_public_schools_2003_full_report.pdf?ht=).

<sup>2</sup> Similarly, curriculum should include instruction about "the legal... aspects and responsibilities of **marriage**". (Educ. Code, § 51890(a)(1)(D).)

<sup>3</sup> Comprehensive Sexual Health Education, CDE Website: <http://www.cde.ca.gov/ls/he/se/sexeducation.asp>

<sup>4</sup> Available at <http://www.cde.ca.gov/be/ag/ag/yr08/documents/mar08item11.doc>.

<sup>5</sup> Available at <http://www.cde.ca.gov/ci/cr/cf/documents/healthfw.pdf>.

Section 220, in turn, lists the characteristic of "sexual orientation". However, the traditional definition of marriage, according to the Supreme Court, "realistically must be viewed as discriminating against gay persons on the basis of their *homosexual orientation*"<sup>6</sup>--- a bias strictly forbidden in the classroom under the Education Code.

Therefore, a public school teacher's failure to present same-sex and opposite-sex marriage equally would unquestionably constitute a violation of the Education Code provision that prohibits "instruction... that promotes a discriminatory bias" on the basis of sexual orientation. It simply lacks credibility for opponents to argue that, even while gay marriage is legal in California, teachers may continue to instruct children that marriage is a heterosexual-only relationship.

Also, with specific reference to the topic of *marriage*, the Education Code explicitly forbids mentioning marriage in a way that reflects a discriminatory bias on the basis of sexual orientation. The same code section (§ 51933) that states "[a] school district that elects to offer comprehensive sexual health education ... shall teach respect for marriage" also provides: "If a school district elects to offer comprehensive sexual health education... the school district shall comply with the following: ...*Instruction and materials may not reflect or promote bias against any person on the basis of [sexual orientation].*" (Educ. Code, § 51933(d)(2), referring to the list of prohibited biases in § 220.) As noted above, the Supreme Court has expressly stated that the traditional definition of marriage *is* sexual orientation discrimination.

The claim that gay marriage will be taught in California public schools, unless Prop 8 passes, was a subject of litigation over the arguments appearing in the official voters pamphlet. In that case, the Superior Court ruled that it is "an accurate statement of the law" for Proposition 8's proponents to claim as follows, which appears in the final voter pamphlet:

State law may require teachers to instruct children as young as kindergarteners about marriage. (Education Code §51890.) 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.

(*Jenkins v. Bowen*, Sacramento Superior Court, Case No. 34-2008-00017366, at p. 3 and Exh. A.) This ruling was not appealed by the No on 8 litigants.

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<sup>6</sup> *In Re Marriage Cases* (2008) 43 Cal.4th 757, 840 (emphasis added)

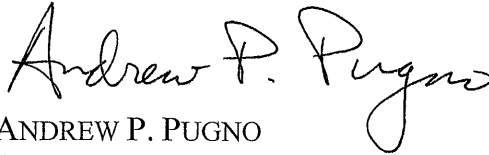
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Prop 8 Ad: *"It's Already Happened"*

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As you can see, the facts and legal authorities completely substantiate the simple claims made in this ad.

Thank you for your attention. Please contact me directly if there are any questions, (916) 608-3065.

Very truly yours,

A handwritten signature in black ink that reads "Andrew P. Pugno". The signature is written in a cursive, flowing style.

ANDREW P. PUGNO  
Attorney at Law