UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 01-17335

KARL DEBRO,

Appellant,

v.

SAN LEANDRO UNIFIED SCHOOL DISTRICT, et al.,

Appellees.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, CALIFORNIA TEACHERS ASSOCIATION, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., and GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK IN SUPPORT OF APPELLANT

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The organizations identified herein respectfully submit this brief as *amici curiae* in support of Appellant Karl Debro. *Amici*'s motion for leave to submit this brief is filed concurrently.

I. IDENTITY AND INTEREST OF AMICI

American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the defense of constitutional guarantees of individual liberty. American Civil Liberties Union of Northern California is its regional affiliate. Since their founding, these organizations have worked to protect the system of free expression that is at the core of our constitutional democracy. They also have long fought against bigotry against the gay and lesbian community.

The California Teachers Association is a labor organization with more than 300,000 members dedicated to improving the conditions of teaching and learning. CTA policy provides that all persons, regardless of sexual orientation, should be afforded equal opportunity within the public education system.

The Lambda Legal Defense and Education Fund, Inc. is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS through impact litigation, education, and public policy work.

The Gay, Lesbian and Straight Education Network ("GLSEN") is the leading national network of parents, students, educators and others working to end anti-gay bias in K-12 schools.

Amici have three primary interests in this litigation.

First, *amici* believe that "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v.*

Tucker, 364 U.S. 479, 487 (1960). *Amici* seek to have this Court protect teachers' freedom to speak without fear of discipline about matters of public concern, recognizing that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal quotation omitted). Appellee's actions are contrary to these principles: the lesson they teach is that to speak in the classroom about a public controversy – even one of indisputable importance to the students, the teacher and the broader community – is to risk official sanction. The teaching of this Court should be that, under the circumstances presented here, the First Amendment does not tolerate such a result.

Second, *amici* urge this Court to confirm a workable legal standard that protects "controversial" classroom discussions. Such a standard need not intrude on a school's authority to choose and implement curricula, but it should recognize the constitutional (and academic) value of enabling teachers to engage in brief, age-appropriate discussions on public issues. In this case, the facts submitted by Debro show that his Honors English students were concerned and distracted by the controversy resulting from a widely reported public school board meeting; in an attempt to focus them on their lessons, Debro allowed a brief discussion of the issue. A determination that teachers like Debro are unprotected if they in any manner "depart from classroom instruction in order to initiate discussion on a matter of public concern" would be unworkable. It would permit a school district to discipline a teacher who spent a limited amount of class time allowing students to discuss the death of a classmate or who, on September 12, 2001, answered questions about the previous day's terrorist attacks. Such a result would stifle the

education process by engendering uncertainty about what classroom speech is "permissible."

Third, *amici* urge this Court to recognize that extreme weight, in the constitutional balance, should be given to teaching about tolerance and discrimination against gay and lesbian teens. In this case, a small band of parents tried to make it taboo for a high school teacher to discuss anti-gay bias in an Honors English class. Such an attempt to "cast a pall of orthodoxy over the classroom" would violate the First Amendment regardless of the topic. *Keyishian*, 385 U.S. at 603. But where the issue is discrimination against gay students, such efforts are not only unconstitutional but dangerous. As detailed below, studies show that anti-gay harassment in our nation's high schools is rampant. Gay and lesbian teens are more likely than their heterosexual peers to feel threatened at school; to be physically assaulted; to face depression; and to attempt suicide. A supportive or at least tolerant school environment – of the sort Debro was trying to promote at San Leandro High School ("SLHS") – is not only a matter of public concern in an abstract sense but also, for a segment of the school population, literally a matter of survival. Debro's speech deserves constitutional protection.

II. SUMMARY OF ARGUMENT

To understand the issue in this appeal, it is necessary to understand the basis for the district court's conclusion that appellee was entitled to qualified immunity. The court framed the constitutional issue as whether a teacher has a First Amendment right "to depart from classroom instruction in order to discuss matters of public concern." ER67. The court did not resolve that issue, however. Rather, the court simply concluded that the issue was one of first impression in this Circuit

and therefore that the right was not "clearly established," thus entitling defendant to claim qualified immunity. ER69.

Having ruled that there was no clearly established law entitling a teacher to depart from classroom instruction to discuss a matter of public concern, the court apparently concluded that Debro could only prevail on his constitutional claim if he established that "his comments were imbedded in classroom instruction of English." ER69-70. The court held that plaintiff had not made that showing and accordingly granted appellee's motion for summary judgment.

The district's court's ruling is infected with two errors, each of which independently requires reversal. First, the court failed to resolve the threshold question of whether the facts alleged by Debro amounted to a constitutional violation, as required by the Supreme Court's qualified immunity cases. Second, in concluding that Debro had failed to show that his speech was, in fact, properly within the district's curriculum, the court failed to acknowledge that substantial factual disputes existed between the parties on this issue.

This brief addresses only the first of these errors. As discussed below, Debro's comments were entitled to First Amendment protection, even if characterized as outside the scope of the formal English curriculum. Debro's speech must be regarded as a matter of the utmost public concern, given the well-documented harassment of gay students in public schools and the California Legislature's mandate that schools affirmatively combat it. Appellee has not shown that Debro's actions caused any material interference with school operations, and school officials can claim no pedagogical interest in suppressing speech on such a vital topic. Moreover, the legal underpinnings of Debro's constitutional claim – in particular, the public-employee speech doctrine or,

arguably, the First Amendment framework for evaluating restrictions on student curricular speech – were not novel. The law on this issue was clearly established long before appellee's actions.

III. ARGUMENT

A. The District Court Erred in Failing Even To Consider Whether Appellee Violated Debro's Constitutional Rights, and in Concluding His Rights Were Not Clearly Established.

As an initial matter, the district court's qualified-immunity analysis is fatally flawed because the court granted judgment for appellee without even considering whether the conduct alleged by Debro amounts to a constitutional violation. The Supreme Court repeatedly has instructed that when faced with a qualified-immunity defense, a court first must address whether a constitutional right existed. *See Saucier v. Katz*, 121 S.Ct. 2151, 2155-56 (2001) (threshold question is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [state's] conduct violated a constitutional right?"). Courts cannot "skip ahead to the question whether the law clearly established" that the conduct was unlawful, because the development of constitutional law requires "elaboration from case to case" as to the existence of constitutional rights. *Id*.; *Wilson v. Layne*, 526 U.S. 603, 609 (1999). In this case, the district court skipped the threshold question of whether a teacher has a right to discuss public issues not strictly within the formal curriculum. The judgment below must be reversed for this reason alone.

Had the district court performed the qualified immunity analysis in the manner required by the Supreme Court, it would have assessed whether Debro's speech was constitutionally protected. As discussed in the remainder of this brief, a proper application of any of the possible First Amendment tests would have led

the court to conclude that appellee violated Debro's First Amendment rights, and that those rights were clearly established.

B. Debro's Speech Was Constitutionally Protected.

1. The Protection of Classroom Speech Has Long Been a Matter of First Amendment Concern.

Classroom speech has always been "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 602 (internal quotations and citations omitted). The Supreme Court has long recognized that teachers' in-class speech merits protection from unreasonable state intrusion, based on the rationale that a democratic society cannot survive without schools that permit its young citizens to consider competing values and ideas: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court reversed the conviction of a teacher who taught German to a 10-year-old, in violation of a criminal statute prohibiting foreign-language education before grade eight. The Court held the statute violated the teacher's Due Process rights, because it lacked "any reasonable relation to any end within the competency of the state."[1] *Id.* at 403. Significantly, the Court found that the state could not constitutionally proscribe the classroom speech at issue because education in a foreign language

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[1] Though *Meyer* arose under the Fourteenth Amendment (at the time, the First Amendment had yet to be applied to the states), its holding indicates the statute would have failed even the least stringent First Amendment scrutiny.

"cannot reasonably be regarded as harmful." *Id*. at 400. Though acknowledging the "state's power to prescribe a curriculum," the Court held that power did not overcome the constitutional rights of teachers to instruct in a manner "not injurious to the health, morals or understanding of the ordinary child." *Id*. at 402-03.

In *Keyishian*, the Court again invalidated a state law aimed at curtailing teachers' in-class speech – there, a statute requiring removal of public-school teachers who utter "any treasonable or seditious word or words" while teaching. 385 U.S. at 591-92, 612. The Court noted that the First Amendment protects academic freedom and free expression in the classroom:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.

Id. at 602-03 (internal quotations and citations omitted). The court found the anti-sedition provisions overbroad because they appeared to impose penalties even on a teacher "who merely advocates the [anti-government] doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims." *Id*. at 599-600.

In *Epperson v. Arkansas*, 393 U.S. 97 (1968), a high school biology teacher sought a declaratory judgment that a statute prohibiting instruction about evolution was unconstitutional. The Court struck the law because "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." 393 U.S. at 106. Though a state has the "undoubted right to prescribe the curriculum for its public

schools," it may not "impose upon the teachers in its schools any conditions that it chooses"; rather, any such restrictions must be consistent with "constitutional guarantees" protecting teachers. *Id.* at 107.

These cases illustrate that, for nearly 80 years, and in a variety of contexts, the Supreme Court consistently has recognized the importance of teachers' in-class speech and free-flowing classroom expression. These cases recognize that teachers have a First Amendment right to engage in classroom speech that does not interfere with the school's reasonably prescribed curriculum; is not injurious to students; and does not amount to improper indoctrination or incitement. It is against this backdrop that Debro's comments to his students about making SLHS a tolerant place for all students must be considered.

2. Debro's Speech Is Protected Under the Public-Employee Speech Doctrine.

a. *Pickering* Provides the Most Appropriate Framework for Evaluating Whether a Teacher's Non-Curricular Speech Is Constitutionally Protected.

As formulated by the district court, the issue in this case is whether a high school teacher has "the right to depart from classroom instruction in order to discuss matters of public concern." Courts evaluating similar in-class teacher speech cases have applied one of two First Amendment frameworks – either the public-employee speech doctrine established in *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983), or the standard applicable to restrictions to student curricular speech set forth in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

Amici believe Debro's First Amendment rights were infringed regardless of which standard applies, but that *Pickering* provides the more appropriate analytical framework. The issue in *Hazelwood* was "whether the First Amendment requires a

school affirmatively to promote particular student speech"; the standard announced applies only to ***students'*** expressive activities that "may fairly be characterized as part of the school curriculum…." 484 U.S. at 270-71. Under *Hazelwood*, schools may limit student speech if doing so is "reasonably related to legitimate pedagogical concerns." *Id.* at 273. A number of lower courts have applied this standard to teacher speech cases, but only in the context of affirming that schools, and not teachers, have final authority to determine formal course curricula and the content of messages to be promoted in school facilities.[2]

This case, in contrast, involves speech beyond the formal curriculum; made by an individual teacher, not a student or the school itself; and relating to an issue of public concern then raging in the high school and the community. In these circumstances, as the district court recognized (ER67), the public-employee speech

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[2] *See, e.g., Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003 (9th Cir. 2000) (rejecting teacher's asserted right to post personal religious views on school-operated bulletin board), *cert. denied*, 532 U.S. 994 (2001); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (teacher did not have right to select play, over administration's objections, for performance by drama students); *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794, 800-01 (5th Cir. 1989) (history teacher had no First Amendment right to assign unapproved reading list); *cf. California Teachers Ass'n v. State Board of Educ.*, 271 F.3d 1141, 1148-49 (9th Cir. 2001) (assuming, without deciding, that *Hazelwood* is appropriate standard to evaluate whether teachers enjoy constitutional protection for "instructional" speech). *Peloza v. Capistrano Unified School District*, 37 F.3d 517, 522 (9th Cir. 1994), relied on below by appellee, does not compel the application of *Hazelwood* to the instant facts. The case involved a teacher who sought to revise his school's biology curriculum to suit his religious beliefs; like the other cases cited above, it addresses a teacher's right to ***establish*** the course curriculum, not to discuss issues not formally within it. Indeed, *Peloza* arose under the Establishment Clause and does not mention *Hazelwood* or a school's "legitimate pedagogical concerns."

standard is more appropriate than *Hazelwood*. First, this standard is more mindful of high constitutional value of unfettered classroom speech, as expressed in *Meyer*, *Keyishian*, and *Epperson*. *Pickering* itself involved speech by a teacher – specifically, a letter to a local newspaper criticizing his district's handling of school finances. The Court held the letter could not form the basis for the teacher's dismissal, recognizing that "free and open debate" about school operations was vital to the public, and that teachers are particularly likely to have informed opinions about such issues. "Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dissent." *Pickering*, 391 U.S. at 571, 572.

Under *Pickering*, a teacher's speech on matters of public concern is fully protected if it outweighs "the need for orderly school administration." *Id.* at 569. The threshold question is whether the speech is on a matter of public concern, which "must be determined by the content, form and context of a given statement, as revealed by the whole record"; if it is, the subsequent balancing requires consideration of "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 147-48, 150; *accord*, *Anderson v. Central Point School Dist.*, 746 F.2d 505 (9th Cir. 1984). The government bears the burden of showing that its interests are "substantial." *Tucker v. California Dept. of Educ.*, 97 F.3d 1204, 1210-11 (9th Cir. 1996). A mere difference of opinion with school administrators that does not interfere with school operations or discipline is not enough to overcome a teacher's First Amendment rights. *Pickering*, 391 U.S. at 569-71.

In *Piver v. Pender County Board of Education,* 835 F.2d 1076 (4th Cir. 1987), the Fourth Circuit applied the *Pickering* balancing test in a case almost

identical to this one. *Piver* involved an ongoing controversy over whether to retain a high-school principal. Piver, a social-studies teacher at the school, spoke at a public meeting in support of retaining the principal. He also, like Debro, allowed his students to discuss the issue during class. *Id.* at 1077.[3] The district reassigned Piver involuntarily, based on allegations that his support of the principal had been "divisive and disruptive for the students…." *Id.* at 1078.

The court had little difficulty concluding that the district's actions violated Piver's First Amendment rights. Applying *Pickering*, the court first found that Piver's speech clearly addressed a matter of public concern because it was "on a matter in which the community … was vitally interested" and was "of much wider importance than a mere 'private personnel grievance.'" *Id*. at 1080. The court observed that Piver's speech furthered his students' education by "engaging them in issues of interest to the community," and that these "weighty interests" far outweighed the alleged threat to school discipline and harmony asserted by the school board. *Id*. at 1081.

Similarly, in *Cockrel v. Shelby County School Dist.*, 270 F.3d 1036 (6th Cir. 2001), the Sixth Circuit applied *Pickering* to evaluate a fifth-grade teacher's claim

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[3] As in this case, the classroom speech in *Piver* involved a public matter not included in the formal course curriculum. The case is thus to be distinguished from the Fourth Circuit's 7-6 *en banc* decision in *Boring*, which addressed only "whether a public high school teacher has a First Amendment right ***to participate in the makeup of the school curriculum*** through the selection of a play." 136 F.3d at 364 (emphasis added). The "question of whether a teacher has a First Amendment right when she speaks in the classroom generally, other than through the curriculum itself," was not before the *Boring* panel. *Id*. at 372 (Luttig, J., concurring). The district court in this case relied on *Boring*, without recognizing that it does not apply to the facts presented here.

that she was terminated in retaliation for inviting (with her principal's permission) industrial hemp advocates to address her class. Treating her choice of speakers as speech, the court first rejected the notion that teachers, in choosing what to teach, necessarily are speaking as employees on matters of private concern. "As the Supreme Court made clear in [*Connick*], however, the key question is not whether a person is speaking in his role as an employee or a citizen, but whether the employee's speech in fact touches on a matter of public concern." *Id*. at 1052. The *Cockrel* court concluded that speech about industrial hemp implicated environmental and policy issues of clear public concern. *Id*. at 1052.

In determining whether the school's interest in orderly administration outweighed the teacher's right to speak on matters of public concern, the court found the relevant considerations to be whether the teacher's speech meaningfully interfered with the performance of her duties, undermined a legitimate goal of the employer, created disharmony among co-workers, impaired discipline by superiors, or destroyed the relationship of trust required of "confidential" employees. *Id*. at 1053. The court found little weight to the school's asserted interests: it held that public school teachers are not "confidential employees," that the speech at issue had educational value, and that the speech did not interfere with the plaintiff's performance as a teacher. Though the issues raised by the teacher resulted in an occasionally contentious school environment, the court discounted this factor because any disruption resulted from "the government's express decision permitting the employee to engage in" the speech at issue. *Id.* at 1055. The court therefore held the *Pickering* scale tilted in the teacher's favor.

b. Speech About Making Schools Safe for Gay and Lesbian Students Is of Great Public Concern.

In this case, the threshold question under *Pickering* indisputably is satisfied: as the district court noted, the very issue to be decided is whether a teacher may "discuss matters of public concern" during class time, and appellee conceded below that tolerance of homosexuality was a public issue in the community. Nevertheless, because *Pickering* is a balancing test, weighing the value of the speech against any countervailing state interest, it is appropriate for the Court to consider the value of the speech at issue. *Amici* urge this Court to recognize the importance of classroom discussions of tolerance of gays and lesbians – at SLHS, in the broader community speech and to the public at large – and that it outweighs any interest the school may claim in suppressing it.

Whenever speech "relates to an issue of 'political, social or other concern to the community,' as distinct from a mere personal grievance, it fairly is characterized as addressing a matter of public concern." *Gilbrook v. City of Westminster*, 177 F.3d 839, 866 (9th Cir. 1999) (quoting *Connick*, 461 U.S. at 146-147). Certainly, discrimination is of vital societal concern.

The California Legislature has confirmed the important public interest in prevention of discrimination based on sexual orientation. By statute, in place at the time of the events in question and today, all California students are entitled "to participate fully in the educational process, free from discrimination or harassment." Cal. Educ. Code § 201(a) (formerly § 45). In amending the Education Code in 2000, the Legislature found that "it is incumbent upon us to ensure that all students attending public school in California are protected from potentially violent discrimination. Educators see how violence affects youth every day; they know first hand that youth cannot learn if they are concerned about their

safety." 1999 Cal. A.B. 537, Stats 1999, ch. 587 § 2, 3. The Legislature specifically identified sexual orientation as one of the prohibited forms of discrimination in public schools. Cal. Ed. Code § 200; Cal. Penal Code § 422.6. Moreover, the Legislature found that "California's public schools have an affirmative obligation to combat racism, sexism and other forms of bias," and need to "inform pupils in the public schools about their rights … with the intention of promoting tolerance and sensitivity in public schools…." Cal. Educ. Code § 201(b).

A district court in this Circuit relied on these statutory provisions as evidence that the public interest would be served by enjoining a school district from interfering with the formation of a high school gay-straight alliance – precisely the sort of group Debro was involved in at SLHS. *Colin v. Orange Unified School Dist.*, 83 F. Supp.2d 1135, 1150-51 (C.D. Cal. 2000). The court had no difficulty recognizing the overriding value of promoting a safe and tolerant atmosphere for gay and lesbian students. "As any concerned parent would understand, this case may involve the protection of life itself." *Id*. at 1151. This observation is not hyperbole: studies show that gay teens attempt suicide at a disproportionately high rate. *See id.*; Human Rights Watch, HATRED IN THE HALLWAYS 68 (2001) ("HRW")[4]; Gadolfo *et al*., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-Based Sample of Adolescents*, 101 PEDIATRICS 895 (1998).

These and other studies confirm that harassment of gay and lesbian youth is rampant in schools throughout the country, and that having a supportive teacher or

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[4] Available at http://www.hrw.org/reports/2001/uslgbt/toc.htm.

adult is vital to easing the difficulties these students face. *See* HRW at 18; Kosciw & Cullen, GLSEN 2001 National School Climate Survey (2001) ("Kosciw") (*available at* www.glsen.org/templates/news).[5] One such study found that gay and lesbian teens are nearly three times as likely as their heterosexual peers to have been assaulted or involved in at least one physical fight in school, three times as likely to have been threatened or injured with a weapon at school, and nearly four times as likely to have skipped school because they felt unsafe.[6]

The harassment that lesbian and gay youth face in American schools ranges from anti-gay remarks, "whisper campaigns," and obscene notes or calls, to violent physical and sexual assaults. *See, e.g., Nabozny v. Podlesny*, 92 F.3d 446, 451-52 (7th Cir. 1996); *Henkle v. Gregory*, 150 F. Supp.2d 1067, 1070-71 (D. Nev. 2001). Eighty-four percent of gay and lesbian students reported hearing anti-gay remarks in school frequently or often – and one-quarter heard such remarks from faculty or staff. Kosciw at 6; *id*. at 13-14; HRW at 33. Such verbal harassment – especially if left unchecked – quickly can escalate to physical harassment and assault. *Id.* at 31; Kosciw at 13. Over one-third of gay and lesbian students in one survey reported that they had been victims of "physical harassment," such as being shoved or pushed, because of their sexual orientation. *Id.* at 14. A large percentage of gay teens are assaulted in school because of their sexual orientation. *See id*. at 14. (over 20 percent reported incident of physical assault in past year); Rhode Island

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[5] Estimates on the number of gay, lesbian and bisexual students vary; "most researchers believe that between five and six percent of youth fit into one of these categories." HRW at 18.

[6] Massachusetts Dept. of Educ., 1999 Massachusetts Youth Risk Behavior Survey (2000), *available at* http://www.doe.mass.edu/lss/yrbs99/.

Task Force on Gay, Lesbian, Bisexual and Transgendered Youth (March 1996) (41% of lesbian and gay youth have been violently attacked at school).[7]

This verbal and physical harassment can do serious damage to gay and lesbian students' ability to learn. Kosciw at 12. Over two-thirds of the respondents in one study reported feeling "unsafe" in school because of their sexual orientation, and over 30 percent had skipped at least one entire day of school in the past month because they felt threatened there. *Id.* Because of discrimination, harassment, and violence, many gay youth skip school, some switch schools to escape their harassers, and some simply drop out. HRW at 37. Against this background of harassment and violence, gay and lesbian students were more likely than their heterosexual peers to be depressed, use alcohol and other drugs, engage in risky sexual behaviors, and run away from home. *Id.* at 68.

Having a supportive teacher or other staff member at school, however, eases the emotional and educational difficulties that gay and lesbian students face as a result of a hostile school environment. Students who have a supportive teacher or staff person are far more likely to feel that they belong at school. Kosciw at 35; *see also id.* at 1 ("if young people ha[ve] in-school supports – such as . . . supportive teachers – the situation brightens dramatically"); Russell, et al., *School Outcomes of Sexual Minority Youth in the United States*, 24 J. ADOLESCENCE 117, 124 (2001) (national study finding gay and lesbian youth "with positive feelings about their teachers were significantly less likely than their peers to experience the broad range of school troubles."); HRW at 96 ("[s]tudents repeatedly told us that having even just one adult in the school system who supported them was critical to

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[7] Available at http://members.tripod.com/~twood/safeschools.html.

them surviving the otherwise hostile atmosphere"). The support of teachers who openly address issues of bias and harassment based on sexual orientation is of profound importance. Educators who strive to make their schools safe and supportive places for all students to learn necessarily improve the educational atmosphere for everyone.

c. Debro's Speech Involved a Matter of the Highest Public Concern, and the *Pickering* Balance Tips Entirely in His Favor.

Against this backdrop, it is clear that Debro's discussions with students in his Honors English class are constitutionally protected under the standard for public-employee speech. The speech for which Debro was sanctioned[8] was of paramount public concern. Speech about the value of diversity and tolerance, and the elimination of bias toward gay students in particular, is critical in any high school. SLHS was no exception: the record in this case shows that gay students there regularly were subjected to harassment, threats and assault, to the point that some were unable to remain at the school. To combat bias and promote tolerance for gay and lesbian people at the school, Debro on a few occasions held classroom discussions regarding discrimination and the rights of all students to a safe learning

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[8] Sanctions on classroom speech need not be severe to achieve their full *in terrorem* effect, for it is "a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living." *Keyishian*, 385 U.S. at 601. *Keyishian*, 385 U.S. at 601; *see Piver*, 835 F.2d at 1078 (finding constitutional violation based on threat to transfer teacher involuntarily). Appellee's disciplinary letter to Debro chilled Debro's ability to speak out in school against bigotry and intolerance, for it threatened serious retaliation for subsequent incidents.

environment. Record evidence confirms these discussions were always brief and respectful.

Debro's speech had all the attributes that led the Fourth Circuit in *Piver* to conclude that a teacher's non-curricular classroom discussion was particularly "weighty" and of vital interest to the teacher, the community and the students. 835 F.2d at 1080. First, Debro's classroom discussion was linked to his very recent appearance at a public meeting of the local school board. Just like the teacher in *Piver*, Debro was one of numerous community members to address elected officials. In Debro's case, it is apparent his students were not only aware of the controversy but concerned about it to the point of distraction. To bar him from discussing with his students an issue of both public and personal significance to them – one they likely were discussing at home and with peers, and which they could read about on the front page of the local newspaper – defies common sense.

Second, Debro's speech concerned a public issue on which he had "particular expertise." 835 F.2d at 1081. Debro was actively involved in combating anti-gay bias at SLHS, advising students who formed one of the first gay-straight alliances in California and actively supporting the rights of gay students. He was recognized, by both supporters and detractors, as a leader in promoting tolerance at the school. Moreover, as one of only a handful of minority teachers in the high school, Debro was uniquely qualified to address the issue of discrimination at SLHS, and his students looked to him for leadership when conflicts involving bias erupted.

Third, as in *Piver*, Debro's in-school speech merits heightened protection because it was raised in a manner entirely appropriate to the classroom setting. Debro alleges that he was disciplined for engaging in a brief discussion about a

roiling public controversy with his eleventh-grade Honors English class. Record evidence shows the discussion was substantive and respectful. By allowing his students to discuss issues involving tolerance and diversity, Debro was engaging his students in issues of interest to the community. *Piver*, 835 F.2d at 1081. All of these factors "weigh[ ] against the charge that [Debro's] actions disrupted the classroom …." *Id.*

To overcome Debro's right to engage in speech of such high public importance, appellee bears a heavy burden to show the speech interfered with the "need for orderly school administration." *Pickering*, 391 U.S. at 569. There is no proof of material interference that could justify granting summary judgment for appellee (and even if there were, it would not outweigh Debro's right to speak about discrimination and tolerance in the school community). Courts routinely have rejected school districts' assertions that speech on a matter of public concern is overly disruptive absent clear evidence that the speech has a "tangible impact" on school operations. *Belyeu v. Coosa County Board of Educ.*, 998 F.2d 925, 928-29 (11th Cir. 1993) (teacher's aide publicly discussed, "without animosity or unnecessary confrontation," the need for school to commemorate Black History Month; speech protected under *Pickering*); *Piver*, 835 F.2d at 1078. In reaching its decision here, the district court identified no meaningful interference with Debro's ability to teach or with the school's mission, no allegation that Debro's discussion created disharmony among co-workers or impaired discipline, and no suggestion that the topic was unsuitable for Honors English students. *See Cockrel*, 270 F.3d at 1052.

Appellee asserted in his summary judgment memorandum below that Debro was disciplined for expressing in class his "personal antagonism for his students'

parents' views." To the extent this suggests Debro criticized the parents of his students, it is sufficient on the posture of this case to note that a factual dispute exists and therefore that summary judgment was inappropriate. To the extent Debro expressed his view (which happened to conflict with the views of some of his students or their parents) that promoting tolerance is important, that expression is constitutionally protected and, indeed, reflects the state's public policy. Mere differences of opinion are not sufficient to overcome a teacher's First Amendment rights. *Pickering*, 391 U.S. at 569-71. Nor can school officials claim that having to respond to the objections of a small group of parents to Debro's expressive activities amounts to a meaningful disruption of school administration. *Tucker v. California Dept. of Educ.*, 97 F.3d 1204, 1211 (9th Cir. 1996) (alleged "disruption" of supervisor's duties caused by plaintiff's controversial speech given no weight under *Pickering* analysis; "it was part of the supervisor's regular functions to deal with problems of this nature."). A school district's "interest in being free from general criticism cannot outweigh" the right of a teacher to speak out against policies he believes are harmful or unlawful. *Bernasconi v. Tempe Elementary School Dist.*, 548 F.2d 857, 862 (9th Cir. 1977).

Finally, it is worth noting that SLHS officials did not attempt to suppress Debro's speech until parental criticism swelled. Controversy or even heavy dissention in the school community about a teacher's speech is given little weight in the *Pickering* balance, particularly where that speech was previously allowed by school officials. *Cockrel*, 270 F.3d at 1054-55. "[A]n unconstitutional dilemma may exist for a teacher whose controversial speech is approved ex ante by school officials, but used ex post, in the wake of parental and/or community dismay with that speech, as the reason for the teacher's discharge." *Id.* at 1055 n.6. Debro was

placed in such a dilemma: rather than "take the heat" from a small group of parents who opposed any discussion about tolerance, the superintendent had a change of heart and moved to squelch any further discussion of these issues. Moreover, to deny Debro the opportunity to continue discussing these issues just days after a heavily attended school board meeting – at the very moment when the public, and his students', interest in the issue were at their apogee – would be to turn *Pickering* on its head. This Court should hold that appellee had no permissible interest in doing so.

3. Debro's Speech Is Constitutionally Protected Under *Hazelwood*.

As stated above, *amici* believe *Pickering* provides a more appropriate framework than *Hazelwood* for evaluating the extent to which public school teachers may engage in brief classroom discussions on topics not expressly contained in (but not contrary to) the formal course curriculum. *Hazelwood* held that schools do not violate ***students'*** First Amendment rights by "exercising editorial control over the style and content of student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. As discussed previously, courts have applied *Hazelwood* to affirm that schools, and not teachers, retain the right to establish curricula. *See supra* note 2. This case, in contrast, involves a teacher's First Amendment right to engage in speech on issues of public concern in addition to the formal course work.

If this Court is inclined to apply *Hazelwood*, the most appropriate precedent is *Hosford v. School Committee of Sandwich*, 659 N.E.2d 1178 (Mass. 1996), an opinion from Massachusetts' highest court involving in-classroom speech by a teacher outside the regular course work. In *Hosford*, a special-needs teacher was

terminated for holding a brief classroom discussion about profanities with her 13-year-old students. The talk came in response to a student's profane outburst; rather than ignore it, the teacher decided to confront the issue and to discuss words that should not be used in school or at home. *Id.* at 1179. Reversing a judgment for defendants, the court stated it was "certain" school officials violated the teacher's First Amendment rights because they had no pedagogically valid reason for terminating her:

> Common sense compels the conclusion that there was nothing amiss about the discussion. The contention that these are words that would surprise or offend the delicate ears of thirteen year old boys is unconvincing, the more so since it was the boys themselves who brought them up. Nor is there the slightest basis for the suggestion that Hosford had continued the discussion to titillate or provoke the boys. Hosford was quite stern about admonishing the students not to use these terms in class….

Id. at 1182.

Just as in *Hosford*, Debro's brief classroom discussion about the previous week's school board meeting was a pedagogically appropriate attempt to focus his distracted students on their lessons. Debro's students were concerned that the school board might end the gay-straight alliance or terminate Debro; rather than allow the issue to remain a distraction, he decided to spend a few minutes confronting it and put any rumors to rest. Moreover, there is no indication that Debro discussed anything beyond the maturity level of his eleventh-grade honors students. To the contrary, his class had discussed the topic of tolerance on other occasions earlier that year. Indeed, because community interest – and, by extension, his students' interest – in efforts to combat anti-gay bias at SLHS was

peaking, it was a particularly appropriate time for Debro to continue the conversation. It was, in short, a pedagogically valuable "teaching moment."

Finally, appellee simply has no legitimate pedagogical basis for attempting to stifle Debro's discussions about the public debate over tolerance and anti-gay bias at SLHS. By statute, the school is required to protect gay and lesbian students from threats and discrimination and to "promote tolerance and sensitivity." Cal. Educ. Code § 200, 201. At the time, SLHS had a documented history of anti-gay harassment, with several students leaving the school as a result; this is consistent with research showing that many gay and lesbian teens feel unsafe and unable to learn at school. The fact that some parents did not approve of the discussions in Debro's class does not mean they were educationally inappropriate, or that the school had any legitimate justification for prohibiting them.

4. Debro's Rights Were Clearly Established.

The district court found that appellee had qualified immunity because, even if he violated a constitutional right of Debro (an issue the district court was required, but failed, to decide, *see supra* Section III.A), that right was not clearly established. The district court based this finding on what it perceived as an absence of cases addressing whether, pursuant to the First Amendment, a teacher may depart from classroom instruction to discuss a controversial matter without fearing retaliation by his employer. However, *Piver*, *Cockrell*, and *Hosford* all establish this exact right. The courts in those cases had no difficulty applying the principles set forth in *Pickering* or *Hazelwood* to facts very similar to those at issue here.

The right of a teacher to engage in speech of public concern, far outweighing any asserted interest of his employer, was clearly established in *Pickering*. Even if

Debro's speech is subjected to the standard for student speech, *Hazelwood* established in 1988 that such speech is protected unless the school has legitimate pedagogical grounds to restrict it. The right at issue in this case was clearly established, regardless of which analytic framework is applied.

IV. CONCLUSION

To hold that a school superintendent does not offend the First Amendment by retaliating for the speech at issue in this case would be to find that teachers are automatons – that every moment of class time can be scripted, and that the school administrators can control every classroom utterance even if they have no constitutional or pedagogical justification for doing so. It would handcuff educators, preventing them from teaching tolerance or responding appropriately when an issue threatens to interfere with their students' ability to learn – be it the death of a classmate, a national emergency, or the harassment of a peer. Such a result can be avoided through a proper application of appropriate constitutional standards. Karl Debro's efforts to make SLHS a safe and tolerant place for all students was speech of the utmost importance, and it fully warrants constitutional protection.

RESPECTFULLY SUBMITTED this _____ day of June, 2002.

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Circuit Rule 32. The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 6,940, not including the corporate disclosure statement, table of contents, table of citations, certificate of service, certificate of compliance, statement of related cases, and any addendum containing statutes, rules or regulations required for consideration of the brief.

DATED this 28th day of June, 2002.

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