Case No. 07-1528

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DAVID PARKER, et al.,

Plaintiffs-Appellants,

v.

WILLIAM HURLEY, et al.,

Defendants-Appellees.

Appeal
from the United States District Court
for the District of Massachusetts

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, LEXINGTON COMMUNITY ACTION FOR RESPONSIBLE EDUCATION AND SAFETY, LEXINGTON EDUCATION ASSOCIATION, MASSACHUSETTS TEACHERS ASSOCIATION, AND RESPECTING DIFFERENCES IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

None of Amici Curiae is a nongovernmental corporate entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock.

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STATEMENT OF INTEREST

Amici Curiae are (1) teacher, parent, and community organizations that have a profound interest in preserving the ability of all students to receive a meaningful education, and (2) legal organizations that have considerable expertise in due process and free exercise jurisprudence. See Addendum infra. Amici Curiae respectfully submit that they are well-positioned to assist this Court in its analysis of the issues central to this appeal: (1) whether the constitutional right to parental autonomy or religious freedom is violated where a lesson taught to a child by her school is inconsistent with a belief inculcated in the child by her parent, and (2) whether a broad right of a parent to opt a child out of a lesson would fatally compromise the ability of a school to provide a meaningful education. Amici Curiae respectfully submit this brief pursuant to Fed. R. App. P. 29.

STATEMENT OF FACTS

Appellants are two sets of parents and their children, who are elementary school students in Lexington Public Schools. App'x at 187-88. Appellees include certain officials and employees of the Town of Lexington and its public schools. Id. at 188-91.

Appellants object to the inclusion of certain children's books within Appellees' curriculum because their content is inconsistent with Appellants' sincerely held religious beliefs about sexual orientation and marriage. Id. at 192-

93, 201-02. Specifically, Appellants object to (1) the inclusion of Who's in a Family? within a "Diversity Book Bag," id. at 192, (2) the availability of Who's in a Family? and Molly's Family in a reading center, id., and (3) the reading of King and King during class time, id. at 201. The district court described these children's books as follows:

> Who's in a Family includes illustrations of different forms of families, including children with parents of different genders, children with parents of the same gender, children with parents of different races, and a single parent family . . . . Molly's Family teaches about different kinds of families, focusing on a student whose parents are a same-sex couple.
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> . . .
>
> King and King is a fairytale about a prince ordered by his mother, the queen, to find a princess to marry. The prince rejects each of the princesses he meets. Ultimately, the prince meets another prince. The two fall in love, marry, and live happily ever after. The book concludes with a cartoon kiss between the young couple.

Id. at 17; see also id. at 232-57 (excerpt from King and King); Supp. App'x at 28-33 (remainder of King and King); 34-67 (Who's in a Family?); 68-102 (Molly's Family).

On April 27, 2006, Appellants filed their complaint, claiming, among other things, that the inclusion of Who's in a Family?, Molly's Family, and King and King within Appellees' curriculum violated Appellants' constitutional rights to parental autonomy and religious freedom, and seeking, among other things, a right of the parents to opt the children out of certain lessons. App'x at 204-05, 208.

Appellees moved to dismiss Appellants' claims on August 15, 2006. Id. at 82-83. The district court granted Appellees' motion to dismiss on February 23, 2007. Id. at 45.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO PARENTAL AUTONOMY IS NOT VIOLATED WHERE A LESSON TAUGHT TO A CHILD BY HER SCHOOL IS INCONSISTENT WITH A BELIEF INCULCATED IN THE CHILD BY HER PARENT.

As the district court correctly recognized, App'x at 10-11, over a decade ago, in Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995), cert. denied, 516 U.S. 1159 (1996), a case materially identical to this one, this Court considered whether the constitutional right to parental autonomy is violated where a parent is at odds with a school over what her child is to be taught – and squarely held that it is not. Brown not only remains correct as a matter of law but indeed is binding on this panel. See Seale v. INS, 323 F.3d 150, 159 (1st Cir. 2003) ("[T]he principle that a ruling of law by a panel of this court is binding upon subsequent panels is an integral component of our jurisprudence.") (quotation omitted).

In Brown, the plaintiffs, two fifteen-year-old high school students and their parents, alleged that the students were compelled to attend a mandatory schoolwide assembly featuring a ninety-minute AIDS awareness program. Brown, 68 F.3d at 529. The program, the plaintiffs alleged, consisted of sexually explicit monologues and skits that endorsed same-sex, non-marital, and other sexual

activity, which the students found humiliating and intimidating. Id. The parents, the plaintiffs further alleged, were not given notice of the content of the program or an opportunity to excuse their children from attendance. Id. at 530. The plaintiffs claimed that, as a result, their constitutional right to parental autonomy, among other rights, was violated. Id.

In affirming the dismissal of the claim for failure to state a claim upon which relief can be granted, this Court acknowledged that the Due Process Clause of the Fourteenth Amendment to the Constitution protects from unjustified governmental interference the liberty interest of a parent in directing the upbringing of her child. Id. at 533. It traced the recognition of the liberty interest to a pair of cases that were decided by the Supreme Court almost a century ago: Meyer v. Nebraska, 262 U.S. 390 (1923), in which the Court struck down a prohibition on instruction of any foreign language, and Pierce v. Society of Sisters of Holy Names of Jesus & Mary, 268 U.S. 510 (1925), in which the Court struck down a prohibition on any alternative to public education.

This Court held, however, that, even assuming that the liberty interest of a parent in directing the upbringing of her child rises to the level of a fundamental right,[1] Brown, 68 F.3d at 533, the constitutional right to parental autonomy does

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[1] Because this Court assumed for purposes of its analysis that the liberty interest rises to the level of a fundamental right, the fact that the Supreme Court subsequently confirmed that it does, Troxel v. Granville, 530 U.S. 57, 65-66

not extend so far as to encompass a constitutional right to dictate the curriculum of a school, even where a parent is at odds with a school over what her child is to be taught.

> The Meyer and Pierce cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program – whether it be religious instruction at a private school or instruction in a foreign language . . . . We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children. We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children . . . . We . . . find that the rights of parents as described by Meyer and Prince do not encompass a broad-based right to restrict the flow of information in the public schools.

Brown, 68 F.3d at 533-34 (citations omitted). In others words, this Court established that the government may neither proscribe the choice of private or home schooling over public schooling, nor, where a parent chooses public schooling over private or home schooling, prescribe what *the parent* teaches her child. See id. at 533 ("[T]he state does not have the power to 'standardize its

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(2000), does not change the analysis. See Leebaert v. Harrington, 332 F.3d 134, 141-42 (2d Cir. 2003) ("[T]here is nothing in Troxel that would lead us to conclude from the Court's recognition of a parental right in what the plurality called 'the care, custody and control' of a child with respect to visitation rights that parents have a *fundamental* right to the upbringing and education of the child that includes the right to tell public schools what to teach or what not to teach him or her.") (emphasis in original).

children' or 'foster a homogenous people' by completely foreclosing the opportunity of individuals and groups to choose a different path of education."). The government may, however, where a parent chooses public schooling over private or home schooling, prescribe what *the government* teaches her child. See Pisacane v. Desjardins, No. 02-1694, 2004 WL 2339204, at *3 (1st Cir. Oct. 18, 2004) (unpublished) ("[The parental due process] right embraces the principle that the state cannot prevent parents from choosing for their child a specific educational program but [does] not include the right to dictate the curriculum at the public school to which parents have chosen to send their children . . . . [A] refusal to let [a parent] dictate to [a] school about [a] science textbook . . . would not violate the parental due process right.") (citation omitted). Accordingly, this Court affirmed the dismissal of the claim.

Brown has proven to be especially persuasive. It has been embraced by numerous other courts considering similar claims.

For example, in Leebaert, the Second Circuit, citing Brown, held that the constitutional right to parental autonomy was not violated by a mandatory health education class that touched on sex, family, and other topics that the parent found objectionable.[2] Leebaert, 332 F.3d at 140-41. In doing so, the court echoed the

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[2] Of particular relevance to this case, the topics that the parent found objectionable included "[r]espect for others[']s feelings, rights and differences." Leebaert, 332 F.3d at 138.

holding of Brown: "Meyer, Pierce, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught." Leebaert, 332 F.3d at 141.

Similarly, in Fields v. Palmdale School District, 427 F.3d 1197 (9th Cir. 2005), amended, reaff'd & reh'g denied, 447 F.3d 1187 (9th Cir. 2006), cert. denied, 127 S. Ct. 725 (2006), the Ninth Circuit, citing Brown, held that the constitutional right to parental autonomy was not violated by the distribution to elementary school students of a voluntary survey inquiring about sex. Fields, 427 F.3d at 1205-07. In doing so, the court similarly echoed the holding of Brown:

> Meyer, Pierce, and their progeny "evince the principle that the state cannot prevent parents from choosing a specific educational program," but they do not afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense. Parents have a right to inform their children when and as they wish on the subject of sex; they have no constitutional right, however, to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so.

Fields, 427 F.3d at 1205-06; see also Fields, 447 F.3d at 1190 ("[O]ur decision does not affect the rights of parents to influence or change the conduct of school boards through all lawful means generally available to citizens of this nation.").

These and other courts have thus confirmed the soundness of Brown. See, e.g., C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 182 (3d Cir. 2005) (constitutional right to parental autonomy not violated by distribution to middle

and high school students of involuntary survey inquiring about sex, family, and other topics that parents found objectionable; "[T]he right [to familial privacy] is necessarily qualified in a school setting where the state's power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.") (quotation omitted); Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998) (constitutional right to parental autonomy not violated by full-time attendance requirement; "[D]ecisions as to . . . what curriculum to offer or require[ ] are uniquely committed to the discretion of local school authorities."); Morrison ex rel. Morrison v. Board of Educ., 419 F. Supp. 2d 937, 946 (E.D. Ky. 2006) (appeal pending) (constitutional right to parental autonomy not violated by mandatory student diversity training; "[T]he Plaintiffs do not have the right to impede the Board's reasonable pedagogical prerogative, nor do they have the right to opt-out of the same."); see also, e.g., Murphy v. Arkansas, 852 F.2d 1039, 1043 (8th Cir. 1988) (constitutional right to parental autonomy not violated by standardized test requirement; "[T]he Supreme Court has recognized the broad power of the state to . . . regulate curriculum.").

Under Brown, Appellants' due process claim must fail. Just as the parents in Brown did not have a constitutional right to override the professional pedagogical judgment of the school with respect to its lessons about AIDS, the parents in this

case do not have a constitutional right to override the professional pedagogical judgment of the school with respect to its lessons about "respect for the human and civil rights of all individuals regardless of . . . sexual orientation," "different types of families," and "concepts of prejudice and discrimination" which aim to foster "a safe and supportive environment where individual similarities and differences are acknowledged." App'x at 15-16 (quotations omitted). Specifically, the parents in this case do not have a constitutional right to override the professional pedagogical judgment of the school with respect to the inclusion within the curriculum of the age-appropriate children's books Who's in a Family?, Molly's Family, and King and King.[3]

This is so notwithstanding the fact that, just as the parents in Brown objected to lessons that conflicted with the beliefs about sexual activity that they sought to inculcate in their children, the parents in this case object to lessons that conflict with the sincerely held religious beliefs about sexual orientation and marriage that they seek to inculcate in their children. Just as the parents in Brown remained free to choose private or home schooling over public schooling and, regardless,

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[3] As the district court found, these books are intended simply to introduce the reader to the fact that there are gay and lesbian-headed families and the fact that there are gay and lesbian married couples: "Who's in a Family? and Molly's Family each describe many different types of families and do not suggest the superiority of any paradigm. The premise of King and King is that men usually marry women, but that some men are happier marrying another man." App'x at 33 n.4.

remained free to inculcate in their children their beliefs about sexual activity, the parents in this case remain free to choose private or home schooling over public schooling and, regardless, remain free to inculcate in their children their sincerely held religious beliefs about sexual orientation and marriage. See App'x at 33 n.3 ("[T]he devoted plaintiff parents in this case have demonstrated their capacity to inform their children of views that contradict those to which the students are being introduced at school."); see also C.N., 430 F.3d at 185 ("A parent whose middle or high school age child is exposed to sensitive topics or information in a survey remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials.").

For the foregoing reasons, under Brown, the constitutional right to parental autonomy was not violated by virtue of the fact that the lessons that the children have been taught by their school are inconsistent with the beliefs that have been inculcated in the children by their parents.

II. THE CONSTITUTIONAL RIGHT TO RELIGIOUS FREEDOM IS NOT VIOLATED WHERE A LESSON TAUGHT TO A CHILD BY HER SCHOOL IS INCONSISTENT WITH A BELIEF INCULCATED IN THE CHILD BY HER PARENT.

As the district court also correctly recognized, App'x at 10-11, in Brown, this Court considered whether the constitutional right to religious freedom is

violated where a parent is at odds with a school over what a child is to be taught – and squarely held that it is not.

In Brown, the plaintiffs also claimed that their constitutional right to religious freedom was violated. Brown, 68 F.3d at 530. In affirming the dismissal of the claim for failure to state a claim upon which relief can be granted, this Court recognized that its analysis was governed by Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).[4] Brown, 68 F.3d at 538. In Smith, the Supreme Court held that the application of a controlled substance law to the sacramental use of peyote did not violate the constitutional right to religious freedom guaranteed by the Free Exercise Clause of the First Amendment to the Constitution. In doing so, the Court established that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Smith, 494 U.S. at 879 (quotation and citation omitted). Applying this principle, this Court found that the mandatory schoolwide assembly was a neutral requirement that applied generally to all students. Brown, 68 F.3d at 539; see also Swanson, 135 F.3d at 697-98 (full-

[4] The accompanying discussion of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, is moot. RFRA was subsequently struck down in relevant part in City of Boerne v. Flores, 521 U.S. 507 (1997).

time attendance requirement was a neutral requirement that applied generally to all students). Accordingly, this Court affirmed the dismissal of the claim.[5]

Under Brown, Appellants' free exercise claim must also fail. Just as the mandatory schoolwide assembly in Brown was neutral and generally applicable, the inclusion within the curriculum of Who's in a Family?, Molly's Family, and King and King in this case is neutral and generally applicable, i.e., is not targeted at religion, as the district court correctly found, App' x at 39.

Appellants invoke the hybrid-rights exception of Smith: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children." Smith, 494 U.S. at 881 (citation omitted). The hybrid-rights exception, however, does not apply in this case, as the district court correctly held, App'x at 42.

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[5] As set forth herein, it is not a free exercise violation where a lesson taught to a child by her school is inconsistent with a sincerely held religious belief inculcated in the child by her parent. It is, however, a free exercise violation where a school requires a child to disavow a sincerely held religious belief. Appellants have alleged that Appellees "commenced an intentional campaign to teach the Parkers' very young child that the family's religious faith was incorrect." App'x at 191-92. It appears from context, however, that Appellants' allegation is grounded only in the inconsistency between their sincerely held religious beliefs and the inclusion within the curriculum of Who's in a Family?, Molly's Family, and King and King. This inconsistency does not rise to the level of a free exercise violation.

In Brown, this Court held that the hybrid-rights exception does not apply where a free exercise claim is not paired with a cognizable due process claim. Brown, 83 F.3d at 539 ("[T]he plaintiffs' allegations of interference with family relations and parental prerogatives do not state a privacy or substantive due process claim. Their free exercise challenge is thus not conjoined with an independently protected constitutional protection."). Numerous other courts have held likewise.[6] See, e.g., Swanson, 135 F.3d at 700 ("[I]t cannot be true that a plaintiff can simply invoke the parental rights doctrine, combine it with a claimed free-exercise right, and thereby force the government to demonstrate the presence of a compelling state interest. Whatever the Smith hybrid-rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one's child.") (citation omitted); see also, e.g., Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752,

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[6] The cases on which Appellants rely, see Appellants' Br. at 39, are distinguishable. In each of these cases, the school was not seeking to regulate itself. Rather, it was seeking to regulate the parent or her child. See Hicks ex rel. Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649 (E.D.N.C. 1999) (school sought to regulate child's dress and grooming, not its own curriculum); Alabama & Coushatta Tribes of Tex. v. Trustees of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993), remanded, No. 93-4365, 1994 WL 1222555 (5th Cir. Mar. 31, 1994) (unpublished) (same); Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997) (same); Michigan v. DeJonge, 442 Mich. 266, 501 N.W.2d 127 (1993) (school sought to regulate parent's ability to teach, not its own curriculum). Thus, unlike in this case, in each of these cases, the free exercise claim was paired with a cognizable due process claim.

765 (7th Cir. 2003), cert. denied, 541 U.S. 1096 (2004); Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999). Just as the hybrid-rights exception did not apply in Brown because there was no cognizable due process claim, the hybrid-rights exception does not apply in this case because there is no cognizable due process claim, see § I supra.[7, 8]

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[7] Wisconsin v. Yoder, 406 U.S. 205 (1972), is distinguishable because Appellants did not allege that the inclusion within the curriculum of Who's in a Family?, Molly's Family, and King and King "threaten[s] their entire way of life." Brown, 68 F.3d at 539; see also Leebaert, 332 F.3d at 144 ("[The parent] has not alleged that his community's entire way of life is threatened by [the child's] participation in the mandatory health curriculum. [The parent] does not assert that there is an irreconcilable Yoder-like clash between the essence of [the parent's] religious culture and the mandatory health curriculum that he challenges."). Indeed, Appellants concede that they did not do so. Appellants' Br. at 27 n.8; see also Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 683 (7th Cir. 1994) ("The parents do a much better job of describing the religion they believe is endorsed through the use of the series in their Brief to this court; unfortunately for the parents, the allegations in the amended complaint are all that matter at this stage.").

[8] Even if the hybrid-rights exception were to apply in this case – which it does not – Appellants' free exercise claim would still fail in light of the overriding governmental interest in eradicating sexual orientation discrimination. See Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *9 (N.D. Cal. Apr. 17, 2006) (unpublished) (appeal pending) ("States have . . . a substantial, indeed compelling, interest in prohibiting discrimination on the basis of . . . sexual orientation. The interest in prohibiting discrimination is particularly critical in the context of education.") (citations omitted); see also Fields, 427 F.3d at 1209 (recognizing "the state's compelling interest in the broad ends of education").

The case law confirms that there is no cognizable burden on the constitutional right to religious freedom where a lesson taught to a child by her school is inconsistent with a belief inculcated in the child by her parent.

For example, in Fleischfresser, the Seventh Circuit held that the constitutional right to religious freedom was not violated by a reading series for elementary school students that the parents alleged "indoctrinate[d] children in values directly opposed to their Christian beliefs," Fleischfresser, 15 F.3d at 683. In so holding, the court found that the reading series did not impose a cognizable burden on the constitutional right to religious freedom.

> The burden to the parents in this case is, at most, minimal. The directors are not precluding the parents from meeting their religious obligation to instruct their children. Nor does the use of the series compel the parents or children to do or refrain from doing anything of a religious nature. Thus, no coercion exists, and the parents' free exercise of their religion is not substantially burdened.

Id. at 690. In this case, the inclusion within the curriculum of Who's in a Family?, Molly's Family, and King and King likewise does not impose a cognizable burden on the constitutional right to religious freedom because it does not prevent the parents from meeting their religious obligation to inculcate their sincerely held religious beliefs in their children, and because it does not compel their children to do, or to refrain from doing, anything of a religious nature.

In Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988), the Sixth Circuit similarly held that the

constitutional right to religious freedom was not violated by a reading series for elementary and middle school students that the parents alleged was inconsistent with their sincerely held religious beliefs. In so holding, the court similarly found that the reading series did not impose a cognizable burden on the constitutional right to religious freedom.

> The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion.
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> . . .
>
> [G]overnmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise. An actual burden on the profession or exercise of religion is required. In short, distinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion . . . . To establish a violation of [the Free Exercise Clause], a litigant must show that challenged state action has a coercive effect that operates against a litigant's *practice* of his or her religion.

Id. at 1065, 1068 (quotations omitted) (emphasis in original). In this case, the inclusion within the curriculum of Who's in a Family?, Molly's Family, and King and King likewise does not impose a cognizable burden on the constitutional right to religious freedom because it does not require affirmation or denial of a religious belief or performance or non-performance of a religious practice but rather requires only exposure to that which may be religiously offensive.

The case law thus confirms that the inclusion within the curriculum of Who's in a Family?, Molly's Family, and King and King does not impose a cognizable burden on the constitutional right to religious freedom. See also, e.g., Morrison, 419 F. Supp. 2d at 943-44 (constitutional right to religious freedom not violated by mandatory student diversity training; "[I]t is not enough that Plaintiffs[ ] claim that the mandatory student training offends their religious beliefs. They must establish that it created a burden upon the exercise of their religion . . . . There is no evidence that the student-Plaintiff, or any other student, was compelled to disavow his or her religious beliefs. Nor is there evidence that the student-Plaintiff, or any other student, was called upon to endorse homosexuality, bisexuality or transgendered persons.").

For the foregoing reasons, under Brown, the constitutional right to religious freedom was not violated by virtue of the fact that the lessons that the children have been taught by their school are inconsistent with the beliefs that have been inculcated in the children by their parents.

III. THIS COURT HAS ASTUTELY RECOGNIZED THAT A BROAD RIGHT OF A PARENT TO OPT A CHILD OUT OF A LESSON WOULD FATALLY COMPROMISE THE ABILITY OF A SCHOOL TO PROVIDE A MEANINGFUL EDUCATION, A CONCLUSION THAT HOLDS TRUE REGARDLESS OF THE AGE OF THE CHILD OR THE NATURE OF THE BELIEF.

Appellants' attempt to distinguish Brown in light of the age of the children and the nature of the belief in this case must also fail. The reasoning underlying Brown is instructive.

Notwithstanding Appellants' characterization of the relief that they seek as "the most minimal," Appellants' Br. at 4, in Brown, this Court astutely recognized that a broad right of a parent to opt a child out of a lesson would fatally compromise the ability of a school to provide a meaningful education.

> If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems.

Brown, 68 F.3d at 534. Numerous other courts have reached the same conclusion. See, e.g., Leebaert, 332 F.3d at 141 ("[R]ecognition of such a fundamental right – requiring a public school to establish that a course of instruction objected to by a parent was narrowly tailored to meet a compelling state interest before the school could employ it with respect to the parent's child – would make it difficult or impossible for any public school authority to administer school curricula

responsive to the overall educational needs of the community and its children."); Mozert, 827 F.2d at 1068 ("Were the free exercise clause violated whenever governmental activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible.") (quotation omitted). As Justice Jackson recognized over half a century ago:

> If we are to eliminate everything that is objectionable to any of these [religious bodies] or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

Illinois ex rel. McCollum v. Board of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 235 (1948) (Jackson, J., concurring).

The universe of subject matters that a parent may find objectionable is limitless. As the Ninth Circuit observed in Fields:

> Although the parents are legitimately concerned with the subject of sexuality, there is no constitutional reason to distinguish that concern from any of the countless moral, religious, or philosophical objections that parents might have to other decisions of the School District – whether those objections regard information concerning guns, violence, the military, gay marriage, racial equality, slavery, the dissection of animals, or the teaching of scientifically-validated theories of the origins of life. Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy.

Fields, 427 F.3d at 1206. Indeed, the case law reveals the wide range of subject matters that parents have found objectionable, from health, safety, alcohol,

tobacco, drugs, and family life,[9] Leebaert, 332 F.3d at 136; to same-sex, non-marital, and other sexual activity, Brown, 68 F.3d at 529; to "wizards, sorcerers, giants and . . . creatures with supernatural powers," Fleischfresser, 15 F.3d at 683; to "mental telepathy," "evolution," "'secular humanism,'" "'futuristic supernaturalism,'" "pacifism," "magic," "death," "role reversal," "rebellion against parents," "one-world government," "other philosophies and religions," and "feminism," Mozert, 827 F.2d at 1060, 1062, 1064; to student diversity and sexual orientation, Morrison, 419 F. Supp. 2d at 940. See also People for the American Way, "Back to School with the Religious Right" (available at http://www.pfaw.org/pfaw/general/default.aspx?oid=3655) (reporting parental objections to inclusion within curricula of children's book Harry Potter).

In light of the limitlessness of the universe of subject matters that a parent may find objectionable, a school would grind to a halt if there were a broad right of a parent to opt a child out of a lesson. As Judge Kennedy observed in Mozert:

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[9] Specifically, "self-esteem;" "[g]rieving and feelings about death;" "[t]he definition of love, . . . different kinds of love, and how love and affection influence behavior;" "[t]he qualities of successful people;" "[m]yths and facts about tobacco, marijuana and alcohol;" "drinking alcohol;" "using drugs and social pressures to use drugs;" "the negative consequences of using drugs, marijuana and alcohol;" "alcohol and alcoholism;" "tobacco products;" "the harmful effects of marijuana;" "high risk behaviors and measures for protecting against them;" "social pressure resistance skills;" "[r]espect for others[']s feelings, rights and differences;" "behaviors which demonstrate respect for self and others;" "responses to being sexually harassed;" "the ability to set personal goals;" and "the habits of highly effective people." Leebaert, 332 F.3d at 136.

> If the opt-out remedy were implemented, teachers . . . would have to either avoid the students discussing objectionable materials . . . or dismiss [objecting] students from class whenever such material is discussed. To do this the teachers would have to determine what is objectionable to [parents]. This would either require that [parents] review all teaching materials or that teachers review [parents' objections]. If the teachers concluded certain material fell in the objectionable classification but nonetheless considered it appropriate to have the students discuss this material, they would have to dismiss [objecting] students from these classes. The dismissal of [objecting] students from the classes would result in substantial disruption to the public schools.

Mozert, 827 F.2d at 1072 (Kennedy, J., concurring) (footnote omitted). Judge Kennedy's observation captures the multiple ways in which a broad right to opt a child out of a lesson would fatally compromise the ability of a school to provide a meaningful education.

First, a broad right of a parent to opt a child out of a lesson would subject a school to a staggering administrative burden. Because a teacher could not anticipate with certainty what a parent may find objectionable, the teacher would be required to clear every part of every lesson with every parent in advance,[10] and would be required to remember which student has been opted out of what part of what lesson. Even if a teacher were capable of doing so, for those children who have been opted out of a lesson, the teacher would be required to arrange for

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[10] Indeed, the parents in this case have prayed that they "be expressly and clearly notified prior to any adult-directed or initiated classroom discussions of sexuality, gender identity, and marriage constructs, until such time as the children are in seventh grade." App'x at 208.

another classroom, another teacher, and another lesson – perhaps multiple other classrooms, teachers, and lessons if the parents of those children could not agree on a single other lesson.

Second, in contravention of the axiom that "[t]he classroom is peculiarly the 'marketplace of ideas,'" Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 512 (1969) (quotation omitted), a broad right of a parent to opt a child out of a lesson would chill discussion in the classroom. Even if a teacher were capable of clearing every part of every lesson with every parent in advance, because the teacher could not anticipate with certainty what else a parent may find objectionable, the teacher would be unable to deviate from the lesson plan in any way, even to answer a question from a student. The teacher would err on the side of self-censorship to avoid the risk of making an objectionable statement, to the detriment of the students. Such self-censorship would be especially likely in this case in light of the subject matter that the parents find objectionable. Family life is a subject matter that is especially susceptible to a diversity of viewpoints.[11, 12]

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[11] Such self-censorship would also be especially likely in this case in light of the prayer of the parents that they "be presented with an opportunity to attend, as silent observers, and record any school presentations or discussions of the [objectionable] ideological/socialization perspectives." App'x at 208.

[12] The relief that Appellants seek appears to raise a related constitutional concern: censorship of library books. Who's in a Family?, Molly's Family, and King and King are available in a library. App'x at 192, 201. Appellants appear to seek to restrict access to the books. App'x at 208. Censorship of library books has

Third, the coming and goings of those children who have been opted out of lessons would be highly disruptive to the learning environment. Moreover, such comings and goings would fatally undermine the lessons that schools seek to teach the other students. Here, for example, the school seeks to teach students about "respect for the human and civil rights of all individuals regardless of . . . sexual orientation," "different types of families," and "concepts of prejudice and discrimination" to foster "a safe and supportive environment where individual similarities and differences are acknowledged." App'x at 15-16 (quotations omitted). Indeed, the school is required to do so as a matter of state law. Id. As the district court correctly recognized, "[a]n exodus from class when issues of homosexuality or same-sex marriage are to be discussed could send the message that gays, lesbians, and the children of same-sex parents are inferior and, therefore, have a damaging effect on those students." App'x at 14 (citation omitted). This would defeat the point of the lesson.

The reasoning underlying Brown demonstrates why Appellants' attempt to distinguish Brown in light of the age of the children and the nature of the belief in this case must fail. That a broad right of a parent to opt a child out of a lesson would fatally compromise the ability of a school to provide a meaningful education is no less true where the child at issue is young. See, e.g., Fields, 427 F.3d at 1200,

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long been constitutionally suspect. See Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico ex rel. Pico, 457 U.S. 853 (1982).

1201 & n.3 (constitutional right to parental autonomy not violated where first, third, and fifth graders, ages seven to ten, were subjected to survey on such matters as "[t]ouching my private parts too much," "[t]hinking about having sex," "[t]hinking about touching other people's private parts," "[h]aving sex feelings in my body," and "[c]an't stop thinking about sex"); Fleischfresser, 15 F.3d at 683 (constitutional right to religious freedom not violated where elementary school students were subjected to objectionable reading series); Mozert, 827 F.2d at 1060 (same); see also, e.g., Runyon v. McCrary, 417 U.S. 160, 165 (1976) (constitutional right to parental autonomy not violated where nursery school was required to integrate racially). It is also no less true where the belief at issue is religious or concerns sex, marriage, family, or any other constitutionally protected liberty interest. See, e.g., Leebaert, 332 F.3d at 136 (constitutional right to parental autonomy not violated where belief at issue was religious and concerned sex and family); Brown, 68 F.3d at 529 (constitutional right to parental autonomy not violated where belief at issue was religious and concerned sex); Morrison, 419 F. Supp. 2d at 940 (constitutional right to parental autonomy not violated where belief at issue was religious). Neither the age of the child nor the nature of the belief changes the analysis. A broad right of a parent to opt a child out of a lesson would fatally compromise the ability of a school to provide a meaningful education, a

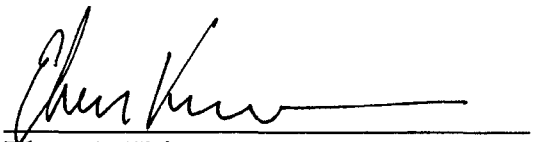
conclusion that holds true regardless of the age of the child or the nature of the belief.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully submit that this Court should affirm the judgment of the district court.

Dated: October 1, 2007.

Respectfully submitted,



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ADDENDUM

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members. The ACLU of Massachusetts (ACLUM) is its Massachusetts affiliate. Their members share a commitment to the defense of the rights that are guaranteed by the Constitution. Among the most fundamental of these rights are the constitutional rights to parental autonomy and religious freedom. ACLU and ACLUM regularly appear before courts throughout the nation in cases involving these constitutional rights, including those arising in the educational context. Indeed, ACLUM successfully appeared before this Court in Brown, a case central to this appeal.

Lexington Community Action for Responsible Education and Safety (Lexington C.A.R.E.S.) is an organization comprised of approximately 100 concerned parents and other citizens of Lexington who seek to keep the Town's classrooms safe and welcoming for children from all families and backgrounds. It was formed in the spring of 2005 to serve as a counterbalance to Appellants and their public messaging around the events giving rise to this case.

The Lexington Education Association (LEA) is a professional association and union of 680 licensed professional educators, 130 instructional assistants, and 6 technology employees. As the sole authorized collective bargaining agent for the largest organized group of Lexington Public Schools employees, LEA is legally

bound to represent the interests of its members, two of whom are named as defendants in this lawsuit. Believing that an inclusive and welcoming school system for all students and families is a fundamental premise of the public school mission, LEA embraces the diversity that Appellants find objectionable. Along with its state affiliate, the Massachusetts Education Association, LEA is deeply concerned that this lawsuit may significantly chill its members' academic freedoms.

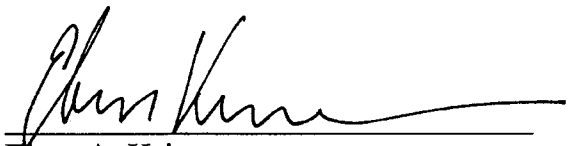
Respecting Differences is a coalition sponsored by nine churches and synagogues in Lexington. It was established in 1999 to advance the understanding of the need for safe and respectful treatment of all people, regardless of sexual orientation or gender identity. Supporting Lexington Public Schools in creating and maintaining an environment in which all staff, students, and families are safe and welcome, regardless of sexual orientation or gender identity, and regardless of religious affiliation, is a critical goal.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,995 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 the type style requirement of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2004 in 14-point Times New Roman font.

Dated: October 1, 2007.



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PROOF OF SERVICE

I hereby certify that, on this 1st day of October, 2007, copies of the foregoing Brief of Amici Curiae American Civil Liberties Union, et al., were mailed, first-class, postage prepaid, to the following parties of record:

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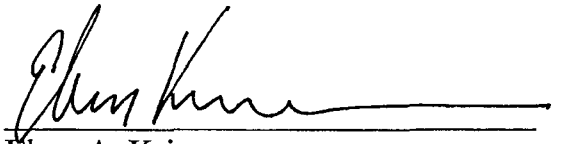

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