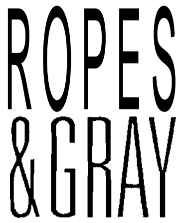

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September 27, 2007

Bonnie S. McGuire
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VIA HAND DELIVERY

Richard Cushing Donovan, Clerk of Court
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210

Re: *David Parker, et al.* v. *William Hurley, et al (No. 07-1528)*

Dear Sir or Madam:

Enclosed for filing in the above-referenced matter are:

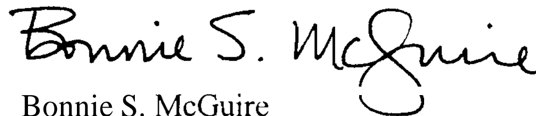
(1) the Anti-Defamation League's Motion for Leave to File Brief as *Amicus Curiae* in support of the Defendant-Appellees;

(2) the original and nine (9) copies of the Brief of *Amicus Curiae* Anti-Defamation League in Support of Appellees and Affirmance of District Court's Ruling; and

(3) a compact disc containing one (1) electronic copy of the brief in Word Perfect format.

Please do not hesitate to contact me if you have any questions.

Very truly yours,



Bonnie S. McGuire

Enclosures

cc: Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DAVID PARKER, et al.,	)	
Plaintiff-Appellant,	)	
v.	)	No 07-1528
WILLIAM HURLEY, et al.,	)	
Defendant-Appellee.	)	

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Anti-Defamation League ("ADL") hereby moves, pursuant to Federal Rule of Appellate Procedure 29(b), for leave to file an *amicus curiae* brief. As grounds for this motion, ADL states that it has an interest in the instant appeal and that a brief from *amicus* will assist the Court in its disposition of the appeal. Appellees have consented to this filing, but Appellants have not provided their consent.

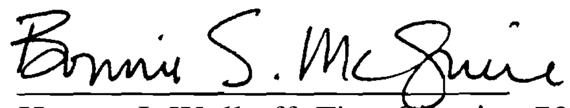
Amicus has a substantial interest in this appeal. ADL's core mission includes the eradication of bias and discrimination. To that end, one of the major strategies ADL employs is promoting tolerance and diversity education in schools. Through advocacy and by making lesson materials available to educators, ADL

supports schools that wish to include anti-bias lessons in their curricula. The court's decision will significantly impact the level of discretion that public schools may exert when designing their tolerance and diversity curricula, directly affecting how ADL may approach its anti-bias mission and advocacy in school settings. The case is therefore highly salient to ADL. Likewise, as experts on both the negative impact of intolerance in schools and communities, and the importance of anti-bias education, ADL's perspective is greatly relevant to the disposition of the case.

In its brief, *amicus* seeks to address the strong interest of the Commonwealth in teaching to students about diversity. *Amicus* does not seek to raise any novel legal issues. Thus, ADL meets the requirements of Federal Rule of Appellate Procedure 29(b) and should be permitted to file its *amicus* brief.

Dated: September 27, 2007

Respectfully submitted,



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FEDERAL RULE OF APPELLATE PROCEDURE 26.1
CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Anti-Defamation League states that it is a non-profit organization, has no parent corporation and does not issue any stock.

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STATEMENT OF INTEREST

The Anti-Defamation League ("ADL"), founded in 1913, is one of the Nation's premier human relations and civil rights agencies and is dedicated in purpose and program to combating anti-Semitism and all forms of bigotry, defending democratic ideals, and protecting civil rights for all. The case before the Court today compels the ADL to tile as *amicus* to defend the right of public schools to teach students about diversity – in this instance, different kinds of families. The purpose of this instruction is to decrease harassment and discrimination in Massachusetts by fostering awareness about diversity at an early age. ADL believes that there is absolutely no constitutional harm to the students who receive such instruction, nor to the parents of those students – indeed, there is much benefit. ADL supports the Commonwealth of Massachusetts' strong interests in preparing students to live in a diverse society and ensuring that students of *any* sexual orientation, or from *any* type of family, have a safe and supportive learning environment at school. Furthermore, ADL supports the Commonwealth's interest, through education in the public schools, to help eradicate the broad social harms arising from discrimination against homosexuals.

ARGUMENT

I. THE STATE HAS A STRONG INTEREST IN ENCOURAGING STUDENTS TO RESPECT DIFFERENT TYPES OF PEOPLE AND FAMILIES.

Public schools that instruct their students about different types of people and families, including families with homosexual parents, are acting on the basis of strong and legitimate state interests. First, the state has an interest in preparing students to be citizens in a diverse society, where they will encounter a wide variety of people, cultures, and ideas. Second, the state has an interest in fostering a safe and supportive educational environment for all of its students, including those who are gay or lesbian, or who have same-sex parents. Third, the state has an interest in eradicating the many social harms that are caused by prejudice and discrimination against homosexuals. Although a state need only show that there is a legitimate government interest in the subjects that it teaches to students (*see infra*, Section II), the interests described below would satisfy even the stricter level of scrutiny that appellants seek. Under any standard, the public schools' interests are sufficiently compelling to justify encouraging students to respect families with same-sex parents.

A. The State Has a Strong Interest in Preparing Students for Citizenship in a Diverse Society.

The state has a strong interest in preparing its students for citizenship in a society that features a wide variety of people and families. As the Supreme Court

has recognized, public education plays a unique and indispensable role in providing students with the knowledge and understanding that is necessary for them to participate effectively in their communities. Bethel Sch. Dist. No. 403 v. *Fraser*, 478 U.S. 675, 681 (1986) (noting that public schools must help "prepare pupils for citizenship") (citation omitted). An important aspect of that education is teaching students about the many different types of people they will encounter in their daily lives, including at school, in their communities, and eventually in their professional careers. See *Grutter v.* Bollinger, 539 U.S. 306, 330 (2003) ("[T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.").

The Lexington schools may be "indoctrinating" elementary school students into the concept of diversity, but even the appellants do not dispute "the rights of all students to respect in the public schools, regardless of their sexual preferences or identities." (Br. of Appellant at 23.) This admirable goal is precisely what the Lexington schools aspired to by introducing the books at issue. Diversity education is most effective when it begins during students' formative years. The earlier diversity education occurs, the more likely it is that students will be able to educate their peers, thereby compounding the benefits of this instruction.

The empirical evidence supports this point. For example, ADL's A WORLD OF DIFFERENCE® Institute Peer Training Program, which began in

Boston, has demonstrated that once students are educated regarding diversity, they can be powerful agents of change for transforming their school environment, and, ultimately, society. According to a 2006 Yale University Study, the effects of ADL's Program include enhancing understanding of the nature and manifestations of prejudice, increasing student ability to respond to name-calling and other bias incidents, and increasing awareness of bias-motivated activities in schools. *See* ELIZABETH LEVY PALUCK AND DONALD P. GREEN, ANTI-BIAS EDUCATION AND PEER INFLUENCE AS TWO STRATEGIES TO REDUCE PREJUDICE: AN IMPACT EVALUATION OF THE ANTI-DEFAMATION LEAGUE PEER TRAINING PROGRAM 1 (Yale University 2006). ADL believes that the Lexington school system's Diversity Book Bag program is a similar means to foster these goals.

The Lexington school system's Diversity Book Bag program encourages students to respect the rights and dignity of those who are different from themselves. This is an important goal of the Commonwealth's public schools. *See* 603 Mass. Code Regs. § 26.05(1) (2007) ("All public school systems shall, through their curricula, encourage respect for the human and civil rights of all individuals regardless of race, color, sex, religion, national origin or sexual orientation."). In a diverse society, it is important for the state to promote understanding and tolerance among those whose beliefs and values may at times come into tension with one another. In order to accommodate, and benefit from, the great diversity of its

people, the state has a strong interest in encouraging all its citizens to recognize and accept one another as members of the same community. *See* Ill. ex *rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring) (recognizing the interest of public schools in "promoting cohesion among a heterogeneous democratic people.").

In the Commonwealth of Massachusetts, where the right of same-sex couples to marry is protected under the state constitution, it is particularly important to teach students about families with gay parents. See Goodridge v. Dep't. of Pub. *Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). Married gay couples, many of whom have children, are now increasingly a fixture in communities throughout Massachusetts. Since 2004, when the Massachusetts Supreme Court struck down the ban on same-sex marriage, over 8,500 same-sex couples have married in the state. See Pam Belluck, Massachusetts *Gay Marriage Referendum is Rejected*, N.Y. TIMES, June 15, 2007 at A16. In this context, educating students about families with homosexual parents, as the Lexington schools have done, is part and parcel of preparing those students to be effective and respectful members of their society.

B. The State Has a Strong Interest in Fostering a Safe and Supportive Educational Environment for all Students.

The state has a strong interest in creating an educational environment where gay and lesbian students, as well as students with same-sex parents, will feel

sufficiently safe and comfortable to permit them to learn. It is important for the state to maintain an education system that is available to all students who seek to benefit from it. This priority is undermined when certain groups of students feel unsafe and unwelcome at their schools. The Lexington school system's curriculum, which exposes students to positive depictions of families with homosexual parents, is an effective and appropriate means to foster "a safe and supportive environment where individual similarities and differences are acknowledged." Massachusetts Comprehensive Health Curriculum Framework 5 (Oct. 1999), http://www.doe.mass.edu.

Gay and lesbian students encounter widespread acts of prejudice at their schools on a daily basis.[1] Such a barrage of bias and bullying, if left unchecked, has the potential to severely disrupt the educational development of gay and lesbian students. One study of teenage victims of anti-gay discrimination demonstrated that 75% experienced a decline in academic performance, 39% had

---

[1] In a nationwide survey of almost two thousand gay and lesbian students between the ages of 13 and 20, over three-quarters of the respondents reported hearing homophobic remarks frequently or often at their schools. GAY, LESBIAN & STRAIGHT EDUCATION NETWORK, THE 2005 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 14 (2005), http://www.glsen.org. Even more alarmingly, over 60% of the students had been directly verbally harassed, and over 17% had been physically assaulted because of their sexual orientation. Id. at 13, 26. In the same survey, almost two-thirds of gay and lesbian students reported feeling unsafe at school because of their sexual orientation, and more than a quarter missed at least one day of school because of feeling unsafe. Id. at 21.

truancy problems, and 28% dropped out of school. *Harper* v. *Poway Unified Sch. Dist.*, 445 F.3d 1166, 1179 (9th Cir. 2006) *(cert. granted)* (citing Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 225 (2005)). In this context, public schools have an especially strong interest in presenting students with positive depictions of homosexuals.[2]

The goal of fostering a supportive educational environment is also served by presenting these positive depictions to public school students who are not gay or lesbian, or do not have same-sex parents. In the analogous context of improving the learning environment for students who are racial or ethnic minorities, the Educational Resources Information Center ("ERIC"), an organization sponsored by the U.S. Department of Education, recommends teaching all students about "intergroup similarities and differences." *See* HARRIETT ROMO, IMPROVING ETHNIC AND RACIAL RELATIONS IN THE SCHOOLS 4 (1997), http://www.eric.ed.gov. According to ERIC, an effective program of "intergroup education," like the Lexington Diversity Book Bag program, should include "films, plays, biographies,

[2] Although over 80% of gay and lesbian students reported never having been taught about other gay and lesbian people while at school, those who *had* received such instruction (similar to the Diversity Rook program in Lexington) were much less likely than their peers to miss school because of feeling unsafe. GAY, LESBIAN & STRAIGHT EDUCATION NETWORK, THE 2005 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 82 (2005). Furthermore, those students demonstrated a much stronger sense of school belonging and community. *Id.*

novels, and other ways of presenting members of all groups in a respectful way." *Id.*

ADL's diversity education initiatives have demonstrated that increasing diversity education benefits students and the community in unexpected ways. The ADL has found through its work with the Peace and Diversity Academy in New York, for example, that educational programs focusing on understanding student differences increase school attendance, promotion rates, and educational testing scores. These results illustrate that creating an educational environment that is accepting of diversity is a means to foster a safe and supportive learning environment.

C. The State Has a Strong Interest in Eradicating the Harms Caused by Prejudice against Homosexuals.

The state also has a strong interest in promoting tolerance through its public schools as a means to combat harmful prejudice against homosexuals outside of the classroom. Gay and lesbian men and women have been frequently discriminated against in both private and public settings. *See, e.g.*, JONATHAN N KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE UNITED STATES 11-128 (1992). It is imperative for the government to have the right to act through its schools to combat the great damage inflicted on a significant portion of American society by this pervasive prejudice.

As Justice Brennan observed, "homosexuals have historically been the object of pernicious and sustained hostility." *Rowland* v. *Mad* River Local *Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of writ of certiorari) (citation omitted). Though efforts have been made to combat this prejudice and hostility, these forces are still prevalent in American society. In Goodridge *v.* Department of Public Health, the Supreme Judicial Court of Massachusetts remarked that the legal ban against same-sex marriage had "work[ed] a deep and scarring hardship on a very real segment of the community for no rational reason." 440 Mass. 309, 34.1, 798 N.E.2d 941,968 (2003). Furthermore, the harm from this prejudice has often manifested itself in dangerous and violent forms. The most recent FBI Hate Crime Statistics show that there are over a thousand hate crimes in the United States each year that are motivated by sexual orientation bias, accounting for over 14% of the total number of hate crimes in the country. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, HATE CRIME STATISTICS 2005 (2006), http:// www.fbi.gov/ucr/hc2005/ incidentsandoffenses.htm.

Using public schools to promote tolerance and understanding allows the state to combat the harms of this widespread prejudice from the ground up, by seeking to improve the cultural and civic values of its youngest citizens. See *Bd.* of *Educ.* v. *Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring) ("[L]ocal

education officials may attempt 'to promote civic virtues' ... [that] awake[n] the child to cultural values.") (citation omitted).

D. Under Any Legal Standard, Public Schools Have a Sufficiently Compelling Interest to Justify Teaching Students About Different Types of People and Families.

Though the government need only show that there is a rational basis for the curriculum it mandates for its public school students (see *infra,* Section II), the interests described above are sufficiently strong to satisfy even the heightened level of scrutiny demanded by appellants. Teaching students about different types of people and families is an indispensable means for the state to reduce the harmful prejudice against gay and lesbian students and the children of same-sex parents. This instruction is ideally tailored to ensure that a public school can effectively educate all its students and keep them safe from harm, both of which have been recognized as "compelling" state interests.

Several Courts of Appeal have recognized that a state's interest in effectively educating the students at its public schools is "compelling." See, *e.g. LaVine v. Blaine Sch.* Dist., 257 F.3d 981, 988 (9th Cir. 2001) (noting that "[s]tates have a compelling interest in their educational system"); *Perry Local Educators' Ass'n v. Hohlt,* 652 F.2d 1286, 1300 (7th Cir. 1981), *rev'd* on *other grounds*, (discussing "the state's compelling interest in educating the students attending its public schools"); *Freeman v. Flake*, 448 F.2d 258, 261 (10th Cir. 1971) (remarking

that "states have a compelling interest in the education of their children"). As described earlier (see *supra*, Section I.A), preparing students for citizenship in a diverse society is a crucial part of a state's educational mission. *See* Ill. ex rel. *McCollum*, 333 U.S. at 235 (Frankfurter, J., concurring). Furthermore, pervasive discrimination against homosexuals has a severe and detrimental effect on the educational success and aspirations of the victims of this prejudice. *See* supra, Section I.B. Schools must be permitted to take appropriate steps to prevent material and substantial disruptions to the operation of the school. *See Tinker v.* Des Moines *Indep. Cmty.* Sch. *Dist.*, 393 U.S. 503, 512 (1969).

Furthermore, public schools have a compelling interest in protecting their students from harm. Cf Morse *v.* Frederick, 127 S. Ct. 2618, 2628 (2007) (holding that deterring drug use in public school is a "compelling" state interest because drug use could harm the "health and well-being" of students). Instructing students about tolerance and acceptance of different types of people and families is an essential method of reducing verbal and physical violence in schools. *See supra*, Section I.B. Under any legal standard, the state has a sufficiently compelling justification to minimize the dangerous spread of hate crime to the public school setting. *See Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 (1989) ("It is sufficient that the Government have a compelling interest in

preventing an otherwise pervasive societal problem from spreading to the particular context.")

II. PUBLIC SCHOOLS ARE ENTITLED TO TEACH ANY SUBJECT THAT IS REASONABLY RELATED TO A LEGITIMATE STATE INTEREST.

The Lexington school district was and is entitled to teach its students about families with same-sex parents as long as this instruction has a rational basis. It is settled law that Government actions that do not impinge on fundamental rights are constitutionally permitted if they are reasonably related to a legitimate state interest. *See Vacco v.* Quill, 521 U.S. 793 (1997). Because the content of the Lexington school's curriculum did not implicate any of the appellants' fundamental rights, the school's actions should not be subjected to the heightened scrutiny that appellants seek. The district court correctly applied a rational basis review, and its dismissal of the appellants' claims should be affirmed.

A. Public School Instruction About Diversity Does Not Implicate the Fundamental Liberty Interest in Raising One's Own Children.

The Lexington school district's decision to teach students about families with same-sex parents does not implicate appellants' right to direct the upbringing and education of their children. A plurality of the Supreme Court has recognized that parents have a fundamental liberty interest in the "care, custody, and control" of their children. *Troxel v. Granville, 530* U.S. 57, 65 (2000). Nonetheless, the constitutional right to raise one's own children does not encompass the right "to

dictate the curriculum at the public school to which [parents] have chosen to send their children." *Brown v.* Hot, *Sexy & Safer* Prods., 68 F.3d 525, 533-34 (1st Cir. 1995).

The present case is similar to Brown, where this Court held that parents do not have the right to prevent a public high school from requiring students to attend an AIDS awareness program. **Id.** at 529. Brown essentially anticipated the Supreme Court's decision in *Troxel* by assuming that "the right to rear one's children is fundamental." **Id.** at 533. Brown held, however, that a public school mandating certain types of instruction for its students does not constitute "an intrusion of constitutional magnitude." **Id.** The First Circuit recently reaffirmed the holding from Brown, *see* Pisacnne *v. Desjardins*, 115 F. App'x. 446,450 (1st Cir. 2004), and every other circuit that has discussed *Brown* in defining the scope of a parent's right to raise his or her children has found its reasoning persuasive.[3]

The constitutional analysis does not change based on the age of the school children at issue. As the district court noted, parents do not have a greater constitutional right concerning public elementary school students than they do older students. (A.30); *see also* Fields *v. Palmdale Sch. Dist.*, 427 F.3d 1197,

[3] See *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003); C.N. *v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3rd Cir. 2005); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001); *Blau v.* Fort *Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L.*, 135 F.3d 694, 700 (10th Cir. 1998).

1205-06 (9th Cir. 2005) (applying the First Circuit's reasoning in *Brown* to a case where elementary school students were provided with a survey containing questions concerning sexuality).

The question is whether the conduct is rationally related to a legitimate state interest.

As *Brown* held, and the district court reiterated, granting individual parents the constitutional right to dictate the content of a public school's curriculum would place an impossible burden on the state educational system. (A.24-26). In 1948, Justice Jackson warned of the consequences of allowing the moral beliefs of individuals to govern the content of public school instruction. Noting the wide variety of religions in the United States, Justice Jackson wrote: "If we are to eliminate everything that is objectionable... or inconsistent with any of their doctrines, we will leave public education in shreds." *Ill. ex r-el. McCollum,* 333 U.S. at 235 (Jackson, J., concurring). Though parents do have a fundamental right to choose whether their children should receive religious instruction, *see Pierce* v. *Society of the Sisters,* 268 *U.S.* 510 (1925), or be taught in a foreign language, *see Meyer v. Nebraska,* 262 U.S. 390 (1923), both precedent and sound policy require that these lights not extend to dictating the curriculum at public schools.

B. Public School Instruction About Diversity Does Not Implicate the Free Exercise of Religion.

The Lexington school district's teachings about families with same-sex parents do not implicate appellants' right to the free exercise of religion. Appellants assert that books referencing different kinds of families are a form of "indoctrination" into lifestyles that are antithetical to their religion, and that therefore, the Lexington schools are encouraging children to violate core tenets of their religious faith. ADL is a staunch advocate of the free exercise of religion, and would be loathe to support a program that would encourage students to violate their religious beliefs. The books used in the Lexington schools, however, do not advocate any particular belief or value system; their purpose is to introduce students to the idea that other families may look different from their own, which is acceptable in a diverse society. An individual's right of free exercise is not infringed by government action that is neutral and of general applicability, even if there is an incidental effect of burdening a particular religious practice. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881 (1990).

Appellants claim that this case falls within the so-called "hybrid exception," wherein government actions that involve "the Free Exercise Clause in conjunction with other constitutional protections" are subjected to heightened scrutiny instead

of rational basis review." *Smith,* 494 U.S. at 881. The hybrid exception is, however, inapplicable to this case, because appellants have failed to state any constitutional claim in addition to the free exercise claim. The right to raise one's own children does not "encompass a broad-based right to restrict the flow of information in the public schools." Brown, 68 F.3d at 534. The appellants' free exercise claim is thus not joined by an independently protected constitutional right. The Lexington school district did not, therefore, infringe upon any of the appellants' fundamental liberty interests, and their actions need only to have been reasonably related to a legitimate state interest to pass constitutional muster.

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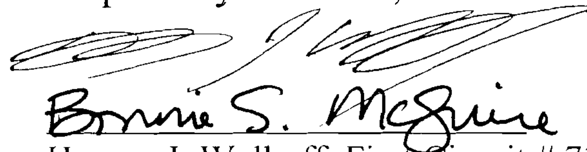
[4] As the district court noted, no circuit has yet actually applied heightened scrutiny to government action based on the hybrid theory. (A.40 (citing *Leebaert*, 332 F.3d at 132))

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3,692 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point Times New Roman.

Respectfully submitted,



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I, Bonnie S. McGuire, certify that two copies of the Brief of *Amicus Curiae* Anti-Defamation League in Support of Appellees and Affirmance of District Court's Ruling were served via overnight mail on counsel for each of the parties in this action at the addresses listed below on this 27th day of September 2007.

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