No. 07-1528

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

DAVID PARKER, et al,

Plaintiff-Appellants,

v.

WILLIAM HURLEY, et al,

Defendant-Appellees.

On Appeal From a Judgment of Dismissal Entered by the
United States District Court for the District of Massachusetts

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BRIEF OF DEFENDANT-APPELLEES

PIERCE, DAVIS & PERRITANO, LLP
John J. Davis, First Circuit #40366
10 Winthrop Square
Boston, MA 02110-1257
(617) 350-0950

Counsel for Defendant-Appellees

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case raises important issues concerning the constitutional rights of parents who elect to send their children to public schools, but object to the school officials' use of reading materials that address issues of homosexuality and same-sex marriage. The defendants believe oral argument may prove of assistance to the Court in determining the scope of the constitutional rights alleged, as well as nature of the state's legitimate interests in exposing public school students to issues of diversity and tolerance in a jurisdiction that recognizes same-sex marriages.

JURISDICTIONAL STATEMENT

(A) The plaintiffs seek relief under 42 U.S.C. § 1983, as well as other remedies. The United States District Court for the District of Massachusetts has original jurisdiction pursuant to 28 U.S.C. § 1331.

(B) The United States Court of Appeals for the First Circuit has jurisdiction over appeals from all final decisions of the United States District Court for the District of Massachusetts. 28 U.S.C. §§ 1291 & 1294(1).

(C) On February 23, 2007, the United States District Court entered a Memorandum and Order in favor of all defendants. (A. 8-45). On that same date, the District Court also entered a Judgment of dismissal for the defendants as to Count I with prejudice and without prejudice as to all state claims. (A. 7). On February 28, 2007, the plaintiffs filed a Notice of Appeal from said Order and Judgment with the District Court. (A. 6). Fed. R. App. P. 4(a)(1)(A).

(D) This appeal is taken from a Judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

(1) Whether the District Court erred in applying a rational basis test to plaintiffs' alleged substantive due process and privacy rights.

(2) Whether the District Court erred in applying a rational basis test to

plaintiffs' alleged free exercise of religion rights.

(3) Whether defendants' use of books in a public elementary school depicting same-sex couples and families is rationally-related to legitimate governmental interests.

(4) Whether the individual defendants are entitled to qualified immunity as against plaintiffs' civil rights claims.

(5) Whether the District Court erred in dismissing plaintiffs' conspiracy claim.

(6) Whether the District Court erred in dismissing plaintiffs' state law claims without prejudice.

STATEMENT OF THE CASE

The defendants are satisfied with plaintiffs' Statement of the Case.

STATEMENT OF THE FACTS

Since at least 1993, Massachusetts has prohibited public schools and other programs of study from discriminating against students on the basis of sex or sexual orientation. M.G.L. c. 76, § 5; 603 C.M.R. § 26.03. Following adoption of the Education Reform Act of 1993 (M.G.L. c. 71, §§ 1, *et seq.*), the Massachusetts Commissioner of Education (as directed by the Board of Education) developed academic standards and curriculum frameworks designed "to inculcate respect for

the cultural, ethnic and racial diversity of the commonwealth . . . and to avoid perpetuating gender, cultural, ethnic or racial stereotypes." M.G.L. c. 69, §§ 1D & 1E; 603 C.M.R. § 26.05(1). The standards and frameworks developed by the Commissioner encourage instruction that describes "different types of families" as well as "the concepts of prejudice and discrimination" (A. 16, 94; S.A. 13-20)[1], all under a Guiding Principle that celebrates the capacity of students, families and staff to work together toward the creation of a "safe and supportive environment where individual similarities and differences are acknowledged." (A. 15-16, 93; S.A. 10 & 21).

In 2003, the Massachusetts Supreme Judicial Court held that a ban on same-sex marriage violates the equal protection principles of the state Constitution. Goodridge v. Dep't of Public Health, 440 Mass. 309, 344, 798 N.E.2d 941, 969-970 (2003). In so doing, the SJC cited (among other support) the statutory prohibition against public school discrimination (M.G.L. c. 76, § 5) as evidence of Massachusetts' "strong affirmative policy of preventing discrimination on the basis of sexual orientation." Id., 440 Mass. at 341.

Objecting to their children's exposure to three school books that reference

[1] On September 12, 2007, the First Circuit allowed the parties' Joint Motion for Leave to File a Supplemental Appendix. "S.A." refers to the Supplemental Appendix.

same-sex families, the plaintiffs filed suit against the Town of Lexington and various public school officials in the District Court on April 27, 2006. The plaintiffs, David and Tonia Parker, are the parents of Jacob and Joshua Parker. The Parkers describe themselves in their Complaint as "devout Judeo-Christians" (A. 191) who sincerely believe that marriage is a union between a man and a woman *only*, and "that labeling marriage to be otherwise is immoral." (A. 192).

In September 2004, the Parkers enrolled their son Jacob in kindergarten at Estabrook Elementary School ("Estabrook"), a public school in Lexington. (A. 191). During his kindergarten year, Jacob brought home from school Who's in a Family?, a book of illustrations that depicts different types 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. (A. 16-17, 192; S.A. 34-67).[2] This book was one of several contained in a "Diversity Book Bag" used by Lexington school officials "to strengthen the connections among our school population and build an atmosphere of tolerance and respect for cultural racial ability and family structure diversity." (A. 192).

During the following academic year, Jacob's first grade reading center at

[2] Who's in a Family? depicts both human and animal families, including birds, kangaroos, pigs, chimpanzees, elephants, lions and dogs. (S.A. 34-67). The

Estabrook included Who's in a Family? among its collection, as well as Molly's Family, a book that teaches about different kinds of families by focusing on a kindergarten student whose parents are a same-sex couple. (A. 17, 192; S.A. 68-102).[3] The Parkers allege that the idea or "notion" depicted in these two books – i.e., "the interchangeability of male and female within a marriage construct" – is inconsistent with their sincerely-held religious beliefs (A. 192-193), and that the school's refusal either to give them prior notice of its intent to use the books and/or to allow their son to "opt out" of that portion of the curriculum, violates the Parkers' parental rights to raise their children in accordance with those beliefs. (A. 195).

The plaintiffs, Joseph and Robin Wirthlin, are the parents of Joey Wirthlin. The Wirthlins, like the Parkers, describe themselves as "devout Judeo-Christians." (A. 201). Among the Wirthlins' "core beliefs" is the concept that issues concerning sexual intimacy and the holy basis of matrimony are governed by the laws of the God of Abraham and should remain private within the family.

Library of Congress CIP (Cataloging in Publication) data identifies Who's in a Family? as suitable for "Age level: 3 to 6." (S.A. 36).

[3] The summary on the copyright page of Molly's Family reads as follows:

> When Molly draws a picture of her family for Open School Night, one of her classmates makes her feel bad because he says she cannot have a mommy and a mama. (S.A. 101).

Included in that concept is the belief that homosexual behavior "is immoral in that it violates God's law." (A. 201).

On March 24, 2006, while Joey was enrolled in the second grade at Estabrook, his teacher, Heather Kramer, read aloud to the class a library book entitled King & King. (A. 201). As described by the District Court:

> King & 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. (A. 17, 115, 257).[4]

The Wirthlins allege that the theme of King & King is not one they wish to have "celebrated and affirmed" to their son "because it is in contravention of their sincerely and deeply held faith." (A. 201-202). In addition, defendants' use of King & King allegedly intrudes upon the Wirthlins' rights "to direct the moral upbringing of their own children." (A. 202).

SUMMARY OF ARGUMENT

The District Court below dismissed plaintiffs' federal civil rights claims

[4] The summary on the copyright page of King & King reads: "When the queen insists that the prince get married and take over as king, the search for a suitable mate does not turn out as expected." (S.A. 30).

with prejudice in reliance upon the First Circuit decision of Brown v. Hot, Sexy and Safer Prods, Inc., 68 F.3d 525 (1st Cir. 1995), cert. den., 516 U.S. 1159 (1996). Such reliance was appropriate, as the Brown decision remains controlling within this Circuit. The reasoning of Brown was neither undermined nor eroded by the subsequent Supreme Court decision of Troxel v. Granville, 530 U.S. 57 (2000), interpreting the scope of parental rights in a non-school setting. In fact, in reaching its decision five years prior to Troxel, the First Circuit expressly anticipated the "fundamental" nature of such rights in upholding the conduct of the defendant public school. Moreover, within the last twelve years, the reasoning of Brown has been found "persuasive" by every other Circuit Court that has addressed the issue of a parent's right to direct the moral upbringing of his or her child. (A. 25).

The District Court below rightly rejected plaintiffs' plea to apply strict scrutiny to defendants' use of same-sex reading materials in Lexington schools. Plaintiffs' substantive due process and privacy rights, as protected by the Fourteenth Amendment, do not include the right to direct how a public school may and may not teach their children. Furthermore, defendants' use of same-sex reading materials in the public school was pursuant to a neutral policy of general applicability which does not threaten plaintiffs' "way of life." Thus, plaintiffs' rights to the free exercise of their religion, as protected by the First Amendment,

were not violated.

The District Court below rightly upheld defendants' use of same-sex reading materials under a rational basis test. In light of the state's compelling interest in providing adequate secular education to all children, including the lessons of tolerance and diversity, the District Court found the use of same-sex reading materials rationally-related to the legitimate state goals of (1) preparing public school students for citizenship; (2) eradicating past prejudice against gays and lesbians; and (3) teaching tolerance of differences in sexual orientation. The District Court applied the rational basis test correctly.

The District Court below properly rejected plaintiffs' attempts to distinguish this case from Brown. No law or applicable analysis justifies giving greater protection under the Free Exercise Clause to parents of elementary school students than to parents of high school students. In addition, the assumed rationale for considering age under the Establishment Clause – i.e., to measure the endorsement effect of governmental conduct on religion – has no place under a free exercise analysis, where judicial focus is on the nature of governmental compulsion on the individual. Finally, plaintiffs' conclusory allegations of "indoctrination" notwithstanding, the mere exposure of plaintiffs' children to ideas and concepts with which they disagree is not a meaningful distinction between this case and

Brown.

If defendants violated plaintiffs' civil rights (which defendants deny) by using same-sex reading materials in a public school, they were exercising discretion in a realm where the law was not clearly-established. Dismissal of plaintiffs' federal and state civil rights claims as against the individual defendants should still be upheld, therefore, under the doctrine of qualified immunity. Dismissal of plaintiffs' conspiracy claim was also appropriate due to plaintiffs' failure to set forth the facts of the alleged conspiracy with sufficient specificity within their Complaint. Finally, plaintiffs failed to brief and, therefore, waived any argument to reinstate their remaining state law claims which, in any event, have no merit.

ARGUMENT

I. Standard of Review.

A district court's dismissal of a complaint for failure to state a claim under Rule 12 is reviewed *de novo*. Morales-Villalobos v. Garcia-Llorens, 316 F.3d 51, 52 (1st Cir. 2003). Thus, this Court must accept as true all well-pleaded facts in plaintiffs' Complaint, construe such facts in the light most favorable to the plaintiffs, and determine whether any set of facts entitle the plaintiffs to relief. Garrett v. Tandy Corp., 295 F.3d 94, 97 (1st Cir. 2002); Cooperman v. Individual,

Inc., 171 F.3d 43, 46 (1st Cir. 1999); Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir. 1988). This Court should reverse if the Complaint contains well-pleaded facts which, taken as true, "justify recovery on any supportable legal theory." Cruz v. Melecio, 204 F.3d 14, 21 (1st Cir. 2000).

This "highly deferential" standard of review does not mean, however, that the Court must take *everything* pled by plaintiffs at face value, or that it "must (or should) accept every allegation made by the [plaintiffs], no matter how conclusory or generalized." United States v. AVX Corp., 962 F.2d 108, 115 (1st Cir. 1992). A court must eschew reliance on the pleader's "rhetorical flourishes," Palmer v. Champion Mortg., 465 F.3d 24, 25 (1st Cir. 2006), as well as "on bald assertions, unsupportable conclusions and 'opprobrious epithets.'" Chongris v. Bd. of Appeals of Town of Andover, 811 F.2d 36, 37 (1st Cir. 1987). See Snowden v. Hughes, 321 U.S. 1, 10 (1944) (allegations that defendants' actions were "willful," "malicious," "unjust," "unequal" and "oppressive" held insufficient to show purposeful discrimination); Hoffman v. City of Warwick, 909 F.2d 608, 624 (1st Cir. 1990) (allegations that defendant's refusal to enforce state statute was "willful, malicious, and criminal" held insufficient to raise viable equal protection claim.) Moreover, the well-pleaded complaint rule "does not entitle a plaintiff to rest on 'subjective characterizations' or conclusory descriptions of 'a general scenario

which could be dominated by unpleaded facts.'" Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52-53 (1st Cir. 1990), quoting Dewey v. Univ. of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982), cert. den., 461 U.S. 944 (1983).

II. The District Court Did Not Err in Dismissing Plaintiffs' Federal Constitutional Claims in Reliance Upon *Brown v. Hot, Sexy and Safer Prods. Inc.*

A. The Brown Decision.

In dismissing plaintiffs' Complaint below, the District Court relied on Brown v. Hot, Sexy and Safer Prods, Inc., 68 F.3d 525 (1st Cir. 1995), cert. den., 516 U.S. 1159 (1996), as "binding precedent." (A. 39). Brown involved an action brought against public school officials and others by two high school students and their parents who objected to the students' compelled attendance at a sexually-explicit AIDS awareness program on the grounds that such attendance violated their substantive due process and privacy rights as protected under the Fourteenth Amendment, as well as their free exercise of religion rights as protected under the First Amendment. Following the District Court's dismissal of their complaint for failure to state a claim upon which relief could be granted, the plaintiffs appealed. The First Circuit Court of Appeals affirmed.

While recognizing that the Fourteenth Amendment protects parental rights to direct the upbringing of their children, the Brown Court concluded that such

rights were not violated by the defendants, even if they *were* "fundamental." Id., 68 F.3d at 533. Although parents have a right to choose a specific educational program for their children – whether religious instruction at a private school or foreign language instruction – they do not have a right, concluded the First Circuit, "to dictate the curriculum at the public school to which they have chosen to send their children." Id.

> 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 . . ..

Id., 68 F.3d at 534. In short, parental rights, as protected under the Fourteenth Amendment, "do not encompass a broad-based right to restrict the flow of information in the public schools." Id.

The Brown Court also rejected plaintiffs' attempt to challenge the school's AIDS awareness program by invoking the so-called "hybrid" exception to the Free Exercise Clause. This exception, which has its genesis in the case of Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), decided five years before Brown, springs from the Supreme Court's recognition that the case before it did not "involve the Free Exercise Clause in conjunction with other constitutional protections." Id., 494 U.S. at 881 & n.1. In so noting, the

Court implied (but did not hold) that such situations might merit a higher standard than rational basis review. Id., 494 U.S. at 882.

The Brown Court ruled this "hybrid" exception did not apply to plaintiffs' free exercise claim for two reasons. First, plaintiffs did not state a viable Fourteenth Amendment due process or privacy claim and, thus, their free exercise challenge was "not conjoined with an independently protected constitutional protection." Brown, 68 F.3d at 539. Second, the type of free exercise claim advanced by the plaintiffs was "qualitatively distinguishable" from the type of claim contemplated in the hybrid situation. Citing Wisconsin v. Yoder, 406 U.S. 205 (1972), "the most relevant of the so-called hybrid cases . . .," the Brown Court considered the nature of the free exercise claim asserted. Brown, 68 F.3d at 539. In Yoder, the Supreme Court invalidated a compulsory school attendance law as applied to Amish parents who refused on religious grounds to send their children to public school. 406 U.S. at 232-233. Enforcement of this law as against the Amish effectively "threatened their entire way of life." Brown, 68 F.3d at 539. In contrast, no such threat was presented by the Brown plaintiffs' compulsory attendance at the AIDS awareness program. Id. Thus, the "hybrid" exception did not fit.

Faced with a non-hybrid free exercise claim, the Brown Court upheld the

compulsory attendance requirement as a neutral rule of general applicability. Id., 68 F.3d at 537-538; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (A law "that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.") No protected constitutional right required the application of a heightened standard of review. And, because compulsory attendance at the AIDS awareness program was rationally related to legitimate governmental interests, the First Circuit upheld the dismissal below.

The case brought by the Parkers and Wirthlins now stands in the same posture as the Brown case stood in 1995. Judge Wolf dismissed plaintiffs' Complaint below under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Thus, unless the controlling law has materially changed since 1995, or the claims of the Parkers and Wirthlins are meaningfully distinguishable from the plaintiffs' claims in Brown, this Court should reach the same result it reached twelve years ago – i.e., it should affirm the Judgment of dismissal entered below.

As addressed at great length in the District Court decision, the law with respect to substantive due process, privacy and free exercise rights has *not*

materially changed since 1995. Nor are the Parkers' and Wirthlins' claims meaningfully distinguishable from the plaintiffs' claims in Brown. The dismissal of plaintiffs' Complaint must, therefore, be affirmed.

B. The Brown Decision Remains Good Law.

1. The Brown decision has neither been undermined nor eroded by subsequent precedent.

At the outset, plaintiffs argue that the Brown holding has "only limited precedential value" to their claims, in part because it was decided five years before the Supreme Court ruling in Troxel v. Granville, 530 U.S. 57 (2000). (A. 58). Even if the First Circuit appreciated the constitutional magnitude of a parent's right to rear his or her children, plaintiffs insist the Brown Court did not have the benefit of "the Supreme Court's guidance on the fundamental nature of the parental right in question . . .." (Appellants' Brief, at 38). Accordingly, it is "not surprising" to the Parkers and Wirthlins that the First Circuit declined, in 1995, to apply a heightened standard of review to the Brown plaintiffs' claims. (A. 58). Presumably (as their argument goes,) a post-Troxel First Circuit would *and should* apply a heightened standard of review to the Parkers' and Wirthlins' constitutional

claims.[5]

The District Court below rejected plaintiffs' contention. The Troxel decision, Judge Wolf wrote, "does not undermine the authority of Brown." (A. 26). On the contrary, Brown "remains precedent that establishes the law which this court must apply in this case." (A. 28). Judge Wolf was correct.

The Troxel case did not involve parental rights in the context of public education. Instead, the Supreme Court considered the effect of a Washington state statute that allowed "any person" to file a petition seeking visitation rights with a child, which rights could be granted upon a showing that such visitation was in the best interests of the child. Troxel, 530 U.S. at 61. Suit arose from a petition filed by the paternal grandparents of two illegitimate children of their late son who sought visitation rights with their grandchildren over the objections of the mother.[6] (The mother's fitness was not at issue.) The Supreme Court struck down the visitation statute as violative of the mother's right "to make decisions concerning

[5] At oral argument on defendants' Motion to Dismiss, plaintiffs counsel labeled the First Circuit's interpretation of the nature of the parents' rights in Brown as "wrong" in light of the subsequent Troxel decision. (A. 157).

[6] At trial, the grandparents requested two weekends of overnight visitation per month, as well as two weeks of visitation each summer. Troxel, 530 U.S. at 61.

the care, custody, and control of [her] children . . .." Id., 530 U.S. at 72.[7] As Judge Wolf appropriately recognized in gauging the impact of Troxel on Brown, forced visitation of children by non-parents, including temporary loss of physical custody over children at the sole discretion of a judge, imposes a far different burden on parental rights than a public school's choice of reading materials.

A plurality of the Troxel Court identified the parental right to "care, custody and control" as "fundamental," but did not define its scope. Id., 530 U.S. at 65. Certainly, nowhere in its decision did the Supreme Court suggest that the liberty interest at stake is so broad as to encompass the right of a parent to dictate curriculum to a public school. (A. 27). On this point, Judge Wolf adopted the reasoning of Second Circuit:

> [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 a child that includes the right to tell public schools what to teach or what not to teach him or her.

Leebaert v. Harrington, 332 F.3d 134, 142 (2d Cir. 2003) (emphasis in original);

[7] Washington's visitation statute was held overbroad in that a parent's estimation of a child's best interests was, in effect, replaced by the views of a judge. "[I]n practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." Troxel, 530 U.S. at 67 (emphasis in original).

(A. 27).

Not only did Troxel fail to undermine the rationale of Brown, but the First Circuit "essentially anticipated" the Supreme Court's later decision in its opinion. (A. 27). In Brown, the First Circuit wrote:

> [T]he Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny. We need not decide here whether the right to rear one's children is fundamental because we find that, *even if it were*, the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude.

Brown, 68 F.3d at 533 (emphasis added). Thus, the Parkers and Wirthlins can neither deprecate nor avoid the holding of Brown by invoking the decision of Troxel. The First Circuit's reasoning remains as right today as it was in 1995.

Indeed, in 2004, the First Circuit confirmed Brown's continued vitality four years *after* Troxel. In Pisacane v. Desjardins, 115 Fed. Appx. 446 (1st Cir. 2004),[8] cited by Judge Wolf below (A. 24-25), the First Circuit affirmed the district court's allowance of a motion for summary judgment in an action brought by a parent critical of a science textbook used in his daughter's public school. In rejecting an

argument that the school violated the father's protected liberty interest to direct the upbringing and education of his daughter, the First Circuit stated:

> In Brown we ruled that the right embraces the principle that the state cannot prevent parents from choosing for their child a specific education program but did not include the right to dictate the curriculum at the public school to which parents have chosen to send their children. 68 F.3d at 533-34.
> . . ..
> The appellees' asserted refusal to let Pisacane dictate to the school about the science textbook would not violate the parental due process right. As said, the right does not include parental control over a public school's curriculum. Brown, 68 F.3d at 533-34.

Pisacane, 115 Fed. Appx. at 450; (A. 25). As stated in his opinion, Judge Wolf was compelled to follow and apply Brown in ruling on the defendants' Motion to Dismiss. (A. 10, 25, 28).

2. The Brown decision has been followed by other Circuit Courts of Appeal.

As observed by the District Court below, the Brown decision has "been found to be persuasive in every other circuit that has discussed it in defining the scope of a parent's right to raise his or her children." (A. 25). Most such cases were decided after Troxel. See Leebaert, 332 F.3d at 141 (2d Cir. 2003)

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[8] A copy of this unpublished opinion (cited below by the District Court) is included in the Addendum pursuant to Local Rule 32.3(a)(3).

(upholding middle school's refusal to exempt seventh-grade student from mandatory health education course); C.N. v. Ridgewood Bd. of Ed., 430 F.3d 159, 185 (3d Cir. 2005) (administration of survey to seventh through twelfth grade students regarding "sensitive topics" held not an unconstitutional intrusion on parental decision-making authority); Littlefield v. Forney Ind. School Dist., 268 F.3d 275, 289 (5th Cir. 2001) (enforcement of mandatory school uniform policy upheld against challenge that it violated "fundamental right of filiation and companionship with one's children" as examined in Troxel); Blau v. Fort Thomas Public School Dist., 401 F.3d 381, 393-394 (6th Cir. 2005) (upholding middle school's refusal to exempt twelve-year old student from mandatory dress code); Fields v. Palmdale School Dist., 427 F.3d 1197, 1206-1207 (9th Cir. 2005) (providing sexual information to elementary school children held not a violation of parents' constitutional rights to direct upbringing of their children); Swanson v. Guthrie Ind. School Dist. No. I-L,135 F.3d 694, 699 (10th Cir. 1998) ("parents have a constitutional right to direct [their daughter's] education, up to a point.") See also Myers v. Loudoun Cty. School Bd., 251 F. Supp. 2d 1262, 1275-76 (E.D.Va. 2003), aff'd, 418 F.3d 395 (4th Cir. 2005) ("[t]he fundamental right to raise one's children as one sees fit is not broad enough to encompass the right to re-draft a public school curriculum.") As the Ninth Circuit explained:

> Schools cannot be expected to accommodate the personal, moral or religions 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.[9]

Plaintiffs cite to no Circuit Court opinion rejecting the reasoning of Brown. The District Court did not err in applying that reasoning below.

C. The Alleged Violation of Plaintiffs' Substantive Due Process and Privacy Rights Did Not Require Application of a Strict Scrutiny Test.

The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV. The Parkers and Wirthlins allege that defendants' use of the three books at Estabrook depicting same-sex couples and families violated their substantive due process and privacy rights "to direct the moral upbringing of their children . . .." (A. 205-205). In other words, plaintiffs challenge as unconstitutional defendants' selection of certain reading materials used within the Lexington public schools.

The right relied upon by the plaintiffs was recognized by the Supreme Court in Meyer v Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268

[9] Plaintiffs cite favorably to the Fields decision in their Brief. (Appellants' Brief, at 22).

U.S. 510 (1925). In Meyer, the Supreme Court struck down a state statute that prohibited the instruction of foreign languages in any school on the grounds it unreasonably infringed upon the liberty interest of a parent "to give his children education suitable to their station in life . . .." Meyer, 262 U.S. at 400. In Pierce, the Supreme Court held unconstitutional a state statute that required compulsory attendance at public schools, and thereby outlawed parochial and private educational institutions. The state statute, ruled the Court, unreasonably interfered with the liberty interest of parents and guardians "to direct the upbringing and education of children under their control." Pierce, 268 U.S. at 534-35.[10]

There is, however, a "fundamental difference" between a state, on the one hand, that seeks to prohibit parents from educating their children as they see fit, and parents, on the other hand, who seek to prescribe what a state can and cannot teach their children. Brown, 68 F.3d at 534. In the United States, public education "is committed to the control of state and local authorities." Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Goss v. Lopez, 419 U.S. 565, 578 (1975); Curtis v. School Comm. of Falmouth, 420 Mass. 749, 754, 652 N.E.2d 580, 584 (1995).

[10] In Yoder, the Supreme Court emphasized the limited scope of Pierce, pointing out that it lent "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society . . .." 406 U.S. at 239 (White, J., concurring).

Indeed, public education "is perhaps the most important function of state and local governments." Brown v. Bd. of Ed. of Topeka, 347 U.S. 483, 493 (1954). Hand-in-hand with that control comes the "undoubted right to prescribe the curriculum for . . . public schools." Epperson, 393 U.S. at 107.[11] Thus, the Supreme Court "has long recognized that local school boards have broad discretion in the management of school affairs." Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 863 (1982). See Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1533-34 (9th Cir. 1985) (school's refusal to remove certain book from tenth grade English curriculum held not unconstitutional).

It is undisputed, based on Meyer, Pierce and their progeny, that the state cannot restrict a parent's right to choose a specific educational program for his or

[11] Plaintiffs admit "[i]t is important to preserve local autonomy over public school curriculum." (Appellants' Brief, at 27). Nevertheless, this autonomy must yield, they insist, "in the distinctly private areas of family life and sexuality." (Id.) In support, plaintiffs cite Gruenke v. Seip, 225 F.3d 290, 303-307 (3d Cir. 2000), where the Third Circuit found sufficient evidence to reverse a summary judgment entered below in favor of a high school swim coach who pressured a student athlete to take a pregnancy test without notifying her parents, then aided and abetted other members of the team and their mothers in making the pregnancy a subject of local school gossip. (Appellants' Brief, at 27). Such behavior, concluded the Court, stated a potential claim for the violation of a parent's right to direct the upbringing of her children. But because the law was not "clearly-established" at the time of the alleged misconduct, the swim coach was entitled to qualified immunity on the parental rights claim. Id., 225 F.3d at 307. Plaintiffs' only other citation on this point is to a student note published in the 2005 Michigan Law Review. (Appellants' Brief, at 27).

her child. Brown, 68 F.3d at 533. But, the liberty interest protected by the Fourteenth Amendment does not include the right to restrict or dictate what a public school may teach. Id., 68 F.3d at 533-34.

> The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or . . . a dress code, these issues of public education are generally "committed to the control of state and local authorities."

Blau, 401 F.3d at 395-96, quoting Goss, 419 U.S. at 578 (emphasis in original). Recognition of such a "right" in every parent – not just the Parkers and Wirthlins – to control the ideas to which their children are exposed "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." Leebaert, 332 F.3d at 141. As Justice Jackson admonished nearly sixty years ago:

> Authorities list 256 separate and substantial religious bodies to exist in continental United States. Each of them . . . has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects 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.

McCollum v. Bd. of Ed. of School Dist. No. 71, 333 U.S. 203, 235 (1948) (Jackson, J., concurring).

The District Court below rejected plaintiffs' argument that defendants' use of same-sex reading materials infringed upon the Parkers' and Wirthlins' substantive due process and privacy rights and, therefore, required application of a strict scrutiny test. The District Court decision should be affirmed.

D. The Alleged Violation of Plaintiffs' Free Exercise of Religion Rights Did Not Require Application of a Strict Scrutiny Test.

The First Amendment makes unconstitutional any law "prohibiting the free exercise" of religion. U.S. Const. amend. I. This prohibition was made binding upon the states through adoption of the Fourteenth Amendment. Cantwell v Connecticut, 310 U.S. 296, 303 (1940). Citing their deeply-held religious beliefs on marriage and homosexuality (A. 191-192, 201), the Parkers and Wirthlins allege that defendants' use of books at Estabrook depicting same-sex couples and families "invaded and impaired the plaintiffs' clearly established rights to the free exercise of their religion." (A. 205). Judge Wolf disagreed.

As a general rule, "a law (or policy) that is neutral and of general applicability need not be justified by a compelling governmental interest even if that law incidentally burdens a particular religious practice or belief." Swanson,

135 F.3d at 697-98, citing Church of Lukumi Babalu Aye, 508 U.S. at 531. See Smith, 494 U.S. at 879. Absent a showing that the plaintiff was either forced by the state to affirm or deny a belief, or forced to engage or refrain from engaging in a practice prohibited (or mandated) by his or her religion, a free exercise claim will ordinarily not be sustained. Mozert v. Hawkins Cty. Bd. of Ed., 827 F.2d 1058, 1065 (6th Cir. 1987), cert. den., 484 U.S. 1066 (1988).

Courts have routinely upheld the rights of public schools to adopt educational policies and design curriculum free of parental controls based on "free exercise" claims. See Mozert, 827 F.2d at 1065 (school's use of teaching materials concerning evolution, secular humanism, futuristic supernaturalism, pacifism, magic, mental telepathy and "false views of death" considered offensive to plaintiffs' religious beliefs, held constitutional); Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680, 689-690 (7th Cir. 1994) (court dismissed parents' claims that elementary school reading program indoctrinated children in values "directly opposed to their Christian beliefs"); Grove, 753 F.3d at 1533 (school's inclusion of The Learning Tree, a book about secular humanism, in tenth grade curriculum, held constitutional); Hansen v. Ann Arbor Public Schools, 293 F. Supp. 2d 780, 808-809 (E.D. Mich. 2003) (high school panel of clergymen espousing tolerance of homosexuality during diversity week held not violative of

plaintiff's free exercise of Christian beliefs).

As the District Court noted below, "[p]laintiffs do not allege that the conduct at issue is not neutral or not of general applicability." (A. 39). Hence, applying the general rule, defendants' use of same-sex reading materials need not satisfy a compelling state interest in order to pass constitutional muster; a rational relationship to a legitimate state interest is sufficient.

In an effort to avoid defendants' neutral and generally-applicable policy, plaintiffs argue that their free exercise claim falls within the Smith "hybrid" exception because it is joined with the "fundamental constitutional rights" of privacy and to direct their children's moral upbringing. (Appellants' Brief, at 33). Because their Complaint contains "good faith" allegations of hybrid rights deprivations, the District Court erred, plaintiffs argue, by subjecting defendants' conduct to a rational basis test only. (Appellants' Brief, at 33-34). Instead, the District Court should have applied a strict scrutiny test and required defendants to demonstrate a compelling state interest to justify their behavior. (Appellants' Brief, at 37).

Even while inviting the First Circuit to reconsider whether Smith requires

heightened scrutiny of a hybrid rights claim (A. 40),[12] the District Court followed and applied Brown's interpretation of the exception. Notwithstanding their so-called "good faith" assertion of a hybrid rights claim, Judge Wolf rejected plaintiffs' argument that something more than a rational basis need be shown, and did so for the same reasons the First Circuit declined to apply heightened scrutiny to the hybrid rights asserted in Brown. Like the Brown plaintiffs, Judge Wolf reasoned that the Parkers and Wirthlins did not state a viable privacy or substantive due process claim. (A. 42).[13] Similarly, in terms of the burden on plaintiffs' free exercise of religion, the Parkers' and Wirthlins' claims were not "factually distinguishable" from the claims in Brown "in any material respect." (A. 42). To reach this conclusion, Judge Wolf must have considered the impact on the Parkers and Wirthlins as "qualitatively distinguishable" from the threat to Amish way of life posed in Yoder.[14]

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[12] In a footnote, Judge Wolf posited that the sound reasoning of the Third Circuit in Leebaert "might cause the First Circuit to reconsider its suggestion in Brown that heightened scrutiny is required for hybrid claims." (A. 33). This case clearly provides the Court with an opportunity to revisit the issue.

[13] The Ninth Circuit has held that, to assert a hybrid rights claim, "a free exercise plaintiff must make out a colorable claim that a companion right has been violated – that is, a fair probability or a likelihood, but not a certitude, of success on the merits." Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999). See Harper v. Poway Unified School Dist., 445 F.3d 1166, 1187 (9th Cir. 2006).

[14] At oral argument on defendants' Motion to Dismiss, plaintiffs' counsel (expressly invoking Yoder) asserted that exposure to the books Who's in a

Family?, Molly's Family and King & King within the Lexington public school system threatened his clients' very "way of life." Yet counsel failed to articulate this threat in any meaningful manner. (A. 160, 164). Rather, he offered only:

> I don't want to get into cliches about sins and sinners, but I think that is the core message, that [the Parkers and Wirthlins] want to have a right to teach in their own way, and it's the essence of their being.

(A. 164). As Judge Wolf pointed out in his decision, however, defendants' use of same-sex reading materials in the Estabrook classrooms does not interfere with that right.

> Parents do have a fundamental right to raise their children. They are not required to abandon that responsibility to the state. The Parkers and Wirthlins may send their children to a private school that does not seek to foster understandings of homosexuality or same-sex marriage that conflict with their religious beliefs. They may also educate their children at home. In addition, the plaintiffs may attempt to persuade others to join them in electing a Lexington School Committee that will implement a curriculum that is more compatible with their beliefs. However, the Parkers and Wirthlins have chosen to send their children to the Lexington public schools with its current curriculum. The Constitution does not permit them to prescribe what those children will be taught. (A. 13).

In their Brief, plaintiffs repeat hyperbolically that exposure of their children to same-sex reading materials has the effect of "destroying" a core tenet of their faith, as well as their very way of life. (Appellants' Brief, at 27). Presumably, however, plaintiffs' right to choose from among the various educational options

As set forth above, analysis of a free exercise claim typically entails inquiry into the nature of the burden placed on the individual's free exercise of religion.

> It is clear that governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion, is the evil prohibited by the Free Exercise Clause.

Mozert, 827 F.2d 1058. See School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."); Universidad Cent. de Bayamon v. N.L.R.B., 793 F.2d 383, 390 (1st Cir. 1985) (court should consider "the extent to which a statute actually burdens the exercise of a religious belief . . .")

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identified by Judge Wolf would allow the Parkers and Wirthlins to shield their children from such unwanted exposure and, thereby, preserve their "way of life" in a way the Amish parents in Yoder could not.

In support of their appeal, plaintiffs cite four cases wherein the courts (three United States District Courts and the Supreme Court of Michigan) applied the "hybrid" exception to protect plaintiffs' free exercise rights in a school setting. (Appellants' Brief, at 39-41). Notwithstanding the fact that such cases are not binding on the First Circuit, each one is distinguishable from the facts alleged by the Parkers and Wirthlins in terms of the nature of the burden placed on plaintiffs' free exercise rights by school requirements. See Hicks v. Halifax Cty. Bd. of Ed., 93 F. Supp. 2d 649, 663 (E.D.N.C. 1999) (mandatory school uniform policy placed unconstitutional burden on guardian who believed that wearing of uniform demonstrated "an allegiance to the spirit of the anti-Christ"); Chalifoux v. New Caney Ind. School Dist., 976 F. Supp. 659, 670 (S.D. Tex. 1997) (prohibition against wearing of rosary beads as "gang-related apparel" violated Catholic students' free exercise rights); Alabama and Coushatta Tribes of Tex. v. Trustees of the Big Sandy Ind. School Dist., 817 F. Supp. 1319, 1328-1333 (E.D. Tex. 1993) (prohibition against wearing of long hair by male students violated Native Americans' free exercise rights); People v. DeJonge, 442 Mich. 266, 501 N.W.2d 127 (1993) (prohibition against home-schooling by non-certified parents violated Roman Catholic parents' free exercise rights).[15]

[15] The Chalifoux and Alabama and Coushatta Tribes cases were both issued

The four cases cited by the plaintiffs stray significantly from the careful analysis of the "hybrid" exception conducted by this Court in Brown. Moreover, they are "qualitatively distinguishable" from the case presented here. The Parkers' and Wirthlins' rights to the free exercise of their religion were not unduly burdened or infringed by defendants' use of same-sex reading materials in the same way the rights of the students and parents were allegedly burdened in Hicks, Chalifoux, Alabama and Coushatta Tribes or DeJonge. "The free exercise inquiry asks whether government placed a *substantial* burden on the observation of a central religious belief or practice . . .." Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (emphasis added). See Strout v. Albanese, 178 F.3d 57, 65 (1st Cir. 1999). Here, the Parker and Wirthlin children were exposed to topics and ideas with which the plaintiffs disagree and at ages the parents consider "too young." (A. 193, 201). Yet, the defendants' selection of reading materials did not place a "substantial" burden on plaintiffs' observation of their religious beliefs, nor did it threaten plaintiffs' "entire way of life." Yoder, 406 U.S. at 235. In Fleischfresser, the Seventh Circuit dismissed parents' claims that the elementary school reading program "indoctrinates children in values directly opposed to their Christian

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by district courts sitting in the Fifth Circuit prior to the decision in Littlefield v. Forney Ind. School Dist., 268 F.3d 275, 289 (5th Cir. 2001), where the Fifth Circuit

beliefs . . .." Id., 15 F.3d at 683.

> 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., 15 F.3d at 690. Hence, the Hicks, Chalifoux, Alabama and Coushatta Tribes and DeJonge cases lend no support to plaintiffs' hybrid rights claims.

In the final analysis, the Parkers and Wirthlins raise untenable claims under the First and Fourteenth Amendments in support of their hybrid rights, then insist that the resulting "synergy" between those claims somehow precludes dismissal of their Complaint at this stage. In plaintiffs' view, a mere "good faith allegation of a hybrid rights violation *requires* the court to exercise strict scrutiny over the state's alleged justifications for its actions." (A. 63; Appellants' Brief, at 34) (emphasis added). But, as the D.C. Circuit so aptly put it, the combination of two untenable claims does not equal a tenable one. "[I]n law as in mathematics zero plus zero equals zero." Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001).

The District Court below rejected the argument that defendants' use of

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embraced the reasoning of Brown. Accordingly, the precedential value of the district court decisions is now cast in doubt.

same-sex reading materials violated plaintiffs' rights to the free exercise of religion – either under the general rule or under the "hybrid" exception – and, therefore, required application of a strict scrutiny test. The District Court decision should be affirmed.

E. Defendants' Use of Books Depicting Same-Sex Couples and Families is Rationally-Related to Legitimate Governmental Interests.

"Rational basis review requires that government action correlate to a legitimate governmental interest." (A. 35). See PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 31-32 (1st Cir. 1991). As the District Court explained, "[t]he fit between means and ends need not be tight – it need only 'be plausible.'" (A. 35), citing FCC v. Beach Communications, Inc., 508 U.S. 307, 313-314 (1993).

Plaintiffs do not assert that no rational basis exists for defendants' use of same-sex reading materials in the classroom. (A. 35). By their silence, plaintiffs acknowledge (as they must) that such an argument would be futile. The state's interest in making certain that children receive an adequate secular education is more than "legitimate"; it is "compelling." New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940, 944 (1st Cir. 1989). In his decision below, Judge Wolf cited Thomas Jefferson's views on the importance of education to the goal of good citizenship.

> [A]s Thomas Jefferson pointed out early in our history . . . education is necessary to prepare citizens to participate effectively and intelligently in our political system if we are to preserve freedom and independence.

(A. 35), quoting Yoder, 406 U.S. at 221. Furthermore, education is "the primary vehicle for transmitting the 'values on which our society rests.'" (A. 36), quoting Schempp, 374 U.S. at 230.

> [Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Brown v. Bd. of Ed., 347 U.S. at 493. It is too late to deny that good citizenship and community values are inextricably bound.

> [P]ublic schools are vitally important "in the preparation of individuals for participation as citizens," and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system." . . .. We are therefore in full agreement . . . that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."

Island Trees Union, 457 U.S. at 864 (citations omitted).[16] See Good News Club v. Milford Central School, 533 U.S. 98, 111-112 (2001) (school cannot ban Christian

[16] On this issue, plaintiffs pointblank disagree with the Supreme Court. According to the Parkers and Wirthlins, "[t]he state has no business teaching morality." (Appellants' Brief, at 28).

club from use of limited public forum simply because club members discuss "otherwise permissible subjects" of morals and character from a religious viewpoint); Plyler v. Doe, 457 U.S. 202, 221 (1982) ("[E]ducation has a fundamental role in maintaining the fabric of our society.")

Among the "most fundamental" of community values is mutual respect. (A. 36). A community includes people of different races, cultures and religions, as well as different sexual orientations. In Massachusetts differences in sexual orientation may result in same-sex marriages. (A. 36); Goodridge v. Dep't of Public Health, 440 Mass. 309, 334, 798 N.E.2d 941, 962-963 (2003). Children of same-sex marriages attend public schools throughout the Commonwealth. Thus, "[s]tudents today must be prepared for citizenship in a diverse society." (A. 36).

Applying a rational basis test to the use of same-sex reading materials in Lexington classrooms, Judge Wolf upheld defendants' conduct as constitutional on three grounds. First, defendants' use of the books is rationally related to "the goal of preparing [public school students] for citizenship." (A. 37). Second, use of the books is rationally related to "the goal of eradicating what the Massachusetts Supreme Judicial Court characterized as the 'deep and scarring hardship' that the ban on same-sex marriages imposed 'on a very real segment of the community for no rational reason.'" Goodridge, 440 Mass. at 341, 798 N.E.2d at 968. (A. 37).

Third, teaching elementary school students to respect gays and lesbians is rationally related to "the legitimate pedagogical purpose of fostering an educational environment in which gays, lesbians, and the children of same-sex parents will be able to learn well." (A. 37). Concerning this third goal, in particular, the District Court cited Harper v. Poway Unified School Dist., 445 F.3d 1166, 1178-79 (9th Cir. 2006), where the Ninth Circuit observed:

> The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development. Indeed, studies demonstrate that "academic underachievement, truancy, and dropout are prevalent among homosexual youth and are the probable consequences of violence and verbal and physical abuse at school."

(A. 37-38).

Identification of at least one legitimate governmental interest is required to affirm the dismissal entered below. Judge Wolf identified three: (1) teaching citizenship; (2) eradication of past prejudice; and (3) teaching tolerance toward people of different sexual orientations. The plaintiffs do not question the legitimacy of defendants' goals.[17] Nor do they contest the existence of a rational relationship between those goals and defendants' use of same-sex reading

[17] No party questions the defendants' good faith belief in diversity. No one questions their sincere belief that their choice of materials *is intended to promote civic virtue.*

materials in the classroom. The District Court decision must, therefore, be affirmed.

III. Plaintiffs' Case is Not Distinguishable From ***Brown.***

On appeal, plaintiffs raise two arguments in an effort to distinguish this case from Brown. First, they insist that the young ages of their children (kindergarten through second grade) create a "heightened concern" of constitutional proportions, meriting application of a strict scrutiny test. (A. 68; Appellants' Brief, at 14-28). Second, plaintiffs maintain that their good faith allegations of "indoctrination" provide a "marked distinction" between this case and Brown. (A. 58, 69-71; Appellants' Brief, at 28-33). Neither point, however, warrants reversal of the decision below.

A. The Young Age of Plaintiffs' Children Does Not Distinguish This Case From Brown.

The Establishment Clause makes unconstitutional any law "respecting an establishment of religion." U.S. Const. amend. I. Government conduct that has the effect of advancing or inhibiting religion is, therefore, prohibited. Everson v. Bd. of Ed., 330 U.S. 1, 15-16 (1947). In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court adopted a three-prong test to determine whether particular government conduct offends the Establishment Clause. The Lemon test

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(Appellants' Brief, at 20) (emphasis added).

(1) asks whether the statute or policy in question has a secular legislative purpose; (2) mandates that the statute's or policy's principal or primary effect is one that neither advances nor inhibits religion; and (3) requires that the statute or policy must not foster "excessive government entanglement with religion." Id., 403 U.S. at 612-613; County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989); Boyajian v. Gatzunis, 212 F.3d 1, 4 (1st Cir. 2000).

In some decisions, courts have suggested that the young age of those affected by a state statute or policy should be factored into the determination of whether government conduct violates the Establishment Clause. See, e.g., Lee v. Weisman, 505 U.S. 577, 592 (1992) (citing "heightened concerns with protecting freedom of conscience from subtle coercive pressure in elementary and secondary public schools");[18] Sherman v. Community Consol. School Dist. 21, 8 F.3d 1160, 1165 (7th Cir. 1993) ("[A]lleged Establishment Clause violations in grade-school settings present heightened concerns for courts.") Plaintiffs attempt to graft this scion of Establishment Clause jurisprudence onto free exercise stock, arguing Judge Wolf erred because he failed to take note of the "obvious factual distinction"

[18] In their Brief, plaintiffs omit the words "and secondary" from between "elementary" and "public schools," when citing the Lee decision. (Appellants' Brief, at 16).

between the high school students in Brown and the kindergarten, first and second grade students here. This "distinction," plaintiffs submit, is one of constitutional significance that requires application of a strict scrutiny test.

Unfortunately for plaintiffs, no law favors such a creative approach. All cases cited by plaintiffs in support of their "tender years" argument involved the analysis of Establishment Clause claims under the Lemon test. (Appellants' Brief, at 15-16). By their own admission, plaintiffs do not assert Establishment Clause claims here. (A. 63, 69; Appellants' Brief, at 16).[19]

[19] Nor can plaintiffs' counsel do so consistent with the mandate of Fed. R. Civ. P. 11(b). Plaintiffs themselves admit that defendants' use of same-sex reading materials "is intended to promote civic virtue," and that diversity "in the abstract" is an important goal. (Appellants' Brief, at 20 & 33). Under no set of circumstances can the promotion of civic virtue and/or the teaching of diversity by public schools be regarded as non-secular purposes under the first prong of the Lemon test. In a footnote, plaintiffs seek leave to amend their Complaint to assert an Establishment Clause claim should this Court "view the matter as an 'establishment clause' violation." (Appellants' Brief, at 18). Notwithstanding the futility of such an amendment (which alone justifies the denial of plaintiffs' request, see Correa-Martinez, 903 F.2d at 59), plaintiffs' request comes too late. It should have been made to the District Court. See United States v. Slade, 980 F.2d 27, 30 (1st Cir. 1992) ("It is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals."); McCoy v. Mass. Instit. of Technology, 950 F.2d 13, 22 (1st. Cir. 1991) (where a plaintiff fails to present a viable legal theory in opposition to Rule 12(b)(6) motion, "[n]o amount of interpretive liberality can save chestnuts so poorly protected from the hot fire of dismissal.") Plaintiffs do not assert a viable Establishment Clause violation merely by criticizing defendants' policy as "a form of doctrinal secularism." (Appellants' Brief, at 18). In fact, under the first prong of the Lemon

In fact, the concept that youthful age raises a "heightened concern" for purposes of Establishment Cause analysis was rejected by the Supreme Court over ten years ago. In their Brief, plaintiffs cite in support the case of School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985). (Appellants' Brief, at 16 & 19). In Ball, the Supreme Court struck down a state program that allowed public school teachers, at public expense, to give instruction on parochial school grounds. In finding that the program ran afoul of the Establishment Clause, the Supreme Court relied on the premise that "[t]he symbolism of a union between church and state is most likely to influence children of tender years, whose exposure is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." Id., 473 U.S. at 390.

Twelve years later, however, the Supreme Court admitted error in the assumptions underlying Ball. In Agostini v. Felton, 521 U.S. 203 (1997), the Supreme Court permitted a New York City remedial education program for disadvantaged children to continue without further judicial oversight despite concerns that the program, which allocated public funds for after-school instruction on private sectarian schools campuses, unconstitutionally entangled church and state in violation of the Establishment Clause. In reaching its decision, the

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test, such allegation effectively pleads plaintiffs out of an Establishment Clause

Supreme Court did not distinguish Ball; rather, it overruled Ball. "[E]ach of the premises upon which we relied in Ball to reach a contrary conclusion *is no longer valid*." Id., 521 U.S. at 226.[20]

Judge Wolf did not overlook the differences in age between the Brown plaintiffs and the Parker and Wirthlin children. Rather, he duly considered the age difference, then rightly rejected any notion that a "heightened concern" for the sensibilities of young school children ought to infuse a free exercise or due process analysis. (A. 29-30). An Establishment Clause challenge examines whether government conduct "has the *effect* of endorsing religion." (A. 29) (emphasis added); County of Allegheny, 492 U.S. at 592. Government must remain neutral in matters of religion, showing neither favoritism nor disapproval towards citizens based on personal religious beliefs. Id., 492 U.S. at 593. But the endorsement effect of government action is not an inquiry under free exercise analysis. Nor should it be. As set forth above, violation of the Free Exercise Clause requires a showing of "direct government compulsion." Engel v. Vitale, 370 U.S. 421, 430 (1962). The successful plaintiff is either *forced* to affirm or deny a belief, or

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claim.

[20] The other case cited by plaintiffs to support their youthful age argument, Sherman v. Community Consol. School Dist. 21, 8 F.3d 1160 (7th Cir. 1993), relied, in part, on Ball to reach its decision. Thus, the Sherman case is now discredited as well.

forced to engage or refrain from engaging in a practice prohibited (or mandated) by his or her religion. Mozert, 827 F.2d at 1065. In short, even if age is a factor to consider under the Establishment Clause (which Agostino rejected), it has no place under the Free Exercise Clause.

> Although the two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

Engel, 370 U.S. at 430.

Where governmental favoritism or disapproval are not at issue, the so-called "heightened concern" for plaintiffs of tender years does not come into play. Despite plaintiffs' sincere wishes, the juxtaposition of the Establishment Clause and Free Exercise Clause in the same amendment does not give substance to their plea.[21] Although both clauses are contained in the First Amendment, there remains a "clear distinction between them." Tarsney v. O'Keefe, 225 F.3d 929, 935 (8th Cir. 2000).[22]

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[21] In an effort to blur these discrete protections, plaintiffs describe the two religion clauses as "doctrinal cousins" that are "inextricably linked." (Appellants' Brief, at 18).

[22] Plaintiffs' drift toward an Establishment Clause analysis hardly helps their cause. As the Supreme Court noted in Epperson, striking down a state statute that

In addressing one of the legitimate governmental interests served by defendants' use of same-sex reading materials in public school – respect for gays, lesbians and children of same-sex parents – the District Court below quoted noted author and educator, Dr. Howard Gardner: "Minds, of course, are hard to change." H. Gardner, Changing Minds: The Art and Science of Changing our Own and Other People's Minds 1 (2004). (A. 38). Plaintiffs assail this statement as an "open acknowledgment" of defendants' coercion, requiring reversal of the dismissal below. "[A] public school has no right to change children's minds about their deeply held faith, particularly in the private areas of marriage and procreation." (Appellants' Brief, at 23).

Plaintiffs' assault, however, reflects a gross misunderstanding of Judge Wolf's reasoning. The District Court was not sanctioning efforts to "change" the minds of children regarding marriage and procreation; instead, it was registering

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regulated the teaching of evolution, the Constitution does not protect particular religions from the teaching of views "distasteful to them." Id., 393 U.S. at 107. See Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (striking down state statute that prohibited the teaching of evolution in public schools unless accompanied by instruction in "creation science.")

approval of the use of reading materials that expose children to different ideas *before their minds are made up.* Such exposure is inherent in the very nature of education.

> As it is difficult to change attitudes and stereotypes after they have developed, it is reasonable for public schools to attempt to teach understanding and respect for gays and lesbians to young students in order to minimize the risk of damaging abuse in school of those who may be perceived to be different. (A. 38).[23]

There is nothing coercive about a curriculum that teaches diversity and tolerance. As noted above, public schools serve the purpose of teaching fundamental values "essential to a democratic society." Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986). Included among those values are "tolerance of divergent political and religious views," as well as "consideration of the sensibilities of others." Id. Plaintiffs' criticism is misplaced.

Plaintiffs flatly assert, without support or rationale, that the free exercise rights of elementary school students are entitled to greater protection than the free

[23] Nor can this statement be interpreted as a criticism of the Parker and Wirthlin parents' personal beliefs, as attitudes and stereotypes are frequently developed from a variety of sources including peers, the media, and family members other than parents.

exercise rights of high school students and, for that reason, their case is distinguishable from Brown. But, if plaintiffs' view is correct – i.e., the younger the child, the greater the protection – then it must ineluctably follow that First Amendment protection diminishes with age. Yet, the Free Exercise Clause is not a sliding scale. As the District Court noted:

> Neither the Supreme Court nor the First Circuit have suggested that parents have constitutional rights concerning public elementary school students that are different or greater than their rights concerning older students. (A. 30).

On the contrary, in Runyon v. McCrary, 427 U.S. 160 (1976), cited by the District Court below (A. 30), the Supreme Court held that the parents of toddlers had no constitutional right to educate their children in private racially-segregated nursery schools. Id., 427 U.S. at 177.

Whether high school students are exposed to a sexually-explicit AIDS awareness program, or elementary school children are exposed to diversity reading materials that depict a kindergarten student raised by Mommy and Mama Lu (Molly's Family) (S.A. 68-102), Laura and Kyle living with two moms, Joyce and Emily, and a poodle named Daisy (Who's in a Family?) (S.A. 48-49), and a young prince rejecting several princesses in favor of another prince (King & King) (A. 232-257, S.A. 28-33), the constitutional analysis is the same. The defendants' conduct need not satisfy a strict scrutiny test to pass muster. It is constitutionally

protected if the conduct is rationally related to a legitimate state interest. The District Court concluded that defendants' use of same-sex reading materials passed the rational basis test. This decision should be affirmed.

B. Plaintiffs' Allegation of "Indoctrination" Does Not Distinguish This Case From Brown.

The second ground upon which plaintiffs rely to distinguish Brown concerns the allegation of "indoctrination." (Appellants' Brief, at 28-33). Plaintiffs are devout Judeo-Christians who sincerely believe that marriage is a union between a man and a woman *only*, and that "homosexual behavior is immoral in that it violates God's law." (A. 191, 201). In an alleged attempt to undermine those beliefs, defendants (plaintiffs claim) have engaged in an "intentional campaign" to teach the Parker and Wirthlin children that their family's religion is "incorrect." (A. 191-192). This so-called "campaign" is being waged through defendants' use of same-sex reading materials intended to "indoctrinate" plaintiffs' children "into the concept that homosexuality and homosexual relationships or marriage are moral and acceptable behavior." (A. 193, 194, 202, 203).[24] According to plaintiffs, the "indoctrination" allegation distinguishes this case from Brown and effectively insulates their Complaint from dismissal under Rule 12(b)(6).

The District Court, nonetheless, found no such magic in the term

"indoctrination." It is merely a pejorative for "teaching." (A. 33). "Indoctrinate" means "to imbue with learning, to teach, . . . to instruct in a subject, principle, . . . [or] to imbue with a doctrine, idea or opinion . . .." 5 Oxford English Dictionary 226 (1978). And, as Judge Wolf observed, "[i]t is, obviously, the duty of schools to teach." (A. 33).

Plaintiffs' stubborn reliance on the term "indoctrination" stems from the C.N. decision, where the Third Circuit upheld as constitutional a school district's use of a survey concerning sexual behaviors to middle and high school students. (A. 58). The survey,[25] held the Third Circuit, did not intrude on parental decision-making in violation of the Constitution.

> A parent whose middle or high school age child is exposed to sensitive topics or information in a survey remains free to discuss

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[24] Plaintiffs' allegations of intent are made only "on information and belief."

[25] The survey, entitled "Profiles of Student Life: Attitudes and Behaviors," was administered to seventh through twelfth grade students in the Ridgewood public school district in New Jersey. "The survey sought information about students' drug and alcohol use, sexual activity, experience of physical violence, attempts at suicide, personal associations and relationships (including the parental relationship), and views on matters of public interest." C.N., 430 F.3d at 161.

> these matters and to place them in the family's moral and religious context, or to supplement the information with more appropriate materials. School Defendants *in no way indoctrinated the students* in any particular outlook on these sensitive topics; at most, they may have introduced a few topics unknown to certain individuals.

Id., 430 F.3d at 185 (emphasis added).[26] Although the Third Circuit did not elaborate on the constitutional significance of "indoctrination," it made plain that the mere introduction of ideas to students, particularly those who remain free to place the topics in the context of their own family's moral and religious values, is not unconstitutional.[27]

The District Court below dismissed any argument that plaintiffs' "indoctrination" allegation was constitutionally significant.

> The complaint, even when read in the light most favorable to plaintiffs, indicates that "[a] parent whose . . . child is exposed to sensitive topics or information . . . remains free to discuss these maters and place them in the family's moral or religious context . . .."

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[26] During oral argument on defendants' Motion to Dismiss, Judge Wolf referred to this language in the C.N. decision as dicta. (A. 167).

[27] Citing, among other cases, the First Circuit decision in Brown, the Third Circuit recognized "Courts have held that in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." C.N., 430 F.3d at 182-183.

> C.N., 430 F.3d at 185. Therefore, the characterization of the use of the books at issue as "indoctrination" does not distinguish the instant case from Brown.

(A. 33) (footnotes omitted). This Court should rule likewise.

In a final effort to boost their claim of "indoctrination," plaintiffs add the inflammatory assertion that defendants' choice of reading materials was actually intended to "denigrate" plaintiffs' deeply-held faith. (A. 187, 203-204).[28] This incantation is no more potent than "indoctrination." As stated above, a district court, when ruling on a Rule 12 motion, must eschew reliance on a pleader's "rhetorical flourishes," "bold assertions, unsupportable conclusions and 'opprobrious epithets.'" Chongris, 811 F.2d at 37; Palmer, 465 F.3d at 25. The conclusory rhetoric of "denigration" falls into the to-be-shunned category. Moreover, it is unsupported by facts. In their Complaint, plaintiffs allege only that, on January 14, 2005, Jacob Parker was exposed to the book Who's in a Family? "with the specific intention to indoctrinate young children into the concept that homosexuality and homosexual relationships or marriage are moral and acceptable behavior." (A. 193). Plaintiffs further allege that, on February 8, 2005, several unnamed teachers and Estabrook Principal Joni Jay attended a presentation given

[28] Plaintiffs make this allegation despite the fact that they do not question defendants' "good faith belief in diversity" or defendants' "sincere belief that their choice of materials is intended to promote civic virtue." (Appellants' Brief, at 20).

by a member of the Gay Lesbian Straight Education Network during a meeting of the Estabrook Anti-Bias Committee entitled "How and Why to Talk to Your Children about Diversity." (A. 194). According to plaintiffs, the speaker encouraged attendees to (1) place homosexual books in each classroom; (2) hang gay and lesbian family posters in each classroom; and (3) "encourage teacher-initiated discussions in each class," all in an effort to "acclimate" young children to the subject of homosexuality. (A. 194). Plaintiffs further allege, "[o]n information and belief," that several defendants thereafter "adopted" the speaker's suggestions. (A. 194).

Yet, plaintiffs' Complaint is woefully thin on facts showing that such "adoption" ever translated into defendants' teaching or instruction. Nor do plaintiffs allege any facts suggestive of a hostile attitude adopted by defendants toward plaintiffs' faith. Within the next year, plaintiffs' children were exposed to two additional books – Molly's Family and King & King. (A. 192, 202). No mention is made of any other so-called "homosexual" materials, nor any "gay and lesbian posters," nor any "teacher-initiated discussions" at Estabrook, nor the teaching of lessons belittling plaintiffs' faith. In short, plaintiffs' allegations of "indoctrination" and "denigration" are nothing more than bald assertions or generalized conclusions based solely on defendants' use of three books.

The District Court below reviewed the books at issue in ruling on defendants' Motion to Dismiss.[29] Based on this review, Judge Wolf found no support for the allegation that the lesson of the books was to teach that plaintiffs' beliefs are "incorrect."

[29] The three books are part of the record on appeal. (A. 232-257, S.A. 28-33, 34-67, 68-102).

> 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, let alone families headed by members of the same-sex. The premise of King & King is that men usually marry women, but that some men are happier marrying another man. (A. 33).[30]

In exposing plaintiffs' children to Who's in a Family?, Molly's Family and King & King, the defendants may have "introduced a few topics unknown to certain individuals." C.N., 430 F.3d at 185. Plaintiffs' children were still free to discuss these topics within the context of their own family's moral and religious beliefs, just as their parents were free to supplement the three books with materials they considered more appropriate. Id. Thus, even under the C.N. case relied upon by plaintiffs, defendants' activities did not amount to a constitutional violation.

Despite plaintiffs' allegations of "indoctrination," the District Court found the Brown case indistinguishable and dismissed plaintiffs' federal constitutional claims with prejudice. This Court should affirm.

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[30] Contrary to plaintiffs' expressed misgivings, the books convey no negative messages regarding parents of different genders. Who's in a Family?, for example, one of the several books contained in Jacob Parker's "Diversity Book Bag," includes many positive images of families headed by both a man and a woman. (S.A. 38-40, 42-43, 61-63).

IV. The Individual Defendants are Entitled to Qualified Immunity as Against Plaintiffs' Civil Rights Claims.

Even if defendants deprived plaintiffs of their constitutional rights by using Who's in a Family?, Molly's Family and King & King at Estabrook, the individual defendants remain protected from liability for damages under the defense of qualified immunity. Qualified immunity shields government officials performing discretionary functions from civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87, 91 (1st Cir. 1994) ("the relevant question is whether a reasonable official could have believed his actions were lawful in light of clearly established law and the information the official possessed at the time of his allegedly unlawful conduct.") Qualified immunity "gives ample room for mistake in judgments by protecting all but the plainly incompetent or those who knowingly violate the law." Lowinger v. Broderick, 50 F.3d 61, 65 (1st Cir. 1995), quoting Hunter v. Bryant, 502 U.S. 224, 228 (1991) (*per curiam*). "A reasonable although mistaken conclusion about the lawfulness of one's conduct does not subject a government official to personal liability." Id. Moreover, qualified immunity protects the individual under both Section 1983 and the Massachusetts Civil Rights Act, M.G.L. c. 12, § 11H. Rodriguez v. Furtado,

410 Mass. 878, 881-82, 575 N.E.2d 1124, 1127 (1991); Duarte v. Healy, 405 Mass. 43, 46-47, 537 N.E.2d 1230, 1232 (1989).

Because it found no violation of plaintiffs' constitutional rights, the District Court below did not reach the issue of defendants' qualified immunity. "[B]efore even reaching qualified immunity, a court of appeals must ascertain whether the appellants have asserted a violation of a constitutional right at all." Brown, 68 F.3d at 531, quoting Watterson v. Page, 987 F.2d 1, 7 (1st Cir. 1993). In the event this Court arrives at a different view regarding plaintiffs' constitutional rights, it should nonetheless affirm the dismissal below entered in favor of the individual defendants. In designing a curriculum for public school students and in selecting grade-appropriate reading materials to be used in teaching that curriculum, defendant school officials were operating in the realm of discretion. Thus, their decisions, even if unconstitutional (which defendants deny) are protected from both suit and liability.

After first determining whether plaintiffs' allegations establish a constitutional violation, this Court must next determine whether the constitutional rights at stake were clearly established at the time of the violation. Mihos v. Swift, 358 F.3d 91, 102 (1st Cir. 2004). If so, the Court must further decide "whether a

similarly situated reasonable official would have understood that the challenged action violated the constitutional right at issue." Id.

"The inquiry into the nature of a constitutional right for the purpose of ascertaining clear establishment seeks to discover whether the right was reasonably well settled at the time of the challenged conduct . . .." Martinez v. Colon, 54 F.3d 980, 988 (1st Cir. 1995). Further, such inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Suboh v. Dist. Attorney's Office of Suffolk Dist., 298 F.3d 81, 93 (1st Cir. 2002). "If the operative legal principles are clearly established only at a level of generality so high that officials cannot fairly anticipate the legal consequences of specific actions, then the requisite notice is lacking." Savard v. Rhode Island, 338 F.3d 23, 28 (1st. Cir. 2003), cert. den., 540 U.S. 1109 (2004).

Here, the right of a parent to dictate curriculum to a public school – either for religious reasons or because of a protected right to direct the upbringing of his or her child – was by no means "reasonably well settled" at the time Lexington school officials chose to include the challenged books at Estabrook. On the contrary, the decisions of Brown and its progeny clearly indicate that plaintiffs'

rights did not extend so far.[31]

To determine the next step – the understanding of an objectively reasonable official – it is necessary to consider the alleged misconduct from the perspective of the individual defendants. Thus, even if Lexington officials erred – i.e., if they violated plaintiffs' clearly-established constitutional rights – the defendants are still immune if their mistake as to what the law required was reasonable. Saucier v. Katz, 533 U.S. 194, 205 (2001). Here, given the difficulty of interpreting and protecting plaintiffs' so-called hybrid rights in an arena where public school officials are expressly encouraged by the Commonwealth to teach diversity and tolerance at the earliest grade levels, where the SJC recently upheld same-sex marriages as constitutional, and where application of the relatively new Massachusetts Opt-out Statute (M.G.L. c. 71, § 32A), is limited solely to curricula "primarily" involving human sexual education or human sexuality issues, it cannot be said that no reasonable official in the position of the defendants could have believed that his or her actions were lawful. As a result, the individual defendants are entitled to qualified immunity. Dismissal of Counts I, II and IV of plaintiffs' Complaint as the individual defendants should be affirmed on this ground as well.

[31] Plaintiffs urge the First Circuit to treat this case as one of "first impression." (Appellants' Brief, at 21). If this is indeed such a case (which

V. The District Court Did Not Err in Dismissing Plaintiffs' Remaining Claims.

A. Plaintiffs' Complaint Does Not State a Viable Claim for Conspiracy.

In Count IV of their Complaint, plaintiffs alleged that the defendants conspired to deprive them of their constitutional rights in violation of 42 U.S.C. § 1983. (A. 207). A conspiracy is actionable under Section 1983 where "a combination of two or more persons [act] in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict the wrong against or injury upon another,' and 'an overt act that results in damages.'" Earle v. Benoit, 850 F.2d 836, 844 (1st Cir. 1988), citing Hampton v. Hanrahan, 600 F.2d 600, 620-621 (7th Cir. 1979). To recover, the overt act must result in "an actual deprivation of a right secured by the Constitution and laws." Earle, 850 F.2d at 844, citing Landrigan v. City of Warwick, 628 F.2d 736, 742 (1st Cir. 1980).

The District Court below dismissed plaintiffs' conspiracy claim with prejudice on the grounds that defendants' alleged conduct did not violate any constitutional rights of the plaintiffs. (A. 43). Nor did plaintiffs allege the violation of any federal statutory rights. As a result, even if defendants acted in

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defendants deny), then the individual school officials should be immune. Gruenke, 225 F.3d at 307.

concert, any agreement among them was not "an unlawful conspiracy for which §1983 would provide a remedy." (A. 43).

On appeal, plaintiffs argue that their allegation of agreement "is clear and supported by inference." (Appellants' Brief, at 49). Plaintiffs miss the mark, however, absent unconstitutional behavior on the part of the defendants. Clearly, defendants are not prohibited from agreeing collectively to engage in *lawful* acts. Moreover, it is not enough, to survive a motion to dismiss, merely to assert conclusory allegations of conspiracy; a plaintiff must instead state with specificity the facts that, in plaintiff's mind, show the existence and scope of the alleged conspiracy. Slotnick v. Staviskey, 560 F.2d 31, 34 (1st Cir. 1977).

The plaintiffs did not set forth in their Complaint the facts of a conspiracy with sufficient specificity. Contrary to Appellants' Brief, the Parkers and Wirthlins allege no agreement among the defendants to commit unlawful acts, nor do they identify the precise conduct allegedly engaged in by the defendants in pursuit of their unlawful conspiracy. Where a conspiracy allegation is "perfunctory," and "specifics as to the details of the alleged conspiracy or the predicate acts committed in pursuit thereof" are lacking, a conspiracy claim will not withstand a motion to dismiss. Miranda v. Ponce Federal Bank, 948 F.2d 41,

48 (1st Cir. 1991). The District Court did not err in dismissing plaintiffs' conspiracy claim under Section 1983. The decision below should be affirmed.

B. The District Court Appropriately Dismissed Plaintiffs' State Law Claims.

In their Complaint, plaintiffs also asserted claims against defendants under the Massachusetts Civil Rights Act ("MCRA"), M.G.L. c. 12, §§ 11H & 11I (Count II) (A. 205-206); and the so-called Opt-out Statute, M.G.L. c. 71, § 32A (Count III) (A. 206-207). The District Court below, after denying plaintiffs' rights to recover under Section 1983, dismissed plaintiffs' pendent state law claims without prejudice in reliance upon the principles of judicial economy, convenience and fairness outlined in United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). (A. 44).

In their Brief, plaintiffs request only that their state law claims "be reinstated as pendent to the reinstated federal claims, without prejudice to defendants' rights to again seek dismissal on more substantive grounds." (Appellants' Brief, at 46). Defendants oppose any such reinstatement of plaintiffs' state law claims. Plaintiffs failed to put forth any argument on appeal for why the District Court erred in dismissing their Counts II and III of their Complaint without prejudice. "[I]ssues raised on a appeal in a perfunctory manner, not accompanied by developed argumentation . . .," are deemed waived. United States v. Bongiorno, 106 F.3d

1027, 1034 (1st Cir. 1997). Thus, even if this Court should reverse the dismissal of plaintiffs' federal claims, it should not return the state claims for further proceedings to the District Court.

More to the merits, with respect to plaintiffs' MCRA claim, the individual defendants are entitled to qualified immunity on this Count for the same reasons they are entitled to qualified immunity (as set forth above) on plaintiffs' Section 1983 claims. Rodriguez, 410 Mass. at 882, 575 N.E.2d at 1127. Moreover, the Town of Lexington is not a "person" subject to suit under MCRA. Howcroft v. City of Peabody, 51 Mass. App. Ct. 573, 591-592, 747 N.E.2d 729, 744 (2001). Finally, for the reasons greater detailed in their Memorandum on Law in support of the Motion to Dismiss, Count III of plaintiffs' Complaint, asserting a claim under the Opt-out Statute, M.G.L. c. 71, § 32A, should not be reinstated. (A. 105-109). The three books used by the defendants do not "primarily involve[ ] human sexual education or human sexuality issues . . ." within the meaning of the statute. Nor can a private right of action be inferred from the language of M.G.L. c. 71, § 32A. See Loffredo v. Center for Addictive Behaviors, 426 Mass. 541, 546-547 (1998) (private right of action cannot be inferred from state statute absent clear legislative intent to support such a remedy.) Dismissal of plaintiffs' state law claims was appropriate.

CONCLUSION

For the reasons set forth above, the defendants respectfully request that this Honorable Court affirm the Judgment of dismissal entered below.

Respectfully submitted,
Defendant-Appellees,
WILLIAM HURLEY, et al,

By their attorneys,
PIERCE, DAVIS & PERRITANO, LLP,

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John J. Davis
First Circuit No. 40366
10 Winthrop Square
Boston, MA 02110
(617) 350-0950

ADDENDUM