STATEMENT

The Appellants have appealed an order granting the defendants' "12(b)6" motion. The case has been briefed and orally argued.

During oral argument the Court asked both sides numerous questions suggesting that the Court was concerned about addressing a constitutional question if the matter could be addressed as one of State law. The Court provided leave to address any questions raised at oral argument.

ARGUMENT

I. THE COURT SHOULD DECIDE THE CASE ON THE MERITS

The Court's questions concerning the applicability of State Law call into play the so called "abstention" doctrine.

The lead case addressing abstention[1] is Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Therein, the Supreme Court held that federal courts may abstain from deciding a case when a state court's resolution of unclear state law would obviate the need for a federal constitutional ruling. Because the federal court's decision in these circumstances "cannot escape being a forecast rather than a determination," abstention is justified to "avoid the waste of a tentative decision as well as the friction of a

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[1] Other forms of abstention appear to be only marginally relevant. See Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); Colorado River Water Conservation Dist. v. U.S., 424 U.S. 800, 96 S.Ct. 1236 (1976); Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

premature constitutional adjudication." Id. at 499-500, 61 S.Ct. at 645. In this way, the Pullman abstention doctrine serves the dual aims of avoiding advisory constitutional decision- making, as well as promoting the principles of comity and federalism by avoiding needless federal intervention into local affairs. Pustell v. Lynn Public Schools, 18 F.3d 50, (1st.Cir. 1994). This doctrine is a useful tool when a state law is unclear and "a state court's resolution ... would obviate the need for a federal constitutional ruling." Pustell v. Lynn Public Schools, 18 F.3d 50, 53 (1st Cir. 1994); See also Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236-37, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984).

The doctrine of abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959). Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." Pustell v. Lynn Public Schools, 18 F.3d 50, (1st Cir. 1994) citing Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976); Villa Marina Yacht Sales v. Hatteras Yachts, 915 F.2d 7, 12 (1st Cir. 1990).

Thus, abstention can only be justified in exceptional circumstances. County of Allegheny v. Frank Mashuda Co., 360 U.S. at 188-89. The Supreme Court has stated that "federal courts need not abstain on Pullman grounds when a state statute is not 'fairly subject to an interpretation which will render unnecessary' adjudication of the federal constitutional question." Hawaii Housing Authority, 467 U.S. at 236, 104 S.Ct. at 2327 (quoting Harman v. Forssenius, 380

U.S. 528, 535, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965)). Accordingly, the Pullman doctrine is not applicable here.

In Pustell v. Lynn Public Schools, 18 F.3d 50, (1st.Cir. 1994) the court was called upon to construe a narrow administrative aspect of the Massachusetts Home Schooling law. M.G. L. Ch. 76 sec. 1. Insofar as the case involved a challenge to a local school district which was dismissed by the District Court, there are certain parallels to the instant situation. The plaintiff parents home-schooled their child, as permitted by Massachusetts law, which allowed local school districts to set standards for home schooling. As a condition of home schooling, the Lynn Public Schools required that parents consent to home visits by school officials to observe and evaluate the instructional process. The plaintiffs objected to this condition, claiming that the home visit policy violated their First Amendment right to the free exercise of their religion, their Fourth Amendment right to be free from unreasonable searches, their substantive due process right under the Fourteenth Amendment to oversee the education of their children, and various provisions of the Massachusetts constitution. Id. at 51. The Massachusetts Supreme Judicial Court had previously held in Care & Protection of Charles, 399 Mass. 324 (1987), that the approval of a home school proposal must not be conditioned on requirements that are not essential to the State interest in ensuring that "all the children shall be educated," but did not specifically resolve the issue of whether home visits could be required.

The court, noting that state law was as yet unsettled as to the legality of requiring home visits, held that a state court ruling on that question could entirely

eliminate the need to address the Federal Constitutional issues. Therefore, abstention was appropriate in that case.[2]

A. The Court Should Not Abstain in Favor of the "Opt Out Statute"

This case is quite different than the one presented in Pustell. Here, the Constitutional questions are novel and paramount. Pleading alternatively, the plaintiffs alleged a cause of action pursuant to G.L. ch. 71 sec. 32A[3]. Colloquially referred to as the "opt out" statute, it allows families to remove their children from public school "sex education." The statute is fairly new; it has never been construed.

In the district court, plaintiffs' claim pursuant to this statute was attacked on two grounds. First, the defendants alleged that there was no private right of action. (A. 105) Second, defendants argued that the subject matter of the complaint did not "primarily involve human sexual activity." (A. 105-106)[4]

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[2] Ultimately, the Supreme Judicial Court decided the issue upon very narrow State statutory grounds. Brunelle v. Lynn Public Schools, 428 Mass. 512 (1998). The court briefly mentioned the Federal Constitutional right of privacy, but did not elaborate or provide citation to federal authority. Id . at 518-519, citing Curtis v. School Comm., 420 Mass. 749 (1995)

[3] Pleading in the alternative of course is an appropriate use of the Rules of Civil Procedure. See generally, Fed. R. Civ. P. 8, 19.

[4] For these reasons, it is submitted that the defendants cannot themselves favor the "abstention doctrine." Moreover, the statute provides for a cumbersome administrative hearing before a body that is totally

Given these positions, it is clear that abstention would not be useful. Pustell favored abstention where it would be clear that the federal court's determination can not escape being a forecast of the state law. Here, the question of whether federal constitutional claims are actionable can be decided without any reference whatsoever to the State statute or State law.[5] However, for the plaintiffs to demonstrate that the statute is applicable to the defendants' misconduct, they would necessarily be called upon to show that the statute even reaches the conduct in issue. This would, in essence, require them articulate the extent of their "Due Process," "First Amendment," and "Privacy" claims.

Given that the district court did not abstain and that the defendants have vigorously contested the notion that the "opt-out" statute even affords a private right of action, Plaintiffs respectfully assert that, at this level, the opt-out statute is best understood as a recognition of the importance of privacy that can inform the federal analysis. This was argued in the Plaintiffs' brief on page 43-45 as follows:

> [T]he court may consider at least in general terms the notion that the state intended to preserve a family's private rights to teach private sexual matter without state interference. This preservation of private rights is consistent with the constitutional issues the plaintiff has presented.

The brief does not address whether the "opt out" statute could also be useful on

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unequipped to deal with profound Constitutional questions.

[5] This is not to say, however, that the statute cannot be mentioned, as it is relevant to the question of remedy.

the question of "remedy." Clearly however, despite defendants' assertions that enforcement would be difficult, the types of procedures plaintiffs request are statutorily mandated. (See Advisory Opinion on the Parental Notification Law, Attached)

B. The Court Should Not Abstain in Favor of the Massachusetts Civil Rights Statute

The Massachusetts Civil Rights act is another state law claim that has been pled. It has been stated that Massachusetts is "more protective of . . . religious freedoms . . . than the United States Constitution, and that the proper standard of review to be applied to the infringement of such freedoms is consequently more demanding." Rasheed v. Comm'r of Corr., 446 Mass. 463, 465 (2006); Attorney Gen. v. Desilets, 418 Mass. 316, 321 n.4 (1994). Conduct which impinges upon free exercise of religion is subjected to the "compelling state interest" test. Desilets, 418 Mass. at 321 n.4. And, conduct motivated by sincerely held religious beliefs must be recognized as the "exercise of religion."

Thus, at first blush "abstention" in favor of this analysis might not appear unreasonable.

It is by no means clear, however, that such an expansive analysis would apply in the hybrid context. Perhaps more importantly, despite its professed willingness to extend "free exercise" protections beyond those articulated in Smith, it appears that the Supreme Judicial Court has taken an excessively restrictive view of "burden" in the School context. Curtis v. School Comm., 420

Mass. 749 (1995)

Thus, as is the case with the “opt out” statute, ultimately the federal constitutional questions must be addressed.

Finally, an action may brought pursuant to the Massachusetts Civil Rights Statute:

> Whenever any person or persons, whether or not acting under color of law, interfere by **threats, intimidation or coercion**, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth... (M.G.L. ch. 12 §11H)

The element of threats and intimidation may make such a claim very difficult to prove.

For these reasons, the abstention doctrine should not be applied here. The court should decide the case on the merits and reverse the district court.

II. THE PLAINTIFFS HAVE CLEARLY ALLEGED AN UNCONSTITUTIONAL BURDEN ON THEIR FAITH.

Throughout the complaint the plaintiffs have alleged in good faith that the defendants’ intention was to indoctrinate their children to accept a faith and/or religious practice radically different from their own. Note the following paragraph from the complaint; one of many:

> On information and belief, the purpose of adopting these suggestions is the specific intention to indoctrinate young children into the concept that homosexuality and marriage between same-sex partners is moral and accepted, and that those who hold a faith such as the Parkers are incorrect in their beliefs. Essentially, the defendants are requiring the

> minor plaintiffs to affirm a belief inconsistent with and prohibited by their religion. Such indoctrination is inconsistent with the Parkers' sincere and deeply held religious faith. (Complaint, para. 33)

Plaintiffs believe that if this matter goes to trial they can easily demonstrate the truth of this allegation.[6] More importantly, if allowed to proceed, they could easily demonstrate that the conduct poses an unconscionable and unconstitutional burden upon them, particularly because of the age of the children.

The impact of "age" upon the concept of " burden" cannot be overlooked. The plaintiffs' children are their most precious treasures from God. The public schools are supposed to educate them neutrally, not teach them that their faith is wrong.

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. Edwards v,. Aguilar, 482 U.S. 578, 584, (1987) Accord, Hansen v. Ann Arbor Pub. Schs, 293 F. Supp. 2d 780 (E.D. Mich 2003)

The problem for the defendants is that they exhibited these books to very young children with the very specific intention of subverting plaintiffs' faith by subtly causing the children to affirm a practice that the plaintiffs believe is sinful. If allowed to proceed to trial, plaintiffs would adduce expert testimony regarding the subtle coercion of using fairy tales as teaching tools. Without question, this is

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[6] Perhaps emboldened by the District Court's acceptance of the notion that a purpose of the public schools is to "change minds," the defendants and their political supporters do not really dispute this.

a burden even in the Constitutional sense.[7]

Mozert v. Hawkins County Bd. of Education, 827 F.2d 1058 (5th cir. 1987) is instructive on this point. Mozert upholds a school committee's book curriculum choice over objections from "Born Again Christians"(Court's phrase) that the schools' book choices interfered with their faith. The gravamen of the Mozert holding is that the plaintiffs were unable to prove *after trial* that the defendants conduct created a "burden" on plaintiff's free exercise claim.

> The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion. Mozert v. Hawkins County Bd. of Education, 827 F.2d 1058, 1065 (5th cir. 1987)

This ruling, however, was only promulgated after a full-blown trial on the merits. Moreover, the books in question were "Holt Readers"; standard fare used to teach "critical reading skills."

These books are not "standard fare," indeed, not part of the curriculum at all. The book "King & King" goes far beyond "teaching diversity and tolerance." It demands nothing less than affirmation and celebration of same- gender marriage. This is consistent with the school administration's intended goal to affirm and "change minds." "Governmental compulsion either to do or refrain

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[7] The plaintiffs will be able to demonstrate at trial that, although the book "King and King" may be more effective and explicit than "Who's in a Family" in achieving the desired affirmation/indoctrination/mind changing process, both of these books are being used in addition to other tools with specific intention of changing the young children's minds without their

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, [that] is the evil prohibited by the Free Exercise Clause." Mozert v. Hawkins County Board of Education, 827 F.2d 1058, 1066 (6th Cir. 1987). Therefore, adherence to the principles espoused in Mozert would require a trial on the merits in this case, as there was therein.

It must be emphasized that this case is about far more than one book. The blunt nature of "King & King" is compelling evidence of defendants' intention, which is nothing less than a deliberate attempt to eliminate plaintiffs' faith. The complaint read as a whole clearly alleges that the defendants' joint and several conduct is a calculated scheme which rises to the level of promotion of views and beliefs.[8] Far more than one book is in issue.

Moreover, the instant case, pled first and foremost as a "due process" case, is so closely analogous to an "establishment clause" case as to render the question of burden less significant in the Constitutional sense. Oversimplified, an "establishment clause case" requires a showing that one faith or sect is elevated over another. At the time the complaint was filed it was difficult to identify a non-secular purpose in defendants' misconduct. And of course, the government insists it has acted in a purely secular sense. (See Appellee's Brief, p. 40)

Indeed, the Appellees take great umbrage at the suggestion that the

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parents' knowledge or consent.

[8] If the case is sent back for further proceedings, plaintiffs anticipate being able to develop evidence that the defendants' use of books like "King and King" was buttressed by many other techniques of indoctrination, many of which were openly supplied by lobbying groups.

establishment clause might be implicated in this case, and go so far as to suggest that the mere mention of it is a Rule 11 violation. (Appellee Brief, p. 37) Thus, plaintiffs who are deeply anguished by defendants' conduct were left with a difficult conundrum. Had they alleged an "establishment clause" violation they would most certainly have been met with howls of indignation and assertions of frivolity. Having alleged a "free exercise" claim they are met with claims that they cannot prove "burden," even though the harm caused to plaintiffs' children is identical in every respect to the harm caused by an "establishment cause" violation. (A. 181)

At least for now, the plaintiffs are willing to label the material "secular propaganda." (A. 181) But as the case develops, the plaintiffs are not required to accept the defendants' self-serving articulation that their purpose was purely secular in every respect. "...[T]he requirement of a secular purpose 'does not mean that the government's purpose must be unrelated to religion.'" Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335, 107 S. Ct. 2862, 2868, 97 L. Ed. 2d 273 (1987). The "purpose" requirement "aims at preventing the relevant governmental decision-maker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters. While the government's characterization of its purpose is entitled to deference, **'it is the duty of the courts to distinguish a sham secular purpose from a sincere one.**'" Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 307, 120 S. Ct. 2266, 2278, 147 L. Ed. 2d 295 (2000) (citations

omitted) (emphasis supplied).

Arguably, defendants' joint and several conduct elevates "secular humanism" over plaintiffs' more fundamental faiths. True, the original complaint does not cite the establishment clause in Count I. But the facts as well-pled certainly raise serious questions as to whether the controlling Constitutional law is, at the least, well informed by establishment clause dogma. Certainly this has been argued consistently (A. 63). (Appellant's Brief, pp.16-20, 29)

Another Establishment Clause case that is useful by way of analogy is Hansen v. Ann Arbor Public Schools, 293 F.Supp.2d 780 (E.D.Mich., 2003). In Hansen, the defendant high school sponsored a panel of speakers on the subject of "Homosexuality and Religion" as part of "Diversity Week." Speakers for the panel were selected by student committee and approved by school administrators, and consisted solely of six members of the clergy specifically chosen because their views were supportive of same gender couples. Plaintiff Betsy Hansen, a student at the school, sought to include a clergyperson to represent her religious view that homosexuality was a sin. The school refused to allow the inclusion of such views on the panel.

The Court held that the defendants had violated the Establishment Clause by sponsoring a religious panel for the primary purpose of suggesting a preference for a particular religious view, and that such panel violated all three prongs of the Lemon test. Id. at 804-806. In defining the relevant issues, the Court noted that "[This case] is not about intolerance towards homosexuality or the appropriateness, religiously or otherwise, of different lifestyles. The case is,

however, about tolerance of different, perhaps 'politically incorrect,' viewpoints in the public schools." The court also noted that the facts presented the ironic, and unfortunate, paradox of a public high school celebrating "diversity" by refusing to permit the presentation to students of an "unwelcomed" viewpoint. Id. at 783. This is precisely the situation in the instant case.

In any event, whether the evidence in this case could ultimately result in relief granted pursuant to the establishment clause is not dispositive at the "12(b)6" stage.[9] It is axiomatic (but worth repeating at this juncture) that the Court's function is to view the well-pled allegations and inferences broadly and in plaintiffs' favor to determine if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim. "[The court] is bound to give the [plaintiff] the benefit of every reasonable inference . . . " Retail Clerks Intern. Ass'n, Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746, 754 n.6 (1963).

The simple fact is that plaintiffs have alleged a "burden" in precise accord with the Mozert formulation. (A. 194, 196, 200-206). And they have alleged enough supporting facts to justify the claim, including but not limited to the allegation that the defendants, sworn and required to be neutral, have acted at the behest of a political lobbying group, intent on eradicating and overcoming plaintiffs' faith. (A. 196)

They have also alleged that the mere introduction of the topic at such an

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[9] If the case is remanded, the question of whether the defendants' conduct is purely "secular" in the Constitutional sense will be open. Rules 8 and 15 would certainly allow for further development of this issue.

early age creates a burden. This is also supported by establishment clause dogma. (A. 193) (Complaint, para. 29)

CONCLUSION

For the foregoing reasons, the plaintiffs request that the Court decide the case on the merits, reverse the judgment of the District Court, and order that the District Court proceed to adjudicate the claims on the merits.

In the alternative, the plaintiffs request that the order of the District Court be vacated, and that this Court either order the District Court to abstain from further proceedings pending appropriate litigation in the courts of the Commonwealth of Massachusetts, or itself certify to the Supreme Judicial Court the question of whether the facts as alleged would support a claim under the Constitution and Laws of the Commonwealth or common law.

Respectfully Submitted:
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PROOF OF SERVICE

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