No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID PARKER; TONIA PARKER; JOSHUA PARKER; JACOB PARKER; JOSEPH ROBERT WIRTHLIN; ROBIN WIRTHLIN; JOSEPH ROBERT WIRTHLIN, JR.,

Petitioners

v.

WILLIAM HURLEY; PAUL B. ASH; HELEN LUTTON; THOMAS R. DIAZ; OLGA GUTTAG; SCOTT BURSON; ANDRE RAVENELLE; JONI JAY; JENNIFER WOLFRUM; HEATHER KRAMER; TOWN OF LEXINGTON; THOMAS GRIFFITH,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OBJECTING PARENTS HAVE A CONSTITUTIONAL RIGHT TO OPT THEIR PUBLIC SCHOOL CHILDREN OUT OF, OR EVEN TO RECEIVE NOTICE OF, UNDISPUTED GOVERNMENT EFFORTS TO INDOCTRINATE KINDERGARTEN, FIRST AND SECOND GRADE SCHOOL CHILDREN INTO THE PROPRIETY, INDEED DESIRABILITY, OF SAME GENDER MARRIAGE?

II. WHETHER A PUBLIC SCHOOL'S OPEN AND SPECIFIC INTENTION TO INDOCTRINATE KINDERGARTEN THROUGH SECOND GRADE CHILDREN INTO DISBELIEVING CORE TENETS OF THEIR FAMILIES' DEEPLY HELD RELIGIOUS FAITH CONSTITUTES A BURDEN ON THE FAMILIES' FREE EXERCISE OF RELIGION?

III. WHETHER THE "HYBRID RIGHTS" DOCTRINE ENUNCIATED IN EMPLOYMENT DIV. V. SMITH, 494 U.S. 872 (1990) PROVIDES A CLAIM FOR FAMILIES WHO WISH TO PROTECT THE RELIGIOUS BELIEFS OF VERY YOUNG CHILDREN FROM MORAL INDOCTRINATION BY PUBLIC SCHOOL TEACHERS CONCERNING THE DEFINITION OF MARRIAGE?

PARTIES TO PROCEEDING

The Petitioners are two sets of families: the Parkers-- David Parker and Tonia Parker, and their two young children Jacob Parker and Joshua Parker, and the Wirthlins-- Joseph Robert Wirthlin and Robin Wirthlin, and their young child, Joseph Robert Wirthlin, Jr. The Petitioners will be referred to collectively as "Plaintiffs" and "Petitioners."

The Respondents are the Town of Lexington, Massachusetts; Paul Ash, the Lexington School Superintendent; William Hurley, Helen Lutton, Thomas R. Diaz, Olga Guttag, Scott Burson, Andre Ravenelle, Joni Jay, Jennifer Wolfrum, Heather Kramer, and Thomas Griffith. The Respondents will be referred to individually by name, as the "school district," the "Town of Lexington," or collectively as "Defendants" and "Respondents."

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The case was originally heard by the District Court for the District of Massachusetts. (Wolf, J.) The District Court issued its Ruling and Order on February 23, 2007. Parker v. Hurley, 474 F. Supp. 2d 261, 218 Ed. Law Rep. 187 (D. Mass. 2007).

STATEMENT OF JURISDICTION

The original judgment of the First Circuit Court of Appeals was entered on January 31, 2008. The Court has jurisdiction to review the Judgment of the Court of Appeals pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The plaintiff petitioners are two separate families, the Parkers and Wirthlins. The Parkers have two young children—Jacob and Joshua, and the Wirthlins have one young child, Joseph ("Joey").

On March 24, 2006, the plaintiff Joey Wirthlin was a child in the second grade. On that date, one of the defendants forced him to listen to a reading of a book entitled King and King, by Linda de Haan and Stern Nijland. This reading was ". . . precisely *intended* to influence the listening children toward tolerance of gay marriage. That was the point of why that book was chosen and used." (App. A37) (Emphasis in original.)

The book describes a romantic attraction between two men. The protagonist is a male prince who searches for a spouse. Several princesses are presented for him to choose from.

He rejects them all for superficial reasons, such as the fact that one princess's arms are too long. He discovers he is homosexual, falls in love, and lives happily ever after with another homosexual male. The two males are depicted as kissing at the end of the book. The book could be objectively and fairly viewed as presenting the homosexual choice as the "better" or "best" choice. (App. D)

Both plaintiff families practice a Judeo-Christian faith that holds that a marriage is, by definition, a holy union between a man and a woman. They believe, as a matter of the deepest faith, that other forms of "marriage" are antithetical to God's purpose for this sacred covenant. They believe, as a matter of the deepest faith, that homosexual conduct and any kind of transgender conduct is immoral. (App. C9-10)

The reading of King and King was part of a larger concerted effort; "a specific intention to denigrate the [families'] sincere and deeply-held faith."[1] The Wirthlins and the Parkers are devout Judeo-Christians. Included in their core Judeo-Christian beliefs is the concept that issues pertaining to sexual intimacy, procreation,

[1] The complaint alleges that "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." (App. C12)

human sexuality, and the holy basis of matrimony should remain private within families, be introduced by parents, and governed by the laws of the God of Abraham. Also included is the concept that homosexual behavior is immoral in that it violates God's law. (App. C8)

In September 2004, five-year-old Jacob Parker began attending kindergarten classes at Estabrook Elementary School Almost immediately thereafter, the defendants commenced an intentional campaign to teach the Parkers' very young child that the family's religious faith was incorrect. (App. C8-12)

On January 14, 2005, Jacob brought home a "Diversity Book Bag." The bag contained a book titled, Who's in a Family by Robert Skutch. Upon reviewing the book, the Parkers realized that the book appeared to depict homosexual couples with children. The Parkers had received no notice that these materials would be sent home at that time. The next school year, Jacob entered the first grade. First graders had a "reading center" in the classroom that served as a mini-library. The same book, Who's in a Family, was in Jacob's reading center along with an additional book, Molly's Family by Nancy Garden, depicting gay and lesbian relationships and gay and lesbian marriage. These books were available to Jacob without parental notification. There was no method by which the Parkers could exercise an opt-out option.

The Parkers did not wish to discuss the topic of homosexual marriage, homosexuality or transgenderism with Jacob or Joshua at their current ages. The school responded by openly

refusing to treat the matter as one that would require notice and the principal stated that this was not a parental notification issue. (App. C12)

On February 8, 2005, the Parkers attended a School Anti-Bias Committee meeting featuring Jon Pfeifer, a Gay Lesbian Straight Education Network (GLSEN) representative. The meeting's subject was titled "How and Why to Talk to Your Children about Diversity." The meeting focused exclusively upon homosexuality and how to acclimate young children to it. Mr. Pfeifer encouraged the School Committee to place many homosexual family books in each classroom, hang gay and lesbian family posters in each classroom, and encourage teacher-initiated discussions in each class. Mr. Pfeifer's response to one parent's comment that kids learn negative jargon at a young age was "kids learn easier . . . go through year after year and it'll be better." Several teachers and the Principal of the Estabrook Elementary School attended the meeting, and visibly and verbally affirmed this action plan. (App. C11)

The catalyst for the litigation is the defendants' refusal to even consider the plaintiffs' reasonable notice and "opt out" requests. (App. C-12, 26)

On April 27, 2006 the families jointly filed a four (4) count complaint asserting that the Town of Lexington, Massachusetts, an elementary school principal, a school teacher, and other educational administrators had violated their fundamental constitutional rights to direct the education and moral upbringing of their children, to the free exercise of religion, and to family

privacy. The complaint alleged that the defendants harbored a 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 plaintiffs are incorrect in their beliefs. The complaint alleged further that the defendants required the minor plaintiffs to affirm a belief inconsistent with and prohibited by their religion. (App. C1-34)

The defendants moved to dismiss per Rule 12(b)(6).[2]

On February 23, 2007, the district court issued a thirty-seven (37) page decision dismissing the federal claims on the merits.[3] It incorrectly held that the plaintiffs' claims were barred by the First Circuit holding in Brown v. Hot, Sexy & Safer Productions, 68 F.3d 525 (1st Cir. 1995). (App. B)

The plaintiffs appealed to the First Circuit Court of Appeals. Acknowledging the difficult constitutional questions presented, the First Circuit upheld the dismissal on different grounds, primarily asserting that the plaintiffs failed to allege a "free exercise" burden. (App. A39).

The First Circuit cited no Supreme Court authority for its core holding, relying instead on Mozert v. Hawkins County Bd. of Education, 827 F.2d 1058 (6th Cir. 1987).

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[2] By agreement of the parties the court expanded the record slightly to include some of the books that the plaintiffs found offensive. (App. A4)

[3] Massachusetts state law claims were correlatively dismissed.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE A SPLIT AMONG THE CIRCUITS OVER WHETHER FAMILIES OF ELEMENTARY AGE PUBLIC SCHOOL CHILDREN LEAVE THEIR "MEYER/PIERCE" RIGHTS AT THE SCHOOL HOUSE DOOR.

> If parents have absolutely no say in what their children may be taught, they are left with 'the most vulgar of ultimatums - either your child can receive a public education or she can continue to faithfully practice her religion, but not both.' Michael E. Lechliter, The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children, 103 Mich. L. Rev. 2209, 2236 (2005).

Parents have a fundamental right to direct the moral upbringing of their children. Troxel v. Granville, 530 U.S. 57, 65 (2000) (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)) (other citations omitted). Whether and to what extent such rights may be asserted in the public schools is a difficult question. At least one circuit, the Ninth, simply refuses to recognize that such rights can be asserted in the context of public schools. See, Fields v. Palmdale, 427 F.3d 1197 (9th Cir. 2005), amended by and re-aff'd, 477 F.3d 1187 (9th Cir.

2006). At least one circuit, the Third, expressly disagrees.

In C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3d Cir. 2005), the Third Circuit upheld a school district's use of a survey concerning sexual behaviors of middle and high school children finding no constitutional violation. However, the Third Circuit went out of its way to distinguish its decision from the Ninth Circuit's erroneous views stated in Fields.

The C.N. court wrote:

> In reaching this conclusion, we do **not** hold . . . that the right of parents under the Meyer-Pierce rubric 'does not extend beyond the threshold of the school door.' Nor do we endorse the categorical approach to this right taken by the Fields court, wherein it appears that a claim grounded in Meyers-Pierce will now trigger only an inquiry into whether or not the parent chose to send their child to public school and if so, then the claim will fail.

C.N., 430 F.3d at 185 n.26 (citing Fields, 427 F.3d at 1207) (Emphasis supplied.)[4]

This court should resolve the split by accepting this case and ruling that the Third Circuit's view is correct.

Those who see little or no role for the courts express hope that parental concerns may be

[4] At least implicitly, the Third Circuit was recognizing the "vulgar ultimatum" that Professor Lechliter succinctly described, as quoted on page 7 above.

appropriately addressed in the political arena. Indeed, in its conclusion here, the First Circuit suggested that the plaintiffs avail themselves of the political process. (App. A34) No doubt, political accommodation is preferable to litigation whenever possible. But the reality is that, at least in Lexington, Massachusetts, the petitioners represent a tiny minority comprised of people who harbor deep and abiding religious beliefs consistent with the "Defense of Marriage Act." 1 U.S.C. §7; 28 U.S.C. §1738C. The whole purpose of civil rights litigation is to protect minorities from the government overreaching the defendants exhibited. See 18 U.S.C. §1983.

This Court has long recognized a basic constitutional right of parents to direct the upbringing of their children. See generally, Troxel v. Granville, 530 U.S. 57 (2000). It has also recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)). "...(S)tudents do not shed their first amendment rights at the schoolhouse gate." Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (citing Tinker v. Des Moines Independent Community School Dist. 393 U.S. 503, 506 (1969)). See also, West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (Fourteenth Amendment claims reach boards of education.)

Since 1923, if not before, the Supreme Court has recognized that parents possess a fundamental liberty interest to be free from unnecessary governmental intrusion in the

rearing of their children. See Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923). In the seminal Pierce decision, the Supreme Court held that the state could not pass a law requiring that all students attend public school. The Court's words from 1925 perhaps remain the most vital formulation of plaintiffs' position here: ". . . [a] child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce, 268 U.S. at 535.

Use of the phrase "high duty" reflects a recognition that the genesis of the parental right is religious and of long standing. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and the upbringing of their children." Yoder, 406 U.S. at 232; see Ginsberg v. New York, 390 U.S. 629, 639 (1968).

In 1972, the Supreme Court ruled that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. Aspects of child rearing protected from unnecessary intrusion by the government include the inculcation of moral standards, religious beliefs, and elements of good citizenship." Yoder, 406 U.S. at 232-33; see Meyer, 262 U.S. at 401; Pierce, 268 U.S. at 534-35.

Petitioners recognize that the rights of students "must be 'applied in light of the special characteristics of the school environment.'" Morse, 127 S.Ct. at 2622 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) Even so, the state's interest in public education "is not totally free from a balancing process when it impinges on fundamental rights and interests, such as . . . the traditional interest of parents with respect to the religious upbringing of their children . . . ." Yoder, 406 U.S. at 213-214.

In light of these competing concerns, petitioners carefully tailored their requested relief. They did not direct their challenge at the curriculum itself, as the First Circuit correctly recognized:

> Plaintiffs . . . are not attempting to control the school's power to prescribe a curriculum. The plaintiffs accept that the school system "has a legitimate secular interest in seeking to eradicate bias against same-gender couples and to ensure the safety of all public school students." They assert that they have an equally sincere interest in the accommodation of their own religious beliefs and of the diversity represented by their contrary views. Plaintiffs specifically disclaim any intent to seek control of the school's curriculum or to impose their will on others. They do not seek to change the choice of books available to others but only to require notice of the books and an exemption, and even then only up to the seventh grade. (App. A29)

The First Circuit nonetheless refused to provide any recognition to plaintiffs' claims. It went on to state: "Nonetheless, **we have found no federal case under the Due Process Clause which has permitted parents to demand an exemption for their children from exposure to certain books used in public schools."** (App. A29). (Emphasis supplied.)

This language is precisely the reason to accept certiorari. The absence of any express authority allowed the First Circuit to ignore decades of constitutional jurisprudence dating back to Meyer and Pierce.

Moreover, this formulation misstates the issue. Petitioners have not complained about "mere exposure." Their concern is about "systematic indoctrination" of children too young to recognize that the materials to which they are subjected can be criticized. (App. A10).

Although there is no identical case, it should be clear that the First and Fourteenth Amendment guarantee parents the right to exclude children from having their true and deepest faith indoctrinated out from under them. The state can not compel families to govern their intimate lives in accord with a government-created ideal. Hodgson v. Minnesota, 497 U.S. 417, 452 (1990) (plurality opinion) (citing Meyer, 262 U.S. at 399-400). Public school students are particularly vulnerable to the inculcation of orthodoxy in the guise of pedagogy. Cole v. Maine Sch. Admin. Dist. One, 350 F. Supp. 2d 143, 150 (D. Me. 2004.)

Petitioners respectfully assert that if the fundamental parental right has any true meaning, it is to preclude a public school from egregiously usurping the parental role in religious and moral matters of the utmost importance. It is not educators, but parents who have primary rights in the upbringing of children. Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000).

Although successful cases may be rare, this Court should follow the Third Circuit and accept the case to make clear that families do not categorically leave their fundamental rights at the school house door.

A. The First Circuit Failed to Construe the Complaint in the Light Most Favorable to Plaintiffs

To justify its holding, the First Circuit engaged in unfair fact finding. On the one hand, the court recognized that an intent to "systematically indoctrinat[e]" was pled. (App. A-9). Yet the court ruled as a matter of law there was no evidence of indoctrination. (App. A32).

This was plain error. Fed.R.Civ.P. Rule 8 allows notice pleadings.[5] The plaintiffs supported their general allegation with specific facts, including that the school committee acted on behalf of a special interest group intent in asserting its private views:

[5] Petitioners recognize that in Bell Atl. Corp. v. Trombly, 127 S. Ct. 1955, 1965-1969 (2007), the Supreme Court "retired" Conley v. Gibson, 355 U.S. 41 (1957). Even so, the complaint is sufficient to state the claim.

> On February 8, 2005, the [Parkers] attended a meeting featuring Jon Pfeifer, a Gay Lesbian Straight Education Network (GLSEN) representative. The meeting's subject was titled "How and Why to Talk to Your Children about Diversity." In fact, the meeting focused exclusively upon homosexuality and how to acclimate young children to it. Mr. Pfeifer encouraged the Committee to place many homosexual family books in each classroom, hang gay and lesbian family posters in each classroom, and encourage teacher-initiated discussions in each class. Mr. Pfeifer's response to one parent's comment that kids learn negative jargon at a young age was "kids learn easier . . . go through year after year and it'll be better." Several teachers and the Principal of the Estabrook Elementary School attended the meeting, and visibly and verbally affirmed this action plan. On information and belief, the Town, School Committee, Ms. Jay, Mr. Hurley, and Dr. Ash have adopted Mr. Pfeifer's suggestions. 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. (App. C11-12)

These facts are ignored in the First Circuit's opinion.

The plaintiffs have alleged that they were acting in accord with the "high duty" this court long ago treated as virtually sacrosanct. Pierce, 268 U.S. at 535. Nothing has been shown that would require this duty to be extinguished.

Plaintiffs should be allowed to prove their case. The defendants were on notice that the claim was one of "indoctrination." It was pled with specificity. The First Circuit did not have the power to assert that there was no indoctrination as a matter of fact.

For all of the above reasons, certiorari should be granted so that this Court may re-affirm the "Meyer/Pierce" tradition and hold that in rare cases, a claim may extend beyond the threshold of the school house door.

II. THIS COURT HAS NEVER DECIDED WHETHER INDOCTRINATION INTENDED TO ERADICATE FAITH CAN CREATE A "FREE EXERCISE" BURDEN.

As demonstrated above, "systematic indoctrination" was pled. The First Circuit could not ignore that reality. It wrote:

> The heart of the plaintiffs' free exercise claim is a claim of "indoctrination": that the state has put pressure on their children to endorse an affirmative view of gay marriage and has thus undercut the parents' efforts to inculcate their children with their own opposing religious views.

> The Supreme Court, we believe, has never utilized an indoctrination test under the Free Exercise Clause, much less in the public school context. The closest it has come is Barnette, a free speech case that implicated free exercise interests and which Smith included in its hybrid case discussion. (App. A35-36)

Despite its clear enunciation of the issue, the First Circuit blatantly refused to decide it. It stated "We do not address whether or not an indoctrination theory under the Free Exercise Clause is sound." (App. A36)[1]

Certiorari should therefore be granted so that this important and properly framed question is answered. Simple logic, as well as the tapestry of this Court's earlier authority, compels the conclusion that open and notorious attempts to teach tiny children that their families' faith is wrong creates an enormous burden on the faith that can never be overcome. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to

[1] To complete its circumvention of the issue, the First Circuit wrote that "Plaintiffs' pleadings do not establish a viable case of indoctrination, even assuming that extreme indoctrination can be a form of coercion." (App. A36). This blatant refusal to follow Rule 12(b)6 is discussed in section I, supra.

confess by word or act their faith therein." Barnette, 319 U.S. at 642.

In 1986, this Court stated that "[P]ublic education must prepare pupils for citizenship in the Republic . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968). Unfortunately, some educators view this language as authorizing an unfettered right to impose their ideologies upon students. At times these efforts violate the establishment clause. E.g., Edwards v. Aguillard, 482 U.S. 578 (1987) (Louisiana Creationism Act).

However, this Court has **never** decided when such pedagogical efforts can become a constitutionally significant burden upon the "free exercise" of religion. The Court should therefore grant certiorari and rule that when such pedagogical efforts intentionally and openly seek to eradicate parents' rights in areas that the court has previously recognized to be the most intimate and private, an actionable free exercise burden has been created. This is especially so where the intentional indoctrination efforts also intrude upon the parents' due process rights to direct the moral upbringing of their children. (See section I, supra.)

The issue is particularly ripe in this case because of the egregious level of defendants' misconduct, in engaging in intentional and systematic indoctrination. Well aware of

petitioners' faith, the defendants nonetheless chose to indoctrinate very young children into the concept that homosexual behavior is right and good. Lest this seem overstated, the First Circuit acknowledged the point even while ruling against the petitioners. "It is a fair inference that the reading of *King and King* was precisely *intended* to influence the listening children toward tolerance of gay marriage. That was the point of why that book was chosen and used." (App. A37) (Emphasis in original)

But this case is about more than tolerance. Adults can learn to recognize and tolerate differences between people. The defendants' intention here **is to eradicate** any differences of opinion. This is evident from the ages of the children, the books themselves, and the defendants' refusal to even consider giving notice to the parents. And this allegation was well pled from the beginning.[6] If not to indoctrinate, why would the school refuse to even notify the parents that these matters were being discussed in second grade? Clearly, the defendants are motivated by a political determination that the plaintiffs' faith is morally incorrect, and that eradication of their beliefs is a civic virtue. Moreover, the complaint alleges that this activity is part of a larger effort

[6] That this was "well pled" cannot be contested. The First Circuit itself stated "The complaint alleges that the public schools are systematically indoctrinating the Parkers' and the Wirthlins' young children contrary to the parents' religious beliefs and that the defendants held "a specific intention to denigrate the [families'] sincere and deeply-held faith." (App. A10-11)

at indoctrination resulting from the interplay between the local school system and political lobbying groups. This too is alleged with clarity. (App. C11-12, C26)

> On information and belief, the reason why the defendants will not inform the Wirthlins is that the defendants' specific intention is to coercively indoctrinate the children into moral belief systems that are markedly different from those of their parents, and the defendants harbor a specific intention to denigrate the Wirthlins' sincere and deeply-held faith. The Wirthlins wish to direct the personal moral and religious views of their own children and believe these children are too young, at ages seven and eight to be able to comprehend the complexities of such a controversial and advanced topic. (App. C26)

"[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." Wooley v. Maynard, 430 U.S. 705, 716 (1977). This is especially true where the effort to disseminate an ideology is targeted at children far too young to evaluate the merits of such ideology for themselves.

> 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, 482 U.S. at 584 (1987); accord, Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780 (E.D. Mich. 2003). There is nothing voluntary about a five-, six- or seven-year-old attending the early grades of elementary school. "[T]he State exerts great authority and **coercive power** through mandatory attendance requirements, **and** because of students' emulation of teachers as role models and the children's susceptibility to peer pressure." Edwards, 482 U.S. at 584 (Emphasis supplied.)

In Lee v. Weisman, 505 U.S. 577, 592 (1992), this court recognized heightened concerns of "subtle coercive pressure in the elementary public schools." Additionally, in Lemon v. Kurtzman, 403 U.S. 602, 619 (1971), this court held that "[w]hat would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion."

The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The clause "forbids subtle departures from neutrality," Gillette v. United States, 401 U.S. 437, 452 (1971), and "covert suppression of particular religious beliefs," Bowen v. Roy, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot

be shielded by mere compliance with the appearance of facial neutrality. The Free Exercise Clause protects against governmental hostility that is masked as well as overt. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1999).

Absent guidance from this Court to define a free exercise burden, the First Circuit adopted language from Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (5th Cir. 1987). (App. A34-35)

Mozert upholds a school committee's book curriculum choice over objections from "Born Again Christians" (Court's phrase) that the schools' books burdened their faith. The First Circuit quoted Mozert to the effect that "the evil prohibited by the Free Exercise Clause" is "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. (App. A35)

This, indeed is precisely what the plaintiff-petitioners pled in their complaint. (App. C10, 12)

In Mozert, the court ruled that the plaintiffs failed to prove their case after a trial on the merits. Here, the court refused to allow the plaintiffs an opportunity to try their case, or even to take discovery. The court confused the failure of plaintiff's proof in Mozert with a legal enunciation of burden. Indeed, in what might be the legal equivalent of a Freudian slip, the First Circuit stated "There is no **evidence** of systemic indoctrination," apparently forgetting that the plaintiffs had properly pled exactly that, and had yet to have been afforded an opportunity to

present any evidence whatsoever. (App. A37) (Emphasis supplied.)

This Court should accept the case and rule that, in the narrow areas of intimate family behavior, a free exercise burden is created where public school educators attempt to systematically indoctrinate young children into disbelieving core tents of their families' faith.

A grant of certiorari and a reversal would not open a floodgate of parental litigation against public schools. The parents here have never challenged curriculum and the Court is not being asked to decide whether a parent may do so.[7] Rather, the parents seek only to exclude children from indoctrination concerning aspects of intimate family and sexual behavior that the court historically protects as private. At least since Griswold v. Connecticut, 381 U.S. 479 (1965), this Court has recognized a privacy right with respect to intimate family matters. E.g., Lawrence v. Texas, 539 U.S. 558 (2003). This Court recognizes spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Id. at 562. In these same private spheres, the public schools cannot usurp the parental role.

In Wisconsin v. Yoder, 406 U.S. 205, 233 (1972), the Court held that parents have the right and duty to inculcate in their children "moral standards, religious beliefs, and elements of good citizenship," and that the Amish plaintiffs had

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[7] Curriculum challenges based upon the "establishment clause" are routine. E.g., Edwards v. Aguillard, 482 U.S. 578 (1987)

demonstrated that the State's educational requirements posed a hazard to the free exercise of their religious beliefs. Id. at 218.

Unlike the Amish plaintiffs in Yoder, the plaintiffs here do not live in a largely separate culture. The First Circuit gave great weight to this distinction essentially ruling that Yoder was sui generis. This thinking is misplaced.

Certiorari should be granted to allow this Court to reiterate Yoder's vitality in a world post-Employment Div. v. Smith, 494 U.S. 872 (1990). Here, the parents have chosen public school and are willing to accept the obligations of citizenship in a diverse community. The alternative choice, to send a child to private school, does not come without a price. Apart from the economic burden, such choices can create an unnecessary insularity. The interesting dynamic in this case is that the petitioners, a small minority in Lexington, Massachusetts, wish to remain part of the fabric of the public school. They ask only that they, as a family unit, not be placed at risk of losing their religion by co-ordinated State efforts to indoctrinate their children. The right to assert an alleged "free exercise" violation should not depend upon the demographics of the practitioners of the religion, or the degree to which the religion may be perceived as demanding upon its adherents. The Constitution should not favor one religion over another in determining the strength of the free exercise right.

Nor is this a case where the local authorities can credibly claim to be concerned with public health. Courts have routinely allowed local

authorities broad latitude in designing "school programs that educate children in sexuality and health." Fields, 427 F.3d at 1205 (citing Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) (upholding school district's mandatory health classes against a father's claim of a violation of his fundamental rights); Parents United for Better Sch., Inc. v. Sch. Dist. of Philadelphia Bd. of Educ., 148 F.3d 260 (3d Cir. 1998) (upholding school district's consensual condom distribution program); Brown, 68 F.3d 525 (upholding compulsory high school sex education assembly program); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal. Rptr. 68 (1975)) (parenthetical descriptions as stated in Fields).

The analysis here is different. Unlike cases in which a school attempts to instill knowledge regarding health issues or consequences of sexual activity, here there is no immediate reason for broaching the topic of sexuality at all. Plaintiffs have alleged that the intent is to indoctrinate a religious ideology for the simple reason that the State believes it is preferable to the plaintiffs' deeply held core belief.

The plaintiffs should be allowed to prove their case.

III. THIS QUINTESSENTIAL "HYBRID RIGHTS" CASE PRESENTS THE COURT A MUCH NEEDED OPPORTUNITY TO EXPLAIN THE DOCTRINE AND RESOLVE A SPLIT AMONG CIRCUITS

Petitioners have asserted that their right to avoid moral and religious indoctrination of their very young children stems from a combination of due process rights enunciated in the Free Exercise Clause, the fundamental right of parents to raise their children, and the rights of privacy related to intimate family associations. (App. C27-28)

This combination of fundamental rights was specifically pled as a "hybrid rights" claim pursuant to Employment Div. v. Smith, 494 U.S. 872, 876-77 (1990). Because the parameters of such claims have generated enormous controversy, certiorari should be granted to provide guidance to the lower courts concerning the manner and means of construing them.

In Smith, this court utilized the "rational relationship" test to uphold an Oregon drug law that was alleged to have impinged upon certain religious groups' desire to use peyote in its ritual. However, the Court reiterated the vitality of the long line of cases that preserve parental rights regarding faith. E.g., Yoder, 406 U.S. at 233. Such cases had utilized a higher standard of review to strike down laws that infringed upon parental rights.

Distinguishing these earlier cases, the Smith Court stated that "[t]he only decisions in which we have held the First Amendment bars

application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . ." Smith, 494 U.S. at 881. The Court ruled that heightened scrutiny should be applied to the "hybrid situation" where "the interests of parenthood are combined with a free exercise claim." Id. at 882 n.1 (quoting Yoder, 406 U.S. at 233).

Ruling against the petitioners, the First Circuit here noted that Smith's enunciation of "hybrid situations" has led to a great deal of discussion and disagreement. (App. A-16) (citing E. Chemerinsky, *Constitutional Law* § 12.3.2.3, at 1262 (3d ed. 2006) (noting different treatments of the hybrid rights language by the lower courts). See also Steven H. Aden & Lee J. Stang, When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith Hybrid Rights Exception, 108 Penn. St. L. Rev. 573 (2003). The First Circuit recognized that observers can not determine "whether Smith created a new hybrid rights doctrine, or whether in discussing 'hybrid situations' the Court was merely noting in descriptive terms that it was not overruling certain cases such as Pierce and Yoder." (App. A19) (Comparing, Michael E. Lechliter, Note, The Free Exercise of Religion and Public Schools: The Implication of Hybrid Rights on the Religious Upbringing of Children, 103 Mich. L. Rev. 2209, 2220-21 (2005), with M.W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1121-22 (1990)). Individual justices of this court have added to the

controversy. See Church of Lukumi Babalu Aye., Inc., 508 U.S. at 567 (Souter, J. concurring) (describing hybrid rights as untenable distinction).

This controversy has led to split among the circuits. At least one circuit has described the "hybrid rights" concept as unworkable. Kissinger v. Bd. of Tr. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993); Accord, Watchtower Bible and Tract Soc'y of New York, Inc. v. Village of Stratton, 240 F.3d 533 (6th Cir. 2001), cert. granted, 534 U.S. 971, rev'd, 536 U.S. 150 (2002). On the other hand, the Eighth Circuit follows the Court's language closely and in its own words has "breathed life" into hybrid claims that had been dismissed. Cornerstone Bible Church v. City of Hastings, 948 F.2d. 464, 473 (8th Cir. 1991).

Regardless of which position one takes, the controversy is real and ongoing. Smith's use of the phrase "hybrid situations" leaves open a complex and fundamental question begging for this Court's resolution: how and to what extent the Free Exercise Clause continues to support parents' fundamental rights to raise their own children in a complex pluralistic society.

The instant case presents the perfect opportunity for the Court to address that very question. The petitioners have asserted exactly those claims the Smith Court envisioned when it created the "hybrid rights" doctrine in the first instance. Count I of the complaint is specifically crafted as a "hybrid rights" claim. (App. C27-28) At both the District Court and Circuit level, the applicability of Smith was thoroughly briefed and

argued. The First Circuit opinion recognizes this as well. (App. A11-18)

In Smith, this Court enunciated an express and specific concern with the correlation between religion and parenthood. Smith, 494 U.S. at 882. This Court should therefore allow certiorari to expand upon the Smith rubric, and clarify its meaning.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

DAVID PARKER; TONIA PARKER; JOSHUA PARKER; JACOB PARKER; JOSEPH ROBERT WIRTHLIN; ROBIN WIRTHLIN; JOSEPH ROBERT WIRTHLIN, JR.,

Petitioners

v.

WILLIAM HURLEY; PAUL B. ASH; HELEN LUTTON; THOMAS R. DIAZ; OLGA GUTTAG; SCOTT BURSON; ANDRE RAVENELLE; JONI JAY; JENNIFER WOLFRUM; HEATHER KRAMER; TOWN OF LEXINGTON; THOMAS GRIFFITH,

Respondents

As required by Supreme Court Rule 33.1(h), I certify that the petition for a write of certiorari contains 6,300 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2008.

_____
Jeffrey A. Denner, Esq.

CERTIFICATE OF SERVICE

DAVID PARKER; TONIA PARKER; JOSHUA PARKER; JACOB PARKER; JOSEPH ROBERT WIRTHLIN; ROBIN WIRTHLIN; JOSEPH ROBERT WIRTHLIN, JR.,

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Respondents

As required by Supreme Court Rule 29.5, I certify that three (3) copies of the Petitioners' Petition for A Writ of Certiorari was served on the following parties on _____, 2008:

Counsel for William Hurley, Paul B. Ash, Helen Lutton, Thomas R. Diaz, Olga Guttag Scott Burson, Andre Ravenelle, Joni Jay, Jennifer Wolfum, Heather Kramer, Town of Lexington, Thomas Griffith:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2008.

_____
Jeffrey A. Denner, Esq.