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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SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEES

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The defendants submit this Supplemental Brief in response to the Court's invitation extended during oral argument on December 5, 2007.

ARGUMENT

I. THIS COURT SHOULD NEITHER ABSTAIN FROM EXERCISING FEDERAL JURISDICTION NOR CERTIFY QUESTIONS OF STATE LAW TO THE SUPREME JUDICIAL COURT.

A. Introduction.

During oral argument, a question arose as to whether it may be appropriate for this Court to abstain from deciding the federal constitutional claims (dismissed below with prejudice on defendants' Rule 12(b)(6) Motion) pending the resolution of plaintiffs' state law claims (dismissed below without prejudice.) Alternatively and/or additionally, should this Court certify questions of state law to the Massachusetts Supreme Judicial Court ("SJC")? The plaintiffs raise two state law claims in their Complaint. In Count II, they seek relief under the Massachusetts Civil Rights Act ("MCRA"), M.G.L. c. 12, § 11I, for the defendants' alleged interference with plaintiffs' exercise and enjoyment of rights secured under the constitution and laws of the Commonwealth of Massachusetts. (A. 205-206). The plaintiffs do not seek relief under the MCRA for the defendants' alleged violation of any federal constitutional or statutory rights. In Count III, the plaintiffs seek relief for the defendants' alleged violation of the so-called Massachusetts Opt-out Statute, M.G.L. c. 71, § 32A. (A. 206-207). Counts II and III of plaintiffs'

Complaint raise several issues of state law that this Court may contemplate certifying to the SJC. First, does the Opt-out Statute provide plaintiffs with a private right of action against the defendants? If so, did defendants' use of King & King, Molly's Family and Who's In a Family? violate the Opt-out Statute? Finally, did defendants' use of such same-sex reading materials violate the Free Exercise clause of the Massachusetts Constitution? But, regardless of how the SJC answers these questions – whether affirmative or negative – such answers will not resolve the issues raised under plaintiffs' federal constitutional claims. Thus, as set forth more fully below, abstention and certification will serve no purpose here other than to delay the litigation unnecessarily.

B. The Doctrine of Abstention.

The doctrine of abstention, under which a federal court may decline to exercise, or postpone the exercise of, its jurisdiction, is the exception rather than the rule. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976). Under ordinary circumstances, a federal court will exercise the judicial power granted to it by Congress. Bath Memorial Hospital v. Maine Health Care Fin. Commission, 853 F.2d 1007, 1013 (1st Cir. 1988). Abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Colorado River, 424 U.S. at 813. "It was never a doctrine of

equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." Id., quoting Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341, 361 (1951).

The Supreme Court has enumerated several specific categories of cases where abstention may be appropriate, only one of which is relevant to the instant matter.[1] The application of the abstention doctrine may be appropriate in cases involving a federal constitutional issue which may become moot or may be presented in a different posture by a state court determination of pertinent state law. Colorado River, 424 U.S. at 814, citing, *inter alia*, Railroad Commissioner of Texas v. Pullman Co., 312 U.S. 496 (1941). The so-called "Pullman" variety of abstention is premised on the preference of a federal court to avoid making a forecasted, rather than determinative, decision on a novel state law question. Guiney v. Roache, 833 F.2d 1079, 1081 (1st Cir. 1987).

[1] For example, abstention may be appropriate to avoid "the awkward circumstance of turning the federal court into a forum that will effectively decide a host of detailed state regulatory matters, to the point where the presence of the federal court . . . makes it significantly more difficult for the state to operate its regulatory system." Bath, 853 F.2d at 1012, citing Burford v. Sun Oil Co., 319 U.S. 315 (1943); Southern Ry. Co., 341 U.S. 341 (1951); Allstate Ins. Co. v. Sabbagh, 603 F.2d 228 (1st Cir. 1979). Where the exercise of federal jurisdiction would enjoin or interfere with state judicial proceedings, abstention may also be appropriate. Younger v. Harris, 401 U.S. 37 (1971).

Although abstention may be appropriate where an unsettled question of state law is involved, many courts have applied Pullman abstention narrowly, and have declined to abstain under Pullman grounds even where complex state law issues are involved. Even where "strands of local law are woven into the case that is before the federal court, difficulties and perplexities of state law are no reason for referral of the problem to state court." McNeese v. Board of Ed. for Community Unit School Dist. 187, Cahokia, Ill., 373 U.S. 668, 673 (1963). For example, in McNeese, the plaintiffs alleged that the school district intentionally segregated black students from white students, in violation of the United States Constitution, by constructing a school within certain geographic boundaries. Id. at 669. The plaintiffs sought equitable relief, to wit, registration of black students in racially-integrated schools. Id. at 670. The school district moved to dismiss the suit, arguing that the plaintiffs had not exhausted their administrative remedies under an Illinois law designed to handle school segregation complaints. Id. The McNeese court declined to exercise Pullman abstention on the plaintiffs' federal claims because, "petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law." Id. at 674, citing Monroe v. Papa, 365 U.S. 167, 183 (1961). "To remit the parties to the state courts is to delay further the disposition of the litigation . . . [i]t is to penalize petitioners for resorting

to a jurisdiction which they were entitled to invoke." Id. at 673, quoting Meredith v. City of Winter Haven, 320 U.S. 228, 236 (1943).

Further, where the validity of a state law is not contested, Pullman abstention is not warranted. Guiney, 833 F.2d at 1081-1082. In Guiney, the plaintiff contested the constitutionality of a Massachusetts law pertaining to drug testing, arguing that it violated the Fourth and Fourteenth Amendments of the United States Constitution. Id. at 1080-1081. The District Court below abstained on the plaintiff's federal constitutional claims on the grounds that state law might resolve the litigation. Id. The First Circuit vacated and remanded the case, holding that Pullman abstention was not appropriate because the plaintiff's complaint did not attack the validity of the state law, and noting that the District Court construed the circumstances under which abstention is appropriate too broadly. Id. at 1082. Even where a state law is unique or novel, there is no reason to abstain when no clarifying interpretation of that state law is necessary to resolution of the federal constitutional issues. Id. Similarly, many courts have declined to abstain in circumstances where it appears unlikely the resolution of state law questions will significantly affect the outcome of a federal claim. See Harris Cty. Commissioners Court v. Moore, 420 U.S. 77, 84 (1975), citing Chicago v. Atchison, T. & S.F. Ry. Co., 357 U.S. 77, 84 (1958); Public Utilities Commission v. United Fuel Gas Co., 317 U.S. 456, 462-463 (1943).

C. Certification of State Law Questions.

In the absence of controlling precedent from the state's highest court on a legal issue that may be determinative of a federal lawsuit, federal courts may, in their discretion, certify a question of state law to the state's highest court. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974); Nett v. Bellucci, 269 F.3d 1, 8 (1st Cir. 2001), citing Kansallis Fin. Ltd. v. Fern, 40 F.3d 476, 481 (1st Cir. 1994); Mass. S.J.C. R. 1:03 (accepting certified questions which may be claim-determinative if there is no controlling SJC precedent). Prior to certifying, however, federal courts must make their own prediction of state law to determine whether the course the state court would take is reasonably clear. Nieves v. Univ. of Puerto Rico, 7 F. 3d 270, 274-275 (1st Cir. 1993).

D. Neither Abstention nor Certification is Warranted in the Circumstances Here.

This Court should neither abstain from exercising federal jurisdiction in this matter, nor certify state law questions to the SJC, as it is unnecessary for this Court to make a forecasted decision regarding the constitutionality, validity or application of either the Opt-out Statute, the MCRA, or article 46, section 1, of the amendments to the Massachusetts Constitution. Abstention and/or certification will not avoid

the need for this Court to ultimately rule on the plaintiffs' federal constitutional claims; it will only delay the litigation.[2]

Regardless of how the SJC answers the question of whether the Opt-out Statute provides a private right of action, the plaintiffs will still seek resolution of their 42 U.S.C. § 1983 claim, as well as a determination as to whether defendants' use of same-sex reading materials from 2004 to 2006 violated their free exercise, substantive due process and privacy rights under the United States Constitution. (A. 204-205). In Count I of their Complaint, the plaintiffs allege that defendants' actions "invaded and impaired" their "clearly established" constitutional rights. As a result, plaintiffs seek, in addition to equitable relief, compensatory damages, punitive damages, attorney's fees and costs. (A. 208). Since plaintiffs' rights to such relief will remain unaffected by a determination of whether a private right of action exists under the Opt-out Statute, abstention and certification of this issue will serve no purpose.

It is unlikely the SJC will recognize a private right of action here under the Opt-out Statute. For this reason alone, the Court should decline certification. The

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[2] Plaintiffs chose to file their Complaint in federal court rather than in state court. Following the dismissal of their state law claims without prejudice on February 23, 2007, plaintiffs have not re-filed the same in state court despite Judge Wolf's invitation to do so. Thus, plaintiffs have not sought, and are not seeking, state court resolution of their claims.

Statute applies only to "curriculum which primarily involves human sexual education or human sexuality issues . . .." M.G.L. c. 71, § 32A. Yet, plaintiffs continually insist that defendants' use of the "offending" books was not part of the Lexington curriculum. (A. 158-159). Further, the books do not "primarily" involve human sexuality any more than other fairy tales with a romantic component are "primarily" sexual. See Town of Eastham v. Clancy, 44 Mass. App. Ct. 901 (1997) ("primarily" means "chiefly, mainly"). Finally, according to the SJC, no private right of action can be inferred from a state statute absent clear legislative intent to support such a remedy. Loffredo v. Center for Addictive Behaviors, 426 Mass. 541, 546-547 (1998).

Even if the SJC recognizes a private right of action under the Opt-out Statute, there are no circumstances whereby the Parkers and Wirthlins can obtain such statutory relief since they failed to exhaust their administrative remedies as required under that law. Specifically, the Opt-out Statute requires the Massachusetts Department of Education to "promulgate regulations for adjudicatory proceedings to resolve any and all disputes arising under this section." M.G.L. c. 71, § 32A. Those regulations, appearing at 603 C.M.R. §§ 5.01 *et seq.*, create a detailed system whereby a parent dissatisfied with a school principal's decision under the Opt-out Statute may engage in a dispute resolution process with the school superintendent, local school committee, and Commissioner of Education, or through an

administrative hearing. 603 C.M.R. §§ 5.03 & 5.04. While both the Parkers and the Wirthlins allege that they met with the principal of Estabrook Elementary School, defendant Joni Jay, to discuss their wishes to opt their children out of any school discussions of homosexual marriage, homosexuality and transgenderism (A. 193, 195-196, 203, 204), plaintiffs' Complaint contains no allegations that they complied with the administrative remedies of 603 C.M.R. §§ 5.03 & 5.04. On the contrary, during a meeting with Ms. Jay, David Parker admitted his non-compliance with the administrative remedies required under the Opt-out Statute because "[o]ther people have tried that and it did not work." (A. 196-197). Thus, even if the Opt-out Statute affords a remedy, that remedy will be unavailing to the plaintiffs. As a result, plaintiffs will no doubt continue to seek relief from this Court based on their federal constitutional claims under 42 U.S.C. § 1983.

Even the SJC were to conclude that defendants' use of the three books violated the Opt-out Statute, that decision would likewise not be determinative of plaintiffs' federal constitutional claims. As the First Circuit held in Martinez v. Colon, 54 F. 3d 980 (1st Cir. 1995):

> [N]ot every transgression of state law does double duty as a constitutional violation. The Constitution is a charter of carefully enumerated rights and responsibilities, defining the relationship between the people and a government of limited powers. Its scope and application are necessarily determined by its own terms. Though grand in its design and eloquent in its phrasing, the Constitution is not an empty ledger awaiting the entry of an aggrieved litigant's recitation

> of alleged state law violations – no matter how egregious those violations may appear within the local legal framework.

Id. at 989 (violation of local Puerto Rico law pertaining to police officers' duties does not establish a claim under 42 U.S.C. § 1983); see also Fournier v. Reardon, 160 F.3d 754, 757-758 (1st Cir. 1998) (violation of state law governing discipline of persons involved in physical training programs at private and public institutions does not establish a claim under 42 U.S.C. § 1983 and does not constitute denial of plaintiff's substantive due process rights under the Fourth Amendment of the United States Constitution). There is no reason to infer that defendants' violation of the Opt-out Statute (if any) implicates state or federal constitutional issues, or somehow creates or adds to plaintiffs' Section 1983 claim.[3] As the plaintiffs note, "the [constitutional] rights exist even absent the legislative enactment [of the Opt-out Statute]." (A. 78). If the SJC should determine, on the other hand, that defendants' use of same-sex reading materials did not violate the Opt-out Statute, then plaintiffs' federal constitutional claims would (again) be unaffected. Compliance with state law would not be a defense to plaintiffs' Section 1983 claims. In short, a determination of whether defendants violated the Opt-out Statute

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[3] The plaintiffs assert that, in enacting the Opt-out Statute, the Legislature "was informed by the constitutional rights in issue" and "clearly intended an Article III forum for review." (A. 78). The plaintiffs cite no support for this proposition.

is irrelevant to plaintiffs' federal constitutional claims. Hence, abstention and/or certification of that issue will not be useful.

Finally, the issue of whether plaintiffs have stated (in Count II of their Complaint) a viable claim for recovery under the MCRA and Free Exercise Clause of the Massachusetts Constitution is likewise no grounds for this Court to abstain or certify. Under Rule 1:03 of the Rules of the Supreme Judicial Court, the SJC may answer a question of law certified by another court if that question "may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of [the SJC.]" Yet, the SJC has interpreted the MCRA and article 46, section 1 on numerous prior occasions. See, e.g., Attorney General v. Desilets, 418 Mass. 316 (1994) (interpreting article 46, section 1); Batchelder v. Allied Stores, 393 Mass. 819, 821 (1985) (interpreting the MCRA). Thus, although the factual circumstances of this case may be novel, there exists "controlling [SJC] precedent" on both subjects. Certification of this question would be improper as it does not contain an unsettled question of law.

Moreover, like the opt-out remedy (if any), there are no circumstances under which the plaintiffs can recover under the MCRA – either from a state or federal court – because the individual defendants will be entitled to qualified immunity, and because a municipality is not a "person" subject to suit under the MCRA. As set

forth more fully in the Brief of Defendant-Appellees, the individual defendants are entitled to qualified immunity on the plaintiffs' MCRA claim because, in designing a curriculum for public school students and in selecting grade-appropriate reading materials to be used in teaching that curriculum, they were operating in the realm of discretion and were not violating any clearly established statutory or constitutional rights of which a reasonable person would have known. (Brief of Defendant-Appellees, pp. 49-52). Massachusetts courts apply the doctrine of qualified immunity in the same manner as federal courts. Rodriguez v. Furtado, 410 Mass. 878, 881-82 (1991). Additionally, the Town of Lexington is not a "person" subject to suit under the MCRA. Howcroft v. City of Peabody, 51 Mass. App. Ct. 573, 591-592 (2001). Denied recovery on their MCRA claims against the defendants, plaintiffs will still seek relief from this Court on their federal constitutional claims under 42 U.S.C. § 1983.

This Court should not abstain from exercising federal jurisdiction in this matter, nor should it certify any state law questions to the SJC. The determination of state law questions is irrelevant to plaintiffs' federal constitutional claims, which must still be decided regardless of the SJC's answers. Moreover, there is no pending parallel state court action in which to resolve the issues raised in this case, or which may turn out differently depending on this Court's resolution of plaintiffs' federal constitutional claims. Abstention, either with our without certification, will

only delay the necessity of resolving the federal issues raised by the plaintiffs. The individual defendants, as public schools educators targeted by the plaintiffs for the alleged violation of plaintiffs' civil rights, face personal exposure in this action for damages (both compensatory and punitive) and attorneys' fees. All defendants are entitled to a resolution of plaintiffs' claims. Until such claims are resolved, the chilling effect of this suit on public education within the Lexington schools, and indeed throughout the Commonwealth, will continue.

By dismissing Counts II and III of their Complaint without prejudice, Judge Wolf invited plaintiffs to pursue their state law claims in a Massachusetts Superior Court. There exists no barrier for plaintiffs to do so. This Court need not abstain or certify. Instead, it should affirm the Judgment of dismissal below and allow plaintiffs to proceed to the state forum, if they so desire.

II. THIS COURT SHOULD NOT VACATE THE JUDGMENT OF DISMISSAL ENTERED BELOW IN ORDER TO ALLOW DISCOVERY OF IMMATERIAL FACTS.

During oral argument, the panel also raised the issue of whether development of certain factual issues below could provide a potential basis for plaintiffs' federal constitutional claims. Specifically: (1) Is the Town's use of King & King consistent with the state's core curriculum?; (2) Did defendants' actions constitute "indoctrination?"; and (3) How and to what extent would school systems be burdened by giving the plaintiffs the relief they seek? Such facts, however, are

immaterial to plaintiffs' rights of recovery and, therefore, do not justify vacating the judgment of dismissal entered below. Even accepting as true all well-pleaded facts in the plaintiffs' Complaint, and construing such facts in the light most favorable to the plaintiffs, plaintiffs' Complaint does not set forth any potential basis for relief. 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). As the District Court correctly noted, "even if proven, the allegations in the Complaint would not establish a violation of plaintiffs' federal constitutional rights." (A. 21).

A. Further Factual Development Cannot Provide a Basis for the Plaintiffs' Claims.

Further factual development of the above issues cannot provide a basis for any of the plaintiffs' claims. The defendants have the right, under the United States Constitution, to "teach anything that is reasonably related to the goals of preparing students to become engaged and productive citizens in our democracy," and:

> It is reasonable for public educators to teach elementary school students about individuals with different sexual orientations and about various forms of families, including those with same-sex parents, in an effort to eradicate the effects of past discrimination, to reduce the risk of future discrimination, to reaffirm our nation's constitutional commitment to promoting mutual respect among members of our diversity society.

(A. 11-12). In fact, the First Circuit recently affirmed the academic freedom of schools protected by the First Amendment in Asociación de Educación Privada de

Puerto Rico, Inc. v. García-Padilla, 490 F.3d 1 (2007). In García-Padilla, the Court invalidated a portion of a Puerto Rico law regulating private schools' use of textbooks on the grounds that it interfered with the schools' autonomous decisionmaking and intruded upon the schools' "freedom to pursue their academic objectives without interference from the government." García-Padilla, 490 F.3d at 15. The Court highlighted this nation's long history of safeguarding academic freedom under the First Amendment, and noted that "[a] school's selection of textbooks is . . . closely tied to its First Amendment right of expression. . . . Accordingly, the selection of textbooks is an important pedagogical decision . . .." Id. at 12-13 (citations omitted).

Whether King & King or the other books are the most suitable or age-appropriate materials available for teaching Lexington schoolchildren about issues of tolerance and diversity necessarily involves pedagogical and political issues beyond the ken of this Court. Regardless of how certain teaching materials are selected, courts ought not to involve themselves in conducting book-by-book analyses, unless a teaching program intrudes upon the constitutional rights of students or parents. Judge Wolf found no such violation here.

The appellate record reveals that Massachusetts law prohibits public schools from discriminating based on sex or sexual orientation, and requires schools to implement curricula aimed at encouraging respect for the human and civil rights of

all individuals regardless of, *inter alia*, sexual orientation. (A.15-16). The record further reveals that the defendants' use of the three "objectionable" books is consistent with the above-mentioned state mandates. (A. 199). The defendants have the First Amendment right to use these books regardless of whether it is a part of the state's core curriculum and regardless of the plaintiffs' allegations of indoctrination.[4] The defendants' conduct is also "reasonably 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." (A. 37).

Further factual development of the potential administrative burden on the defendants, should the plaintiffs be granted relief under the Opt-out Statute, can give no substance to plaintiffs' claims. As discussed at oral argument, that burden would be great, as it would require school officials to acquaint themselves with the religious beliefs of students and parents, to interrupt (and disrupt) classroom discussions or programs deemed offensive to certain students and parents, and to

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[4] As for the plaintiffs' theory that the defendants' intended to indoctrinate the plaintiffs' children, the defendants repeat the District Court's statement that, in ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court should "eschew any reliance on bold assertions, unsupportable conclusions and 'opprobrious epithets.'" Chongris v. Board of Appeals of the Town of Andover, 811 F.2d 36, 37 (1st Cir. 1987) (quoting Snowden v. Hughes, 321 U.S. 1, 10 (1944)).

provide alternative programs, staff and facilities for those students who choose to opt-out of any teaching that exposes them to the subject of same-sex couples.

Although the defendants admit that the Opt-out Statute currently requires schools to arrange for students to be excused from classrooms where curriculum "primarily" involving human sexual education or human sexuality issues is taught, the burden on the defendants – and on all school systems in Massachusetts – will increase significantly if parents have the right to be notified of "any adult-directed or initiated classroom discussions of sexuality, gender identity, and marriage constructs, " as requested by the plaintiffs. (A. 208). Under plaintiffs' view, many subjects offered at Estabrook Elementary School may include course work involving "sexuality, gender identity, and marriage construct." For example, an art teacher may ask students in art class to draw pictures of their families and describe them to the class in an effort to discuss different types of families. If a student in the art class has same-sex parents, the teacher would have to anticipate the day on which that student would present her drawing to the class, remove students such as the Parker and Wirthlin children from the classroom, create an alternative lesson plan for those students, and make sure another teacher is available to supervise the students removed from the art class. Or a social studies teacher may wish to teach about the civil rights movement, which, in turn, gives rise to a discussion about whether discrimination against gays or lesbians is prohibited. If plaintiffs should

obtain the injunctive relief they seek, the social studies teacher would have to anticipate that a student may ask such a question and give parents notice of the potential discussion topic. As the above examples illustrate, the injunctive relief plaintiffs seek is not only burdensome, but also impractical.

Further, granting injunctive relief to the plaintiffs will be harmful to students of same-sex parents, and possibly violate those students' constitutional rights. Specifically, students of same-sex parents may feel devalued if other students need to leave the classroom before they can speak about their families.[5] Public schools have a duty not to impinge on the rights of other students. Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 513 (1969). Encompassed in the Tinker "right to be left alone" is not only the right to be free from direct physical confrontation, but also the right to be free from psychological injury. Harper v. Poway Unified School Dist., 445 F.3d 1166, 1177-1178 (9th Cir. 2006), *cert. granted*, *vacated by* 127 S. Ct. 1484 (2007) (school did not abuse its discretion by banning student from wearing a t-shirt expressing religious condemnation of homosexuals where school reasonably forecast that shirt would psychologically injure gay students); see also West v. Derby Unified School Dist., 206 F.3d 1358,

[5] If Cindy's parents are gay, what lessons does she learn if several of her classmates are escorted from the classroom by a public school official whenever she discusses her home life? Certainly, Cindy does not learn about the goals of tolerance and diversity.

1366 (10th Cir. 2000) (holding that display of Confederate flag may interfere with rights of other students even where there was no indication that any student was physically accosted).

Finally, plaintiffs have not shown that the development of any factual issues in this action will give more substance to the allegations of their Complaint. In Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995), cert. den., 516 U.S. 1159 (1996), involving claims very similar to the claims here, this Court affirmed the District Court's dismissal of the plaintiffs' claims at the motion to dismiss stage under Fed. R. Civ. P. 12(b)(6). As in Brown, nothing in the instant matter precludes this Court from affirming the District Court's dismissal of the plaintiffs' claims because no further development of any factual issues in this matter can provide a potential basis for the plaintiffs' claims.

III. EVEN BORROWING FROM ESTABLISHMENT CLAUSE ANALYSIS, THE YOUNG AGE OF PLAINTIFFS' CHILDREN DOES NOT DISTINGUISH THIS CASE FROM BROWN.

During oral argument, the panel raised the issue of whether the difference in age between the minor Parker and Wirthlin children and the student plaintiffs in Brown is relevant to a free exercise analysis under the First Amendment. Plaintiffs argue, in their Brief, that the "tender years" of their children makes them particularly susceptible to indoctrination by Lexington school officials and,

therefore, some heightened level of scrutiny should be applied to their claims that defendants' use of same-sex reading materials "invade[s] and impair[s] the plaintiffs' clearly established rights to the free exercise of their religion." (A. 205; Appellants' Brief, at 14-28).

As defense counsel admitted during oral argument, defendants are aware of no case law which holds that age is not a factor under a free exercise analysis. By the same token, defendants are aware of no case law suggesting that age *should* appropriately be considered in interpreting the Free Exercise Clause of the First Amendment. The United States Supreme Court defined the proper free exercise test in Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). A policy or law that is neutral and of general applicability will be upheld against a free exercise challenge, even if it incidentally burdens religion. Id., 494 U.S. at 879. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). Thus, in the face of a neutral and generally applicable governmental policy, the burden on a religious practice is not considered, unless the free exercise claim is joined with another protected constitutional right and thereby falls within the so-called "hybrid" rights exception. Smith, 494 U.S. at 881 & n.1. Even then, the burden on religion must be substantial, akin to an impact that threatens plaintiffs' very "way of life," in order to trigger a heightened level of scrutiny. Wisconsin v. Yoder, 406 U.S. 205, 235 (1972). As this Court noted not

long ago in Gary S. v. Manchester School Dist., 374 F.3d 15, 19 (1st Cir. 2004), Smith "remains good law, albeit reflective when written of thinking of a narrow majority of justices, some of whom no longer serve."

If this Court should choose to factor the age of the Parker and Wirthlin children into a free exercise analysis, the manner in which some courts have considered age under the Establishment Clause may be instructive.[6] Government policy does not run afoul of the First Amendment prohibition against "establishment of religion" provided: (1) it has a secular purpose; (2) its principal or primary effect is one that neither advances nor inhibits religion; and (3) it does not foster "excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971); Boyajian v. Gatzunis, 212F.3d 1, 4 (1st Cir. 2000). While impressionability of schoolchildren may play a role under the second prong of the Lemon test (the "effect" of the government policy), the Supreme Court has explained that this factor remains irrelevant so long as the first prong (secular purpose) is satisfied. Good News Club v. Milford Central School, 533 U.S. 98, 116 (2001). See Child Evangelism Fellowship of Md., Inc. v. Montgomery County Public Schools, 373 F.3d 589, 602 (4th Cir. 2004). Rejecting the Milford Central

[6] Defendants addressed plaintiffs' "tender years" argument in their Brief (Brief of Defendant-Appellees, at 35-43) and, therefore, will not repeat that analysis here. The following is intended merely to supplement that analysis in further response to inquiries raised by the panel during oral argument.

School's invitation to inquire into the minds of schoolchildren who might misperceive the Good News Club's use of school facilities, Justice Thomas, writing for the majority, stated as follows:

> We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity. We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might perceive.

Good News, 533 U.S. at 119.

According to the Parkers and Wirthlins, defendants' stated purpose in using same-sex reading materials at Estabrook Elementary School was to teach children about issues of diversity and tolerance in pursuit of a "goal of maintaining an appropriate and respectful educational environment for all children." (A. 192, 199). This purpose is clearly secular.[7] See Skoros v. City of New York, 437 F.3d 1, 18 (2d Cir. 2006) (school policy of using holiday displays "to teach the lesson of pluralism by showing children the rich cultural diversity of the city in which they

[7] As recognized by Judge Wolf, Massachusetts law "requires that public school curricula encourage respect for all individuals regardless of, among other things, sexual orientation." (A. 9). See M.G.L. c. 69, §§ 1D & 1E; M.G.L. c. 76, § 5; 603 C.M.R. §§ 26.03 & 26.05; Massachusetts Comprehensive Health Curriculum Framework, Guiding Principle IV (Supp. A. 10-11).

live and by encouraging them to show tolerance and respect for traditions other than their own" held "clearly secular.") Plaintiffs dispute this professed purpose, claiming instead that defendants' *real* intent was to "intentionally indoctrinat[e] very young children to affirm the notion that homosexuality is right and moral." (A. 187, 202, 206-207).

Government's stated purpose for a policy will ordinarily be given deference, provided it is "genuine, not a sham, and not merely secondary to a religious objective." McCreary Cty. Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844864 (2005); Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 308 (2000). Moreover, as the Supreme Court recently affirmed, the test of secular purpose is an objective one.

> The eyes that look to purpose belong to an "'objective observer,'" one who takes account of the traditional external signs that show up in the "'text, legislative history, and implementation of the statute'" or comparable official act.

McCreary Cty., 545 U.S. at 862, quoting Santa Fe, 530 U.S. at 308. Because defendants' introduction of same-sex reading materials was conducted pursuant to an objectively secular purpose, the first prong of the Lemon test is met here, making the impressionability of plaintiffs' children irrelevant. Good News, 533 U.S. at 116. See Rusk v. Crestview Local School Dist., 379 F.3d 418, 421 (6th Cir. 2004) (noting that the Supreme Court "has never ruled that a school's practice might

amount to an impermissible endorsement of religion because of the impressionability of the school's young students.)

Even if impressionability were to somehow survive as a relevant factor despite the secular purpose of defendants' policy (contrary to the admonition in Good News), this Court, guided by Supreme Court precedent, must reject any argument that the age of plaintiffs' children raises an issue of constitutional magnitude. The second prong of the Lemon test mandates that the principal or primary effect of the challenged government policy neither advances nor inhibits religion. County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989). Stated another way, government endorsement of religion is prohibited. Id. The potential endorsement effect of any policy is not viewed, however, from the standpoint of the intended recipient (such as a schoolchild) but, rather, from the perspective of a "reasonable observer." Van Orden v. Perry, 545 U.S. 677, 695 (2005) (Scalia, J. concurring); Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 34 (2004) (O'Connor, J., concurring); Capitol Sq. Review and Advisory Bd. v. Pinette, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring); Skoros, 437 F.3d at 30; Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School Dist., 386 F.3d 514, 531 (3d Cir. 2004). A "reasonable observer" is one who embodies the "community ideal of social judgment," Elk Grove, 542 U.S. at 35 (O'Connor, J., concurring), and is

"fully cognizant of the history, ubiquity, and context of the practice in question." Id., 542 U.S. at 40.

As the Second Circuit noted, "it makes no sense at the effect step [of the Lemon analysis] to view a kindergarten child or first grader as someone 'fully cognizant of the history, ubiquity, and context of the practice in question.'" Skoros, 437 F.3d at 30, quoting Elk Grove, 542 U.S. at 40. Hence, the "reasonable observer" viewing the endorsement effect of a government policy cannot, by definition, be a schoolchild. Skoros, 437 F.3d at 24. Yet, this is not to say that the age of the intended recipients necessarily plays no part in the effect analysis. The objective reasonable observer, in noting the "context" of the practice in question, would take into account the fact that schoolchildren were the intended recipients of the practice and, because of their age, may be more susceptible to any religious message. Id., 437 F.3d at 24-25, 30.

"The effect prong of the endorsement test . . . is a question of law that [the] court decides without reference to the reactions of individual viewers." O'Connor v. Washburn Univ., 416 F.3d 1216, 1231 n.7 (10th Cir. 2005) (applying the objective "reasonable observer" standard). Thus, the District Court below was free to conclude, as a matter of law, that no reasonable person, familiar with the history, ubiquity, and context of the practice in question, could conclude that the *principal* or *primary* effect of defendants' use of same-sex reading materials in Estabrook

Elementary School was to advance or inhibit religion. A contrary ruling would effectively give plaintiffs a heckler's veto over an otherwise secular policy, thereby allowing plaintiffs' subjective perceptions as to the effect of that policy on their religious beliefs to derail defendants' use of same-sex reading materials in the public schools. No such right is protected under the Constitution. The young age of plaintiffs' children cannot distinguish this case from Brown, even under an Establishment Clause analysis. Therefore, the District Court decision must be affirmed.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the Brief of Defendant-Appellees, the defendants respectfully request that this Honorable Court affirm the Judgment of dismissal entered below.

Respectfully submitted,
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Dated: December 17, 2007

ADDENDUM

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts
Articles of Amendment

Art. XLVI. Substitute for Eighteenth Article of Amendment

ART. XLVI. (In place of and substitution for article XVIII of the articles of amendment of the constitution.)

Art. XVIII. Free exercise of religion; support of public schools; use of public money or credit for schools and institutions

SECTION 1. No law shall be passed prohibiting the free exercise of religion.

MASSACHUETTS GENERAL LAWS

Chapter 69: Section 1D. Statewide educational goals; academic standards; vocational training; grant program

Section 1D. The board shall establish a set of statewide educational goals for all public elementary and secondary schools in the commonwealth.

The board shall direct the commissioner to institute a process to develop academic standards for the core subjects of mathematics, science and technology, history and social science, English, foreign languages and the arts. The standards shall cover grades kindergarten through twelve and shall clearly set forth the skills, competencies and knowledge expected to be possessed by all students at the conclusion of individual grades or clusters of grades. The standards shall be formulated so as to set high expectations of student performance and to provide clear and specific examples that embody and reflect these high expectations, and shall be constructed with due regard to the work and recommendations of national organizations, to the best of similar efforts in other states, and to the level of skills, competencies and knowledge possessed by typical students in the most educationally advanced nations. The skills, competencies and knowledge set forth in the standards shall be expressed in terms which lend themselves to objective measurement, define the performance outcomes expected of both students directly entering the workforce and of students pursuing higher education, and facilitate comparisons with students of other states and other nations.

The standards shall provide for instruction in at least the major principles of the Declaration of Independence, the United States Constitution, and the Federalist Papers. They shall be designed to inculcate respect for the cultural, ethnic and racial diversity of the commonwealth and for the contributions made by diverse cultural, ethnic and racial groups to the life of the commonwealth. The standards may provide for instruction in the fundamentals of the history of the commonwealth as well as the history of working people and the labor movement in the United States. The standards may provide for instruction in the issues of nutrition, physical education, AIDS education, violence prevention, and drug, alcohol and tobacco abuse prevention. The board may also include the teaching of family life skills, financial management and consumer skills, and basic career exploration and employability skills. The board may also include in the standards a fundamental knowledge of technology education and computer science and keyboarding skills; the major principles of environmental science and environmental protection; and an awareness of global education and geography. The board may set standards for student community service-learning activities and programs. The board may also institute a process for drawing up additional standards in other areas of education.

Academic standards shall be designed to avoid perpetuating gender, cultural, ethnic or racial stereotypes. The academic standards shall reflect sensitivity to different learning styles and impediments to learning. The board shall develop procedures for updating, improving or refining standards, but shall ensure that the high quality of the standards is maintained. A copy of said standards shall be submitted to the joint committee on education, arts, and humanities at least sixty days prior to taking effect. The standards shall also include criteria for three determinations or certificates as follows:

(i) The "competency determination" shall be based on the academic standards and curriculum frameworks for tenth graders in the areas of mathematics, science and technology, history and social science, foreign languages, and English, and shall represent a determination that a particular student has demonstrated mastery of a common core of skills, competencies and knowledge in these areas, as measured by the assessment instruments described in section one I. Satisfaction of the requirements of the competency determination shall be a condition for high school graduation. If the particular student's assessment results for the tenth grade do not demonstrate the required level of competency, the student shall have the right to participate in the assessment program the following year or years. Students who fail to satisfy the requirements of the competency determination may be eligible to receive an educational assistance plan designed within the confines of the foundation budget to impart the skills, competencies and knowledge required to

attain the required level of mastery. The parent, guardian or person acting as parent of the student shall have the opportunity to review the remedial plan with the student's teachers. Nothing in this section shall be construed to provide a parent, guardian, person acting as a parent or student with an entitlement to contest the proposed plan or with a cause of action for educational malpractice if the student fails to obtain a competency determination.

(ii) The "certificate of mastery" shall be based upon a determination that the recipient has demonstrated mastery of a comprehensive body of skills, competencies and knowledge comparable to that possessed by accomplished graduates of high school or equivalent programs in the most advanced education systems in the world. The criteria for a certificate of mastery may incorporate a number of factors which may include, but not be limited to, any of the following: high school graduation standards, superior performance on advanced placement tests administered by the educational testing service, and demonstrated excellence in areas not reflected by the state's assessment instruments, such as artistic or literary achievement. Eligibility for potential receipt of a certificate of mastery shall extend to all secondary students residing in the commonwealth.

(iii) The "certificate of occupational proficiency" shall be awarded to students who successfully complete a comprehensive education and training program in a particular trade or professional skill area and shall reflect a determination that the recipient has demonstrated mastery of a core of skills, competencies and knowledge comparable to that possessed by students of equivalent age entering the particular trade or profession from the most educationally advanced education systems in the world. No student may receive said certificate of occupational proficiency without also having acquired a competency determination.

Nothing in this chapter shall prohibit a student from beginning a program of vocational education before achieving a determination of competency. Such vocational education may begin at grade nine, ten or eleven. No provision of law shall prohibit concurrent pursuit of a competency determination and vocational learning. There shall be no cause of action for a parent, guardian or student who fails to obtain a competency determination, a certificate of mastery or a certificate of occupational proficiency.

Subject to appropriation, the board shall establish a grant program which shall award grants to school districts for the costs associated with establishing advanced placement courses. The board shall promulgate regulations defining the standards of eligibility and other implementation guidelines.

Subject to appropriation, the board shall establish an advanced placement test fee grant program which shall award grants to school districts for the reimbursement of application fees for students based on financial need in order to assist students with paying the fee for advanced placement tests. The board shall promulgate regulations defining the standards of eligibility and other implementation guidelines for this program.

Chapter 69: Section 1E. Curriculum frameworks

Section 1E. The board shall direct the commissioner to institute a process for drawing up curriculum frameworks for the core subjects covered by the academic standards provided in section one D. The curriculum frameworks shall present broad pedagogical approaches and strategies for assisting students in the development of the skills, competencies and knowledge called for by these standards. The process for drawing up and revising the frameworks shall be open and consultative, and may include but need not be limited to classroom teachers, parents, faculty of schools of education, and leading college and university figures in both subject matter disciplines and pedagogy. In drawing up curriculum frameworks, those involved shall look to curriculum frameworks, model curricula, content standards, attainment targets, courses of study and instruction materials in existence or in the process of being developed in the United States and throughout the world, and shall actively explore collaborative development efforts with other projects, including but not limited to the national New Standards Project. The curriculum frameworks shall provide sufficient detail to guide and inform processes for the education, professional development, certification and evaluation of both active and aspiring teachers. They shall provide sufficient detail to guide the promulgation of student assessment instruments. They shall be constructed to guide and assist teachers, administrators, publishers, software developers and other interested parties in the development and selection of curricula, textbooks, technology and other instructional materials, and in the design of pedagogical approaches and techniques for early childhood programs and elementary, secondary and vocational-technical schools. The board may review and recommend instructional materials which it judges to be compatible with the curriculum frameworks.

Frameworks shall be designed to avoid perpetuating gender, cultural, ethnic or racial stereotypes. The frameworks shall reflect sensitivity to different learning styles and impediments to learning. The board shall develop procedures for updating, improving or refining said curriculum frameworks. A copy of said

frameworks shall be submitted to the joint committee on education, arts and humanities at least sixty days prior to taking effect.

Chapter 76: Section 5. Place of attendance; violations; discrimination

Section 5. Every person shall have a right to attend the public schools of the town where he actually resides, subject to the following section. No school committee is required to enroll a person who does not actually reside in the town unless said enrollment is authorized by law or by the school committee. Any person who violates or assists in the violation of this provision may be required to remit full restitution to the town of the improperly-attended public schools. No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion, national origin or sexual orientation.

Education Laws and Regulations

603 CMR 5.00:
Dispute Resolution under Parental Notification Law

Section:
5.01: Authority, Scope and Purpose
5.02: Definitions
5.03: Local Process for Dispute Resolution
5.04: Department of Education Process for Dispute Resolution
View All Sections

5.01: Authority, Scope and Purpose

(1) The Board of Education promulgates 603 CMR 5.00 pursuant to its authorit
M.G.L. c. 69, ' 1B and M.G.L. c. 71, ' 32A.

(2) 603 CMR 5.00 governs the resolution of disputes arising under M.G.L. c. 71
concerning notice, access to instructional materials, and student exemptions wi
respect to curriculum that primarily involves human sexual education or huma
sexuality issues, as defined in 603 CMR 5.02.

(3) 603 CMR 5.00 is intended to encourage local resolution of disputes arising
M.G.L. c. 71, ' 32A, and to provide for resolution by the Department of Educatic
when those disputes cannot be resolved by the parties at the local school or sch
district level.

Regulatory Authority:
603 CMR 5.00 M.G.L. c.69, '1B; c.71, '32A

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5.04: Department of Education Process for Dispute Resolution
View All Sections

5.03: Local Process for Dispute Resolution

(1) A parent who is dissatisfied with an action or decision of the school principa M.G.L. c. 71, ' 32A may submit a written request to the superintendent of schoo review of the issue. Except in extenuating circumstances, the parent shall subm request within 30 days of the action or decision of the principal.

(2) The superintendent or designee shall review the issue and provide the parer timely written decision within 15 days of the request, unless extenuating circur require a delay.

(3) A parent who is dissatisfied with an action or decision of the superintenden M.G.L. c. 71, ' 32A may submit a written request to the school committee for re the issue.

(4) The school committee shall review the issue and provide the parent with a t written decision within 30 days of the request, unless extenuating circumstance a delay.

(5) The decision of the school committee on any issue arising under M.G.L. c. 7 shall be considered the final local decision on the matter.

Regulatory Authority:
603 CMR 5.00 M.G.L. c.69, '1B; c.71, '32A

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5.02: Definitions
5.03: Local Process for Dispute Resolution
5.04: Department of Education Process for Dispute Resolution
View All Sections

5.04: Department of Education Process for Dispute Resolut

(1) A parent who is dissatisfied with the final local decision on an issue arising ι
M.G.L. c. 71, ' 32A may submit a written request for review to the Commissione
15 days of the date of the final local decision. The written request shall specify t
on which the parent alleges the school or school district has not met the require
M.G.L. c. 71, ' 32A and shall include a copy of the final local decision and any ot
relevant correspondence. The parent shall send a copy of the written request to
superintendent of schools or, in the case of a charter school, to the charter scho

(2) Based on his review of the material submitted by the parent, the Commissio
determine the process to be followed in resolving the dispute under M.G.L. c. 7
and shall notify the parties within ten days of receipt of the request. The Comm
may propose alternative dispute resolution, including mediation, and may appc
fact-finder or seek the assistance of experts as he deems appropriate to assist in
informal resolution of the matter.

(3) If the matter is not otherwise resolved, the Commissioner shall designate a
officer who will conduct an adjudicatory hearing in accordance with 801 CMR 1
Standard Adjudicatory Rules of Practice and Procedure.

(4) The Commissioner or his designee shall issue a written decision to the parti
30 days of the conclusion of his review of the matter, unless extenuating circum
require a delay. The decision of the Commissioner or his designee shall be the f
agency decision.

Regulatory Authority:
603 CMR 5.00 M.G.L. c.69, '1B; c.71, '32A

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Education Laws and Regulations

603 CMR 26.00: Access To Equal Educational Opportunity

Section:

26.01: Purpose and Construction of 603 CMR 26.00
26.02: School Admissions
26.03: Admission to Courses of Study
26.04: Career and Educational Guidance
26.05: Curricula
26.06: Extra-Curricular Activities
26.07: Active Efforts
26.08: Notification and Complaint Procedure
26.09: Private Right of Action
View All Sections

26.03: Admission to Courses of Study

(1) All courses of study offered by a public school shall be open and avail students regardless of race, color, sex, religion, national origin or sexual orientation.

(2) A public school shall determine what courses or units of study are re a student without regard to the race, color, sex, religion, national origin orientation of that student.

(3) A public school shall not schedule students into courses or units of st the basis of race, color, sex, religion, national origin or sexual orientatio

(4) No student, on the basis of race, color, sex, religion, national origin, l English-speaking ability or sexual orientation, shall be discriminated ag accessing the courses of study and other opportunities available through school system of the city or town in which he or she resides.

(5) Nothing in 603 CMR 26.03 shall be construed to prevent schools fro providing separately to each sex those segments of a program of instruct dealing exclusively with human sexuality.

Regulatory Authority:
603 CMR 26.00: M.G.L. c. 76, § 5.

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Education Laws and Regulations

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26.05: Curricula
26.06: Extra-Curricular Activities
26.07: Active Efforts
26.08: Notification and Complaint Procedure
26.09: Private Right of Action
View All Sections

26.05: Curricula

(1) All public school systems shall, through their curricula, encourage re: the human and civil rights of all individuals regardless of race, color, sex national origin or sexual orientation.

(2) Teachers shall review all instructional and educational materials for : and demeaning generalizations, lacking intellectual merit, on the basis o color, sex, religion, national origin or sexual orientation. Appropriate act discussions and/or supplementary materials shall be used to provide bal context for any such stereotypes depicted in such materials.

(3) Each school shall provide equal opportunity for physical education fc students. Goals, objectives and skill development standards, where used neither be designated on the basis of sex, nor designed to have an advers on members of either sex.

Regulatory Authority:
603 CMR 26.00: M.G.L. c. 76, § 5.

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RULE 1:03. UNIFORM CERTIFICATION OF QUESTIONS OF LAW

Section 1. Authority to Answer Certain Questions of Law. This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

Section 2. Method of Invoking. This rule may be invoked by an order of any of the courts referred to in Section 1 upon that court's own motion or upon the motion of any party to the cause.

Section 3. Contents of Certification Order. A certification order shall set forth

(1) the question of law to be answered; and

(2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Section 4. Preparation of Certification Order. The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to this court by the clerk of the certifying court under its official seal. This court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of this court, the record or portion thereof may be necessary in answering the questions.

Section 5. Costs of Certification. Fees and costs shall be the same as in civil appeals docketed before this court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

Section 6. Briefs and Arguments. Proceedings in this court shall be those provided in these rules, the Massachusetts Rules of Appellate Procedure or statutes governing briefs and arguments, so far as reasonably applicable.

Section 7. Opinion. The written opinion of this court stating the law governing the questions certified shall be sent by the clerk under the seal of this court to the certifying court and to the parties.

Section 8. Power to Certify. This court on its own motion or the motion of any party may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

Section 9. Procedure on Certifying. The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

Section 10. Uniformity of Interpretation. This rule shall be so construed as to effectuate its general purpose to make uniform the law of those states which adopt it; or enact a uniform certification statute.

Section 11. Short Title. This rule may be cited as the Uniform Certification of Questions of Law Rule.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,254 words. In making this certification I have relied on the word-count of the wordprocessing system used to prepare the brief.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Office Word 2003 in 14-point plain roman type including serifs.

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CERTIFICATE OF SERVICE

I hereby certify that on this seventeenth day of December 2007, I have served two (2) copies of the within Supplemental Brief upon counsel listed below by priority mail, postage prepaid:

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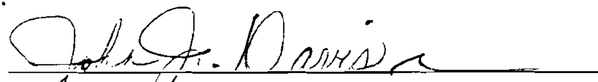

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