UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 07-1528

DAVID PARKER, TONIA PARKER, JOSHUA PARKER, JOSEPH ROBERT WIRTHLIN, ROBIN WIRTHLIN, JOSEPH ROBERT WIRTHLIN, JR.,
Plaintiffs-Appellants

v.

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

ACLU OF MASSACHUSETTS, GAY & LESBIAN ADVOCATES & DEFENDERS, HUMAN RIGHTS CAMPAIGN FOUNDATION, HUMAN RIGHTS CAMPAIGN, LEXINGTON C.A.R.E.S., LEXINGTON TEACHERS ASSOCIATION, MASSACHUSETTS TEACHERS ASSOCIATION, RESPECTING DIFFERENCES
Amicus

BRIEF OF APPELLANT
ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
06-10751

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August 8, 2007

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STATEMENT OF THE CASE

The plaintiffs filed their four (4) count complaint on April 27, 2006. (A. 1.) In it, they asserted that the Town of Lexington and several of its employees had violated a number of their fundamental constitutional rights, including the fundamental right to direct the education and moral upbringing of their children, and the fundamental right to the free exercise of religion. (A. 186-209.)

The defendants moved to dismiss per Rule 12(b)(6). (A. 3.) The motion was fully briefed. (A. 84-121, 46-81.)

On February 7, 2007, the court heard oral argument. Also on that date, the American Civil Liberties Union was

allowed to file an amicus brief. (A. 5.)[1] On February 23, 2007, the court issued a thirty-seven (37) page decision dismissing the federal claims on the merits and dismissing the Massachusetts state law claims without prejudice to refiling them in state court. (A. 8-45.)

A notice of appeal was timely filed. (A. 6.) The matter was docketed in this Court on or about June 9, 2007.

STATEMENT OF FACTS

The plaintiffs brought the action individually and on behalf of their elementary school children. 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. The District Court described their belief as "one holding that marriage is necessarily only a holy union between a man and a woman." (A. 8-10.)

The plaintiffs alleged that the defendants jointly,

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1 The docket indicates that the formal order granting leave was dated February 9, 2007.

severally, and by agreement, chose to "coercively indoctrinate the children into moral belief systems that are markedly different from those of their parents." (A. 194, 203-204; Complaint, paras. 33, 66.) They also alleged that the defendants harbor "a specific intention to denigrate their sincere and deeply held faith." (A. 203-204, 207; Complaint, para. 66.) The court accepted this allegation as well pled. (A. 8-10.)

In March 2006, the Wirthlins' child, Joey, was in the second grade at the Estabrook School. On or about Friday, March 24, 2006, the teacher in Joey's class read out loud to the students a book entitled King and King. This 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 has an arm longer than her other arm. He discovers he is homosexual, falls in love, and lives happily ever after with another homosexual male.[2] The two males are

[2] Indeed, the book could be objectively and fairly viewed as actually presenting the homosexual choice as the "better" or "best" choice.

depicted as kissing at the end of the book.[3] (A. 201; Complaint, para. 53.)

The plaintiff families have no interest in controlling public school curriculum. They desire only the most minimal of relief: to be notified when this type of material is to be presented, and on occasion to be allowed to "opt out" of the adult-directed and initiated discussions they find immoral. (A. 207-208.) They communicated their concerns to the defendants and tendered reasonable requests that the children be allowed to "opt-out" of this indoctrination. The Parkers also requested to be notified in advance of any other planned human sexual education and discussions of human sexuality issues such as abortion, birth-control, pre-marital sex, or surveys, and requested the right to view any materials within the school pertaining to those topics within the reach of their child.

The catalyst for the litigation is the defendants' refusal to even consider their reasonable requests. (A. 200, 203; Complaint, paras. 45, 65.) This request was formally denied by Superintendent Ash in December, 2005.

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[3] By agreement, the court was provided with copies of the books during oral argument. A copy of one is included at the end of the appendix. (A. 232-257.)

(A. 195; Complaint, para. 35.)

SUMMARY OF THE ARGUMENT

The complaint alleges violations of core fundamental rights. Parents possess an absolute right to "direct the [moral] upbringing of their children." This right is related to, but distinct from, the fundamental right to the free exercise of religion. Employment Div. v. Smith, 494 U.S. 872, 876-77 (1990). There is as well a fundamental right to enjoy a zone of privacy related to intimate family matters. See, M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996). (pp. 9-13.)

These rights are not forfeited at the schoolhouse door. C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3d Cir. 2005) A child does not become a "mere creature of the state" simply because she attends public school. Parents maintain a "high duty" to direct the moral and religious upbringing of their children. Because this right is vested in the due process clause of the Fourteenth Amendment, it "provides heightened protection against government interference." (pp. 14-16.)

This Court's ruling in Brown v. Hot, Sexy and Safer Prod., 68 F. 3d 525 (1st Cir. 1995) does not require dismissal of the plaintiffs' complaint here. Brown dismissed claims alleging constitutional violations

resulting from the graphic teaching of AIDS awareness to high school students. Here, very young children are being taught to ignore their deeply held religious faith. (pp. 14-33.)

Age has always been a crucial factor in First Amendment jurisprudence where state sponsored "indoctrination" is alleged. (pp. 15-16.) The tender ages of the children create a "heightened concern" that should apply equally to all First Amendment cases, even if most of the guiding precedent derives from establishment clause litigation. "Establishment clause" cases for the most part have addressed governmental efforts to benefit religion or particular religions, and thus allegations of an "attempt to disfavor" a religion, such as here are "properly analyzed under the free exercise clause." Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1190 (9th Cir. 2006) (citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993)). The Third Circuit has recognized the importance of age in these types of cases. (pp. 13-28.)

The good faith allegation of indoctrination also distinguishes this case from Brown, where only exposure to uncomfortable facts was in question. "[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). Both the defendants and the lower court openly acknowledge the interest in dissemination of the ideology of "diversity." True diversity must also include the plaintiffs and respect for their constitutionally protected faith. (pp. 28-33.)

A claim that the disseminated materials are facially neutral does not require dismissal as a matter of law. "The free exercise clause protects against governmental hostility which is masked as well as overt." 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.) (pp. 31-32.)

The complaint carefully asserts that the defendants intruded upon the plaintiffs' hybrid rights to the "free exercise" of religion and to two other clearly defined fundamental constitutional rights: the right of privacy, and the right to direct their children's moral upbringing. Smith, 494 U.S. at 882. This "hybrid rights" doctrine resulted from the Supreme Court's express and specific concern with the correlation between religion and parenthood. Id. (pp. 33-39.)

Hybrid rights have been successfully asserted against

school districts. The allegation of "indoctrination" also requires strict scrutiny. "Introducing a child to sensitive topics before a parent might have done so herself can complicate and even undermine parental authority." C.N., 430 F.3d at 185. (pp. 39-41.)

The privacy rights violation also mitigates in favor of elevated review. Choices about marriage, family life, and the upbringing of children are among the associational rights this court has ranked as "'of basic importance in our society,' rights sheltered by the fourteenth amendment against the state's unwarranted usurpation, disregard, or disrespect." M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996). (pp. 43-45.)

ARGUMENT

STANDARD OF REVIEW

The District Court allowed the defendants' Motion to Dismiss per Rule 12(b)(6). Thus, review is de novo. The court must view the well-pled allegations and inferences broadly and in plaintiffs favor to determine if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim. "[The court] is bound to give the [plaintiff] the benefit of every reasonable inference . . . ." Retail Clerks Intern. Ass'n, Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746, 754 n.6 (1963); Hobson v. McLean

Hosp. Corp, 402 Mass. 413, 415 (1988).

A court should not lightly grant dismissal. Only if the plaintiff can set forth no set of facts that would entitle him to relief should dismissal be even considered. Indeed, a motion to dismiss a complaint for failure to state a claim on which relief can be granted should not be allowed unless it appears certain that the complaining party is not entitled to relief under any statement of facts that could be proved in support of the claim. "We accept the allegations of the complaint as true, and determine whether, under any theory, the allegations are sufficient to state a cause of action in accordance with the law." Brown, 63 F.3d at 530 (citing Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1st Cir. 1994)); Knight v. Mills, 836 F.2d 659, 664 (1st Cir. 1987). A complaint can not be dismissed simply "because it asserts a novel or extreme theory of liability or improbable facts." Mun. Light Co. v. Commonwealth, 34 Mass. App. Ct. 162, 167 (1993) (citations omitted).

There is nothing novel or extreme about the plaintiffs' allegations. The plaintiffs' personal religious beliefs are grounded in thousands of years of tradition and faith. The legal principles supporting their modest requests are grounded in decades of constitutional jurisprudence.

I. THE COMPLAINT IMPLICATES CORE FUNDAMENTAL RIGHTS

The fundamental right of parents to "direct the [moral] upbringing of their children" is a cornerstone of substantive due process. Troxel v. Granville, 530 U.S. 57, 65 (2000). See also, 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). This right is related to, but distinct from, the fundamental right to the free exercise of religion. Smith, 494 U.S. at 876-77. There is also a fundamental right to enjoy a zone of privacy related to intimate family matters. See M.L.B., 519 U.S. at 116.

Parents who choose to send their children to public schools do not give up these rights. "[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)). Of course, public schools must by definition act *in loco parentis*. Many parental choices about education are delegated to the schools. Even so, parents must always have primacy in exercising the right to direct moral upbringing that encompasses "the inculcation of moral standards." Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

When a child crosses the threshold of the public school doors, he does not become a "mere creature of the state." Pierce, 268 U.S. 535. See also, M.L.B., 519 U.S. at 116. Courts cannot remain idle when public schools violate fundamental rights. As the Supreme Court declared, "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted." West Virginia State Bd of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

There is no doubt the Constitution allows the plaintiff parents to remove their children from the public schools altogether. Yoder, 406 U.S. at 233; Pierce, 268 U.S. at 535. The District Court apparently acknowledged this basic black- letter principle. However, the District Court left the plaintiffs 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). The difficult question is whether the parents of very young children have any say at all over what the public schools may teach their children about private family

behavior.

The historical analysis of "parental rights" begins with Meyer v. Nebraska and Pierce v. Society of Sisters. 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 reasoning is instructive: ". . .those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535. The Pierce expression of a "high duty" is consistent with the right of parents to direct the religious upbringing of their children and reflects a recognition that the genesis of the parental right is both moral and religious. "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).

By 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.

In the year 2000, the Supreme Court reiterated the importance of this right. "[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Troxel, 530 U.S. 57, 66 (2000) (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)) (other citations omitted). Accord, Pelletier v. Maine Principals' Ass'n, 261 F. Supp. 2d 10 n.8 (D. Me. 2003). In Troxel, the Court reiterated that parents have a **fundamental** liberty interest to "direct the upbringing and education of children under their control." Id. at 65 (emphasis supplied) (quoting Pierce, 268 U.S. at 534-35). Moreover, because this right is vested in the Due Process Clause of the Fourteenth Amendment, it "provides **heightened** protection against government interference." Id. at 65 (emphasis supplied) (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)). In Troxel, eight justices recognized the parental right to be "fundamental."

Although a public school exerts a high level of control over its students, its control is not absolute. American constitutional jurisprudence affirms that this society is not one where children are wholly disconnected from their parents and educated entirely by the state. If the fundamental parental right is to have 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). School officials have only a secondary responsibility and must respect the rights of parents. Id.

Thus, there is little doubt that within its four corners, the complaint has alleged violations of fundamental rights. This is not mere craftsmanship. This type of claim, as established by the facts, is the very type of claim the Supreme Court intended to preserve in Smith, supra.

II. BROWN V. HOT, SEXY AND SAFER PRODUCTIONS IS DISTINGUISHABLE

The District Court's decision acknowledged the fundamental nature of the plaintiffs' due process claims, in the abstract. (A. 26-27.) Nonetheless, it held that this Court's decision in Brown v. Hot, Sexy and Safer Productions, 530 F. 3rd 525 (1995) required dismissal of the plaintiffs' complaint. (A. 10.) This is the primary error of law in the District Court's opinion.

Brown upheld the dismissal of a lawsuit brought by

parents of high school students who were required to attend a school assembly in which adult sexual topics were discussed. Some of the discussion was quite graphic. Even so, the First Circuit held that no constitutional right was implicated in that unique circumstance.

The District Court here ruled that the Brown decision "constitutes binding precedent" because the federal claims alleged here are not distinguishable in any material respect from those dismissed in Brown. (A. 10.) That ruling stretches Brown well beyond its facts, and is inconsistent with what actually has been well pled.

A. The Age of the Children Removes this Case from the ambit of Brown's Holding

Contrary to the District Court's view, this is a true case of first impression. The constitutional significance of this case lies in the simple fact that the children are very young. The adult plaintiffs have alleged in good faith that the defendants have intentionally chosen to indoctrinate their youngest children with moral concepts antithetical to their faith. (A. 187, 194, 203.) By contrast, Brown dealt with high school students exposed to aspects of adult sexual behavior in a single school assembly.

The District Court ruled that the obvious factual distinction between this case and Brown was immaterial as a matter of law. (A. 28, 42) In so doing, the District Court

erroneously attempted to distinguish numerous cases lending strong support to the proposition that age is a crucial factor in First Amendment jurisprudence alleging "indoctrination." (A. 30-34.) See, e.g., Sherman v. Cmty. Consol. Sch. Dist. 21, 8 F.3d 1160, 1164 (1993); Lemon v. Kurtzman, 403 U.S. 602, 616 (1971).

1. The Tender Ages Create a "Heightened Concern"

"(T)he process of inculcating religious doctrine is . . . enhanced by the impressionable age of the pupils, in primary schools particularly." Id. at 616. (striking down salary aid to parochial school teachers as establishment clause violation.) There are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." Bd. of Ed. of Westside Cmty. Sch. (Dist. 66) v. Mergens, 496 U.S. 226, 261-62 (1990) (Kennedy, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 584 (1987); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring). See also, Sherman, 8 F.3d at 1164. In Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985), the Court stated: "The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as free and

voluntary choice." See also Lee v. Weisman, 505 U.S. 577, 592 (1992) (noting heightened concerns of "subtle coercive pressure in the elementary public schools.") "What may appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion." Id. at 619.[4]

2. The Heightened Concern Applies Equally to "Free Exercise" Cases

[4] Many of the cases cited in this section involve "establishment clause" challenges. The plaintiffs' complaint in this case does not directly implicate the establishment clause. However, the defendants' elevation of secular humanism over the plaintiffs' private religious views is analogous in some ways to an "establishment clause" violation. The "establishment clause"dogma is therefore useful even if not alone dispositive. See note 6, p. 18, infra

This authority for the proposition that age is an important factor was presented to the District Court. (A. 68-69.) The court's rationale for ignoring or minimizing this all-important authority was an erroneous determination that cases pled under the "establishment clause" are in an entirely "different context."[5] This was reversible error.

True, many of the cases recognizing the importance of age when dealing with religious freedom are first and foremost establishment clause cases. E.g., Lemon, 403 U.S. at 616; Sherman, 8 F.3d at 1164. But that is true only because the good faith claim of indoctrination is more likely to arise in an establishment clause context. Often in an establishment clause case, there is an allegation that the state has chosen to elevate one faith over another. A subsidiary question then arises concerning how the denigrated faith is affected. The language in the establishment clause cases simply reflects the common sense

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5 The court wrote: "In the **different context** of deciding whether government conduct violates the establishment clause of the First Amendment by sending a message that the government is endorsing religion, the Supreme Court has found both the school setting and the young age of the children to be relevant." (A. 28.) (Emphasis supplied)

observation that very young children are far more susceptible to "indoctrination" generally than older persons.

That the susceptibility of very young children to indoctrination is more often discussed in establishment clause cases than in "free exercise cases" does not detract from its materiality in the context of this unique and important case. Indeed it would not be a stretch to posture this case as an establishment clause one because the complaint clearly alleges that the state has established a form of doctrinal secularism.[6] However, establishment clause cases for the most part have addressed governmental efforts to benefit religion or particular religions," and thus allegations of an "attempt to disfavor" a religion, such as here are "properly analyzed under the Free Exercise Clause." Harper, 445 F.3d at 1190 (citing Lukumi, 508 U.S. at 532 (Appeal subsequently dismissed as moot). Lukumi states that, at a minimum, the protections of the free

6 Were this Court to view the matter as an "establishment clause" violation, leave to amend should be allowed. The plaintiffs adhered to the Supreme Court's views as to how similar cases should be analyzed, and determined that the proper focus should be on the "free exercise" clause. Harper, 445 F.3d at 1190. However, the complaint can not be dismissed if it survives on any theory. Given that the matter is one of first impression, the plaintiffs should not be penalized for adhering to the Supreme Court's previous analysis in an analogous circumstance. A "First Amendment"violation is pled.

exercise clause pertain if the law at issue discriminates against some or all religious beliefs. Lukumi, 508 U.S. at 532.

The "establishment clause" and the "free exercise clause" are doctrinal cousins, inextricably linked in the First Amendment. Many, many cases refer to the "free exercise clause" and the "establishment clause" in the plural as the "religious clauses." This dates back at least to Wisconsin v. Yoder,

> Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the **Religious Clauses**.

Yoder, 406 U.S. at 215 (emphasis supplied); see also Van Orden v. Perry, 545 U.S. 677, 698 (2005) (tracing the history of the religious clauses in the plural).

The "religious clauses" prohibit the state from teaching religion. From plaintiffs' perspective, that is

exactly what this commonwealth has chosen to do, regardless of the professed secular intent. A five-year-old has an extremely limited ability to think critically. His or her ability to do so is not altered by the constitutional theory espoused on his or her behalf. "The beliefs of children of tender years whose experience is limited are the function of environment as much as free and voluntary choice." Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985).

To further explain its erroneous distinction between "free exercise" and "establishment clause" in the context of age, the court digressed into an explanation of the public schools' rights and obligations to teach civic values as part of its preparation for citizenship. (A. 30, citing Plyer v. Doe, 457 U.S. 220, 221 (1982); Ambach v. Norwalk, 441 U.S. 68, 76, 80 (1979)). This judicial digression is an adoption of the defendants' explanation for their misconduct and cannot be accepted. No party questions the defendants' good faith belief in diversity. No one questions their sincere belief that their choice of materials is intended to promote civic virtue. No one questions that the majority of people in Lexington may favor the mode of discourse the defendants promote.

The defendants' sincerity is simply irrelevant to the question of whether their conduct poses an unconscionable

and unconstitutional burden upon plaintiffs' sincerely held religious beliefs. The court failed to address how intentional indoctrination and denigration of a minority faith teaches civic values. The court ignored or glossed over the most important aspect of the jurisprudence: the fundamental nature of the rights plaintiffs seek to protect. (See Section I, supra.)

Civic values can be taught in many ways. Many such values are supported by all known faiths. For example, most faiths have a tenet similar to the so-called "golden rule." Most faiths support principles of honesty and integrity.

Regardless of its view of civic virtue, the government's right to teach it ends when it conflicts with the parents "high duty" as defined by Pierce. The simple fact is that the defendants' (and District Court's) view of civic virtue greatly intrudes upon and burdens the plaintiffs' deeply held religious views. This is well alleged but ignored. (A. 187-208.) For the purpose of a 12(b)(6) motion, the plaintiffs' allegations must be accepted as true.

Following its irrelevant digression, the District Court then returned to the topic at hand: whether age distinguishes the instant matter from Brown. The court wrote that "neither the Supreme Court nor the First Circuit

have suggested that parents have constitutional rights concerning public elementary school students that are different or greater than their rights concerning older students." (A. 30.) This observation is all the more reason to treat this as a case of first impression. The distinction created by age is one of nature, not previously espoused court order.

Perhaps even more significantly, in the cases involving adolescents, there is an undercurrent of recognition that the public schools are struggling with a potential public health crisis resulting from societal exposure of post-pubescent adolescents to sexual permissiveness. Although the courts do not treat these facts as doctrinally dispositive in the First Amendment context, there is at least a sensibility throughout all of these types of cases that the courts should not intrude upon the prerogative of the public authorities to address the scourge of AIDS, other sexually-transmitted diseases, and teen pregnancy. E.g., Brown, supra; C.N., 430 F.3d at 185; Curtis v. Sch. Comm. of Falmouth, 420 Mass. 749, 754 (1995). The Ninth Circuit explicitly referred to these types of cases narrowly, describing them as cases dealing with "school programs that educate children in sexuality and health." Fields v. Palmdale, 427 F. 3d 1197, 1205 (9th Cir. 2005), amended by

and re-aff'd, 447 F.3d 1187 (9th Cir. 2006)[7] (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, supra.)

None of this thinking applies here. The defendants' sole motivation is their own political determination that the plaintiffs' faith is morally incorrect, and that eradication of their beliefs is a civic virtue. The District Court's opinion adopts these views. It writes:

> "Minds, of course, are hard to change." Howard Gardner, *Changing Minds: The Art and Science of Changing our Own and Other People's Minds* 1 (2004). "[A] key to changing a mind is to produce a shift in the individual's 'mental representations[.]'" Id. at 5. As it is difficult to change attitudes and stereotypes after they have developed, it is reasonable for public schools to attempt to teach understanding and respect for gays and lesbians to young students in

[7] Justice Alito sat on the panel that issued this ruling.

> order to minimize the risk of damaging abuse in school of those who may be perceived to be different. (A. 38.)

This open acknowledgment of an intention to change plaintiffs' faith is unconstitutional. No one disputes the rights of all students to respect in the public schools, regardless of their sexual preferences or identities. Overlooked is the fact that the plaintiffs are the very a small minority of believers who also need the protection the Constitution affords.

Contrary to the views of the defendants and the District Court, a public school has no right to change children's minds about their deeply held faith, particularly in the private areas of marriage and procreation. The defendants' effort to do so creates an enormous burden upon the parents and the minor plaintiffs who will be emotionally conflicted and drained. There is nothing voluntary about a five, six or seven-year-old attending the early grades of elementary school. School and classroom attendance in this Commonwealth is compulsory. "(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); see also Lee, 505 U.S. at 592 (noting heightened concerns of

"subtle **coercive** pressure in the elementary and secondary public schools.") Because minors are subject to mandatory attendance requirements, the Court has emphasized "the obvious concern on the part of parents" to protect them. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684 (1986). Indeed, the Court has referred to high school students as an "essentially captive audience of minors." Id. at 680.

3. Parents of Very Young Children Do Not Leave their Rights at the Schoolhouse Steps

Despite its attempt to gloss over the all-important distinction of "age," the District Court was required to recognize that in C.N. v. Ridgewood Bd. of Educ., the Third Circuit has "left open the possibility that the age of the students at issue might in some case make a difference." (A.32.) In C.N, the Third Circuit upheld a school district's use of a survey concerning sexual behaviors to middle and high school children finding no constitutional violation. However, the Third Circuit took pains to point out:

> 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).

Plaintiff submits that the Third Circuit's view accurately states the law and should be adopted here. And, the defendant Town of Lexington conceded the point.

> "Admittedly, parental rights do not end at the schoolhouse door. . . " (A. 222.) (Town of Lexington Reply Memorandum, p. 13.)

Notwithstanding, the District Court wrote that "in essence, under the Constitution public schools are entitled to teach anything that is reasonably related to the goals of preparing students to become engaged and productive citizens." (A. 11.) This overbroad formulation no doubt stems from the following passage in Brown that the lower court considered dispositive:

> We, think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their

> children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by Meyer and Pierce do not encompass a broad-based right to restrict the flow of information in the public schools. (A. 24, quoting Brown, supra, at. 533)

The plaintiffs respectfully assert that this passage does not control the instant matter for two distinct reasons.

First, it is not factually on point. The plaintiffs do not seek to restrict the flow of information in the public schools, except to their own children. They have never once sought control of curriculum, and have never conceded that the materials presented were in fact part of the regular curriculum. (A. 158-159; 187-209.) Indeed, it is the defendants' insistence in going beyond the curriculum without notice that has caused the plaintiffs such anguish. (A. 187-209.) It is the school administration that seeks to restrict the flow of information to parents when knowingly inculcating beliefs antithetical to their Faith. The

injunctive relief requested seeks to remove this dictated restriction and restore primacy to the parental role of overseeing their children's moral education. See Pierce, supra. Second, the passage itself is an overbroad construction of the law, at least as applied to the instant circumstance. It fails to take into account the fundamental nature of the rights asserted. At least as interpreted by the District Court, it is just another way of saying that the parents' right to challenge the state action ends at the schoolhouse door. As demonstrated above, this is error. C.N., 430 F.3d at, 185 n.26.

It is important to preserve local autonomy over public school curriculum. The exception asserted herein is where the instruction has the effect of destroying a core tenet of faith protected by the First and Fourteenth Amendments.[8] It is in the distinctly private areas of family life and sexuality that these rights must trump local authority, particularly where the children are so young. E.g., Gruenke,

8 Plaintiffs have repeatedly asserted that the alleged indoctrination could have the effect of destroying their very way of life. (A. 164, 165, 169, 171.) The complaint did not use this phrase as a talisman. However, the court may not dismiss if the facts could be proven.

225 F.3d at, 307; Lechliter, supra, at 2236.

The state has no business teaching morality. Use of phrases such as "good citizenship" or "civic virtue" cannot be allowed mask the state's true intentions. Lukumi, supra, at 532. Nothing in Brown requires a ruling that bars parents of very young children from attempting to prevent the schools from indoctrinating their deeply held faith out from under them.

Thus, the District Court's failure to recognize that the age of the children is a crucial distinction constitutes reversible error. A high school student has far greater ability to process and scrutinize information than does a very young child. Indeed, the fact that the children in this case are so young itself gives rise to a compelling inference that indoctrination is the state's intention.

It is this well pled specific intent to indoctrinate that provides another marked distinction from Brown.

B. The Good Faith Allegation of Indoctrination Also Distinguishes this Case from Brown.

The state makes no attempt to hide from its goal of disseminating ideology. Yet, "where 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, 430 U.S. at 716. Like the establishment

clause, the free exercise clause protects as well against the inculcating of non-religion. See Weinbaum v. Las Cruces Pub. Schs, 465 F. Supp. 2nd. 1116, 1127-30 (D.C.N.M. 2006).

The allegation of indoctrination distinguishes this case from Brown. The Brown Court ruled that the single assembly therein fell within the confines of the "Parratt-Hudson" doctrine. Brown, 68 F. 3d at 535 (citing Hudson v. Palmer, 468 U.S. 517 (1984)); Parratt v. Taylor, 451 U.S. 527 (1981): Parratt and Hudson preclude 1983 claims for the "random and unauthorized" conduct of state officials because the state cannot "anticipate and control [such conduct] in advance." Here, the state acknowledges its ongoing continuous intention to "change minds" all in the interest of secular diversity. The First Amendment protects religion, not secularism. "[T]he State may not establish a religion of secularism in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 225 (1963) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)). The Constitution does not harbor "a philosophy of hostility to religion." Cammack v. Waihee, 932 F.2d 765, 777 (9th Cir. 1991) (citations omitted) (quoting Zorach, 343 U.S. at 313-14).

> [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

Id.; see also, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 845-846, (1995) (warning against the "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires"). Secularism may be important to combat an allegation of establishment, but

secularism can never be allowed to burden faith.[9]

The plaintiffs have alleged "an intentional campaign to teach the . . . families very young children that the families religious faith was incorrect." Id. Moreover, it is alleged that the defendants' choice of material was made with the "specific intention to indoctrinate." (A. 193, 203-204; Complaint, paras. 30, 66.) The defendants harbor a "specific intention 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. (A. 204; Complaint, para. 66.) The allegation that the state has chosen intentional indoctrination at the behest of a political interest group is all-important. (Complaint, paras. 31-35.) Yet the case was not even allowed to proceed to discovery. Instead, the court adopts defendants' assertion that their promulgation of textbooks is facially neutral. (A. 39.) This is a finding of fact that can not be acceptable in the "12(b)(6)" context.

More importantly, "facial neutrality" does not require dismissal as a matter of law. The Supreme Court in Lukumi

9 Plaintiff again urges that dismissal not be upheld if the Court views the facts as alleging an establishment clause violation. (See supra, at 15, fn. 6.)

has stated:

> 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, 28 L. Ed. 2d 168, 91 S. Ct. 828 (1971), and "covert suppression of particular religious beliefs," Bowen v. Roy, supra, at 703 (opinion of Burger, C. J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. **The Free Exercise Clause protects against governmental hostility which is masked as well as overt.** Id. at 532. (Emphasis supplied.)

This covert action is exactly the conduct that has been well-pled. The complaint was carefully drawn to seek relief against adult-**initiated** "indoctrination." "The Wirthlins repeatedly requested they be informed before the adult defendants intentionally present. . . [objectionable] themes to the children. . . ." (A. 203; Complaint, para. 65.)

The District Court's opinion seeks to minimize the good faith allegation of "indoctrination." The court writes that "indoctrination" is merely a pejorative term for teaching. (A. 33.) This ruling is inconsistent with the numerous cases cited above in which the Supreme Court and at least the Third Circuit recognize that the First Amendment protects against state sponsored moral indoctrination. E.g., Wooley, 430 U.S. at 716; Rosenberger, 515 U.S. at 845-846; C.N., 430 F.3d at, 185.

Moreover, the complaint alleges specific factual bases for this theory. The complaint alleges that the administrators were influenced by a political organization and that the defendants intentionally adopted its views. It is alleged:

> On information and belief, the purpose of adopting these suggestions is the **specific intention to indoctrinate young children** into the concept that homosexuality and marriage between same-sex partners is moral and accepted, and that those who hold a faith such as the Parkers are incorrect in their beliefs. Essentially, the defendants are requiring the minor plaintiffs to affirm a belief inconsistent with and prohibited by their religion. Such indoctrination is inconsistent with the Parkers' sincere and deeply held religious faith. (A. 194; Complaint, para. 33.) (Emphasis added.)[10]

[10] Similar allegations were made by the Wirthlins. (A. 202; Complaint, para. 56.)

The courts recognize that public school students are particularly vulnerable to the inculcation of orthodoxy in the guise of pedagogy. Cole, 350 F. Supp. 2d at, 150[11]. "'In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate . . . [school] officials cannot suppress expressions of feeling with which they do not wish to contend.'" Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

For all of the above reasons, it is clear that the complaint contains an allegation that the defendants have intruded upon a fundamental constitutional right worthy of judicial inquiry and cannot be dismissed.

III. THE COURT FAILED TO PROPERLY APPLY THE HYBRID RIGHTS DOCTRINE

The plaintiffs claim that the defendants intruded upon

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11 The teaching of "diversity"is now an orthodoxy. Plaintiffs agree that "diversity"in the abstract is an important goal. (A.92-93; Def. Mem. pp. 7-8.) Defendants' subjective interpretation of this goal cannot trump the important constitutional questions raised here, as a matter of law.

their hybrid rights to the "free exercise" of religion and two other clearly defined fundamental constitutional rights, the right of privacy, and the right to direct their children's moral upbringing. (A. 186-209.) Such allegations are said to implicate "hybrid rights." Smith, 494 U.S. at 882. The alleged violations must be addressed synergistically, and can not be dismissed at this stage. A good faith allegation of a hybrid rights violation requires the court to exercise strict scrutiny over the state's alleged justifications for its actions. Id. at 883.

In the seminal decision Employment Div. v. Smith, the Court was required to determine whether a violation of Oregon drug laws that proscribed use of peyote in religious services could serve as the basis to deny unemployment benefits. The Court retreated from the broader "free exercise" formulations and applied the "rational relationship" test to validate the legislation. However, the Court did not overrule the earlier cases such as Meyer, Pierce, and Yoder, which utilized a "strict scrutiny" test to void state statutes that unnecessarily intruded upon the free exercise of religion. Distinguishing these 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 223).

Subsequently, numerous courts and commentators have referred to this passage in Smith as the inception of a "hybrid rights" doctrine. This doctrine mandates heightened scrutiny of legislation or state action where free exercise of religion and other key rights, including parental rights, are co-joined. Brown, 68 F.3d at 539; Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 765 (7th Cir. 2003); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 165 n.26 (3d Cir. 2002); Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 195-97 (3d Cir. 1990); Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 706 (N.D. Tex. 2000); Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649, 663 (E.D.N.C. 1999).[12]

[12] The "hybrid rights" doctrine has been subjected to criticism but remains good law. See, 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).

Plaintiffs assert that the claims set forth here are exactly those the Smith Court envisioned when it created the hybrid rights doctrine. The creation of the hybrid rights doctrine resulted from the Supreme Court's express and specific concern with the correlation between religion and parenthood. Smith, 494 U.S. at 882.

The District Court below recognized that the "hybrid rights" doctrine is the law of the land, and this circuit. Indeed, Brown stands as First Circuit authority for the proposition that the "hybrid rights" doctrine exists and has vitality.[13] Brown, 68 F.3d at 538-39. Brown recognizes, as it must, that if a "free exercise" claim is linked with another claim of a fundamental right, the heightened standard of review must apply. Although the Brown Court did not apply a heightened standard of review to the parent's claim in that particular instance, this is not surprising; Brown was issued in 1996, a full four years before Troxel firmly and finally held that the parental right to direct the moral upbringing of children was indeed "fundamental."

The District Court suggested that in Brown, "the First Circuit essentially anticipated Troxel." (A. 27.) The court quoted this court's sentence in Brown that:

[13] The defendants have conceded this important point. (A. 95; Def. Mem, p. 10, n.28.)

> "We need not decide whether the right to rear ones children is fundamental because we find that, even if it were, the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude." (A. 27, citing 68 F. 3d at 533.)

Thus, since the court found no fundamental parental right violation in Brown, the District Court dismissed the hybrid rights claim.

Perhaps in recognition that its logic was flawed, the District Court invited this Court to retreat from its recognition that hybrid rights exist and that heightened scrutiny must be applied to good faith allegations of hybrid rights violations. (A. 40.) It is respectfully submitted that such a formulation would be beyond the power of this Court, and that courts which have ignored "hybrid rights" have done so in error. The "hybrid rights" doctrine was created to ensure the continuing vitality of the Meyer Pierce rubric. Smith, 494 U.S. at 887-81. The Court in Smith articulated a bright line rule for the basic free exercise case, where religion alone is implicated and used as an excuse to defeat prosecution of a crime. However, the Supreme Court made explicitly clear that its previous free exercise jurisprudence requiring strict scrutiny where parental rights were implicated remained undisturbed. Id. at. 882.

The good faith allegation of a "hybrid rights"

deprivation subjects the conduct to "strict scrutiny" and requires the state actors to demonstrate a compelling interest in their behavior. Because three fundamental rights are simultaneously implicated, the Town's actions are to be subjected to "strict scrutiny." Such scrutiny cannot be applied purely as a matter of law. Dismissal is therefore not warranted.

As demonstrated above, in Brown, the First Circuit recognized that the hybrid rights doctrine was the law of the land,[14] but had not yet received the Supreme Court's guidance on the fundamental nature of the parental right in question that was reaffirmed in Troxel four years later. The Troxel plurality did not specifically address which standard of review to apply to "hybrid" cases. In Troxel, Justice Thomas noted that while the opinions of Justice Kennedy and Justice Souter appropriately find that parents have this fundamental right, "curiously none of them articulates the appropriate standard of review." 530 U.S. at 80. (Thomas, J. concurring) Justice Thomas grabbed the bull by the horns and urged that the standard should be "strict scrutiny." Id. He was the only one of the nine Justices to clearly enunciate an appropriate standard. However, Justice

[14] Defendants concede this point. (A. 95; Def. Mem., p. 10, n. 28.)

O'Connor noted that if a parental right "becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." Id. at 70.[15]

Given that Troxel re-emphasized the fundamental nature of the parental right even after there had been some criticism of the Smith decision, the logical conclusion is that in cases where the free exercise claim is combined with a parental interest in directing the upbringing of children, a plurality of the Court would support a higher standard of review than rational basis. Set forth below are three reasons why strict scrutiny should apply here.

A. Hybrid Rights Have Been Successfully Asserted Again

Throughout the country, several courts have issued thoughtful opinions applying strict scrutiny to hybrid claims against schools and school districts in the correct manner that Smith mandates. E.g. Hicks v. Halifax County Board of Education, 93 F. Supp. 2d 649 (E.D.N.C. 1999); Alabama & Coushatta Tribes of Texas v. Tr. of the Big Sandy Indep. Sch. Dist., 817 F. Supp. 2d 1319 (E.D. Tex. 1993); Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997); People v. DeJonge, 501 N.W. 2d. 127 (Mich. 1993.) While the facts of these cases are disparate, each stands as an exemplar of how courts have properly applied

[15] Justice O'Connor provided no further explanation of what she meant by the phrase "at least some special weight."

"hybrid rights" claims in accord with the Supreme Court's mandate.

For example, in Hicks, the plaintiffs challenged a school uniform policy. The policy was quite neutral; students were to wear blue shirts and khakis. The plaintiff had nothing against the blue shirts and khakis but, as a matter of religious faith, resented the concept of uniformity in general. She felt "adherence to the uniform policy would violate her basic religious beliefs" and would promote "an allegiance to the spirit of the anti-Christ." Id. at 653. The plaintiff asserted a hybrid claim based on free exercise and her due process right to direct the upbringing of her child. Construing the plaintiff's liberty interest as the parental right to "send her child to school without a uniform . . . [in] her effort to direct the child's moral and religious upbringing," the court found that the plaintiff [had] alleged "a genuine claim, supported by evidence in the record." Id. at 659. The court held that the second companion claim need not be independently viable. Instead, a plaintiff need only bring to the table the "mere presence of the [second protected] interest, as a genuine claim" to trigger the heightened scrutiny occasioned by hybrid claims. Id: at 662. The court therefore rejected the defendants' motion for summary judgment.

Similarly, in Alabama & Coushatta Tribes of Texas v. Tr. of the Big Sandy Indep. Sch. Dist., 817 F. Supp. 2d 1319 (E.D. Tex. 1993), the plaintiffs were Native American school children. The school had enacted a prohibition upon the length of hair on boys. The plaintiffs claimed that this code conflicted with and burdened the boys' ability to practice their deeply held and sincere faith, and the ability of the students' parents to educate and raise their children in the traditional religion. The court ruled that the plaintiffs had a valid hybrid claim consisting of "free exercise" and a parental right to direct the upbringing of their children, and free speech.

Thus, it is clear that many courts throughout the country have correctly applied the hybrid rights analysis. See also, Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997), (valid hybrid claim comprised of free exercise and free speech causes of action.) People v. DeJonge, 501 N.W. 2d. 127 (Mich. 1993) (strict scrutiny to claim that implicated two rights: free exercise and the Pierce parental right to direct the education of one's children). The plaintiffs' claim is consistent with these courts' approaches.

B. The Allegation of "Indoctrination" Also Requires The Court to Exercise Strict Scrutiny

As mentioned above, the allegation of indoctrination distinguishes this case from Brown. The importance of this intention is addressed in Section IIB, supra. It must be reiterated in this context as well. The good faith allegation of "indoctrination" distinguishes this case from others where the mere exposure to uncomfortable facts is placed in issue. And, it is that allegation that creates the need for strict scrutiny.

In C.N., the court held that submission of a survey to high school children did not implicate the Constitution, even though some parents were deeply offended by the sensitive nature of some of the questions. 430 F.3d at 190. To reach this particular result, the C.N. court felt compelled to note that the "School Defendants **in no way indoctrinated** the students in any particular outlook on these sensitive topics . . . ." Id. at 185. (Emphasis supplied.) The obvious implication is that the result would have been otherwise if indoctrination were proven. Indeed, the court recognized that "introducing a child to sensitive topics before a parent might have done so herself can complicate and even **undermine parental authority**." C.N., 430 F.3d at, 185. (Emphasis supplied)

The state actors do not really dispute their

intentions.[16] To the precise contrary, they seem to assert that their intentional conduct is mandated by public education law and somehow implicates health concerns. (A. 92-94; Def. Mem., pp. 7-9.) In so doing, they are sidestepping the legal questions raised by the plaintiffs. The case does not implicate the entire curriculum; the case only requires notice where moral indoctrination of very young children is being aggressively pursued.

C. The Privacy Rights Violation Also Mitigates in Favor

The parental concern here relates in part to the religious definition of marriage.

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being **sacred.** It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any. . . . (Griswald v. Connecticut, 381 U.S. 479, 516 (1965) (emphasis supplied)).

Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as "'of basic importance in our society,' rights

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[16] Indeed, as demonstrated above, the District Court accepts that the state's intention is to change minds. (supra at 19-20.) But even if the intent was disputed, a question of intent is almost always a question of fact.

sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." M.L.B., 519 U.S., at 116 (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).

The plaintiffs respect that their religious views of marriage may differ from the majority view in their state and community. They recognize as well that the state's secular power to define marriage is far more expansive than their privately held faith.

Nonetheless, they assert that their private views concerning marriage should not be subjected to state intrusion. As to these issues they prefer to be left alone. The "recognizable privacy interest in avoiding unwanted communication" is perhaps most important "when persons are 'powerless to avoid' it." Hill v. Colorado, 530 U.S. 703, 716 (2000) (quoting Cohen v. California, 403 U.S. 15, 21-22 (1971)). Short of leaving the school, the young children named as plaintiffs are powerless to avoid the unwanted adult-initiated communications.

Perhaps in recognition of these issues, Massachusetts passed a law known as the "opt-out"statute. G.L. ch. 71 sec. 32A. Plaintiffs had pled a claim under this law. It was dismissed without prejudice.

Of course, the defendants' alleged violation of the

"opt-out" law has not been placed squarely before this court. However, the court may consider at least in general terms the notion that the state intends to preserve a family's private rights to teach private sexual matter without state interference. This preservation of private rights is consistent with the constitutional issues the plaintiff has presented.

The defendants have implied or suggested that their conduct does not really pertain to sexual behavior. However, at least one of the books ends with a graphic kiss. Kissing has sexual elements. Comonwealth v. Vazquez, 65 Mass. App. Ct. 305 (2005). An unwanted kiss can be an "indecent assault" in Massachusetts. Id.

For all of the above reasons, it is clear that privacy interests are implicated, strict scrutiny should be applied to the "hybrid rights" claim that has been carefully pleaded. Thus, the district court should be reversed.

IV. A CLAIM IS STATED PURSUANT TO THE MASSACHUSETTS CIVIL RIGHTS ACT[17]

The Massachusetts Civil Rights Act (MCRA) claims were dismissed correlatively with the federal claims, without prejudice. G.L. ch. 12 Sec. 11I. There was no extended discussion of the merits. (A. 43-45.)

[17] Plaintiffs acknowledge that the MCRA claim against the municipality does not survive.

MCRA claims are often construed similarly to Federal Civil Rights 1983 claims. Thus, if the above analysis applies under Section 1983, a claim is also stated under the Massachusetts statute. Indeed, the Massachusetts Constitution is "more protective of . . . religious freedoms . . . than the United States Constitution, and that the proper standard of review to be applied to the infringement of such freedoms is consequently more demanding." Rasheed v. Comm'r of Corr., 446 Mass. 463, 465 (2006); Attorney Gen. v. Desilets, 418 Mass. 316, 321 n.4 (1994). Conduct which impinges upon free exercise of religion is subjected to the "compelling state interest" test. Desilets, 418 Mass. at 321 n.4. And, conduct motivated by sincerely held religious beliefs must be recognized as the "exercise of religion." Id. at 323.

Plaintiffs respectfully suggest that the Massachusetts claims be reinstated as pendant to the reinstated federal claims, without prejudice to defendants' rights to again seek dismissal on more substantive grounds.

V. QUALIFIED IMMUNITY HAS ONLY LIMITED APPLICABILITY

The defendants have asserted qualified immunity for all "individual actors." (A. 110-113.) For the most part, the claim is premature. The concept was not discussed at length in the District Court opinion.

The defendants correctly assert that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). By focusing on objective reasonableness, "the Supreme Court's decision in Harlow effectively eliminates from the qualified immunity calculus consideration of a government actor's subjective state of mind." Collins v. Marina-Martinez, 894 F.2d 474, 478 n.6 (1st Cir. 1990).

Qualified immunity, however, does not apply to the municipality itself, or to those acting in a supervisory or policymaking capacity. Owens v. City of Independence, 445 U.S. 622 (1980); see also Camilio Robles v. Hoyos, 151 F.3d 1 (1st Cir. 1988). The lead case discussing Section 1983 "supervisory liability" in the First Circuit is Rodriguez v. Cartegena, 882 F.2d 553 (1st Cir. 1989). A supervisor can be held liable if (1) the behavior of his subordinates results in a constitutional violation, and (2) the supervisor's action or inaction is affirmatively linked to that behavior in that it could be characterized as supervisory encouragement, condonation, or acquiescence or gross negligence amounting to deliberate indifference. The

indifference that is required to support supervisory liability under 42 U.S.C. § 1983 must be deliberate, reckless or callous. It should lead "inexorably to the constitutional violation." Seekamp v. Michaud, 109 F.3d 802, 809 (1st Cir. 1997).

The only non-supervisor named is Heather Kramer. She was the teacher of the Wirthlins' child. Plaintiffs acknowledge that as the evidence develops, Ms. Kramer may be able to demonstrate she is entitled to qualified immunity. Moreover, plaintiffs have no interest in seeking damages from Ms. Kramer personally. Surely Ms. Kramer had to know that her choice of books would offend the religious sensibilities of many students. More importantly, qualified immunity by definition applies only to the damages claims.

Therefore, the case against MS. Kramer should be remanded for further proceedings.

VI. THE CONSPIRACY CLAIM SURVIVES IF THE "1983" CLAIM SURVIVES

"Agreement" is the essence of conspiracy. Commonwealth v. Fidler, 23 Mass. App. Ct. 506, 513 (1987). A civil conspiracy is:

> a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'

Hampton v. Hanrahan, 600 F.2d 600, 620-21 (7th Cir. 1979). The allegation of agreement is clear and supported by inference. The most compelling such allegation is set forth in paragraphs 33-36 of the complaint, wherein the plaintiffs allege in detail that the defendants agreed to follow the precepts of a narrow interest group. (A. 194-195) Obviously, the conspiracy allegation cannot stand if the court rules that no underlying constitutional right is even implicated. Therefore, all prior arguments are re-iterated. Assuming there to be a violation (see Sections I-II, supra), a conspiracy is also well-pled.

CONCLUSION

A valid claim is asserted. For the foregoing reasons the case may not be dismissed. The judgment of the District Court should be reversed and the case should be remanded for

further proceedings.

Respectfully Submitted:
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(S) _____

Attorney for David Parker, et. al.

Dated: August 6, 2007

PROOF OF SERVICE

I, Robert S. Sinsheimer, hereby certify that Appellants-Plaintiffs Appeals Brief, relative to the above-captioned matter, was mailed by first-class mail, postage prepaid, on August 8, 2007 to the following:

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