INTRODUCTION

This brief is intended to respond to the Appellants' brief, and is thus a "reply brief." It also simultaneously responds to the three (3) amici briefs: Gay and Lesbian Advocates and Defenders, et al., the Anti-Defamation League, et al., and the American Civil Liberties Union.[1]

I. THE STATE'S INTEREST IN DIVERSITY IS A "RED HERRING"

Two of the amici (GLAD and the ADL) share a common approach. They spend many pages addressing the perceived importance of "diversity" and include reams of material from outside the record. (GLAD, pp. 1-9) (ADL, pp. 1-15) [2] When all is said and done, this argument supports a single point the amici and defendants wish to make: that the state has a legitimate secular interest in seeking to eradicate bias against same-gender couples and to ensure the safety of all public school students.[3]

This argument is for naught. No one disputes that a diverse citizenry is,

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1 For brevity of reference, the brief filed by the Gay and Lesbian Advocates and defenders, et. al. will be referred to as the "GLAD brief." The brief filed by the Anti-Defamation League will be referred as the "ADL brief," and the Brief filed by the American Civil Liberties Union will be referred to as the "ACLU brief."

2 For example, the GLAD brief cites "Business Week," p. 6 n. 3, and a report from a "Human Rights Campaign Report" which purports to be an analysis of census data. (GLAD, p. 7 n. 10)

3 The appeal to safety is ironic to the Parkers since their child was beaten in the playground. The issue of "safety" should never have been addressed in a 12(b)6 pleading. There is no evidence that the defendants' textbook choices promote safety.

in the abstract, a worthy social goal. This was stated clearly in the plaintiffs' brief. (Pp.20, 23, 33). The fact that plaintiffs accept this point is also well-recognized in the Appellee's brief. (P. 27. N. 19, citing Plaintiffs' brief)

Overlooked in these analyses is the plaintiffs' equally sincere interest in inclusion, which rises to Constitutional significance. (See Plaintiffs' Brief pp 9-14). The plaintiffs agree with GLAD that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." (GLAD, p. 18, citing Bd. Of Educ., Island Trees Union Sch. Dist. v. Pico, 457 U.S. 853, 866-67 (1982) and Keyishian v. Bd. Of Regents, 385 U.S. 589 (1967)) They agree as well that educators should not be free to eliminate "all diversity of thought..." (GLAD Brief at 18.)

> Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, (or) religion..." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)

It is the plaintiffs whose belief system is being denigrated and who have alleged that the Town seeks to cast a pall of orthodoxy. It is the Town that has refused to even consider accommodation of the plaintiffs' religion. All parties agree that the plaintiffs could have chosen to send their children to private school. The difficult question is whether there is room for the plaintiff taxpayers in their local public school, even if they harbor a minority faith. Stated in constitutional terms, the difficult question is whether the state's rational interest in secular diversity can overcome plaintiffs' right to the

protections of the First Amendment, even in public schools.[4]

Diversity is not a concept owned exclusively by progressives. See generally, Kors and Silverglate; "The Betrayal of Liberty on America's Campuses," Harper Perrenial, 1998 (focusing on totalitarian use of speech codes in higher education in the name of "diversity" and inclusion) However, the amici hope that the posturing of their political goal as the only one consistent with the concept of "diversity" will overcome the Constitutional right of the minority plaintiffs to direct the moral upbringing of their own children.

As the plaintiffs' brief demonstrates, the First Amendment protects faith, first and foremost. (Plaintiffs' Brief at 8-14, 29, citing School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 225 (1963); Zorach v. Clauson, 343 U.S. 306, 314 (1952); Cammack v. Waihee, 932 F.2d 765, 777 (9th Cir. 1991) "State power is no more to be used so as to handicap religions than it is to favor them." Everson v. Board of Education, 330 U.S. 1, 18, (1947))

Plaintiffs' brief argues for "strict scrutiny." (Plaintiffs' Brief 33-45) The amici argue only that the state has a rational interest in its choice of material. In constitutional terms, the arguments are ships in the night.

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4 ADL includes a "throw-in argument" to the effect that the defendants have a "sufficiently compelling" interest to satisfy the mandates of strict scrutiny. (ADL, p. 2) This was not decided below, and the ADL cites absolutely no authority for this proposition. This segment of the brief is not sufficiently thorough to comply with Fed. R. A. P. 16, and this argument should not be considered for the first time at this level. If the court deems this issue to be in the case, the matter should therefore be remanded to provide plaintiffs with the opportunity to marshal facts and evidence which might rebut this proposition. For example, it might be argued that the "Defense of Marriage Act" is inconsistent with the ADL's position.

II. PLAINTIFFS DO NOT SEEK TO DICTATE CURRICULUM

All three amici suggest at one point or another that the plaintiffs seek to control the school's curriculum. (GLAD p. 15, 18-21)[5] (ADL p. 14, "precedent and sound policy require that ... [rights to raise children] not extend to dictating curriculum.") Again, this is not and never has been the claim. Plaintiffs' brief specifically disclaims any such intent. (Pp. 26, 43).

By misstating the plaintiffs' position, the amici and defendants seek to elevate the importance of cases providing local authorities with virtually plenary curriculum control. E.g. Brown v. Hot and Sexy and Safer Productions, 68 F. 3rd 525 (1st Cir. 1995). But even the amici are forced to acknowledge that the plaintiffs do not leave their First Amendment rights at the schoolhouse door. (GLAD, p. 15) When a child crosses the threshold of a public school, he does not become a "mere creature of the state." Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

Plaintiffs have never once sought to impose their will on others.

GLAD's brief also suggests that allowing parents to "opt out" of curricula they find objectionable would lead to an unacceptable segregation in schools. **CITE** This is a unfair argument; exactly the type of "fact-finding" that has no place in a "12(b)6" environment. Moreover, the argument fails to recognize that such segregation would also be the natural result of parents being forced to send their young children to private schools to avoid the

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5 GLAD also suggests that plaintiffs wish to remove books; a remedy never requested or suggested in the complaint.

teaching of concepts that are the prerogative of an involved parent.

Plaintiffs do not accept the proposition that an "opt out" would lead to segregation of children with same gender parents,. Plaintiffs ought be allowed an opportunity to prove both the Constitutional violation and the feasibility of an appropriate remedy in open court.

III. THE AMICI AND DEFENDANTS UNFAIRLY SEEK TO DISCREDIT THE ANALOGY TO THE ESTABLISHMENT CLAUSE

In their brief, the plaintiffs demonstrated that language from "establishment clause" cases supports their claim. (Plaintiffs' Brief at 18, n. 6.) The plaintiffs have consistently argued that the tender age of their children distinguishes this case from Brown and that the materiality of age is best understood by reference to establishment clause cases. (Plaintiffs' Brief, pp. 15-29)[6] The Third Circuit appears to have recognized the validity of this argument as the district court judge noted even in rejecting it. (Opinion, p. 32). Plaintiffs' appeal directly acknowledges that rejection of this argument is a core error, and requests that the court treat this case as one of first impression. (Plaintiffs' Brief, p. 140-18)

The defendants denigrate this analogy and indeed go so far as to assert that pressing of establishment claims would constitute a "Rule 11

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6 Plaintiffs acknowledge that one case from which they have quoted has been overruled in part. Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985). (overruled by Agostini v. Fulton, 521 U.S. 204 (1997)). The larger point, that age is important to establishment clause jurisprudence, has not been questioned. E.g. Lee v. Weisman, 505 U.S. 577, 592 (1992) (heightened concerns of "subtle coercive pressure in the elementary public schools.").

violation." (Appellee Brief, p. 37.) This hyperbole misses the point entirely. The defendants cannot ignore the following very simple facts:

1. The plaintiffs' children are far younger than those described in the Brown decision.
2. Many First Amendment cases support the notion that "age" makes a difference in constitutional terms, where the underlying question is one of "indoctrination."
3. It is far easier to indoctrinate young children than high-schoolers.

The plaintiffs have alleged in good faith that the defendants have chosen to attempt to indoctrinate their children into believing that their deeply-held faith is wrong. Taken as a whole, the defendants' and amici's position is not so much one of denial as it is a bald assertion that this conduct is right.

Whether one labels the claim "free exercise" or "establishment clause" it should be crystal clear that the First Amendment is intended to prevent this state- sponsored conduct. (See plaintiffs' brief, pp. **CITE**)

IV PLAINTIFF PARENTS ARE THE ONLY APPROPRIATE GUARDIANS OF THEIR OWN CHILDREN'S RIGHTS

GLAD's brief at times seems to imply that the writers know what is best for the plaintiffs' own children. (GLAD, p. 23-31). In support they recognize the long line of "establishment clause" cases that refuse to allow the State to elevate religious doctrine over science. E.g. Epperson v. Arkansas, 393 U.S.

97 (1968)[7]

This argument holds sway only if one accepts the notion subtly implied in the GLAD brief that the defendants are teaching only scientific facts. Again, this ignores the complaint and the "12(b)6" standard. The court is required to look at this case in the light most favorable to the Plaintiffs, not through the lens of GLAD's political agenda.

V. THE BURDEN ON THE PARENTS IS NOT MINIMAL

The Town of Lexington has argued that the burden on the plaintiffs is minimal, since the Town is neither forcing the plaintiffs to do anything of a religious nature, nor precluding the parents from instructing their children in the manner they see fit.

This argument neglects to address the fact that the plaintiffs firmly believe that the moral instruction of their children is their sacred duty. The exercise of parental authority to direct their children in their faith is one of the most basic tenets of the plaintiffs' religion; for the Town to undertake its own instruction and direction regarding beliefs contrary to said religion, without notifying the plaintiffs, is clearly burdensome in the extreme. The very exposure of children to such beliefs, in this case prior to the parents' having even discussed the topic with their children, burdens the parents' ability to instruct their children in accord with their religion.

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[7] Ironically, the plaintiffs David and Tonia Parker are both distinguished scientists.

CONCLUSION

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:
APPELLANTS,
By their attorneys,

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Jeffrey A. Denner, Esq.
Court of Appeals # 123507
Robert S. Sinsheimer, Esq.
Court of Appeals # 464940
Neil Tassel, Esq.
Court of Appeals # 557943
Denner Pellegrino, LLP
4 Longfellow Pl., 35th Floor
Boston, MA 02114
(617) 227-2800

Dated: October 25, 2007

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Robert S. Sinsheimer, Esq.
Court of Appeals # 464940
Denner Pellegrino, LLP
4 Longfellow Pl., 35th Floor
Boston, MA 02114
(617) 227-2800

Dated: October 25, 2007

PROOF OF SERVICE

I, Robert S. Sinsheimer, hereby certify that Appellants-Plaintiffs Reply Brief, relative to the above-captioned matter, was mailed by first-class mail, postage prepaid, on October 29, 2007 to the following:

Court of Appeals Clerk's Office (9 copies)
One Courthouse Way, Suite 2500
Boston, MA 02210;

Appellees' attorney of record:
John J. Davis, Esquire (2 copies)
Pierce, Davis & Perritano, LLP
Ten Winthrop Square
Boston, MA 02110;

Amicis' attorneys of record:
Eben A. Krim, Esquire (2 copies)
Proskauer Rose, LLP
One International Place
Boston, MA 02110;

Sarah R. Wunsch, Esquire (2 copies)
ACLU of Massachusetts
211 Congress Street, 3rd Floor
Boston, MA 02110;

Nima Eshghi, Esquire (2 copies)
Gay & Lesbian Advocates & Defenders
30 Winter Street, Suite 800
Boston, MA 02108-4720

_____
Robert S. Sinsheimer, Esq.