UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID PARKER, et al., Plaintiffs, v. TOWN OF LEXINGTON, et al., Defendants.	)))))))	NO: 06-CV-10751-MLW

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO AMICUS BRIEF

> "The American system of government is founded on two counterbalancing principles: that the majority of the people governs, through democratically elected representatives; and that the power even of a democratic majority must be limited, to ensure individual rights."
>
> www.ACLU.com, February 7, 2007

The ACLU has a long and storied history of supporting religious freedom. See, e.g. McCreary County v. ACLU, 545 U.S. 844, (2005) County of Allegheny v. ACLU, 492 U.S. 573 (1989) A mere three (3) months ago, a federal district court adopted the ACLU position as follows:

> When defining the contours of the **religious clauses**, the "touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and **between religion and non-religion**.'" Weinbaum v. Las Cruces Pub. Schs, 2006 U.S. Dist. LEXIS 83311 (emphasis supplied)

In this case however, the ACLU has forgotten that last clause. The plaintiffs here have alleged that the government has failed to adhere to the requirement of neutrality. The complaint alleges that the government has intentionally chosen to elevate non-religious secular causes over

their deep and abiding religious faith.[1] "The defendants are requiring the minor plaintiffs to affirm a belief inconsistent with and prohibited by their religion." (Complaint, para. 33, p.8). The defendants have chosen to brazenly use tiny children's psyches to promote ideology over faith. As the ACLU well knows, this conduct clearly violates the First Amendment.

The gravamen of the ACLU legal argument is that this matter is controlled by the First Circuit decision Brown v. Hot, Sexy and Safer Prod, Inc., 63 F.3d 525, (1st Cir. 1995). The ACLU describes Brown as the First Circuit's "definitive statement." (ACLU Brief, p. 6.) It also says that "Brown is directly on point and should be treated as controlling precedent." (ACLU Brief, p. 8).

No doubt, Brown is an important decision. However, Brown is not sufficiently similar to require that it be deemed precedential in every respect.

I. THE AGE OF THE CHILDREN IS A MAJOR DISTINCTION

By far the greatest factual distinction lies in the tender age of the children. The plaintiffs cite numerous cases to support the proposition that age should be treated as an important factor. See Plaintiff's Brief, p. 20-21, citing Sherman v. Cmty. Consol. Sch. Dist. 21, 8 F.3d 1160, 1164 (1993), Lemon v. Kurtzman, 403 U.S. 602, 616 (1971). It bears repeating that the Third Circuit in a "free exercise" case has 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. v.

[1] The secular mantra of "diversity" cannot trump the First Amendment. The defendants' professed belief in "diversity" is inconsistent with their intentional efforts to make the plaintiffs feel unwelcome.

Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3rd Cir. 2005)

Many of the cases that recognize the importance of age when dealing with religious freedom are first and foremost "establishment clause" cases. That these cases are primarily "establishment clause" constructions does not detract from their value here. The "establishment clause" and the "free exercise clause" are doctrinal cousins. As the segment in Weinbaum v. Las Cruces Pub. Schs, 2006 U.S. Dist. LEXIS 83311 quoted above demonstrates, 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 Yoder itself. Wisconson v. Yoder, 406 U.S. 205, 215 (1972).

> 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**. Id. At 215 (emphasis supplied)

There are literally hundreds of such cases.

True, this is not an establishment clause case because the plaintiffs do not dispute that the defendants have articulated a "secular purpose" for their constitutional misconduct. Thus, the conduct could pass the "so-called" Lemon test, and no establishment clause violation is directly alleged. See, Lemon v. Kurtzman, 403 U.S. 602, 616 (1971)

This does not mean that the defendants can simply ignore the obvious fact that "(t)he process of inculcating religious doctrine is ... enhanced by the impressionable age of the pupils, in primary schools particularly." Lemon v. Kurtzman, 403 U.S. 602, 616 (1971) The free exercise clause protects as well against the "inculcating" of non-religion. See Weinbaum v. Las

Cruces Pub. Schs, 2006 U.S. Dist. LEXIS 83311 (emphasis supplied). The First Amendment protects religion, not secularism. Secularism may be important to combat an allegation of establishment, but secularism can never be allowed to burden faith.

The burden here is nothing short of an intentional attempt to wipe the plaintiff's faith away altogether. The obvious and well-pleaded impressionable age of the children, combined with the State's abject unwillingness to even notify the parents that it intends to indoctrinate on these extremely personal topics virtually ensures that if the State gets its way, the Plaintiffs' children will not harbor the families' beliefs. Note that the complaint alleges that the Plaintiffs attempted to initiate a dialogue. (Complaint para. 31, p. 8, para. 63, p. 18) The state however refuses to even discuss the issue, even though it was put on notice that the parents believed their deep and abiding faith was being denigrated.

The ACLU insists that the age is meaningless and paints the issue with a broad brush.:

> "... the burden on parents' religious and parental rights from exposure of their children in the public schools to objectionable ideas did not rise to the level of a constitutional issue." ACLU brief, p. 10. "... That principle does not vary with age of children." (ACLU brief p. 10)

Again, the ACLU takes an over-broad position which ignores (or seeks to paint over) two key and interrelated points.

First, as stated, the impressionable age of the children is what creates the burden. The adult plaintiffs fear that their families' deep, sincere and abiding faith will be eradicated, and seek an opportunity to prove it. The minor plaintiffs, too young to speak for themselves, assert nonetheless that their parents alone have the right and obligation to impart to them their faith, and that the state has neither the right nor power to intentionally interfere with this right.

Second, the complaint alleges far more than mere “exposure.” Indeed, the complaint states to the contrary; “The plaintiffs recognize that at some point their children will be exposed the knowledge that the Commonwealth .... recognizes as legal some marriages they believe to be inconsistent with their faith...” (Complaint, para 29, p. 8). How and when this mere “exposure” comes is not an issue in this lawsuit, which seeks to prevent adult-initiated indoctrination or psychic imprinting. Contrary to defendants’ expressed fears, the plaintiffs recognize that mere “exposure” can come from other children. Nothing in the complaint is directed at children. The defendants and the ACLU have sought to alter the discussion by suggesting that the plaintiffs wish to chill the rights of other children to talk about their families. Nothing could be further from the truth.

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 ...” (Complaint para. 65, p. 18).

As the court is well aware, plaintiffs have alleged “intentional indoctrination.” As demonstrated above, Lemon uses the word “inculcate. ” The word “brainwash” may also apply, as would the word “imprint.” At some point, the choice of word is semantic. The concept, which the ACLU chooses to ignore, is that the parents are alleging far more than mere exposure. A second grade teacher siting down and reading a book is a far different circumstance from kids bantering with one another on the playground.

Finally, when considering the ages of the minor plaintiffs the court should recognize that in the cases involving adolescents, such as Brown, there is at least an undercurrent of recognition that the schools are struggling with a potential public health crisis. This is born of hard fact.

"Puberty" is a scientific term; the onset of puberty results from factually demonstrable hormonal changes in the human body. Correlatively, the unregulated exposure of post-pubescent adolescents to sexual permissiveness is a modern reality. Although the courts do not treat these facts as doctrinally dispositive in the First Amendment context, there is at least a sensibility throughout these types of cases that the courts should abstain[2] from intruding upon the prerogative of the public authorities to address the scourge of AIDS, other sexually transmitted diseases, and teen pregnancy. E.g. Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, (1st Cir. 1995) C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3rd Cir. 2005) Curtis v. Sch. Comm. of Falmouth, 420 Mass. 749, 754 (1995).

None of this thinking applies here. The defendants' sole motivation is their own political determination that the Plaintiffs' faith should be eradicated, and the place to start this process is with their children. This places an enormous burden upon the parents, a small minority of believers, and the minor plaintiffs who will be emotionally conflicted and drained.

II. AGE IS NOT THE ONLY DISTINCTION BETWEEN THIS CASE AND BROWN

There are many other facts other than the age of the youth that distinguish Brown. In that case, the adolescent children were asked to attend a school-wide assembly. The performer was an outside contractor. This is a far cry from the intimate classroom setting where the five year old child's mind is overwhelmed by the respect, adoration, and admiration for a known adult teacher.[3]

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[2] The word "abstain" here is not a reference to the legal doctrine of "abstention."

[3] Plaintiffs offer proof that if allowed to try the case, they will be able to adduce

Moreover, and perhaps alone dispositively, it appears that the parents in Brown were in fact given some sort of prior notice and an opt-out option. In Brown, the court noted that **"A school policy adopted by the School Committee required 'positive subscription, with written parental permission' as a prerequisite to 'instruction in human sexuality.'"** Brown, 68 F.3d at 539. This is exactly what the plaintiffs here are looking for.[4] Thus, Brown stands for no more than the proposition that parents, having elected to allow their adolescent children to participate in instruction regarding sexuality, don't have the option of second- guessing and micro-managing the content. This is far cry from the instant situation where the parents are being told in essence that their only choice is to leave the public school community altogether.

The ACLU also misses the mark when it states that there "are no well pleaded" allegations that these parents were singled out. It may be that the original promulgation of the offending material was not specifically aimed at the plaintiffs. However the complaint clearly alleges that the parents notified the school that the materials offended their faith. The school outright refused to even consider an opt-out proposal. At that point, the school was on notice that these few parents were aggrieved and consciously choose to refuse any accommodation.

III. THE COURT MUST IGNORE THE ACLU'S SUGGESTION THAT THE PARENTS' RIGHTS STOP AT THE SCHOOLHOUSE DOOR

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expert testimony to the effect that there is "transference" between the teachers and parents in the minds of very young children. In essence they see the teacher as almost equivalent in moral authority to a parent. This information is available in the academic literature promulgated to educators of the very young. This transference dissipates over time.

[4] Defendants have suggested that their fairy tales do not involve "sexuality." Again, they ignore the age of the children. The defendants are not providing "birds and bees" material. However, they are intentionally introducing the topics that the parents should control.

Running through the ACLU brief is a strident tone suggesting that parents' rights end at the schoolhouse door. The brief states in its very introduction:

> "The amici organizations urge this court to grant the motion to dismiss...because the scope of the rights of religious freedom and parental control would undermine teaching and learning in the Lexington Schools. These rights have never meant that a parent can demand prior notice and the right to opt-out of a child out of mere exposure to ideas in the public schools that a parent disapproves of, whether based on religious or other principles ...
>
> Alternatives exist...The individual parents...may not demand control" (ACLU Brief, p. 2)

This position is so overbroad as to become flat-out wrong. As the ACLU well knows, if the ideas to which a parent objects violate the establishment clause, they are routinely stricken. E.g. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. PA. 2005) (upholding parental challenge to teaching of "intelligent design").

Having chosen to elevate its secular cause over religion, the ACLU is telling the parents to get lost, and thinks it can do so simply because the plaintiffs cannot cram the facts into an "establishment clause" box. And, the ACLU seeks to garner sympathy for its secular cause by mis-stating the case. The plaintiffs do not wish to undermine the teachers, and do not object to mere exposure of pluralism.

The actual party defendant is far more cognizant of this court's task. Indeed on page thirteen of its reply brief, the Town of Lexington has accepted recognition of the difficult legal question.

> "Admittedly, parental rights do not end at the schoolhouse door..." Town of Lexington Reply memorandum, p. 13.

The allegations are well grounded and well pled and cannot be dismissed.

IV. THE PRIVACY INTEREST CANNOT BE IGNORED

As stated in the plaintiffs' original brief, the claim here stands at the epicenter of three important constitutional rights. See Plaintiffs' Brief pp. 11-13. The argument is ignored in the ACLU brief. Therefore, it need not be reiterated, but the appended schematic may be useful.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied.

RESPECTFULLY SUBMITTED

PLAINTIFFS

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CERTIFICATE OF SERVICE

I hereby certify that on this date this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and paper copies will be sent to those indicated as non-registered participants as of February 12, 2007.

/s/ Robert S. Sinsheimer
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