UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID PARKER, TONIA PARKER, Individually and as next friends and guardians of Jacob Parker and Joshua Parker, JACOB PARKER, JOSHUA PARKER,

JOSEPH ROBERT WIRTHLIN, ROBIN WIRTHLIN, Individually and as next friends and guardians of Joseph Robert Wirthlin, Jr.,

Plaintiffs,

vs.

Civil Action No. 06-10751 MLW

WILLIAM HURLEY, PAUL B. ASH, PH.D, Individually and as Superintendents of the Town of Lexington Public Schools,

HELEN LUTTON COHEN, THOMAS R. DIAZ, OLGA GUTTAG, SCOTT BURSON, THOMAS GRIFFITH, Individually and as members of the Town of Lexington School Committee,

ANDRE RAVENELLE, Individually and as Director of Education of the Town of Lexington,

JONI JAY, Individually and as Principal of the Estabrook Elementary School,

JENNIFER WOLFRUM, Individually and as Coordinator of Health Education,

HEATHER KRAMER, Individually and as a Teacher at the Estabrook Elementary School, and

TOWN OF LEXINGTON,

Defendants.

REPLY BRIEF OF DEFENDANTS TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

On August 15,2006, the defendants filed a Motion to Dismiss Plaintiffs' Complaint and supporting Memorandum of Law. On September 15,2006, the plaintiffs filed an Opposition to Defendants' Motion to Dismiss and accompanying Memorandum in Opposition. Defendants' Motion to Dismiss rests on the principle that public school officials may use instructional materials to promote diversity and the elimination of discrimination against minorities, including gays and lesbians, without subjecting themselves to civil liability or infringing on the constitutional or statutory rights of students and parents. Thus, the issues involved in this case are important not only to the Town of Lexington and the other named defendants, but to all public schools and school officials throughout the Commonwealth of Massachusetts. The potential state-wide impact of this case is evidenced by the proposed Memorandum Amicus Curiae filed on September 20,2006, by the American Civil Liberties Union of Massachusetts, the Massachusetts Teachers Association, and six (6) other organizations interested in the outcome of the issues raised herein.

In their Opposition to Defendants' Motion to Dismiss, the plaintiffs raise several arguments to suggest that their claims should survive a Rule 12(b) Motion and, thereafter, proceed to discovery. The defendants disagree. This is a case that cries out for early resolution. Taking their well-pleaded "facts" as true, the plaintiffs fail to state claims against the defendants upon which relief can be granted, notwithstanding their creative attempts to distinguish (and circumvent) the controlling decision of Brown v. Hot. Sexy and Safer Prods.. Inc., 68 F.3d 525 (1st Cir. 1995), cert. den., 516 U.S.1159 (1996). The purpose of this Reply Brief is to rebut plaintiffs' obfuscation by redirecting the focus of this Court to thosefacts (as distinct from mere

conclusions) actually alleged in the Complaint and by assisting the Court in applying the controlling law to those facts.

II. STANDARD OF REVIEW

As set forth in defendants' Memorandum of Law in Support of their Motion to Dismiss (hereinafter "Defendants' Memorandum,") when ruling on a Rule 12(b) motion, this Court must accept as true all well-pleaded facts in the Complaint, construe such facts in the light most favorable to the plaintiffs, then determine whether the Complaint sets forth any set of facts which could entitle the plaintiffs to relief. Defendants' Memorandum, at 3; Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999). This "highly deferential" standard of review does not mean, however, that the Court must take everything pled by the plaintiffs at face value, nor that it "must (or should) accept every allegation made by the [plaintiffs], no matter how conclusory or generalized." United States v. AVX Corp., 962 F.2d 108, 115 (1" Cir. 1992). "A court should 'eschew any reliance on bald assertions, unsupportable conclusions and 'opprobrious epithets.'" Murphy v. Social Security Admin., 2006 WL 2691614, *1 (D. Mass.), quoting Chongris v. Bd. of Appeals of Town of Andover, 811 F.2d 36, 37 (1st Cir. 1987). See Snowden v. Hughes, 321 U.S. 1, 10 (1944) (allegations that defendants' actions were "willful," "malicious," "unjust," "unequal" and "oppressive" held insufficient to show purposeful discrimination); Hoffman v. City of Warwick, 909 F.2d 608, 624 (1st Cir. 1990) (allegations that defendant's refusal to enforce state statute was "willful, malicious, and criminal" held insufficient to raise viable equal protection claim.) Moreover, the well-pleaded complaint rule "does not entitle a plaintiff to rest on 'subjective characterizations' or conclusory descriptions of 'a general scenario which could be dominated by unpleaded facts.'" Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52-53 (1"

Cir. 1990), quoting Dewey v. Univ. of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982), cert. den., 461 U.S. 944 (1983).

In their Memorandum in Opposition to Defendants' Motion to Dismiss (hereinafter "Plaintiffs' Memorandum,") the plaintiffs maintain that they should survive a Rule 12(b) motion because of the allegations contained in their Complaint that defendants are "indoctrinating" their children "into the concept that marriage between same sex couples is right and moral." Plaintiffs' Memorandum, at 2, 10-11. Indeed, plaintiffs are so enamored of the term "indoctrination" that it appears, in one form or another, seven (7) times in their Complaint, and twenty-two (22) times in their Memorandum. Yet, mere repetition of a generalized conclusion – i.e. that defendants are somehow guilty of "indoctrination" – does not overcome the complete lack of alleged facts from which this conclusion can logically be drawn.

Plaintiffs' reliance on the term "indoctrination" stems from the decision of C.N. v. Ridgewood Bd. of Educ., 430 F. 159, 182-183 (3rd Cir. 2005), where the Third Circuit upheld as constitutional a school district's use of a survey concerning sexual behaviors to middle and high school students. Plaintiffs' Memorandum, at 10. The survey,[1] held the Court, did not intrude on parental decision-making to a degree prohibited by the United States Constitution.

> A parent whose middle or high school age child is exposed to sensitive topics or information in a survey remains free to discuss these matters and to place them in the family's moral and religious context, or to supplement the information with more appropriate materials. School Defendants ***in no way indoctrinated the students*** in any particular outlook on these sensitive topics; at most, they may have introduced a few topics unknown to certain individuals.

[1] The survey, entitled "Profiles of Student Life: Attitudes and Behaviors," was administered to 7th through 12th grade students in the Ridgewood public school district in New Jersey. "The survey sought information about students' drug and alcohol use, sexual activity, experience of physical violence, attempts at suicide, personal associations and relationships (including the parental relationship), and views on matters of public interest." C.N., 430 F.3d at 161.

Id., 430 F.3d at 185 (emphasis added). Although the Third Circuit does not elaborate on the constitutional significance of such "indoctrination," it makes plain that the mere introduction of ideas to students, particularly those who remain free to place the topics in the context of their own family's moral and religious values, is not unconstitutional.[2]

"Indoctrinate" means "to imbue with learning, to teach, . . . to instruct in a subject, principle, . . . [or] to imbue with a doctrine, idea or opinion . . .." Oxford English Dictionary. Defendants do not deny that they have taught and instructed plaintiffs' children, or that they attempted to imbue plaintiff's children with knowledge. And, although defendants do deny that they ever attempted, through the use of certain books or instructional materials, to inculcate morals or values abhorrent to the plaintiffs, the plaintiffs allege no facts in their Complaint (as distinct from mere conclusions) to the contrary.

In their Complaint, the plaintiffs allege that, on January 14,2005, Jacob Parker was exposed to a book entitled Who's In A Family. This book, plaintiffs summarily conclude, was introduced by the defendants "with the specific intention to indoctrinate young children into the concept that homosexuality and homosexual relationships or marriage are moral and acceptable behavior."[3] The plaintiffs further allege that, on February 8,2005, several unnamed teachers and Estabrook Principal Joni Jay attended a presentation given by a member of the Gay Lesbian Straight Education Network during a meeting of the Estabrook Anti-Bias Committee entitled

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[2] Citing, among other cases, Brown v. Hot. Sexy and Safer Prods., Inc., 68 F.3d 525, 533 (1" Cir. 1995), cert. den., 516 U.S. 1159 (1996), the Third Circuit recognized "Courts have held that in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." C.N., 430 F.3d at 182-183.

[3] Complaint, ¶ 30. Who's In A Family also shows a Hispanic family, a mixed-race family, and single parents.

"How and Why to Talk to Your Children about Diversity."[4] According to the plaintiffs, the speaker encouraged attendees to (1) place homosexual books in each classroom; (2) hang gay and lesbian family posters in each classroom; and (3) "encourage teacher-initiated discussions in each class," all in an effort to "acclimate" young children to the subject of homosexuality.[5] The plaintiffs further allege, but only "[o]n information and belief. . .," that several defendants thereafter "adopted" the speaker's suggestions.[6] Yet, plaintiffs' Complaint is woefully thin on facts to show that such alleged "adoption" ever translated into defendants' teaching or instruction. Within the next year, plaintiffs identify two more books to which their children were exposed – Mollv's Family[7] and Kina and King.[8] Yet no mention is made of any other so-called "homosexual" materials, nor any "gay and lesbian posters," nor any "teacher-initiated discussions" at Estabrook. In short, plaintiffs' "indoctrination" allegation is nothing more than a bald assertion or generalized conclusion ***based solely on defendants' use of three books.***[9]

In exposing plaintiffs' children to Who's In A Family, Molly's Family and King and King, the defendants may have "introduced a few topics unknown to certain individuals." C.N., 430 F.3d at 185. Plaintiffs' children were free to discuss these topics within the context of their

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[4] Complaint, ¶ 32.

[5] Id.

[6] Id., ¶ 33.

[7] Molly's Family was on the shelf in the "reading center" or "mini-library" of Jacob Parker's first grade classroom. Complaint, ¶ 27.

[8] King and King is the library book read aloud by the defendant, Heather Kramer, to Joey Wirthlin's second grade class on March 24,2006. Complaint, ¶ 56.

[9] The plaintiffs do not allege (nor can they) that the three books portray mixed-gender relationships as somehow immoral or inferior to same-sex relationships, nor do they allege that use of the books was accompanied by classroom lectures or instruction belittling the views of any class, group or religion.

own family's moral and religious beliefs, just as their parents were fiee to supplement the three books with materials they considered more appropriate. Id. Thus, even under the C.N. case relied upon by the plaintiffs, the defendants' activities did not amount to a constitutional violation. Taking all alleged facts as true, defendants are entitled to the dismissal of plaintiffs' Complaint as a matter of law.

III. ARGUMENT

A. Plaintiffs' Free Exercise Claim Does Not Fall Within the "Hybrid Rights" Exception.

1. The "Hybrid Rights" Exception

The plaintiffs assert that their free exercise claims fall into the "hybrid rights" exception postulated in Employment Div.. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 882 (1990), and, *ipso facto*, this Court must apply heightened scrutiny to defendants' activities. Plaintiffs' Memorandum, at 14. Yet, to understand the exception upon which plaintiffs seek to rely, it is appropriate first to state the general rule. When evaluating a free exercise claim, the Supreme Court has explained that a "law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993), citing Smith, 494 U.S. at 879. A limited exception to this rule may be found, however, where a fiee exercise claim is joined with another alleged constitutional violation. Smith, 494 U.S. at 882. These are so-called "hybrid" situations. Id.

In opposition to the Motion to Dismiss, the plaintiffs criticize the defendants for employing a "divide and conquer" strategy in an effort to defeat separately those constitutional

claims which, plaintiffs maintain, can only be analyzed collectively or "synergistically." Plaintiffs' Memorandum, at 4. In short, under plaintiffs' "hybrid rights" analysis, the whole is *always* greater than the sum of its parts. This view, however, was expressly rejected as "bootstrapping" in the very cases relied upon by the plaintiffs.

> In keeping with the purpose and scope of Smith, it is clear that Plaintiffs cannot merely allege the violation of several constitutional rights, link them to a free exercise claim, and thereby invoke the demanding strict scrutiny standard. Whether they attach to their free exercise claim a parental rights claim or a free speech claim, the result is the same. Such bootstrapping cannot be inferred from Smith.

Littlefield v. Forney Ind. School Dist., 108 F. Supp. 2d 681,706 (N.D. Tex. 2000) (footnote omitted).'" The Seventh Circuit concurred. In Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003),[11] the Court cautioned (citing Brown among other cases) that "a plaintiff does not allege a hybrid rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right." Id., 342 F.3d at 765, quoting Miller v. Reed, 176 F.3d 1202, 1207-1208 (9th Cir. 1999).

The "hybrid rights" analysis employed in Defendants' Memorandum is the same as that employed by the First Circuit in Brown. The plaintiffs and this Court are obliged to employ that analysis here.

2. The Brown "Hybrid Rights" Analysis

In Brown, the First Circuit upheld students' compelled attendance at a sexually-explicit

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[10] Cited in Plaintiffs' Memorandum, at 15. The argument that strict scrutiny is required whenever "hybrid rights" are presented "is a product of a misreading of Smith." Littlefield, 108 F. Supp. 2d at 704.

[11] Cited in Plaintiffs' Memorandum, at 15.

AIDS awareness program in the face of a challenge that the program violated plaintiffs' "hybrid rights" –i.e., free exercise claims joined with right of privacy and due process claims. In ruling for the school defendants, the First Circuit did not apply a strict scrutiny test but, instead, applied a rational basis test. The Parkers and Wirthlins criticize the First Circuit's failure to apply a heightened standard of review, rationalizing that the Brown decision was rendered five years before the Supreme Court recognized the "fundamental right of parents to make decisions concerning the care, custody and control of their children." Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality). For that reason and others, the Brown holding, they sniff, "has only limited precedential value here . . .." Plaintiffs' Memorandum, at 10.

Plaintiffs' off-handed dismissal of Brown is not surprising given its outcome. Contrary to plaintiffs' suggestion (and, no doubt, strong desires), however, Brown is still good law. In fact, demonstrating considerable foresight regarding the protection of parental rights, the First Circuit stated:

> [T]he Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny. We need not decide here whether the right to rear one's children is fundamental because we find that, even *if it* were, the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude.

Brown, 68 F.3d at 533 (emphasis added). In short, even after Troxel, the First Circuit would reach the same result in Brown today as it did in 1995.

To reach its decision in Brown, the First Circuit first considered and rejected plaintiffs'

parental rights claims.[12] Although parents may have a right to choose a specific educational program for their children, they do not, reasoned the Court, have a right "to dictate the curriculum at the public school to which they have chosen to send their children." Id., 68 F.3d at 533 (citation omitted). Next, the Court disposed of plaintiffs' free exercise claims.

> The plaintiffs do not allege, nor is it apparent from their claim, that the compulsory attendance at the [AIDS Awareness] Program was anything but a neutral requirement that applied generally to all students.

Id., 68 F.3d at 538. Finally, the Court considered whether the case fell within the "hybrid rights" exception recognized by Smith "for cases that involve 'the Free Exercise Clause in conjunction with other constitutional protections.'" Id., 68 F.3d at 539, citing Smith, 494 U.S. at 881 & n.1.[13] As defined by the First Circuit, the exception applies only when a free exercise claim of *a particular quality* is combined with an independently protected constitutional right. In that event, something more than a reasonable relation to a legitimate state interest may be required to sustain the state activity. Brown, 68 F.3d at 539, citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).[14]

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[12] The Brown case, as presented to the District Court, was in the same posture as the case now before this Court. The defendants moved to dismiss plaintiffs' Complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. The First Circuit upheld the allowance of that motion on appeal.

[13] As set forth in more recent cases, to invoke the "hybrid rights" exception, "a free exercise plaintiff must make out a colorable claim that a companion right has been violated – that is, a fair probability or a likelihood, but not a certitude, of success on the merits." Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999); Harper v. Poway Unified School Dist., 445 F.3d 1166, 1187 (9th Cir. 2006); Green v. City of Philadelphia, 2004 WL 1170531, at *7 (E.D. Pa. 2004).

[14] In Yoder, the Supreme Court invalidated a compulsory school attendance law as it applied to Amish parents who refused to send their children to public school on religious grounds. 406 U.S. at 232-233. In so doing, the Supreme Court emphasized the need to consider the "quality" of the free exercise claim asserted. Id., at 215-216 & 233. See Littlefield, 108 F. Supp. 2d at 707 (holding that the "quality" of plaintiffs' free exercise claims – that the wearing of school uniforms would negatively impact their religious beliefs – implicated no more than the rational basis test).

The First Circuit concluded that the plaintiffs case did not fall within the "hybrid rights" exception for two distinct reasons. First, the plaintiffs' allegations of "interference with family relations and parental prerogatives" did not set forth an independently protected constitutional right. Brown, 68 F.3d at 539. Second, plaintiffs' free exercise claim was "qualitatively distinguishable" from the type of claim raised in Yoder, where the state program of compulsory school attendance "threatened [the plaintiffs'] entire way of life." Id. In short, the First Circuit did not blindly apply a strict scrutiny test simply because the plaintiffs linked a free exercise claim with another constitutional right. Instead, it considered both the "quality" of the free exercise claim and the viability of the companion rights asserted. This Court must do likewise.

*3. **Application of the Brown "Hybrid Rights" Analysis to Plaintiffs' Claims***

i) Plaintiffs' Complaint does not raise an independently protected constitutional right.

Following the First Circuit, this Court should determine at the outset whether the plaintiffs raise an independently protected constitutional right in their Complaint. The plaintiffs fail to do so.

The Parker and Wirthlin parents first allege that defendants' use of the three books violated their due process rights "to direct the moral upbringing of their children . . .."[15] In support they cite Troxel v. Granville, 530 U.S. 57 (2000) (plurality), the Supreme Court's "most recent 'parental rights' decision." Plaintiffs' Memorandum, at 7. The Troxel case, however, did not involve claims that arose in the context of public education. Instead, the Supreme Court considered the application of a Washington state statute that permitted "any person" to file a

[15] Complaint, ¶ 71.

petition to seek visitation rights with a child, so long as such visitation was found to be in the best interests of the child. Troxel, 530 U.S. at 61. Suit arose from a petition filed by the paternal grandparents of two illegitimate children of their late son who sought visitation rights with their grandchildren despite the objections of the mother.[16] (The mother's fitness was not at issue.) The Supreme Court struck down the state statute as violative of the mother's right "to make decisions concerning the care, custody, and control of [her] children. . .."[17] Forced visitation by non-parents, including temporary loss of physical custody, imposes a far different burden on a parent's rights than a public school's use of reading materials with which a parent disagrees.

Despite the plurality's declaration that parental rights are "fundamental," the Troxel Court "conspicuously failed to articulate a standard of judicial scrutiny to be applied to laws which impinge on such rights." Littlefield, 108 F. Supp. 2d at 700. Thus, Troxel cannot be relied upon as support for plaintiffs' suggestion that defendants' conduct must be subjected to strict scrutiny. Indeed, since Troxel, no Supreme Court case or First Circuit case has applied strict scrutiny to a claim of public school interference with parental rights. This Court should refiain from doing so here.[18]

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[16] At trial, the grandparents requested two weekends of overnight visitation per month, as well as two weeks of visitation each summer. Troxel, 530 U.S. at 61.

[17] Washington's non-parental visitation statute was held overbroad in that a parent's estimation of a child's best interests was, in effect, replaced by the views of a judge. "[I]n practical effect, in the State of Washington a court can disregard and overturn ***any*** decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." Troxel, 530 U.S. at 67 (emphasis in original).

[18]

> [T]here is nothing in Troxel that would lead us to conclude from the Court's recognition of a parental right in what the plurality called "the care, custody, and control" of a child with respect to visitation rights that parents have a ***fundamental*** right to the upbringing and education of a child that includes the right to tell public schools what to teach or what not to teach him or her.

Leebaert v. Harrington, 332 F.3d 134, 142 (2nd Cir. 2003) (emphasis in original).

Admittedly, parental rights do not end at the schoolhouse door; yet such rights may be limited in the context of a public school.[19] That is the message of the Brown, where the First Circuit found a "fundamental difference" between a state which sought to prohibit parents from educating their children as they saw fit, and parents who sought to proscribe what the state could teach their children. Brown, 68 F.3d at 534. The former intruded on the rights of parents to direct the upbringing and education of their children. See Meyer v. Nebraska, 262 U.S. 390,400 (1923) (state statute prohibiting instruction in foreign languages held unconstitutional); Pierce v. Societv of Sisters, 268 U.S. 510, 534-535 (1925) (state statute requiring public school attendance – and thus outlawing parochial schools – held unconstitutional). The latter did not. See Brown, 68 F.3d at 534 ("We . . . 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.")

In their Memorandum, the defendants cite numerous cases in which courts followed Brown by limiting the right of parents to dictate the content of public school teaching materials. See Defendants' Memorandum, at 13-15. This Court should do likewise.

In a further effort to identify a protected constitutional right independent of their free exercise claim, the Parkers and Wirthlins next assert that defendants' use of diversity reading materials violates their privacy rights. Plaintiffs' Memorandum, at 23-24. In support of this claim, the plaintiffs cite Griswold v. Connecticut, 381 U.S. 479, 516 (1965) (Connecticut birth

[19] For an apt analogy, see Tinker v. Des Moines Ind. Community School Dist, 393 U.S. 503, 509 (1969) (students' free speech rights held not without limitation within school); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (public school need not tolerate student speech inconsistent with its basic educational mission, even though government could not censor similar speech outside of school).

control statute held an unconstitutional intrusion upon the right of marital privacy); M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (Mississippi statute preventing parent from appealing sufficiency of evidence upon which trial court based parental termination decree held unconstitutional); and Hill v. Colorado, 530 U.S. 703,716 (2005) (Colorado statute prohibiting protesters from approaching women entering health care facilities protected individual's right to be free from unwanted communications and, therefore, did not violate the First Amendment).

The privacy rights addressed in Griswold, M.L.B. and Hill – the right to be free from state regulation of birth control, the right to appeal a judicial decision that permanently terminates one's parental rights, and the right to enter a health care facility without interference from protestors – are of an order and magnitude far different from the plaintiffs' concern in avoiding communications inconsistent with their beliefs. As the Supreme Court noted, the privacy interest in avoiding unwanted communications "varies widely in different settings." Hill, 530 U.S. at 716. Yet plaintiffs cite no cases whatsoever wherein this interest has been held protected in a public school setting. In fact, in Brown, the First Circuit expressly rejected the minor plaintiffs' claim of a protected privacy right to be free from exposure to language they found offensive. 68 F.3d at 534. Moreover, plaintiffs' choices about marriage and family life are in no way threatened by the defendants' teaching of issues regarding tolerance and diversity. Plaintiffs' privacy rights, therefore, were not infringed by the defendants.[20]

Upon determining that the plaintiffs raise no independently protected constitutional right in their Complaint, this Court should dismiss their "hybrid rights" claim on that ground alone.

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[20] In their Memorandum, the defendants also argued that their use of diversity teaching materials did not violate plaintiffs' substantive due process rights to be free from conduct that "shocks the conscience." Defendants' Memorandum, at 15-16. The plaintiffs offer no argument to the contrary in their Memorandum.

However, the "quality" of plaintiffs' free exercise claim serves as a second and independent reason for dismissal.

ii) Plaintiffs' free exercise claim is "qualitatively distinguishable" from the claim raised in Wisconsin v. Yoder.

In Opposition to defendants' Motion to Dismiss, the plaintiffs cite four cases wherein the courts (three United States District Courts and the Supreme Court of Michigan) applied the "hybrid rights" exception to protect plaintiffs' free exercise rights in a school setting. Notwithstanding the fact that such cases are not binding on the courts of the First Circuit, each one is distinguishable from the facts presented here since each court identified a specific burden placed on plaintiffs' free exercise rights by the schools' requirements. See Hicks v. Halifax Cty. Bd. of Educ., 93 F. Supp. 2d 649,663 (E.D.N.C. 1999) (mandatory school uniform policy placed unconstitutional burden on guardian who believed that wearing of uniform demonstrated "an allegiance to the spirit of the anti-Christ"); Chalifoux v. New Caney Ind. School Dist., 976 F. Supp. 659, 670 (S.D. Tex. 1997) (prohibition against wearing of rosary beads as "gang-related apparel" violated Catholic students' free exercise rights); Alabama and Coushatta Tribes of Tex. v. Trustees of the Big Sandy Ind. School Dist., 817 F. Supp. 1319, 1328-1333 (E.D. Tex. 1993) (prohibition against wearing of long hair by male students violated Native Americans' free exercise rights); People v. DeJonge, 442 Mich. 266,501 N.W.2d 127 (1993) (prohibition against home-schooling by non-certified parents violated Roman Catholic parents' free exercise rights).

As the First Circuit would no doubt agree, the cases cited by the plaintiffs are "qualitatively distinguishable" from the case presented here. The Parkers' and Wirthlins' rights to the free exercise of their religion were not unduly burdened or infringed by the defendants' use

of diversity reading materials in the same way the rights of the students and parents were burdened in Hicks, Chalifoux, Alabama and Coushatta Tribes or DeJonge. "The free exercise inquiry asks whether government placed a ***substantial*** burden on the observation of a central religious belief or practice . . .." Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (emphasis added)." Here, the Parker and Wirthlin children were exposed to topics and ideas with which the plaintiffs disagree. Further, such exposure took place at age levels considered inappropriate by the plaintiffs. Yet, the defendants' selection of reading materials did not place a "substantial" burden on plaintiffs' observation of their religious beliefs, nor did it threaten the plaintiffs' "entire way of life." Yoder, 406 U.S. at 235. In Fleischfiesser v. Directors of School Dist. 200, 15 F.3d 680 (7th Cir. 1994), the Seventh Circuit dismissed the parents' claims that the elementary school reading program "indoctrinates children in values directly opposed to their Christian beliefs . . .." Id., 25 F.3d at 683.

> The burden to the parents in this case is, at most, minimal. The directors are not precluding the parents from meeting their religious obligation to instruct their children. Nor does the use of the series compel the parents or children to do or refrain from doing anything of a religious nature. Thus, no coercion exists, and the parents' free exercise of their religion is not substantially burdened.

Id 15 F.3d at 690. Hence, the Hicks, Chalifoux, Alabama and Coushatta Tribes and DeJonge cases lend no support to plaintiffs' free exercise claims.

The First Circuit rejected plaintiffs' "hybrid rights" claims for "two distinct reasons" – their free exercise challenge was not conjoined with an independently protected constitutional right; and their free exercise claim was "qualitatively distinguishable" fiom the claim alleged in

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[21] "[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203,223 (1963).

~~Yoder~~. ~~Brown~~, 68 F.3d at 539. In applying the law of the First Circuit, this Court should reject the "hybrid rights" claims of the Parker and Wirthlins for the same two reasons.

B. Age of Minor Plaintiffs Does Not Compel Application of a "Strict Scrutiny" Test.

The plaintiffs maintain that the tender age of their children compels application of a "strict scrutiny" test. Plaintiffs' Memorandum, at 20. Yet, the Parkers and Wirthlins offer scant support for this bold assertion. In neither C.N. v. Ridgewood Bd. of Educ., 430 F. 159 (3rd Cir. 2005), nor Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000), the two parental rights cases cited by the plaintiffs, did the Third Circuit rest its decision on the age of the children, and neither case involved primary school students in their "tender years." C.N., 430 F.3d at 185 (upholding administration of survey to seventh through twelfth grade students); Gruenke, 225 F.3d at 306 (swim coach held to have violated plaintiffs' parental rights by requesting their 17-year old daughter to take pregnancy test). Moreover, both C.N. and Gruenke recognize that, in the public school setting, student privacy rights are not necessarily as broad as the privacy rights of adults:

> The Court has recognized that for some portions of the day, children are in the compulsory custody of state-operated school systems. In that setting, the state's power is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."

Gruenke, 225 F.3d at 304, quoting Vernonia School Dist. v. Acton, 515 U.S. 646, 655 (1995); C.N., 430 F.3d at 182. Thus, neither C.N. nor Gruenke compel, or even suggest, that use of a strict scrutiny analysis depends on the age of the children involved.

The remaining seven cases cited by plaintiffs in support of their "tender years" argument – Board of Educ. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226 (1990); Edwards v. Aguillard, 482 U.S. 578 (1987); School Dist. of Abington v. Schempp, 374 U.S. 203

(1963); Sherman v. Community Consol. School Dist. 21 of Wheeling Township, 8 F.3d 1160 (7th Cir. 1993); Grand Rapids School Dist. V. Ball, 473 U.S. 373 (1985); Lee v. Weisman, 505 U.S. 577 (1992); and Lemon v. Kurtzman, 403 U.S. 602 (1971) – all concern the analysis of Establishment Clause claims made under the First Amendment Lemon test.[22] Yet, by their own admission, the plaintiffs do not assert Establishment Clause claims against the defendants. Plaintiffs' Memorandum, at 15, n.13; & at 21, n.17. And even to the extent these courts referenced student age in determining whether state action ran afoul of the Establishment Clause, they did not consider age a dispositive factor. In Sherman, the Third Circuit specifically rejected the notion that the age of the children mitigated in favor of the plaintiffs.

> [W]e cannot accept the Shermans' contention that the age of the children involved tips the balance in their favor. In all three cases, Grand Rapids, Lee, and *Berger*,[23] the courts noted the need for special monitoring because of the age of the children. However, that need was not dispositive in any of these cases.

Id., 8 F.3d at 1166-1167 (emphasis added).

Whether high school students are exposed to a sexually-explicit AIDS awareness program, or elementary school children are exposed to diversity reading materials that depict a kindergarten student raised by Mommy and Mama Lu (Molly's Family), Laura and Kyle living with two moms, Joyce and Emily, and a poodle named Daisy (Who's In A Family), and a young prince rejecting several princesses in favor of another prince (King and King), the analysis is the same. The defendants' conduct need not satisfy a strict scrutiny test in order to pass

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[22] The three-prong Lemon test (1) asks whether the statute in question has a secular legislative purpose; (2) mandates that the statute's principal or primary effect is one that neither advances nor inhibits religion; and (3) requires that the statute must not foster an "excessive government entanglement with religion." Lemon, 403 U.S. 602,612-613 (1971).

[23] Berger v. Rensselaer Central School Corp., 982 F.2d 1160 (7th Cir.), cert. den., 508 U.S. 911 (1993).

constitutional muster. If such conduct was rationally-related to a legitimate state interest – such as the interest in exposing students to diversity in a respectful educational environment free from discrimination based on race, gender, color, religion, sexual orientation or disability – then it must be upheld.

C. The Plaintiff Parents Should Not Be Given Veto Power Over Information Provided To Their Children.

In a final attempt to avoid the reach of Brown, the plaintiffs insist that they seek only "minimal relief" from the defendants. Plaintiffs' Memorandum, at 3. They do not wish, they claim, to dictate curriculum or to influence the behavior of other children. Rather, the plaintiffs ask only to be notified before material of the "type" contained in the three books is presented to their children, and that they be allowed to "opt-out" of instruction which they find "offensive." Id. Presumably, by understating their demands, the plaintiffs believe that some sort of reasonable accommodation can be made by the defendants to satisfy plaintiffs' personal concerns.

Contrary to their Memorandum, however, the plaintiffs did not seek only "minimal relief' from school officials prior to filing suit, nor do they seek "minimal relief' in their Complaint. What plaintiffs seek is virtual veto power over the type of information provided to their children in public school. In the spring of 2005, the Parkers objected to defendants' use of "any materials or discussions featuring sexual orientation, same-sex unions, or homosexuality . . ." without their prior notice and a chance to "opt-out."[24] On December 5,2005, the Parkers requested prior notice of all planned discussions of "homosexuality, transgenderism, or gay relationshipslmarriage" in their son's presence, their son's removal from "spontaneous"

[24] complaint, ¶ 34. This request followed on the heels of Jacob Parker's exposure to Who's In A Family. Id., ¶¶ 26, 30-31.

discussions of the same topics, and an opportunity "to view any materials within the school pertaining to the aforementioned topics within the reach of our child."[25] On April 6, 2006, the Wirthlins "repeatedly requested that they be informed before the adult defendants intentionally presented themes of homosexuality to their children."[26] Not satisfied with defendants' responses to these requests, the plaintiffs filed suit on April 27,2006, wherein they ask this Court to order that (1) they be given prior notice of "any adult-directed or initiated classroom discussions of sexuality, gender identity, and marriage constructs, until such time as the children are in seventh grade"; (2) they be permitted to excuse their children from certain classroom presentations and discussions concerning views of gender identity and marriage contrary to their own; (3) they be permitted to "attend" and "record" school presentations and discussions "of the aforementioned ideological/socialization perspectives"; and (4) "no materials graphically depicting homosexual physical contact be submitted to the students until the seventh grade . . .."[27]

The relief sought by the plaintiffs is by no means "minimal"; on the contrary, the plaintiffs directly challenge the Lexington school policy of acknowledging and respecting diversity, including gays and lesbians, and eliminating all types of discrimination against minorities from the public educational environment. By invoking a purported "right" to be free from formal curricular or extra-curricular activities, planned or "spontaneous" discussions, and "graphic" depictions or written materials with which they disagree, the plaintiffs effectively

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[25] Id., ¶ 42.

[26] Id., ¶ 65. This request followed on the heels of Joey Wirthlin's exposure to Kinn and King. Id., ¶¶ 53-64.

[27] Id., at 23, ¶¶ A-D. To put this final demand into context, the plaintiffs characterize the illustration of two princes kissing on the final page of King and King as a "graphic depiction." Id., ¶ 53. A copy of this illustration is attached to Defendants' Memorandum as "A."

dispute that public education is entrusted "to the control, management, and discretion of state and local school committees." Curtis v. School Comm. of Falmouth, 420 Mass. 749,754 (1995). While defendants' diversity policy may be suitable for others, it is not, plaintiffs claim, suitable for them.

The First Circuit expressly rejected the notion of a parental veto over public education in Brown. The rights of parents "do not encompass a broad-based right to restrict the flow of information in the public schools." 68 F.3d at 534, citing Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925). Thus, parents do not have a right "to dictate the curriculum at the public school to which they have chosen to send their children." Id.[28]

Their pained disavowals notwithstanding, see, e.g., Plaintiffs' Memorandum, at 8; the plaintiffs are attempting to dictate curriculum to the defendants. By insisting their children have a constitutional right *not* to be taught the lessons of Who's In A Family, Molly's Family and Kine and King, the Parkers and Wirthlins seek to define the boundaries of what lessons ***may*** be taught to their children. This is dictating curriculum, pure and simple.

IV. CONCLUSION

For the reasons stated in Defendants' Memorandum, and for the reasons set forth above, the plaintiffs fail to state a claim against the defendants upon which relief can be granted. Therefore, this Court should dismiss plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

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[28] Numerous cases following Brown are cited in Defendants' Memorandum, at 14-15.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing, filed through the Electronic Case Filing System, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and that a paper copy shall be served upon those indicated as non-registered participants on October 16, 2006.

John J. Davis