No. 07-1528

In The
Supreme Court of the United States

David Parker, Et Al.,

Petitioner,

v.

William Hurley, Et Al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the First Circuit

BRIEF FOR RESPONDENTS

Counsel of Record
Counsel for Respondents

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STATEMENT OF THE ISSUES

1. Did the appellate court reasonably dismiss without prejudice Plaintiffs' state law claim that Defendants violated the Massachusetts Parental Notification Statute, Mass. Gen. Laws ch. 71, § 32A?
2. Did the appellate court reasonably dismiss with prejudice the federal claim that Defendants violated Plaintiffs' Free Exercise guarantee under the First Amendment to the United States Constitution?
3. Did the appellate court reasonably dismiss with prejudice the federal claim that Defendants violated Plaintiffs' parental and privacy rights under the Due Process clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Over the last fifteen years, Massachusetts has made broad steps in becoming one of our nation's leaders in enacting nondiscrimination policy, specifically in regard to sexual orientation. In 1993, Massachusetts approved of a comprehensive education reform bill requiring the State Board of Education to create academic standards for core subjects in line with the Massachusetts Statewide Education Goals statute, Mass. Gen. Laws ch. 69, §1D, teaching nondiscrimination. However, in 1996, another state statute, Mass. Gen. Laws ch. 71 §32A, was enacted requiring school districts to implement a parental notification and opt-out opportunity for curriculum involving human sexuality. In 1999, the State Board of Education implemented a Comprehensive Health Curriculum Framework that set measurable goals in several subsets for students in Pre-K – 12th grade; goals varied depending on the grade of the student, but included such things as being able to "describe different types of families" for elementary students. *Parker v. Hurley* 514 F. 3d 87 (2008). And, in 2003,

Massachusetts became the first state in the nation to allow for gay marriage by ruling the allowance of only heterosexual marriages unconstitutional in *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003).

The instant case arises out of complaints made by Plaintiffs, two families whose sons are enrolled in Estabrook Elementary School in Lexington, Massachusetts. Each family's child has encountered an incident that the families believe violate not only their United States constitutional guarantees of Free Exercise of religion and Due Process in the ability to rear their children as they see fit, but also the Massachusetts Parental Notification Statute requiring the school to notify and provide an opt-out option for curriculum containing sexual content. Both families, the Parkers and Wirthlins, allege to have sincerely held Judeo-Christian beliefs that find homosexuality to be immoral and against the teachings of their religion.

In January of 2005, the Parkers' son, Jacob, brought home a book entitled *Who's in a Family?*, a picture book that showed many types of families with mixes of race and ethnicity as part of a "Diversity Book Bag" program the school enacted. One picture showed a same-sex couple with a child. The book's message was clearly to promote acceptance of the fact that not all families look the same but they are still families. From January to April 2005, the Parkers had multiple meetings with school and district officials regarding the incident with their son. The Parkers asked for the parental notification mandate to be implemented in the future, but the school adhered to the belief that they were under no obligation to do so as the statute did not apply to this situation. The next year, when Jacob was in first grade, his reading center offered a book called *Molly's Family*, which showed many types of families but focused on the child of a same-sex couple.

In March 2006, the Wirthlin's son, Joseph, was read a story by his 2nd grade teacher called *The King and King*, which showed the journey of a prince looking for a princess, but not being satisfied with any he found; eventually he meets another prince, falls in love, and happily marries the prince instead. Finding the story offensive, the Wirthlins met with the teacher and the principal and asked for the parental notification to be implemented in the future under similar circumstances; their request was denied on the same basis as the Parkers' request.

On April 27, 2006, the Parkers and Wirthlins filed suit in federal court claiming the above United States constitutional violations, as well as a violation of the Massachusetts Parental Notification Statute. On February, 23, 2007, the district court granted the Defendants' Motion to Dismiss, dismissing the state claim without prejudice to allow for a state court for a decision, and dismissing the federal claims with prejudice on the grounds that no constitutional violations had taken place. The Court used *Brown v. Hot, Sexy, and Safer Productions*, 68 F. 3d 525 (1st Cir. 1995), as precedent determining that:

> This case is not distinguishable in any material respect from *Brown*...In *Brown*, the First Circuit held that the constitutional right of parents to raise their children does not include the right to restrict what a public school may teach their children and that teachings which contradict a parent's religious beliefs do not violate the First Amendment right to exercise their religion.

Parker v. Hurley 474 F. Supp. 2d 261, 263 (2007)

On January 31, 2008, the First Circuit Court of Appeals affirmed the district court's decision, although, under different reasoning. Plaintiffs have now appealed to the Supreme Court of the United States and have been granted certiorari.

Although Defendants believe *Brown* to be precedent in this situation and essential to the overall merits of the school district's practices, Defendants have chosen to focus on the factors brought to light in the First Circuit Court of Appeal's decision. *Parker v. Hurley* 514 F. 3d 87 (2008).

ARGUMENT

I. THE APPELLATE COURT REASONABLY DISMISSED WITHOUT PREJUDICE PLAINTIFFS' STATE LAW CLAIM THAT DEFENDANTS VIOLATED THE MASSACHUSETTS PARENTAL NOTIFICATION STATUTE

A. The state statue does not apply to the instant case.

The Parental Notification Statute, ALM GL ch. 71 §32A, requires that a school district, "implementing or maintaining curriculum which *primarily* involves human sexual education or human sexuality issues shall adopt a policy ensuring parental/guardian notification" (italics added for emphasis). The materials in question in the instant case clearly do not *primarily* involve human sexuality or attempt to educate on human sexuality, as they are picture and story books used at the elementary level. Conversely, these books simply adhere to the Massachusetts Department of Education statute mandating academic standards for all students that "…shall be designed to inculcate respect for the cultural, ethnic and racial diversity of the commonwealth…" ALM GL ch. 69, §1D. The purpose of these materials is obviously to instill acceptance and acknowledgement of all lifestyles.

Additionally *Who's in a Family?* and *Molly's Family* were not required reading, but provided as part of a selection of books students could choose from. Although the public school teacher read *King and King* aloud to the class, connoting mandatory attendance, it is

clear that all three books were used in an attempt to build tolerance for and promote the benefits of diverse communities, such as those found in Massachusetts, rather than explicitly teach human sexuality.

Plaintiffs argue that in addition to the refusal to notify, no "opt-out" alternative allowing parents to "exempt their children from any portion of said curriculum" or "to the extent practicable, [making] program instruction materials for said curricula…reasonably accessible to parents…for inspection and review," ALM GL ch. 71, §32A, was provided, both of which would have also required prior notification in order to implement. Defendants insist such accommodations are not *reasonable* considering such books are not part of a particular unit which would be taught at a particular time, as a sex education unit would be, making it impracticable to foreworn parents of all available curriculum and book options for students. On September 22, 2005, the Superintendent of Schools, Paul Ash, published a letter clarifying the school district's policy and explaining the decision regarding the Parkers' complaint made the previous school year, claiming that the district's policy was to promote diversity and dissuade discrimination. He claimed,

> The Parental Notification Statute has been interpreted by the Massachusetts Department of Education to allow for 'activities and materials designed to promote tolerance and respect for individuals including recognition of differences in sexual orientation'…'under this standard, staff has no obligation to notify parents of discussions, activities, or material that simply reference same-gender parents or that otherwise recognize the existence of differences in sexual orientation.'

Simchi-Levi 2008, 761

Therefore, Plaintiffs' claim of a violation of the Parental Notification Statute encompasses a broader spectrum than the application of the statute was intended for and is not valid.

B. The claim does not ask a federal question.

Plaintiffs mistakenly brought this state claim into the federal courts. Appropriately, the District Court and Court of Appeals have both deferred judgment to the state courts by dismissing the claim without prejudice as to allow Plaintiffs to reassert the claim in the appropriate Massachusetts state court.

II. THE APPELLATE COURT REASONABLY DISMISSED WITH PREJUDICE THE FEDERAL CLAIM THAT DEFENDANTS VIOLATED PLAINTIFFS' FREE EXERCISE GUARANTEE UNDER THE 1ST AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Plaintiffs were not denied choice in their children's education.

Plaintiffs allege that the availability and reading of said materials violate the students' and their families' Free Exercise of religion guarantee under the First Amendment to the United States Constitution. They claim that by recognizing same-sex couples and their families, said materials are promoting a homosexual lifestyle and that the school is thus indoctrinating their children with a moral belief incongruent to their own, therefore constraining their right to exercise their belief that homosexuality is immoral.

This issue was appropriately dismissed in the appellate court. The court recognized the decision made in 1925 on this issue in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Pierce* the Court held that the state does not have the authority to mandate student attendance in the public school system. Thus, Plaintiffs have the freedom to enroll their students in a multitude of educational programs to meet state educational goals including private schools and home-schooling options. It is impossible for Plaintiffs' Free

Exercise rights to be violated when Plaintiffs have chosen for their children to enroll, attend, and participate in the public school system where such nondiscriminatory, and contrary beliefs to their own are known to be held.

B. Curriculum does not promote or hinder any religious beliefs.

Neither the state of Massachusetts nor the State Board of Education have enacted any mandates on academic curriculum that require teaching either in accordance with or against any particular religious class in accordance with the Establishment Clause of the First Amendment of the United States Constitution. Plaintiffs allege that the promotion of tolerance that the school district's curriculum encourages directly contradicts their sincerely held religious beliefs. Defendants do not recognize nondiscrimination practices and the encouragement of tolerance in a diverse community by the mere recognition of race, gender, ethnicity, culture, or orientation as an intended contradiction to any particular religious beliefs. Therefore, Defendants deny Plaintiffs' claim that the school district is targeting their particular religious beliefs.

Even in the event that Plaintiffs' religious beliefs against homosexuality are contradicted in some school materials:

> It would be literally impossible to develop a public school curriculum that did not in some way affect the religious or nonreligious sensibilities of some of the students or their parents…[schools] need not and should not sacrifice the quality of the students' education. They need only ensure that the primary effect of the school's policy is secular.

Florey v. Sioux Falls School District 619 F. 2d 1311, 1317 (1980).

Here, Defendants are confident that the school curriculum being implemented retains a secular and beneficial primary effect, which "neither advances nor inhibits religion." *Lemon v. Kurtzman* 403 U.S. 602, 612 (1971).

C. Plaintiffs have failed to show a substantial burden on their religious beliefs.

Schools are charged with the task of educating hundreds of students in a limited amount of time and on a limited budget. It is an ideal and not a reality that public schools would be able to cater to students' individualized needs and/or beliefs in order to avoid offense and assist parents in rearing children with the views they wish to impart. The Court has often recognized this impracticability and has determined that in order for a First Amendment Free Exercise claim to be valid, the plaintiff must "allege something more than the fact… offended her personal religious beliefs" and that when a choice to participate without penalty is presented an argument of coercion is negated. *Bauchman v. West High School* 132 F. 3d 542, 557 (1997). Defendants note such a choice was presented to Plaintiffs in determining where to enroll their children in school. Additionally, "it 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 District of Abington Township v. Schempp* 374 U.S. 203, 223 (1963). Plaintiffs have failed to show the effects of the school materials in coercing their children to hold beliefs contrary to their own religion's values or in showing that the use of these materials placed such influence on their children as to negate the Plaintiffs' own moral and religious teachings to their children.

In 1990, the Court warned, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." *Employment Division, Department of Human resources of Oregon v. Smith* 494 U.S. 872, 878-79 (1990). This precedent is applicable to the instant case because rules, regulations, and decisions regarding curriculum of public schools has always been left to the state's discretion. Here, Defendants are appropriately carrying out

Massachusetts' and the State Board of Education's mandates regarding curriculum standards. Since Plaintiffs have chosen for their children to attend Estabrook Elementary School, they are not eligible to exempt their children from curriculum created in accordance with valid law.

Plaintiffs have failed to substantiate their free exercise claim, which was rightfully dismissed by the Court of Appeals.

III. THE APPELLATE COURT REASONABLY DISMISSED WITH PREJUDICE THE FEDERAL CLAIM THAT DEFENDANTS VIOLATED PLAINTIFFS' SUBSTANTIVE PARENTAL AND PRIVACY RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Plaintiffs do not have authority to determine school curriculum.

Although Defendants do recognize and appreciate parents' critical roles in the education of their children, that role has specifically been limited in terms of burdening the school district with only what is reasonable to accommodate parental interests. The Court has been a long-time supporter of the public school system's sovereignty in adequately determining the means of educating students to become productive members of their community and society as a whole. "Preparing children for democratic citizenship is an important and demanding responsibility." (Eichner 2007, 1340). The public school system's efforts are focused at creating leaders for future generations. "Citizens must be committed to political equality, to listening to other points of view, to resolving issues through deliberation rather than force, and the rule of law." (Eichner 2007, 1341). Means to this end include instruction and practice in building interpersonal skills and relationships with a diverse body

of people. The Court acknowledges, "The critical point is this: While parents may have a fundamental right to decide whether to send their child to a public school, they do not have the fundamental right to generally direct how a public school teachers their child" *Blau v. Fort Thomas Public School District* 401 F. 3d 381, 395 (2005). Similarly, the Court refuses to acknowledge, "the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught." *Leebaert v. Harrington* 332 F. 3d 134, 141 (2003). Therefore, Defendants have, under their authority appropriately denied Plaintiffs' request for special accommodations, including prior notification and opt-out alternatives, with regard to the specific materials in question.

B. <u>The state holds a compelling interest in maintaining current curriculum standards.</u>

Discrimination has been haunting our nation since its inception. Slowly, but surely we work as a society, led by legislation and litigation, to eliminate discriminatory actions. More often than not, such objectives require confirmation of the Court. Defendants believe this to be one such case.

Fifty years ago, the country was struggling to secure racial equality; government assistance was needed to achieve such important but controversial changes. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court was needed to mandate the desegregation of public schools in an effort to curb racial discrimination and avoid potential damage to African-American students who were overly susceptible to feelings of inferiority brought on by such discrimination.

In *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983), the Court ruled that the government's purpose in revoking the University's tax exempt status was "a

fundamental, overriding interest in eradicating racial discrimination in education…that government interest substantially outweighs whatever burden denial of tax benefits places on petitioner's exercise of their religious beliefs." Here, the Court recognized alleviating racial prejudices as so fundamentally important, that they were willing to renege monetary funding for education in an institution that participated in discriminatory practices.

In the instant case, discrimination based on "sexual orientation" can be substituted for "racial discrimination" and we arrive at the same principle quest for equality, and see that the school district is trying to preemptively eradicate discrimination in the public school classrooms by use of nondiscriminatory materials, which has been determined to be a compelling government interest by the Court.

In our changing and growing society, it becomes increasingly important to educate our youth through the teaching tolerance and acceptance of cultures, religions, races, ethnicities, and orientations different than our own in order to protect all people, regardless of how they identify themselves, from discrimination. As our fast-paced society continues to rob our youth of a childhood it also becomes increasingly important to instill these values in a younger and younger audience.

If schools were to wait until the seventh grade, as Plaintiffs request, to begin the teachings of tolerance and acceptance in a diverse world, it would be of little effect as students may have already been indoctrinated into systematic beliefs of intolerance and discrimination from within or outside of the public school system. Teaching a child that good people come in a variety of forms, before their innocence is lost and their ability to pre-judge arrives, is much more effective than to wait and try to reverse a child's preconceived notions.

C. Avoiding nondiscrimination curriculum is dangerous for LGBTQ students.

It has proven to be dangerous for LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning) students to attend a school that does not recognize their status or teach tolerance and acceptance of their lifestyle. Plaintiffs argue for the suspension of curriculum that acknowledges sexual orientation, but it is not enough to simply advocate muteness on the issue. "…by ignoring the subject in all curricula…the schools deny access to positive information about homosexuality that could improve the self-esteem of gay youth. This silence provides tacit support for homophobic attitudes and conduct by some students." (Simchi-Levi 2008, 776). Although gay students make up a relatively small percentage of students as a whole, they are the most adversely affected group of students due to the harassment and negative treatment they endure. Ninety percent of LGBTQ students have heard disparaging or homophobic comments at school. Gay students are more likely to be bullied or harassed in school than heterosexual students. This treatment often results in gay youth failing classes, having low self-esteem, being victims of abuse, and having a high risk of suicide. (Fedders 2006).

It should infuriate the Court to know that in response to these consequences, "one Southern California school district developed…a separate campus, to provide a safe educational space for students who were subject to severe harassment and/or physical assault by classmates. New York City's Harvey Milk School serves a similar function." (Lovell 1998, 626). These schools have just erased the last fifty years of progress made in eradicating discrimination and have returned us to a new form of segregation. Encouraging tolerance of sexual orientation rather than tolerating bullying *should* be the school's objective.

Surely the government's interest in safeguarding students from emotional or physical harm by quelling misconceptions outweighs any Free Exercise and Due Process burdens that Plaintiffs may or may not suffer by enduring such curriculum.

D. <u>It is unlawful for Defendants to cease with nondiscrimination curriculum</u>

According to Massachusetts' law, discrimination in public schools is prohibited. The law states, "No person shall be excluded from or discriminated against…[in] obtaining the advantages, privileges, and courses of study of such public school on account of race, color, sex, religion, national origin, or sexual orientation." ALM GL ch. 76 §5. As noted above, efforts to eradicate such discrimination are futile without the direct acknowledgment and encouragement of toleration, if not acceptance, of all persons by school personnel on a regular basis and through the medium of academic curriculum. For schools not to teach these fundamental principles would not only be a violation of state statute, but would cause irreparable harm to a portion of the youth population:

> The information flowing to students cannot be restricted in an effort to accommodate the rights of parents, or in order to protect the students from a particular viewpoint. If a high school does not provide gay and lesbian support services to students because it chooses to suppress the message of tolerance and self-acceptance that accompanies the services, then the state is denying youth the right to receive accurate information.

Henigan 1996, 1290

This negates the entire goal of education in any school of any curriculum. Denial of accurate and factual information to kids is criminal, robbing youth of making poignant, educated judgments of their own. No one can be expected to make a equitable decision with half the facts. Do we really want to blind our youth and lead a generation to an ignorant state that supports hatred and bigotry?

If the district were to cease implementation of materials such as those in question, this case would not thwart litigation it would propel it. In fact, litigation is becoming common in cases where students can show "that the abuse and harassment occurred with the knowledge and tacit approval or indifference of school administrators." (Fedders 2006, 791). As the Defendants have adamantly argued in this brief, endorsement comes not only in the form of approving, but also avoiding. Silence on the subject would be tantamount to approval and indifference of the harassment and abuse of a population of students entrusted to the care of schools acting in *loco parentis*.

E. <u>Nondiscrimination curriculum will build a better society and world.</u>

Throughout American history African-Americans were considered inferior and in the late 1700s were determined to be worth only 3/5 the value of any other person. It took almost 200 years and a national movement to result in the Civil Rights Act of 1964, providing legal equality to African-Americans. That was almost fifty years ago, and yet, we still have not absorbed the concept of true equality through the tolerance and acceptance of each other's differences. Instead of embracing the opportunity to learn, we choose to judge.

It wasn't until 1973 that the American Psychiatric Association decided that homosexuality wasn't the result of a mental illness. (Fedders 2006, 781). It would be shameful to think that in our nation's long history of fighting ignorance to bring about equality an entire state's undertaking in an effort to grasp at that end was diluted by a few people who were offended by a book.

Schools are bestowed the monumental task of training society's youth so that students internalize and develop the interests of their community in a way that will allow

them to live and work successfully in a diverse world with ever-increasing expectations of cooperation and acceptance of an array of sincerely held beliefs other than their own. It is an unquestionable necessity that schools introduce to their students the ideas of tolerance and acceptance, despite parental objections, in order to fulfill their larger obligations to the state, nation, world and, most importantly, the students they are educating. The immediate rewards are sure to be seen in the increasing strength of the diverse community that already exists in Massachusetts, where same-sex couples are a real part of the immediate community and students can experience first-hand the betterment of a society that judges people on their merits rather than their sexual orientation. The District Court opinion in the instant case reiterated this very notion:

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

Parker v. Hurley 474 F. Supp. 2d 261, 264 (2007).

CONCLUSION

For the foregoing reasons, the District Court and First Circuit Court of Appeals decisions should be affirmed.

Respectfully submitted this 24th day of April, 2009.