

No. 07-1528

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

v.

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

MOTION FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF
DEFENDANTS-APPELLEES

Gay & Lesbian Advocates & Defenders (GLAD), Greater Boston
Parents, Families and Friends of Lesbians and Gays (Greater Boston
PFLAG), the Gay Lesbian Straight Education Network (GLSEN), Human
Rights Campaign (HRC), Human Rights Campaign Foundation (the
Foundation), and the Women's Bar Association (WBA) respectfully request
leave to file the accompanying brief of amici curiae in the above-captioned
matter.

Founded in 1978, GLAD is New England's leading public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression.

GLAD has litigated widely throughout New England in both state and federal courts. In this Court, GLAD's litigation has included: Largess v. Sup. Jud. Ct. for the State of Mass., 373 F.3d 219 (1st Cir. 2004), cert. denied 543 U.S. 1003 (2004); Rosa v. Park West Bank & Trust Co., 314 F.3d 213 (1st Cir. 2000), Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997), cert. granted 532 U.S. 991 (1997), Bragdon v. Abbott, 524 U.S. 624 (1998) opin. after remand Abbott v. Bragdon, 163 F.3d 87 (1st Cir. 1998), cert. denied 526 U.S. 1131 (1999); and Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995), cert. denied 516 U.S. 1159 (1996).

GLSEN is a national education organization focused on ensuring safe schools for all students. GLSEN strives to assure that each member of every school community is valued and respected regardless of sexual orientation or gender identity and expression.

Greater Boston PFLAG represents parents, families and friends of lesbian, gay bisexual and transgender persons and provides opportunity for dialogue about sexual orientation. Greater Boston PFLAG acts to create a society that is healthy and respectful of human diversity through providing

support to families as they cope with an adverse society, education to enlighten the public, and advocacy to end discrimination and to secure equal rights.

Human Rights Campaign, the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where gay, lesbian, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community.

Human Rights Campaign Foundation is an affiliated organization of HRC. The Foundation develops educational resources on the many issues facing lesbian, gay, bisexual, and transgender individuals, with the goal of achieving full equality regardless of sexual orientation or gender identity or expression. The Foundation's Family Project assists parents and students in identifying safe and welcoming schools.

The Women's Bar Association of Massachusetts is a professional association comprised of 1,300 Massachusetts attorneys, judges, and policy makers dedicated to promoting and advancing gender equity and to advancing and protecting the interests of women and children in society and in the legal profession. The WBA has actively advocated for civil rights for all types of families and for the elimination of discriminatory practices and

beliefs throughout society and has filed numerous amicus briefs in matters involving the elimination of discrimination, especially discrimination related to gender.

GLAD, Greater Boston PFLAG, GLSEN, HRC, the Foundation, and WBA have a particular interest in this case because all six organizations encompass within their missions a commitment to the importance of acknowledging, and educating about, the broad diversity of America in our public schools. All six organizations agree that including information about lesbian and gay people and about families with same-sex parents in their curriculum is particularly important. GLAD, Greater Boston PFLAG, GLSEN, HRC, the Foundation, and WBA have, collectively, a wealth of experience working closely with schools and students to combat discrimination based on sexual orientation and gender identity in the school setting.

The accompanying brief focuses on constitutional issues from a different perspective than the party briefs. The brief examines three important roles of public schools that have been elucidated by the Supreme Court: (1) inculcating values; (2) serving as a marketplace of ideas where students can be exposed to a broad range of age-appropriate information and theories; and (3) protecting students' right to receive information and to

learn. Amici submit that viewing the issues in this case through the lens of these three doctrines is particularly helpful in resolving the dispute.

Specifically, public education plays a central role in exposing students to a diverse population and in teaching the values that can end discrimination.

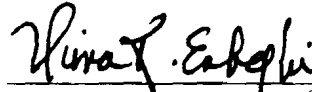
Thus, requiring schools to eliminate books and lessons that have been specifically included to promote mutual respect and to lessen intergroup conflict -- or to subject those books and lessons to additional scrutiny and make them optional -- will disrupt schools' efforts to teach tolerance from an early age. In addition, this brief provides important background regarding changes in U.S. family demographics over the last several decades that directly relate to the issues before this Court.

Pursuant to Fed. R. App. 29(a) GLAD, Greater Boston PFLAG, GLSEN, HRC, the Foundation, and WBA requested the consent of the parties to the filing of this brief. Defendants consented, but the Plaintiffs refused consent on September 17, 3007 and again on September 18, 3007.

WHEREFORE, Gay & Lesbian Advocates & Defenders, Greater Boston Parents, Families and Friends of Lesbians and Gays, the Gay Lesbian Straight Education Network, Human Rights Campaign, Human Rights Campaign Foundation, and the Women's Bar Association respectfully ask

this Court for leave to file the accompanying amici curiae brief in support of the Defendants-Appellees, Town of Lexington, et al.

Respectfully submitted,



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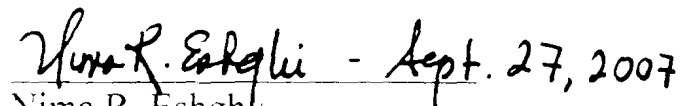
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CERTIFICATE OF SERVICE

I, Nima R. Eshghi, hereby certify that on September 27, 2007, I served two copies of the foregoing Motion for Leave to File an Amicus Brief in Support of Defendants-Appellees, Town of Lexington, et al., by way of Hand Delivery.

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INTEREST OF AMICI CURIAE

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SUMMARY OF ARGUMENT

GLAD, GLSEN, Greater Boston PFLAG, HRC, the Foundation and the WBA (collectively the "amici") submit this brief as amici curiae, urging this Court to affirm the District Court's order dismissing plaintiffs' federal and state law claims. Amici endorse the arguments presented by the defendants and by our fellow amici, but write separately to focus the Court's attention on the crucial role of public schools in three areas implicated by this dispute: (1) the transmission of values that prepare students for participation in a pluralistic democracy; (2) the maintenance of a marketplace of ideas so that students can be exposed to a robust exchange of views and information; and (3) the constitutional right of students to learn.

In each of these three areas implicating the role of public schools, all of which have been discussed by the Supreme Court in various contexts, Lexington correctly included age-appropriate books about lesbian and gay people and families in its curriculum. There is no constitutional principle, grounded in either the First Amendment's free exercise clause or the right to direct the upbringing of one's children, which requires defendants either to remove the books now in issue -- or to treat them as suspect by imposing an opt-out system. Rather, it would be the exclusion of these books, or the

imposition of restrictions on their use through an opt-out system, that would raise serious constitutional concerns.

ARGUMENT

I. LEXINGTON CORRECTLY INCLUDED AGE-APPROPRIATE MATERIALS DEPICTING THE GROWING DIVERSITY OF AMERICAN FAMILIES.

A. The Three Books Challenged by Plaintiffs Provide Age-Appropriate Examples of Various Types of Families.

The plaintiffs' complaint centers on three children's books: Who's in a Family?, by Robert Skutch; King & King, by Linda de Haan and Stem Nijland; and Molly's Family, by Nancy Garden. (A. 192-193, 202-203; Complaint ¶¶ 26, 27, 30, 53-57, 60). Who's in a Family? is a picture book depicting two dozen family types. The families featured include children and parents from a variety of racial and cultural backgrounds, two-parent families with different-sex parents, single-parent families, stepfamilies, extended families, as well as two families with parents of the same sex. (S.A. 39-66).¹ King & King is a fairy tale in which a prince, during his quest to find a princess to marry, instead meets and falls in love with another prince. (A. 233-257). Molly's Family is a picture book about a kindergarten class preparing for Open School Night. As part of the preparations, the young

¹ S.A. refers to the Supplemental Appendix which was allowed by the First Circuit on September 12, 2007.

students are drawing pictures of their families. The book features Molly as she experiences worry about being the only child in her class with two mothers and wonders whether to display her family picture along with the others. (S A. 70-99).

When plaintiff Jacob Parker was in kindergarten, he brought home a "diversity book bag" that contained the book Who's in a Family?, classified for ages 3-6 by the Library of Congress.² Later, when Jacob was in first grade, the same book was available in his classroom "mini-library" – a dedicated reading center. (A. 192; Complaint ¶ 27). Molly's Family was also available in Jacob's first grade classroom "mini-library." (A. 192; Complaint ¶ 27). Molly's Family has been deemed age-appropriate for ages 4-8, or for pre-school to Grade 2.³

When plaintiff Joseph Wirthlin, Jr. was in the second grade, his class had a thematic unit on weddings. (A. 201; Complaint ¶ 52-53). King & King

² The Library of Congress specifies that this book is for "Age level: 3 to 6." Library of Congress Online Catalog "Full Record" for Who's in a Family?, <http://ilcatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v3=1&DB=local&CMD=010a+94029635&CNT=10+records-per-page>.

³ The book's publisher, Farrar, Straus & Giroux, specifies ages 4 - 8. Also, the well-regarded School Library Journal found Molly's Family appropriate for Pre-School to Grade 2, <http://www.schoollibraryjournal.com/article,CA6405896.html>. There is no age range specified by the Library of Congress for Molly's Family.

was included as part of the “weddings” theme, and the book was read aloud in the classroom. (A. 201; Complaint ¶ 53). King & King has been deemed age-appropriate for ages 6 and up.⁴

In reviewing these three books, the District Court specifically found that:

Who's in a Family? and Molly's Family each describe many different types of families and do not suggest the superiority of any paradigm, let alone families headed by members of the same-sex. The premise of King & King is that men usually marry women, but that some men are happier marrying another man.

Parker v. Hurley, 474 F. Supp.2d 261, 273 note 4 (D. Mass. 2007); (A. 33 note 4).

B. Lexington's Curriculum Depicts the Growing Diversity of American Families.

Lexington's curriculum for its younger students focuses on familiar themes such as “family.”⁵ Teaching about different kinds of families

⁴ No age range classification is offered by the Library of Congress, but the book publisher, Tricycle Press, and Publisher's Weekly both specify that King & King is appropriate for ages 6 and up. Tricycle Press Website (2006) http://www.tenspeed.com/store/index.php?mainpage=pubsqproduct_book_jph1_info&products_id=1384. Publisher's Weekly Editorial Review (2002), [http://www.amazon.com/King-Linda-Haan/dp/1582460612,ref=pd_bbs_1_104-8665999-6254323?ie=UTF8&s=books&qid=1189701500&sr=8-1](http://www.amazon.com/King-Linda-Haan/dp/1582460612/ref=pd_bbs_1_104-8665999-6254323?ie=UTF8&s=books&qid=1189701500&sr=8-1).

See, e.g., Massachusetts Comprehensive Health Curriculum Framework, PreK-12 Standard 6: Family Life, 39, (Mass. Dep't of Educ., Oct. 1999), <http://www.doe.mass.edu/frameworks/health/1999/1099.pdf>; (S.A. 15-16).

comports with the Massachusetts Curriculum Framework which sets forth Learning Standards that provide, inter alia, that “[a]t the preschool and kindergarten level, learning in history and social science is built on children's experiences in their families, school, community, state, and country.”⁶ In addition, the Massachusetts Comprehensive Health Curriculum Framework identifies “Family Life” as a learning standard from preschool through grade 12, under which students, by the end of grade 5, should be able to “[d]escribe different types of families, addressing membership and social influences, and the functions of family members.”⁷ The three challenged books, then, are part of Lexington's effort to implement the educational standards devised by the Commonwealth for its elementary school students.

To that end, the Lexington curriculum depicts a variety of family types to reflect the growing recognition that families today come in many forms. Since the release of the 2000 Census data, there has been much public acknowledgment of the fact that there is no longer one predominant

⁶ Massachusetts Curriculum Framework, History and Social Science Curriculum Framework, 6, (Mass. Dep't of Educ., Aug. 2003), <http://www.doe.mass.edu/frameworks/hss.final.pdf> (emphasis added).

⁷ Massachusetts Comprehensive Health Curriculum Framework, PreK-12 Standard 6: Family Life, supra at note 5.

family type or household structure in the United States.⁸ The U.S. Census Bureau has detailed a steady rise in family and household diversity in its reports interpreting the 2000 Census data, noting especially that children today are being raised in a variety of family configurations.⁹ Indeed, as the U.S. Supreme Court has observed, “[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.” Troxel v. Granville, 530 U.S. 57, 63 (2000) (plurality opinion); cf. Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 504-05 (1977) (observing that

⁸ See, e.g., Michelle Conlin, UnMarried America: Say good-bye to the traditional family. Here's how the new demographics will change business and society, BusinessWeek, Oct. 20, 2003, at 106 (noting that married couple households with children now total only 25% of households – down from 80% in the 1950s, and pointing also to the rise in single person households and in unmarried families – including gay couples unable to marry in most states); see also Editorial, The Changing American Family, N.Y. Times, May 18, 2001, at A18 (reflecting on the 2000 Census data and opining that in “modern America no type of family can really be recognized to the exclusion of all others.”)

⁹ See U.S. Census Bureau, married-Couple and Unmarried-Partner Households: 2000, Census 2000 Special Reports, 10, (February 2003) (reporting that 43% of different-sex unmarried partner households, 33% of female partner households, and 22% of male partner households are raising children under 18.); see also U.S. Census Bureau, Households and Families: 2000, Census 2000 Brief. 7, (September 2001) (noting the rise in a variety of household and family types, including the increased number of multi-generational households - where grandparents are often raising grandchildren - and single-parent families.)

our society supports a large conception of family and is "by no means limited" to respect only for the nuclear family).

It is instructive, then, to view this dispute, at least in part, through the lens of this significant demographic shift. One feature of this shift is that lesbian and gay people and their families have become more visible and more integrated into their communities. Lesbian and gay families are members of virtually every American community. Census 2000 revealed that lesbian and gay families reside in 99.3% of U.S. counties, and that same-sex couples are raising children in 96% of all U.S. counties." Because of advances in civil rights in some states, including especially in the Commonwealth of Massachusetts, lesbian and gay people and also their children have become increasingly integrated into the fabric of the many communities in which they live." In Middlesex County, Massachusetts,

¹⁰ David M. Smith & Gary J. Gates, Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households, A Preliminary Analysis of 2000 United States Census Data, Human Rights Campaign Report, 2-3, (August 22, 2001), <http://www.hrc.org/documents/gayandlesbianfamilies.pdf>.

¹¹ The 2000 Census represents the second time that the Census bureau sought to capture data about same-sex partner households. It is important to note that researchers analyzing this issue have found that the 2000 figures still represent a serious undercount of same-sex couples and families. See M.V. Lee Badgett, Ph.D. & Marc A. Rogers, Ph.D., Left Out of the Count: Missing Same-sex Couples in Census 2000, Institute for Gay and Lesbian Strategic Studies (2003).

where Lexington is located, Census 2000 recorded 1,015 same-sex couples raising one or more children.¹² Today, seven years after the 2000 census, there are likely many more children with same-sex parents residing in Lexington and surrounding communities.

In light of this demographic data, it would be most appropriate for any school district -- anywhere in the United States -- to include information reflecting a broad variety of family types in its curricula. The three books in this case, Who's in a Family?, Molly's Family, and King & King, have been deemed age-appropriate and educationally relevant examples of books that strive to depict the growing diversity of American families. Moreover, the Lexington school district is in Massachusetts, where lesbian and gay couples can marry and raise children with all the same rights and responsibilities under State law as their heterosexual counterparts. See Goodridge v. Dep't of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003). That a Massachusetts public school, when teaching about families, would deem it pedagogically appropriate to include same-sex couples or same-sex parent families among the many family types depicted or discussed: is therefore not remarkable.

¹² Lisa Bennett & Gary J. Gates, The Cost of Marriage Inequality to Children and Their Same-Sex Parents, Human Rights Campaign Foundation Report, 14, (April 13, 2004), <http://dev.hrc.org/documents/costkids.pdf>.

In short, there can be no serious dispute that the books in issue are both age-appropriate and reflect the growing diversity of American families. Plaintiffs object to Lexington's inclusion of these books in the curriculum solely because the books include positive depictions of same-sex couples and same-sex parent families. Lexington's inclusion of these books, however, cannot possibly burden the right to free exercise, nor can it violate any legally cognizable parental rights -- even where, as here, a parent holds a sincere religious belief that same-sex parent families and marriage other than that between a man and a woman are "immoral." (A. 192; Complaint ¶ 28; Br. Appellant at 2).

II. UNDER ANY RECOGNIZED LEGAL THEORY REGARDING THE ROLE OF PUBLIC SCHOOLS, LEXINGTON'S INCLUSION OF BOOKS DEPICTING GAY AND LESBIAN PEOPLE AND THEIR FAMILIES IS ENTIRELY PROPER.

Within the Supreme Court's First Amendment jurisprudence, three doctrines delineate the special role of public schools. The Supreme Court has, in various contexts, embraced the view that (1) public schools bear responsibility for transmitting values fundamental to maintaining our democratic system. See, e.g., Ambach v. Norwick, 441 U.S. 68, 76-77 (1979); (2) public schools are "peculiarly the marketplace of ideas" where "safeguarding academic freedom" is a core value. See, e.g., Keyishian v.

Bd. of Regents, 385 U.S. 589, 603 (1967);¹³ see also West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); and (3) public schools are entrusted with advancing the students' right to receive information and to learn, and that therefore excising otherwise pedagogically sound materials from either a school's curriculum or from its library in order to accommodate individual personal or religious views interferes with the right to learn. See Bd. of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion); see also Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

Amici submit that each of these three doctrines regarding the role and responsibility of public schools preclude the granting of the relief sought by the plaintiffs.

A. Public Schools Teach Values Essential to a Democratic Society.

It is well-settled that public education plays an extremely important role in preparing students to become productive citizens in our increasingly pluralistic democracy. The Supreme Court has stated that public education is "the very foundation of good citizenship" and "a principal instrument in awakening the child to cultural values." Brown v. Board of Education, 347

¹³ Though the Keyishian case arose in the context of higher education, it addressed itself more broadly to public education in general. See Pico, 457 U.S. at 877.

U.S. 483, 493 (1954); see also Wisconsin v. Yoder, 406 U.S. 205, 238 (1972) (quoting same); Parker v. Hurley, 474 F.Supp.2d at 271; (A. 29-30) (quoting same). Accordingly, a leading "objective of public education" is the "inculcation of fundamental values necessary to the maintenance of a democratic political system." Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) citing Ambach, 441 U.S. at 76-77.

Transmitting "the shared values of a civilized social order," is, according to the Court, "truly the 'work of the schools.'" Bethel, 478 U.S. at 683 quoting Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508 (1969). See also Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988)(Brennan, J., dissenting) ("Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic") citing Brown, 347 U.S. at 493. It is beyond dispute that schools are not only permitted, but are indeed expected, to transmit civic values. See Plyler v. Doe, 457 U.S. 202, 221 (1982) (holding that the children of undocumented immigrants must be permitted to attend public schools so that they can "absorb the values and skills upon which our social order rests.") To that end, the Massachusetts Curriculum Framework

explicitly acknowledges the role of the schools in helping even the youngest students to develop "their civic identity."¹⁴

It is axiomatic that "[d]iversity is a hallmark of our nation." Parker, 474 F. Supp. at 263; (A.11). Because of this diversity, one of the values increasingly essential to our society is that of "promoting cohesion among a heterogeneous democratic people." Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring). Indeed, a steady line of Supreme Court cases expresses the view that our nation's public schools play a vital role in joining together the many diverse groups within our society. See Ambach, 441 U.S. at 77 (public schools bring together "diverse and conflicting elements of our society" on a "broad but common ground."); Pico, 457 U.S. at 868 (public schools convey values that prepare students to participate effectively in a "pluralistic, often contentious, society."); see also Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1068 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988) (emphasizing the key role of public schools in teaching "tolerance of divergent political and religious views") quoting Bethel, 478 U.S. at 681

¹⁴ Massachusetts Curriculum Framework. History and Social Science Curriculum Framework, 6, (Mass. Dep't of Educ., Aug. 2003), <http://www.doe.mass.edu/frameworks/hss/final.pdf> ("The purpose of the preK-K curriculum is to begin the development of [students'] civic identity.")

Consistent with this established doctrine that public schools are a place for teaching values essential to democracy, including those values needed to participate effectively in our increasingly diverse society, many schools today explicitly include in their pedagogical missions the goal of promoting tolerance and understanding among different groups of students. Respect for diversity is both a general civic virtue and, more specifically, a means of addressing issues of bias and harassment in school.¹⁵

Lexington's selection of the books Who's in a Family?, King & King, and Molly's Family for inclusion in its curriculum is firmly-rooted in this long-recognized tradition of public schools as a place for disseminating the knowledge and information that helps to foster understanding between diverse groups and individuals for the overall benefit of society. Lexington has selected materials that include representations of many kinds of families, including: single parent families, multi-racial and multi-cultural families, families that include stepparents, children living with extended family members, and families where there are two mothers or two fathers. In amici's view, this is an unassailable pedagogical approach, because -- consistent with its responsibility to inculcate values such as mutual respect and inclusion -- Lexington has selected materials that portray a variety of

¹⁵ See specific discussion of anti-bias programs in schools infra at 25-28.

families and, in so doing, has also signaled to the community that all families are valued.¹⁶

Among our most cherished civic values is the tenet that, even when there is deep disagreement, subjects taught in our public schools should be conveyed accurately and in a manner that encourages respect for different types of people. See Parker, 474 F.Supp.2d at 274; (A. 36) (noting that one of "the most fundamental" values taught in our public schools is that of "mutual respect.") Just as eliminating the materials in issue from the Lexington curriculum would surely violate this tenet, so too would imposing the "opt-out" system demanded by plaintiffs.

Although plaintiffs strain to characterize "opt-out" as minimally intrusive, such a system would, in practice, effectively segregate the public school classroom based solely on parental beliefs. Dividing students according to parental beliefs would conflict with the school's role of teaching the civic values of mutual respect and inclusion and would thus undermine the school's pedagogical objectives. An advance notification and opt-out program would send the clear message that certain families (and

¹⁶ See Statement of Superintendent Ash on September 22, 2005, explaining that the Lexington schools "routinely provide students with access to materials, activities and discussions that recognize diversity. This access is designed to assist in our goal of maintaining an appropriate and respectful educational environment for all students" as required by law and by district policy. (A. 92).

therefore, the children of those families) are so different, so unacceptable, that some students must be shielded from information about their mere existence. Sending such a message is contrary to the state's interest, as expressed in the Department of Education's regulations, in encouraging respect for all individuals. 603 C.M.R. § 26.05 (1) directs that "public school systems shall, through their curricula, encourage respect for the human and civil rights of all individuals regardless of race, color, sex, religion, national origin or sexual orientation." Thus, the opt-out remedy is quite plainly "inconsistent with the public schools' compelling interest in 'promoting cohesion among a heterogeneous democratic people.'" Mozert, 827 F.2d at 1062-64, 1072 (Kennedy, J., concurring) quoting McCullum, 333 U.S. at 216 (Frankfurter, J., concurring).

B. Public Schools Serve as a Marketplace of Ideas.

The Supreme Court has long recognized that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate;" Tinker v. Des Moines independent School Dist., 393 U.S. 503, 506 (1969). The freedom to receive ideas, and its relation to the freedom of expression, is particularly relevant in the classroom setting because the classroom is "peculiarly the marketplace of ideas," Keyishian v. Bd. of Regents, 385 U.S. at 603 (internal quotations omitted), where

students ought to be exposed to a broad array of materials as part of their learning process. Indeed, even students in the youngest grades - as in the case at bar - enjoy the right to experience a broad range of age-appropriate materials that reflect the society in which they live and in which they will eventually become adult members. See generally Parker, 474 F.Supp.2d at 274-75; (A.36-38) (noting the importance of exposing young students to a wide variety of ideas to foster a positive learning environment and to prepare students for adult citizenship).

Viewing the school system through the lens of the "marketplace of ideas," where a wide range of learning materials is made available to students, is consistent with the importance our society places in promoting understanding and "tolerance of divergent political and religious views." ~~See~~ Bethel, 478 U.S. at 681. If students are not exposed to a range of age-appropriate ideas on a given school topic, they are deprived of the opportunity to develop critical thinking skills so that they can evaluate information for themselves. For younger students, an important aspect of the school as a "marketplace" is learning to express themselves and, over time, to develop their own views. To facilitate critical thinking skills, then, "a school should be a readily accessible warehouse of ideas." Right to Read Def. Comm. of Chelsea v. School Comm. of Chelsea, 454 F. Supp. 703, 710

(D. Mass. 1978). Of course, the ideas presented must be age-appropriate and educationally relevant. As already discussed supra, however, neither age-appropriateness nor educational relevance are in serious dispute here.

The "marketplace" or "warehouse" of ideas function of schools is also particularly important because "[s]tudents today must be prepared for citizenship in a diverse society." Parker, 474 F. Supp. at 274; (A. 36) citing Grutter v. Bollinger, 539 U.S. 306, 330 (2003) ("skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints"); see also Keyishian, 385 U.S. at 603 quoting U.S. v. Associated Press, 52 F. Supp. 102, 372 (S.D.N.Y. 1943) ("[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'") Though it may seem obvious, it is worth noting here that early exposure to the rich diversity of our society, as exemplified in this case by the Lexington curriculum, is the best way to insure that students develop the skills needed to relate well to their peers – both today, and when they eventually reach adulthood.

As discussed supra, the books in issue here are properly included pursuant to the schools' mission of inculcating shared democratic values. By the same token, to exclude these three picture books, or to treat them

differently from other materials solely because of their depictions of same-sex couples and families, would clearly violate the principle that the First Amendment "'does not tolerate laws that cast a pall of orthodoxy over the classroom.'" Pico, 457 U.S. at 877 quoting Keyishian, 385 U.S. at 603. While schools must maintain significant discretion to determine their curriculum and the contents of their libraries, that discretion "may not be exercised in a narrow, partisan or political manner." Pico, 457 U.S. at 870. If educators were free to eliminate "all diversity of thought," schools would "'strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.'" Pico, 457 U.S. at 879 quoting Barnette, 319 U.S. at 637.

Plaintiffs contend that Who's in a Family?, Molly's Family, and King & King advance "moral concepts" antithetical to their faith. (A. 187, 194, 203). Amici, however, submit that these books do not present "moral concepts" or even "ideas" but are more properly understood as grounded in fact.¹⁷ Nonetheless, even accepting plaintiffs' characterization of the books'

¹⁷ The books convey the following messages: (1) yes, families can come in many forms - including having two moms or two dads - as reflected in Who's in a Family? and also in Molly's Family, (2) yes, two men can choose each other as life partners (and even get married) – as reflected in King & King, and (3) some children may experience uncertainty or concern when their family is "different" from others, but there are a broad range of

contents at face value solely for purposes of this argument, which the Court itself need not do, the books must remain in the curriculum because to remove them in response to political or religious disapproval would violate the First Amendment principle that schools properly function as a marketplace of ideas. Moreover, as discussed below, removing these books would violate the students' right to receive information and to learn.

C. Public Schools Advance the Right of Students to Receive Information and to Learn.

Students in Lexington, and elsewhere, have a right to learn that includes the right to receive accurate information about families, including same-sex parent families. The right to learn is rooted in Supreme Court jurisprudence establishing the right to receive ideas and information. See Stanley v. Georgia, 394 U.S. 557, 564 (1969). In Pico, the Court reaffirmed that "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them." Bd. of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 866-67 (1982) (plurality opinion). Pico held that a school board could not remove books from a school library if it did so "in a narrowly partisan or political manner," because the deeply-rooted constitutional "right to receive information and

families and all are equally welcome at school – as reflected in Molly's Family.

ideas" extends to students attending public schools. Id. at 867, 870-71. Although Pico centered on book removal, the right of public school students to receive information from which they can learn and form their own thoughts was central to Justice Brennan's reasoning. He explained that, "just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society, in which they will soon be adult members." Id. at 868.

Pico's reasoning has support in history and in subsequent federal cases charged with resolving similar disputes over either curriculum or library books. In Pratt v. Independent School Dist. No 831, Forest Lake, Minn., 670 F.2d 771 (8th Cir. 1982), a school board removed two films from the school curriculum after parents complained that they found the films' themes to be offensive. In particular, opponents had urged that the films be removed because they "posed a threat to students' religious beliefs and family values." Pratt, 670 F.2d at 776-77. Teachers responding to these objections stated that the films in issue had been selected because they were valuable teaching tools that stimulated students to consider new ideas. Id. at 777. In holding that plaintiffs had met their burden of establishing that the

films were banned solely because some parents and board members objected to ideas contained within them, and not for any legitimate pedagogical reason, the Eighth Circuit anticipated the Supreme Court's reasoning in Pico. To wit, Pratt stated that "to avoid a finding that it acted unconstitutionally, the board must establish that a substantial and reasonable governmental interest exists for interfering with the students' right to receive information." Id. at 777 (emphasis added). Mere disapproval of the ideas contained in the films cannot be the basis for their removal from the curriculum.

Moreover, Pratt noted the "symbolic effect" of removing material from the curriculum solely for ideological reasons. Through the removal, the school board clearly indicated that the ideas contained in the films were "unacceptable and should not be discussed or considered." Id. at 779. Thus, the school board's action in Pratt was an improper exercise of its traditional discretion to define the curriculum. Id. at 779-80. Very shortly thereafter, the Supreme Court reached the same conclusion in Pico. The Pico plurality explained that, if a school district's removal decision is taken with the intention of denying students access to materials with which the school district or individual parents disagree, then the school district has exercised its discretion in violation of the Constitution. Pico, 457 U.S. at 871.

The Ninth Circuit applied Pico to a curriculum dispute in Monteiro v. Tempe Union High School Dist., 158 F. 3d 1022 (9th Cir. 1998). In Monteiro, an African-American student alleged equal protection violations due to an English class requirement regarding the reading of certain literary works containing racially derogatory language – Huckleberry Finn by Mark Twain and A Rose for Emily by William Faulkner. The Ninth Circuit understood well the gravity of the student's concerns and agreed that "words can hurt." Id. at 1031. Still, drawing heavily from Pico, the Court found that either removing the books from the curriculum or allowing certain students to be exempt from both the reading assignments and from any classes where the challenged books were discussed burdened the right of all students "to receive a broad range of information so that they can freely form their own thoughts," and, further, that the right to receive ideas and to learn is a "'necessary predicate'" to the students' meaningful exercise of political freedoms. Id. at 1027, note 5 quoting Pico, 457 U.S. at 867. See also American Civil Liberties Union of Fla., Inc. v. Miami-Dade County School Bd., 439 F.Supp.2d 1232, 1270-72 (S.D. Fla. 2006) (relying on Pico in ruling that school district violated the First Amendment when it removed a book about Cuba from the school library in response to parental complaints that the book failed to describe oppressive conditions in Cuba; books may

not be removed simply because they become controversial or because parents or school board members disagree with their point of view); Campbell v. St. Tammany Parish School Bd., 64 F.3d 184, 189 (5th Cir. 1995) (relying on Pico in determining whether the decision to remove a book from a school library was unconstitutional).

1. When learning about family structure, or about societal diversity, students have a right to learn about gay people and same-sex parent families.

If a public school chooses to teach a unit about families, students in that school have a right to relevant and accurate information about what constitutes a family in America today. Students have a right to learn from a broad range of age-appropriate educational materials chosen for them by qualified educators. "Certainly when a school board identifies information it believes to be a useful part of a student's education, that student has the right to receive the information." Monteiro, 158 F.3d at 1028.

Parents indeed have a constitutional right to direct the upbringing of their children, Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925), but that right does not extend to permitting individual parents to screen materials in or out of the public

school curriculum. See Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995), cert. denied, 516 U.S. 1159 (1996).¹⁸

The Supreme Court has been clear that nothing in First Amendment jurisprudence supports placing limits on the right of schools to teach factual information, or to present a credible theory, simply because it conflicts with the teachings of a particular religious doctrine. In the oft-cited case of Epperson v. Arkansas, 393 U.S. 97 (1968), the Supreme Court struck a ban on teaching evolution in the context of a unit on the origins of man. In that case, an Arkansas school adopted a textbook that included a section on Darwinian theory even though the State had a statute that prohibited public schools from teaching the theory of evolution. While mindful of the bedrock principle that "public education in our Nation is committed to the control of

¹⁸ Plaintiffs try to save their claims from being controlled by the Brown v. Hot, Sexy and Safer analysis by insisting that the "tender age" of the children named in this litigation makes this a question of first impression. (Br. Appellant at 14-15, 21). In addition to the legal defects in this "tender age" argument, which have been ably addressed by the defendants, (Def. Br. at 35-43), this argument is nonsensical in light of the actual subject matter being taught. The subjects at issue have been characterized by the Lexington school officials as teaching about "families" and teaching about "diversity." (A. 92). "Families" are a common curricular subject in the early childhood years - learning about different types of families in the earliest years of school helps to orient children to their school community and to familiarize them with their peers. Certainly, plaintiffs do not mean to object to teaching young children about families. Rather, what they object to is the inclusion of particular families.

state and local authorities," the Epperson Court found that judicial intervention in this instance was "essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." Id. at 104. The Supreme Court held that the ban on teaching "a scientific theory or doctrine" because it is contrary to the religious beliefs of some violated both of the First Amendment's religion clauses – Establishment and Free Exercise. Id. at 107. "The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine." Id. at 103 (emphasis added); see also Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1306 (7th Cir. 1980) (public schools may not limit information available to students solely to cater to individual beliefs or preferences and also may not place a "flat prohibition on the mention of certain relevant topics in the classroom.")

In the instant case, plaintiffs seek to excise from the curriculum not the entire discussion of families, but rather only the references to same-sex parent families or to gay and lesbian people. Though plaintiffs claim that they seek only to be excused from the portions of the curriculum with which they disagree, the practical import of their request violates Epperson and Pico just as surely as removing books that teach about lesbian and gay

people also would. Plaintiffs ask this Court to rule that *any* books, materials or school lessons that acknowledge, or otherwise relate to, lesbian and gay people or same-sex parents must be subjected to special scrutiny solely because of their personal religious beliefs that homosexuality is immoral and that marriage can only exist between a man and a woman. Subjecting books to special scrutiny for these reasons simply cannot stand under either Epperson or Pico.

In Epperson, the Supreme Court explained that the anti-evolution law must fail because it did not ban all teaching about the origin of man, but was "confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read." Epperson, 393 U.S. at 109. Eliminating important information or a credible theory from the curriculum because it conflicts with a religious belief restricts "the freedom of teachers to teach and of students to learn." Id. at 105. (emphasis added); Pico, 457 U.S. at 870 ("school's discretion may not be exercised in a narrowly partisan or political manner" without violating a student's right to receive information); cf. Zykan, 631 F.2d at 1306 (finding no cognizable claim where no evidence demonstrated that the school removed certain books and courses from the curriculum out of "a desire to eliminate a particular kind of inquiry generally.")

Thus, where, as here, the school has already exercised its discretion to include certain materials in the curriculum – eliminating or restricting access to that material solely because it conflicts with the religious beliefs of a particular group impermissibly interferes with the students' right to receive accurate, topical information and to learn. The plain fact is that lesbian and gay people exist in the U.S., and some children, including children in Lexington, have two mothers or two fathers who are married to each other or otherwise partnered. A study of families specifically designed to be inclusive is correct to include this information, even if the information may make some people extremely uncomfortable.

2. Students have a right to learn information that can lessen intergroup conflicts and avoid bullying.

In recent years, American schools have focused increasingly on the importance of stemming the tide of bullying and school harassment so that all students can learn in a safe environment.¹⁹ Bullying can take place in any school setting, and can affect any child or group of children. Consequently, many educational programs have emerged throughout the public school

¹⁹ Bullying is comprised of direct behaviors including teasing, taunting, threatening, hitting, and stealing as well as indirect behaviors including spreading rumors and acting in other deliberate ways to cause a student to feel socially isolated through intentional exclusion. See National Parent Teacher Association, Resolution - Bullying, http://www.pta.org/archive_article_details_1141756156578.html.

system aimed at combating bullying before it starts. Educational programs for the youngest age groups that teach tolerance, respect for differences and effective problem-solving are widely regarded as key ingredients in a school's anti-bullying curriculum. As the District Court aptly noted, "it is difficult to change attitudes and stereotypes after they have developed." Accordingly, "it is reasonable for public schools to attempt to teach understanding and respect for gays and lesbians to young students in order to minimize the risk of damaging abuse in school of those who may be perceived to be different." Parker, 474 F.Supp.2d. at 275; (A. 38). Amici Greater Boston PFLAG and GLSEN both offer educational programs designed to assist schools in their anti-bias and anti-bullying efforts, including programs for students in the earlier grades.²⁰ All students benefit from the lessening of intergroup conflict and the long-term benefits inure to society as a whole.

Several leading mental health organizations have identified lesbian, gay, bisexual and transgender students, or students perceived to be lesbian,

²⁰ Greater Boston PFLAG and GLSEN Boston, with a team of educators and parents, jointly developed an Elementary School Initiative entitled, "Welcoming Schools: A Guide to LGBT Inclusive Lessons and Resources on Family Diversity, Gender, and Name-calling for Elementary Schools." Greater Boston PFLAG, Pamphlet, Safe Schools and Communities Project. (2007). Additionally, between July 2006 to June 2007. Greater Boston PFLAG delivered 171 educational programs statewide reaching 10,000+ people.

gay, bisexual or transgender, as particularly vulnerable targets for bullying.²¹

The United States Department of Health and Human Services has identified derogatory remarks about sexual orientation as a form of bullying "so common that many parents do not think of telling their children that it could be hurtful."²²

Given this reality, amici submit that inclusive books for young children, such as those in issue here, can have the effect, over time, of decreasing hostility toward gay and lesbian people and their families. A decrease in hostility benefits not only those students who may become the targets of bullying, but also those students who might have engaged in the bullying behavior had they not been exposed to positive messages about their fellow students. Thus, Lexington's decision to employ simple picture

²¹ See, e.g., American Psychological Association, APA Resolution on Bullying Among Children and Youth (July 2004), http://www.apa.org/pi/cyf/bully_resolution_704.pdf ("children and youth who are lesbian, gay or transgender, or who are perceived to be so may be at a particularly high risk of being bullied by their peers."); School Social Work Association of America, Resolution: Help Prevent Bullying (July 2003), <http://www.sswaa.org/members/resolutions/bullying.html> ("students who may be or are thought to be gay, lesbian, bisexual or questioning find themselves at considerable risk of bullying by others.")

²² U.S. Department of Health & Human Services, Stop Bullying Now! What We Know About Bullying (2003), www.StopBullyingNow.hrsa.gov/HHS_PSA/pdfs/SBN_Tip_9.pdf.

books to begin a conversation about the diversity within its own school community is an important step toward creating a safe and welcoming atmosphere for all students.

Federal courts have only recently begun to hear disputes about efforts to lessen conflict through anti-bias programs in the public schools. In one recent case, Morrison ex rel. Morrison v. Bd. of Educ. of Boyd County, Ky., 419 F.Supp.2d 937 (E.D. Ky. 2006), the District Court engaged in a thoughtful and well-reasoned analysis of why a school program that addresses anti-gay harassment serves the legitimate educational goal of maintaining a safe environment. In Morrison, the Board of Education required all middle and high school students to attend a diversity training program – a significant portion of which was devoted to issues of sexual orientation and gender harassment. The purpose of the training was to implement the school's anti-harassment and anti-discrimination policies. Id. at 939. The court held that the requirement did not burden the free exercise rights of students who believed homosexuality was sinful nor did it interfere with parental rights to direct the upbringing of their children. Id. at 943, 945. The court reasoned that the training's purpose of addressing “harassment at school, including harassment based upon actual or perceived sexual orientation, is rationally related to a legitimate educational goal, namely to

maintain a safe environment. As such, the [p]laintiffs do not have the right to impede the Board's reasonable pedagogical prerogative, nor do they have the right to opt-out of the same." Id. at 946 (emphasis added).

CONCLUSION

The Lexington public schools have offered an age-appropriate, inclusive curriculum on families and diversity that is consistent with any established legal theory regarding the proper role of public schools. ~~Who's in a Family?~~, Molly's Family and King & King cannot be removed or segregated from the curriculum to accommodate plaintiffs' disapproval of same-sex couples, nor can these books be removed or segregated without undermining important constitutional principles regarding the role of public schools.

In light of the foregoing, the amici curiae respectfully urge this Court to affirm the District Court's judgment dismissing plaintiffs' claims.

**United States Court of Appeals
For the First Circuit**

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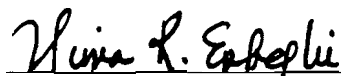
No. 07-1528

DAVID PARKER, et al,
Plaintiffs-Appellants,
v.
WILLIAM HURLEY, et al,
Defendants-Appellees.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(A)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect Office 10 in 14-point Times New Roman font.

Dated: September 27, 2007



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Lesbians and Gays, the Gay Lesbian Straight
Education Network, Human Rights Campaign,
Human Rights Campaign Foundation, and the
Women's Bar Association of Massachusetts

CERTIFICATE OF SERVICE

I, Nima R. Eshghi, hereby certify that on September 27, 2007, I served two copies of the Brief of Amici Curiae, Gay & Lesbian Advocates & Defenders, Greater Boston Parents, Families and Friends of Lesbians and Gays, the Gay Lesbian Straight Education Network, Human Rights Campaign, Human Rights Campaign Foundation, and the Women's Bar Association, in Support of Defendants-Appellees, on the following parties by hand delivery:

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