IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KAREN JO BARROW,	)	
	)	
Plaintiff-Appellant	)	
	)	
v.	)	Case No. 02-10351
	)	
GREENVILLE INDEPENDENT SCHOOL DISTRICT, ET AL	)	
Defendants	)	
	)	
HERMAN SMITH,	)	
Defendant-Appellee	)	
	)	
_____	)	

CERTIFICATE OF INTERESTED PERSONS

Amicus Curiae The National Legal Foundation, has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

The undersigned, counsel of record, certifies that the following listed persons may have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1) The Texas Association of School Boards. The Texas Association of School Board is an insuror who has agreed, by contract, to indemnify Dr. Herman Smith and the Greenville Independent School District in the event of an adverse judgment against them.

2) The Greenville Independent School District, a Defendant in the court below, who operates an independent school district authorized by the State of Texas in Greenville, Texas.

3) Karen Jo Barrow, Plaintiff-Appellant, an individual residing in Greenville, Texas.

4) Herman Smith, Dr., a Defendant and the Appellee in this appeal. Dr. Smith is a school superintendent in the State of Texas.

5) Dennis Eichelbaum, Esq., Schuartz & Eichelbaum, P.C., Plano, Texas 75025, is an attorney for the Greenville Independent School District.

6) Cobby Caputo, Esq., Schuatz & Eichelbaum, P.C., Plano Texas 75025, is an attorney for the Greenville Independent School District.

7) Tom Brandt, Esq., Fanning, Harper & Martinson, Two Energy Square, 4849 Greenville Ave., Suite 1300, Dallas, Texas 75206, is an attorney for the Appellee, Dr. Herman Smith.

8) Fanning, Harper & Martinson, the law firm for the Appellee, Dr. Herman Smith.

9) Kelley Shackelford, Esq., Liberty Legal Institute, Plano, Texas. Mr. Shackelford is an attorney for Plaintiff-Appellant, Karen Jo Barrow.

10) Wm. Charles Bundren, an attorney residing in Dallas, Texas, with the firm of Wm. Charles Bundren & Associates, P.C., Lead Counsel for Plaintiff-Appellant.

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18) *Amicus curiae* Institute for Justice is a public interest law firm dedicated to individual liberty, free market solutions, and limited government.

19) *Amicus curiae* Counsel for American Private Education is a coalition of national organizations and state affiliates serving private elementary and secondary schools.

20) *Amicus curiae* Christian Legal Society is a national non-denominational membership organization of Christian attorneys, judges, law professors, and law students with an interest in religious liberty issues.

21) *Amicus curiae* Christian Educator's Association International is a national organization of professional Christian educators serving in public, private and charter schools.

22) *Amicus curiae* Ethics and Religious Liberty Commission of the Southern Baptist Convention is the arm of the Southern Baptist Convention responsible for, *inter alia*, promoting religious liberty.

23) *Amicus curiae* The National Legal Foundation is a public interest law firm concerned about issues of religious liberty.

By: _____
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INTEREST OF AMICUS

The National Legal Foundation (NLF) is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of its public interest litigation and educational activities relating to the public schools. The NLF litigated *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), the so-called Bible Club case. In addition to this Supreme Court case, the NLF routinely interacts with public schools on issues of religious liberty—both in support of and in oppostition to these schools as the individual case may require.

This Brief is filed pursuant to the content of the Counsel of Record for the Appellant, Karen Jo Barrow and a Motion for Leave to File a Brief Amicus Curiae.

ARGUMENT

The district court in *Barrow v. Greenville Independent School District*, No. CIV.A.3:00-CV-0913-D, 2002 WL 255484 (ND. Tex. Feb. 20, 2002), decided that Dr. Herman Smith, the former Superintendent of the Greenville Independent School District was entitled to qualified immunity from claims for violations of various constitutional rights in his refusal to consider Karen Jo Barrow for a promotion. The court held that the constitutional rights violated were not clearly established at the time. In deciding the rights were not clearly established, the district court ignored the Supreme Court's holding in *Troxel v. Granville,* 530 U.S. 57 (2000), and held parents do not have a *fundamental* right to chose which school their children should attend. The court also rejected the "hybrid rights" doctrine and analyzed the claim under the rational basis test. The court also held there was no violation of Barrow's religious liberties. This brief will concentrate on two aspects of the district court's opinion: First, it will show that parents do have a fundamental right to chose where their children will be educated; and second, it will show that the hybrid rights doctrine applies in this case. For both of these reasons, the district court erred in applying the rational-basis test rather than strict scrutiny in this case.

I. *LITTLEFIELD V. FORNEY INDEPENDENT SCHOOL DISTRICT* IS NOT THE CONTROLLING PRECEDENT FOR THIS CASE BECAUSE *LITTLEFIELD* IS DISTINGUISHABLE BOTH FACTUALLY AND LEGALLY FROM THE PRESENT CASE.

The district court in the instant case relied heavily upon *Littlefield v. Forney Independent School District,* 268 F.3d 275 (5th Cir. 2001) to support its conclusion that a school policy restricting employees' right to send their children to private school should be governed by a rational-basis test. Indeed, the court below considered *Littlefield* to be controlling. However, far from being controlling, Littlefield is inapposite since it is both factually and legally distinguishable.

A. *Littlefield v. Forney Independent School District* is factually distinguishable from the present case because this case involves a condition of employment rather than student behavior.

The facts of *Littlefield* are quite different from the facts of the instant case. In *Littlefield* the plaintiffs brought suit against the Forney Independent School District claiming the school district violated their fundamental right to control the education of their children by implementing a mandatory Uniform Policy. The defendant school district argued that while the parents may have a fundamental liberty interest in their children's upbringing, that interest did not include usurping "the state's role in *determining appropriate behavior* at public schools, including the role of determining appropriate *dress codes* in the district." 268 F.3d at 288 (emphasis added).

In the instant case, the parties are contending over an entirely different issue. The controversy before this Court has nothing to do with a dress code. Nor does it have to do with any factual issue that is legally analogous. In *Littlefield*, this Court rightly accepted the school district's argument that the dress code issue was a sub-component of the school's appropriate role in controlling the behavior of its student body, noting that the Uniform Policy furthered "the legitimate goals of improving student safety, decreasing socioeconomic tensions, increasing attendance, and reducing drop-out rates." *Id*. at 291. Here, the issue is whether Barrow's promotion can be conditioned upon the removal of her children from the Christian school she has selected for them. In no way does this controversy involve student behavior.

In *Littlefield*, the school district specifically argued that the then newly decided case of *Troxel v. Granville*, 530 U.S. 57 (2000), did not change the legal landscape and that even under *Troxel* parents do not have the right "to frustrate basic school rules reasonably required to regulate the educational system." *Littlefield*, 268 F.3d at 288. While this discussion took place in the context of determining whether rational basis or strict scrutiny was the proper standard to apply, this Court, in accepting the school district's argument, noted that nothing in *Troxel* was incompatible with numerous pre-*Troxel* cases. The cases which this Court reviewed all involved facts that were legally analogous to the Uniform

Policy controversy then before the Court. However, none of these cases are germane to the instant controversy, and thus, serve to highlight *Littlefield's* inappositeness here. First, this Court cited *Herndon v. Chapel Hill—Carrboro City Board of Education*, 89 F.3d 174, 177-79 (4th Cir. 1996); and *Immediato v. Rye Neck School District*, 73 F.3d 454, 461 (2d Cir. 1996). Both of these cases concern constitutional challenges to community service graduation requirements. Graduation requirements are quintessential regulations of student behavior.

This Court then cited *Runyon v. McCrary*, 427 U.S. 160, 177, (1976). *Runyon* did not deal with the regulation of student behavior. Rather it dealt with the applicability of federal civil rights legislation to private, segregated schools. Nonetheless, *Littlefield's* invocation of *Runyon* fits squarely within the pattern of citing cases that demonstrate *Littlefield's* inappositeness to the instant case. *Runyon* stands for the proposition that parents have a First Amendment right to send their children to any private school that they chose—as long as they do not try to exclude others from that same school. This case falls squarely within *Runyon's* general rule and has nothing to do with the discrimination exception.

The *Littlefield* Court then cited *Kite v. Marshall*, 661 F.2d 1027, 1029 (5th Cir. 1981) and *Swanson v. Guthrie Independent School District*, 135 F.3d 694, 698 (10th Cir. 1998). The former case concerns the constitutionality of a regulation governing eligibility for interscholastic sports. The latter case concerns a student's

attempt to force a local school board to allow her to attend its school on a part-time basis. Again, both of these issues implicate the regulation of student behavior.

Finally the *Littlefield* Court cited *Brown v. Hot, Sexy & Safer Productions, Inc*., 68 F.3d 525, 533 (1st Cir. 1995); *Fleischfresser v. Director of School District 200*, 15 F.3d 680, 690 (7th Cir. 1994); *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988); and *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 491 (8th Cir. 1987). These cases dealt with controlling the content of student assemblies, controlling the content of a supplemental reading program, administration of standardized tests, and implementation of compulsory attendance and reporting requirements, respectively. Each of these cases concerned the regulation of student conduct. None had anything to do with conditions of a parent's employment or promotion.

Thus, in summary, this Court's opinion in *Littlefield* is, on its face, inapposite because the facts are—in a legally significant way—completely different. Furthermore, one may go behind the cases cited by the *Littlefield* Court in its discussion of *Troxel* in which it stated that 'parental rights are not absolute in the public school context and can be subject to reasonable regulation." *Littlefield*, 268 F.3d at 291. When one looks at those cases, the inappositeness of *Littlefield* is accentuated. The instant case has nothing to do with 'reasonable regulation" of parental rights in the interest of appropriately controlling student behavior. Rather,

as will be shown in Section II, below, this case should be governed by the decisions of this Court that have evaluated a school district's ability to condition employment upon enrolling the employee's child in the district's schools.

B. *Littlefield* is legally distinguishable from the present case, because neither a fundamental right nor a hybrid right was implicated in *Littlefield*; whereas both are implicated in the present case.

1. *The Uniform Policy in Littlefield did not implicate a fundamental right, but Barrow's choice to enroll her children in a Christian school does implicate a previously recognized fundamental right.*

While recognizing that parents have a "fundamental right in the upbringing and education of their children," the *Littlefield* Court held that the parents' desire to control what their children wore to a public school did not fall within this fundamental right. *Id*. at 291. Since no fundamental right was implicated, the Court applied a rational basis test and found that the Uniform Policy implemented by the school district was rationally related to the "state's interest in fostering the education of its children and furthering the legitimate goals," *id*., of regulating student behavior (as discussed above).

However, as just mentioned, the Court in *Littlefield* specifically recognized "a fundamental right in the upbringing and education of their children . . . . " *Id*. at 291. The right of parents to direct the education of their children by sending them to a private school has already been determined as a matter of law to be a constitutionally protected interest.

The Supreme Court in *Troxel* recognized the "extensive precedent," that "protects the fundamental right of parents to make decisions concerning the care, custody and control of their children." 530 U.S. at 66 (plurality opinion). The "extensive precedent" the Supreme Court relied on included *Meyer v. Nebraska*, 262 U.S.390 (1923), *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925), and their prodigy. *Troxel,* 530 U.S. at 65-66.

In *Pierce*, the Court held that a state cannot mandate that children attend public schools. As long as the child was enrolled in a school that met the minimum state educational requirements, parents had a right to send their children to private school. The Court found that parents have a liberty interest under the Due Process Clause to "direct the upbringing and education of children under their control." 268 U.S. at 534-35.

Since *Pierce* was one of the very cases that the Supreme Court relied on in *Troxel* when determining that parents had a fundamental right to direct the care, custody, and control of their children, the Court implicitly included the choice of private schooling within parents' *fundamental* rights.

Thus, the right to chose to enroll one's children in private school is, unlike the putative right to object to the wearing of uniforms, subject to strict scrutiny analysis. While the Court in *Littlefield*, could conclude that "the sweeping statements of the plurality opinion in *Troxel*," 268 F.3d. at 289, did not reach the

wearing of uniforms, it is clear that the direct citation of *Pierce* by the *Troxel* Court brings Barrow's choice squarely within *Troxel's* protection. As *Troxel* recognized, the choice of private education has been a clearly established fundamental right since the *Pierce* case was decided in 1925. Therefore, *Littlefield* cannot control the instant case since it applied the wrong standard of scrutiny.

2. *The hybrid rights doctrine was not at issue in Littlefield, but is at issue in the present case, therefore a heightened scrutiny should be applied.*

Assuming *arguendo* (see Section III, below) that no hybrid rights claim was at issue in *Littlefield*, rational basis scrutiny was the proper standard to apply in that case. However, this merely serves to re-emphasize that *Littlefield* is not controlling here. The *Littlefield* Court specifically noted that the appellants in that case "abandoned allegations of a 'hybrid-rights' challenge to the opt-out policy;" and "we do not address it." *Littlefield*, 268 F.3d at 293 n.27. However, Barrow continues to assert her hybrids right claim. For example, Barrow continues to assert this claim in Section II of her Brief to this Court.

Since this Court did not address the hybrid rights claim in *Littlefield*, it had no opportunity to correct the error committed by the district court on that issue. The *Littlefield* district court claimed it was "adopt[ing] the reasoning of the First, Sixth, Ninth, and Tenth Circuits." However, this could not possibly be correct since, as the same court wrote only paragraphs prior to the language just quoted, "[t]he Sixth Circuit, however, has taken a different approach to the hybrid rights

theory—it has refused to apply it." *Littlefield v. Forney Indep. School Dist.,* 108 F.Supp. 2.d 681, 705 (N.D. Tex. 2000).

In reality, the *Littlefield* district court aligned itself with the minority Sixth Circuit—the only Court of Appeals to reject the hybrid rights approach—while trying to appear to be in the mainstream. But in reality, as the *Littlefield* district court elsewhere admitted, the First, Ninth, and Tenth Circuits *do* recognize the hybrid rights approach. *Id*. Indeed, so do the Third, Eighth, and D.C. Circuits. *See*, *Salvation Army v. Dep't of Community Affairs*, 919 F.2d 183 (3rd Cir. 1990); *Cornerstone Bible Church v. Hastings*, 948 F.2d 464 (8th Cir. 1991); and *EEOC v. Catholic University of America*, 83 F.3d 455, 467 (D.C. Cir. 1996). Thus, the *Littlefield* district court placed itself squarely in the minority camp—and a minority of one, at that.

The district court in the instant case made two errors with regard to *Littlefield's* treatment of the hybrid rights issue. First, the district court uncritically accepted the *Littlefield* district court's above-quoted erroneous statement that it was adopting the approach of the First, Sixth, Ninth, and Tenth Circuits. *Barrow* No. CIV.A.3:00-CV-0913-D, 2002 WL 255484, *4 (N.D. Tex. Feb. 20, 2002) (*citing Littlefield v. Forney Indep. School Dist*., 108 F.Supp.2d 681, 705-06 (N.D. Tex. 2000)). Second, the district court in the instant case, claimed that this Court "declined to recognize" the hybrid rights approach. However, as has been stated,

this Court simply did not review that claim because this Court believed that the claim had been abandoned. *Littlefield*, 268 F.3d at 193 n.27.

Thus, the district courts in both *Littlefield* and the instant case have seriously misunderstood and erroneously failed to applied the hybrid rights doctrine. This Court should clarify the status of the hybrid rights doctrine in this Circuit by explicitly joining with the First, Third, Eighth, Ninth, Ten, and D.C. Circuits in following binding Supreme Court precedent.

But the *Littlefield* district court did get one thing right: under the hybrid rights doctrine, most courts want to be sure that the various claims comprising the hybrid right are colorable. Here, this brief has previously discussed the legitimacy of the parental rights claim. Equally important, the Free Exercise claim is also valid.

Rather than repeat the arguments advanced by the party, Amicus will add the following: For many Chrisitans, the very act of educating one's children is a religious act. Indeed the very foundation of *public*—let alone, private—education in America has been seen as a religious act, dating back even to the pre-national era. For example the impetus for public education in colonial Massachusetts was to assist the colony's children in their ability to read the Bible. The so-called "Old Deluder Satan Act" stated that

> It being one chief project of that old deluder Satan to keep men from the knowledge of the Scriptures, as in former times by keeping them

> in an unknown tongue, so in these latter times by persuading from the use of tongues, that so at least the true sense and meaning of the original might be clouded by false glosses of saint-seeming deceivers, that learning may not be buried in the grave of our fathers in the church and commonwealth, the Lord assisting our endeavors:
>
> It is therefore ordered that every township in this jurisdiction, after the Lord has increased them to the number of 50 householders, shall then forthwith appoint one within their town to teach all such children as shall resort him to write and read . . . .

Massachusetts School Law *in* 1 *Annals of America* 184.

While such a statute would be struck today under the Establishment Clause, the fact is not changed that what was once burning in the hearts of citizens and could be accomplished under the auspices of the state may still burn in the hearts of citizens when they chose to educate their children in private schools that still see education as a religiously motivated act. Karen Jo Barrow undeniably has a colorable Free Exercise claim.

Since Karen Jo Barrow has a valid parental rights claim and a valid Free Exercise claim, this case represents a textbook hybrids right claim under *Employment Division v. Smith*, 494 U.S. 872 (1990). Therefore, the district court erred when it declined to apply strict scrutiny.

II. *BRANTLEY V. SURLES* AND *FYFE V. CURLEE* PROVIDE THE RULE OF LAW THAT SHOULD BE APPLIED IN THE PRESENT CASE BECAUSE THEY ARE DIRECTLY ON POINT WITH THE PUBLIC SCHOOL EMPLOYMENT ISSUE.

In addition to failing to recognize this case as a hybrid rights case, the district court failed to apply the test developed in the controlling line of cases. While it is often stated that a public school, as an employer, may discharge an unprotected employee for any job-related reason, or for no reason at all, the universally recognized exception is that "it is *well established* that they may not do so for a reason which infringes constitutionally protected interests." *Brantley v. Surles*, 718 F.2d 1354, 1358 (5th Cir. 1983) (*Brantley I*) (emphasis added). When a public school employee has shown that a condition to her continued public employment violates her constitutionally protected interests, the burden is then on the state to show that without the condition the employee's conduct would materially and substantially interfere with the effectiveness of the school. *Fyfe v. Curlee*, 902 F.2d 401, 404 (5th Cir. 1990).

A. The test set forth in *Brantley v. Surles* provides a heightened scrutiny standard rather than a rational basis standard.

In *Brantley I*, the plaintiff, the manager of an elementary school cafeteria, was fired from her position because she had enrolled her son in a private school. 718 F.2d at 1356. The school board had received complaints from other parents and was afraid that Brantley's decision to send her son to private school would

start a precedent that would 'get out of control." *Id*. This Court concluded that Brantley's decision to send her son to private school was within her parental rights guaranteed by the Constitution. *Id*. at 1359. While the Court noted that parental rights in the realm of public school employment were not absolute and must be balanced with the school's interests to determine whether the school can interfere with those rights, *id,*. this Court placed the burden on the school board to show, on remand, that Brantley's decision 'materially and substantially impede[d] the operation or effectiveness of the educational program." *Id*. (citing *Tinker v. Des Moines Sch. Dist*., 393 U.S. 503 (1969)).

After the case was remanded and judgment entered for the plaintiff, the school board appealed a second time. *Brantley v. Surles* 765 F.2d 478 (5th Cir. 1985) (*Brantley II*). The only evidence that the school offered to prove material and substantial impediment of the school's operation was the superintendent's fear that interracial dissension might occur after plaintiff put her son in a private school. *Id*. at 480. This Court held that since the superintendent's belief was unsupported by any *objective* evidence the judgment for Brantley was not clearly erroneous. *Id*.

In the second controlling case, *Fyfe,* the plaintiff was the secretary to the principle of an elementary school. 902 F.2d at 402. The secretary put her daughter in a private school because the daughter could not get along with another student at the public school. *Id*. Subsequently, the superintendent of the school created a

new, menial job for her at a different facility. *Id*. This Court placed the burden on the school, holding that the school could not discharge, or transfer an employee to a more menial position, "unless it could demonstrate that the conduct materially and substantially interfered with the effectiveness of the school system." *Id*. at 402. This Court in *Fyfe* specifically cited *Brantley I* and held that the secretary's decision to send her child to a private school was constitutionally protected and reassigning her was a constitutional violation. *Id*. at 405 (citing *Brantley,* 718 F.2d at 1359).

A condition was also placed on Barrow's continued public employment that interfered with her constitutionally protected interests. This Court in *Fyfe* explicitly stated that promotions enjoy constitutional protection. 902 F.2d at 404 (citing *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980) (involving a fireman who was not promoted because he exercised his right to freedom of speech)). As in *Brantley I* and *Fyfe*, the standard that the district court below should have been applied to Borrow's claim that her constitutional interests had been violated was a heightened scrutiny rather than a rational basis test. GISD's superintendent should have been required to show Barrow's decision to send her children to public school would have materially and substantially effected the efficiency of the school.

This standard is a higher standard than a mere rational basis test. "A state action viewed under the rational basis banner is presumed to be valid. In such a

situation, the 'burden is not upon the state to establish the rationality of its restriction, but is upon the challenger to show that the restriction is wholly arbitrary.'" *Kite v Marshall*, 661 F.2d 1027, 1030 (5th Cir. 1981) (citing *Karr v. Schmidt*, 460 F.2d 609, 617 (5th Cir. 1972)). In both *Brantley I* and *Fyfe*, the school district had the burden of producing actual proof of substantial and material interference with the effectiveness of the school. This could not have been a rational basis test, where the state is not required to show anything at all. Rather, the standard was one of a heightened scrutiny requiring the state to justify its actions.

B. To the extent that the district court interacted with *Brantley I* and *Fyfe*, it erroneously changed the test articulated in those cases.

In deciding that the superintendent of GISD was entitled to qualified immunity, the district court completely turned the *Brantley I* test upside down to find the rights of the plaintiff were not clearly established in July of 1998. The district court stated the superintendent's belief (that requiring administrators to educate their children in the public school would signal a communication of loyalty and confidence in the public school system) could by itself provide a rational basis for the policy. *Barrow v. Greenville Indep. School Dist.,* No. CIV.A.3:00-CV-0913-D, 2002 WL 255484, at *5 (N.D. Tex. Feb. 20, 2002).. The court said that "supported by appropriate objective evidence, a patronage requirement could conceivably be shown to materially and substantially advance

the effectiveness of GISD's educational program." *Id*. The burden on the school district is *not* to show that a *policy* will materially *advance* the effectiveness of the school system. Neither does Barrow, as plaintiff, have a burden to show that the policy will not advance the district's effectiveness. Rather, when constitutional rights are infringed by a district's policy, the district has the burden to show that the plaintiff's *conduct* materially and substantially *impedes* the efficiency of the school. *Brantley I,* 718 F.2d at 1359. In *Brantley I*, this Court held that if the school board could not show a material and substantial effect in the efficiency of the school due to Brantley's conduct, then "*as a matter of law*, Mrs. Brantley's interest in controlling the education of her son takes precedence over the school board's interest . . . ." *Id*. (emphasis added).

The district court below, to justify its misconstruction of the applicable standard, stated that because the present case involves administrative personnel, the standard must be different. However, nothing in *Brantley I* or *Fyfe* indicates that there should be a different standard merely because the public employee is a school administrator. This Court has not distinguished between categories of public school employees. *Brantley I*, 718 F.2d at 1359 (citing *Pickering v. Board of Educ*., 391 U.S. 563, 568 (1968)).

Furthermore, this Court's analyses in *Brantley I and II* and *Fyfe* comport with the analysis of other Courts of Appeals. For example, the Tenth Circuit Court

of Appeals, in *Peterson v. Minidoka Co. School Dist*., 118 F.3d 1351 (10th Cir. 1997) dealt specifically with a principal who, for religious reasons, decided to home school his children rather than keep them in public school. The court balanced the interest of the principal in directing the education of his children and the interest of the school to have an effective principal. *Id*. at 1358. No substantial evidence indicating that the school's interest outweighed the principal's constitutional interest to direct the education of his children. *Id*. at 1357. Similarly here, no evidence exists to show an interest outweighing Barrow's.

The policy of GISD's superintendent not to promote employees that sent their children to private schools infringed on the right of parents to direct their children's education; therefore, the lower court should have applied the standard found in *Brantley I* and reaffirmed in *Fyfe*. The burden should have been on the superintendent to show plaintiff's decision to send her child to private school, substantially and materially impeded the efficiency of the school system. As the Supreme Court has said,

> [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . or if the government could deny a benefit to a person because of his constitutionally protected [interests] his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. *Such interference with constitutional rights is impermissible*.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (emphasis added) (citation omitted).

III. EVEN IF THIS COURT DECIDES *LITTLEFIELD* IS APPLICABLE TO THE PRESENT CASE, ITS APPLICATION IS IN CONFLICT WITH *BRANTLEY* AND *FYFE* AND THEREFORE, IN ACCORDANCE WITH FIFTH CIRCUIT LAW, *BRANTLEY* AND *FYFE,* AS THE EARLIER PRECEDENT, CONTROL.

If this Court decides that the district court correctly applied *Littlefield* to the present case, it becomes obvious that *Brantley I and II* and *Fyfe* also apply and that analysis of this same issue under the two very different approaches will produce a conflicting result.

"As a general rule, one panel may not overrule the decision of a prior panel, right or wrong, in the absence of an intervening contrary or superseding decision by this court sitting *en banc* or by the United States Supreme court." *Billiot v. Puckett* 135 F.3d 311, 316 (5th Cir. 1998) (citing *Pruitt v. Levi Strauss & Co*., F.2d 458, 465 (5th Cir. 1991)). However, in the Fifth Circuit where two previous holdings or lines of precedent conflict "the earlier opinion controls and is the binding precedent in the circuit." *Id*. (citing *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991)). Therefore, since *Littlefield* applies a rational basis test, and *Brantley* and *Fyfe* apply a heightened scrutiny test, the two are in conflict and the earlier decisions of *Brantley I* and *Fyfe* are controlling.

Following the above rule may at times produce "gritted teeth," should the precedent that must be followed be the one that the current panel believes is actually the erroneous one. However, no such "dilemma" is likely to occur in the

instant case, since *Littlefield* was arguably wrongly decided. The *Littlefield* Court stated that the appellants had abandoned their hybrid rights claim. Yet the Court discussed both a parental rights claim and a Free Exercise claim. *Littlefield*, 268 F.2d at 288-96. Under *Smith*, "hybrid rights" is not a pleading issue. They are not "magic words" that must be used to preserve the claim. Rather, under *Smith* it is sufficient for both interests to be in play. *See generally, Employment Div. v. Smith* 494 U.S. 872 (1990).

IV. THIS COURT SHOULD FOLLOW THE LEAD OF THE UNITED STATES SUPREME COURT IN RECOGNIZING THE PARAMOUNT SIGNIFICANCE OF BOTH FAMILY AND RELIGION IN OUR SOCIETY.

The United States Supreme Court has repeatedly recognized the importance of family in American history and society. While many of the Supreme Court's earlier precedents, including those cited in this brief, attract attention because of the efforts required to bring them under modern day analytical rubrics, it is important to remember their genesis. Many of them, including *Pierce*, *Meyer*, and *Wisconsin v. Yoder* 406 U.S. 205 (1972), were set in the context of the intersection of family, education, and religion. And while there was certainly constitutional analysis involved, there was also resort to first principals. Perhaps the very struggle to fit these cases in analytical pigeonholes has caused some to lose sight of the great first principals required to navigate the constitutional waters. This Court should not lose sight of the guidance provided by the Supreme Court's high view

of the parents role in deciding how to raise children—an undertaking that is inherently both religious and educational.

For example, in *Meyer*, the Court, after quoting from Plato's *Ideal Commonwealth*, in which Plato advocated that all children should be raised by officers of the state, rejected such education and training as foreign to the history and ideals of the United States:

> Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were *wholly different* from those upon which out institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

262 U.S. at 402 (emphasis added).

Thus, the *family* is the cornerstone institution of the American society. We trust parents to teach the values, principles, and traditions that children need to live as productive citizens in this country. The Supreme Court in *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), after recognizing the institution of family is "deeply rooted in this Nation's history and tradition," stated that it was through the family that "our most cherished values [both] moral and cultural," were passed down.

The Supreme Court has properly stated—and strongly so—that

> It is *cardinal* with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom

> include preparation for obligations the state can neither supply nor hinder.

Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (emphasis added).

All of these statements of first principal harken back to the oft-quoted words from *Pierce*:

> The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, *coupled with the high duty,* to recognize and prepare him for additional obligations.

268 U.S. at 535 (emphasis added).

When a parent, for purposes of directing her children's educational and religious upbringing, decides that she wants those children to be taught in a certain manner, by a certain person or school, that parent is making a decision about what is best for that child. The historical traditions and principles upon which this country was built allow her to do so. As the Supreme Court also said in *Pierce*, it is *fundamental to the theory of liberty* that the state cannot standardize children "by forcing them to accept instruction from public teachers only." 268 U.S. at 535 (emphasis added). Neither can Greenville Independent School District hold its employees' promotions hostage until they agree to withdraw their children from the schools of their choice.

CONCLUSION

For the foregoing reasons the decision of the district court should be reversed.

Respectfully submitted,
this 28th day of May, 2002,

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief Amicus Curiae of the National Legal Foundation in the case of *Barrow v. Greenville Ind. Sch. Dist*, No. 02-10351, on all required parties by depositing two paper copies and one electronic copy of the same in the United States mail, first class postage, prepaid on May 28, 2002 addressed as follows:

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