No. _____

In the Supreme Court of the United States

COPE (A.K.A. CITIZENS FOR OBJECTIVE PUBLIC EDUCATION, INC.), *et al.*,
Petitioners,

v.

KANSAS STATE BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court and numerous Circuit Courts uniformly hold that non-theistic parents and children have standing to challenge state endorsement of offensive theistic preferences, practices and programs in their public school system (*Lee v. Weisman*, 505 U.S. 577 (1992); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *McCollum v. v. Board Of Education*, 333 U.S. 203 (1948)).

Do theistic parents and school children have Article III standing to challenge their state's establishment of a 13 year K-12 program of education designed to supplant the children's theistic religious beliefs with non-theistic religious beliefs that are materialistic/ atheistic in violation of their rights under the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the 14th Amendment? See "Importance of the Question," *infra* at 1.

LIST OF PARTIES

Petitioners, who were Plaintiffs below, are Citzens for Objective Public Education, Inc. (COPE), and the following Individual Petitioners who are residents of Kansas and their Children who are or will be enrolled in Kansas K-12 public schools.

Carl and Mary Angela Reimer, and their minor children B.R., H.R., B.R. and N.R. by and through their parents as Next Friends; Sandra Nelson, and her minor child J.N. by and through his mother as Next Friend; Lee and Toni Morss, and their minor children L.M., R. M. and A.M. by and through their parents as Next Friends; Mark and Angela Redden, and their minor child M.R. byand through his parents as Next Friends; Burke and Kelcee Pelton and their minor children B.P., L.P. and K.P. by and through their parents as Next Friends; Michael and Bre Ann Leiby, and their minor children E.L, P.L., and Z.P. by and through their parents as Next Friends; Jason and Robin Pelton, and their minor children C.P., S.P., C.P., and S.P. by and through their parents as Next Friends; Carl and Marisel Walston, and their minor child H.W. by and through his Parents as Next Friends; and David and Victoria Prather.

CORPORATE DISCLOSURE STATEMENT

COPE is a non profit Missouri corporation whose purpose is to promote the religious rights of parents, students and taxpayers in public education. It has no shareholders or parent and no publicly held corporation owns any portion of COPE. Its members support the corporation and its mission and include residents of Kansas who are taxpayers and parents that have children that are enrolled in Kansas public schools and children that are expected to be enrolled in Kansas Public Schools.

Respondents, who were Defendants below, are the Kansas State Board of Education; the following members of the Kansas State Board of Education in their official capacity only: Janet Waugh, Steve Roberts, John W. Bacon, Carolyn L. Wins-Campbell, Sally Cauble, Deena Horst, Kenneth Willard, Kathy Busch, Jim Porter, and Jim McNiece; Kansas State Department of Education and Randy Watson, Commissioner of the Kansas State Department of Education, in his official capacity.

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OPINIONS BELOW

The opinion of the district court (App. C) is reported at *COPE v. Kan. State Bd. of Educ.*, 71 F. Supp. 3d 1233 (D. Kan. 2014). The opinion of the Tenth Circuit court of appeals (App. A) is reported at *COPE v. Kan. State Bd. of Educ.*, 821 F.3d 1215 (10th Cir. Kan. 2016).

JURISDICTION

The Tenth Circuit's judgment was entered on April 19, 2016, (App. A) and the Order denying Hearing En banc, was entered on May 20, 2016. App B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The provisions are set forth in Appendix E.

STATEMENT OF THE CASE

I. Importance of the Question

The Question as to whether theistic parents and children may complain about the use of their K-12 schools to replace the children's theistic beliefs with a non-theistic religious worldview is, perhaps the most important issue this Court has addressed since its decision in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). *Cantwell* held that the First Amendment applies to the states and not just to Congress due to the adoption of the 14th Amendment. Since *Cantwell,* a long series of complaints by Atheistic, Agnostic, Unitarian, Humanistic, Freethinking, Native American and Jewish parents and children have incrementally removed theistic preferences from K-12 public schools.

The incremental nature of the removal has produced a problem. Although theistic viewpoints about religious questions or issues have been removed, the questions or issues themselves have not.

As alleged in the Complaint, the Standards address ultimate religious questions. Children are led to ask: *Where do we come from*, *what is the nature of life*, *what happens to it upon death, and how should we decide life should be lived from an ethical and moral standpoint?* App D, at 66, ¶¶ 2-4. Thus, the removal of theistic viewpoints about these issues has not removed the issues. Instead, students are now being led by the Standards "to answer [the ultimate questions] with only materialistic/atheistic answers." *Id.* ¶ 5.

The question then is: Do theistic parents and children have standing to complain if the goal of the state is to cause their children to embrace a "non-theistic religious worldview that is materialistic/ atheistic?" If the answer is no, like that of the Decision, then (a) the Establishment Clause is not substantively neutral as Government may prefer atheists over theists, (b) the religious liberty of theistic parents and children will be abridged by K-12 public schools, (c) graduates educated to know and be able to do the Standards may reasonably be expected to embrace a non-theistic religious worldview that is materialistic and atheistic, and (d) most voters in the Country will reflect that faith in the "next generation."

The transition from a theistic to a non-theistic culture is reflected in Pew Research reports that show the percentage of U.S. residents holding non-theistic beliefs to have increased to about 25% of the total population with the rate of increase at more than one

percent per year.[1] The Standards should accelerate this change as they have been adopted by 19 states and the District of Columbia at the rate of about seven adoptions a year since 2013.[2] At this rate nearly every state in the nation will have embraced them by 2020. By 2033 one might reasonably expect most children in the country to have received the complete 13 year K-12 program of indoctrination.

The question then is whether Government may establish, promote and endorse this change in religious demography. Or, should it follow this Court's conclusions in *Lee* v. *Weisman*, 505 U.S. 577 (1992) that religion (a) includes non-theistic belief systems, (b) that government must be neutral as between theistic believers and non-theistic believers and (c) that it may not establish a "religious orthodoxy," whether theistic or non-theistic by allowing complaints against the establishment of a theistic orthodoxy, but not against the establishment of a non-theistic religious orthodoxy. REASONS II.A., *infra* at 12-17.

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[1] Pew Research Center, *America's Changing Religious Landscape: Christians Decline Sharply as Share of Population; Unaffiliated and Other Faiths Continue to Grow*, p. 3 (May 12, 2015) www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf, accessed on July 16, 2016.

[2] Citizens for Objective Public Education, *State Adoptions of NGSS* (May 2016) http://copeinc.org/docs/StateAdoptions.pdf, accessed on July 11, 2016.

II. Summary of the Facts

A. The Plaintiffs and the Complaint

COPE, 15 Christian Parents, their 21 Christian Children, enrolled or to be enrolled in K-12 schools supervised by Defendants, filed their Complaint containing 130 particularized allegations on September 26, 2013. App D.

The Complaint seeks declaratory and injunctive relief against the Defendants' June 11, 2013 adoption and implementation of a 402 page Framework for K-12 Science Education and related 446 page Next Generation Science Standards (collectively, the "Standards"). It alleges that the Standards are designed to incrementally, progressively, comprehensively and deceptively lead the Children during their 13 years of Kansas K-12 public education to "suppress" their theistic religious beliefs and replace them with a "non-theistic religious worldview (the 'Worldview')" that is "materialist/atheistic." *Id.*

It alleges that the "adoption," "endorsement" promotion," "use" and implementation of the Standards violates Plaintiffs' rights under the Establishment, Free Exercise, and Speech Clauses of the First Amendment, and the Equal Protection Clause of the 14th Amendment." App. D., at 65, ¶¶ 1, 14, 20-22, 48, 65, 87, 123-126, 127, VIII. a.

The Complaint describes in 122 detailed paragraphs and the attached Exhibits A and B the "methods" by which the Standards seek to convert the theistic beliefs of the Children into a non-theistic religious worldview. These allege that the Standards are designed to cause the children to ask ultimate questions addressed by all

religions regarding the "cause and nature of life and the universe - 'where do we come from,'" and what happens when life ends. *Id.,* Cplt. ¶¶ 2-4. The Complaint explains that "These questions are exceedingly important as ancillary religious questions regarding the purpose of life and how it should be lived ethically and morally depend on whether one relates his life to the world through a creator or considers it to be a mere physical occurrence that ends on death per the laws of entropy." *Id.*

The Complaint then explains that, instead of seeking to objectively inform children of the actual state of our scientific knowledge about these ultimate questions in an age appropriate and religiously neutral manner, the Standards use, without adequately disclosing, an "Orthodoxy" called Methodological Naturalism or Scientific Materialism (defined in App. D, at 66-68, ¶¶ 4, 8 and 9) and a variety of other deceptive methods to lead impressionable children, beginning in Kindergarten, to answer the questions with only materialistic/atheistic answers." *Id.,* Cplt. ¶¶ 5-10.

The balance of the 130 paragraph Complaint provides detailed explanations of the "methods" used to inculcate the non-theistic religious worldview. One of those methods is to classify children's instinctive teleological conceptions of the world that support theistic answers to the ultimate questions to be "misconceptions," and then to train teachers to correct those misconceptions so that their conceptions become materialistic/atheistic, consistent with the non-theistic religious worldview the standards seek to establish. App. D at 70-71, ¶¶ 15-19.

The "*religious* worldview" is to be inculcated not only in science curriculum but also in all other school curriculum. *Id.,* Cplt. ¶22. Other strategies of indoctrination used by the Policy include: (a) employing the indoctrination during the years that children typically formulate their worldviews and at a time when they are not cognitively mature or sufficiently knowledgeable "to enable them to critically analyze and question any of the information presented and to reach their own informed decision about what to believe about ultimate questions fundamental to all religions" (*Id.,* Cplt. ¶¶14, 18); and (b) excluding "from its policies regarding non-discrimination and equity, children, parents and taxpayers that embrace theistic worldviews, thereby enabling the discriminatory establishment of the non-theistic Worldview under the guise of 'science'" *Id.,* Cplt. ¶21.

¶¶ 123 through 126 of the Complaint detail in 19 subparagraphs the injuries to the Plaintiffs arising from the adoption of the Standards. These include: (a) a violation of the Parents' rights to direct the religious education of their children, (b) a violation of the rights of the Children to not be indoctrinated by the state to accept a particular religious view, and (c) the violation of all Plaintiffs' rights to equal protection and non-discrimination arising from the Standards classifying theists as outsiders in the community.

The Prayer seeks a declaratory judgment and an injunction against implementation of the Standards. In the alternative it seeks a declaration and injunction against the use of the standards to teach origins science (origin of the universe, of life and the diversity of life) (i) in grades K-8 due to the lack of background

knowledge and cognitive development of young children and (ii) in high school if not "taught objectively so as to produce a religiously neutral effect." The prayer seeks to have students objectively taught the actual state of our scientific knowledge about origins, not "creation science" - a literal Genesis account of origins. App. D, at 100-105, ¶¶ VIII.c.(2)(a)-(o).

B. The District Court Ruling

The District Court dismissed the Complaint for a lack of Article III standing without ruling on the merits of the Complaint. App. C. The dismissal was based on the District Court's incorrect characterization of the Parents and Children as *Valley Forge* "bystanders" whose Establishment Clause injuries are nothing more than "abstract stigmatic" injuries, resulting only from "the psychological consequence presumably produced by observation of conduct with which one disagrees," incorrectly relying on *Valley Forge Christian College v. AUSCS*, 454 U.S. 464, 485 (1982), a case which recognizes that parents and school children are not bystanders. App. C. at 49.

C. The Tenth Circuit Ruling - The Decision

Plaintiffs appealed to the Tenth Circuit, because the District Court decision gave no consideration to the violations of the rights of parents to direct the religious education of their children, the rights of children to not be indoctrinated as to a particular religous view and other rights as alleged in ¶¶ 124 and 125 of the Complaint. It therefore incorrectly characterized their injuries as only abstract "disagreements" of bystanders rather than personal injuries arising from alleged

violations of legally enforceable rights. App. D at 95-97.

The Standards define what is to be put into the minds of the Children: "'Curriculum standards' means statements, adopted by the state board, of what students should know and be able to do in specific content areas." K.A.R. § 91-31-31(d). Thus, the Parents and Children are not mere bystanders, as they are the very "object[s] of the action... at issue" and have an enormously important "stake in the outcome." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 562-3, 579 (1992). If what is to be put in their minds is a religious world view the rights of the Children and their parents are personally and directly violated.

The Tenth Circuit Decision (the "Decision") recognized that parents have the right to guide the religious education of their children and that children have the right to not be religiously indoctrinated by the state. App A at 11. However, it then completely misstates the core allegations of the Complaint that the Standards seek to replace the Children's theistic religious beliefs with a "non-theistic religious worldview that is materialistic/atheistic."

Without any factual or legal basis, the Decision incorrectly states that the *Complaint alleges* that the standards promote a "non-religious worldview." However, the word "non-religious" does not appear in the Complaint, yet it occurs six times in the Decision. (App. A, 5, 7, 10 and 11.).

Thus, the Complaint alleges the complete opposite of the Decision's statement of what it alleges. In seven instances the Complaint alleges that the Standards

seek to promote a "non-theistic *religious* worldview." App. D, Cplt ¶¶ 1, 19, 48, 80, 123, 124, 125, emphasis added. The religious worldview is characterized as "materialistic/atheistic" in 21 instances. "Atheism and Religious ("Secular") Humanism" are alleged by the Complaint to be non-theistic religions the Standards promote. App. D at 80, 83 Cplt. ¶¶ 66, 77, and Cplt. Exhibit A, *Id.* at 111.

The Decision's misstatements are compounded by a complete omission to mention and reconcile numerous other contradictory allegations. The Complaint (with exhibits A&B) alleges the religious nature of the Standards using a number of words and phrases, including the following in the number of instances (x) parenthetically shown: "non-theistic religious worldview" (7x); "materialistic/atheistic religious Worldview" (8x) "Religious ('Secular') Humanism" (12x.), "atheism," "atheist" or "atheistic" (66x), "materialistic" (66x), "materialistic/atheistic" (33x), orthodoxy (54x), non-theistic (16x), and theistic (18x)." App. D. None of these words or phrases occur in the Decision.

Using the false idea that the Complaint alleges the Standards to be not religious, the Decision then incorrectly concludes that the Complaint fails to allege that the standards condemn the Children's religious beliefs. The faulty reasoning of the Decision, is that if the standards are not religious, then they can't condemn a religion and therefore their injuries reduce to nothing more than abstract "disagreements" rather than concrete personal injuries.

Of course, the Complaint alleges precisely the opposite. *Id*. REASONS IV.A. at 34-36. A correction of

the Decision's misstatements of the Complaint removes any valid legal or factual basis for the denial of standing.

III. Standing is based on the assumption that the allegations of the Complaint are true.

The question to be reviewed is the justiciability of the Parents and Children's complaint. In reviewing the issue de novo the Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party," *Warth v. Seldin*, 422 U. S. 490, 501 (1975); *see also Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979), *Pennell v City of San Jose,* 485 U.S. 1, 6 (1988). Also, "at the pleading stage, general factual allegations are sufficient to carry plaintiffs' burden of establishing the elements of standing because the Court must "'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992) quoting *Lujan v. National Wildlife Federation,* 497 U.S. 871, 889 (1990).

The fatal flaw of the Decision is that it recognized that the allegations must be deemed true and valid, (App. A, 8-9), but it then ignored that requirement by misstating and ignoring the key allegations of the Complaint so as to give it a meaning that is the opposite of what it actually states.

REASONS FOR GRANTING THE PETITION

I. Summary of Reasons

Review is necessary because (a) the Decision presents questions of exceptional and profound importance to every person in the U.S., (b) the Decision is inconsistent with at least eight decisions of this court and the Decisions of the 2nd, 4th, 5th, 7th, 8th, 9th and 10th Circuits in the context of complaints by parents and children injured by a religious preference in a school context, and (c) because the Decision is clearly and exceptionally wrong.

The Questions of exceptional importance include (a) whether "religion" under the First Amendment is confined to only theistic views, and if not (b) whether the Decision's implicit and improper analysis of the merits of the Complaint will establish a non-theistic religious program of indoctrination for every child in the Country and thereby move the U.S. to become an Atheocracy rather than a truly secular state, and (c) whether the Courts should apply principles of standing neutrally as between competing theistic and non-theistic religions.

II. Review is necessary as the Decision presents questions of exceptional and profound importance to every person in the U.S.

A. The Decision raises the question of whether "religion" is confined to theistic views, thereby allowing K-12 public education to endorse competing non-theistic views about religious issues.

1. The Decision is based either on (a) key misstatements of the Complaint or (b) the incorrect idea that a non-theistic worldview that is materialistic-atheistic cannot be religious and therefore injurious.

The Decision's assertion that the Complaint alleges that the Standards are "non-religious" is false. The Complaint alleges in extreme detail that the Standards seek to establish in the Children a "non-theistic ***religious*** worldview that is materialistic/atheistic." STATEMENT II.C, *supra* at 7-10.

The false conclusion that the Complaint alleges the Standards to be "non-religious" renders them secular. Merriam-Webster's unabridged dictionary explains: "nonreligious: 1: not religious: not having a religious character: SECULAR." If alleged to be secular no Establishment Clause injury is alleged.

Since the Complaint alleges the Standards promote a non-theistic *religious* worldview, the only way the Decision's not religious misstatement can be reconciled with the requirement that the contrary allegations of the Complaint be deemed true, is if "religion" in the First Amendment sense is in fact and law confined to theistic beliefs. In that case a "non-theistic worldview,"

cannot be "religious." However, it is not, and the Decision does not explicitly disagree.

2. In fact and law this and other Courts have uniformly recognized that religion includes non-theistic belief systems.

> "Religion - in the comprehensive sense in which the Constitution uses that word - is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives." *McGowan v. Maryland,* 366 U.S. 420, 461 (1961) (Frankfurter, J. concurring, with Harlan, J.).

The ideas that there is no God or supernatural that has intervened in the natural world and that life is not a creation, but rather just an occurrence arising from unguided evolutionary processes, do profoundly relate life to the world in which it is lived. Thus, these ideas are religious in the comprehensive sense in which the Constitution uses that word. Neutrality is therefore required not only between theistic sects, but also between theistic and non-theistic sects.

> "The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's ***belief or disbelief*** in the verity of some transcendental idea and man's expression in action of that *belief or disbelief*. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country." *Id.* at 465-6.

As a consequence, this Court and many other courts have held that religion includes both "theistic and non-

theistic religions." *Lee v. Weisman,* 505 U.S. 577, 617 (1992) (Souter, Stevens and O'Connor concurring). "[T]he settled law" is that "'the Clause applies 'to each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker.'" *Id* at 611.

Religious ("secular") Humanism, a non-theistic religion (App. D. Cplt. Exhibit A, p 2.) has been held to be a religion by numerous courts, [*Fellowship of Humanity v. County of Alameda* at 315 P.2d 394, 406 (Cal. Ct. App. 1957); *Washington Ethical Society v. Dist of Columbia,* 249 F.2d 127 (D.C. Cir 1957); *Smith v. Bd. of Sch. Comm'rs of Mobile County*, 655 F. Supp. 939 (S.D. Ala. 1987), *rev'd on other grounds*, 827 F.2d 684 (11th Cir. 1987); and *Strayhorn v. Ethical Society of Austin,* App. 2003: 110 S.W. 3d 458, 473 (Tex. App. 2003)]. It has been recognized as a religion by this Court explicitly in *Torcaso v. Watkins,* 367 U.S. 488, 495 and Note 11 (1961) and implicitly in *U.S. v. Seeger,* 380 U.S. 163, 166 (1965), where the Court adopted a test of religion identical to the one articulated by Judge Peters in *Fellowship of Humanity*. Atheism has been held to be a religion for Free Exercise purposes in *Torcaso, id.* and for Establishment Clause purposes in *Lee v. Weisman,* 505 U.S. at 592, 611, and in *Kaufman v. McCaughtry,* 419 F.3d 678, 682 (7th Cir 2005).

Other non-theistic belief systems found to be religions include Buddhism and Taoism (*Torcaso*, *id*. 367 U.S. at 495 note 11), the "Science of Transcendental Meditation," (*Malnak v. Yogi*, 592 F.2d 197, 212-213 (3d Cir. 1979); Scientology (*Founding Church of Scientology v. United States,* 409 F.2d 1146, 1160 (D.C. Cir. 1969), Wicca (*Dettmer v. Landon* , 799 F.2d 929, 932 (4th Cir. 1986), and an atheistic White

Supremacist religion based on survival of the fittest and natural selection (*Peterson v. Wilmur Communication, Inc.*, 205 F. Supp. 2d 1014, 1022 (E.D. Wis 2002).

3. This issue is enormously important. If religion is limited to theistic beliefs, then public schools may routinely evangelize children to convert to Atheism, as alleged in the Complaint.

The issue is discussed in *Malnak v. Yogi*, at 212-213. Judge Adams was confronted with the argument that the word "religion" in the First Amendment has two meanings. *Id.* He was asked to construe religion in the Free Exercise Clause as having a broad and comprehensive meaning that protects the "ultimate concerns" or beliefs of the individual, while finding it to have a narrow theistic meaning in the Establishment Clause.

In responding to this argument, Judge Adams first noted that logic and coherent application of the Establishment Clause and Free Exercise Clause demand one meaning for the word "religion." This follows because the word appears only once in a sentence that contains both clauses. The word first appears in the Establishment Clause and then is incorporated by reference into the Free Exercise Clause by the word "thereof." *Id*. at 211-212. He noted that his assignment of a single meaning to the word appeared to be the position of this Court as Justice Rutledge had reached that conclusion in *Everson v. Board of Education,* 330 U.S. 1, 32 (1947) (dissenting opinion).

More importantly, Judge Adams held that "the practical result of a dual definition is itself troubling" because it is discriminatory. *Malnak*, 592 F.2d at 212.

> "Such an approach would create a three-tiered system of ideas: those that are unquestionably religious and thus both free from government interference and barred from receiving government support; those that are unquestionably non-religious and thus subject to government regulation and eligible to receive government support; and those that are only religious under the newer approach and thus free from governmental regulation but open to receipt of government support. That belief systems classified in the third grouping are the most advantageously positioned is obvious. No reason has been advanced, however, for favoring the newer belief systems over the older ones. If a Roman Catholic is barred from receiving aid from the government, so too should be a Transcendental Mediator or a Scientologist if those two are to enjoy the preferred position guaranteed to them by the free exercise clause. It may be, of course, that they are not entitled to such a preferred position, but they are clearly not entitled to the advantages given by the first amendment while avoiding the apparent disadvantages. *The rose cannot be had without the thorn*. *Id.* at 212-13 (emphasis added).

Judge Adams used the example of a Scientologist, but the same would apply to an Atheist or Religious ("Secular") Humanist. If Atheism is deemed a religion for free exercise purposes, but not for establishment

clause purposes, then government may support the promotion of its tenets in the public school classroom, but not deprive an atheist of standing to complain about a discussion of the opposing theistic views and evidence in the same classroom. Indeed, "[t]he rose cannot be had without the thorn." *Id.*

B. Review is necessary, because the Decision sends a false message to the K-12 U.S. public education community that the Standards are not religious, when that fact has not been established through a proper test of the merits of the Complaint.

1. The reason given for the lack of standing itself amounts to an improper merits analysis.

The Complaint alleges that the Standards seek to replace the Children's theistic beliefs with a non-theistic ***religious*** worldview. However, the Decision is based entirely on the misstatement that the Complaint alleges the opposite - that it alleges the Standards are not religious. STATEMENT II.C., *supra* at 7-10; REASONS IV.A., *infra* at 34-36.

The effect of the misstatement is a factually and legally unsupported merits analysis of the extremely complex Standards and their effect on religious beliefs and issues. Thus, by misstating the Complaint to deny standing, the decision purports to hold that the standards are in fact not religious, when the Complaint alleges exactly the opposite. This unsupported Decision on standing effectively causes the merits of the religious complaint against the Standards to be deemed

not valid, when such a conclusion has not been factually or legally established.

2. The Decision itself also precludes a merits analysis because if the parents and children lack standing then no one is qualified to test the religiosity of the Standards.

This effect will insulate the Standards from testing, as it holds that the very objects and targets of the Standards, the Parents and children, are not personally or directly affected by the Standards when they actually define what is to be put into the minds of the children. If it is true that such injuries are not sufficient, then no person will qualify to test the merits of the standards, including teachers, administrators, taxpayers, voters and other citizens.

3. This effect of the Decision to preclude a proper test of the Constitutionality of the standards is profoundly important for they are designed to indoctrinate every K-12 student in the Country.

If the implicit faulty merits analysis is allowed to stand, then the 20 states that have adopted them will continue their implementation unchanged and other states will be encouraged to embrace the common model. Eventually every state in the Country will likely adopt the standards with a test of their Constitutionality being prohibited by the Courts. STATEMENT I, *supra* at 2-3. Thus, the Court's denial of standing will effectively enable the several states to establish a non-theistic religion throughout the U.S. The Country will become a sectarian Atheocracy rather than a truly secular or religiously neutral country.

This will be the case if (a) the Complaint is true but not allowed to be tested by the parents and children it is designed to affect and (b) if the Standards continue to be adopted by states at the current rate of adoption. The failure to allow a test of the merits of the allegations of the Complaint may reasonably be expected to move the country from a theistic culture to one that is non-theistic.

C. Review is necessary, because the Decision suggests that the principles of standing are to be applied non-neutrally as between complaining theists and non-theists.

Non-theists have routinely been granted standing for injuries far less damaging than a 13 year program of incremental, comprehensive, progressive and deceptive religious indoctrination. REASONS III, *Infra* at 21-34. However, rather than using the law established by these cases, the Decision denies standing to these theistic parents and children without any legal or factual basis. Implicilty the Decision suggests, as a minimum, that the rules of standing for religious and equal protection clause standing are to be applied in a discriminatory manner that favors non-theists and disfavors theists. This misapplication of the rules actually causes the Courts themselves to enable the establishment of a religious preference in violation of the Establishment Clause.

This issue was disccussed at length in *Catholic League v. City and County of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010). A narrow *En banc* majority held that theists had standing to complain about a non-binding resolution adopted by the City of San Francisco

that castigated a theistic organization for opposing adoptions by homosexual couples. Judge Kleinfeld noted that Establishment Clause standing is subjective because "the Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature." Due to this subjectivity and, perhaps because any judge will likely be affected by a religious bias, the Court explained that care should be used to apply the rules of standing doctrine neutrally:

> "It is, of course, incumbent upon the courts to apply standing doctrine neutrally, so that it does not become a vehicle for allowing claims by favored litigants and disallowing disfavored claimants from even getting their claims considered. *Without neutrality, the courts themselves can become accessories to unconstitutional endorsement or disparagement*. Standing is emphatically not a doctrine for shutting the courthouse door to those whose causes we do not like. *Nor can standing analysis,* which prevents a claim from being adjudicated for lack of jurisdiction, *be used to disguise merits analysis,* which determines whether a claim is one for which relief can be granted if factually true." *Id.* (emphasis added).

The Court then detailed numerous Ninth Circuit and Supreme Court cases conferring standing in complaints against theists. *Id.* at 1050. It concluded: "If we reject standing for [theistic] plaintiffs in this case, then those cases must somehow be distinguished convincingly (a difficult task), or overruled." *Id.* Similarly, if the Decision is left standing, the same

question arises with respect to at least 15 inconsistent cases discussed *infra*.

III. Review is necessary as the Decision conflicts with the decisions of this Court and many Circuit Courts, including the Tenth Circuit.

A. Review is necessary as the Decision Conflicts with at least eight Decisions of this Court.

1. To be entitled to use the Federal Courts to complain about an activity of the state the plaintiffs must allege at the pleading stage of the case that a Plaintiff has suffered an "injury in fact," which is actual or imminent.

Plaintiffs' Complaint alleges both actual and imminent injuries arising out of the Defendants' adoption of the Standards and their actual and threatened implementation.

The actual injuries from adoption are alleged with specificity in ¶¶ 48 and 123-126 of the Complaint. App D. at 77, 94-97. These include the violation of the rights of parents to direct the religious education of their children, the rights of the children to not be indoctrinated by the state to accept a particular religious view, the violation of the Parents and Children's Free Exercise Rights as the taking of the specified rights clearly burdens the exercise of their religion and the denial of equal protection rights by, among other things, denying theistic Parents and Children their right to be treated equally with non-theists. *Id.* at 71, Cplt. ¶ 21.

An actual injury qualifies if the plaintiffs "'have suffered ... an invasion of a legally protected interest which is ... concrete and particularized and not abstract...' In requiring a particular injury, this Court has held 'that the injury must affect the plaintiff in a personal and individual way.'" *Ariz. Christian Sch. Tuition Org. v. Winn,* 131 S.Ct. 1436, 1442 (2011) citing *Lujan* 504 U.S. at 560-61, n.1. The injury is concrete, as opposed to abstract, if the Plaintiff has "'a *personal stake* in the outcome'" of the controversy. *Los Angeles v. Lyons* 461 U.S. 95, 101 (1983), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Actual injuries arise from the adoption of the Standards because the Standards are alleged to be designed to direct the religious education of the children by guiding teachers and schools to replace their theistic religious beliefs with a "non-theistic religious worldview that is materialistic/atheistic." Thus, the adoption actually violates and is alleged to violate the exclusive right of the parents, not the state, to direct the religious education of the child and the right of the child to not be indoctrinated by the state to accept a particular religious view or belief. Since the violations directly and personally affect them, the adoption itself produces actual particularized injuries.

The injuries are concrete as the Children and Parents are the objects of the Standards and have a stake in the outcome. This is because the Standards are "statements, adopted by the state board, of what students should know and be able to do in specific content areas." K.A.R. § 91-31-31(d). The Parents also have a stake in the outcome as they are responsible for the growth and development of their children.

> "[T]he parent is surely the person most directly and immediately concerned about and affected by the challenged establishment, and to deny him standing either in his own right or on behalf of his child might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment -- even though no special monetary injury could be shown." *Abington,* 374 U.S. at 266, n. 3/30 (J. Brennan, concurring).

2. Review is necessary as the Decision conflicts with at least eight decisions of this Court.

These decisions hold or imply that non-theistic parents and children enrolled in K-12 public schools have standing to complain about the establishment of a theistic religious preference or "orthodoxy" in the school system that parents and children would have to assume some burden to avoid.

McCollum v. Board of Education, 333 U.S. 203, 205-6 (1948). An "avowed atheist" and her child had standing to complain about a Board of Education policy that permitted schools to release the children of *consenting* parents to be taught "the Scriptures." *Id*. at 234, J. Jackson concurring. According to J. Brennan in *Abington, Infra*; the Free Exercise claims of the *McCollum* parent and student also establish injury in fact for their Establishment Clause claims. *Id.* 266 n.3/30). Similarly, the Parents and Children allege free exercise claims.

Engel v. Vitale, 370 U.S. 421 (1962). Agnostics complained about New York's use of "its public school system to encourage recitation of the Regents' prayer,"

"a practice wholly inconsistent with the Establishment Clause;" *Id*. at 424. Standing may be implied from the Court's reliance on *McCollum. Id.* at 439.

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 224-5 (1963). Atheistic and Unitarian parents and children complained about laws requiring readings from the Bible at the beginning of school that parents and children could opt-out of. They had standing because the religious exercises were "conducted *in direct violation of the rights*" of the Parents and children. *Id.* 224-5, n. 9.

Valley Forge Christian College v. AUSCS, 454 U.S. 464, 486 (1982). *Abington* parents and children complaining of religious preference in school context have standing because they are not bystanders airing general grievances. They "had standing...because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Id.* 486 n. 22.

Wallace v. Jaffree, 472 U.S. 38 (1985). Agnostics complained of potential period of silence for prayer or meditation. Parent and child standing implied from reliance on *McCollum* and *Abington. Id.* at 60-61.

Edwards v. Aguillard, 482 U.S. 578, 584-5 (1987) The Court made clear the rights of parents to direct the religious education of their children and the right of children to not be indoctrinated. Parents complained of a law requiring the teaching of a religious orthodoxy (the Genesis account of creation) when objective evolution is taught. Standing may be implied from citation to *McCollum, Abington* and *Wallace*. *Id.*

Lee v. Weisman, 505 U.S. 577, 584 (1992). Jewish family and winner of the 1992 Freethinker Award of the Freedom from Religion Foundation in 1992[3] had standing to complain about a school district policy that permitted theistic invocations and benedictions to an unnamed God at school graduation ceremonies. State may not establish a theistic or non-theistic orthodoxy. *Id.* at 592.

Elk Grove Unified School District v. Newdow, 542 US 1, 17-18 (2004). *Newdow,* an Atheist, complained of the mention of God in the Pledge of Allegiance. He would have had standing to assert religious rights of parent and child if he had legal custody of the child. *Id.* All of the parent petitioners allege legal custody of the Children.

In *Lee* Justice Kennedy explained in writing for the majority, that a prayer to God reflects a preference that when embraced by the state amounts to the establishment of an impermissible "religious orthodoxy." "A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." "What to most believers may seem nothing more than a reasonable request that the *nonbeliever* respect their religious practices, in a school context may appear to the *nonbeliever or dissenter* to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 505 US. at 592.

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[3] Freedom from Religion Foundation, *Freethinker of the Year Award for 1992*, https://ffrf.org/outreach/awards/freethinker-of-the-year-award/item/11919-the-weisman-family, accessed June 27, 2016.

The non-theistic orthodoxy or religious preference established by the Standards, as discussed in Statement II.A., *supra* at 5, is called Methodological Naturalism or Scientific Materialism. Its nature and effect are extensively discussed in the Complaint and defined in Cplt. ¶¶ 8 and 9, App. D at 67-68. It requires that explanations of the origin of the universe, of life and the diversity of life be materialistic/atheistic as it denies the existence of any teleological or supernatural influence. It's effect is similar to the theistic religious orthodoxy that was the subject of the *Edwards* decision. Whenever evolution was taught, presumably in an objective manner, children were also to be taught the evidence that supports a literal interpretation of the book of Genesis. The difference between the Complaint and *Edwards* is that the orthodoxy contested by the Complaint is non-theistic rather than theistic and its effect is designed to be inculcated in the Children's worldview.

The reasons parents and children have standing is that a religious preference or orthodoxy in a public school system violates the rights of the parent to direct the religious education of the child and the rights of the child to not be indoctrinated with a particular religious view as explained by this court in *Edwards:*

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not *purposely be used to advance religious views that may conflict with the private beliefs of*

> *the student and his or her family*. Students in such institutions are impressionable and their attendance is involuntary. ... The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. .... Furthermore, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . . .
>
> Consequently, the Court has been required often to invalidate statutes which advance religion in public elementary and secondary schools. *Edwards* at 583-5, *extensive citations omitted*.

A violation of the rights injures the parent and children in fact, because a legally enforceable right gives them a stake in the matter so that its violation directly and personally affects them. *Abington* and *Valley Forge, id*. Such an injury is therefore particularized and concrete and not abstract.

Edwards and all the cases show that even the slightest of injuries is actionable because, unlike adults, children are impressionable, subject to both the pressure of accepting what school authorities lead them to accept and pressure from the non-objecting peers.

It makes no difference whether the religious program is voluntary or mandatory. All of the eight cases involved preferences which are open, notorious and avoidable by the Parent or child. The reason their

standing was recognized is that the burden of seeking avoidance is itself a sufficient personal injury. *Id.* It is akin to the injury borne by an Atheist having to make a detour to avoid an observation of a Christian monument along the road or in a state owned park. This reflects the basis for Judge Brennan's conclusion that an allegation of a free exercise claim supports Establishment Clause standing because a free exercise claim is dependent on showing that a state activity burdens the exercise of their religion. *Abington Id.* 266 n. 3/30 The Complaint includes detailed free exercise claims.

The Petitioners complain of injury far more serious than any injury alleged in the above eight cases. The Complaint alleges that the Standards are designed to permeate every aspect of the Child's K-12 education for 13 years, incrementally, progressively, comprehensively and deceptively. Neither the parent nor the child will even know when an increment is being inculcated. Increments are designed to cohere with all curriculum. The standards are designed so that the children will embrace the materialistic/ atheistic worldview by the age of 13, the age when children typically form their worldviews. App. D. at 70-71, Cplt. ¶ 18. As a practical matter, the only way a parent can protect the child is through a costly program of home schooling or private education.

All of the eight cases involved parents and children who were Atheists, agnostics, humanists or Jewish, except for the adult non-resident *Valley Forge* separationist bystanders and the parents in *Edwards*, whose faiths are not revealed. If non-theists have standing to complain about a theistic preference in the

school system, then should theists be denied the right to complain about a materialist/atheistic preference in their school system? Does not the Establishment Clause require the same result for both?

This Court's decision in *Lee, id.* clearly answers that question as it holds that religion includes "non-theistic religion" and neutrality is required as between "believers" or theists and "non-believers" or non-theists:

> Many Americans who consider themselves religious are not theistic; some, like several of the Framers, are deists who would question Rabbi Gutterman's plea for divine advancement of the country's political and moral good. Thus, a nonpreferentialist who would condemn subjecting public school graduates to, say, the Anglican liturgy would still need to explain why the government's preference for theistic over *nontheistic religion* is constitutional. *Id.* at 617 (emphasis added).

The Decision is based in part on the false premise that schools may choose not to "adopt" the standards, and therefore until a school has adopted them no injury will accrue. That is not true as K.S.A. § 72-1172, K.S.A. § 72-6479 and the Kansas Supreme Court require that the Defendant State Board "design" and "adopt" standards so that every child will receive an adequate education. *Gannon v State of Kansas*, 298 Kan. 1107, 1170, 319 P.3d 1196 (2014). "'Curriculum standards' means statements, *adopted by the state board*, of what students should know and be able to do in specific content areas." K.A.R. § 91-31-31(d). It is then the job of the schools to develop "curriculum," not standards, and train teachers to enable the accomplishment of the

performance objectives set out in the standards [K.S.A. § 72-9606(c); K.A.R. §§ 91-31-32 (c)(3) and (4)]. Both the schools and the State are also required to develop tests aligned with the standards to determine if the child has learned the content of the Standards [K.S.A. § 72-6479(c); K.A.R. § 91-31-31 (l)]. If the children or the schools fail the tests then the schools may lose their accreditation and otherwise be sanctioned by the Defendants. [K.S.A. § 72-6479(e); K.A.R. § 91-31-31, K.A.R. § 91-31-32 (b)(1), K.A.R. § 91-31-38(h)]. The implementation of the full set of standards is effectively required.

B. Review is necessary as the Decision Conflicts with its own Decisions and those of at least six other Circuit Courts.

1. The Decison conflicts with its own decision in *Bell v. Little Axe.*

The Tenth Circuit in *Bell v. Little Axe ISD*, 766 F.2d 1391, 1398 (10th Cir. 1985) held that parents have standing on their own behalf, when the "state is unconstitutionally acting to establish a religious preference affecting their children." The preference in *Bell* was a policy that permitted the conduct of voluntary Bible studies on school property before the start of class. The Plaintiffs were parents of children that did not attend the studies. They had standing:

> "'because impressionable schoolchildren [are] subjected to unwelcome religious exercises *or [are] forced to assume special burdens to avoid them....*'"
>
> In this case, plaintiffs ... *testified that, as parents, they have the right to guide their*

> *children's religious education without interference at school.* The district court concluded that "[t]his Court can see no reason why parents cannot, on their own behalf, assert that the state is unconstitutionally acting to establish a religious preference affecting their children.' Rec., vol. IV at 1176. *We agree.* These parents are not merely 'concerned by-standers,' see *Valley Forge*, 454 U.S. at 473, 102 S.Ct. at 759, airing 'generalized grievances,' id. at 475, 102 S.Ct. at 760. Rather, *they assert a specific injury that falls well within the zone of interests protected by the Establishment Clause*. See id." *Id*. (emphasis and bracketed phrases added)

The silence of the District Court and the Tenth Circuit Panel relative to *Bell* is deafening. The Decision does not reconcile *Bell,* it simply ignores it along with all the other cases cited herein. In addition, neither the District Court nor the Panel offered any apposite case that would support the dismissal for lack of standing. Instead those decisions rely entirely on misstatements of the Complaint that classify the Parents and Children as *Valley Forge* bystanders expressing mild disagreements, when in fact they are the objects of a program designed to brainwash the children for thirteen years in a religious worldview wholly inconsistent with their theistic beliefs.

2. The Decision also conflicts with the following decisions of the 2nd, 4th, 5th, 7th, 8th, and 9th Circuits in the context of complaints by parents and children injured by a religious preference in a school context.

All of these decisions recognizing standing involve voluntary programs that the parents and children

could avoid, although avoidance would be burdensome. The program alleged in the Complaint does not allow avoidance. It is effectively compulsory.

Fleischfresser v. Dir. of Sch. Dist. 200, 15 F.3d 680, 683-4 (7th Cir 1994). Theistic parents have standing to claim a violation of the Establishment Clause due to the "Impression Reading Series," "*because the impermissible establishment of religion might inhibit their right to direct the religious training of their children*." *Id*. at 683-4, citations omitted, emphasis added. Standing was similarly recognized in *Berger v. Rensselaer Cent. School Corp*, 982 F.2d 1160, 1164 (7th Cir. 1993), and *Doe v. Elmbrook Sch. Dist*., 687 F.3d 840, 848 (7th Cir. 2012), *cert den*. 134 S.Ct. 2283 (2014).

Moss v. Spartanburg CSD Seven, 683 F.3d 599, 607 (4th Cir. 2012). Jewish parents who received written invitation to have their children participate in a School District program that would permit students to be released to attend classes in a Christian school have standing, because (a) they believed or "came to the view that it was part of a broader pattern of Christian favoritism on the part of Spartanburg High School and the School District;" and (b) "because the Mosses are not Christians, the School District's alleged Christian favoritism made them feel like 'outsiders' in their own community." *Id.*

Steele v. Van Buren Public School Dist., 845 F.2d 1492, 1495 (8th Cir. 1988)**.** *Steele* holds that a violation of Parent's right to direct the religious education of their children provides standing because implicit in that right is the "parental interest to have one's children educated in public schools that do not

impose or permit religious practices. *Cf. Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1398 (10th Cir. 1985): 'parents can, on their own behalf, assert that the state is unconstitutionally acting to establish a religious preference affecting their children.' (Emphasis added). By suing as a parent, Steele asserted this interest." *Id.*

Doe v. Beaumont ISD, 240 F.3d 462, 466 (5th Cir. 2001). Parents had standing to complain about a school district's establishment of a policy to permit a "Clergy in the Schools" program that was voluntary, because "a claim of standing is even stronger when the plaintiffs are students and parents of students attending public schools."

Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1531-2 (9th Cir.1985). The right of parents to direct the religious education of their children provides them with standing when they allege that they are directly affected by use of a religiously offensive book in school curriculum.

Sullivan v. Syracuse Housing Authority, 962 F.2d 1101, 1109-10 (2d Cir. 1992). *Sullivan* recognizes the standing of a Native American tenant of a public housing development. The parent complained about an offensive religious use of a community center visited by his child but not during religious exercises conducted in the facility as permitted by the Authority. Tenant and child were not "bystanders," airing generalized grievances and therefore had standing to complain.

IV. Review is necessary as the Decision is clearly and exceptionally wrong.

A. The Decision is wrong because it is based on key misstatements of the Complaint.

The Decision is based entirely on unsupported false statements that the allegations of the Complaint are "threadbare assertions that the Standards intend to promote a *non-religious* worldview" and that the Complaint "does not offer any facts to support the conclusion that the Standards condemn any religion or send a message of endorsement." App. A. at 10 and 12.

1. The Complaint does not allege that the "Standards intend to promote a *non-religious* worldview." Rather, the Complaint repeatedly and consistently alleges the exact opposite. STATEMENT II.C., *supra* at 7-10.

The word "non-religious" does not appear in the Complaint or its two attachments, yet it occurs six times in the Decision. App. A , 5, 7, 10 and 11. The misstatement is crucial to the Decision as "secular" means "not religious." REASONS II.A., *supra* at 12. The Complaint alleges that the Standards promote a religious worldview in the context and guise of secular science. Religions include nontheistic belief systems and the state may not conceal a religious message in the guise of science. *Malnak*, 592 F.2d at 210 n. 45.

2. The Decision also asserts contrary to the Complaint that "the Standards do not condemn any or all religions and do not target religious believers for disfavored treatment" and that "COPE does not offer any facts to support the conclusion that the Standards

condemn any religion or send a message of endorsement." App. A. at 10 and 12.

An example of a detailed allegation which refutes the Decision's false statement is the preamble to Cplt. ¶ 123, App. D at 94: "**All Plaintiffs,** who are Kansas residents or Kansas taxpayers, are injured by their State's *endorsement and promotion of an Orthodoxy that establishes and promotes non-theistic religious beliefs* while seeking *to suppress* competing theistic religious views because it: "a. causes the state *to promote religious beliefs* that are *inconsistent with the theistic religious beliefs of plaintiffs*, thereby depriving them of the right to be free from government that favors one religious view over another...." Other injury allegations of the balance of ¶¶ 123 - 126 are similar. *id.* at 94-97. (*emphasis added*)

Furthermore, the injury allegations in Cplt. ¶¶ 123-126 are based on detailed factual allegations in the 122 preceding paragraphs, many of which are briefly summarized in the STATEMENT II.A., *supra* at 4-7. Cplt. ¶¶ 10-19 together with numerous other provisions describe in detail the strategy for replacing children's intuitive theistic beliefs with a non-theistic religious worldview. App. D. at 68-71.

Given the particularized allegations, the Complaint clearly explains how the Standards are designed to convert the Children's theistic beliefs into a non-theistic religious worldview. The allegations go far beyond notice pleading or even the particularity required of allegations of fraud. They allege a program for the systematic replacement of the Children's theistic beliefs with a non-theistic religious worldview in all public K-12 schools in Kansas and the entire

country beginning at age 5, incrementally, progressively, comprehensively and deceptively. These are not "threadbare" allegations or conclusory allegations of fact.

3. The Decision incorrectly concludes that Plaintiffs' injuries consist only of the "psychological consequences produced by observation of conduct with which it disagrees." App. A, at 10-11.

The assertion is false. In addition to the psychological consequences of disagreements, the Complaint alleges numerous direct personal injuries resulting from the adoption's violation of the legally enforceable religious and equal protection rights of the parents and children. App. D, at 95-96, ¶¶ 124-125.

The exclusion of these rights from consideration is curious, because the Decision recognizes that the Complaint does allege that the adoption of the Policy violates the specified rights. However, it fails to explain how the violation of a legally enforceable personal right and breach of trust can be factually classified as a mere disagreement by a not personally affected bystander.

B. The Decision is wrong because it is based on an implicit improper and insufficient merits analysis.

The Complaint alleges that the standards seek to replace the religious beliefs of the children with a non-theistic religious worldview that is materialistic/ atheistic. The Decison concludes that the Complaint instead alleges that the worldview is not religious. If it is not religious the parents and children suffer no injury other than a psychological injury arising solely

from a disagreement. Since the Complaint actually alleges the opposite, the Decision reflects nothing more than an improper ruling on the merits of the Complaint. It is clear that the implicit merits analysis is not proper as the Decision acknowledges that it has not undertaken such an analysis in a note that also mischaracterizes the allegations of the complaint. App. A at 12 n. 6.

CONCLUSION

The Decision sends a false message to the education community that (a) the standards do not violate the Establishment Clause when that issue has not been legally or factually tested and (b) that in any event parents and children may not complain about them. If not corrected, one may reasonably expect our public K-12 schools will guide all students to replace their theistic beliefs with a non-theistic religious worldview that is materialistic/atheistic. A test of the Complaint is essential as soon as possible. Otherwise, the Decision will effectively deny the religious liberty of theistic residents and citizens througout the country.

Respectfully submitted.

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August 16, 2016

APPENDIX

APPENDIX

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-3280

[Filed April 19, 2016]

COPE, a/k/a Citizens for Objective Public Education, Inc.; CARL REIMER; MARY ANGELA REIMER; B.R., a Minor, by and through her parents Carl and Mary Angela Reimer as Next Friends; H.R., a Minor, by and through her parents Carl and Mary Angela Reimer as Next Friends; B.R., a Minor, by and through his parents Carl and Mary Angela Reimer as Next Friends; N.R., a Minor, by and through her parents Carl and Mary Angela Reimer as Next Friends; SANDRA NELSON; J.N., a Minor, by and through his parent Sandra Nelson as Next Friend; LEE MORSS; TONI MORSS; L.M., a Minor, by and through her parents Lee and Toni Morss as Next Friends; R.M., a Minor, by and through his parents Lee and Toni Morss as Next Friends; A.M., a Minor, by and through his parents Lee and Toni Morss as Next Friends; MARK REDDEN; ANGELA REDDEN; M.R., a Minor, by and through his parents Mark Redden and)

Angela Redden as Next Friends; BURKE PELTON; KELCEE PELTON; B.P., a Minor, by and through her parents Burke Pelton and Kelcee Pelton as Next Friends; L.P., a Minor, by and through her parents Burke Pelton and Kelcee Pelton as Next Friends; K.P., a Minor, by and through her parents Burke Pelton and Kelcee Pelton as Next Friends; MICHAEL LEIBY; BRE ANN LEIBY; E.L., a Minor, by and through his parents Michael Leiby and Bre Ann Leiby as Next Friends; P.L., a Minor, by and through his parents Michael Leiby and Bre Ann Leiby as Next Friends; Z.L., a Minor, by and through his parents Michael Leiby and Bre Ann Leiby as Next Friends; JASON PELTON; ROBIN PELTON; C.P., a Minor, by and through her parents Jason Pelton and Robin Pelton as Next Friends; S.P., a Minor, by and through his parents Jason Pelton and Robin Pelton as Next Friends; S.P., a Minor, by and through her parents Jason Pelton and Robin Pelton as Next Friends; C.P., a Minor, by and through her parents Jason Pelton and Robin Pelton as Next Friends; CARL WALSTON; MARISEL WALSTON; H.W., a Minor, by and through his parents Carl Walston and Marisel Walston as Next Friends; DAVID PRATHER; VICTORIA PRATHER,

Plaintiffs - Appellants,

v.

KANSAS STATE BOARD OF EDUCATION; JANET WAUGH, Member of the Kansas State Board of Education, in her official capacity only; STEVE ROBERTS, Member of the Kansas State Board of Education, in his official capacity only; JOHN W. BACON, Member of the Kansas State Board of Education, in his official capacity only; CAROLYN L. WIMS-CAMPBELL, Member of the Kansas State Board of Education, in her official capacity only; SALLY CAUBLE, Member of the Kansas State Board of Education, in her official capacity only; DEENA HORST, Member of the Kansas State Board of Education, in her official capacity only; KENNETH WILLARD, Member of the Kansas State Board of Education, in his official capacity only; KATHY BUSCH, Member of the Kansas State Board of Education, in her official capacity only; JANA SHAVER, Member of the Kansas State Board of Education, in her official capacity only; JIM MCNIECE, Member of the Kansas State Board of Education, in his official capacity only; KANSAS STATE DEPARTMENT OF EDUCATION; BRAD NEUENSWANDER, Acting Commissioner of the Kansas State Department of Education, in her official capacity only,

Defendants - Appellees.

_____

Appeal from the United States District Court for the District of Kansas (D.C. No. 5:13-CV-04119-DDC-JPO)

John H. Calvert, Calvert Law Firm, Kansas City, Missouri, (Michelle W. Burns, Kellie K. Warren, and Douglas J. Patterson, Property Law Firm, Leawood, Kansas; Kevin Trent Snider, Pacific Justice Institute, Sacramento, California, on the briefs), for Plaintiffs-Appellants.

Dwight Carswell, Office of the Attorney General for the State of Kansas, Topeka, Kansas, (Jeffrey A. Chanay, Cheryl L. Whelan, and Stephen Phillips, Office of the Attorney General for the State of Kansas, Topeka, Kansas; Richard Scott Gordon, Kansas State Department of Education, Topeka, Kansas, on the briefs), for Defendants-Appellees.

Before **LUCERO**, **MATHESON**, and **PHILLIPS**, Circuit Judges.

LUCERO, Circuit Judge.

In 2013, the Kansas Board of Education (the "Board") adopted curriculum standards establishing performance expectations for science instruction in kindergarten through twelfth grade. Appellants—Citizens for Objective Public Education, Kansas parents, and school children (collectively, "COPE")—contend that although the standards purport to further science education, their concealed aim is to teach students to answer questions about the cause and

nature of life with only non-religious explanations. COPE thus claims injury under the Establishment Clause because: (1) the Board's adoption of the Standards has communicated a religious symbol or message and breached plaintiff parents' trust; and (2) Kansas schools' implementation of the Standards is imminent and will result in anti-religious instruction. COPE also asserts two plaintiffs have standing as taxpayers who object to their tax dollars being used to implement the Standards. The district court disagreed, and dismissed the suit without prejudice for lack of standing.

We conclude all three theories of injury fail. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I

In 2011, the National Research Council[1] published the Framework for K-12 Science Education: Practices, Crosscutting Concepts, and Core Ideas (the "Framework"). The Framework was intended to "articulate a broad set of expectations for students in science" through twelfth grade. Based on the Framework, a group of 26 states developed and published the Next Generation Science Standards (the "NGSS") to "provide performance expectations that depict what . . . student[s] must do to show proficiency in science." In 2013, the Board adopted the Framework and NGSS (together, the "Standards") pursuant to a

[1] The National Research Council is the principal operating agency of the National Academy of Sciences—a non-governmental organization organized under Congressional charter in 1863 to advise the federal government on scientific and engineering issues.

Kansas state law requiring the Board to adopt curriculum standards. Kan. Stat. § 72-6479(b).[2]

As the Standards themselves state, they are "not intended to define course structure." Instead, Kansas law provides that they are guideposts for school districts, which retain control to shape and adopt their own curricula. Kan. Stat. § 72-6479(b) (curriculum standards "shall [not] be construed in any manner so as to impinge upon any district's authority to determine its own curriculum"). Thus, the Standards simply establish performance expectations for what students should "know and be able to do" at each grade level.[3] Kan. Admin. Regs. § 91-31-31(d). Accordingly, they acknowledge that they "do not prescribe specific curricula, [although] they do provide some criteria for designing curricula." And they expressly state that teachers may go "beyond the standards to ensure their students' needs are met" and that educators and curriculum developers maintain a "great deal of discretion."

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[2] The parties cite Kan. Stat. § 72-6439. Kansas repealed § 72-6439 effective July 1, 2015. 2015 Kansas Session Laws Ch. 4 § 81. But the legislature enacted a new statute that contains all of the provisions previously in § 72-6439. 2015 Kan. Sess. Laws Ch. 4 § 20; Kan. Stat. § 72-6479. For ease, we cite the new statute.

[3] For example, the "Biological Evolution" section of the Standards states that by the end of grade two students should know that "[s]ome kinds of plants and animals that once lived on Earth (e.g., dinosaurs) are no longer found anywhere"; "[l]iving things can only survive where their needs are met"; and "there are many different kinds of living things in any area, and they exist in different places on land and in water."

COPE is an organization formed to promote the religious rights of parents, students, and taxpayers. Its members include individuals whose children are, or expect to be, enrolled in Kansas public schools. COPE alleges that the Standards violate the Establishment Clause, U.S. Const. amend. I, by seeking to establish a non-religious worldview in the guise of science education.[4] It argues that such a worldview will be inculcated in children throughout their thirteen-year public school experience by requiring students, beginning in kindergarten, to answer questions about the cause and nature of life with only scientific, non-religious explanations. COPE contends that the Standards omit relevant evidence, and are driven by a covert attempt to guide children to reject religious beliefs. However, COPE appears not to object to the Standards' methods generally, having conceded that

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[4] COPE's complaint also alleges that the Standards violate the First Amendment's Free Exercise and Free Speech Clauses and the Fourteenth Amendment's Equal Protection Clause. COPE makes only passing references to these claims on appeal. In particular, COPE does not identify or apply the test for determining whether a cognizable injury exists for these claims. See Ward v. Utah, 321 F.3d 1263, 1267 (10th Cir. 2003) (test for speech claim); see also Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) (test for equal protection claim). Instead, COPE limits its arguments to demonstrating standing under the Establishment Clause. Accordingly, any challenge to the district court's dismissal of COPE's Free Exercise, Free Speech, and Fourteenth Amendment claims is waived, Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived."), and we exclusively consider whether COPE has suffered a cognizable injury under the Establishment Clause.

the methods "ha[ve] utility in many areas of science." Nor does COPE categorically object to teaching evolution or origins science. Rather, it proposes that all biological theories, including evolution, should be taught "objectively to generate a religiously neutral effect." COPE also objects to teaching origins science to young children before they are mature enough to critically analyze scientific theory. Thus, it seeks a declaration that the Standards violate the Establishment Clause. It further seeks an injunction against implementation of the Standards in their entirety or, in the alternative, an injunction against teaching origins science until high school, and then requiring that it be taught in a manner COPE believes is objective.

II

The district court held that it lacked subject matter jurisdiction over this suit because COPE lacks standing. We review the district court's determination regarding subject matter jurisdiction de novo. Niemi v. Lasshofer, 770 F.3d 1331, 1344 (10th Cir. 2014). "For purposes of standing, we must assume the Plaintiffs' claim has legal validity." Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1092-93 (10th Cir. 2006) (en banc). However, Plaintiffs must show an "injury in fact" that is: (1) "concrete, particularized, and actual or imminent"; (2) "fairly traceable to the challenged action"; and (3) "redressable by a favorable ruling." Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013).

In the Establishment Clause context, "standing is clearly conferred by [injury to] non-economic religious values" but litigants must "identify a personal injury

suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." Awad v. Ziriax, 670 F.3d 1111, 1122 (10th Cir. 2012). As the party invoking federal jurisdiction, COPE bears the burden of establishing these elements. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). And "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Id. at 561. At the pleading stage, we "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth v. Seldin, 422 U.S. 490, 501 (1975). "[G]eneral factual allegations of injury resulting from the defendant's conduct may suffice" to support the claim. Lujan, 504 U.S. at 561. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Thus, plaintiffs must adequately allege a plausible claim of injury. Walker, 450 F.3d at 1089.

COPE argues it suffered three injuries sufficient to support standing. It contends first that the adoption of the standards created an actual injury both by adopting a religious symbol and by breaching parents' trust in the Kansas school system. It also argues that future injury is imminent because the standards compel Kansas schools to teach objectionable material. Finally, it alleges that two appellants have standing as taxpayers who object to their tax dollars being used for

religious (or anti-religious) purposes. Each of COPE's arguments fails.

A

COPE alleges that the Board's act of adopting the Standards, without more, created concrete injury-in-fact. COPE argues the Standards are a symbol of a non-religious worldview, adoption of which violates the "right to be free from government that favors one religious view over another." To support this claimed injury, COPE relies on Awad, 670 F.3d 1111, and American Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010). However, COPE does not allege any facts that suggest injury under either case.

In Awad, we held that the adoption of a statute that singled out an individual religion for disfavored legal treatment is sufficient to cause injury to a member of that religion for standing purposes under the Establishment Clause. 670 F.3d at 1122. The relevant statute in Awad targeted the Muslim religion explicitly and interfered with the plaintiff's ability to practice his faith and access legal processes. Id. at 1120, 1122. We held that a statute that "expressly condemns" a particular religion and exposes its members to such disfavored treatment causes sufficient injury to support standing. Id. at 1123. But unlike the statute in Awad, the Standards do not condemn any or all religions and do not target religious believers for disfavored treatment. And COPE offers only threadbare assertions that the Standards intend to promote a non-religious worldview. Thus, COPE's allegations regarding adoption amount to psychological consequences produced by observation of conduct with which it disagrees. Awad, 670 F.3d at 1122. This injury does not

suffice. Id. Similarly, in American Atheists, Inc., we held plaintiffs had standing to challenge the placement of crosses along public roadsides as government-sponsored religious symbols with which they had personal and unwelcome contact. 637 F.3d at 1114-1115. But, again, unlike the plaintiffs in American Atheists, COPE does not offer any allegations to support the conclusion that the Standards are a government-sponsored religious symbol.

COPE also contends that the adoption breached its trust by violating both the parents' right to direct their children's religious education, and the children's right to public education without religious (and non-religious) indoctrination, contrary to Edwards v. Aguillard, 482 U.S. 578 (1962).[5] In Edwards, the Court held that it is the parents' right to direct the religious education of their children. 482 U.S. at 583-84. The Court noted that public schools must uphold the trust that the State will not use the classroom to "advance religious views that may conflict with the private beliefs of the student and his or her family," id., and that families "condition their trust [of public schools] on the understanding that the classroom will not purposely be used to advance religious views," id. at

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[5] Edwards and other cases COPE relies on do not discuss standing, and so do not stand for the proposition that a standing defect did not exist on the facts of those cases. Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."). Nevertheless, the analysis in these cases is instructive. Accord Awad, 670 F.3d at 1121 n.6 (finding previous merits decisions instructive in defining the contours of standing under the Establishment Clause).

584.[6] COPE argues that the Standards violate this trust by sending a message of religious endorsement to guide school districts; and by causing fear and anxiety that the students may have to opt-out of religiously biased classroom instruction. However, as noted supra, COPE does not offer any facts to support the conclusion that the Standards condemn any religion or send a message of endorsement. And any fear of biased instruction is premised on COPE's predictions of school districts' responses to the Standards—an attempt by COPE to recast a future injury as a present one. For reasons discussed infra, we reject this claim as well.

B

COPE also asserts injury because local school districts' potential implementation of the Standards will cause science to be taught in a manner that violates religious liberties. For this potential future injury to support standing, the injury must be "certainly impending." Clapper, 133 S. Ct. at 1147. But COPE acknowledges that the statute requiring the Board to adopt curriculum standards expressly preserves districts' authority to determine their own curricula. Kan. Stat. § 72-6479. And COPE concedes that it is possible that districts may not adopt the Standards, even if it perceives that possibility as

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[6] Although we do not reach the merits, we note that COPE asks the court to implement a requirement identical to the one imposed by the statute in Edwards. COPE frames the materialism of evolutionary theory as a religious belief competing with COPE's own teleological religion, and demands that if evolution is taught, teleological origins theories must also be taught. The Edwards Court expressly held such a requirement unconstitutional. 482 U.S. at 592.

remote.[7] Moreover, even if implementation were certainly impending, we find nothing to suggest that injury from implementation is also impending. COPE alleges injury because it believes the Standards do not reflect an objective or neutral view of evolution, and require schools to teach science to young children who cannot critically analyze scientific theories. These claimed injuries would result from what is allegedly not in the Standards—an objective view of origins science. But nothing prevents school districts from adding to or altering the Standards as they develop curricula.[8] And the Standards themselves encourage

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[7] COPE argues that implementing the Standards is effectively or practically required—and thus certainly impending—because: (1) Kansas law requires that districts meet or exceed minimum requirements, and the adopted Standards can be viewed as the baseline for these requirements; (2) the Standards are intended to, and do, guide local revisions to curricula; (3) the Board controls accreditation and financing for teacher training, and may use these tools to guide curriculum development; (4) the districts have implemented similar standards in the past; (5) some districts are in the process of implementing the Standards; and (6) the Standards are detailed and comprehensive, so even though districts may change them, it is easier for them to simply adopt the Standards as-is. However, COPE did not raise any of these arguments below, and they are waived. Wilburn v. Mid-S. Health Dev., Inc., 343 F.3d 1274, 1280 (10th Cir. 2003). Moreover, these factors do not eliminate the districts' discretion, and so do not demonstrate that implementation is beyond doubt or certainly impending. Clapper, 133 S. Ct. at 1147.

[8] COPE argues that districts will likely implement the Standards without change. It is difficult to grasp how districts would do so, given the Standards' statements that they are not curricula, and their plea that districts reach beyond the Standards to ensure students' needs are met. Nevertheless, COPE asserts that

districts to teach the limits of scientific knowledge. They state that students should "develop an understanding that . . . science and engineering . . . are human endeavors," and that some science- or engineering-related questions have "moral . . . underpinnings that vary across cultures," the answers to which are "not solved by scientific and engineering methods alone." Moreover, the Kansas NGSS Review Committee expressly recommends that districts "push beyond these standards" as they develop curricula. Because the Standards expressly recommend objective curricula, and the committee advises districts to add to the Standards, districts may choose to delve deeper into the limitations of the scientific method or to teach alternative origins theories.[9] In the face of this uncertainty, we cannot know whether COPE will find the curricula districts adopt adequately objective.[10]

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implementation-without-change is an option, and we have assumed that assertion is accurate for purposes of our analysis.

[9] Relatedly, COPE argues that it will be onerous or impossible for objecting parents to opt-out of the Standards, which will permeate all aspects of school curricula. But until school districts implement the Standards in an objectionable way, there is nothing to opt-out of.

[10] Regardless, COPE has not shown that these alleged future injuries are fairly traceable to the challenged action. Id. COPE acknowledges that evolution is the dominant origins theory in American culture, which suggests COPE would fear objectionable teaching of origins sciences even without the Standards' recommendations. This suggestion is supported by COPE's assertion below that the previous version of the Standards incorporated the same methods COPE finds objectionable in the new version. Thus, the alleged absence of objective curricula is not fairly traceable to the Standards.

In sum, because the districts may choose not to adopt the Standards, or may alter the Standards in ways that alleviate Appellants' concerns, potential future injury from the Standards themselves is speculative and insufficient to support standing.[11]

C

Finally, two appellants assert standing on the theory that they object to their tax dollars being spent to support the Standards. Appellants do not raise this argument in their opening brief, and so it is waived. Adler, 144 F.3d at 679.

III

The district court's dismissal for lack of standing is **AFFIRMED**.

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[11] COPE's alleged injuries are also not redressable by a favorable ruling. Id. COPE asks us to issue a declaratory judgment and to enjoin the Standards either entirely or as applied to elementary and middle school students, and to require objective teaching of origins science in high school. But none of these remedies would redress the alleged threat of a biased, subjective version of evolution. Again, schools may incorporate the Standards or other curricula regardless of whether the Board has officially adopted them. And even with a favorable ruling from this court, schools could teach evolution in a manner COPE finds objectionable. Implementation therefore turns on the decisions of third-parties that are not before us. Allen, 468 U.S. at 757. We will not "endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." Clapper, 133 S. Ct. at 1150.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 14-3280

[Filed May 20, 2016]

COPE, a/k/a Citizens for Objective Public Education, Inc., et al., Plaintiffs - Appellants,	)
v.	)
KANSAS STATE BOARD OF EDUCATION, et al., Defendants - Appellees.	)

ORDER

Before **LUCERO**, **MATHESON**, and **PHILLIPS**, Circuit Judges.

Appellants' petition for rehearing en banc is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 13-4119-DDC-JPO

[Filed December 2, 2014]

COPE (a.k.a. CITIZENS FOR OBJECTIVE PUBLIC EDUCATION, INC.), ET AL., Plaintiffs,	)
v.	)
KANSAS STATE BOARD OF EDUCATION, ET AL., Defendants.	)

MEMORANDUM AND ORDER

Plaintiffs bring this declaratory judgment action seeking to enjoin the Kansas State Department of Education and the Kansas State Board of Education from implementing new science standards for Kansas schools. Plaintiffs[1] consist of students, parents, Kansas

[1] Citizens for Objective Public Education, Inc. ("COPE"), Carl Reimer, Mary Angela Reimer, B.R., H.R., B.R., N.R., Sandra Nelson, J .N., Lee Morss, Toni Morss, L.M., R.M., A.M., Mark Redden, Angela Redden, M.R., Burke Pelton, Kelcee Pelton, B.P., L. P., K.P., Michael Leiby, Bre Ann Leiby, E. L., P. L., Z. L., Jason

resident taxpayers, and a nonprofit organization. They have sued the Kansas Commissioner of Education,[2] the Kansas State Department of Education, the Kansas State Board of Education, and its individual members.[3]

This matter is before the Court on defendants' Motion to Dismiss (Doc. 29) and plaintiffs' Motion for Leave to file a Surreply (Doc. 42). After considering the arguments of the parties, the Court grants defendants' Motion to Dismiss (Doc. 29) and denies plaintiffs' Motion for Leave to File a Surreply (Doc. 42).

I. Background

The following facts are taken from plaintiffs' Complaint (Doc. 1) and viewed in the light most favorable to them. *S.E.C. v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014) ("We accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the [plaintiffs]." (citation and internal quotation marks omitted)). On June 11, 2013, the Kansas State Board of Education adopted the Next Generation Science Standards ("the Standards")[4]

Pelton, Robin Pelton, C.P., S.P., S.P., C.P., Carl Walston, Marisel Walston, H.W., David Prather, and Victoria Prather.

[2] Diane DeBaker.

[3] Janet Waugh, Steve Roberts, John W. Bacon, Carolyn L. Wims–Campbell, Sally Cauble, Deena Horst, Kenneth Willard, Kathy Busch, Jana Shaver, and Jim McNiece.

[4] Plaintiffs incorporate the Standards into their Complaint by reference and state that the Standards are available at http://www.nextgenscience.org/. Pls.' Compl. (Doc. 1) at ¶ 1. Defendants have submitted the Standards as an exhibit to their

and the related *Framework for K-12 Science Education: Practices, Crosscutting Concepts and Core Ideas* ("the Framework").[5] Plaintiffs allege that the Kansas State Board of Education's adoption of the Framework and Standards will cause Kansas public schools to establish and endorse a non-theistic religious worldview in violation of the Establishment, Free Exercise, and Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

More specifically, plaintiffs allege that the Framework and Standards take impressionable children, beginning in kindergarten, into the religious sphere by leading them to ask ultimate religious questions such as "what is the cause and nature of life and the universe—'where do we come from?'" Pls.' Compl. (Doc. 1) at ¶ 2. Plaintiffs assert that the Standards fail to inform children objectively about the actual state of our scientific knowledge on these questions in an age appropriate and religiously neutral manner. Instead, plaintiffs claim the Standards use an "Orthodoxy," called methodological naturalism or scientific materialism, which requires that explanations of the cause and nature of natural phenomena only use natural, material, or mechanistic causes, and must assume that supernatural and

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Memorandum in Support of their Motion to Dismiss (Doc. 30, Ex. B) (hereinafter, "Standards").

[5] Plaintiffs incorporate the Framework into their Complaint by reference and state that the Framework is available at http://nap.edu/catalog.php?record_id=13165#. Pls.' Compl. (Doc. 1) at ¶ 1. Defendants have submitted the Framework as an exhibit to their Memorandum in Support of their Motion to Dismiss (Doc. 30, Ex. A) (hereinafter, "Framework").

teleological or intelligent design conceptions of nature are invalid. Plaintiffs contend that the Standards do not adequately disclose this "Orthodoxy" and use other deceptive methods to lead impressionable children to answer questions about the cause of life with only materialistic or atheistic answers. Plaintiffs characterize this "Orthodoxy" as "an atheistic faith-based doctrine." *Id.* (Doc. 1) at ¶ 9. Plaintiffs argue that the purpose of teaching this Orthodoxy is to indoctrinate children by establishing a non-theistic religious worldview rather than delivering an objective and religiously neutral origins science education.

Plaintiffs seek to enjoin the implementation of the Framework and Standards and ask the Court to enter a declaratory judgment finding that the Framework and Standards violate: (1) the Establishment Clause of the First Amendment; (2) the Free Exercise Clause of the First Amendment; (3) the Equal Protection Clause of the Fourteenth Amendment; and (4) the Speech Clause of the First Amendment. Plaintiffs also seek relief in the alternative, requesting an injunction prohibiting defendants from implementing the portions of the Framework and Standards that seek to teach about the origin, nature, and development of the cosmos and life on earth ("origins science") for children in kindergarten through grade 8 entirely and for grades 9 through 12 unless the origins science instruction also includes additional information such as: "an evidence-based teleological alternative competes with the materialistic explanations provided by the Orthodoxy, which is an inference to an intelligent rather than a material cause [of origins events]." Pls.' Compl. (Doc. 1) at p. 32 ("Prayer for Relief" ¶ c.2.g).

II. Plaintiffs' Motion for Leave to File a Surreply

As an initial matter, the Court must decide whether it may consider plaintiffs' proposed surreply (Doc. 43-1) as part of the briefing on defendants' motion to dismiss. Defendants filed their Motion to Dismiss (Doc. 29) and Memorandum in Support of that Motion (Doc. 30). In response, plaintiffs filed a Memorandum in Opposition to Defendants' Motion to Dismiss (Doc. 40), and defendants filed a Reply (Doc. 41). Afterwards, plaintiffs filed a Motion for Leave to File a Surreply under D. Kan. Rule 15.1(a) (Doc. 42). Defendants filed a Response in opposition to plaintiffs' request to file a surreply (Doc. 44), and plaintiffs filed a Reply (Doc. 46).

Under D. Kan. Rule 7.1(c), briefing on motions is limited to the motion (with memorandum in support), a response, and a reply. Surreplies typically are not allowed. *Taylor v. Sebelius*, 350 F. Supp. 2d 888, 900 (D. Kan. 2004), *aff'd on other grounds*, 189 Fed. App'x 752 (10th Cir. 2006). Rather, surreplies are permitted only with leave of court and under "rare circumstances." *Humphries v. Williams Natural Gas Co.*, No. 96–4196–SAC, 1998 WL 982903, at *1 (D. Kan. Sept. 23, 1998) (citations and internal quotation marks omitted). For example, when a moving party raises new material for the first time in a reply, the court should give the nonmoving party an opportunity to respond to that new material (which includes both new evidence and new legal arguments) in a surreply. *Green v. New Mexico*, 420 F.3d 1189, 1196 (10th Cir. 2005); *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1139 n.13 (10th Cir. 2003). The rules governing the filing of surreplies "are not only fair and reasonable, but they

assist the court in defining when briefed matters are finally submitted and in minimizing the battles over which side should have the last word." *Humphries*, 1998 WL 982903, at *1 (citation and internal quotation marks omitted).

Here, plaintiffs argue that they should be permitted to file a surreply to address: (1) defendants' citation to the minutes of a June 11, 2013 Kansas Board of Education meeting, a video streamed online of a June 11, 2012 Kansas Board of Education meeting, and a Report and Recommendation of the Next Generation Science Standards Review Committee ("Report and Recommendation") because plaintiffs claim they do not have access to these materials "due to a moratorium on discovery" and therefore they are unable to check them for accuracy and completeness; (2) "important errors" in defendants' arguments; and (3) a "new argument" that plaintiffs have changed their theory of injury from the theory asserted in the Complaint.

Defendants oppose plaintiffs' motion for leave to file a surreply, arguing that their citation to the minutes and video and their argument about plaintiffs changing their theory of injury are not "new" arguments but instead respond to arguments made by plaintiffs in their Memorandum in Opposition. Defendants also point out that plaintiffs devote only about 11 lines of their 23-page surreply to the minutes and video and only one sentence to defendants' argument that plaintiffs have changed their theory of injury.

The Court agrees that plaintiffs' proposed surreply does not respond to "new material." Rather, the majority of plaintiffs' proposed surreply addresses what plaintiffs claim are "important errors" in defendants'

arguments. But in so doing plaintiffs have rehashed arguments that they made or could have made in their Memorandum in Opposition, including their responses to defendants' arguments that plaintiffs have mischaracterized the Framework and Standards,[6] that plaintiffs' alternative prayer for relief would violate the Establishment Clause,[7] and that the Kansas opt out statute provides an opportunity for students to opt out of activities that offend their religious beliefs and therefore defeats a Free Exercise claim.[8] This is precisely why our Court typically does not allow surreplies. *See Hall v. Whitacre*, No. 06–1240–JTM, 2007 WL 1585960, at *1 (D. Kan. May 31, 2007) (finding "utterly no justification for the surreply" that "essentially provides additional and longer arguments, which also could have been submitted in the first response"); *see also E.E.O.C. v. Int'l Paper Co.*, No. 91–2017–L, 1992 WL 370850, at *10 (D. Kan. Oct. 28, 1992) (refusing to consider a surreply because the

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[6] Defendants made this argument in their Memorandum in Support of the Motion to Dismiss (Doc. 30 at 8–13). Plaintiffs could have responded to this argument in their Memorandum in Opposition. Plaintiffs instead respond to this argument in the proposed surreply (Doc. 43-1 at 4–12).

[7] Defendants made this argument in their Memorandum in Support of the Motion to Dismiss (Doc. 30 at 35). Plaintiffs could have responded to this argument in their Memorandum in Opposition. Plaintiffs instead respond to this argument in the proposed surreply (Doc. 43-1 at 15).

[8] Defendants made this argument in their Memorandum in Support of the Motion to Dismiss (Doc. 30 at 36). Plaintiffs admit in their surreply that they already responded to this argument in their Opposition (Doc. 43-1 at 18 (citing Doc. 40 at 6, 15, 39–40)).

parties' briefing "must have an end point and cannot be allowed to become self-perpetuating").

Defendants' reference to the minutes, video, and Report and Recommendation in their Reply is also not "new material." First, the minutes and video of Kansas State Board of Education meetings were cited in defendants' Reply to rebut plaintiffs' argument that the Kansas State Board of Education acted with the purpose of advancing or inhibiting religion when it adopted the Framework and Standards (Doc. 41 at 14). Thus, it is not "new material" but rather part of a response to an existing argument made by plaintiffs. Defendants also provided hyperlinks for the minutes and video directing the reader to internet websites where the minutes and video are located online. Thus, plaintiffs did have access to these materials. Second, defendants cited the Report and Recommendation in their Memorandum in Support of the Motion to Dismiss (Doc. 30 at 32–33) and provided a hyperlink in the Reply that directed the reader to the document on the internet. Plaintiffs argued in their Memorandum in Opposition, as they also do in the proposed surreply, that they have never seen this document "because of the moratorium on discovery" (Doc. 40 at 30). Defendants explained in their Reply that the Report and Recommendation is a public document and that they had provided an internet link to that document in their Memorandum in Support (Doc. 41 at 14). By the time defendants filed their Reply, the internet link they had cited previously was broken, and they provided a new internet address where the Report and Recommendation now is located online and explained that the Report and Recommendation is available on the Kansas Next Generation Science Standards

homepage and accessible through a Google search (Doc. 41 at 14 n.5). Plaintiffs therefore did have access to the Report and Recommendation.

In addition, defendants' argument about plaintiffs changing their theory of injury is not "new material." Plaintiffs argued in their Memorandum in Opposition that defendants misconceived the nature of the injury alleged in the Complaint and explained that plaintiffs' injury arises from a "message of endorsement" (Doc. 40 at 8). Defendants responded to that argument in their Reply by asserting that plaintiffs had changed their theory of injury in the Memorandum in Opposition from what was alleged in the Complaint (Doc. 41 at 7). This is not new argument but instead responds to an argument made by plaintiffs in their Memorandum in Opposition. Plaintiffs contend that they have not had an opportunity to oppose defendants' argument on this point (Doc. 43 at 3–4), but allowing plaintiffs to file a surreply in response to an argument that is not "new" contradicts our rules governing briefing on motions. *See* D. Kan. Rule 7.1(c) (limiting briefing on motions to the motion (with memorandum in support), a response, and a reply); *see also Humphries*, 1998 WL 982903, at *1 (the rules "assist the court in defining when briefed matters are finally submitted and in minimizing the battles over which side should have the last word." (citation and internal quotation marks omitted)).

For these reasons, the Court denies plaintiffs' Motion for Leave to File a Surreply. Although the Court will not consider plaintiffs' proposed surreply in the motion to dismiss analysis below, the Court nevertheless has reviewed plaintiffs' proposed surreply and has determined that its arguments do not alter the

outcome of defendants' motion. The Court would reach the same result on defendants' Motion to Dismiss regardless of its consideration of the arguments in plaintiffs' proposed surreply.

III. Motion to Dismiss Standard

Defendants move for dismissal of this lawsuit under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.[9] "Federal courts are courts of limited jurisdiction and, as such, must have a statutory basis to exercise jurisdiction." *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002) (citation omitted). Federal district courts have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States or where there is diversity of citizenship. 28 U.S.C. § 1331; 28 U.S.C. § 1332. "A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974) (citation omitted). Since federal courts are courts of limited jurisdiction, there is a presumption against jurisdiction, and the party invoking federal jurisdiction bears the burden to prove it exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Generally, a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1)

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[9] Defendants also move for dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Because the Court determines below that it lacks subject matter jurisdiction over plaintiffs' claims, it does not reach defendants' arguments for dismissal under Fed. R. Civ. P. 12(b)(6).

takes one of two forms: a facial attack or a factual attack. *Holt v. United States*, 46 F.3d 1000, 1002–03 (10th Cir. 1995). "First, a facial attack on the complaint's allegations [of] subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Id.* at 1002 (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)) (internal citations omitted).

"Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and [to conduct] a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.* at 1003 (internal citations omitted); *Los Alamos Study Group v. United States Dep't of Energy*, 692 F.3d 1057, 1063–64 (10th Cir. 2012). *See also Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324–25 (10th Cir. 2002) (holding that a court must convert a motion to dismiss to a motion for summary judgment under Fed. R. Civ. P. 56 only when the jurisdictional question intertwines with the merits of the case).

IV. Analysis

Defendants seek dismissal of plaintiffs' Complaint in its entirety for four reasons: (1) the Kansas State Board of Education and the Kansas State Department of Education are entitled to Eleventh Amendment

sovereign immunity; (2) plaintiffs lack Article III standing; (3) plaintiffs have failed to state a claim under the Establishment Clause of the First Amendment; and (4) plaintiffs have not stated a claim under either the Free Exercise or Free Speech Clauses of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. Because the Court grants defendants' motion for the first two reasons, it does not reach defendants' arguments that plaintiffs have failed to state a claim. The Court therefore addresses only defendants' sovereign immunity and standing arguments below.

A. Eleventh Amendment Sovereign Immunity

Defendants assert that the Eleventh Amendment bars plaintiffs' claims against the Kansas State Board of Education and the Kansas State Department of Education because they have sovereign immunity under the Eleventh Amendment. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Eleventh Amendment grants immunity that "accord[s] states the respect owed them as joint sovereigns," "applies to any action brought against a state in federal court, including suits initiated by a state's own citizens," and "applies regardless of whether a plaintiff seeks declaratory or injunctive relief, or money damages." *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1252 (10th Cir. 2007) (citations omitted). "The ultimate guarantee of the Eleventh Amendment is that

nonconsenting States may not be sued by private individuals in federal court." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). Eleventh Amendment immunity applies not only to states but also extends to state entities that are considered "arm[s] of the state." *Steadfast Ins. Co.*, 507 F.3d at 1253 (citing *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977)).

In response to defendants' sovereign immunity argument, plaintiffs do not contest that the Kansas State Board of Education and the Kansas State Department of Education, as state agencies, are immune from suit (Doc. 40 at 7). The Court thus concludes that the agencies, as state entities, are immune from suit under the Eleventh Amendment and dismisses the Kansas State Board of Education and the Kansas State Department of Education from this suit based on Eleventh Amendment sovereign immunity.

B. Standing

Defendants assert that each plaintiff in this lawsuit lacks standing, and therefore the Court must dismiss the case. Article III of the United States Constitution limits federal courts' jurisdiction to "cases" and "controversies." *Clapper v. Amnesty Int'l USA*, ___ U.S. ___, 133 S. Ct. 1138, 1146 (2013). To present a case or controversy under Article III, a plaintiff must establish that he has standing to sue. *Id.* (citations omitted); *see also Ariz. Christian Sch. Tuition Org. v. Winn*, ___ U.S. ___, 131 S. Ct. 1436, 1442 (2011) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Article III standing requires a plaintiff to establish (1) that he or she has "suffered an 'injury in fact'"; (2) that the injury is "'fairly . . . trace[able] to the challenged action of the defendant'";

and, (3) that it is "'likely'" that "the injury will be 'redressed by a favorable decision.'" *Ariz. Christian Sch. Tuition Org.*, ___ U.S. at ___, 131 S. Ct. at 1442 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)); *see also Awad v. Ziriax*, 670 F.3d 1111, 1120 (10th Cir. 2012). "At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007) (citation and internal quotation marks omitted).

First, defendants argue that all plaintiffs lack standing because they have failed to allege an injury that is sufficiently concrete and particularized, actual or imminent, and not conjectural or hypothetical; fairly traceable to the adoption by the Kansas State Board of Education ("the Board") of the Framework and Standards; or redressable by a favorable decision by this Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Second, defendants assert that plaintiffs David and Victoria Prather, who allege standing because they are Kansas taxpayers, lack standing for an additional reason—their claims fail to satisfy one of the exceptions to the general prohibition against taxpayer standing. The Court addresses defendants' standing arguments separately, below.

The Court first addresses whether plaintiffs have alleged an injury sufficient to support their claims (the first requirement of *Lujan*). Next, the Court discusses whether plaintiffs have satisfied the second and third requirements of *Lujan* by alleging causation and

redressability. Finally, the Court examines whether plaintiffs David and Victoria Prather have standing based on their status as Kansas taxpayers.

1. Injury Requirement

Plaintiffs bring four claims in this lawsuit. Each one of the four claims has different standing requirements. The first section below (part a) discusses whether plaintiffs have alleged an injury sufficient to support an Establishment Clause claim. The next section (part b) considers whether plaintiffs have alleged an injury sufficient to support their remaining claims.

a. Establishment Clause Injury

Defendants argue plaintiffs have alleged no injury caused by the Board's adoption of the Framework and Standards because they have no binding effect on local public schools. To put this argument in context, it is imperative to understand the role that the Board plays—and does not play—as a matter of Kansas law.

The Kansas Constitution limits the Board's authority over local public schools to "general supervision" and reserves the actual operation of local public schools to locally elected school boards: "Local public schools under the general supervision of the state board of education shall be maintained, developed and operated *by locally elected boards*." Kan. Const. art. 6, §§ 2, 5 (emphasis added). Kansas law requires the Board to establish "curriculum standards" for local public schools, but also prohibits the Board from "imping[ing] upon any district's authority to determine

its own curriculum." K.S.A. § 72-6439(b);[10] *see also State ex rel. Miller v. Bd. of Educ. of Unified Sch. Dist. No. 398*, 511 P.2d 705, 713 (Kan. 1973) (explaining that "supervision" by the Board "means something more than to advise but something less than to control"). Thus, defendants argue the Framework and Standards, as adopted by the Board, do not bind local public schools.

Plaintiffs have not alleged when or how Kansas schools will implement the Framework or Standards, and therefore, defendants argue plaintiffs' alleged injury is speculative. Plaintiffs respond, contending that their Establishment Clause injury arises from a "message of endorsement" signaled by the Board's adoption of the Framework and Standards because, by doing so, the Board endorsed "a non-theistic religious Worldview" (Doc. 40 at 8). In their Reply, defendants

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[10] In *Montoy v. State*, 120 P.3d 306 (Kan. 2005), the Kansas Supreme Court held that the Kansas School District Finance Quality Performance Act (SDFQPA), K.S.A. §§ 72-6405 *et seq.*, was unconstitutional because the school funding formula in that Act failed to satisfy the legislature's constitutional obligation to make suitable provision for finance of public schools. *Id.* at 308–10. (K.S.A. § 72-6439 is contained in the SDFQPA.) In 2006, the Kansas Legislature increased funding for K-12 education, and in response, the Kansas Supreme Court held that the newly legislated school finance formula complied with the court's previous orders. *Montoy v. State*, 138 P.3d 755, 763 (Kan. 2006), *cert. denied*, 549 U.S. 1078 (2006). Thus, while the Kansas Supreme Court previously held K.S.A. § 72-6439 unconstitutional because it was part of the deficient school funding formula, that statute is currently in compliance with the Kansas Constitution because of the subsequent legislation that increased school funding. Therefore, K.S.A. § 72-6439 is the current governing law in Kansas.

assert that plaintiffs' Complaint alleges an injury caused by the implementation of the Framework and Standards and, by arguing that their injury is caused by a "message of endorsement," plaintiffs have changed their theory of injury to one not alleged in the Complaint.

The Court disagrees that plaintiffs have changed their theory of injury. While the Court agrees with defendants that the Complaint alleges injury by the Framework and Standards' implementation, the Complaint also alleges that plaintiffs have sustained actual, threatened, and redressable injury by a "message of endorsement." Plaintiffs allege they sustained this injury by the "endorsement and promotion of an Orthodoxy that establishes and promotes non-theistic religious beliefs while seeking to suppress competing theistic religious views" because it "causes the [S]tate to promote religious beliefs that are inconsistent with the theistic religious beliefs of plaintiffs, thereby depriving them of the right to be free from government that favors one religious view over another" and " sends a message that they, being theists, are outsiders within the community and that non-theists and materialists are insiders within the community." Pls.' Compl. (Doc. 1) at ¶ 123. At the pleading stage, general factual allegations are sufficient to carry plaintiffs' burden of establishing the elements of standing because the Court must "'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *See Lujan*, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)); *see also Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.3d 1234, 1236 (10th Cir. 2013) (Hartz, J., dissenting)

(explaining "[t]he Supreme Court has not imposed special burdens at the pleading stage with respect to jurisdictional issues;" rather, the "sequence of pleading and proving jurisdiction is described in" *Lujan*, 504 U.S. at 561), *cert. granted*, ___ U.S. ___, 134 S. Ct. 1788 (2014); *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013). Thus, the Court considers whether plaintiffs' alleged injury, as they pleaded it in their Complaint, establishes an injury sufficient to confer standing.

i. Do plaintiffs allege an Establishment Clause injury sustained as a result of the Board's adoption of the Framework and Standards?

The Tenth Circuit has observed that though it often is "not difficult" to determine whether a plaintiff has alleged a sufficient injury in fact, "the concept of injury for standing purposes is particularly elusive in Establishment Clause cases." *Awad*, 670 F.3d at 1120 (citations and internal quotation marks omitted). In the context of Establishment Clause violations, the Tenth Circuit has held that "standing is clearly conferred by non-economic religious values." *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 31 (10th Cir. 1973), *superseded on other grounds by Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005). The Supreme Court requires, however, that plaintiffs alleging non-economic injury must be "'directly affected by the laws and practices against which their complaints are directed.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*,

454 U.S. 464, 487 n.22 (1982) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963)). This requires a plaintiff to allege an injury that is more concrete than the mere assertion that he has observed conduct violating the Constitution. *Id.* at 485 ("the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing" under Article III).

The plaintiffs in *Valley Forge* challenged the federal government's transfer of surplus property in Pennsylvania to a Christian college, claiming that it violated the Establishment Clause. The plaintiffs learned about the transfer from a news release. None of the plaintiffs lived in or near Pennsylvania, where the property was located, and none alleged that they would use the property. The Supreme Court held that plaintiffs could not confer standing on themselves simply by claiming a personal constitutional right to a government that does not establish religion. *Id.* at 483. Instead, the Supreme Court concluded that plaintiffs lacked standing because they "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. The Supreme Court also noted that it was "not retreat[ing] from [its] earlier holdings that standing may be predicated on noneconomic injury," but the *Valley Forge* plaintiffs simply had not "alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing." *Id.* at 486 (citations omitted).

After *Valley Forge*, the Tenth Circuit has recognized the Supreme Court "has not provided clear and explicit guidance on the difference between psychological consequence from disagreement with government conduct and noneconomic injury that is sufficient to confer standing." *Awad*, 670 F.3d at 1121. But in several cases involving challenges to government-sponsored religious symbols, the Tenth Circuit has concluded: "'[A]llegations of personal contact with a state-sponsored [religious] image suffice to demonstrate . . . direct injury' for standing purposes in Establishment Clause cases." *Id.* at 1122 (quoting *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1113 (10th Cir. 2010)); *see also O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005), *cert. denied*, 547 U.S. 1003 (2006); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490–91 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990). It is not necessary for a plaintiff to allege "a change in behavior" as a consequence of the offensive action. *Foremaster*, 882 F.2d at 1490.

Awad outlined several "key principles" that govern the standing analysis in the Establishment Clause context. In that case, a Muslim residing in Oklahoma brought an action alleging that a proposed amendment to the Oklahoma Constitution prohibiting courts from considering or using international or Sharia law violated the Establishment Clause. 670 F.3d at 1117–19. The Tenth Circuit noted:

> First, in the context of alleged violations of the Establishment Clause, . . . standing is clearly conferred by non-economic religious values. Second, it is not enough for litigants to claim a constitutional violation. They must also identify

> a personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. Finally, alleging only personal and unwelcome contact with government-sponsored religious symbols is sufficient to establish standing.

Id. at 1122 (citations and internal quotation marks omitted). Applying these standards, the Tenth Circuit held that the plaintiff in *Awad* had standing to assert his Establishment Clause claim because he suffered from "personal and unwelcome contact" with the proposed constitutional amendment that expressly condemned his religion and exposed him and other Muslims in Oklahoma to disfavored treatment. *Id.* at 1122–23. This injury, the court held, sufficed as an injury in fact that conferred standing. *Id.*

Unlike the plaintiff in *Awad*, plaintiffs here have not alleged "personal and unwelcome contact" with the Framework and Standards because the Board has only the power to "supervise" local public schools and is prohibited from impinging upon a local school district's authority to determine its own curriculum. *See* Kan. Const. art. 6, § 2; K.S.A. § 72-6439(b). While plaintiffs argue that the Board has "the duty and authority to adopt" the Framework and Standards and "to supervise local schools in implementing" them under Kansas law (Doc. 40 at 14), the Board's authority merely to adopt the Framework and Standards does not make them "binding" on local school districts as plaintiffs contend. This is especially true when Kansas law specifically prohibits the Board from "imping[ing]" upon a local

school district's authority to determine its own curriculum. K.S.A. § 72-6439(b).

Plaintiffs argue that the adoption of the Framework and Standards injures them directly because K.S.A. § 72-1127(a) requires every accredited school in the State of Kansas to "teach the subjects and areas of instruction adopted by the state board of education." K.S.A. § 72-1127(a). In making this argument, plaintiffs argue implicitly that the Framework and Standards are "subjects and areas of instruction" adopted by the Board that every accredited school in Kansas must teach, as required by K.S.A. § 72-1127(a). But defendants correctly put this argument in context by explaining the difference between: (a) "subjects and areas of instruction," that local schools must teach under K.S.A. § 72-1127(a); and (b) "curriculum standards," which the Board must establish under K.S.A. § 72-6439(b) as guidance for local schools in setting curriculum but cannot "impinge" on any local school district's authority to determine its own curriculum. *See also* K.A.R. 91-31-31(d) (defining "curriculum standards" as "statements, adopted by the state board, of what students should know and be able to do in specific content areas").

The Court agrees that the Framework and Standards are "curriculum standards" and not "subjects and areas of instruction" that accredited schools must teach under K.S.A. § 72-1127(a). *See* Framework at 2 ("The broad set of expectations for students articulated in the framework is intended to guide the development of new standards that in turn guide revisions to science-related curriculum, instruction, assessment, and professional development

for educators."); *see also* Standards at 5 ("The [Standards] are standards, or goals, that reflect what a student should know and be able to do—they do not dictate the manner or methods by which the standards are taught. The performance expectations are written in a way that expresses the concept and skills to be performed but still leaves curricular and instructional decisions to states, districts, school[s] and teachers."). As specifically stated in the Kansas statute, the Board has authority to establish curriculum standards but it must not "impinge upon any district's authority to determine its own curriculum." K.S.A. § 72-6439(b). Thus, the Board's adoption of the Framework and Standards does not require local school districts to implement them in their own curriculum.

In addition, Kansas law lists "required subjects" for accredited elementary schools as "reading, writing, arithmetic, geography, spelling, English grammar and composition, history of the United States and of the state of Kansas, civil government and the duties of citizenship, health and hygiene, together with such other subjects as the state board may determine." K.S.A. § 72-1101. The statute lists these "subjects" broadly and explains that the Board is responsible for selecting "subject matter within the several fields of instruction" and for organizing it "into courses of study and instruction" that is merely "for the *guidance* of teachers, principals and superintendents." *Id.* (emphasis added). The Framework and Standards are not broad "subjects" or "areas of instruction" that local schools must teach under the Kansas statute, but instead they include a "subject matter" within a field of instruction that the Board has adopted merely as guidance for local schools.

Consequently, plaintiffs do not allege that the Board requires local school districts to implement the Framework and Standards. Plaintiffs also do not allege that any local school districts actually have implemented the Framework and Standards in the local public schools attended by the plaintiff students. Rather, plaintiffs complain about the potential for future implementation of the Framework and Standards.[11] *See, e.g.*, Pls.' Compl. (Doc. 1) at ¶¶ 1 (the Board's adoption of the Framework and Standards "*will have* the effect of causing Kansas public schools to establish and endorse a non-theistic religious worldview") (emphasis added), 24 (alleging that the Framework and Standards impose a strategy that "*will cause* [the State] to endorse a particular religious viewpoint") (emphasis added), 25 ("implementation of the [Framework and Standards] *will infringe* on [plaintiffs'] rights under the First and Fourteenth Amendments") (emphasis added).

These allegations of potential, future injury do not establish an actual or imminent injury sufficient to confer standing. *See Clapper*, ___ U.S. at ___, 133 S. Ct. at 1147, 1150 (explaining "imminence" requires an "injury is *certainly* impending" and "allegations of possible future injury" are not sufficient and thus

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[11] Plaintiffs also complain that the Board adopted the Framework and Standards over their objections. Pls.' Compl. (Doc. 1) at ¶¶ 58–63. Plaintiffs' mere objection to the Framework and Standards without any direct, personal injury "suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees" does not suffice to confer standing under Supreme Court precedent. *Valley Forge*, 454 U.S. at 485.

holding that plaintiffs lacked Article III standing because they could not demonstrate that a future injury was certainly impending rather than merely speculative (citations and internal quotation marks omitted)). Consequently, plaintiffs have not alleged "personal and unwelcome contact" with the Framework and Standards sufficient to establish an injury in fact to confer standing under the Tenth Circuit's standard for Establishment Clause claims.

ii. Do plaintiffs allege an Establishment Clause injury based on a "government message" theory?

Plaintiffs also assert an alternative form of injury. They argue that the adoption of the Framework and Standards "sends a message that they, being theists, are outsiders within the community and that non-theists and materialists are insiders within the community." Pls.' Compl. (Doc. 1) at ¶ 123(b). In asserting this argument, plaintiffs cite several cases addressing the merits of Establishment Clause claims where plaintiffs challenged unwelcome government-sponsored religious messages. But in many of those cases, the courts did not address standing. *See, e.g.*, Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss (Doc. 40) at 11–12 (citing *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573 (1989); *Epperson v. Arkansas*, 393 U.S. 97 (1968)). The Supreme Court has cautioned against the use of federal decisions to support standing arguments when such decisions discuss only the merits of a claim but do not address, specifically, whether a plaintiff had standing

to bring the action: "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, ___ U.S. ___, 131 S. Ct. 1436, 1448 (2011). Still, the Tenth Circuit has found "the volume and content of Supreme Court merits decisions in Establishment Clause religious display and expression cases involving noneconomic injury . . . instructive." *Awad*, 670 F.3d at 1121 n.6.

The Court has reviewed plaintiffs' cases carefully and also examined other federal court decisions addressing standing in Establishment Clause-based challenges to government actions that purportedly endorsed a "message." The Court has not located a Tenth Circuit case deciding whether a "message" allegedly transmitted by a non-binding governmental policy—by itself—suffices to confer standing on a plaintiff to assert an Establishment Clause violation. Nor do the parties cite any controlling case law in the Tenth Circuit discussing whether a "message" of endorsement theory is sufficient to confer standing on a plaintiff asserting an Establishment Clause violation.

However, in *Awad*, the Circuit referenced a Ninth Circuit opinion holding that plaintiffs had standing to challenge a non-binding resolution adopted by the San Francisco Board of Supervisors. *Awad*, 670 F.3d at 1123 (citing *Catholic League for Religious and Civil Rights v. City and Cnty. of S.F.*, 624 F.3d 1043 (9th Cir. 2010) (en banc), *cert. denied*, ___ U.S. ___, 131 S. Ct. 2875 (2011)). The resolution at issue in *Catholic League* denounced the Catholic Church's position opposing homosexual adoptions calling it "hateful," "insulting,"

and "callous." 624 F.3d at 1047. The Board of Supervisors' resolution also urged the local archbishop and Catholic Charities to "defy" the Church's instructions to stop placing children in need of adoption with homosexual households. *Id.* Plaintiffs, who were Catholics and a Catholic advocacy organization, challenged the resolution as a violation of the Establishment Clause, arguing that it conveyed a "government message" of disapproval and hostility toward their religious beliefs. *Id.* at 1048.

In a 6-5 *en banc* decision, the Ninth Circuit's opinion in *Catholic League* held that plaintiffs had alleged an actual and concrete injury because they came in contact with a non-binding resolution that "convey[ed] a government message of disapproval and hostility toward their religious beliefs" that "sen[t] a clear message that they are outsiders, not full members of the political community . . . thereby chilling their access to the government" and "forcing them to curtail their political activities to lessen their contact with defendants." 624 F.3d at 1053 (internal quotation marks omitted). The Ninth Circuit distinguished *Catholic League* from the Supreme Court's decision in *Valley Forge*, explaining that though "[a] 'psychological consequence' does not suffice as concrete harm where it is produced merely by 'observation of conduct with which one disagrees' . . . it does constitute concrete harm where the 'psychological consequence' is produced by government condemnation of one's own religion or endorsement of another's in one's own community." *Id.* at 1052 (quoting *Valley Forge*, 454 U.S. at 485). The Ninth Circuit further explained:

> [I]n *Valley Forge*, the psychological consequence was merely disagreement with the government, but in the [cases involving government-sponsored religious symbols], for which the Court identified a sufficiently concrete injury, the psychological consequence was exclusion or denigration on a religious basis within the political community.

Id. The court found that plaintiffs had alleged they were "directly stigmatized" by the resolution, making them feel "like second-class citizens" of the political community and expressing to the citizenry that they are, because the resolution disparaged their religious beliefs by calling them "'hateful and discriminatory,' 'insulting and callous,' and 'insensitiv[e] and ignoran[t].'" *Id.* at 1052–53.

As noted above, the Tenth Circuit referred to this Ninth Circuit opinion in *Awad*. In that case, the Tenth Circuit explained that *Catholic League* was "consistent with" the standing holding in *Awad*, although the court did not rely on *Catholic League* for its analysis. *Awad*, 670 F.3d at 1123. Instead, the Circuit specifically noted that though the non-binding city resolution in *Catholic League* conveyed "'a government message,'" the proposed constitutional amendment in *Awad* did more: it conveyed "more than a message; it would impose a constitutional command" prohibiting the consideration of Sharia law in state courts. *Awad*, 670 F.3d at 1123 (quoting *Catholic League*, 624 F.3d at 1048). Thus, in *Awad*, the Tenth Circuit did not rely on the Ninth Circuit's reasoning that a "government message" conveyed by a non-binding resolution is sufficient, by itself, to allege an injury to establish standing.

The Court concludes that the Tenth Circuit would not reach the same conclusion on standing as the Ninth Circuit reached in *Catholic League* on the facts alleged by plaintiffs here. Even if the Tenth Circuit were to apply the reasoning of *Catholic League* to the facts presented in this case, the Court predicts that it would conclude plaintiffs' allegations are more like those made in *Valley Forge* than the allegations at issue in *Catholic League*. Unlike the plaintiffs in *Catholic League*, plaintiffs here have not alleged that the Board's adoption of the Framework and Standards denounces, condemns, or disapproves their religion. Rather, plaintiffs complain that the non-binding Framework and Standards endorse a "non-theistic religious worldview" and exclude the teaching of the "teleological hypothesis." *See* Pls.' Compl. (Doc. 1) at ¶¶ 1, 71–73, 82. As a consequence, plaintiffs argue that this exclusion of teleological teachings in non-binding curriculum standards discriminates against those who "embrace theistic worldviews." *Id.* at ¶ 21. The Court concludes these allegations are more like those made in *Valley Forge*, where the Supreme Court held that plaintiffs had suffered no injury in fact as a consequence of the challenged action (the government's sale of property to a religious college). Instead, the *Valley Forge* plaintiffs merely complained about conduct they disagreed with, and plaintiffs here do the same thing.

In addition, plaintiffs' claim the adoption of the Framework and Standards sends a message that they are "outsiders" within the community. This message, even if true, is not sufficient to confer standing because plaintiffs allege only an "abstract stigmatic injury" rather than a direct and concrete injury. *Newdow v.*

Lefevre, 598 F.3d 638, 643 (9th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 1612 (2011) (citing *Allen v. Wright*, 468 U.S. 737, 755–56 (1984)); *see also Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 606 (4th Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 623 (2012) (plaintiffs had no standing to bring an Establishment Clause claim challenging a public school district's policy allowing students to obtain academic credit for off-campus religious instruction offered by private educators because, although plaintiffs alleged that the policy made the student feel like an "outsider," they had "no personal exposure" to the policy "apart from their abstract knowledge" of it); *Awad*, 670 F.3d at 1122 (plaintiffs alleging an Establishment Clause violation must identify a "'personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.'" (quoting *Valley Forge*, 454 U.S. at 485)).

Here, plaintiffs' disagreement with the Board's adoption of the Framework and Standards alleges only an abstract stigmatic injury. As explained above, plaintiffs have not alleged that defendants have authority to implement the Framework and Standards within the curriculum of any local public school or that any local school districts actually have implemented them. Consequently, plaintiffs' alleged injury is just speculative and so they have failed to allege that they have suffered a direct or concrete injury. Instead, plaintiffs' only alleged injury is their abstract knowledge of the Board's adoption of the Framework and Standards. Therefore, plaintiffs' allegation that the Framework and Standards sends a message that they

are "outsiders" within the community does not establish standing because this allegation, alone, is insufficient to confer standing without an injury in fact. While plaintiffs may have experienced "deep and genuine offense to a defendant's actions," their disagreement with the Board's actions is not sufficient to confer standing absent a direct and concrete injury. *Catholic League*, 624 F.3d at 1062 (Graber, J., dissenting).

While this Court has not located any controlling Tenth Circuit precedent on this question, at least two other circuits have come to similar conclusions when presented with a "government message" theory of standing. In *Freedom From Religion Foundation, Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011), the Seventh Circuit addressed an Establishment Clause challenge to a federal statute requiring the President to issue a proclamation designating a National Day of Prayer. *Id.* at 805. Plaintiffs alleged injury because "they feel excluded, or made unwelcome, when the President asks them to engage in a religious observance that is contrary to their own principles." *Id.* at 806–07. The district court determined that plaintiffs had standing to sue because they had been injured by a "message" from the government that it favors Americans who pray and disfavors plaintiffs' views on religion. *Id.* at 805; *Freedom From Religion Found., Inc. v. Obama*, 691 F. Supp. 2d 890, 894–95, 902–906 (W.D. Wisc. 2010), *vacated and remanded by* 641 F.3d 803 (7th Cir. 2011). But the Seventh Circuit reversed, concluding that plaintiffs lacked standing because their only injury was "hurt feelings" which "differ from legal injury" and "'value interests of concerned bystanders' do not support standing to sue." 641 F.3d at 807

(quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). As the Seventh Circuit summarized, the only injury to plaintiffs was "disagreement with the President's action" and "a feeling of alienation cannot suffice as injury in fact." *Id.* at 808.

In *In re Navy Chaplaincy*, 534 F.3d 756 (D.D.C. 2008), *cert. denied*, 556 U.S. 1167 (2009), the District of Columbia Circuit considered a challenge brought by a group of Protestant Navy chaplains alleging that the Navy discriminates in favor of Catholic chaplains in certain aspects of its retirement system. *Id.* at 759. Plaintiffs asserted several standing arguments including that they had been "subjected to the Navy's 'message' of religious preference as a result of the Navy's running a retirement system that favors Catholic chaplains." *Id.* at 760. The court rejected plaintiffs' standing argument, concluding it impermissibly expanded standing limitations and would have allowed "every government *action* that allegedly violates the Establishment Clause [to] be re-characterized as a governmental *message* promoting religion." *Id.* at 764. The court of appeals distinguished *Navy Chaplaincy* from religious symbol cases where the government actively and directly had communicated a religious message that plaintiffs observed, read, or heard. *Id.* In contrast, the Navy had not communicated a religious message through words or symbols. *Id.* Rather, the plaintiffs only had alleged disagreement with the government's conduct which, under *Valley Forge*, does not confer standing to sue. *Id.* Thus, the court concluded: "When plaintiffs are not themselves affected by a government action except through their abstract offense at the *message* allegedly conveyed by that action, they have not shown injury-in-

fact to bring an Establishment Clause claim, at least outside the distinct context of the religious display and prayer cases." *Id.* at 764–65.

The Court concludes that our Circuit, when confronted with plaintiffs' standing argument in this case, would follow the reasoning used by the Seventh and District of Columbia Circuits and hold that plaintiffs lack standing to sue where the only injury alleged is based on a "message" of government endorsement of religion. As those circuits explained, allegations of injury based on a "message" did not confer standing absent a concrete injury. Likewise, in this case, plaintiffs have not established a concrete injury because they do not allege that local schools districts have implemented the Framework and Standards but rather describe implementation as only a potential or future event. Plaintiffs' only alleged injury is disagreement with the Board's adoption of the Framework and Standards. But mere disagreement with government action is not an injury sufficient to confer standing under Article III. *Valley Forge*, 454 U.S. at 485 (no standing derived from "the psychological consequence presumably produced by observation of conduct with which one disagrees."). Thus, without a personal and concrete injury plaintiffs lack standing to sue based on only an alleged injury arising from a "message of endorsement" and therefore, the Court holds plaintiffs have failed to show they have standing to assert their Establishment Clause claim.

b. Free Speech, Free Exercise, and Equal Protection Injury

Although plaintiffs' briefing does not distinguish between their Establishment Clause injury and their

Free Speech, Free Exercise, and Equal Protection injury, the Court nevertheless considers whether plaintiffs have alleged an injury sufficient to establish standing for plaintiffs' other three claims. As explained below, the Court concludes that plaintiffs have failed to identify an injury sufficient to confer standing to assert any of their three remaining theories.

A plaintiff must allege an injury to establish standing to assert each of its claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). First, to establish an injury sufficient to confer standing for a free speech claim, plaintiffs must demonstrate that the challenged government action has or will have a "chilling effect" on the exercise of their free speech rights and that this "chilling effect" arises from an objectively justified fear of real consequences. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1182 (10th Cir. 2010); *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003). Although plaintiffs do not specifically allege that the Board's adoption of the Framework and Standards has had or will have a "chilling effect" on their free speech rights, plaintiffs do allege that it "discourages [the students from asking] questions that imply any criticism of the Orthodoxy" and "interferes with [the parents'] right to direct the religious education of their children." Pls.' Compl. (Doc. 1) at ¶¶ 124(e), 125(a). Thus, only the plaintiff students and parents have alleged any free speech injury. For the reasons explained below, however, the Court concludes even these allegations fail to establish an actual or imminent injury sufficient to confer standing to assert a free speech claim.

Second, to establish an injury sufficient to assert a free exercise claim, plaintiffs "must show that the challenged government action infringes on their 'particular religious freedoms.'" *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1186 (10th Cir. 2013) (Matheson, J., concurring in part and dissenting in part), *aff'd*, ___ U.S. ___, 134 S. Ct. 2751 (2014) (quoting *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 224 n.9 (1963)). Plaintiffs allege the Board's adoption of the Framework and Standards "interferes with the free exercise of [the students'] religion by imbuing them with a religious belief that is inconsistent with their existing religious beliefs" and "interferes with [the parents'] right to freely exercise their theistic religion by causing their children to embrace a materialistic/atheistic Worldview that is inconsistent with that religion." Pls.' Compl. (Doc. 1) at ¶¶ 124(d), 125 (c). Once again, only the plaintiff students and parents have alleged a free exercise injury in their Complaint but again, as shown below, these allegations do not suffice to demonstrate an actual or imminent injury.

Finally, to establish an injury sufficient to allege standing for an equal protection claim, a plaintiff must show that the challenged government action denies plaintiff equal treatment. *Am. Civil Liberties Union of N.M. v. Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008) (citing *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993)). All plaintiffs allege that they have been injured by the Board's adoption of the Framework and Standards because this adoption "denies them the right to be treated equally with non-theists." Pls.' Compl. (Doc. 1) at ¶ 123(c).

Although plaintiffs have alleged interference with their free speech and free exercise rights and a denial of equal treatment, these alleged injuries are not actual or imminent injuries sufficient to establish standing because plaintiffs have not alleged either that: (a) the Board has mandated implementation of the Framework and Standards in local school districts; or (b) any local school district actually has implemented the Framework and Standards. Thus, plaintiffs have suffered no injury. Plaintiffs claim only the threat of potential and future injury when the Framework and Standards are implemented by local school districts. *See, e.g.*, Pls.' Compl. (Doc. 1) at ¶ 25 ("implementation of the [Framework and Standards] *will infringe* on [plaintiffs'] rights under the First and Fourteenth Amendments") (emphasis added). But, as already discussed, the Board only can "supervise" local school districts under Kansas law and it is prohibited from controlling any local school district's curriculum. Thus, plaintiffs' allegations that local school districts will implement the Framework and Standards consist purely of their conjecture and it does not establish an actual or imminent injury sufficient to confer standing. *See Clapper v. Amnesty Int'l USA*, ___ U.S. ___, 133 S. Ct. 1138, 1147 (2013) (explaining that an alleged injury must be "certainly impending" and not "too speculative for Article III purposes"). Therefore, while plaintiffs may disagree with the Board's decision to adopt the Framework and Standards, they have not alleged an actual or imminent injury that could establish standing to sue for their Free Speech, Free Exercise, and Equal Protection claims. Consequently, plaintiffs lack standing to assert these three claims.

2. Causation and Redressability

The Court also concludes that plaintiffs lack standing to assert any of their four claims[12] because they cannot establish the second and third requirements for standing under *Lujan*—causation and redressability. *Lujan*, 504 U.S. at 560–61. Plaintiffs allege the Board's adoption of the Framework and Standards has injured them. As described above, however, the Board only has supervisory authority over local school districts and cannot impinge on local school districts or require them to implement the Framework and Standards as part of their curriculum. Where, as here, plaintiffs' asserted injury arises from the government's regulation of someone else, "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Lujan*, 504 U.S. at 562. Consequently, "[t]he existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Id.* (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)). Thus, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* (citation omitted).

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[12] This includes plaintiffs' Establishment Clause, Free Speech, Free Exercise, and Equal Protection claims.

Recently, the Supreme Court affirmed its "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l USA*, ___ U.S. ___, 133 S. Ct. 1138, 1150 (2013). In *Clapper*, plaintiffs challenged a federal statute authorizing government surveillance of individuals who are not "United States persons" and are reasonably believed to be located outside the United States. But before it could commence surveillance, the government was required to obtain approval from the Foreign Intelligence Surveillance Court. *Id.* at 1142. The Supreme Court found that plaintiffs only could speculate whether the court would authorize such surveillance and, therefore, plaintiffs could not establish that the requisite injury was certainly impending or fairly traceable to the federal statute. *Id.* at 1150.

Likewise, in this case, plaintiffs only can speculate whether local school districts will implement the Framework and Standards in their schools' curriculum. Plaintiffs allege only that the Framework and Standards will cause injury when implemented by local school districts, but plaintiffs have not alleged when or how or even if that will occur.

In addition, plaintiffs do not allege that the Board's adoption of the Framework and Standards mandates or requires local school districts to implement them. Nor could they make such a claim, for Kansas law only allows the Board to supervise and it prohibits the Board from impinging on a local school district's authority to determine its own curriculum. Thus, the Board's adoption of the Framework and Standards is a permissive action providing guidance to local school

districts, but it does not mandate any action by local schools. The Northern District of Oklahoma recently determined that plaintiffs lacked standing to challenge a permissive federal law that, like the Board's adoption of the Framework and Standards here, did not mandate any action by states or remove any discretion from states. *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1266 (N.D. Okla. 2014), *aff'd on other grounds*, 760 F.3d 1070 (10th Cir. 2014).

In *Bishop*, plaintiffs, a lesbian couple, lacked standing to challenge section 2 of the Defense of Marriage Act (DOMA) which provides that no state "shall be required to give effect to" a marriage license of any other state if the marriage was between persons of the same sex because it was an entirely permissive federal law that "does not mandate that states take any particular action, does not remove any discretion from states, does not confer benefits upon non-recognizing states, and does not punish recognizing states." *Id.* at 1266. Thus, because the federal law did not "remove any local, independent discretion" to enforce the law, the Oklahoma district court held that the statute was not a fairly traceable cause of the same sex couple's injuries which included not having their California marriage recognized in Oklahoma, the denial of equal treatment of their marriage, and stigma and humiliation. *Id.* at 1266, 1267, 1268.

Similarly, here, plaintiffs challenge the Board's adoption of the Framework and Standards which they allege local school districts will implement in the future. But the Framework and Standards do not require local school districts to implement them. Rather, local school districts retain their local and

independent authority to determine their own curriculum under K.S.A. § 72-6439(b). *See also State ex rel. Miller v. Bd. of Educ. of Unified Sch. Dist. No. 398*, 511 P.2d 705, 713 (Kan. 1973) (explaining that the Board's "supervision" of local school districts "means something more than to advise but something less than to control"). Thus, like the plaintiffs in *Bishop*, plaintiffs here lack standing to challenge the adoption of a permissive set of standards which do not eradicate any of the independent discretion Kansas school districts possess to control their curriculum. Consequently, plaintiffs have alleged no injury fairly traceable to the Board's adoption of the non-binding Framework and Standards. In addition, the Court cannot redress plaintiffs' claims because, even if the Court grants plaintiffs' requested relief and prohibits the Board from implementing the Framework and Standards, the Board lacks authority under Kansas law to control the curriculum of local school districts. Thus, a favorable decision from the Court would not redress the harm theorized by plaintiffs' claims.

The Supreme Court requires plaintiffs to allege facts "showing [that unfettered choices made by independent actors not before the courts] have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. Plaintiffs here have not done so. Thus, plaintiffs have not alleged an injury that is fairly traceable to the Board's decision to adopt the Framework and Standards or redressable by a favorable decision from this Court. *Id.* at 560–61. Plaintiffs thus lack standing to bring the suit they have filed.

3. Taxpayer Standing

Finally, plaintiffs David and Victoria Prather allege standing based on their status as Kansas taxpayers "who pay state and local income and property taxes which are used in part to fund public schools in Kansas." Pls.' Compl. (Doc. 1) at ¶ 43. Defendants argue[13] the Prathers cannot establish standing based merely on their status as taxpayers and that their allegations do not satisfy the narrow exception to the general rule prohibiting taxpayer standing for certain Establishment Clause claims. The Court agrees. The Prathers' taxpayer status does not confer standing on them to assert the claims alleged here.

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[13] Defendants argue that the Prathers assert only Establishment Clause claims. *See* Pls.' Compl. (Doc. 1) at ¶ 43 ("Plaintiffs [the Prathers] . . . who pay state and local income and property taxes which are used in part to fund public schools in Kansas, and who object to the use of such funds by the State of Kansas for the establishment and promotion of a non-theistic religious worldview through its implementation of the F&S.") Plaintiffs never contest this assertion. Nevertheless, the Court concludes that the Prathers do not have standing to assert any of the claims in this lawsuit.

The Tenth Circuit has determined that "where an Establishment Clause violation is not asserted, a state taxpayer must allege that appropriated funds were spent for an allegedly unlawful purpose and that the illegal appropriations and expenditures are tied to a direct and palpable injury threatened or suffered." *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1401 (10th Cir. 1992), *cert. denied*, 507 U.S. 949 (1993). As described above, plaintiffs have alleged no direct and palpable injury threatened or suffered sufficient to establish taxpayer standing. Rather, plaintiffs' alleged injury (the use of income and property taxes to fund the implementation of the Framework and Standards) is speculative and fails to allege a sufficient injury to confer standing.

The Supreme Court refuses to recognize standing based on a plaintiff's status merely as a taxpayer, absent special circumstances. *Ariz. Christian Sch. Tuition Org. v. Winn*, ___ U.S. ___, 131 S. Ct. 1436, 1442 (2011). The Supreme Court "has rejected the general proposition that an individual who has paid taxes has a 'continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution.'" *Id.* at 1442–43 (quoting *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 599 (2007)). This is known as the "rule against taxpayer standing." *Id.* at 1443; *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (holding the rule against taxpayer standing applies both to federal taxpayers and state taxpayers "challeng[ing] state tax or spending decisions simply by virtue of their status as [state] taxpayers").

There is, however, a "narrow exception" to the general prohibition against taxpayer standing. *Bowen v. Kendrick*, 487 U.S. 589, 618 (1998) (citing *Flast v. Cohen*, 392 U.S. 83 (1968)). In *Flast v. Cohen*, the Supreme Court held that a plaintiff may establish standing under the narrow taxpayer exception by alleging: (1) a "logical link" between the plaintiff's taxpayer status "and the type of legislative enactment attacked" as well as (2) "a nexus" between the plaintiff's taxpayer status and "the precise nature of the constitutional infringement alleged." *Flast*, 392 U.S. at 102. A plaintiff must satisfy both prongs of this test to demonstrate that he has "a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction." *Id.* at 103. Here, plaintiffs have failed to allege facts establishing either prong of the *Flast* test.

First, plaintiffs have not alleged a "logical link" between their taxpayer status and the Board's adoption of the Framework and Standards. *Id.* at 102. The Board's action was not a "legislative enactment" within the state government's power to tax and spend. Rather, as previously described, the Board's adoption of the Framework and Standards was part of its "supervisory" function over local public schools. Plaintiffs do not allege that the Board's action mandates or requires local school districts to implement the Framework and Standards, and, under Kansas law, local school districts retain control to determine their own curriculum. Therefore, plaintiffs' claims that "significant funding will be necessary for implementation" of the Framework and Standards (Doc. 40 at 28) is speculative at best and does not establish a "logical link" between plaintiffs' taxpayer status and the challenged government action.

The Supreme Court rejected a similar attempt to assert standing in the *Valley Forge* case. This case challenged a Cabinet Secretary's decision to transfer government property to a Christian college. The Supreme Court held that plaintiffs did not meet the first requirement of *Flast* of establishing a "logical link" between the plaintiffs' taxpayer status and the challenged legislative enactment because "the source of [plaintiffs'] complaint is not a congressional action, but a decision by [the Secretary] to transfer a parcel of federal property." 454 U.S. at 479. Likewise, here, the source of plaintiffs' complaint is the Board's adoption of the Framework and Standards. The Board's adoption was not legislative action but, instead, part of its function supervising and providing guidance to local

school districts in a non-binding and non-controlling capacity.

Second, plaintiffs have alleged no "nexus" between their taxpayer status and "the precise nature of the constitutional infringement alleged." *Flast*, 392 U.S. at 102. Again, plaintiffs' allegation that the Board's adoption of the Framework and Standards will require significant funding from Kansas taxpayers is speculative when plaintiffs do not allege that any local school district has implemented the Framework and Standards or that they will do so in the future. Thus, plaintiffs' complaints about taxpayer funding are too "minute and indeterminable . . . remote, fluctuating and uncertain" to provide a basis for standing. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). Therefore, the Prathers, as taxpayers, have failed to allege the requisite standing interest necessary to maintain this action.

The Supreme Court has explained that *Flast* "reaffirmed that the 'case or controversy' aspect of standing is unsatisfied 'where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in [government].'" *Valley Forge*, 454 U.S. at 479 (quoting *Flast*, 392 U.S. at 106). Here, the Prathers disagree with the Board's decision to adopt the Framework and Standards. But they cannot bring a lawsuit based on these grievances merely because they are Kansas taxpayers. Thus, the Court determines that the Prathers, as Kansas taxpayers, lack standing to sue.

V. Conclusion

Defendants seek dismissal of plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Because the Court determines that it lacks subject matter jurisdiction, it does not reach defendants' arguments seeking dismissal for failure to state a claim. *See Staggs v. U.S. ex rel. Dep't of Health & Human Servs.*, 425 F.3d 881, 884 n.2 (10th Cir. 2005) (declining to reach the merits of claim as an alternative basis for affirmance where the court affirmed the district court's decision that it lacked subject matter jurisdiction over claim (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 101–02 (1998) (rejecting the doctrine of hypothetical jurisdiction))).

The Court grants defendants' motion to dismiss the Kansas State Board of Education and the Kansas State Department of Education based on Eleventh Amendment sovereign immunity. The Court also grants defendants' motion to dismiss because plaintiffs lack standing to prosecute this action. In sum, the Court dismisses this case in its entirety without prejudice.[14]

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' Motion to Dismiss (Doc. 29) is granted.

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[14] When dismissing a case based on sovereign immunity or the absence of standing, the Court must dismiss the case without prejudice. *See Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1, Logan Cnty., Okla. v. Guthrie*, 654 F.3d 1058, 1069 n.9 (10th Cir. 2011) ("[A] dismissal on sovereign immunity grounds or for lack of standing must be without prejudice." (citations omitted)).

IT IS FURTHER ORDERED THAT plaintiffs' Motion for Leave to File Surreply (Doc. 42) is denied.

IT IS SO ORDERED.

Dated this 2nd day of December, 2014, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 13-4119-KHV-JPO

[Filed September 26, 2013]

COPE (a/k/a CITIZENS FOR OBJECTIVE)
PUBLIC EDUCATION, INC.; and CARL REIMER;)
and MARY ANGELA REIMER; and BR, a Minor,)
BY AND THROUGH HER PARENTS CARL AND)
MARY ANGELA REIMER AS NEXT FRIENDS;)
and HR, a Minor, BY AND THROUGH HER)
PARENTS CARL AND MARY ANGELA REIMER)
AS NEXT FRIENDS; and BR, a Minor, BY AND)
THROUGH HIS PARENTS CARL AND MARY)
ANGELA REIMER AS NEXT FRIENDS; and NR, a)
Minor, BY AND THROUGH HIS PARENTS CARL)
AND MARY ANGELA REIMER AS NEXT)
FRIENDS; and SANDRA NELSON; and JN,)
a Minor, BY AND THROUGH HIS PARENT)
SANDRA NELSON AS NEXT FRIEND; and LEE)
MORSS; and TONI MORSS; and LM, a Minor, BY)
AND THROUGH HER PARENTS LEE AND TONI)
MORSS AS NEXT FRIENDS; and RM, a Minor, BY)
AND THROUGH HIS PARENTS LEE AND TONI)
MORSS AS NEXT FRIENDS; and AM, a Minor, BY)
AND THROUGH HIS PARENTS LEE AND TONI)
MORSS AS NEXT FRIENDS; and MARK REDDEN;)
and ANGELA REDDEN; and MR, a Minor,)
BY AND THROUGH HIS PARENTS MARK)
REDDEN AND ANGELA REDDEN AS NEXT)

FRIENDS; and BURKE PELTON; and KELCEE PELTON; and BP, a Minor, BY AND THROUGH HER PARENTS BURKE PELTON AND KELCEE PELTON AS NEXT FRIENDS; and LP, a Minor, BY AND THROUGH HER PARENTS BURKE PELTON AND KELCEE PELTON AS NEXT FRIENDS; and KP, a Minor, BY AND THROUGH HER PARENTS BURKE PELTON AND KELCEE PELTON AS NEXT FRIENDS; and MICHAEL LEIBY; and BRE ANN LEIBY; and EL, a Minor, BY AND THROUGH HIS PARENTS MICHAEL LEIBY AND BRE ANN LIEBY AS NEXT FRIENDS; and PL, a Minor, BY AND THROUGH HIS PARENTS MICHAEL LEIBY AND BRE ANN LIEBY AS NEXT FRIENDS; and ZL, a Minor, BY AND THROUGH HIS PARENTS MICHAEL LEIBY AND BRE ANN LIEBY AS NEXT FRIENDS; and JASON PELTON; and ROBIN PELTON; and CP, a Minor, BY AND THROUGH HER PARENTS JASON PELTON AND ROBIN PELTON AS NEXT FRIENDS; and SP, a Minor, BY AND THROUGH HIS PARENTS JASON PELTON AND ROBIN PELTON AS NEXT FRIENDS; and SP, a Minor, BY AND THROUGH HER PARENTS JASON PELTON AND ROBIN PELTON AS NEXT FRIENDS; and CP, a Minor, BY AND THROUGH HER PARENTS JASON PELTON AND ROBIN PELTON AS NEXT FRIENDS; and CARL WALSTON; and MARISEL WALSTON; and HW, a Minor, BY AND THROUGH HIS PARENTS CARL WALSTON AND MARISEL WALSTON AS NEXT FRIENDS; and DAVID PRATHER; and VICTORIA PRATHER,

Plaintiffs.

v.)
)
KANSAS STATE BOARD OF EDUCATION;)
and MEMBERS OF THE KANSAS STATE BOARD)
OF EDUCATION, in their official capacities only,)
consisting of: JANET WAUGH; and STEVE)
ROBERTS; and JOHN W. BACON; and CAROLYN)
L. WIMS-CAMPBELL; and SALLY CAUBLE;)
and DEENA HORST; and KENNETH WILLARD;)
and KATHY BUSCH; and JANA SHAVER; and)
JIM MCNIECE; and KANSAS STATE)
DEPARTMENT OF EDUCATION; and DIANE)
DEBAKER, Commissioner of the Kansas State)
Department of Education, in her official)
capacity only,)
Defendants.)
_____)

COMPLAINT

(Bold face captions are intended as descriptive of the substantive content of the related paragraph and need not be addressed by any answer)

I. INTRODUCTION

1. The Plaintiffs, consisting of students, parents and Kansas resident taxpayers, and a representative organization, complain that the adoption by the Defendant State Board of Education on June 11, 2013 of Next Generation Science Standards, dated April 2013 (the Standards; http://www.nextgenscience.org/) and the related *Framework for K-12 Science Education: Practices, Crosscutting Concepts and Core Ideas, (*2012; (http://www.nap.edu/catalog.php?record_id=13165#*)*, incorporated therein by reference (the "Framework"

with the Framework and Standards referred to herein as the "F&S") will have the effect of causing Kansas public schools to establish and endorse a non-theistic religious worldview (the "Worldview") in violation of the Establishment, Free Exercise, and Speech Clauses of the First Amendment, and the Equal Protection Clauses of the 14th Amendment.

Article III regarding the Parties begins at paragraph 26
Article IV regarding Venue and Jurisdiction begins at paragraph 48

II. BACKGROUND

2. The F&S take impressionable children, beginning in Kindergarten, into the religious sphere by leading them to ask ultimate religious questions like what is the cause and nature of life and the universe - "where do we come from?"

3. These questions are ultimate religious questions because answers to them profoundly relate the life of man to the world in which he lives. ["By its nature, religion - in the comprehensive sense in which the Constitution uses that word - is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives." *(McGowan v. Maryland,* 366 U.S. 420, 461 (1961) (Frankfurter, J. concurring, with Harlan, J.)]

4. These questions are exceedingly important as ancillary religious questions regarding the purpose of life and how it should be lived ethically and morally depend on whether one relates his life to the world through a creator or considers it to be a mere physical occurrence that ends on death per the laws of entropy.

5. However, instead of seeking to objectively inform children of the actual state of our scientific knowledge about these questions in an age appropriate and religiously neutral manner, the Standards use, without adequately disclosing, an Orthodoxy (defined in paragraphs 8 and 9) and a variety of other deceptive methods to lead impressionable children, beginning in Kindergarten, to answer the questions with only materialistic/atheistic answers.

6. Instead of explaining to students that science has not answered these religious questions, the F&S seek to cause them to accept that controversial materialistic/atheistic answers are valid.

7. The purpose of the indoctrination is to establish the religious Worldview, not to deliver to an age appropriate audience an objective and religiously neutral origins science education that seeks to inform.

8. The orthodoxy, called methodological naturalism or scientific materialism, holds that explanations of the cause and nature of natural phenomena may only use natural, material or mechanistic causes, and must assume that, supernatural and teleological or design conceptions of nature are invalid (the "Orthodoxy").

9. The Orthodoxy is an atheistic faith-based doctrine that has been candidly explained by Richard Lewontin, a prominent geneticist and evolutionary biologist, as follows: "Our willingness to accept scientific claims that are against common sense is the key to an understanding of the real struggle between science and the supernatural. We take the side of science *in spite* of the patent absurdity of some of its

constructs, *in spite* of its failure to fulfill many of its extravagant promises of health and life, *in spite* of the tolerance of the scientific community for unsubstantiated just-so stories, because w*e have a prior commitment, a commitment to materialism*. It is not that the methods and institutions of science somehow compel us to accept a material explanation of the phenomenal world, but, on the contrary, that *we are forced by our* a priori *adherence to material causes* to create an apparatus of investigation and a set of concepts that produce material explanations, no matter how counter-intuitive, no matter how mystifying to the uninitiated. *Moreover, that materialism is absolute, for we cannot allow a Divine Foot in the door."* [Richard Lewontin, *Billions and Billions of Demons* 44 N.Y. REV. OF BOOKS 31 (Jan. 9, 1997) (emphasis added)]

10. Many of the misleading methods used to promote the Worldview are detailed in paragraphs 94 through 122; however, three critical devices are omissions to cause students to analyze and understand (a) that the ultimate questions which students are led to ask identify mysteries that have not been answered by science, (b) that the explanations to be accepted by students are driven by the Orthodoxy and not by an objective weighing of all the "available evidence," and (c) that many naturally occurring patterns and phenomena contradict the materialistic/atheistic tenet of the Orthodoxy, including (1) the fine-tuning of matter, energy and the physical forces to permit the existence of life and (2) the fact that physics and chemistry do not explain the sequences of nucleotide bases that carry the functional information and genetic programming necessary to the origin of life and much of its diversity.

11. **Concealing the Orthodoxy.** Although omissions mentioned in the preceding paragraph enhance the promotion of the Atheistic Worldview, a more robust tool for that indoctrination is the omission to provide standards that will adequately explain to students the nature, use and effect of use of the Orthodoxy.

12. Instead of candidly disclosing the Orthodoxy as explained by Richard Lewontin, its nature and use is masked by standards which misrepresent the materialistic and atheistic explanations provided as being based on all the "available evidence," and on "open-minded," "objective," "logical" and "honest" investigation per "common rules of evidence," when in fact the explanations violate all of those descriptors due to the use of the Orthodoxy and the lack of consideration given to evidence that is inconsistent with it.

13. **Other methods of Indoctrination.** Other tools of indoctrination and evangelism are detailed in paragraphs 87 through 122 below, but three additional strategies employed by the F&S reflect a purpose to establish in impressionable minds the materialistic/ atheistic Worldview rather than to provide an objective and religiously neutral origins science education.

14. **Indoctrinating Impressionable Young Minds.** First, the F&S begin the indoctrination of the materialistic/atheistic Worldview at the age of five or six with young impressionable minds that lack the cognitive or mental development and scientific, mathematical, philosophical and theological sophistication necessary to enable them to critically analyze and question any of the information presented

and to reach their own informed decision about what to believe about ultimate questions fundamental to all religions.

15. Because living systems appear to be "brilliantly" and "superbly" "designed for a purpose" by a "sentient" designer and because of religious training and belief acquired from family and the community, young children bring to public schools teleological conceptions of the natural world which conflict with the tenets of the materialistic/atheistic Orthodoxy.

16. Taking advantage of their malleable minds the F&S deem these "conceptions" to be "misconceptions," as they are inconsistent with the Orthodoxy, and then provide strategies for correcting them as explained herein, which include strategies to train teachers to identify and then lead children to correct their so-called "misconceptions" about the natural world.

17. No secular purpose exists for the state seeking to teach impressionable young children about a materialistic/atheistic view of origins before the mind of the child has achieved the necessary cognitive development and has acquired knowledge of the necessary intellectual predicates of math, chemistry, physics, geology, biology, molecular biology, biochemistry, statistics, philosophy and theology.

18. The effect of the F&S in teaching the materialistic/atheistic Worldview to young children before they attain the age and sophistication necessary to make an informed decision about it, is likely to cause them to embrace it, because studies show (a) that children between the age of five and eleven simply

assimilate and take, unthinkingly, what authorities have taught to the child and (b) that they generally form their religious worldview by the time they attain the age of 13.

19. The effect of teaching for thirteen years only the materialistic/atheistic side of a religious controversy to an audience that is not age appropriate is religious, not educationally objective, and is indicative of an intent to inculcate and establish that non-theistic religious Worldview in the children.

20. The effect of seeking to establish the Worldview, particularly in the minds of impressionable primary school students, amounts to an excessive governmental entanglement with religion.

21. **Excluding Theists from policies of non-discrimination and "equity."** Second, the F&S implicitly excludes from its policies regarding non-discrimination and equity, children, parents and taxpayers that embrace theistic worldviews, thereby enabling the discriminatory establishment of the non-theistic Worldview under the guise of "science."

22. **Causing the Worldview to be incorporated in all other curriculum.** Third, the F&S use a strategy that seeks to cause the core materialistic/atheistic ideas of the Worldview to be used in and "cohere" with all other curriculum and to cause students to develop "habits of mind" that accept those core ideas.

23. The foregoing strategies have the effect of evangelizing students to accept a religious idea rather than objectively informing children about the actual

state of our scientific knowledge concerning the cause and nature of life and the universe.

24. As a consequence, implementation of the foregoing strategies by Kansas will cause it to endorse a particular religious viewpoint, without a valid secular purpose, with a primary effect that is not religiously neutral, and in a manner that will treat atheists and materialists as favored insiders and theists as disfavored outsiders, and otherwise cause the state of Kansas to be excessively entangled with religion.

25. Plaintiffs therefore complain that the implementation of the F&S will infringe on their rights under the First and Fourteenth Amendments.

III. THE PARTIES

26. Plaintiff **Citizens for Objective Public Education** ("COPE") is a nonprofit organization whose purpose is to promote the religious rights of parents, students and taxpayers in public education and whose members include residents of Kansas who are taxpayers and parents that have children that are enrolled in Kansas public schools and children that are expected to be enrolled in Kansas Public Schools.

27. Plaintiffs Carl and Mary Angela Reimer, are residents of Meade, Kansas, are parents of BR, age 5, HR, age 8, BR, age 9 and NR, age 11, who are enrolled in Kansas public schools, and are Christian parents who seek to instill in their children a belief that life is a creation made for a purpose, that does not end on death and is not simply a purposeless occurrence that is the product of an unguided evolutionary process.

28. Plaintiffs BR, HR, BR and NR seek to enforce their rights to not be indoctrinated by Kansas public schools to accept the materialistic/atheistic religious Worldview which the F&S seek to establish, which rights are being asserted herein on their behalf by their father and mother and next friend, Carl and Mary Angela Reimer.

29. Plaintiff Sandra Nelson, is a resident of Rush Center, Kansas, and is the mother of JN, age 13, who is enrolled in a Kansas public school, and is a Christian parent who seeks to instill in her child a belief that life is a creation made for a purpose that does not end on death and is not simply a purposeless occurrence that is the product of an unguided evolutionary process.

30. Plaintiff JN seeks to enforce his rights to not be indoctrinated by Kansas public schools to accept the materialistic/atheistic religious Worldview which the F&S seek to establish, which right is being asserted herein on his behalf by his mother and next friend, Sandra Nelson.

31. Plaintiffs Lee and Toni Morss, are residents of Burdett, Kansas, are parents of LM, age ten, RM, age 13 and AM, age 14, who are enrolled in Kansas public schools, and are Christian parents who seek to instill in their children a belief that life is a creation made for a purpose that does not end on death and is not simply a purposeless occurrence that is the product of an unguided evolutionary process.

32. Plaintiffs LM, RM and AM seek to enforce their rights to not be indoctrinated by Kansas public schools to accept the materialistic/atheistic religious Worldview which the F&S seek to establish, which

rights are being asserted herein on their behalf by their father and mother and next friend, Lee and Toni Morss.

33. Plaintiffs Mark and Angela Redden, are residents of Gypsum, Kansas, are parents of MR, age nine who is enrolled in a Kansas public school, and are Christian parents who seek to instill in their child a belief that life is a creation made for a purpose that does not end on death and is not simply a purposeless occurrence that is the product of an unguided evolutionary process.

34. Plaintiff MR seeks to enforce his rights to not be indoctrinated by Kansas public schools to accept the materialistic/atheistic religious Worldview which the F&S seek to establish, which rights are being asserted herein on his behalf by his father and mother and next friend, Mark and Angela Redden.

35. Plaintiffs Burke and Kelcee Pelton, are residents of Burdett, Kansas, are parents of BP, age 1 and LP, age 3, who are expected to be enrolled in Kansas public schools, and KP, age 5, who is enrolled in a Kansas public school, and are Christian parents who seek to instill in their children a belief that life is a creation made for a purpose, that does not end on death and is not simply a purposeless occurrence that is the product of an unguided evolutionary process.

36. Plaintiffs BP, LP and KP seek to enforce their rights to not be indoctrinated by Kansas public schools to accept the materialistic/atheistic religious Worldview which the F&S seek to establish, which rights are being asserted herein on their behalf by their father and mother and next friend, Burke and Kelcee Pelton.

37. Plaintiffs Michael and Bre Ann Leiby, are residents of Burdett, Kansas, are parents of EL, age 1 who is expected to be enrolled in Kansas public schools, and PL, age 9, and ZL, age 10, who are enrolled in a Kansas public schools, and are Christian parents who seek to instill in their children a belief that life is a creation made for a purpose, that does not end on death and is not simply a purposeless occurrence that is the product of an unguided evolutionary process.

38. Plaintiffs EL, PL and ZL seek to enforce their rights to not be indoctrinated by Kansas public schools to accept the materialistic/atheistic religious Worldview which the F&S seek to establish, which rights are being asserted herein on their behalf by their father and mother and next friend, Michael and Bre Ann Leiby.

39. Plaintiffs Jason and Robin Pelton, are residents of Burdett, Kansas, are parents of CP, age 7, SP, age 9, CP, age 10 and SP, age 12, who are enrolled in Kansas public schools, and are Christian parents who seek to instill in their children a belief that life is a creation made for a purpose, that does not end on death and is not simply a purposeless occurrence that is the product of an unguided evolutionary process.

40. Plaintiffs CP, SP, CP and SP seek to enforce their rights to not be indoctrinated by Kansas public schools to accept the materialistic/atheistic religious Worldview which the F&S seek to establish, which rights are being asserted herein on their behalf by their father and mother and next friend, Jason and Robin Pelton.

41. Plaintiffs Carl and Marisel Walston, are residents of Lenexa, Kansas, are parents of HW, age 9, who is enrolled in a Kansas public school, and are Christian parents who seek to instill in their son a belief that life is a creation made for a purpose, that does not end on death and is not simply a purposeless occurrence that is the product of an unguided evolutionary process.

42. Plaintiff HW seeks to enforce his rights to not be indoctrinated by Kansas public schools to accept the materialistic/atheistic religious Worldview which the F&S seek to establish, which right is being asserted herein on his behalf by his father and mother and next friend, Carl and Marisel Walston.

43. Plaintiffs David and Victoria Prather, are residents of Lake Quivira, Kansas, who pay state and local income and property taxes which are used in part to fund public schools in Kansas, and who object to the use of such funds by the State of Kansas for the establishment and promotion of a non-theistic religious worldview through its implementation of the F&S.

44. Defendant Kansas State Board of Education (the "Board") is a ten member governmental body, established under Section 2 of Article 6 of the Kansas Constitution to have general supervision of K-12 public schools, educational institutions and educational interests of the state, and has its principal offices at 120 SE 10th Avenue, Topeka, Kansas 66212.

45. The ten elected defendant members of the Board are individual Kansas residents, are joined only in their official capacities and may be served at 120 SE 10th Avenue, Topeka, Kansas 66212.

46. The Defendant Kansas State Department of Education is a governmental entity established by Section 72-7701 of the Kansas Statutes which is under the administrative supervision of a commissioner of education as directed by law and by the state board. The Department has offices at and may be served at 120 SE 10th Avenue, Topeka, Kansas 66212.

47. Diane DeBacker is the Kansas Commissioner of Education appointed by the Board, is joined in her official capacity only and may be served at 120 SE 10th Avenue, Topeka, Kansas 66212.

IV. JURSIDICTION AND VENUE

48. This is a civil action whereby Plaintiffs seek: a Declaratory Judgment that the F&S adopted by the defendant Kansas State Board of Education (the "Board") on June 11, 2013, seeks to establish a program for indoctrinating students in a non-theistic religious Worldview in public schools (the "Policy") and thereby violates the rights of Plaintiffs under the Establishment, Free Exercise and Speech Clauses of the First Amendment and the Equal Protection Clause of the 14th Amendment of the United States Constitution; and permanent injunction against implementation of all or certain portions of the Policy by the Board and defendant Kansas State Department of Education (the "Department"); nominal damages incurred by all Plaintiffs; the costs incurred in this litigation, including attorneys' fees, and such other relief as the Court deems equitable, just and proper.

49. This action arises under the United States Constitution, particularly the First and Fourteenth

Amendments; and under federal law, particularly 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §§ 1983 and 1988.

50. This Court has original jurisdiction over the federal claims by operation of 28 U.S.C. §§ 1331 and 1343.

51. This Court has authority to issue the requested declaratory relief under 28 U.S.C. § 2201.

52. This Court has authority to issue the requested injunctive relief under 28 U.S.C. § 1343(a)(3).

53. This Court is authorized to award the requested damages under 28 U.S.C. § 1343(a)(3).

54. This Court is authorized to award attorneys' fees under 42 U.S.C. § 1988.

55. Venue is proper under 28 U.S.C. § 1391(b) in the District of Kansas because the offices of the Kansas Department of Education and the Kansas State Board of Education are located therein, all members of the Board reside therein, and the events or omissions giving rise to the claims occurred therein.

V. ALLEGATIONS COMMON TO ALL COUNTS - THE F&S AND THE WORLDVIEW IT SEEKS TO ESTABLISH AND PROMOTE

56. The Framework was published by the National Academies of Science in final form in 2012 as a "blueprint" for K-12 science education in the U.S.

57. The Standards were developed pursuant to that Framework and finalized in April 2013.

58. Plaintiff COPE issued analyses objecting to the F&S on June 1, 2012, and January 29, 2013, copies of which are appended as Exhibits A and B (the "COPE Analyses").

59. On May 14, 2013 and June 11, 2013 representatives of COPE urged the Kansas Board to reject the F&S for the reasons stated in the COPE Analyses and invited representatives of the Board to engage in a detailed discussion of concerns that the F&S infringe on the religious rights of parents, children and taxpayers.

60. COPE's invitations were met with silence.

61. During the meeting of the State Board on June 11, 2013, Mr. Willard, a member of the State Board, urged the Board to delay action on the F&S until it had investigated the assertions in the COPE analyses that the F&S were unconstitutional.

62. The Chairman invited discussion on Mr. Willard's proposal for the Board to engage in such due diligence before adoption of the F&S, however, other Board members expressed the view that there was no need to consider those and other objections expressed by Mr. Willard.

63. On June 11, 2013, over the objections of two members of the State Board, the Defendant State Board adopted the Standards and the Framework, which is incorporated therein by reference, without engaging in any due diligence with regard to the issues expressed in the COPE analyses.

64. The F&S seek to cause students to embrace a non-theistic Worldview. As used herein, "worldview"

means a religious view that is "an aspect of human thought and action which profoundly relates the life of man to the world in which he lives" (McGowan v. Maryland*, supra*).

65. The F&S seek to establish the Worldview by leading very young children to ask ultimate questions about the cause and nature of life and the universe - *Where do we come from?* - and then using a variety of deceptive devices and methods that will lead them to answer the questions with only materialistic/atheistic explanations about how their lives are related to the world in which they live.

66. The effect of the F&S is to cause the student to ultimately "know" and "understand" that the student is not a design or creation made for a purpose, but rather is just a "natural object" that has emerged from the random interactions of matter, energy and the physical forces via unguided evolutionary processes which are the core tenets of Religious ("secular") Humanism.

67. The F&S engage the child to ask and answer ultimate questions by causing them to observe naturally-occurring patterns and then leading them to explain the cause of the patterns using only mechanistic or materialistic/atheistic causes.

68. The patterns which children are led to examine and ascertain the cause of include the pattern that emerged during the origin of the universe in the "Big Bang," and the patterns consisting of the origin and diversity of life, such that children are led to reconstruct "histories" or genesis accounts of the

cosmos and of life on earth using materialistic and atheistic explanations and narratives.

69. As explained by the late Ernst Mayr, an icon of evolutionary biology, origins science differs from traditional experimental sciences in that it relies on the construction of historical narratives rather than laws and experiments to explain the cause of past events: ". . . Darwin introduced historicity into science. Evolutionary biology, in contrast with physics and chemistry, is a historical science – the evolutionist attempts to explain events and processes that have already taken place. *Laws and experiments are inappropriate techniques for the explication of such events and processes. Instead one constructs a historical narrative,* consisting of a tentative reconstruction of the particular scenario that led to the events one is trying to explain." [Ernst Mayr, *Darwin's Influence on Modern Thought,* SCIENTIFIC AMERICAN, Jul. 2000, at 80 (emphasis added).]

70. Historical sciences use a form of abductive reasoning that seeks to develop an inference to the best of competing alternative explanations based on the weight of all of the available evidence, which method requires that the weight of the evidence both favor or rule in one hypothesis while disfavoring or ruling out the other competing possibilities.

71. Two principal competing evidence-based explanations have existed for thousands of years with respect to the origin of the universe, of life and of the diversity of life, one materialistic and the other teleological.

72. The teleological hypothesis argues that the apparent design that may be observed in many naturally occurring patterns may be real and therefore due to an intelligent cause. It is an evidence-based logical inference derived from patterns that are observed to (a) exhibit function or purpose, (b) consist of sequences or arrangements of elements that are not ordered by any physical or chemical necessity and, (c) cannot be plausibly explained, because of their complexity, by stochastic or random events.

73. Naturally occurring patterns which support the teleological hypothesis include (a) the fine-tuning of the universe for life, (b) the genetic programming necessary to get life started, (c) the genetic code which has been found to exhibit "eerie perfection" which organizes the "messages" in DNA that must be "error-checked," "edited" and then translated into functional proteins, (d) a fossil record that shows large increases in biological information over very short time-spans, such as the Cambrian explosion, (e) the existence of "orphan" genes that lack an apparent common ancestor, (f) human consciousness and free will, and (g) the fact that all living systems exhibit similarities and differences consistent with a "unifying" idea that life may be the result of a common design.

74. The competing materialistic or naturalistic idea is "a theory that expands conceptions drawn from the natural sciences into a worldview and that denies that anything in reality has a supernatural or more than natural significance; specifically: the doctrine that cause-and-effect laws (as of physics and chemistry) are adequate to account for all phenomena and that teleological conceptions of nature are invalid"

("Naturalism" - Merriam Webster's Unabridged Dictionary, 2013).

75. The two competing ideas about the nature of the natural world generate competing religious beliefs.

76. The teleological hypothesis supports (but does not require belief in) traditional theistic religions that claim that life was created for a purpose and that it has a soul that does not end on death.

77. The materialistic/naturalistic hypothesis supports (but does not require belief in) non-theistic religions like Atheism and Religious ("secular") Humanism which deny the supernatural, hold that physical matter is the only reality and the reality through which all being and processes can be explained, that life arises via unguided evolutionary processes driven by physics and chemistry, and that it ends on death.

78. The F&S employ the Orthodoxy called methodological naturalism or scientific materialism described in paragraphs 8 and 9 above.

79. The Orthodoxy has utility as a refutable presumption in a variety of scientific endeavors.

80. When applied to subjective historical origins science as an irrefutable absolute commitment, the Orthodoxy is inconsistent with (a) an objective search for the truth and intersubjectively accessible knowledge, (b) common rules of evidence, (c) accepted methods of testing historical hypotheses using abductive reasoning and (d) objective science that eschews preconceptions that favor a particular theistic or non-theistic religious view.

81. The Orthodoxy when applied to historical origins sciences violates the common rules of evidence and the logic of abductive reasoning by excluding the principal evidence-based competing alternative to materialism - the idea that many naturally occurring patterns may be due to teleological rather than materialistic causes.

82. The effect of the use of the Orthodoxy is that it causes the investigation to close its mind to competing alternatives and evidence that undermine the core materialistic assumption so that the investigation becomes one that employs "tunnel vision" that necessarily leads to only atheistic explanations of the cause and nature of life and the universe.

83. The Orthodoxy is functionally atheistic when used to explain the origin of the universe and of life as it precludes any supernatural or teleological explanation and holds that life may only be explained via unguided evolutionary processes.

84. The F&S employ the Orthodoxy in seeking to educate students about the cause and nature of natural phenomena and naturally occurring patterns, including the origin and nature of life and the universe.

85. Because the F&S use the Orthodoxy, standards that lead children to investigate the cause and nature of naturally occurring patterns such as life and the universe lead them to employ tunnel vision and to explain the patterns as due only to materialistic and functionally atheistic causes.

86. Because the F&S use the Orthodoxy, the Worldview it seeks to promote is materialistic and

atheistic and thereby favors, promotes and endorses non-theistic religion over theistic religion.

A. GENERAL METHODS OF INDOCTRINATION

87. The F&S seek to inculcate the Worldview through a variety of deceptive methods, including those listed in paragraphs 1 through 25 above and 88 through 122 below.

88. As explained in paragraphs 1 through 25 above the F&S seek to inculcate the Worldview by teaching one side of a complex and sophisticated scientific and religious controversy to impressionable primary and middle school children who lack the cognitive development, maturity, intellectual sophistication and knowledge necessary to question or critically analyze the information presented to reach an informed decision and simply assimilate and take unthinkingly what their teachers have taught to them.

89. It uses standards that seek to inculcate the materialistic/atheistic explanations as "habits of mind."

90. As set out in paragraph 21 the F&S implicitly exclude from policies of non-discrimination, equity and diversity children being trained by their parents to accept and embrace traditional theistic religious views, thereby placing them in a disfavored class.

91. The F&S create a false dilemma that the "way of knowing" promoted by the Worldview is intellectually honest, objective, open-minded, logical, open to criticism, skeptical and subject to change, while the Worldview (a) actually lacks those qualities due to use of the Orthodoxy and (b) suggests to

students that other "ways of knowing" lack these qualities and should therefore be avoided.

92. The F&S seek to promote the Worldview by causing it to be used in and to "cohere" with all curricula provided by the school, not just science curricula.

93. The F&S employ a number of other devices that tend to indoctrinate rather than objectively inform about the actual state of our scientific knowledge about issues affecting the Worldview, including, without limitation, (a) the misrepresentations and omissions described in paragraphs 94 through 122 below, (b) the omission of explicit, accurate and complete definitions of important terms and concepts through the use of a glossary or otherwise, (c) the use of generalizations about science that are not always applicable, (d) teaching only one side of a controversy, (e) the misleading use of statistics, (f) combining subjects into a single class and ignoring important distinctions, (g) appeals to authority, (h) appeals to consensus, (i) appeals to emotion, (j) generating implications that opposing views are incorrect and not deserving of consideration, and (k) ignoring assumptions and built-in biases.

B. F&S USE OF MISREPRESENTATION AND OMISSION TO ADVANCE THE WORLDVIEW

94. The F&S use misrepresentation of fact and the omission of facts relevant to explanations about the cause and nature of life and the universe as outlined in paragraphs 95 and 122 to inculcate and advance the Worldview.

95. The most critical omission is that the F&S employ the Orthodoxy but do not provide for standards that will inform students about (a) the nature of the Orthodoxy and how its use in origins science affects religious beliefs, (b) the fact that the F&S and the explanations provided have been developed using the Orthodoxy and the tunnel vision it provides, (c) the effects of the use of the Orthodoxy that suppress relevant evidence that casts doubt on the plausibility of the materialistic/atheistic explanations provided, and (d) the purpose of using the Orthodoxy in seeking to provide to impressionable young minds answers to deeply religious questions.

C. MISREPRESENTATIONS

96. The F&S use misrepresentations to advance the Worldview, including those listed in paragraphs 97 through 108 below.

97. **Misrepresenting the Evidentiary Basis for Materialistic/Atheistic Explanations.** The F&S implicitly represent that unguided evolutionary theory is based on a consideration of all the "available evidence," when F&S use of the Orthodoxy excludes from consideration evidence inconsistent with the Orthodoxy and evidence that supports an evidence-based alternative.

98. The F&S represent that explanations provided by the standards regarding unguided evolutionary processes are based on a use of common rules of evidence, when in fact an Orthodoxy is used that violates common rules of evidence in historical origins science.

99. **Misrepresenting the Nature of "science" promoted by the F&S.** The F&S misrepresent the nature of the kind of "science" promoted by the F&S as "logical, precise, objective, open-minded, logical, skeptical, replicable, and honest and ethical," when the concealed use of the Orthodoxy in origins science violates all of these characteristics with respect to explanations about the cause and nature of life and the universe.

100. **False Dichotomies.** The F&S use a series of false dichotomies that divide all objects, structures, systems and the world into two classes: ***natural*** objects, systems, structures and the world into one class and ***designed*** objects, systems structures and the world into the other, with the latter class consisting of objects, structures and systems made by humans.

101. These dichotomies used by the F&S teach that "design" is the attribute that one class has that the other class lacks, such that children are taught that natural objects, systems and structures and the natural world lack the attribute of design.

102. The dichotomies are false because the representation that natural objects, systems, structures and the world lack the attribute of design is (a) based on a questionable assumption and not a conclusive evidential showing, and (b) because much empirical evidence exists that living systems reflect actual design.

103. **False Descriptors.** The F&S use a descriptor that implicitly classifies the natural world as just "material," consistent with the materialistic tenet of the Orthodoxy: "Science Addresses Questions About

the Natural and ***Material*** World….scientists study the ***natural and material*** world. (2-ESS2-1)" (emphasis added) [NGSS, *Topic Arrangements of the Next Generation Science Standards*, p.15 (April 2013)].

104. The descriptor is false as the representation that the world is just material is (a) based on a questionable assumption and not a conclusive evidential showing and (b) because living systems are driven by functional information and genetic programming which is not material and because human consciousness and other entities have not been shown to be reducible only to the material.

105. The F&S misrepresent to children that changes in living systems are due to a "choice," by teaching that the changes are due to "natural selection."

106. The "natural selection" descriptor is false because the mechanism it describes is one which sorts, not selects or chooses, as the mechanism lacks an actual mind and the capacity to "choose" as it consists merely of the effects of random changing environmental constraints that tend to positively sort or enhance the survival of organisms that happen by chance to be most fit for those constraints.

107. The misrepresentation that this mindless mechanism "selects" is materially misleading because it leads one to believe that a mindless materialistic mechanism has the capacity of a mind that can therefore explain the apparent design of living systems, when it actually does not.

108. The false descriptor conceals from the student the critical question as to whether random

mutations coupled with a mindless random sorting process actually has the capacity to generate living systems that appear to have been "brilliantly" and "superbly" designed by a "sentient mind."

D. OMISSIONS

109. The F&S omit to include standards that seek to inform students of facts relevant to the materialistic/atheistic explanations of the cause and nature of natural phenomena, including those described above and in paragraphs 110 through 122 below.

110. **Omitting to explain the impact of origins science on religious belief and the fact that the state may not take a position as to whether a particular view of origins is or is not valid.** The F&S omit to include a standard that will cause students to know and understand (a) that explanations regarding the cause and nature of life and the universe deal with deeply religious issues that can dramatically affect the student's religious belief and religious worldview, (b) that science has not provided definitive answers to the questions, (c) that the state may not pass on the validity of any answer to the questions or take a position as to which is the best of competing explanations, and (d) that science education about these questions is required to be objective so that the effect of instruction is religiously neutral.

111. **Omitting to explain that scientific knowledge does not include knowledge of the cause of certain origins events.** The F&S omit to include a standard that will cause students to know and understand that scientific knowledge does not now

and may never include knowledge of the cause of the universe, the cause of the genetic code, the cause of life, the cause of the sequences of bases in DNA necessary to explain life, the cause of large increases in biocomplexity such as that which suddenly occurred during the Cambrian explosion, the cause of orphan genes, the cause of consciousness, and many other mysteries regarding the origin of life and its diversity.

112. **Omitting consideration of the evidence-based alternative.** The F&S omit to include a standard that will cause students to understand that an evidence-based teleological alternative to unguided evolutionary theory exists and that the explanations they are to learn and accept per the F&S exclude consideration of the alternative and the evidence that supports it due to the use of the Orthodoxy.

113. **Omitting consideration of evidence of the teleological alternative.** The F&S fail to provide standards that will inform students about evidence that supports the evidence-based teleological alternative to the materialistic origins narrative, including those set forth in paragraphs 114 through 120 below.

114. **Omitting to explain that the historical explanations used to support the theory of unguided biological evolution have not been adequately tested.** The F&S omit to include a standard that will cause students to know and understand that historical science seeks to test historical narratives or explanations through the use of abductive reasoning that seeks an inference to the best of the competing alternatives by a weighing of all of the available evidence and that the materialistic/atheistic

explanations of unguided evolution students are to learn pursuant to the F&S have not been tested through the use of that method as an Orthodoxy is employed that precludes consideration of the evidence-based competing teleological alternative.

115. **Omitting consideration of the fine-tuning of the universe.** The F&S fail to provide standards that will inform students about the fine-tuning of the Universe for life.

116. **Omitting chemical evolution.** The F&S fail to provide standards that will inform students about the state of our scientific knowledge regarding the chemical origin of life and the lack of natural or material cause explanations for the genetic code, and the biological information necessary for replicating life to exist.

117. **Omitting to inform students of critical assumptions and the lack of their evidentiary foundations.** The F&S fail to provide standards that will inform students that biological evolution is an unguided process that depends on the assumption (a) that only material or mechanistic causes have operated in the natural world when the assumption is essentially faith-based and not consistent with much contrary evidence and (b) that chemical evolution occurred via only material or mechanistic causes when there is little or no evidence that such causes are adequate to explain it.

118. **Omitting to explain that the materialistic/atheistic explanations are not based on a weighing of all the available evidence.** The F&S fail to provide standards that will inform students

that the historical narratives that purport to explain biological evolution are not based on a consideration of all the available evidence as use of the Orthodoxy excludes consideration of evidence inconsistent with the materialistic tenets of the Orthodoxy and evidence of the evidence-based teleological alternative it presumes to be invalid.

119. **Omitting to explain that most of the evidence for the core idea of unguided biological evolution is consistent with the disallowed competing alternative.** The F&S fail to provide standards that will inform students that the evidence that supports unguided biological evolution also supports the competing evidence-based alternative and therefore is insufficient to support an inference that unguided biological evolution is the best explanation.

120. **Omitting consideration of evidence that supports the competing teleological alternative.** The F&S fail to provide standards that will inform students about evidence that supports the teleological alternative, including (a) the fact that living systems appear brilliantly and superbly designed, (b) that physics and chemistry do not order the sequences of bases that provide the information and genetic programming that runs life, and (c) that statistical calculations and experiments suggest that stochastic processes are not adequate to explain the information necessary for the origin and existence of life and large increases in biological information, such as that which occurred during the Cambrian Explosion.

121. **Omitting to explain extrapolations used to support the materialistic/atheistic explanation.** The F&S omit to provide standards that

distinguish between micro-evolutionary change (small-scale change within a species) and macro-evolutionary change (the generation of large-scale biological innovations above the level of species), thereby leading students to believe that stochastic processes which do account for certain micro-evolutionary changes are adequate to explain macro-evolutionary changes, although significant scientific controversy exists over the plausibility of that extrapolation.

122. **Omitting to explain the discrimination that exists within the scientific community against those who do not embrace the Orthodoxy.** The F&S fail to provide standards that will inform students that explanations of unguided biological evolution have not been open to the criticism and critique that other scientific explanations have experienced that do not invoke or affect religious beliefs, and that scientists who criticize the explanations provided by the F&S are subject to significant employment and other discrimination within academic and educational communities.

E. PLAINTIFFS' ACTUAL, THREATENED AND REDRESSABLE INJURY TRACEABLE TO THE POLICY

123. **All Plaintiffs,** who are Kansas residents or Kansas taxpayers, are injured by their State's endorsement and promotion of an Orthodoxy that establishes and promotes non-theistic religious beliefs while seeking to suppress competing theistic religious views because it:

a. causes the state to promote religious beliefs that are inconsistent with the theistic religious

beliefs of plaintiffs, thereby depriving them of the right to be free from government that favors one religious view over another;

b. sends a message that they, being theists, are outsiders within the community and that non-theists and materialists are insiders within the community;

c. denies them the right to be treated equally with non-theists; and

d. causes them to pay taxes to fund the state's endorsement of the tenets of non-theistic religions which conflict with their theistic beliefs.

124. **Plaintiffs who are students who attend public schools** are injured by State use of the F&S in a manner calculated to cause them to be indoctrinated into accepting a non-theistic religious Worldview that effectively:

a. deprives them of the right to choose what to believe about an origins narrative critical to the formation of their worldviews regarding religion, ethics, morals, and other matters of opinion;

b. imbues them with, rather than educates them about, a concept fundamental to religious belief that also has a major influence on other views they will form regarding ethics, morals, politics, government, and other matters of opinion;

c. imbues them with a religious belief that is inconsistent with the beliefs their parents have sought to instill in them;

d. interferes with the free exercise of their religion by imbuing them with a religious belief that is inconsistent with their existing religious beliefs;

e. discourages questions that imply any criticism of the Orthodoxy;

f. causes them to lose respect for their parents and advisors who hold views inconsistent with the Orthodoxy; and

g. causes them to lose respect from their peers who have accepted the Orthodoxy.

125. **Plaintiffs who are parents of students who attend public schools** are injured by State endorsement and promotion of the Orthodoxy that is hostile to theistic religious beliefs and supportive of non-theistic religious beliefs because it:

a. interferes with their right to direct the religious education of their children.

b. interferes with their right to direct the development of their children's worldviews regarding ethics, morals, government, politics, and other matters of opinion that are affected by the materialistic orthodoxy;

c. interferes with their right to freely exercise their theistic religion by causing their children to embrace a materialistic/atheistic Worldview that is inconsistent with that religion; and

d. causes them to lose the respect of their children for holding views inconsistent with a materialistic Orthodoxy that their children have been indoctrinated to accept.

126. **Members of Plaintiff Citizens for Objective Public Education ("COPE")** consist of parents, students and taxpayers who are residents of the state of Kansas have suffered actual and threatened injuries of the kind suffered by other plaintiffs herein alleged that are traceable to the F&S and that can be redressed by the relief requested herein. The interests at stake in this complaint are germane to the purposes of COPE, and neither the claim asserted nor the relief requested requires the participation of individual members of COPE in the lawsuit.

VI. CLAIMS AND CAUSES OF ACTION

COUNT 1

(Violation of the Establishment Clause of the First Amendment of the Constitution of the United States)

127. The actions of defendants as set forth in paragraphs 1 through 122 amount to a violation of the Establishment Clause of the First Amendment of the Constitution of the United States and entitle plaintiffs to relief under 42 U.S.C. § 1983 because defendants, acting under color of law, subjected plaintiffs to a deprivation of their rights under the Establishment Clause of the First Amendment of the Constitution of the United States, as applied to the states by the Fourteenth Amendment.

COUNT 2

(Violation of the Free Exercise Clause of the First Amendment of the Constitution of the United States)

128. The actions of defendants as set forth in paragraphs 1 through 122 amount to a deprivation of their rights to freely exercise their religion in violation of the Free Exercise Clause of the First Amendment of the Constitution of the United States and entitle plaintiffs to relief under 42 U.S.C. § 1983 because defendants, acting under color of law, subjected plaintiffs to a deprivation of their rights under the Free Exercise Clause of the First Amendment of the Constitution of the United States, as applied to the states by the Fourteenth Amendment.

COUNT 3

(Violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States)

129. The actions of defendants as set forth in paragraphs 1 through 122 amount to the establishment of an orthodox answer to ultimate questions that causes Kansas to discriminate against Plaintiff theists who reject the Orthodoxy and in favor of those who hold religious and other beliefs that depend on or are consistent with the Orthodoxy all in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and entitle plaintiffs to relief under 42 U.S.C. § 1983 because defendants, acting under color of law, subjected plaintiffs to a deprivation of their rights under the Equal Protection Clause of the Fourteenth Amendment

of the Constitution of the United States, as applied to the states by the Fourteenth Amendment.

COUNT 4

(Violation of the Speech Clause of the First Amendment of the Constitution of the United States)

130. The use of the Orthodoxy to restrict the kinds of explanations permitted in public schools about the natural world infringes on the speech rights of Plaintiffs in violation of the Speech Clause of the First Amendment of the Constitution of the United States and entitle plaintiffs to relief under 42 U.S.C. § 1983 because defendants, acting under color of law, subjected plaintiffs to a deprivation of their rights under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, as applied to the states by the Fourteenth Amendment.

VII. PRAYERS FOR RELIEF

WHEREFORE, in light of the foregoing, plaintiffs respectfully request the following:

a. A declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 1983 declaring that the defendants' adoption and implementation of the F&S violates the Establishment and Free Exercise Clause of the First Amendment as made applicable to the States by the 14th Amendment and the Equal Protection Clause of and 14th Amendment of the Constitution of the United States; and

b. An injunction pursuant to Fed. R. Civ. P. 65 prohibiting the defendants from implementing the F&S;

c. In the alternative to the relief requested under the preceding paragraph b. an injunction prohibiting the implementation of those provisions of the F&S that seek to teach about the origin, nature and development of the cosmos and of life on earth (origins science)

(1) For grades K-8, and

(2) for grades 9 through 12 unless the origins science instruction includes adequate and reasonably complete information about the following matters and is taught objectively so as to produce a religiously neutral effect with respect to theistic and non-theistic religion:

(a) An explanation that origins science addresses ultimate religious questions, the answers to which will likely influence the religious beliefs of students;\

(b) An explanation that the body of scientific knowledge that exists does not include knowledge of the cause of many naturally occurring origins events, including without limitation, the origin of (i) the universe, (ii) the particular characteristics of matter, energy and the physical forces, (iii) life on earth (iv) the genetic codes, (v) the functional information and genetic

programming needed to cause replicating cellular life to exist, (vi) the causes of major increases in biodiversity such as the numerous body plans that arose during the Cambrian explosion, (vii) orphan genes, and (viii) nonmaterial phenomena such as functional information, and human consciousness, mind, free will, feelings and emotions.

(c) That there exists conflicting scientific views about the cause of the origins events listed in paragraph (b) ("origins events") that also impact religious views and that students should keep an open mind about these events, subject to religious guidance provided by their parents;

(d) That teachers may not present one of competing explanations of an origins event as valid or as the best explanation, but rather should seek to merely objectively explain the actual state of our scientific knowledge concerning those events;

(e) that (i) origins science is primarily an historical rather than experimental science that uses abductive reasoning that seeks an inference to the best of competing evidence-based alternative explanations; (ii) that it is appropriate for students to use this method in

seeking to ascertain the cause of origins events; (iii) that it is appropriate and permissible for them to consider the evidence-based teleological alternative to the materialistic/atheistic alternative provided by F&S in seeking to reach an inference to the best explanation; and (iv) that it is up to the student, not the state, to decide which is the best of the competing explanations, subject to parental guidance on the subject.

(f) With respect to the Orthodoxy, (i) that the origins science explanations provided by most institutions of science and the Standards are based on a doctrine or orthodoxy that permits only natural, material, or mechanistic explanations for the cause of origins events, (ii) that the Orthodoxy is inconsistent with the abductive method of reasoning used in historical origins science as it excludes from consideration the evidence based teleological alternative, (iii) that the explanations permitted by the Orthodoxy are materialistic and functionally atheistic, and (iv) that students are not expected to understand, know or accept those explanations to be true, valid or the best of the competing evidence-based explanations;

(g) That an evidence-based teleological alternative competes with the materialistic explanations provided by the Orthodoxy, which is an inference to an intelligent rather than a material cause for a pattern that exhibits (i) purpose or function, (ii) a sequence or arrangement of elements that is not due to physical or chemical necessity, and (iii) where the elements of the pattern necessary to its function are too numerous or complex to be plausibly explained by chance or stochastic processes.

(h) That intersubjectively accessible evidence exists which supports the teleological alternative and which is inconsistent with the Orthodoxy regarding the origins events, and that such evidence may not have been taken into account in the development of the materialistic/atheistic answers allowed by the Orthodoxy (the "excluded evidence");

(i) That students will be reasonably and objectively informed of the nature and extent of the excluded evidence;

(j) That it is rational and reasonable for students to take into account the excluded evidence in deciding what to believe about the best explanation for the cause of origins events;

(k) That explanations for biological evolution provided by the Standards were developed using the Orthodoxy and therefore are not based on a weighing of all the available evidence using common rules of evidence consistent with the principles of abductive reasoning used in historical sciences;

(l) That explanations for biological origins provided by the F&S do not distinguish between micro and macro-evolution, and although significant evidence exists to support micro-evolutionary explanations via random mutation and natural sorting, a scientific controversy exists as to whether random mutation and natural sorting adequately explain the cause of macro-evolutionary events.

(m) That various lines of evidence used to support the theory of biological evolution (fossil record, anatomical similarities, biochemical similarities, embryological development, biogeography) are also consistent with the evidence-based teleological alternative, thereby necessitating a weighing of the evidence for and against the competing teleological and materialistic views to logically reach an inference to the best explanation;

(n) That explanations for biological evolution are also based on an assumption that the origin of life occurred via a material, mechanistic or natural cause, although there is no known evidential basis for that explanation and that science is essentially ignorant as to how life began if it did begin via a material cause;

(o) That the misleading statements described in paragraphs 96 through 108 be eliminated from all science curricula;

(3) Any standard that will have the effect of causing origins science explanations to cohere with other subject matter or curriculum unless the coherence includes all of the elements of (2).

d. nominal damages against the defendants for violating the plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution;

e. an order awarding plaintiffs the costs incurred in this litigation, including attorneys' fees pursuant to 42 U.S.C. § 1988; and

f. any such further relief as the Court deems equitable, just, and proper;

g. that this Court adjudge, decree and declare the rights and other legal relations of the parties to the subject matter here in controversy, in order

that such declarations shall have the force and effect of final judgment; and

h. that this Court retain jurisdiction of this matter as necessary to enforce the Court's orders.

DEMAND FOR JURY TRIAL

COME NOW, Plaintiffs and hereby demand a trial by jury on all triable issues.

Respectfully submitted,

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Exhibit A to Complaint

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June 1, 2012

Achieve, Inc.
1400 16th Street NW, Suite 510
Washington, DC 20036

RE: Response of Citizens For Objective Public Education, Inc. (COPE)
To 2012 Draft of National Science Education Standards (the "Standards") and the Framework for K-12 Science Education (the Framework) upon which the Standards are based

Ladies and Gentlemen,

We sought to provide general comments with respect to the above on the web site developed for public comment. However, the field permits a comment of only a couple of pages. Accordingly, we provided in that field a very brief comment and explained that this

more lengthy comment would be mailed to your address as provided on your "Contact Us" web page.

Please provide any response to Anne Lassey at the above Kansas address.

The following are our more detailed comments regarding the Framework and Standards:

1. The "stakeholders" COPE represents are children, parents and taxpayers who share our views regarding the need for objectivity in public education that addresses religious issues. COPE is a nonprofit organization that seeks to ensure neutrality in the teaching of subjects in public schools that touch on religious issues. Curricula that address religious questions should objectively inform students in a manner that produces a religiously neutral effect, given the age and maturity of the expected audience. This approach not only seeks to preserve the religious rights of children, parents and taxpayers, but it also promotes critical thinking and logical analysis important to good education.

Subject to the rights of parents to direct their religious education, children have the right to choose what to believe about important religious issues, whether theistic, pantheistic or atheistic. If the curriculum promotes only one of competing religious viewpoints then it will indoctrinate in the preferred view rather than objectively teach about it. This will effectively deprive the child of the right to make an informed decision about the religious issue. Religious indoctrination will also take away the right of parents to direct the religious education of their children. Similarly, it will offend the rights of taxpayers who do

not support the particular religious position being presented to students and classify them as outsiders within the community.

The State may satisfy its First Amendment obligations by excluding religious subject matter from the curriculum. It can also include the subject matter if it does so objectively and in a neutral manner that respects the Constitutional rights of children, parents and taxpayers. This may be accomplished with some subjects through carefully designed programs that inform students of the competing or alternative viewpoints that lead to differing religious implications and inferences. Neutrality may also be achieved through an objective consideration of the strengths and weaknesses of explanations that support a particular religious viewpoint. Objectivity opens rather than closes the minds of students. It encourages critical thinking about answers to ultimate questions that may profoundly affect the way they choose to lead their lives. Objectivity and neutrality will also enhance science education by encouraging critical and independent thinking and analysis.

We are furnishing this comment because the Framework and Standards address religious questions and then provide Atheistic/materialistic explanations in a manner that is not likely to produce a religiously neutral effect.

2. Religion under the First Amendment includes non-theistic beliefs. Religion has been defined by the courts very broadly to include theistic and non-theistic religions: Atheism, Religious ("Secular") Humanism, Buddhism, Ethical Culture, *et al.* In *McGowan v. Maryland*, 366 US 420, 461 (1961), the Supreme Court

described religion as an "activity that profoundly relates the life of man to the world in which he lives." This is an explicit goal of the Framework – to relate the lives of the children to the world in which they live. The courts indicate religion is an organized set of beliefs about "matters of ultimate concern," such as ultimate questions about the cause, nature and purpose of life and how it should be lived. Religions provide answers to questions like "Where do we come from?" "What is the nature of life – is it just an occurrence or is it a creation made for a purpose?" "What happens when we die?" "How should life be led from an ethical and moral standpoint or from a standpoint that logically denies the idea of absolute ethical and moral standards?"

3. It appears that the Framework and Standards promote Religious ("Secular") Humanism. The particular religious view that appears to be promoted by the Framework and Standards is an Atheism referred to as Religious ("Secular") Humanism. The Humanist Manifestos define "Religious Humanism" (now called "Secular Humanism") as an organized set of atheistic beliefs that (1) deny the supernatural, (2) claim that life arises via unguided evolutionary processes rather than as a creation made for a purpose, and (3) claim that life should be guided by naturalistic/materialistic science and reason rather than traditional theistic religious beliefs. These tenets imply that life has no inherent purpose and that it ends on death. The manifestos also explain that this religion is evangelistic as it seeks to replace all traditional theistic beliefs in all public and private institutions. The word "Religious" in the 1933 Manifesto was replaced with the word "secular" after the Supreme

Court held that the First amendment was applicable to the states in the 1940s.

In a court proceeding in 1987 where the belief system was held to be a religion, Paul Kurtz, a co-author of Manifesto II (who had previously acknowledged it to be a religion), was asked what the belief system was if, as he then argued, it was not a religion. Kurtz replied that "Secular Humanism is science." This is interesting because the science Framework and proposed Standards certainly promote all of the tenets of Religious ("Secular") Humanism. However the courts have found it to be a religion and not science. Judge Hand clearly articulated his reasons as follows:

> "Dr. Paul Kurtz *testified that secular humanism is a scientific methodology,* not a religious movement. . . . Dr. Kurtz's attempt to revise history to comply with his personal beliefs is of no concern to this Court. *For first amendment purposes, the commitment of humanists to a non-supernatural and non-transcendent analysis, even to the point of hostility towards and outright attacks on all theistic religions, prevents them from maintaining the fiction that this is a non-religious discipline.* This Court is concerned with the logic and consistency, the rationality, one might say, of Dr. Kurtz's contention that secular humanism is not a religious system, but science. Secular humanism is religious for first amendment purposes *because it makes statements based on faith-assumptions."* [*Smith v. Bd. of Sch. Comm'rs of Mobile County*, 655 F. Supp. 939, 982 (S.D. Ala. 1987), *rev'd on other grounds*, 827 F.2d 684 (11th Cir. 1987).]

Since the Framework and the Standards address all of the issues important to all religions, they should be revised to ensure that the subject matter is objectively presented in a way that has a religiously neutral effect. Some of our key concerns are very briefly listed below.

4. The use, purpose and effect of Methodological Naturalism are not explained. "Materialism" or "naturalism" is "a doctrine, theory, or principle according to which physical matter is the only reality and the reality through which all being and processes and phenomena can be explained."[1] "Methodological Naturalism" (MN) is the idea that science is not permitted to explain the cause of events within the natural world with anything other than a materialistic explanation through the use of "material" or "natural" causes (that is a cause resulting from the unguided interactions of matter, energy and the forces). Thus MN effectively requires materialistic explanations. Accordingly, when applied to the ultimate questions of life, only atheistic or unintelligent cause explanations are permitted. MN requires that all evidence of an intelligent cause be ignored or somehow attributed to a natural cause. MN is a logical assumption when dealing with experimental physical science in the present-day world. However, it is problematic when applied to historical life sciences that address questions that are both religious and scientific.

Children should be informed that MN is being used in the historical and life sciences and that there is a significant body of evidence that conflicts with its

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[1] Webster's Third New International Dictionary of the English Language, Unabridged (2003).

materialistic assumption. Many recognized scientists believe it should be abandoned in certain areas of historical science, where it impedes rather than aids open-minded inquiry.

The assumption of materialism (MN) is incompatible with science education that must respect the religious rights of children, parents and taxpayers. The effect of MN is to lead children to accept atheistic explanations of the origin and nature of life, rather than to question them. Not only must use of this assumption be explained, students must also be informed of the evidence and alternative explanations that are excluded by the assumption so that they acquire a genuine appreciation and understanding of its overall effect. The Framework and Standards do none of this. Instead, while using the assumption, they effectively hide its use.

5. No distinction is made between experimental and historical science. Most science takes place via experimentation and observation in the present-day world. This may be called "experimental" (or empirical) science. However, some branches of science use a form of abductive reasoning in an attempt to reach a "best explanation" for the cause of past events. This type of "historical" science is practiced in such disciplines as cosmology, astronomy, historical geology, paleontology, archaeology, and origins science (studies of the origin and development oflife on earth). Biologist Ernst Mayr put it this way:

> "[Charles] Darwin introduced historicity into science. Evolutionary biology, in contrast with physics and chemistry, is a historical science – the evolutionist attempts to explain events and

> processes that have already taken place. *Laws and experiments are inappropriate techniques for the explication of such events and processes. Instead one constructs a historical narrative*, consisting of a tentative reconstruction of the particular scenario that led to the events one is trying to explain." [Ernst Mayr, *Scientific American*, 283 (2000) 78.]

Philosopher of science Carol Cleland explains that "there are fundamental differences in methodology between experimental scientists and historical scientists. . . ." She goes on to say that "good historical scientists focus on formulating multiple competing (versus single) hypotheses. . . . Their main research efforts are directed at searching for a smoking gun, a trace that sets apart one hypothesis as providing a better causal explanation (for the observed traces) than the others." [Carol E. Cleland, *Geology*, 29 (2001) 987.]

Abductive reasoning requires one to show that evidence offered in support of a historical hypothesis also rules out alternative or competing explanations. Evolutionary explanations regarding the origin and development of life on earth depend to a large extent on imagination and speculation about past events rather than experimental testing and direct observation. It is crucial to note that the Framework and Standards do not inform students that alternatives to unguided evolutionary explanations exist.

The historical versus experimental distinction is extremely important in the context of modem evolutionary theory. This is because it is grounded in the incontrovertible assumption of Methodological Naturalism (MN). MN, as explained above, rules out

the primary competing historical hypothesis that life arises via a guided or designed process. Thus, MN allows only one of the competing ideas – the materialistic explanation that all of the diversity of life arises via the unguided evolutionary mechanism of random mutation and natural sorting ("selection"). The excluded teleological hypothesis arises not from a religious text, but from direct observations, experiment and statistical analysis of biological systems, and other aspects of the natural world which appear exquisitely designed, including human consciousness. The appearance of design is evidenced by the adjectives and metaphors found both in the Framework and all of the scientific literature. Although MN has application in many areas of physical science, it is counterproductive in the context of historical evolutionary science. This is because its materialistic/Atheistic assumption has the effect of ruling out the competing hypothesis, not on the evidence but by enforcement of its dogma. This causes so-called "scientific" explanations to be functionally Atheistic when it addresses religious questions like the origin of life and its diversity. The Atheistic effect arises because the dogma requires one to ignore evidence inconsistent with materialism and consistent with teleological inferences.

Accordingly, we believe the Framework and Standards must (1) describe methods of testing historical hypotheses in historical sciences by seeking the best of competing explanations, (2) state the fact that this method is not generally used in the development of unguided evolutionary explanations about the origin of life and its diversity, as MN rules out the competition by assumption rather than by the evidence, and (3) include a showing of the evidence that would be

considered but for the use of MN, and (4) describe how that evidence would affect the plausibility of the evolutionary explanations. Unless this kind of objectivity is required, then the effect of the NGSS will not be religiously neutral as it will inexorably lead children over their thirteen years of education to accept the atheistic view of how life is related to the world in which it is lived.

6. Evidence which is inconsistent with the unguided materialistic assumption of MN and which supports the idea that the apparent design of many aspects of the natural world may be real is not included. Some of this evidence (none of which appears in the Framework or Standards) is summarized below:

(a) The characteristics of the matter, energy and forces that comprise the physical universe have discrete values, which if changed by any small amount, would not permit the existence of human life. This phenomenon suggests that the universe itself and its matter, energy and forces have been "fine-tuned" or "designed" for life. If any one of these constants were changed by a small amount, human life would not be possible within the universe. This ***evidence*** supports the view that the universe itself is a design rather than a mere random occurrence.

(b) The *intangible* genetic code and other codes in living organisms have no known natural or material cause. Furthermore, these *intangible* codes are far more sophisticated than any designed by man, suggesting an

intelligent cause for their origin. The genetic code was found in 1998 to exhibit "*Eerie Perfection.*"[2]

(c) Natural cause explanations are inconsistent with the *intangible* messages of life that are carried in sequences of four bases in DNA. Investigation has shown that the sequences are not ordered by any physical or chemical necessity. The lack of such necessity caused renowned geneticist Jacques Monad to describe this as the "ultimate mystery of life."[3]

(d) There are no known coherent materialistic explanations for the origin of life itself. Even the Framework describes the initial cellular information processors needed to get life started as "programmed." In particular we believe the Framework and Standards should include an objective presentation of the state of our existing scientific knowledge relative to the origin of life.

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[2] In *Life's Solution: Inevitable Humans in a Lonely Universe* (2003, p. 13), paleontologist Simon Conway Morris devotes a sub-chapter to the extraordinary efficiency of the Genetic Code, which he calls "Eerie Perfection." See also Stephen J. Freeland and Laurence D. Hurst, *Journal of Molecular Evolution*, 47 (1998) 238.

[3] Jacques Monad, *Chance and Necessity* (Austryn Wainhouse trans.), 1971, pp. 95-96. "[I]f one were able not only to describe these sequences but to pronounce the law by which they assemble, one could declare the secret penetrated, the *ultima ratio discovered*."

(e) Major increases in organized biocomplexity require numerous additions to the information content of DNA before selectable function can arise, thereby casting doubt on the plausibility of stochastic processes to explain all of those increases. The inherent problem of trying to explain large pre-function increases by a random gradual process is that the probability of the occurrence of the new beneficial function decreases exponentially as the number of necessary steps or mutations increase only incrementally. This statistically increases "waiting times" for the occurrence of new function far beyond available probabilistic resources. Examples of increases which are challenges to the gradual Darwinian process are the ubiquity of orphan genes which have no detectable homolog in other organisms, the ubiquity of biological convergence, and the sudden appearance of novel body parts and body plans without adequate evidence of a series of gradual transitions.

(f) Many scientists now believe that the neo-Darwinian mechanism for macroevolution (random DNA mutation and natural selection) is inadequate to explain major rapid increases in organized biocomplexity. An example is James A. Shapiro's *Evolution: A View from the 21st Century* (2011) in which he "explains how conventional evolutionary theory (as elaborated from the Darwinian synthesis) has become outdated. . . ."

(g) A number of statistical analyses and experiments show that random mutation and natural selection are implausible explanations for increases in organized biocomplexity that require multiple integrated steps before function arises. The issue is also intuitive as probability decreases exponentially as the number of integrated steps necessary for function increase only incrementally.

(h) Although the Framework and Standards describe mutations as "beneficial . . . harmful, and some neutral to the organism," much of the data indicate that mutations that are beneficial are extremely rare and that mutations generally result in a loss of functional or prescriptive information rather than a gain of information. This evidence casts doubt on the plausibility of random mutations accounting for major increases in biocomplexity within plausible "waiting times."

7. Definitions of key terms are omitted. The Framework and Standards contain no glossary of key terms and phrases. In particular important concepts such as "science," "scientific knowledge," "evolution," "natural cause," "mechanism," "materialism," "methodological naturalism," "intelligent design," and the like need to be carefully defined. Without clear definitions the Framework and Standards are ambiguous, open to interpretation, confusion and conflicting messages. Definitions are needed to enable clear communication of concepts and core ideas of

science. This is particularly the case when the boundaries between science and religion are so closely intertwined.

A particularly egregious omission is the failure of the Framework and Standards to explain the various definitions of evolution. One common definition is simply "change over time," which means that different species lived during different time periods on earth. This is not controversial. "Microevolution" is small-scale change within a species (adaptation, change in gene frequency). This is also generally not controversial. However, "Macroevolution" is a controversial historical hypothesis. It seeks to explain all major increases in organized biocomplexity via unguided descent with modification from a common ancestry. The Framework and Standards ignore the distinction and controversy and therefore *assume by extrapolation* and the use of MN that microevolution leads to macroevolution over long periods of time. This supposition is the subject of much scientific debate. Students should be informed of the debate and not be given the impression that all forms of "evolution" are the same, and that if one form is true then all are true.

8. There appears to have been no vetting for First Amendment compliance. We note that the Framework and Standards have apparently not been analyzed for First Amendment compliance. A word search of both the Framework and the Standards for the word "religion" results in a "not found" response. This is odd given the clear recognition that the Standards are designed to influence the worldviews of "all children" and "all citizens." They explicitly have as their goal to cause children to relate their lives to the

world around them. Thus, the Framework and Standards studiously ignore the religious rights of parents, children and taxpayers. Instead, the document explicitly and implicitly promotes an atheistic worldview.

9. Religious groups are not included within the concepts of "Equity and Diversity." The emphasis of the Framework and Standards on "Equity and Diversity" omits any mention of equity and non-discrimination among diverse religious groups and beliefs. Although the Framework and Standards discriminate in favor of a religious worldview that is atheistic, they mask that discriminatory effect by omitting any explicit mention of "religion" at all. This leads the student and patrons of science to believe that atheism is not religious and that the Standards are not religious, when in fact atheism is a profoundly religious viewpoint that actively seeks to change the religious views of traditional theists.

10. The religious beliefs of the Committee are not disclosed. Given the religious nature of the Framework and Standards it would be helpful to children, parents and taxpayers to know more about the religious beliefs of the Framework Committee and those who assisted with its development. The Framework is copyrighted by the National Academy of Sciences, and a number of the members of the committee are members of the Academy. A study published in the journal *Nature* shows that ninety-three percent of Academy respondents disbelieved (72.2%) or doubted (20.8%) the existence of a "personal

god."[4] Thus, nearly 92% of the Academy might be classified as sympathetic to the tenets of Religious ("Secular") Humanism. Indeed, one of the major contributors to the Framework, Eugenie Scott, who is the CEO of the National Center for Science Education, is a signatory to Manifesto III and has been listed among the top 50 Atheists in the country.

11. The Framework and Standards are not age appropriate. Since the Standards and Framework address religious issues, then they must ensure that the children have the knowledge and intellectual maturity needed to allow them to make informed judgments about the religiously sensitive material before it is presented. In this respect we find the Framework and Standards inappropriate as they begin teaching these religious concepts in Kindergarten. We believe teachings about religious issues relating to the origin and nature of life should not be introduced before the ninth grade. The complex issues relating to the origin of life and its diversity require a good understanding of a number of scientific concepts dealing with physics, chemistry, geology and biology. Because the origins issue unavoidably addresses religious questions, objective teachings about it will necessarily involve high intellectual capacities but also

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[4] Edward J. Larson & Larry Witham, *Nature*, 394 (1998) 313. The article closes with these remarks: "As we compiled our findings, the NAS issued a booklet encouraging the teaching of evolution in public schools . . . . The booklet assures readers, 'Whether God exists or not is a question about which science is neutral.' NAS president Bruce Alberts said: 'There are many very outstanding members of this academy who are very religious people, people who believe in evolution, many of them biologists.' *Our survey suggests otherwise.*"

a substantial grounding in many scientific disciplines. If the teaching of unguided materialistic evolution begins in Kindergarten, one may reasonably conclude that the children will lack the knowledge and maturity necessary to reach informed decisions about what to believe about that "dangerous idea."[5]

12. Coherence and progression can become tools of indoctrination and evangelism. The Framework and Standards are designed to cause all children to accept the core ideas presented. To achieve this result they utilize a method of progressively increasing knowledge about a "core idea" over the 13-year educational experience so that by the end of the 12th grade the child will be proficient in understanding and accepting the core idea. In addition the idea is used in connection with other ideas so that all of the ideas "cohere" into a single organized belief system or world view. This method has significant merits if one is trying to train a child to play baseball or learn how to read or do math. However, when applied to an idea about religion, it becomes a tool of indoctrination and evangelism. Thus, beginning to teach children uncritically the tenets of unguided materialistic evolution, a "dangerous idea," in Kindergarten and continuing that teaching for the next thirteen years will have the likely effect of causing the child to come to believe in that religious idea and to eventually

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[5] "Darwin's Dangerous Idea" is the title of a book by Atheist Daniel Dennett (1995) that is also the title of a PBS video that features Dennett and his views about evolution. Dennett explains that the idea is "dangerous," because it has the effect of destroying the idea of a creator God that is the foundation of traditional theistic beliefs.

become one who embraces an atheistic view regarding the origin and nature of life.

Accordingly, we believe that subjects that deal with religious issues be taken out of the coherence and progressions and treated separately in upper grade classes (if covered at all) where the curriculum has been carefully designed to present the subject matter objectively to a mature and knowledgeable audience so that the effect of the curriculum is religiously neutral.

13. The Framework and Standards cause science to be an enterprise promoted by consensus. The Framework abandons the scientific method and converts science into an enterprise that rules by consensus. This so-called "consensus" then purports to speak for all scientists. This would seem to convert it from an enterprise that investigates into one that seeks to make social policy. We know that many scientists disagree with this move. This is important as the scientific method holds the definition of scientific knowledge to a high standard. In *Daubert v. Merrill Dow Pharmaceuticals* [509 U.S. 579, 590 (1993)], the Supreme Court found, based on the testimony of scientists, that scientific knowledge is knowledge gained by the scientific method. The scientific method limits scientific knowledge to intersubjectively accessible knowledge that has been tested by observation and experiment, where possible. However, the ambiguous Framework description of scientific knowledge appears to cast it in terms of knowledge that has been agreed to by a "consensus" of an unspecified group of scientists based on assumptions, models and speculations that may or may not be intersubjectively accessible. This puts the classification

of what is and what is not scientific knowledge in the hands of those who control the "consensus." Rather than having knowledge defined by tested evidence, it appears to be defined by what some group of scientists say it is. Often funding for scientific endeavors depends on a particular form of "consensus," which renders the entire notion of scientific objectivity questionable. This formula for science undermines the trust of patrons of science and tends to make science an advocacy enterprise that favors particular religious beliefs and political ends.

14. Politically correct, big government solutions are promoted. The Framework and Standards appear to set societal goals to be achieved by increased governmental involvement and regulation. This is inconsistent with the role of science as an unbiased and objective investigator. It puts science in the role of a public policy advocate that promotes a pro-government, atheistic bias. Government regulations can sometimes be helpful, but they also reduce individual rights and individual freedom. It appears that the Standards and Framework are being used to promote increased government and reduced human freedom.

15. The mechanisms used for obtaining public feedback are biased. It appears from the report on public feedback that most of the feedback came from institutions of science already committed to a functionally atheistic view of life. The only evidence of any contrary response came from those who "wanted evolution excluded." A number of focus groups were conducted, but were any held that involved scientists not committed to the use of methodological naturalism or to groups of open-minded parents or groups of

scientists that might be classified as unconvinced with standard atheistic explanations of origins? Given the lack of objectivity in the Framework with respect to the question of origins, it is understandable that parents and students would want evolution omitted. We believe it can be included in the Standards, but only in a manner that is truly objective so that the presentations are both scientifically valid and religiously neutral. This can be accomplished without discussing origins narratives found in religious texts such as the Bible.

In conclusion we do not believe the Standards and Framework produce a religiously neutral effect required by law and should be revised to achieve that effect and render science truly objective.

Very truly yours

s/ Anne Lassey
Anne Lassey, VP
For the Board of Directors

Exhibit B to Complaint

Citizens for Objective Public Education
COPE

P.O. Box 117
Peck, KS 67120
info@copeinc.com
www.copeinc.org

January 29, 2013

Achieve, Inc.
1400 16th Street NW, Suite 510
Washington, D.C. 20036

RE: Response of Citizens for Objective Public Education, Inc. (COPE) to the January 2013 Draft of National Science Education Standards (the *Standards*) and the Framework for K-12 Science Education (the *Framework*) upon which the Standards are based.

Ladies and Gentlemen,

We have reviewed the second draft of the Next Generation Science Standards and find that it is not responsive to any of the comments we provided regarding the first draft. A copy of that response (dated June 1, 2012) is posted on our website at www.COPEinc.org/docs/COPE-Letter-Achieve-Inc-June-1-2012.pdf. Achieve's lack of response to the serious Constitutional, scientific, and educational issues raised by our letter is both surprising and puzzling.

To reiterate our main complaints:

1. The *Framework* and *Standards* (F&S) address fundamental religious questions. If implemented the F&S will likely indoctrinate children, beginning in Kindergarten, to accept materialistic/atheistic explanations to these religious questions.

2. The F&S do not explain to impressionable children the use, purpose, and effect of using methodological naturalism, which arbitrarily limits explanations in historical (origins) science to materialistic/atheistic causes.

3. The F&S omit evidence that conflicts with the materialistic assumption of methodological naturalism, including evidence that leads to a logical inference of purposeful design in nature.

4. The F&S omit distinctions between historical (origins) science and experimental (operational) science, which are important in assessing the plausibility of competing materialistic and teleological narratives about the origins of the universe and of life.

5. The F&S make no provision to provide students with clear and precise definitions of key terms and phrases necessary to an adequate understanding of the nature of science, the concepts presented, and the methods used for testing hypotheses.

6. The F&S are not age appropriate. For example, throughout grades K-8 the F&S seek to teach answers to religious questions to immature minds that lack the capacity or knowledge to understand or to question the teachings.

7. The *Standards*, which effectively promote an atheistic religious viewpoint, are designed to cohere in mathematics, English language arts, and social studies. Coherence and progression, while good in some cases, become tools of indoctrination and evangelism that will promote that religious viewpoint.

8. The F&S reflect the consensus of a small group of science and education elites. Input from parents and other stakeholders appears to have been minimal or non-existent. Although the F&S purport to promote diversity among a wide variety of groups and classes of individuals, no provision addresses the religious rights of theistic stakeholders.

9. The F&S support specific political views on certain controversial issues. Legitimate competing viewpoints are minimized or omitted.

These concerns have already been explained in detail in our letter of June 1, 2012. In this letter we will provide a few specific examples of our concerns with respect to selected provisions in the January 2013 draft.

A. Materialism.

The philosophy of *materialism* (or naturalism) and the assumption of *methodological naturalism* by NGSS were covered in some detail in our letter of June 1, 2012. Only a couple examples of their use by NGSS will be given here. Crosscutting concept #2 is described as follows:

> "Cause and Effect: Mechanism and Prediction. Events have causes, sometimes simple, sometimes multifaceted. Deciphering causal

> relationships, and the mechanisms by which they are mediated, is a major activity of science and engineering." (Appendix G, p. 13)

In the context of the *Standards*' prescription of methodological naturalism as the sole legitimate scientific methodology, this concept assumes that all events are the product of unguided material/mechanistic causes. However, there are many events for which the cause is unknown, such as the origin of the universe, the origin of the genetic code, and even the origin of life itself. Much of the evidence relative to causation actually points to nonmaterial/teleological causes as a more plausible explanation.

The assumption that only material causes have "mediated" all events in the natural world is evidenced by a dichotomy used throughout the *Standards.* Several references are made to the "natural and designed world" and to "natural and designed systems." These are some examples:

> "Ask questions based on observations of the natural and/or designed world." (Appendix F, p. 5, grades K-2)
> "Cause and effect relationships may be used to predict phenomena in natural and designed systems." (Appendix G, p. 4, 6-8 grade band)
> "Cause and effect relationships can be suggested and predicted for complex natural and human designed systems by examining what is known about smaller scale mechanisms within the system." (Appendix G, p. 4, 9-12 grade band)

These examples *assume* that human-made systems are designed and that "natural" ones are not. This is an

opinion, not a scientific fact. An enormous amount of observable evidence contradicts this dichotomy. Evolutionary biologists, in a paper published in the *Proceedings of the National Academy of Sciences*, acknowledge that "[T]he challenge for evolutionary biologists is to explain how seemingly well designed features of [an] organism, where the fit of function to biological structure and organization often seems superb, is achieved without a sentient Designer." [Adam S. Wilkins, "Between 'design' and 'bricolage': genetic networks, levels of selection, and adaptive evolution," in *PNAS* (2007), 1004 (Suppl. 1), *supra* note 53]

B. The nature of science.

The term *science* is only defined in a general sense in the *Standards*:

> "[S]cience is a way of explaining the natural world." (Appendix H, p. 1) "Science is the pursuit of explanations of the natural world." (Appendix H, p. 2)

This definition is extremely misleading and inadequate. It gives the impression that *all logical* explanations for natural phenomena can be considered, but taken in context with the *Standards*' prescription of methodological naturalism, in reality only *materialistic / mechanistic* explanations are allowed.

The *Standards* list these criteria regarding scientific inquiry:

> "Scientific inquiry is characterized by a common set of values that include: logical thinking, precision, open-mindedness, objectivity,

> skepticism, replicability of results, and honest and ethical reporting of findings." (Appendix H, p. 6)
> "Scientific explanations are subject to revision and improvement in light of new evidence." (Appendix H, p. 6)

These statements are good guidelines, but by limiting science to materialistic explanations, the *Standards* violate these criteria. NGSS leads the student to believe that science is open-minded, when in fact the *Standards* promote the closing of minds with respect to the possibility that the apparent design of living systems is not an illusion.

Also, NGSS never defines the key term "scientific knowledge." The Supreme Court has concluded that "to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method." The *Daubert* decision explains that true science seeks the most "reliable" explanations rather than explanations that seek to reach a pre-ordained conclusion. The Court pointed out that the focus should be "on principles and methodology, not on the conclusions that they generate." [*Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993)] The scientific method is defined by a dictionary frequently used by that Court "as the principles and procedures used in the systematic pursuit of intersubjectively accessible knowledge and involving as necessary conditions the recognition and formulation of a problem, the collection of data through observation and if possible experiment, the formulation of hypotheses, and the testing and confirmation of the hypotheses formulated." [*Webster's Third New*

International Dictionary, 2003] This definition omits any suggestion that scientific knowledge is to be developed through the use of a preconception like methodological naturalism.

C. Evolution.

This core idea from the *Standards* relates to the *origin of the diversity of life*:

> "Genetic information, like the fossil record, also provides evidence for evolution. DNA sequences vary among species, but there are many overlaps; in fact, the ongoing branching that produces multiple lines of descent can be inferred by comparing the DNA sequences of different organisms. Such information is also derivable from the similarities and differences in amino acid sequences and from anatomical and embryological evidence." (HS-LS4.A)

This description is *biological evolution*, a materialistic origins narrative. Only evidence that appears to support biological evolution is given, and no evidence is given that critiques the adequacy of the theory. The core idea listed above is particularly misleading, since the evidence cited (fossil record, similarities, embryological development) can also be interpreted as evidence that the apparent design of the system is not an illusion. However (because of the use of methodological naturalism), the evidence that leads to a teleological inference, as explained above in the *PNAS* article, is omitted.

D. Environmentalism.

This important topic was not addressed in the letter of June 1, 2012. The *Framework* and *Standards* seek to imbue students with a particular view regarding the manner in which humans should respond to climate change, sustainability, and other environmental matters. This issue impacts not only religion, but also political and Constitutional views regarding human liberty, the right to property, and the proper role of government. Like origins science, environmental science often reduces to matters of opinion about many controversial issues. The fact that the F&S take a position on these issues seems to be inconsistent with the view of the U.S. Supreme Court that the state should not prescribe what is "orthodox in politics, religion, nationalism or other matters of opinion." [West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943)] The following are specific examples taken from the *Standards.*

Several core ideas, including those listed below, relate to *human interaction* with the environment:

> "Moreover, anthropogenic changes (induced by human activity) in the environment – including habitat destruction, pollution, introduction of invasive species, overexploitation, and climate change – can disrupt an ecosystem and threaten the survival of some species." (HS-LS2-j)
> "But human activity is also having adverse impacts on biodiversity through overpopulation, overexploitation, habitat destruction, pollution, introduction of invasive species, and climate change." (HS-LS2-l)

The emphasis in the *Standards* seems to be on ameliorating the negative effects of human activities – without giving consideration to the negative effects of governmental regulation on human liberty, property rights, and the economy. Also, there needs to be a greater emphasis on positive human effects that result from responsible interactions with the environment. The issue is extraordinarily complex and based in many respects on opinions which frequently change as new data come to light. What seems to be lacking is an objective discussion of competing viewpoints.

Several core ideas, including the ones listed below, deal with the controversial issue of *climate change.*

> "The geological record shows that changes to global and regional climate can be caused by interactions among changes in the sun's energy output or Earth's orbit, tectonic events, ocean circulation, volcanic activity, glaciers, vegetation, and human activities." (HS-ESS2-e,f)
> "Human activities, such as the release of greenhouse gases from burning fossil fuels, are major factors in the current rise in Earth's mean surface temperature ('global warming')." (MS-ESS3-e)

While there is evidence that global temperatures may be slowly rising, the causes and future effects of "global warming" are still being debated. In particular, students should be aware that there is widespread debate among climate scientists over (a) the extent to which greenhouse gases (GHG) contribute to changes in global temperature, (b) the degree of climate sensitivity to atmospheric carbon dioxide, (c) whether the consequences of GHG warming will be net

beneficial or net harmful, and (d) whether the benefits of any attempts to reduce GHG emissions would be worth the costs. The curriculum needs to be balanced and objective on this topic.

Another core idea deals with *sustainability*:

> "The sustainability of human societies and the biodiversity that supports them requires responsible management of natural resources." (HS-ESS3-e)

The general idea of protecting the environment and conserving natural resources is not controversial. However, "sustainability" has become a political movement that emphasizes simpler lifestyles, reduced economic development, global redistribution of wealth, limited use of natural resources in developed countries, "green" (renewable) energy, "smart growth" policies, human population control, and global governance. In short, sustainability is more a term of ideology than of science; it is a word that needs to be defined and used carefully. But more importantly, the issue deals with "politics, religion and other matters of opinion." We question the wisdom of even raising these issues with impressionable young minds. If they are raised, then the state assumes an enormous burden of presenting the issues objectively so that they will have a neutral effect. It is clear to us that NGSS coverage of environmental issues lacks the necessary objectivity.

E. Glossary and definitions.

The January 2013 draft contains a "Glossary of Common Acronyms used by NGSS." A dictionary definition of *glossary* is a "list of terms in a special subject, field, or area of usage, with accompanying

definitions." No definitions are given in the NGSS "Glossary," so the word is used incorrectly. A real glossary is needed so that the meaning of key words is clear. Among the many words and phrases that should be defined are these: science, scientific knowledge, materialism, mechanism, naturalism, methodological naturalism, teleology, design, information, evolution, homology, adaptation, mutation, natural selection, climate change, global warming, ecosystem, and sustainability.

In summary, Achieve has failed to respond to the key concerns we have raised about the proposed NGSS document. We believe the issues we raise must be satisfactorily resolved to ensure that the *Framework* and *Standards* are consistent with the mandates of the First Amendment that "government activities [which] *touch on the religious sphere* ... be secular in purpose, evenhanded in operation, and neutral in primary impact." [*Gillette v. United States*, 401 U.S. 437, 450 (1971)]

Sincerely yours,

/s/ Robert P. Lattimer
Robert P. Lattimer, Ph.D.
President
(330) 285-6409

APPENDIX E

Constitutional Provisions, Statutes, and Regulations

U.S. Constitution

Amendment 1 (Establishment, Free Exercise and Speech Clauses)

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment 14 (Equal Protection Clause)

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article Six, Kansas Constitution

Article Six: Education

§ 1: Schools and related institutions and activities. The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law.

§ 2: State board of education and state board of regents.

(a) The legislature shall provide for a state board of education which shall have general supervision of public schools, educational institutions and all the educational interests of the state, except educational functions delegated by law to the state board of regents. The state board of education shall perform such other duties as may be provided by law.

(b) The legislature shall provide for a state board of regents and for its control and supervision of public institutions of higher education. Public institutions of higher education shall include universities and colleges granting baccalaureate or postbaccalaureate degrees and such other institutions and educational interests as may be provided by law. The state board of regents shall perform such other duties as may be prescribed by law.

(c) Any municipal university shall be operated, supervised and controlled as provided by law.

§ 3: Members of state board of education and state board of regents.

(a) There shall be ten members of the state board of education with overlapping terms as the legislature may prescribe. The legislature shall make provision for ten member districts, each comprised of four contiguous senatorial districts. The electors of each member district shall elect one person residing in the district as a member of the board. The legislature shall prescribe the manner in which vacancies occurring on the board shall be filled.

(b) The state board of regents shall have nine members with overlapping terms as the legislature may prescribe. Members shall be appointed by the governor, subject to confirmation by the senate. One member shall be appointed from each congressional district with the remaining members appointed at large, however, no two members shall reside in the same county at the time of their appointment. Vacancies occurring on the board shall be filled by appointment by the governor as provided by law.

(c) Subsequent redistricting shall not disqualify any member of either board from service for the remainder of his term. Any member of either board may be removed from office for cause as may be provided by law.

§ 4: Commissioner of education. The state board of education shall appoint a commissioner of education who shall serve at the pleasure of the board as its executive officer.

§ 5: Local public schools. Local public schools under the general supervision of the state board of education

shall be maintained, developed and operated by locally elected boards. When authorized by law, such boards may make and carry out agreements for cooperative operation and administration of educational programs under the general supervision of the state board of education, but such agreements shall be subject to limitation, change or termination by the legislature.

§ 6: Finance.

(a) The legislature may levy a permanent tax for the use and benefit of state institutions of higher education and apportion among and appropriate the same to the several institutions, which levy, apportionment and appropriation shall continue until changed by statute. Further appropriation and other provision for finance of institutions of higher education may be made by the legislature.

(b) The legislature shall make suitable provision for finance of the educational interests of the state. No tuition shall be charged for attendance at any public school to pupils required by law to attend such school, except such fees or supplemental charges as may be authorized by law. The legislature may authorize the state board of regents to establish tuition, fees and charges at institutions under its supervision.

(c) No religious sect or sects shall control any part of the public educational funds.

§ 7: Savings clause.

(a) All laws in force at the time of the adoption of this amendment and consistent therewith shall remain in full force and effect until amended or repealed by the legislature. All laws inconsistent with this amendment,

unless sooner repealed or amended to conform with this amendment, shall remain in full force and effect until July 1, 1969.

(b) Notwithstanding any other provision of the constitution to the contrary, no state superintendent of public instruction or county superintendent of public instruction shall be elected after January 1, 1967.

(c) The state perpetual school fund or any part thereof may be managed and invested as provided by law or all or any part thereof may be appropriated, both as to principal and income, to the support of the public schools supervised by the state board of education.

§ 8: Eliminated by amendment.

§ 9: Eliminated by amendment.

§ 10: Eliminated by amendment.

Kansas Statutes Annotated

K.S.A. 72-1127. Accredited schools; mandatory subjects and areas of instruction; legislative goal of providing certain educational capacities

(a) In addition to subjects or areas of instruction required by K.S.A. 72-1101, 72-1103, 72-1117, 72-1126 and 72-7535, and amendments thereto, every accredited school in the state of Kansas shall teach the subjects and areas of instruction adopted by the state board of education.

(b) Every accredited high school in the state of Kansas also shall teach the subjects and areas of instruction

necessary to meet the graduation requirements adopted by the state board of education.

(c) Subjects and areas of instruction shall be designed by the state board of education to achieve the goal established by the legislature of providing each and every child with at least the following capacities:

(1) Sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;

(2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;

(3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;

(4) sufficient self-knowledge and knowledge of his or her mental and physical wellness;

(5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

(6) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

(7) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

(d) Nothing in this section shall be construed as relieving the state or school districts from other duties and requirements imposed by state or federal law including, but not limited to, at-risk programs for pupils needing intervention, programs concerning special education and related services and bilingual education.

History: Laws 2005, ch. 152, § 6; Laws 2014, ch. 93, § 32, eff. May 1, 2014.

K.S.A. 72-6479. School performance accreditation system; curriculum standards; student assessments; school site councils. (Formerly, 72-6439)

(a) In order to accomplish the mission for Kansas education, the state board of education shall design and adopt a school performance accreditation system based upon improvement in performance that reflects high academic standards and is measurable.

(b) The state board shall establish curriculum standards which reflect high academic standards for the core academic areas of mathematics, science, reading, writing and social studies. The curriculum standards shall be reviewed at least every seven years. Nothing in this subsection shall be construed in any manner so as to impinge upon any district's authority to determine its own curriculum.

(c) The state board shall provide for statewide assessments in the core academic areas of mathematics, science, reading, writing and social studies. The board shall ensure compatibility between the statewide assessments and the curriculum standards established pursuant to subsection (b). Such

assessments shall be administered at three grade levels, as determined by the board. The state board shall determine performance levels on the statewide assessments, the achievement of which represents high academic standards in the academic area at the grade level to which the assessment applies. The state board should specify high academic standards both for individual performance and school performance on the assessments.

(d) Each school in every district shall establish a school site council composed of the principal and representatives of teachers and other school personnel, parents of pupils attending the school, the business community, and other community groups. School site councils shall be responsible for providing advice and counsel in evaluating state, school district, and school site performance goals and objectives and in determining the methods that should be employed at the school site to meet these goals and objectives. Site councils may make recommendations and proposals to the school board regarding budgetary items and school district matters, including, but not limited to, identifying and implementing the best practices for developing efficient and effective administrative and management functions. Site councils also may help school boards analyze the unique environment of schools, enhance the efficiency and maximize limited resources, including outsourcing arrangements and cooperative opportunities as a means to address limited budgets.

(e) Whenever the state board of education determines that a school has failed either to meet the accreditation requirements established by rules and regulations or

standards adopted by the state board or provide the curriculum required by state law, the state board shall so notify the school district in which the school is located. Such notice shall specify the accreditation requirements that the school has failed to meet and the curriculum that the school has failed to provide. Upon receipt of such notice, the board of education of such school district is encouraged to reallocate the resources of the school district to remedy all deficiencies identified by the state board. When making such reallocation, the board of education shall take into consideration the resource strategies of highly resource-efficient districts as identified in phase III of the Kansas education resource management study conducted by Standard and Poor's (March 2006).

(f) The provisions of this section shall be effective from and after July 1, 2015, through June 30, 2017.

History: L. 2015, ch. 4, § 20; Apr. 2.

K.S.A. 72-6479 previously was 72-6439 and 72-6439a which were reapealed but essentially reincorporated into 72-6479, effective July 1, 2015

72-9606. Applications for state aid; required information. In order to be approved for payment of state aid, any application under K.S.A. 72-9605, and amendments thereto, shall contain the following information:

(a) The number of certificated personnel of the school district who are participating in the program;

(b) a description of the scope, objectives, procedures and activities of and the services provided by the professional development program for the school year;

(c) the manner in which the professional development program is aligned with the mission, academic focus, and quality performance accreditation school improvement plan;

(d) a description of the performance measures utilized in meeting the evaluation standards and criteria established under subsection (b) of K.S.A. 72-9603, and amendments thereto;

(e) the amount budgeted by the board for its professional development program;

(f) the amount of the actual expenses incurred by the school district in maintaining an approved professional development program;

(g) the amount of the actual expenses, if any, incurred by the school district for the provision of innovative and experimental procedures, activities and services in its professional development program; and

(h) such additional information as determined by the state board.

History: L. 1984, ch. 260, § 6; L. 1994, ch. 172, § 4; L. 2003, ch. 9, § 7; July 1.

Kansas Administrative Regulations

K.A.R. 91-31-31. Definitions.

(a) "Accredited" means the status assigned to a school that meets the minimum performance and quality criteria established by the state board.

(b) "Accredited on improvement" means the status assigned to a school that, for two consecutive years, is described by any of the following:

(1) The school fails to meet one or more of the performance criteria applicable to the school.

(2) The school has a prescribed percentage of students in one or more student subgroups that fails to meet one or more of the performance criteria applicable to the school.

(3) The school fails to meet three or more of the quality criteria applicable to the school.

(c) "Conditionally accredited" means the status assigned to a school that, for three consecutive years, is described by either of the following:

(1) The school has a prescribed percentage of all students assessed that scores below the proficient level on the state assessments.

(2) The school fails to meet four or more of the quality criteria applicable to the school.

(d) "Curriculum standards" means statements, adopted by the state board, of what students should know and be able to do in specific content areas.

(e) "External technical assistance team" means a group of persons selected by a school for the purpose of advising school staff on issues of school improvement, curricula and instruction, student performance, and other accreditation matters.

(f) "Local board of education" means the board of education of any unified school district or the governing body of any nonpublic school.

(g) "Not accredited" means the status assigned to a school that, for five consecutive years, is described by either of the following:

(1) The school has a prescribed percentage of all students assessed that scores below the proficient level on the state assessments.

(2) The school fails to meet four or more of the quality criteria applicable to the school.

(h) "On-site visit" means a visit at a school by either the school's external technical assistance team or a state technical assistance team.

(i) "School" means an organizational unit that, for the purposes of school improvement, constitutes a logical sequence of elements that may be structured as grade levels, developmental levels, or instructional levels.

(j) "School improvement plan" means a multiyear plan for five years or less that is developed by a school and that states specific actions for achieving continuous improvement in student performance.

(k) "Standards of excellence" means the expectations for academic achievement that the state board has set for Kansas schools.

(l) "State assessments" means the assessments that the state board administers in order to measure student learning within the Kansas curriculum standards for mathematics, reading, science, history and government, and writing.

(m) "State board" means the state board of education.

(n) "State technical assistance team" means a group of persons appointed by the state department of education to assist schools in meeting the performance and quality criteria established by the state board.

(o) "Student subgroup" means those students within a school who, for monitoring purposes, are classified by a common factor, including economic disadvantage, race, ethnicity, disability, and limited English proficiency.

(p) "Unit of credit" means a measure of credit that may be awarded to a student for satisfactory completion of a particular course or subject. A full unit of credit is credit that is awarded for satisfactory completion of a course or subject that is offered for and generally requires 120 clock-hours to complete. Credit may be awarded in increments based upon the amount of time a course or subject is offered and generally requires to complete. Individual students may be awarded credit based upon demonstrated knowledge of the content of a course or subject, regardless of the amount of time spent by the student in the course or subject. This regulation shall be effective on and after July 1, 2005.

(Authorized by and implementing Article 6, Section 2(a) of the Kansas Constitution; effective July 1, 2005.)

K.A.R. 91-31-32. Performance and quality criteria.

(a) Each school shall be assigned its accreditation status based upon the extent to which the school has met the performance and quality criteria established by the state board in this regulation.

(b) The performance criteria shall be as follows:

(1) Except as provided in subsection (d), having met the percentage prescribed by the state board of students performing at or above the proficient level on state assessments or having increased overall student achievement by a percentage prescribed by the state board;

(2) having 95% or more of all students and 95% or more of each student subgroup take the state assessments;

(3) having an attendance rate equal to or greater than that prescribed by the state board; and

(4) for high schools, having a graduation rate equal to or greater than that prescribed by the state board.

(c) The quality criteria shall consist of the following quality measures, which shall be required to be in place at each school:

(1) A school improvement plan that includes a results-based staff development plan;

(2) an external technical assistance team;

(3) locally determined assessments that are aligned with the state standards;

(4) formal training for teachers regarding the state assessments and curriculum standards;

(5) 100% of the teachers assigned to teach in those areas assessed by the state or described as core academic subjects by the United States department of education, and 95% or more of all other faculty, fully certified for the positions they hold;

(6) policies that meet the requirements of S.B.R. 91-31-34;

(7) local graduation requirements that include at least those requirements imposed by the state board;

(8) curricula that allow each student to meet the regent's qualified admissions requirements and the state scholarship program;

(9) programs and services to support student learning and growth at both the elementary and secondary levels, including the following:

(A) Computer literacy;

(B) counseling services;

(C) fine arts;

(D) language arts;

(E) library services;

(F) mathematics;

(G) physical education, which shall include instruction in health and human sexuality;

(H) science;

(I) services for students with special learning needs; and

(J) history, government, and celebrate freedom week. Each local board of education shall include the following in its history and government curriculum:

(i) Within one of the grades seven through 12, a course of instruction in Kansas history and government. The

course of instruction shall be offered for at least nine consecutive weeks. The local board of education shall waive this requirement for any student who transfers into the district at a grade level above that in which the course is taught; and

(ii) for grades kindergarten through eight, instruction concerning the original intent, meaning, and importance of the declaration of independence and the United States constitution, including the bill of rights, in their historical contexts, pursuant to L. 2013, ch. 121, sec. 2 and amendments thereto. The study of the declaration of independence shall include the study of the relationship of the ideas expressed in that document to subsequent American history;

(10) programs and services to support student learning and growth at the secondary level, including the following:

(A) Business;

(B) family and consumer science;

(C) foreign language; and

(D) industrial and technical education; and

(11) local policies ensuring compliance with other accreditation regulations and state education laws.

(d) If the grade configuration of a school does not include any of the grades included in the state assessment program, the school shall use an assessment that is aligned with the state standards.

(Authorized by and implementing Article 6, Section 2(a) of the Kansas Constitution and K.S.A. 2013 Supp.

72-1130; effective July 1, 2005; amended Jan. 10, 2014.)

K.A.R. 91-31-38 Accreditation status.

(a) Each school shall be classified as one of the following:

(1) Accredited;

(2) accredited on improvement;

(3) conditionally accredited; or

(4) not accredited.

(b) Each school that has accredited status from the state board on June 30, 2005 shall retain its accreditation status until that status is replaced with a status specified in subsection (a) of this regulation.

(c) Each school that seeks initial accreditation by the state board shall be designated as a candidate school and shall be granted accredited status until the school's status can be determined using the criteria prescribed in S.B.R. 91-31-32.

(d) If a school is accredited on improvement or conditionally accredited, the school shall develop and implement a corrective action plan approved by the state technical assistance team assigned to the school and shall implement any corrective action required by the state board.

(e) Each school that is accredited on improvement and that fails to meet one or more of the performance criteria in regard to all students assessed or four or more of the quality criteria shall be classified as conditionally accredited.

(f) Any school that is accredited on improvement or conditionally accredited may attain the status of accredited or accredited on improvement, respectively, by meeting, for two consecutive years, the criteria for that accreditation status.

(g) Each school that is conditionally accredited and that, for a fifth consecutive year, fails to meet one or more of the performance criteria or four or more of the quality criteria shall be classified as not accredited.

(h) If a school is not accredited, sanctions shall be applied.

This regulation shall be effective on and after July 1, 2005.

(Authorized by and implementing Article 6, Section 2(a) of the Kansas Constitution; effective July 1, 2005.)