No. 16-229

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

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF REPLY

The Brief in Opposition (the "Response") of The Kansas State Board of Education and the Commissioner of the Kansas State Department of Education (the "State Supervisor") misstates the question.

This case is about whether parents and children may complain if a state supervisor of schools guides its supervised schools and teachers to replace the theistic religion of the children with a non-theistic religious worldview that is materialistic/atheistic. Defendants argue that the parents and children are not injured because the schools might not follow the guidance. Well, why should any rational parent or child believe that or even know the extent to which the school is or is not implementing an incremental, progressive, and deceptive 13 year program? The Response does not deny that the schools have no real alternative but to follow the guidance. Teachers must be trained to teach consistent with it, the children must be tested to determine if they have performed per the expectations of the guidance, and the schools may be sanctioned if they fail the tests.

The State's religious guidance severely conflicts with the rights of parents to direct the religious education of their children and the rights of children to not be indoctrinated by the state to accept a particular religious view (the "Religious Rights"). Both the parents and children are its targets and clearly have a stake in the Standards. Accordingly, the injury is actual, personal, direct and concrete.

Significantly, the Response does not deny the enormous importance of the Question. If this issue is not allowed to be tested on its merits, then this Court's failure to act is likely to facilitate a severe abridgement of religious liberty throughout the Country never imagined by the authors of the First Amendment.

Nor does the Response deny that the Decision is based on a key misstatement of the allegations of the Complaint. Instead the denial is based on the conjecture that even if the Court misstated the allegations, it did not base its decision on the misstatement. That too is a misstatement, as the penultimate paragraph of the Decision for denying actual injury is based on that misstatement, thereby classifying the violation of the religious rights of parents and children as nothing more than a "disagreement."

The Response argument that the Decision is not in conflict with the 15 cases, ignores that those cases find standing because a religious preference in a K-12 school system violates the rights of parents to direct the religious education of their impressionable children and the rights of children to not be indoctrinated with respect to a particular religious view. Of course one may search for mention of those rights in the Response and come up empty handed.

Finally, the Response relies on a highly technical argument for declining review of this most important case. The so-called misinterpretation of state law is not in fact the Decision's misinterpretation of state law, rather it is its misstatement of Plaintiffs' brief in support of their appeal.

The lack of substantive response to the Petition by the State Supervisor of schools and the enormity of its importance simply underscore the need for review.

I. THE RESPONSE MISSTATES THE QUESTION

The important question is not whether the schools write the curriculum. Everyone agrees that the schools and teachers write the curricula and the lesson plans, etc. The question raised by the Decision is whether Parents and Children are personally injured when the State Supervisor of their schools guides those schools and teachers to write it in a manner that seeks to replace the Children's Christian beliefs with a "non-theistic religious worldview that is materialistic/atheistic" in violation of their legally enforceable Religious Rights.

The Decision and Response do not deny that the Standards adopted by the Supervisor are designed to guide the schools so that all students meet the "performance expectations for what students should 'know and be able to do' at each grade level." (App. A at 6)

Also, neither denies that the teachers of the schools are to be trained to teach children so that they will meet the performance expectations, that the schools are required to test their students to determine if the expectations have been met, and that the state may sanction schools that don't pass the tests.

Thus, the Question is not whether the schools had implemented the alleged religious program when instituted, but rather whether the parent and student targets of the religious program are injured in fact

when the School Supervisor undertakes to use their supervised schools to guide the children's religious education in violation of their Religious Rights.

II. THE RESPONSE DOES NOT CHALLENGE THE ENORMOUS IMPORTANCE OF THE QUESTION

The Response does not challenge Petitioners' contentions regarding the enormous importance of a program designed to cause all K-12 public schools in the Country to promote a non-theistic religious worldview or that the program has now been adopted by nineteen states and the District of Columbia in the past three years.

In addition the Response does not expressly controvert any of the following of Plaintiff's arguments:

1. that the Question is the most important one addressed by the Court since its 1940 decision in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Pet.1).

2. that the Parents and Children have the Religious Rights and that the adoption of the standards conflict with those rights (Pet. 22-23);

3. that "religion" under the First Amendment includes non-theistic religions such as Religious ("Secular") Humanism and Atheism, religions which the Complaint alleges the Standards promote (Pet. 12-15);

4. that application of the Establishment Clause by non-theists has eliminated from K-12 public education theistic views about ultimate religious questions addressed by the Standards, but not the issues

themselves, thereby allowing students to be led to answer the questions with only non-theistic explanations (Pet. 1-3);

5. that the State Supervisor of public schools may not guide the schools to convert students to accept a non-theistic religious worldview (Pet. 15-17);

6. that the allegations of the Complaint must be deemed true and valid for purposes of determining standing (P.1 10);

7. that the Decision misstates the Complaint as described at pages 8 and 9 and 34-36 of the Petition, and that the misstatement amounts to an improper merits analysis, although it does deny (incorrectly) that such key misstatements form the basis for the Decision (Resp. 7);

8. that if the parents and children who are the targets and objects of the Standards lack standing then no one is qualified to test the religiosity of the Standards (Pet. 18);

9. that elimination of the right of theistic parents and children to complain about a goal of the state to supervise its schools to cause students to embrace a non-theistic religious worldview (a) is not substantively neutral, (b) will abridge their religious liberty, (c) will cause graduates of K-12 schools that meet the performance expectations of the standards to embrace that worldview, and (d) will cause most voters in the "next generation" to "reflect that faith" (Pet. 2).

Although the Response denies that the Decision sends a false message to the educational community that the Standards are not religious, that denial is both

unsupported and contradicted by the plain language of the Opinion.

Finally, as incorrectly suggested by the Response, the Complaint is not about the promotion of "Intelligent Design." It is about the need in education about the origin of the universe, of life and the diversity of life for objective teaching about the concealed orthodoxy of scientific materialism used by the Standards. That orthodoxy bans the competing idea called teleology. Teleology and materialism have provided the foundation for competing theistic and non-theistic religious views since at least the 5th Century BC. Objective teaching of origins science to impressionable, unknowledgeable and cognitively immature children is necessary to achieve religious neutrality.

III. THE CRITICAL ERROR OF THE RESPONSE

The critical error of the Response is that it incorrectly contends that the Decision's misstatements that the Complaint alleges the Standards are "non-religious" does not form the Basis for the Decision.

As the Response, recognizes, the Complaint repeatedly and in detail alleges that the Standards seek to "suppress" the Children's theistic beliefs with a "***non-theistic religious*** worldview that is materialistic/atheistic." However, the Response incorrectly states that the Decision does not base its decision on its "non-religious" false misstatements (Resp. 7).

As explained at Pet. 7-10 and 34-36 the Decision's conclusion that the Parents and Students fail to allege

a justiciable Establishment Clause injury is because the Complaint alleges that the "Standards intend to promote a ***non-religious*** worldview" (emphasis added). This false assertion is repeated six times throughout the Decision. In no instance does the Decision advise this Court or the Country's K-12 schools that the Complaint alleges in great detail the exact opposite - that the Standards seek to promote a "***non-theistic religious*** worldview that is materialistic/atheistic."

Because the Decision misstates the key allegation of the Complaint as alleging the standards to be not religious, it uses that false basis to incorrectly conclude that the "Standards do not condemn any or all religions and do not target religious believers for disfavored treatment," when in fact the Complaint alleges precisely the opposite:

> "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. This injury does not suffice." App. A 10-11 [emphasis added]

Thus, the above false conclusion of the Decision that the Complaint alleges a secular or non-religious set of standards, becomes the false basis for the false conclusion that the injuries to the Parents and Children amount to nothing more than

"disagree[ments]" rather than the actual violation of their legally enforceable religious and equal protection rights. *Id*.

As explained in the Petition, the misstatement by the Decision that the Complaint alleges the standards to be not religious is enormously important. The misstatement eliminates entirely both actual and threatened Establishment Clause injuries to anyone. If the Standards are not religious then there can be no Establishment Clause injury, hence no one may complain.

It also sends a false message to the educational establishment that the standards are not in any way religious and therefore they are legally appropriate for the states that have adopted them and those that have not. Thus, the Decision effectively approves and endorses the standards for the entire country when, in fact the alleged religious nature has not been tested on the merits.

Thus, the Decision amounts to an improper merits analysis. Finally, it implicitly rules that "religion" does not include non-theistic belief systems based on materialism and atheism, as the Complaint in fact alleges. This essentially authorizes public K-12 education to promote non-theistic worldviews to the exclusion of theistic ones.

IV. THE DECISION CONFLICTS WITH THE 15 CITED CASES

The fifteen cases involve school systems that had established a religious preference or “orthodoxy” (Pet. 23, 25-28). The establishment of the preference itself produces an actual injury to children enrolled in the system and their parents, because the unwelcome preference violates the rights of the parents to direct the religious education of the child and the right of the impressionable child to not be indoctrinated by the state. Id. and see in particular: *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224-5, n. 9 (1963); *Valley Forge Christian College v. AUSCS*, 454 U.S. 464, 486, n. 22 (1982); *Edwards v. Aguillard*, 482 U.S. 578, 583-5 (1987); *Lee v. Weisman*, 505 U.S. 577, 584, 592 (1992); *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 17-18 (2004); *Bell v. Little Axe ISD*, 766 F.2d 1391, 1398 (10th Cir. 1985); *Fleischfresser v. Dir. of Sch. Dist. 200*, 15 F.3d 680, 683-4 (7th Cir 1994); *Moss v. Spartanburg CSD Seven*, 683 F.3d 599, 607 (4th Cir. 2012); *Steele v. Van Buren Public School Dist,* 845 F.2d 1492, 1495 (8th Cir. 1988); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1531-2 (9th Cir. 1985).

The cases also hold that the preference produces actual injuries in fact even if participation in the program is elective and not required. The reason is that the burden of having to accept or avoid the unwelcome preference for impressionable children is itself a direct and personal injury. Similarly, an Atheist who sees an unwelcome Christian cross on a public right of way is injured as it imposes on him the burden of accepting the unwelcome message or avoiding the use of the highway, which avoidance is not necessary

(*Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1113 (10th Cir. 2010).

The Standards establish a religious preference to be imposed daily for 13 years in a subtle, incremental, progressive and deceptive manner which essentially cannot be avoided by unknowledgeable parents and cognitively immature, impressionable and unknowledgeable children.

Thus, the Decision is inconsistent with the 15 cases, as it holds that the religious preference established by the Standards which violates the religious rights of the Parents and Children and which is nearly impossible to avoid is not a sufficient injury to entitle them to complain. In substance the Decision conflicts with each and every one of the fifteen cases.

Defendants' argue that the Decision does not conflict as the 15 cases involved religious practices which were actually occurring in the schools. However, in each case the Parents and Children were permitted to avoid the practices by choosing not to participate. But injury still was found to exist even though the children were not subjected to the actual occurrence of the practice. The actual injury flows from the burden of the Parent and Child to either tolerate the unwelcome preference or to take special efforts to avoid it.

In the case of the parents, there is no way to know if and when the Preference is being implemented by their school. As a consequence their only alternative is to tolerate or complain about the unwelcome preference. The Decision, however, denies the complaint alternative. This then requires Plaintiffs

and all other parents and children in the US to suffer the unwelcome taking of their fundamental rights, an injury that is personal, direct and concrete as they are the targets of the Standards and clearly have a stake in them.

V. THE DECISION WAS NOT BASED ON AN INTERPRETATION OF STATE LAW, RATHER IT WAS BASED ON MISSTATEMENTS OF THE COMPLAINT AND PLAINTIFFS BRIEF.

Section III of the Response argues that review is inappropriate for Federal review as the Petition asserts that the Decision is based on a misinterpretation of state law. However, the Petition does not make that argument.

Petitioners allege both actual and threatened injuries. As explained on pages 29-30, Petitioners claim that they have standing with respect to the threatened injuries as "the implementation of the full set of standards is effectively required." In making this argument they point out that the Decision's conclusion with respect to the threatened injury is based on "the false premise that schools may choose not to 'adopt' the standards, and therefore until a school has adopted the standards no injury will accrue." (Pet. 29)

The Response argues that this contention amounts to a quarrel over the Decision's misinterpretation of state law. In fact, the Decision's contention that the schools may choose to adopt or not adopt the standards is not based on its interpretation of state law, rather it is based on its misstatement of Petitioners' brief in support of its appeal.

The Decision states at the end of its discussion of the threatened injuries:

> "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." (App 15, emphasis added)

The Petition takes issue with this conclusion because the statutes and even the Decision itself make clear that standards are adopted by the state, not the schools (App 4-6). It is up to the schools to write curriculum (not standards) that meet the performance expectations established by the State standards.

The Decision does not cite any authority or statute for its penultimate conclusion that the schools may choose not to adopt the standards. Rather pages 12 and 13 of the Decision show that this conclusion is based on statements in Plaintiff's brief on appeal, not on any statute (App. A 12-13). However, Plaintiffs' brief in no place or section contends that the schools may choose to not adopt the standards. Rather it explains at length that as a practical matter the schools must implement them and therefore the threatened injury is not speculative (Brief of Appellants, *COPE, et al. v. Kansas State Board of Education, et al.*, No. 14-3280, 24-31 (Tenth Cir., March 20, 2015).

CONCLUSION

Review is necessary to preserve the religious liberty of parents and children in the Country's K-12 schools.

Respectfully submitted.

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October 24, 2016