

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

COPE (a.k.a. CITIZENS FOR OBJECTIVE,)
PUBLIC EDUCATION, INC.), *et al.*,)
)
Plaintiffs,)
)
v.)
)
KANSAS STATE BOARD OF)
EDUCATION, *et al.*,)
)
Defendants.)
_____)

Case. No. 13-CV-4119-KHV-JPO

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

OFFICE OF KANSAS ATTORNEY GENERAL
DEREK SCHMIDT

Jeffrey A. Chanay, KS Sup. Ct. No. 12056
Deputy Attorney General, Civil Litigation Division
Stephen O. Phillips, KS Sup. Ct. No. 14130
Assistant Attorney General
Memorial Bldg., Third Floor
120 SW Tenth Ave.
Topeka, KS 66612
Phone: 785-296-2215
Fax: 785-291-3767
E-mail: jeff.chanay@ksag.org
steve.phillips@ksag.org

Cheryl L. Whelan, KS Sup. Ct. No. 14612
General Counsel
Kansas State Department of Education
Office of General Counsel
Landon State Office Building
900 SW Jackson St., Suite 102
Topeka, KS 66612
E-mail: cwhelan@ksde.org

Attorneys for Defendants

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ARGUMENTS AND AUTHORITIES

Plaintiffs' Response (Doc. #40) to Defendants' Memorandum in Support of Their Motion to Dismiss (Doc. #30) continues Plaintiffs' mischaracterization of the Framework and Standards, attempts to change Plaintiffs' theory of how the Framework and Standards purportedly injure Plaintiffs, and reiterates Plaintiffs' request for a remedy that itself would violate the Establishment Clause. For the reasons stated in Defendants' Memorandum in Support (Doc. #30) and below, Defendants' respectfully request that the Court grant Defendants' Motion to Dismiss (Doc. #29) and dismiss Plaintiffs' suit in its entirety.¹ Plaintiffs lack standing and their Complaint fails to state a claim for which relief may be granted.

I. The Court Is Not Required To Accept Plaintiffs' Mischaracterization Of The Framework And Standards, Both Of Which Are Before The Court.

Plaintiffs' claims rest on a mischaracterization of the Framework and Standards. *See* Defs.' Mem. (Doc. #30) at 34-35. Plaintiffs do not contest that the entirety of the Framework and the Standards are properly before the Court. Plaintiffs argue, however, that their characterization of the Framework and Standards creates "an issue of fact to be resolved against Defendants on a motion to dismiss." Pls.' Resp. (Doc. #40) at 35; *see also* Pls.' Resp. App. (Doc. #40-1) at A-1. This misstates the motion to dismiss standard: the Court need not accept Plaintiffs' legal conclusions or conclusory factual allegations, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007)), much less Plaintiffs blatant mischaracterization of the Framework and Standards, both of which are before the Court, *cf.* *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir. 2010); *Scott v. Harris*, 550 U.S. 372, 379-80

¹ Plaintiffs concede that under the Eleventh Amendment the Kansas State Board of Education and the Kansas Department of Education have sovereign immunity to Plaintiffs' suit. At the very least, Plaintiffs' claims against those two defendants should be dismissed.

(2007).² See also, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) (rejecting defendants’ characterization of Louisiana’s Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act and rejecting defendants’ claim that genuine issues of material fact remained in dispute, holding that “plain meaning of the statute’s words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose”). Because Plaintiffs’ claims rely on implausible (indeed, wholly unfounded) inferences from the Framework and Standards, they have not stated a “plausible claim for relief.” *Iqbal*, 556 U.S. at 678-79.

Plaintiffs’ Complaint describes the Framework and Standards as creating an “Orthodoxy” to “establish the religious Worldview” through “indoctrination,” Complaint (Doc. #1) ¶ 7, which “causes the investigation to close its mind to competing alternatives and evidence,” *id.* ¶ 82. Plaintiffs’ Response further describes the Framework and Standards as being “concealed Orthodoxy,” Pls.’ Resp. (Doc. #40) at 4, promoting “Religious (secular) Humanism,” *id.*, “forbidding any mention of teleology in the classroom,” *id.* at 8, “allowing only materialistic/atheistic explanations of origins,” *id.*, teaching that “there is no God” and that “life is not a creation,” *id.* at 15, requiring students to answer “questions only with ‘scientific’ or ‘materialistic/atheistic’ explanations allowed by the Orthodoxy,” *id.* at 30, and “sanctioning discrimination in favor of non-theists and disfavoring theists,” *id.* at 31. Throughout their

² Although *Lewis v. Tripp* and *Scott v. Harris* involved summary judgment motions, the rationale of those cases also applies to a motion to dismiss. *Scott* held that on a motion for summary judgment a court “should not adopt [a] version of the facts” that “is blatantly contradicted by the record” such that “no reasonable jury could believe it.” 550 U.S. at 380. Similarly, when deciding a motion to dismiss, a court should not assume as true allegations that are blatantly contradicted by the very materials on which plaintiffs base their allegations, where, as here, those materials are properly before the court. Such allegations are not “well-pleaded factual allegations” and do not “plausibly give rise to an entitlement to relief.” *Iqbal*, 556 U.S. at 679. Thus it would make little sense for the Court to assume that Plaintiffs’ allegations are true when they so plainly mischaracterize the Framework and Standards, both of which are before the Court just as the videotape was before the U.S. Supreme Court in *Scott*. See *Lewis*, 604 F.3d at 1226 (citing *Iqbal*, 129 S. Ct. at 1947) (“we need not defer to the district court’s assessment of the reasonable factual inferences that arise from a complaint at the motion to dismiss stage, but may instead assess for ourselves the sufficiency of the complaint as a matter of law *de novo*”).

Complaint and Response, Plaintiffs use the terms “Orthodoxy,” “Worldview,” and “Policy” to describe the Framework and Standards. Plaintiffs’ use these loaded terms, and make up their own definitions for these terms, to avoid what the Framework and Standards *actually* say.

The Framework and Standards actually belie these statements. The Framework and Standards “stress that critique is an essential element both for building new knowledge in general and for the learning of science in particular,” [Framework](#) at 59, that “all ideas in science are evaluated against alternative explanations and compared with evidence,” *id.*, and that “scientific knowledge [] is open to revision in light of new evidence,” [NGSS, Appendix H](#) at 2, 4. The Standards “are not intended to be an exhaustive list of all that could be included in a student’s science education nor should they prevent students from going beyond the standards where appropriate.” [NGSS Introduction](#) at 5. Indeed, the Standards acknowledge the limitations of science. *Id.* at 6 (“Science is *a* Way of Knowing,” “Science findings are limited to what can be answered with empirical evidence,” “Science is *a* unique way of knowing *and there are other ways of knowing*,” “Not all questions can be answered by science,” and “Science and technology may raise ethical issues for which science, by itself, does not provide answers and solutions”) (emphasis added). The Standards do not attempt to inhibit students’ scientific exploration by mandating answers to certain questions or limiting the evidence students may consider; the Standards “do not dictate []or limit curriculum and instructional choices.” *Id.* at 2.

Plaintiffs mischaracterize the Framework and Standards, attempting to fill the Framework and Standards with religious meaning that the Framework and Standards simply do not have. The Appendix to Plaintiffs’ Response is illustrative of Plaintiffs’ attempts to make the Framework and Standards to be something that they are not.

For example, Plaintiffs contend that the Framework and Standards require students to contemplate whether the “existence of life . . . ends on death,” “what caused [life],” and “what is [life’s] nature.” Pls.’ Resp. App. (Doc. #40-1) at A-1 (internal quotation marks omitted). Plaintiffs contrive these questions from a standard that requires students to be able to “[a]nalyze and interpret *data* for patterns in the fossil *record* that *document* the existence, diversity, extinction, and change of life forms throughout the history of life on Earth.” [NGSS, MS-LS4.1](#). Plaintiffs admit that this is a “legitimate scientific” exercise, Pls. Resp. App. (Doc. #40-1) at A-1; indeed it is. Moreover, contrary to Plaintiffs’ assertions, this standard does not “take the child into the religious sphere”; rather, it simply expects students to be able to use evidence – data from the fossil record regarding a species – and draw conclusions from that evidence. Specifically, this standard is supposed to “help students formulate answers to the questions: ‘How does genetic variation among organisms in a species affect survival and reproduction? How does the environment influence genetic traits in populations over multiple generations?’” [Middle School Life Sciences Storyline](#) at 2; *see also* [High School Life Sciences Storyline](#) at 2 (the standard helps students “answer the questions: ‘How can there be so many similarities among organisms yet so many different plants, animals, and microorganisms? How does biodiversity affect humans?’” by “investigat[ing] patterns to find the relationship between the environment and natural selection”). This standard has nothing to do with what caused life or whether one’s existence ends on death.

Plaintiffs also assert that the Standards “lead[] the student to conclude that life arises via an unguided evolutionary processes [*sic*], consistent with a core tenet of the Humanist Manifestos.” Pls.’ Resp. App. (Doc. #40-1) at A-2. In an attempt to support this unfounded conclusion, Plaintiffs cite a standard which simply states that “[i]n sexually reproducing

organisms, each parent contributes half of the genes acquired (at random) by the offspring,” and that “variations” can arise from “sexual reproduction” or altered “genetic information . . . because of mutations.” *Id.* at A-2 (quoting [NGSS, LS3.B.](#)). This standard is meant to allow students to “develop evidence to support *their understanding* of the structures and behaviors that increase the likelihood of successful reproduction by organisms.” [Middle School Life Sciences Storyline](#) at 1; *see also* [High School Life Sciences Storyline](#) at 1 (standard helps students “in pursuing an answer to the question: ‘How are the characteristics from one generation related to the previous generation?’” through “understanding of the relationship of DNA and chromosomes in the processes of cellular division that pass traits from one generation to the next”).

These standards do not resemble the “Orthodoxy” that Plaintiffs describe. Moreover, the Framework and the Standards as a whole do not create an “Orthodoxy” that “only allows the construction of materialistic/atheistic explanations about where we come from.” Pls.’ Resp. App. (Doc. #40-1) at A-3. The Framework and Standards do not require students to believe anything in particular about “origins”; the Framework and Standards do not mandate any particular conclusions to the questions they ask, and certainly they do not lead ineluctably to questions of what caused life and whether life exists after death, as Plaintiffs suggest. Moreover, even if the Framework and Standards are “consistent with” a religious teaching, *id.* at A-2, that is not enough to violate the Establishment Clause, *see Edwards*, 482 U.S. at 605.

Plaintiffs note that Defendants’ Memorandum in Support (Doc. #30) incorrectly states that the phrase “where do we come from?” is not in the Framework or Standards. *See* Pls.’ Resp. App. (Doc. #40-1) at A-1 (citing [Framework](#) at 28).³ But the Framework and Standards do

³ Plaintiffs’ Complaint stated – without citation to the Framework or the Standards – that the Framework and Standards require students to ask and answer the question “Where do we come from?” Defendants were unable to find what part of the Framework and/or Standards that Plaintiffs were quoting and concluded (as it turns out, incorrectly) that the phrase did not appear in the Framework or the Standards. As discussed above, however, this

support Defendants’ broader point – that the Framework and Standards do not mandate a particular answer to that question, nor do they specifically ask it. The Framework simply states that “building on prior interest” in questions like “Where do we come from?” helps “engage young people.” [Framework](#) at 28. Again, the Framework and Standards as a whole belie Plaintiffs’ attempt to turn the Framework and Standards into religious texts. Just as in *Edwards*, in which the U.S. Supreme Court stated that it “need not be blind . . . to the legislature’s preeminent religious purpose” of “discrediting evolution by counterbalancing its teaching . . . with the teaching of creationism,” 482 U.S. at 590 (internal quotation marks omitted), this Court need not be blind to the Board’s secular purposes in adopting the Framework and Standards – improving science education for the benefit of Kansas students and the State. *See* Defs.’ Mem. (Doc. #30) at 32-34; *see also infra* Part III.A. The Court should also not be blind to Plaintiffs’ motivation to insert their own religious beliefs into the Framework and Standards. *See* Complaint (Doc. #1) ¶¶ 15, 105, 108, 119; *see also id.* Part VII.c.2., at 30 (Prayers for Relief); *see also Edwards*, 482 U.S. at 590.

II. Notwithstanding Plaintiffs’ Attempt To Change Their Theory Of Injury, Plaintiffs Lack Standing And In Any Event The Court Should Dismiss Plaintiffs’ Complaint For Failure To State A Claim.

The opening paragraph of Plaintiffs’ Complaint alleges that the Framework and Standards violate various provisions of the First and Fourteenth Amendments because they “*will have the effect of causing Kansas public schools to establish and endorse a non-theistic religious worldview.*” (Doc. #1) ¶ 1 (emphasis added). That is, Plaintiffs “complain that the *implementation* of the F&S *will* infringe on their rights under the First and Fourteenth Amendments.” *Id.* ¶ 25 (emphasis added). Thus Plaintiffs’ Complaint alleges that Plaintiffs’

does not affect Defendants’ position that Plaintiffs’ Complaint and Response mischaracterize the Framework and Standards.

injury will arise in the future when (or if) Kansas public schools begin implementing the Framework and Standards – not that Plaintiffs were injured upon the adoption of the Framework and Standards. This is evident throughout Plaintiffs’ Complaint. *See, e.g., id.* ¶¶ 18 (the “effect of the F&S in *teaching* the materialistic/atheistic Worldview to young people . . . is *likely to cause* them to embrace it”), 24 (“*implementation* of the foregoing strategies by Kansas *will cause* it to endorse a particular viewpoint”), 43 (taxpayer plaintiffs “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”), 48 (Plaintiffs seek a “permanent injunction against *implementation* of all or certain parts of the Policy”), 67 (the “F&S *engage the child* to ask and answer ultimate questions”), 110-22 (describing how alleged “omissions” will affect how students are taught) (all emphasis added).

Defendants’ Memorandum in Support (Doc. #30) addressed these allegations. Plaintiffs’ Response, however, attempts to change Plaintiffs’ theory of injury. It argues that Plaintiffs’ “Establishment Clause injury arises from a ‘message of endorsement’ . . . that Defendants delivered . . . when they adopted” the Framework and Standards, regardless whether the Framework and Standards are ever implemented. (Doc. #40) at 11. This is not the theory of injury that Plaintiffs pled. *Compare, e.g.,* Complaint (Doc. #1) ¶ 1 *with* Plaintiffs’ Response (Doc. #40) at 9 (citing Complaint (Doc. #1) ¶ 1). To the extent Plaintiffs’ Complaint could be construed as mentioning this “message of endorsement” theory of injury, *see* Complaint (Doc. #1) ¶ 123, at 26, Plaintiffs’ Complaint does not state a claim under this theory of injury, and Plaintiffs do not rely on paragraph 123 of their Complaint to support their “message of endorsement” theory in their Response.

Plaintiffs' revised theory of injury also ignores the fact that when the Board adopted the Framework and Standards it conscientiously sought to send a message of neutrality with respect to religion by expressly "mak[ing] clear to parents that an Opt Out opportunity for specific curriculum is permissible." [June 11, 2013 Kansas Board of Education Minutes](#) at 3.⁴ In any event, the Establishment Clause does not allow Plaintiffs to exercise a sort of "heckler's veto" of any government regulation with which they disagree. *See Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1239 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing); *cf. Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001). Merely stating in response to a motion to dismiss that a government enactment endorses religion does not relieve Plaintiffs of their burden to plead a plausible claim. Nor can plaintiffs avoid this burden by baldly asserting that children's "injuries must be presumed." Pls.' Resp. (Doc. #40) at 19. In applying the "reasonable observer" standard the Court should give "due consideration for the concern that school children will see the governmental message or symbol," *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1032 (10th Cir. 2008), but Plaintiffs cite no case holding that the Court must *presume* that Student Plaintiffs have been injured. *See e.g., Agostini v. Felton*, 521 U.S. 203 (1997) (upholding federally funded program that sent public school children to private, sectarian schools for additional instruction).

With respect to the theory of injury that Plaintiffs actually pled, Plaintiffs lack standing for all the reasons discussed in Defendants' Memorandum in Support (Doc. #30) at 17-22. In any event, Plaintiffs have not stated a plausible claim that the Framework and Standards violate the First and Fourteenth Amendments.

⁴ The Court may consider the minutes as well as the video recording (cited below) of the Kansas Board of Education's meeting on June 11, 2013, because Plaintiffs rely on the proceedings at this meeting throughout their Complaint (Doc. #1) ¶¶ 61-63, and Response (Doc. #40) at 32. And as publicly available records of a public agency, the Court may take judicial notice of both the minutes and the video recording.

III. Plaintiffs Have Not Stated A Claim That The Framework And Standards Violate The Establishment Clause.

Because Plaintiffs' Response advocates an Establishment Clause analysis that no court has adopted, it is worth reiterating the proper Establishment Clause framework. As discussed in Defendants' Memorandum in Support, (Doc. #30) at 22-34, to state a claim for violation of the Establishment Clause, Plaintiffs must show that (1) the Framework and Standards have no valid secular purpose, (2) the principal or primary effect of the Framework and Standards is to advance or inhibit religion, or (3) the Framework and Standards excessively entangle the government with religion. *See Bauchman v. West High Sch.*, 132 F.3d 542, 550-53 (1997).

A. The Framework And Standards Have Secular Purposes.

The "purpose" prong of the Establishment Clause inquiry asks whether, from the perspective of an "objective observer" familiar with the history and context of the Framework and Standards, "the government's 'actual' purpose is to endorse or disapprove of religion." *Bauchman*, 132 F.3d at 551 (citing *Edwards*, 482 U.S. at 585; *Jaffree*, 472 U.S. at 56).

1. The Framework And Standards Do Not Deliver A "Religious Message."

With respect to the "purpose" prong of the Establishment Clause inquiry, Plaintiffs contend that "Defendants' argument rests on the assumption that because parts of the Policy have valid secular purposes, then the alleged activity that otherwise takes the state into the religious sphere can be legally ignored." Pls.' Resp. (Doc. #40) at 23. Plaintiffs argue throughout their Response that "government may not use secular content to justify the delivery of a religious message," *id.*, and that a "stealth message can not [*sic*] be justified by surrounding it in secular garb," *id.* at 36, emphasizing that the "Orthodoxy" is "concealed" and achieves a "stealth form of indoctrination which few will actually recognize," *id.*

This line of argument **(1)** mischaracterizes Defendants’ position; **(2)** begs the ultimate Establishment Clause question; and **(3)** fundamentally alters the “purpose” inquiry under the Establishment Clause.

First, Plaintiffs mischaracterize Defendants’ position. Defendants do not assume that any “activity that . . . takes the state into the religious sphere can be legally ignored.” *Id.* at 23. Rather, Defendants maintain that no reasonable observer could conclude that the purpose behind adopting the Framework and Standards was to endorse or disapprove religion. *See* Defs.’ Mem. (Doc. #30) at 27-28, 32-34; *see also supra* Part I. Moreover, a “decision respecting the subject matter to be taught in public schools does not violate the Establishment Clause simply because the material to be taught happens to coincide or harmonize with the tenets of some or all religions.” *Edwards*, 482 U.S. at 605 (internal quotation marks omitted) (quoting *Harris v. McRae*, 448 U.S. 297, 319 (1980); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

Second, Plaintiffs’ flawed reasoning simply begs the ultimate Establishment Clause question – whether the purpose of the Framework and Standards is to endorse or disapprove religion. *Plaintiffs* assume that parts of the Framework and Standards “take[] the state into the religious sphere.” Pls.’ Resp. (Doc. #40) at 23. But whether the Framework and Standards actually do so is precisely the question before the Court. In answering the question, the Court is not bound by Plaintiffs’ *ipse dixit* that the Framework and Standards are in and of themselves religious. *See supra* Part I; *Iqbal*, 556 U.S. at 677-78; *see also Lewis*, 604 F.3d at 1225-26; *cf. Scott*, 550 U.S. at 379-80. Rather, the Court should view the Framework and Standards in light of their full context and history, from the perspective of a reasonable observer, to determine whether a religious purpose predominates. *Lynch v. Donnelly*, 465 U.S. 668, 679-80; *Edwards*, 482 U.S. at 585-94; *Bauchman*, 132 F.3d at 553, 555-56.

Third, Plaintiffs attempt to fundamentally alter the “purpose” component of the Establishment Clause inquiry. The “purpose” inquiry is objective; based on whether a “reasonable observer,” considering the text and history of the Framework and Standards, would conclude that government has abandoned religious neutrality and instead acted with the predominant purpose of advancing or inhibiting religion. *See Lynch*, 465 U.S. at 679-80; *Bauchman*, 132 F.3d at 553, 555-56.

Yet Plaintiffs argue that the Court should view the Framework and Standards from the perspective of an observer with their particular religious convictions, and that the Court should view in isolation the portions of the Framework and Standards to which Plaintiffs object, treating context as mere “garb.” *See* Pls.’ Resp. (Doc. #40) at 23-24, 36. In evaluating government purpose under the Establishment Clause, context matters. *See* Defs.’ Mem. (Doc. #30) at 28; *Lynch*, 465 U.S. at 679-80; *Bauchman*, 132 F.3d at 553, 555-56. And here, context shows that the Framework and Standards have strong secular purposes. *See* Defs.’ Mem. (Doc. #30) at 32-34.

Plaintiffs contend that the purported religious aspects of the Framework and Standards are “concealed.” *See, e.g.*, Pls.’ Resp. (Doc. #40) at 26. But the text, context, and history of the Framework and Standards show that the Board did not have any surreptitious religious intent in adopting the Framework and Standards. *See supra* Part I; Defs.’ Mem. (Doc. #30) at 32-34. In any event, the very case on which Plaintiffs rely – *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 863 (2005) – actually undermines this theory that the Court should find that Defendants acted with a religious purpose even though “few would actually recognize” that purpose, Pls.’ Resp. (Doc. #40) at 36.

McCreary states:

The cases with findings of a predominantly religious purpose point to the straightforward nature of the test. . . . In [*Wallace v. Jaffree*, 472 U.S. 38 (1985), *Edwards v. Aguillard*, 482 U.S. 578 (1987), *School District of Abington Township v. Schempp*, 374 U.S. 203 (2002), and *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam)], the government’s action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government’s action. * * *

If someone in the government hides religious motive so well that the objective observer, acquainted with the text, legislative history, and implementation of the statute, cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides. A secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion.

545 U.S. at 862-63 (quotation marks and citation omitted in second paragraph).

McCreary enjoined displaying the Ten Commandments under the Establishment Clause, but it did so because a “reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments’ religious message.” 545 U.S. at 869. That is not the case here. Here, the Framework and Standards have clear secular purposes. Plaintiffs even admit as much. *See* Plaintiffs’ Response (Doc. #40) at 34 (“It is true that many of the goals of the Policy are secular . . .”).

Moreover, no reasonable observer would find a religious purpose behind the Board’s adoption of the Framework and Standards. *See* Defs.’ Mem. (Doc. #30) at 27-28, 32-34. This is not a case like *Bell v. Little Axe Independent School Dist. No. 70 of Cleveland County*, 766 F.2d 1391, 1403 (10th Cir. 1985), in which a school used an anti-discrimination policy to require public school students to attend overtly religious assemblies, or *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985), in which the text, legislative history, and Governor’s statements revealed a purpose to “characterize prayer as a favored practice.” *Compare also, e.g., Edwards*, 482 U.S. at 585-94

(“The preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind.”); *Stone*, 449 U.S. 39 (Kentucky law requiring posting of Ten Commandments in public classrooms “serve[d] no educational function,” but served only to “induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments”); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (“[s]urely the place of the Bible as an instrument of religion cannot be gainsaid”). In these cases, the courts found that the text, context, or history of the laws at issue betrayed a religious motive for enacting the law. Indeed, in several of the cases, the Court found that the *only* reasonable explanation for the law in question was a religious motive. But that is not the case here. The Framework and Standards do not pertain to religion at all, and are in no way analogous to Alabama’s school prayer law in *Jaffree*, Louisiana’s Balanced Treatment law in *Edwards*, Kentucky’s Ten Commandments law in *Stone*, or Pennsylvania’s Bible-reading law in *Abington*, which all were overtly religious. *See Brown v. Woodland Joint Unified Sch.*, 27 F.3d 1373, 1382 (9th Cir. 1994) (distinguishing overtly religious exercises from not overtly religious exercises).

Unlike in those cases, a “reasonable observer” aware of the context and history of the Framework and Standards would conclude that the purposes of the Framework and Standards are not predominantly religious. The purpose of the Framework is to “build students’ proficiency and appreciation for science over multiple years of school” by “integrating understanding the ideas of science with engagement in the practices of science.” [Framework, Foreword](#), at x. The purpose of the Standards is to help “provide all students an internationally benchmarked science education” because science education is “central to the lives of all Americans” and is key to “comprehending current events, choosing and using technology, or making informed decisions

about one’s healthcare.” [NGSS, Executive Summary](#), at 1. No context or history of the Framework and Standards suggests otherwise.

These purposes are also supported by the Report and Recommendation of the Next Generation Science Standards Review Committee (“R&R”). Defs.’ Mem. (Doc. #30) at 32-33. Plaintiffs ask the Court not to consider the R&R. Plaintiffs claim they “have never seen” it “because of the moratorium on discovery.” Pls.’ Resp. (Doc. #40) at 33. But the R&R is a public document and Defendants’ Memorandum in Support provided a link to the R&R.⁵ Moreover, the Court may, and should, take judicial notice of the R&R. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 & n.22 (10th Cir. 2009) (taking judicial notice of Falcon releases documented on two government websites); *O’Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1224 (10th Cir. 2007) (noting “[i]t is not uncommon for courts to take judicial notice of factual information found on the world wide web”; holding district court abused discretion by not taking judicial notice of historical retirement fund earnings on defendant’s website).

In addition, when the Board adopted the Framework and Standards, it “ma[de] clear to parents that an Opt Out opportunity for specific curriculum is permissible.” [June 11, 2013 Kansas Board of Education Minutes](#) at 3; *see also* [June 11, 2012 Kansas Board of Education Meeting Media Streaming](#) at 01:43:50-01:45:01; *see also id.* at 02:03:05-02:03:36 (motion to adopt the Standards emphasizing right to opt out of specific curriculum). The Board specifically

⁵ Although the link Defendants provided is now broken because the page was moved, Plaintiffs do not claim that the broken link prevented them from viewing the R&R. A link to the R&R is prominently displayed on the Kansas NGSS homepage: <http://community.ksde.org>. The link is titled “The Kansas recommendation for adoption and Kansas influences on the NGSS.” And a Google search for “Report and Recommendation of the Kansas NGSS Review Committee” returns the R&R as the first search result. The R&R is now located at:

<http://community.ksde.org/Portals/48/Documents/NGSS/NGSS%20Feedback/KS%20NGSS%20Recommendation%20to%20KSBE%20with%20Appendix%20A.pdf>.

discussed this opt out right in the context of addressing objections similar to Plaintiffs' objections. *See* [June 11, 2012 Kansas Board of Education Meeting Media Streaming](#) at 02:03:08-02:37:50. The Board's emphasis on protecting this right to opt out of certain curriculum completely contradicts Plaintiffs' theory that the Board acted with a religious motive when it adopted the Framework and Standards.

For these reasons, the Court should find that the Framework and Standards have legitimate secular purposes. When properly stripped of its blatant mischaracterization of the Framework and Standards, Plaintiffs' Complaint does not plausibly allege that the Board had any religious motive in adopting the Framework and Standards.

2. The Framework And Standards Do Not Have A "Goal" To "Establish A Worldview" Of "Religious (Secular) Humanism."

Plaintiffs' assert that the "goal" of the Framework and Standards was to "establish a 'worldview,'" Pls.' Resp. (Doc. #40) at 27-28, which Plaintiffs define as "promot[ing] all of the tenets of Religious (secular) Humanism and in particular those tenets that deny the supernatural, hold that life arises via unguided evolutionary processes and that life should be lived using reason and materialistic science," *id.* at 4. Yet the portions of the Standards that Plaintiffs quote to support this conclusion show just the opposite – that the Framework and Standards have a secular purpose and that the Framework and Standards do not advance or inhibit religion. *See id.* at 28. For example, the Standards are meant to help students "recogniz[e] similarities among core ideas in science or engineering that may at first seem very different, but are united through crosscutting concepts," *id.* (quoting [NGSS, Appendix G](#) at 4); identify "crosscutting concepts that bridge disciplinary boundaries, uniting core ideas throughout the fields of science and engineering," *id.* (quoting [NGSS, Appendix G](#) at 1); detail practices "essential for learning science and engineering," *id.* (quoting [Framework](#) at 41-42); and help students "develop and

demonstrate understanding of” – not faith or belief in – ““an accepted scientific viewpoint,”” *id.* (quoting [Framework](#) at 48) (alterations by Plaintiffs omitted). And these are only the examples from the portions of the Framework and Standards that Plaintiffs cited. *See also supra* Part I.

Plaintiffs argue that because the Board did not respond to Plaintiffs’ comments regarding the Standards, it shows that “Defendants specifically recognized the religious effects [of the Standards] but chose to promote those effects regardless of the objections.” Pls.’ Resp. (Doc. #40) at 33. To the contrary, the fact that Defendants did not respond to Plaintiffs’ comments shows that the Board rejected Plaintiffs’ skewed view of the Standards. *See* Complaint (Doc. #1) ¶¶ 61 (Board approved Framework and Standards over request to delay for further investigation of Plaintiffs’ assertions), 62 (“no need to consider those and other objections expressed by Mr. Willard”), 63 (Board adopted Framework and Standards “over the objections of two members”). In fact, during the meeting at which the Board adopted the Standards, several Board members specifically disagreed with objections similar to Plaintiffs’ objections, and with their vote to approve the Framework and Standards, rejected those objections. *See* [June 11, 2012 Kansas Board of Education Meeting Media Streaming](#) at 02:03:08-02:37:50.

Plaintiffs’ Complaint and Plaintiffs’ Response search in vain for a religious purpose behind the Framework and Standards. So Plaintiffs resort to mischaracterizing the Framework and Standards through the use of “religious” labels such as “Orthodoxy,” “indoctrinate,” and “evangelize.” But no amount of inapt religious labels can change the fact that the Board’s adoption of the Framework and Standards was not motivated by religion.

B. The Framework And Standards Are Religiously Neutral – They Do Not Have The Primary Effect Of Advancing Secular Humanism Or Inhibiting Theistic Religious Beliefs.

The “primary effect” prong of the Establishment Clause inquiry also is objective. It tests “whether a ‘reasonable observer,’ aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval” of religion. *Bauchman*, 132 F.3d at 551-52 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 779-81 (O’Connor, J., concurring)).

Plaintiffs contend that the Framework and Standards have a number of “religious effects,” including establishing a “Worldview” or “Policy,” Pls.’ Resp. (Doc. #40) at 27-28, promoting an “Orthodoxy,” *id.* at 29, requiring students to “ask and answer religious questions with only materialistic/atheistic explanations,” *id.* at 29-30, and employing “general methods of indoctrination,” *id.* at 30-31.⁶ As discussed above and in Defendants’ Memorandum in Support (Doc. #30), Plaintiffs’ use of “religious” labels to mischaracterize the Framework and Standards is both misleading, *see supra* Parts I and III.A., and insufficient to survive a motion to dismiss, *see Iqbal*, 556 U.S. at 1949 (quoting *Twombly*, 550 U.S. at 555) (“pleading that offers ‘labels and conclusions’ . . . will not do”).

Contrary to Plaintiffs’ mischaracterization of the Framework and Standards, the Framework and Standards are facially neutral with respect to religion – the Framework and Standards do not communicate a message of government endorsement or disapproval of religion. *See* Defs.’ Mem. (Doc. #30) at 34-36; *see also supra* Part III.A. Rather, the Framework and Standards promote open-minded investigation of all empirical evidence and “critique” of “*all*

⁶ Plaintiffs address most of the purported religious “effects” of the Framework and Standards in Plaintiffs discussion of the “purpose” prong of the Establishment Clause inquiry. Defendants, in reply, have done the same. To avoid repetition, Defendants simply cite the relevant portions of this brief and their Memorandum in Support.

ideas” while acknowledging that “[n]ot all questions can be answered by science.” [NGSS, Introduction](#) at 6 (emphasis added).

Plaintiffs’ attempt to lump the Framework and Standards together with “transcendental meditation” courses that involved ceremonies and offerings to a deified “Guru Dev,” religious assemblies, and mandatory prayer time, Pls.’ Resp. at 5 (citing *Malnak v. Yogi*, 592 F.2d 197, 210 (3d Cir. 1979)), 37 (citing *Bell*, 766 F.2d at 1402; *Jaffree*, 472 U.S. at 60-61), highlights the religious neutrality of the Framework and Standards. The Framework and Standards do not require or involve a “formal” or “overt” religious exercise. Compare *Lee v. Weisman*, 505 U.S. 577, 587-88 (focusing on “formal” and “overt” religious nature of prayer); see also *Brown*, 27 F.3d at 1382.

Moreover, to the extent Plaintiffs rely on the potential effects of the Framework and Standards once local school boards adopt and implement them, Plaintiffs lack standing and their claims are not ripe. See Defs.’ Mem. (Doc. #30) at 19-24; see also *Bowen v. Kendrick*, 487 U.S. 589, 612 (1988) (in considering facial challenges, it has not been the Supreme Court’s practice to strike down statutes “in anticipation that particular applications may result in” constitutional violations).

C. The Framework And Standards Do Not Excessively Entangle Government With Religious Activity Or Institutions.

The excessive-entanglement-with-religion prong of the *Lemon* test “typically is applied to circumstances in which the state is involving itself with a recognized religious activity or institution.” *Bauchman*, 132 F.2d at 556; see also *Lemon*, 403 U.S. at 615. Plaintiffs do not take issue with this traditional focus of the excessive entanglement prong of the *Lemon* test. But instead of alleging that the Framework and Standards entangle the State with religious “activity”

or “institutions,” as traditionally understood under *Lemon*, Plaintiffs simply rehash their “purpose” and “primary effect” allegations.

Specifically, Plaintiffs contend that the Framework and Standards are entangled with “Religious (secular) Humanism,” and that the Framework and Standards “seek[] to promote all of the tenets of that non-theistic religion,” including “environmentalism and social justice,” as well as that “life should be led through the use of human reason and naturalistic science,” “life arises via unguided evolutionary processes,” “there is no supernatural,” and “life ends on death.” Pls.’ Resp. (Doc. #40) at 37-38. Plaintiffs argue that “the very discussion of origins by the state entangles it with religion.” Pls.’ Resp. (Doc. #40) at 38. But Plaintiffs cite no case to support this argument, and at least two U.S. Supreme Court cases refute it. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act); *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968) (striking down Arkansas anti-evolution statutes).

Plaintiffs primarily rely on *Epperson v. Arkansas* to support their “entanglement” argument, but that case turned on the “fundamentalist sectarian conviction [that] was and is the law’s reason for existence”; in other words, the religious purpose of the Arkansas antievolution statutes, not excessive entanglement as it is understood under *Lemon*. *See Bauchman*, 132 F.2d at 556; *see also Lemon*, 403 U.S. at 615.

Plaintiffs’ Complaint does not state a claim that the Framework and Standards excessively entangle the State with religious activities or institutions. Indeed, Plaintiffs’ Response does not even argue that the Complaint satisfies the proper excessive entanglement test under *Lemon*. Instead, Plaintiffs contend that a different standard should apply, without providing any basis for altering the excessive entanglement inquiry.

D. The Relief Plaintiffs Seek Would Violate The Establishment Clause.

Plaintiffs contend that they “seek[] to replace non-theistic religion with objectivity, not with their religious beliefs.” Pls.’ Resp. (Doc. #40) at 39 (internal quotation marks omitted). Plaintiffs’ Response only underscores the point that “[b]alance in the treatment of religion lies in the eye of the beholder,” and that “[e]fforts to achieve the particular ‘balance’ desired by any individual or group by the addition or deletion of religious material would” involve government and the courts in religion in the very manner the Establishment Clause forbids. *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1065 (6th Cir. 1987) (citing *Epperson*, 393 U.S. at 107; *Abington*, 374 U.S. at 222).

Plaintiffs’ argument regarding “underinclusion” poses similar problems. Moreover, in *Edwards*, the U.S. Supreme Court held that a law requiring “balanced treatment for creation-science and evolution-science” violated the Establishment Clause. 482 U.S. 578. What Plaintiffs attempt to accomplish with this lawsuit is similar to what the Louisiana legislature tried to accomplish by enacting the Balanced Treatment Act – to eliminate certain science curriculum or require that certain religious perspectives be taught alongside certain topics. In other words, to “alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution.” *Edwards*, 482 U.S. at 593; *see also, e.g.*, Complaint (Doc. #1) ¶ 108 (taking issue with Framework and Standards because they do not reflect that “living systems [] appear to have been ‘brilliantly’ and ‘superbly’ designed by a ‘sentient mind’”). The U.S. Supreme Court struck down the Act in *Edwards* because it violated the Establishment Clause.

In Kansas under the Framework and Standards – as in Louisiana before it enacted its Balanced Treatment Act – “no law prohibit[s Kansas] public school teachers from teaching any scientific theory.” *Edwards*, 482 U.S. at 587. The Court should leave in place the neutral

Framework and Standards as they are, and avoid the constitutional issues that Plaintiffs' requested relief would raise.

* * *

From the perspective of an objective observer familiar with the history and context of the Framework and Standards, the Framework and Standards do not have the predominant purpose or primary effect of advancing or inhibiting religion. Nor do the Framework and Standards endorse religion or excessively entangle the State with religion. The Framework and Standards are facially neutral with respect to religion. Defendants' position is consistent with U.S. Supreme Court cases that have rejected similar attempts to inject personal religious beliefs into science curriculum. *See, e.g., Edwards*, 482 U.S. 578 (legislation violated the Establishment Clause because it sought to "alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution"); *Epperson*, 393 U.S. 97 (the Establishment Clause "forbids . . . the prohibition of theory which is deemed antagonistic to a particular dogma"). Moreover, the federal circuit courts that have considered similar claims regarding the purported establishment of anti-theist or secular humanist religion have rejected such claims. *See, e.g., Brown*, 27 F.3d 1373 (rejecting claim that portions of teaching aids violated the Establishment Clause by promoting the practice of witchcraft); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 687 (7th Cir. 1994) (rejecting claim that school district's supplemental reading program violated the Establishment Clause by indoctrinating children in values directly opposed to plaintiffs' Christian beliefs); *Mozert*, 827 F.2d 1058 (rejecting claim that requiring students to study a basic reader series violated the Free Exercise Clause, noting that it would violate the Establishment Clause to tailor a public school's curriculum to satisfy the principles or prohibitions of any religion); *Smith v. Bd. of Sch. Comm'rs of Mobile Cnty.*, 827 F.2d 684 (11th

Cir. 1987) (rejecting claim that the use of certain textbooks violated the Establishment Clause by advancing secular humanism or inhibiting theistic religion); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985) (rejecting claim that the school board's refusal to remove books from sophomore English literature curriculum based on plaintiffs' religious objections violated the Establishment Clause) *see also Crowley v. Smithsonian Inst.*, 636 F.2d 738 (D.C. Cir. 1980) (rejecting claim that Smithsonian evolution exhibit established a religion of secular humanism).

For these reasons, and the reasons stated in Defendants' Memorandum in Support (Doc. #30), the Court should dismiss Plaintiffs' Establishment Clause claim.

IV. Plaintiffs Have Not Stated A Claim That The Framework And Standards Violate The Free Exercise Clause Because The Framework And Standards Do Not Have A Coercive Effect On Plaintiffs' Exercise Of Religion.

In *Bauchman v. West High School*, the Tenth Circuit held that the opportunity to opt out of activities that offend a plaintiff's religious beliefs "negates the element of coercion and therefore defeats [a] Free Exercise claim." 132 F.3d at 557. Kansas law provides just such an opt out: "[n]o child attending public school in this state shall be required to participate in any activity which is contrary to the religious teachings of the child," so long as the child's parent or guardian requests in writing for the child to be excused. K.S.A. 72-1111(f).

Plaintiffs attempt to distinguish the exemption in K.S.A. 72-1111(f) from *Bauchman* by arguing that "the Statute does not guarantee that the opt-out will not adversely affect the student's grade" and that the "same statute . . . actually compels [students'] attendance." Pls.' Resp. (Doc. #40) at 43. The structure of the exemption statute, however, indicates that no student will be punished for obtaining an exemption based on their religious beliefs. The statute first imposes "compulsory attendance requirements" in section 72-1111(a), and then provides several exemptions from those requirements, including section 72-1111(f). The compulsory attendance

requirements do not apply if an exemption applies. This structure indicates that obtaining an exemption under section 72-1111(f) will not negatively affect a student's grade. The exemption would make little sense otherwise. Moreover, the motion to adopt the Standards specifically included a caveat that the Board would "make clear to parents that an Opt Out opportunity for specific curriculum is permissible." [June 11, 2013 Kansas Board of Education Minutes](#) at 3. Thus when the Board adopted the Standards, the Board understood that parents would have the opportunity to opt their children out of specific curriculum without negatively affecting their child's grades. See [June 11, 2012 Kansas Board of Education Meeting Media Streaming](#) at 01:43:50-01:45:01; see also *id.* at 02:03:05-02:03:36 (motion to adopt the Standards, including a caveat regarding the right to opt out of specific curriculum).

Plaintiffs also argue that the "Policy" so "effectively conceals the indoctrination" that "it is quite likely a child will not even recognize when the indoctrination is occurring." Pls.' Resp. (Doc. #40) at 43. If, as Plaintiffs argue, the purported religious effect of the Framework and Standards is virtually undetectable, then the Framework and Standards surely do not have the "coercive effect" on Plaintiffs' exercise of religion that is required to violate the Free Exercise Clause. See *Bauchman*, 132 F.3d at 557. This case is not like *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), in which the Supreme Court struck down a law that targeted a religious practice. 508 U.S. at 524, 534 (striking down a city ordinance that made "ritual sacrifices of animals" illegal, finding that the "record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances," *i.e.*, that "the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs"). Moreover, Plaintiffs' Complaint does not

allege that the Framework and Standards undermine Plaintiffs’ statutory right to opt out of any activity that offends their religious beliefs.

Because the Framework and Standards are neutral rules of general applicability, they need only to be supported by a rational basis to survive a constitutional challenge. Defs.’ Mem. (Doc. #30) at 39-40. Plaintiffs’ Response provides no basis for finding otherwise. Plaintiffs’ Response relies on Appendix D to the Standards, which is titled “All Standards, All Students: Making the Next Generation Science Standards Accessible to All Students,” to argue that the Framework and Standards “enable[e] the discriminatory establishment of the non-theistic Worldview under the guise of ‘science.’” (Doc. #40) (quoting Complaint (Doc. #1) ¶ 21). Plaintiffs’ Complaint provides no basis for this conclusion. Indeed, the very section to which Plaintiffs refer explains that the intent of the Framework and Standards is to “address[] what classroom teachers can do to ensure that the NGSS are accessible to *all* students.” [NGSS, App. D](#) at 1 (emphasis added). Plaintiffs have not plausibly alleged the type of religious coercion required for applying strict scrutiny in the Free Exercise context. *Compare Church of the Lukumi Babalu Aye*, 508 U.S. at 524, 534; *see also Bauchman*, 132 F.3d at 558.

V. Plaintiffs Have Not Stated A Claim That The Framework And Standards Violate The Equal Protection Clause Because The Framework And Standards Treat Everyone Equally.

Plaintiffs’ Response argues that Defendants rely on “facially inadequate opt out rights” to defend against Plaintiffs’ Equal Protection claim. Plaintiffs fail to explain why the opt out right is “facially inadequate.” (Doc. #40) at 46-47; *see also supra* Part III.C.

Plaintiffs also fail to address Defendants’ primary Equal Protection argument – that the Framework and Standards do not treat Plaintiffs differently than anyone else; the Framework and Standards apply to *all* students in the same manner. Defs.’ Mem. (Doc. #30) 38-40. Plaintiffs

argue that because “the Policy was adopted after very specific assertions that the Policy would discriminate against the Plaintiffs,” (Doc. #40) at 47, and because “the policy explicitly discriminates against theists by excluding them from its policy of equal treatment based on religion,” then the “Policy” does in fact “discriminate against theists in favor of non-theists,” *id.* at 48. But Plaintiffs have not pointed to a single provision in the Framework or the Standards that supports these conclusory allegations. Moreover, Plaintiffs fail to state a plausible claim that Defendants intended to discriminate against Plaintiffs. *See* Defs.’ Mem. (Doc. #30) at 40.

Plaintiffs Equal Protection claim should be dismissed.

VI. Plaintiffs Have Not Stated A Claim For Violation Of Their Free Speech Rights Because The Framework And Standards Do Not Restrict Students’ Freedom Of Speech.

Plaintiffs’ Free Speech claim is equally without merit. Plaintiffs’ Response makes clear that Plaintiffs’ Free Speech claim hinges on their assertion that the Framework and Standards “limit [science class discussion] to only those scientific views that favor materialistic/atheistic explanations.” (Doc. #40) at 46. As discussed above in Part I, this description of the Framework and Standards finds no support in the Framework or the Standards. Perhaps this is why Plaintiffs do not support their Free Speech claim with any citation to the Framework or the Standards. Plaintiffs’ conclusory allegations do not state a claim that the Framework and Standards violate the Free Speech Clause of the First Amendment. The Framework and Standards set performance expectations for science; the Framework and Standards do not restrict Plaintiffs’ speech. *See, e.g., Framework* at 59 (“critique is an essential element both for building new knowledge in general and for the learning of science in particular,” and “all ideas in science are evaluated against alternative explanations and compared with evidence”).

Plaintiffs’ Free Speech claim is baseless and should be dismissed.

CONCLUSION

For the reasons stated in Defendants' Memorandum in Support (Doc. #30) and above, Defendants' respectfully request that the Court dismiss Plaintiffs' claims that the Framework and Standards violate the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs lack standing and Plaintiffs' Complaint (Doc. #1) fails to state any plausible claim.

Respectfully submitted,

**OFFICE OF KANSAS ATTORNEY GENERAL
DEREK SCHMIDT**

By: s/ Jeffrey A. Chanay
Jeffrey A. Chanay, KS Sup. Ct. No. 12056
Deputy Attorney General, Civil Litigation Division
Stephen O. Phillips, KS Sup. Ct. No. 14130
Assistant Attorney General
Memorial Bldg., Third Floor
120 SW Tenth Ave.
Topeka, KS 66612
Phone: 785-296-2215
Fax: 785-291-3767
E-mail: jeff.chanay@ksag.org
steve.phillips@ksag.org

Cheryl L. Whelan, KS Sup. Ct. No. 14612
General Counsel
Kansas State Department of Education
Office of General Counsel
Landon State Office Building
900 SW Jackson St., Suite 102
Topeka, KS 66612
E-mail: cwhelan@ksde.org

Attorneys for Defendants

CERTIFICATE OF SERVICE

This is to certify that on this 17th day of April, 2014, the above and foregoing **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS** was electronically filed with the Clerk of the Court by using the CM/ECF system with notice electronically sent to:

Douglas J. Patterson doug@propertylawfirm.com
Kellie K. Warren kellie@propertylawfirm.com
Michelle W. Burns michelle@propertylawfirm.com
John H. Calvert jcalvert@att.net
Kevin T. Snider ksnider@pji.org

Attorneys for Plaintiffs

s/Jeffrey A. Chanay _____
Jeffrey A. Chanay