Case No. 14-3280
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COPE (A.K.A. CITIZENS FOR OBJECTIVE PUBLIC EDUCATION, INC.) ET AL.,	:
Plaintiffs/Appellants,	:
vs.	:
KANSAS STATE BOARD OF EDUCATION, ET AL.,	:
Defendants/Appellees	:

REPLY BRIEF OF PLAINTIFF-APPELLANTS

AN APPEAL FROM AN ORDER DISMISSING
PLAINTIFFS' COMPLAINT
United States District Court for the District of Kansas
Case No. 13-4119-DDC-JPO
The Hon. Daniel Crabtree, Judge Presiding

Douglas J. Patterson, Esq. (KS # 17296)
PROPERTY LAW FIRM, LLC
4630 W. 137th St., Suite 100
Leawood, Kansas 66224
913-663-1300 Telephone
913-663-3834 Facsimile
doug@propertylawfirm.com

John H. Calvert, Esq. (MO #20238)
CALVERT LAW OFFICES
2300 Main St., Suite 900
Kansas City, MO 64108
816-797-2869 Telephone
816-448-3703
816-448-3101 Facsimile
jcalvert@att.net

Kevin T. Snider, Esq. (CA #170988)
PACIFIC JUSTICE INSTITUTE
P.O. Box 276600
Sacramento, California 95827-6600
(916) 857-6900 Telephone
(916) 857-6902 Facsimile
ksnider@pji.org
ATTORNEYS FOR PLAINTIFFS

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REPLY BRIEF OF PLAINTIFF-APPELLANTS

PLAINTIFFS/APPELLANTS, by and through their counsel present the following Reply to Defendants' Brief.

SUMMARY OF THE ARGUMENT

Plaintiffs' Complaint alleges that the Framework and Standards (together the "Policy") seek to establish a non-theistic religious worldview in the Children. And that its adoption resulted in both actual and threatened injuries to Plaintiffs, by establishing a religious preference that breaches the trust explained by the Supreme Court in Edwards and confirmed by this Court in Bell. Pltfs. Br. at 17-19. This violated, among other things, the rights of the Children to not be religiously indoctrinated by the State and the right of the Parents to direct the religious education of their Children.

There is no dispute that the Complaint alleges that the message of endorsement conveyed by the adoption produced actual injuries. However, Defendants argue that they are not particularized and concrete because the non-theistic religious worldview the Policy seeks to promote does not "personally affect" the Parents and Children because they are not "the objects of the Standards." Def. Br. at 23.

The argument is patently absurd. The Complaint alleges the Children to be students in K-12 Kansas Public Schools. The standards are defined as "statements of what students should know and be able to do in specific content areas." K.A.R. 91-31-31(d), (emphasis added). Grammatically and otherwise, the object of the sentence that defines a "standard" is the "student," and the Children are students. It is their minds the

standards seek to fill. They are the objects of the Policy and are thereby personally affected by it and have a "stake in it."

If the parents and students are not "personally affected" by the religious preference reflected in the Policy, then no one is. Defendants' awkward and illogical argument serves only to shut the door to a legitimate claim.

Defendants urge this Court to ignore the immediate violation of the right by arguing that the rights are not taken until the Policy is actually implemented. Thus, the argument seeks to convert an actual injury into a threatened injury. This too is absurd as Defendants finally admit that the message of endorsement carried by the adoption of the Policy does in fact injure the Plaintiffs. Given that present injury, which is concrete and particularized, the future implementation is wholly irrelevant as to the actuality of the injury in fact upon adoption.

Defendants cite no authority for their argument as it is actually contrary to Supreme Court and Tenth Circuit cases. Pltfs. Br. at 34-45

Defendants also argue that the alleged threatened injuries are not imminent, because the Schools are not bound by the Policy, although they acknowledge that schools are to be guided by it in aligning their curriculum with it so that students may perform successfully when they are tested on it. The law explicitly and implicitly requires that the schools align their curriculum with the standards, thereby requiring them to implement the standards.

Defendants, who we may presume know the actual status of implementation, do not assert that the curriculum is not being implemented. Rather the Exhibits attached to

Plaintiffs' Brief which they do not dispute show that it is being implemented. Implementation of Curriculum Standards is the normal course and to contend that implementation may not occur is speculative. Thus, the threatened injuries are certainly impending and therefore imminent.

ARGUMENT

I. Replies of a General Nature

A. Defendants' Statement of Issues and Facts is incorrect in key respects

Defendants contend that the key issue in this case is whether the adoption of the standards actually injures Plaintiffs even though they fail to allege "they are being implemented." The allegation is not necessary as future implementation is not an issue for an actual injury that occurs on adoption. Both the District Court and Defendants agree that the message of endorsement delivered on adoption produced actual injuries.

Thus the issue is not whether the message of endorsement actually injured the Plaintiffs. Rather the only issue is whether the actual injuries from the message are concrete and particularized. Plaintiffs claim they are because the Complaint shows that the Parents and Children are the objects of the Policy, have a personal stake in it and are thereby personally affected by it.

Defendants contend that the second issue in the case is whether the actual injuries are concrete and particularized "when Plaintiffs are not directly affected by the adoption." This statement of the issue incorrectly assumes that Plaintiffs are not directly or personally affected by the Policy. However, they must be affected by the adoption as they are actually injured by it. An injury is an "affect." Accordingly the issue is whether

the affect or "injury" is personal or direct. If so, then their actual injuries are justiciable injuries in fact. Plaintiffs show that the injuries are personal as they are the objects of message of the Policy. It is the minds of the Children the Policy seeks to fill. The Children and their Parents, at least, have a stake in it.

Defendants contend that the causation and redressability requirement is not met if the schools have the authority to decide how to implement the standards. That is not the issue. The issue is whether the actual and threatened injuries are caused by the Defendants. The answer is clearly yes. Will the injuries be redressed if the standards are enjoined as requested? Again the answer is yes, regardless of the authority of local schools.

Generally, Plaintiffs' objections to the statement of facts are reflected in the arguments on specific issues below. However, one important omission should be noted.

Defendants statement [Def. Br. at 3-4] includes a citation from the Policy that **omits the underlined phrase in bold face**:

> "While the NGSS have a *fuller architecture* than traditional standards ..... **—at the request of states so they do not need to begin implementation by "unpacking" the standards—** the NGSS do not dictate nor limit curriculum and instructional choices." Aplt. App. at 543. (underlined phrase and emphasis added)

Implicitly, the omitted phrase states that the Standards are extremely detailed so that states may use them as is, and begin implementation by the schools immediately. Defendants' idea that the schools will not implement the standards is a wholly theoretical and abstract possibility - an unsupported speculation.

B. Defendants' arguments are inconsistent with the need for standing neutrally.

Defendants' application of the abstract rules of standing is not neutral. Many unsupported arguments depend on strained and illogical applications of common words and phrases that argue semantics rather than substance to fit a twisted theory. Defendants argue that the Plaintiff students are not the "objects" of the "Standards," [Def. Br. at 23] although the definition of "curriculum standard" is "a statement of what students are to know and be able to do." They contend that the Complaint does not allege that the Policy "condemns" Plaintiffs' religion, when it alleges that it seeks to "suppress" it. Def. Br. at 29. Defendants' imply that a fleeting observation of a roadside cross by an atheist reflects "unwelcome personal contact" while a theist's reading, analysis and written objections to a State Policy to indoctrinate their children in a non-theistic religious worldview does not. Id.

In Catholic League 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 Church for opposing adoptions by homosexual couples. Catholic League v. City and Cnty. of San Francisco, 624 F.3d 1043, 1049 (9th Cir. 2010). 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." Because of this inherent subjectivity and, perhaps because all members of any court may be affected by their own religious bias, the Court expressed a necessity that standing doctrine be applied 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.]

In making this argument the Court detailed ten Supreme Court cases where standing was recognized in complaints against theists and five cases in the Ninth Circuit which produced the same result. Id. at 1050. It concluded that a finding of standing with respect to the non-binding resolution was also necessary from a precedential standpoint: "If we conclude that plaintiffs in the case before us have standing, we need not decide whether those cases retain their vitality or are overruled, because our conclusion would be consistent with them. But if we reject standing for plaintiffs in this case, then those cases must somehow be distinguished convincingly (a difficult task), or overruled." Id.

Similarly, if the District Court holding is sustained, the same question will have to be addressed with respect to Bell, American Atheists, Awad and others.

C. Defendants' argument improperly rests on a denial of allegations that must be deemed to be true.

Defendants argue that the Allegations of the Complaint are false because of unsupported assertions that the Framework and Standards do not address religious issues or questions and do not guide atheistic responses. Def. Br. at 5.

For purposes of this motion, the Court must assume the allegations of the Complaint are true. Pltfs. Br. at 2.

Plaintiffs' Complaint alleges that the Framework and Standards "seeks to establish a non-theistic religious worldview in the Plaintiffs who are children (the 'Children') in violation of a number of rights of the Children, their Plaintiff parents (the 'Parents')" and Kansas resident taxpayers. The District Court agreed that these and similar allegations should be deemed true for purposes of deciding the motion, citing S.E.C. v. Shields, 744 F.3d 633, 640 (10th Cir. 2014). Pltfs. Exhibit A at 2-3. Mem. & Or. at 2-3, Applt. App. 1143-44.

Accordingly, in determining whether the Plaintiffs are injured by the adoption and implementation of the Policy, this Court must assume that the Policy does seek to establish a non-theistic religious worldview.

Furthermore, the allegations of the Complaint are extremely detailed and none have been shown to be false or implausible. Defendants' Memorandum In Support of their Motion to Dismiss asserted that the Policy does not address religious questions, does not seek to cause children to answer the question "Where do we come from? and does not use the Orthodoxy." The Appendix to Plaintiffs' Response shows where the Policy does all three. (Applt. App. 1035-1039) The goal of the Policy to establish a worldview that is materialistic/atheistic is detailed in Plaintiffs' Response at Applt. App. 1014-1017.

D. The Response mischaracterizes the goal of the Complaint.

Defendants characterize the Complaint as one that seeks to promote "intelligent design" and discredit "evolution." Def. Br. at 4. A review of the Complaint makes clear that its goal is simply to cause origins science (cosmological, chemical and biological

evolution) to be taught objectively so that students are informed of the actual state of our scientific knowledge regarding those subjects. The alternative prayer makes this clear.

Objectivity is needed because the Standards employ a concealed orthodoxy called Methodological Naturalism in addressing the religious questions. That doctrine requires that explanations of where we come from be only materialistic/atheistic and that design conceptions of nature be deemed invalid. Intelligent design or teleology is an issue because the Orthodoxy bans it and students need to be informed of the ban. The ban effectively requires a non-theistic answer to the ultimate questions of where do we come from and what is the nature of life.

Biological evolution is the dominant view of the origin of the diversity of life, and it needs to be taught in public schools. However, it does address ultimate religious questions and should be taught objectively to generate a religiously neutral effect. It is particularly problematic to teach it beginning at age 5 systematically and incrementally. As a consequence, the alternative prayer of the Complaint urges that the teaching of origins science be delayed until high school, after the minds of the students are both mature and knowledgeable.

E. Defendants do not deny that the rights of Parents and Children actually violated are legally protected rights.

1. There is no dispute that the Complaint alleges actual injuries.

The District Court agrees that the Complaint alleges both actual and threatened injuries. Defendants no longer deny allegations of actual injury.

The Complaint alleges that the adoption of the Policy actually injures:

a. **the Children** by State use of a Policy "calculated to cause them to be indoctrinated into accepting a non-theistic religious worldview," (Cplt. ¶¶124.a, d and e);

b. **their theistic Parents** by "violat[ing]" and "interfer[ing] with their rights to direct" (a) "the religious education of their children" and (b) "the development of their children's worldviews regarding ethics, morals, government, politics, and other matters of opinion;" and (c) with their "right to freely exercise their theistic religion." (Cplt. ¶¶125.a, b and c);

c. **the Parents** as the threatened injuries to the Children are actual injuries to the Parents, as any threat to a child injures the parent, regardless of whether the threat is implemented; (Applt Brief at 21)

d. **all Plaintiffs** as the Policy is (a) religiously discriminatory in that it "causes the state ... to depriv[e] them of the right to be free from government that favors one religious view over another" (Cplt. ¶ 48,123.a); (b) stigmatically injures them by sending a message that they are "outsiders" in the community and (c) denies their equal protection rights - the right to be "treated equally with non-theists" (Cplt. ¶¶123.a,b and c);

The District Court recognized the injuries to all Plaintiffs under ¶¶123.a,b and c listed in d. above. However, in making its ruling under the Establishment Clause it inexplicably failed to consider the injuries to the Parents and Children listed above.

Although Defendants argue that some of the actual injuries are not actual, they fail to delineate those that are not actual. Given that failure, the argument that some unspecified injures are not actual should be ignored.

Since the District Court did not hold that the injuries to the Parents and Children are not actual, and since the Defendants have not shown how they are not actual, then Plaintiffs' arguments regarding the actual injuries remain uncontroverted.

Thus, the only issue is whether the actual injuries are concrete and particularized - whether they personally affect Plaintiffs because they are objects of the Policy.

2. Defendants and the District Court do not deny that the rights alleged by the Parents and Children are legally protected.

In ignoring the actual injuries of the Parents and Children, neither the District Court nor the Defendants deny that the rights of Parents to direct the religious education of the Children and the rights of the Children to not be religiously indoctrinated by the State are legally protected rights. Plaintiffs' Brief details the authorities showing that they are legally protected at 19-21, including this Courts' ruling in Bell v. Little Axe ISD, 766 F.2d 1391, 1398 (10th Cir 1985).

It should also be clear that a State Policy to cause its supervised schools to take, violate or interfere with those rights, itself amounts to an immediate and present violation of those rights. The District Court and Defendants' have made no attempt to contravene the existence of the rights or the argument that a State policy designed to take the rights actually injures the persons whose rights are being taken or violated.

F. The adoption was not "mere."

Defendants, characterize the "adoption" of the F&S as being only "mere" or insignificant. "[M]ere," means "1 a : done or invoked without assistance or support

.... having theoretical or legal but not practical reality ... "[1]

"Mere" is an incorrect modifier as the uncontroverted factual contentions regarding the adoption describe the adoption as something far from mere. Pltfs. Br. 6-9.

The adoption was the culmination of work by Kansas as a Lead State to develop an 850 page reformation of science education for all students in the Country. Pltfs. Br. 6-9. Before adoption, COPE objected in detailed written analyses furnished to the Defendants at meetings of the State Board. The analyses explain in detail how the Policy has the effect of establishing a non-theistic religious worldview in the children. Id.

A majority of the Defendants did not deem Plaintiffs' religious objections relevant, because K.S.A. § 72-1111(f) entitles parents to a wholly impractical and "grandly illusory" opt-out that actually poses a serious dilemma for the Parents. Pltfs. Br. at 21-23. In no instance did Defendants suggest to Plaintiffs that the Policy would not injure them because it was deemed to not be binding on local schools. (Cplt. ¶¶ 56-63) Instead Defendants were advised before adoption that the standards will be "translated into curriculum and lesson plans that bundle the standards into teachable units by local districts with "fidelity" and that local districts would be expected to "prioritize the curriculum changes for their districts." R&R. Applt. App. 1097.

Rather than exercise due diligence to analyze Plaintiffs' objections, Defendants did not wish to delay implementation (Cplt. ¶¶ 61-63) as they were urged to proceed with implementation without delay. R&R Applt. App. 1099. Subsequent events after the filing

[1] Merriam Websters Unabridged Dictionary of the English Language 2015.

of the Complaint show that "Kansas Schools continue working toward full implementation" "with the tenacity of a honey badger." Pltfs. Br. Exhibits C-6 and C-4.

The Policy itself contains many provisions regarding implementation and explains that the "standards [are to] permeate the education system and guide curriculum, instruction, teacher preparation and professional development, and student assessment." (emphasis added), Applt. App. 392. Thus, the adoption itself was an extraordinarily significant event that denied the right of the Parents and Children and established a religious preference in Kansas public schools. It was not a "mere" act having only theoretical and no substantive consequence.

II. Replies to Specific Arguments

A. Defendants' reliance on the District Court's holding that the actual injuries are abstract and not particularized is misplaced.

Defendants argue that the actual injuries are not particularized and concrete because "the District Court correctly recognized, however, the injuries allegedly caused by the Board's adoption of the Science Standards are abstract and hypothetical, not concrete, particularized, and actual or imminent as required for standing." Def. Br. at 21.

However, in making this argument the Defendants ignore the fact that the District Court inexplicably omitted consideration of all of the actual injuries to the Parents and Children, other than the Stigmatic injuries to all Plaintiffs alleged in ¶123(b). Pltfs. Br. at 40-42.

Although the District Court recognized the equal protection and nondiscrimination injuries of ¶¶123 (a) and (c) as actual, it misclassifed them as stigmatic. Pltfs. Br. at 42-43

Nor does Defendants' brief correct the omission as it gives no consideration to the ¶124, ¶125 injuries to the Parents and Children or the ¶¶123(a) and (c) actual injuries to all Plaintiffs.

Nor does Defendants' Brief controvert the argument of Plaintiffs that the stigmatic injuries of ¶123(b) are not abstract as Parents and Children are the objects of the Policy and directly affected by it. As a consequence, even the stigmatic injuries are concrete and particularized. Id.

The argument of the Defendant also incorrectly argues that the actual injuries fail the imminence test because implementation has not been shown to be imminent. As explained by Plaintiffs, "imminence" is not an issue for an actual injury as the injury is not just imminent, it has already occurred. That is why it is classified as "actual." The only issue for an actual injury is whether it is particularized and concrete rather than abstract.

Thus, Defendants' Response ignores Plaintiffs' principle arguments of error by the District Court.

B. Defendants' contentions that the Children and their Parents are not the "objects" of the Policy and not "directly" or "personally affected" by it are illogical and wholly unsupported by the alleged facts and existing law.

1. The Children and Parents are objects of the Policy.

An actual injury is an injury in fact if it is particularized and concrete. The injury is particularized if it is personal to the Plaintiffs or if they are an object of the activity. It is concrete if they have a stake in it. Pltfs Br. at 15.

Defendants incorrectly argue that Plaintiffs' actual injuries are not particularized and concrete because they are not the objects of the "Standards." Instead, according to the Defendants the "schools," not the "students," are the objects of the Policy.

> "Because the Science Standards were designed to guide local schools in developing their science curriculum, the schools, not the students, are more appropriately described as the "objects" of the Science Standards." Def. Br. at 23.

The argument fails as the definition of "'Curriculum standards' means statements, adopted by the state board, of what students should know and be able to do in specific content areas." KAR 91-31-31(d), (emphasis added). The object of this sentence is the word "students." As used in the K-12 Education laws and regulations students mean "each and every child," [K.S.A. 72-1127 (c)] in " [e]ach school in every district." 72-6439 (d). Thus, the Children are "students." Implicitly it is the minds of the Children that are to be filled with the knowledge specified by the State in the standards. Thus, the Children are explicitly classified as objects of the Policy.

Since parents are directly responsible for the religious information that goes into the minds of the Children and also legally responsible for the children themselves, who

have the right to not be religiously indoctrinated by the state, the Parents are also implicitly the objects of the standards.

The Policy also recognizes parents as objects of the Policy as it classifies them as "stakeholders," Framework at 244 and 299. Applt. App. 395 and 450. It views the parents as their children's and teachers' "partners in science learning." Appendix D - "All Standards, All Students" Applt. App. 702. This is to be accomplished by "ensuring alignment of rigorous academic standards...with... instructional materials..," so that "parents.... can measure progress against common expectations for students' academic achievement." Applt. App. 726 (emphasis added)

As a consequence the activity which produces the actual injuries is "personal" to the Children and their Parents. They also have a stake in the adoption and implementation of the Policy as the Children's minds will not be filled with the content if the adoption is declared unconstitutional and the implementation is enjoined.

Since they are the objects of the Policy and have a stake in it, the injury that flows from the adoption is particularized and concrete and not abstract. Pltfs. Br. at 11-12.

2. The Parents and Children are personally affected by the adoption of the Policy and its implementation.

a. Defendants' Argument that Plaintiffs are not personally affected by the actual injuries is incorrect.

The contention that the Parents and Children are not "personally" or "directly" "affected" by the alleged actual or threatened violations of their religious rights seems patently incorrect.

It should be obvious that they are "affected" as they are "injured" by any injury, whether it is actual or threatened. The issue then is about the nature of the injury - is the affect of the injury personal and particularized or is it just abstract? As explained above, it is clearly personal and particularized as the Parents and Students are the objects of the Policy and have a stake in it.

However, Defendants argue throughout their brief that "the education of the Plaintiff children will be affected only if the Science Standards are implemented in the schools attended by the Plaintiff children." Def. Br. at 22.

The argument is incorrect because its focus is on the future affect of the future "education of the child," not the affect of the present taking of the parents and children's rights to a religiously netural education in a non-preferential environment. The issue is whether the Parents and Children are personally affected by that present actual injury. They are as they are the objects of the Policy and have a stake in it.

In Bell this Court could "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." Bell v. Little Axe ISD, 766 F.2d 1391, 1398 (10th Cir 1985). In Bell the preference was established by the School. In this case the preference is established by the "state"s adoption of the Policy, thereby authorizing, guiding, and in Plaintiffs' view mandating, its implementation by the schools. Id. Thus the Parents "are forced to assume special burdens to avoid" the "unwelcome" religious preference. Id.

The actual psychological and other injuries and "special burdens" that arise from the establishment of the preference are discussed extensively at pages 19-23 of Plaintiffs'

Brief. Although actions taken to avoid the effects of a religious message of the state are sufficient to show actual injury, they are not necessary. See American Atheists v. Davenport, 637 F.3d 1095, 1113 (10th Cir 2010).

b. The actual injuries include the denial of equal treatment rights which are sufficient even though the future effect of the denial has yet to occur.

The distinction is also reflected in Tenth Circuit Equal Protection cases discussed at page 24 of Plaintiffs' Brief. A government action which takes or interferes with a legally protected right such as a denial of equal treatment, as is also alleged in the Complaint, is an actual injury even though it has yet to occur. "The `injury in fact'... is the denial of equal treatment.... not the ultimate inability to obtain the benefit." Schultz v. Thorne, 415 F.3d 1128, 1133 (10th Cir. 2005) quoting Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 665-66 (1993).

The denial of equal treatment is pervasive as the Policy seeks to establish a non-theistic religious worldview, thereby discriminating against theists over non-theists. The Policy 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' (Cplt. ¶21).

Defendants' citation to Clapper for the proposition that fear of future injury does not confer standing is inapplicable. Def. Br. at 28. Clapper did not deal with an actual injury - the present taking of a legally protected interest. The statute itself in Clapper was

not a violation of Plaintiffs rights and Clapper did not involve an Establishment Clause violation in the context of public school education.

C. Defendants offer no legal authority to support their arguments other than the inapposite authorities discussed in Plaintiffs Reply.

1. The District Court offered no Supreme Court or Tenth Circuit authority for its Holdings nor any apposite authority from any other jurisdiction.

Plaintiffs' Brief shows that the District Court's holding admits not being supported by any Supreme Court or Tenth Circuit authority. It also shows why authorities cited from other circuits are inapposite. Pltfs. Br. at 34-36 and 45-49.

Defendants' brief does not resolve the issue as it points to no authority other than that mentioned by the District Court. Its arguments that the authorities relied on by the District Court are in fact apposite are not convincing, particularly because none involve Establishment Clause violations to the religious rights of parents and children with regard to K-12 public education.

2. Defendants' arguments that seek to distinguish American Atheists, Awad and other Authorities are based on semantics rather than substance.

a. Defendants' claim that Plaintiffs had no "personal and unwelcome contact" with the message of endorsement reflects illogical semantics over substance.

Defendants seek to distinguish American Atheists v. Davenport, 637 F.3d 1096 (10th Cir. 2010) on the grounds that while the Atheists were directly or personally affected by a fleeting observation of a cross along the side of a highway, the Parents and Children are not because they do not experience "personal and unwelcome contact," with

the Policy. Def. Br. at 27. Presumably the argument is that the cross was actually observed by the Atheist, while the Policy was not observed by the Plaintiffs. True, the Policy was not "observed," in the sense of a fleeting visual observation of the Atheist. However all 850 pages were read and carefully analyzed. The reading was personally unwelcome so they complained at meetings before adoption and in a lawsuit filed after adoption. They had direct and personal contact with the message and tried to stop it.

Plaintiffs do not see a distinction that makes a difference other than the fact that the fleeting injury to the Atheists was only stigmatic, while the injury to the Plaintiffs both stigmatized them and violated their legally protected rights and interests.

b. Defendants' Argument that the Policy Does not "condemn" Plaintiffs religion, is substantively incorrect as the Complaint alleges that it does seek to "suppress" it.

Defendants seek to distinguish Awad v. Ziriax, 670 F.3d 1111, 1119-1120 (10th Cir. 2012) on a semantic rather than a substantive argument. The court in Awad found standing because the State enactment involved was found to "condemn" Plaintiffs' religion. Since Plaintiffs' Complaint does not contain the word "condemn," Defendants argue that Awad is inapposite. Def. Br. at 29.

It is true the Complaint does not use the word "condemn." Instead the allegations of ¶123 uses the word "suppress," as well as a variety of other allegations which have the effect of an implicit and far more subtle and effective condemnation. "Suppress" means "1 a : to put down or out of existence by or as if by authority, force, or pressure ... b : to force into impotence or obscurity c : to extinguish by prohibiting, dissolving, or dispersing." Websters, Id.

The second argument is that Awad is not applicable because the message was a "constitutional command," rather than standards designed to guide schools to indoctrinate the Children with a non-theistic religious worldview, which Defendants claim to be non-binding. There are many differences between the injuries alleged by Mr. Awad and those alleged by the Complaint. Plts. Br. at 34-35. It should be clear that the alleged injury to the Parents and Children is far more severe then that ever experienced by Mr. Awad, or that he might likely experience. The major difference between Mr. Awad's injury is that his injuries did not involve direct personal injuries arising from the taking of his rights and the rights of his children.

Remarkably, Defendants' analysis of the controlling cases did not include any analysis of Bell v. Little Axe other than brief mention. The District Court ignored Bell, presumably because it ignored the ¶124 and ¶125 injuries to the Parent and Children in its Establishment Clause analysis.

D. Defendants' conclusion that "Kansas law does not require local school districts to implement the Science Standards" is unsupported by Gannon, Miller, applicable statutes, regulations, actual practice and Defendants' own intentions.

1. The Complaint does allege threatened future implementation by the Schools the Children attend.

Defendants assert that the Complaint does not allege future implementation by the schools the Children attend. Def. Br. at 11. Plaintiffs disagree. The Policy itself is designed for implementation by every Kansas K-12 School for "each and every child." Since the Children allege that they are students of K-12 Kansas Schools, they implicitly allege threatened implementation by the schools they attend. It is true that they do not

allege that their schools were implementing the Policy when adopted, as the Complaint was filed at the beginning of the first school year following adoption. Instead they allege that the Policy seeks to be implemented in their schools and that such future implementation is an imminent injury as it is certainly impending.

All parties agree that the Policy is designed, as a minimum, to guide the implementation by all K-12 schools through alignment of the curriculum, lesson plans, assessments and teacher development with the Standards. "All" includes schools attended by Plaintiffs.

2. The Threatened Implementation is Imminent.

Plaintiffs argue that the threat is imminent for the various reasons set forth in its Brief at pages 24-33. Defendants argue the threat is not imminent, because the standards are not binding on the local schools due to the last sentence in K.S.A. §72-6439 (b). Plaintiffs argue that the non-impingement language does not operate to constrain laws and regulations outside K.S.A. §72-6439 (b). This is because the holdings in Miller and Gannon essentially require local districts to implement the Standards [Pltfs. Br. at 25-26], and because other statutory and regulatory provisions necessitate alignment. Pltfs. Br. 27-30. In addition the District Court and Defendants recognize that the standards are designed to guide implementation of curriculum to meet their performance expectations. Thus both the law, the Policy and Defendants' behavior show, as a minimum, a clear intent to implement the standards in all schools, which include those being attended by the Children.

a. The unsupported argument that curriculum standards do not reflect the state Board's "design" of a "subject and area of instruction," called "science," is illogical.

The arguments of Defendants that local schools have no obligation to implement the standards depends entirely on the unsupported suggestion that "curriculum standards" do not reflect the State Board's "design" of "subjects and areas of instruction" which are statutorily and constitutionally required to be provided to "all Kansas public education students." Gannon v State of Kansas, 298 Kan. 1107, 1170 (2014)

The Kansas Supreme Court in Gannon held that Section 6 of Article 6 of the Kansas Constitution requires that "all Kansas public education students" be provided with an "adequate" education as defined by the State Board pursuant to K.S.A.2013 Supp. §72–1127." Pltfs. Br. at 25-26. Id That K-12 education law requires the State Board to "adopt and design" "subjects and areas of instruction" that will "provid[e] each and every child" with certain "capacities."

Defendants and the District Court argue, without logical support or authority, that this section is inapplicable because "curriculum standards" are not "subjects and areas of instruction." Mem. & Or. at 18. The argument is ill-conceived as §72-1127 clearly requires the state board to "design" the content of the "subjects and areas of instruction" that will cause students to acquire the specified "capacities." A curriculum standard identifies the content of the subject with particularity as it is a "statement of what students are to know and be able to do in specific content areas." K.A.R. 91-31-31(d) A "content area" is essentially the same as a "subject and area of instruction." In reaching its holding the Kansas Supreme Court actually referred to the "subjects and areas of instructions" to

be designed by the State Board as "standards." Gannon v State of Kansas, 298 Kan. 1107, 1170 319 P.3d 1196 (2014).

Defendants repeat the District Court's argument that "the phrase 'subjects and areas of instruction' in K.S.A. 72-1127 refers to "broad topics, not specific curriculum." Def. Br. at 13.

Although the Board's "adoption" of a "subject and area of instruction" may be "broad," such as "science," it may also be narrow - such as "the history of life on earth," a subject addressed by the Policy in the sixth grade. Applt. App. 623. K.S.A. 72-1127 does not limit the scope of the Board's authority on choice of subjects or their breadth. Furthermore, the statute requires that the subject adopted will be further "designed" by the State Board such that "every child" will know and be able to do certain things and acquire certain capacities. Thus, curricula standards in fact reflect the design of a subject and area of instruction that local schools must teach to "each and every child."

Once again, Defendants' arguments are based on illogical and unsupported semantics, not substance.

b. Plaintiffs do not contend that local school districts are required "to adopt the standards" adopted by the State Board, rather the schools are required to "align" curricula and lesson plans with the standards.

Defendants argue that "legal provisions regarding student assessments, school accreditation, and professional development do not require local school districts to adopt the Science Standards." Def. Resp. at 15. This is incorrect as the Defendants ignore the

distinction between curriculum and a curriculum standard. The Board adopts the standard, not the school. The school then aligns its curricula with the standard.

Defendants also argue that Plaintiffs' argument [Pltfs Br. at 27-30] that assessments, accreditation, and professional development effectively require implementation are not properly before the Court as they were not made in their Response to Defendants' Motion to dismiss, citing Richison v. Ernest Group, Inc., 634 F.3d 1123, 1127-28, 1131 (10th Cir. 2011). Def. Resp. at 15.

The argument is based on a false premise, as Plaintiffs Response to Defendants' Motion to Dismiss did argue that even if the Standards are not technically binding, the Board has the authority to effectively require their implementation due to accreditation and other requirements. Plaintiffs' Response to Motion to Dismiss at 10-11, Applt app 1000 - 1001.

Secondly, Richison is inapposite as the standard of review in that case was not de novo. Richison involved the appellate review of a final judgement after a ruling on the merits where plaintiff asserted a theory of recovery not raised at trial. Defendants agree that the standard of review applicable to this case is de novo. Def, Resp. at 10.

Defendants make a litany of arguments regarding the implementing effect of laws and regulations regarding assessment, accreditation, professional development and so forth. However, in the end they admit that these regulations "provide an incentive for local school districts to adopt curriculum consistent with the Science Standards." Def. Resp. at 20. The incentives are significant, as a failure to implement will result in both failing students and a failing school, which can result in a loss of accreditation, sanctions

and a failure to deliver the Constitutionally required "capacities" listed in Section K.S.A. §72-1127.

Given those incentives and the fact that Exhibits C-1 through C-6 show that Kansas Schools are engaged in an implementing process called for by the Policy, and have previously implemented standards adopted by the state, it is not speculative to expect them to implement the standards.

c. Exhibits C-1 through C-6 show implementation is ongoing and Defendants assert no refusals.

Defendants argue that Exhibits C-1 through C-6 do not show that any of the schools attended by the Children are implementing the standards. However, Defendants are the supervisors of those schools and receive reports from them and can be expected to know the status of implementation by each school and whether any of the schools have refused to implement the Policy. Since Defendants have not advised the Court that the schools have refused to do their jobs, it is not speculative to presume, given the requirements and incentives, that they are implementing or intend to implement the Policy.

Defendants' Exhibit C-5 is an example of an implementing plan, and therefore it is not binding. However, The document reflects the clear expectations that the standards will be implemented and that all districts will be involved.

E. Defendants' arguments regarding causation and redressability fail because all injuries are caused by Defendants' actions.

The Policy reflects statements adopted by the Defendants of what the Children are to know and be able to do. The injuries arise from or are caused by that content.

Accordingly, the relief requested will enjoin that content or cause it to be revised so that it is religiously neutral.

Defendants' arguments ignore that the injuries arise from and are caused by the Board's alleged violations of the Plaintiffs' First Amendment rights, not violations by schools. The Complaint alleges that the Defendants' actions take or violate their rights and seek to cause future violations. Thus Defendants fail to recognize that the injuries arise from the content of the Policy itself and its threatened implementation by the Board as well as the schools. If the Policy is declared unconstitutional and thereby enjoined, then the violations will be redressed, regardless of the actions of the schools.

Defendants argue that Plaintiffs' claim is based on what is not contained in the Policy, and therefore enjoining it will not produce any relief. This is another absurd argument as the Complaint alleges that the omissions render the knowledge to be delivered by the standards to be not objective with respect to religious issues and therefore not neutral.

F. Plaintiffs have not waived taxpayer standing or any of the other bases of standing for the Prathers under ¶123(c) of the Complaint.

Defendants do not waive taxpayer standing for the Prathers More importantly, Plaintiffs' Complaint and Brief argue that the Prathers have standing as residents regardless of their taxpayer status under ¶¶123(a) through (c) of the Complaint. Pltfs. Br. at 51. The activity of the state in Awad that "condemned" his religion, does the same for the Prathers. Defendants' reply does not controvert this basis for standing.

III. Conclusion

In conclusion, the issue in this case is whether any of the Plaintiffs have been injured in fact with respect to any of the alleged violations of the First and Fourteenth Amendments. Defendants have failed to show in a single instance a lack of standing for any of the Plaintiffs with respect to any alleged injury, other than possibly the payment of taxes alleged in ¶123(d).

Accordingly, any neutral application of the principles of standing requires that the Judgment of the District Court be reversed and the case remanded for further proceedings.

ORAL ARGUMENT REQUESTED

Plaintiffs/Appellants request oral argument in this case involving substantial constitutional issues. Appellants believe that the constitutional questions as to Article III standing will be better presented by oral arguments. Oral argument will provide the Court and the parties an opportunity to more thoroughly explore and consider the important issues raised herein.

Dated this 25th day of June, 2015

s/ Douglas J. Patterson, Esq. (KS # 17296)
PROPERTY LAW FIRM, LLC
4630 W. 137th St., Suite 100
Leawood, Kansas 66224
913-663-1300 Telephone
913-663-3834 Facsimile
doug@propertylawfirm.com

s/John H. Calvert, Esq. (MO #20238)
CALVERT LAW OFFICES
2300 Main St., Suite 900
Kansas City, MO 64108
816-797-2869 Telephone
816-448-3703
816-448-3101 Facsimile
jcalvert@att.net

s/ Kevin T. Snider, Esq. (CA #170988)
PACIFIC JUSTICE INSTITUTE
P.O. Box 276600
Sacramento, California 95827-6600
(916) 857-6900 Telephone
(916) 857-6902 Facsimile
ksnider@pji.org
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. . 32(a)(7)(B)(i) because it contains less than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Word 2013.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface—13-point Times New Roman—using Microsoft Word 2007.

CERTIFICATE OF PRIVACY REDACTIONS

As required by Fed. R. App. P. 25(a)(5) and 10th Cir. R. 25.5, the undersigned attorney certifies that all required privacy redactions have been made.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing BRIEF OF PLAINTIFFS-APPELLANTS as submitted in digital form is an exact copy of the written document filed with the Clerk.

CERTIFICATE OF SCANNING

I hereby certify that the digital form of the foregoing BRIEF OF DEFENDANTS-APPELLEES has been scanned for viruses using the Sophos Endpoint Security and Control updated daily, and, according to the program, is free of viruses.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on June 25, 2015, the foregoing BRIEF OF PLAINTIFFS-APPELLANTS was electronically filed with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I caused seven paper copies to be delivered by Federal Express to the Clerk's Office.

Dated this 25TH day of June, 2015

s/ Douglas J. Patterson, Esq. (KS # 17296)
PROPERTY LAW FIRM, LLC
4630 W. 137th St., Suite 100
Leawood, Kansas 66224
913-663-1300 Telephone
913-663-3834 Facsimile
doug@propertylawfirm.com