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

BRIEF OF 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
ORAL ARGUMENT REQUESTED

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EXHIBIT "C-1"

Copy of Kansas State Department of Education web page titled:
Science Home - New KSDE Science Home
Publicly accessible on March 17, 2015 at:
http://community.ksde.org/Default.aspx?tabid=5975

EXHIBIT "C-2"

Copy of Kansas State Department of Education web page titled:
KS Science Standards
Publicly accessible on March 17, 2015 at:
http://community.ksde.org/Default.aspx?tabid=5785

EXHIBIT "C-3"

Copy of Kansas State Department of Education web page titled:
Copy of Kansas Vision for Science Education ....
Publicly accessible on March 17, 2015 at:
http://community.ksde.org/Default.aspx?tabid=5918

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Copy of Kansas State Department of Education web page titled:
Standards Implementation Planning

Publicly accessible on March 17, 2015 at:
http://community.ksde.org/Default.aspx?tabid=5675

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Copy of Kansas State Department of Education web page titled:
NGSS Example Implementation Timeline
Publicly accessible on March 17, 2015 under "Implementation" at
http://community.ksde.org/Default.aspx?tabid=5675

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STATEMENT RE: PARTIES AND COUNSEL PREVIOUSLY INVOLVED IN THIS LITIGATION AND/OR NOT SET OUT IN CAPTION

Defendant Diane DeBacker is the former Kansas Commissioner of Education who was joined as a defendant in her official capacity. She was replaced as Commissioner by her successor defendant Brad Neuenswander in 2014, in his official capacity.

Defendant Jana Saver was joined as a defendant in her official capacity as a member of the Kansas State Board of Education. She was replaced by her successor Jim Porter in January 2015, who is now a defendant in his official capacity.

STATEMENT RE: CORPORATE PLAINTIFF

Citizens for Objective Public Education, Inc., is a non profit Missouri corporation whose purpose is to promote the religious rights of parents, students and taxpayers in public education. It has no shareholders. Its members support the corporation and its mission and include residents of Kansas who are taxpayers and parents that have children that are enrolled in Kansas public schools and children that are expected to be enrolled in Kansas Public Schools.

STATEMENT RE; PRIOR OR RELATED APPEALS

There are no prior related appeals.

BRIEF OF APPELLANTS

PLAINTIFFS/APPELLANTS, by and through their counsel present the following Brief of Appellants.

STATEMENT RE: JURISDICTION

Jurisdiction in this Court is based upon Fed. R. App. Pro. Rule 4(a)(1)(A). Jurisdiction in the court below was based on 42 U.S.C. § 1□983 and § 1988 as well as □ §§ 1331 and 1343, and 28 U.S.C. § 2201 and § 2202.

The appeal is from a final order on December 2, 2014, dismissing the Plaintiffs' complaint without predjucice on the ground that it lacked subject matter jurisdiction. Exhibit B. Applt. App. 1179. Plaintiffs timely filed their notice of appeal on December 30, 2014. Applt. App. 1180.

ISSUES ON APPEAL

Whether the Complaint alleges Article III standing for any of the Plaintiffs for any of the alleged violations of the Establishment, Free Exercise, Speech and Equal Protection Clauses under the First and Fourteenth Amendments.

STANDARD OF REVIEW

The questions before the Court relate to the justicibility of the Plaintiffs' claims. The District Court held they are not for a lack of Article III standing. Due to the lack of standing the Court did not address the merits of Plaintiffs' claims. As a consequence, the issues before this Court are to be reviewed de novo. “We review questions of justicibility de novo." Awad v. Ziriax, 670 F.3d 1111, 1119-1120 (10th Cir. 2012). citing Kansas Judicial Review v. Stout, 519 F.3d 1107, 1114 (10th Cir.2008). See also: American

Atheists, Inc. v. Davenport, 637 F.3d 1095, 1113 (10th Cir. 2010) citing Green v. Haskell County Bd. of Comm'rs, 568 F.3d 784, 792 (10th Cir. 2009), cert. denied, 130 S. Ct. 1687 (2010)].

In reviewing the issues of standing de novo the Court must "accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party," Warth v. Seldin, 422 U. S. 490, 501 (1975); see also Gladstone, Realtors v. Village of Bellwood, 441 U. S. 91, 109 (1979). Pennell v City of San Jose, 485 U.S. 1, 6 (1988). Also, "at the pleading stage, general factual allegations are sufficient to carry plaintiffs' burden of establishing the elements of standing because the Court must "'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) quoting Lujan v Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990); see also Dart Cherokee Basin Operating Co., LLC v. Owens, 730 F.3d 1234, 1236 (10th Cir. 2013) (Hartz, J., dissenting).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Kansas Constitution and Kansas law charges the Kansas State Board of Education (the "State Board") with the general supervision of local school districts in Kansas and the adoption of "curricula standards" that state what Kansas students enrolled in local schools are to be taught "to know and be able to do." K.A.R. 91-31-31(d). See §II.B. 3.a.(3) infra at 24-26, note 3. Appellants'/Plaintiffs' (hereinafter "Plaintiffs") Complaint (Applt. App. at 33-85, hereinafter the "Complaint" or "Cplt.") alleges that on

June 11, 2013 the State Board adopted "Next Generation Science Standards, dated April 2013 and a related Framework for K-12 Science Education" (together, the "Policy") that 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 two Kansas resident taxpayers (the "Taxpayers") under the Establishment, Free Exercise, Speech and Equal Protection Clauses of the First and Fourteenth Amendments. Applt. App. at 33-85.

Appellees/Defendants (hereinafter "Defendants") moved to dismiss the Complaint on December 5, 2013, due to an alleged lack of Article III Standing under Rule 12(b)(1) and for a failure to state a claim upon which relief may be granted under Rule 12(b)(6). Without reviewing the merits of the 12(b)(6) motion, the District Court dismissed the complaint without prejudice on the grounds that all Plaintiffs lack standing to assert any of the claims. Mem. & Or. at 36-37, Applt. App. 1177-78.

Plaintiffs contend that the decision of the District Court was erroneous due to (a) its failure to take into consideration all alleged injuries, (b) its erroneous conclusions that Plaintiffs' actual injuries are abstract rather than particularized and concrete, and that their threatened injuries are not imminent, and (c) the inconsistency of the decision with respect to controlling legal precedents of this Court and the Supreme Court.

The District Court also dismissed the entities conisting of the Defendant State Board of Education and the Defendant Kansas State Department of Education on the grounds that both entities enjoy Sovereign Immunity under Article 11 of the US Constitution. Plaintiffs did not, and do not in this appeal, contest that ruling.

In connection with their Argument under §I.B and II.B.3.a.(3) infra regarding the implementation of the Policy, Plaintiffs ask the Court to take judicial notice of Exhibits C-1 through C-6 relating to the implementation and binding effect of the Policy. See. Note 1 infra at 7-8.

I. STATEMENT OF FACTS, SUMMARY OF THE COMPLAINT, AND BACKGROUND

A. The Complaint ("Cplt."- Applt. App. 33-85)

The Complaint states an action by 21 children (the "Children") enrolled or to be enrolled in Kansas Public Schools, their parents (the "Parents"), two Kansas resident taxpayers (the "Taxpayers"), and Citizens for Objective Public Education, Inc. a non-profit organization ("COPE"). COPE seeks to promote the religious rights of parents, students and taxpayers in public education. Its members include parents having children enrolled in Kansas public schools and Kansas taxpayers. Cplt. ¶¶ 26-43,

The Complaint alleges that a "Framework for K-12 Science Education" and related "Next Generation Science Standards" (collectively the "Policy") adopted by the Defendants on June 11, 2013, for the education of the Children endorses and seeks to establish, explicitly and implicitly a non-theistic religious Worldview in the guise of science education. Cplt. ¶¶1,11-24, 48, 65.

The Worldview is to be inculcated in the children throughout their thirteen-year public school experience, beginning in Kindergarten, not only in science curriculum but also in all other school curriculum. (Cplt. ¶¶11-22).

The Policy seeks to inculcate the Worldview by causing children, beginning in Kindergarten, to ask ultimate religious questions like the cause and nature of life and the universe - where do we come from? (Cplt. ¶2-7) The Policy then uses a fundamental but concealed Orthodoxy called "methodological naturalism" or "scientific materialism" to guide the child to answer the questions with only materialistic/atheistic explanations. (Cplt. ¶¶5-11, 65).

Because the use of the Orthodoxy is concealed and because of other omissions and misrepresentations, the Policy is designed to cause the children to believe that the materialistic explanations they are to be led to accept are based on all the available evidence using common rules of evidence through open-minded investigation and inquiry, when in fact the explanations are to a large part driven by the concealed materialistic/atheistic Orthodoxy (Cplt. ¶97-99).

Other strategies of indoctrination used by the Policy include: (a) strategies that classify children's naturally acquired instinctive teleological conceptions of the world as "misconceptions" and then change them to be consistent with the materialistic/atheistic Orthodoxy (Cplt. ¶¶15-16); (b) employing the indoctrination during the years that children typically formulate their worldviews and at a time when they are not cognitively mature or sufficiently knowledgeable "to enable them to critically analyze and question any of the information presented and to reach their own informed decision about what to believe about ultimate questions fundamental to all religions" (Cplt. ¶¶14, 18); (c) excluding "from its policies regarding non-discrimination and equity, children, parents and taxpayers that embrace theistic worldviews, thereby enabling the discriminatory

establishment of the non-theistic Worldview under the guise of 'science' (Cplt. ¶21); (d) using a strategy that seeks to cause the core materialistic/atheistic ideas of the Worldview to be used in and 'cohere' with all other curriculum and to cause students to develop 'habits of mind' that accept those core ideas" (Cplt. ¶22); and (e) systematically misrepresenting and omitting information highly relevant to the questions of origins addressed by the Policy (Cplt. ¶2-20 and ¶¶84-122).

The Complaint prays for a declaration that "the adoption and implementation" of the Policy violates the rights of Plaintiffs under the First and Fourteenth Amendments [¶ 48 and VIII (a)]. The Complaint further prays for either (a) an injunction against implementation of the Policy as a whole, or in the alternative (b) an injunction against the implementation of those provisions of the policy that seek to teach Origins Science (cosmological, chemical and biological evolution) in grades K-8 and in grades 9-12 unless the origins science instruction includes adequate and reasonably complete information about certain specified matters and is taught objectively so as to produce a religiously neutral effect. (Cplt. ¶VIII).

B. Adoption and Implementation of the Policy.

COPE objected to the Policy in detailed written analyses appended to the Complaint as Exhibits A (Applt. App. 71-79) and B (Applt. App. 80-85), during the periods for public comment in 2012 and early 2013 and at two Meetings of the Defendant Board of Education on May 14 and June 11, 2013 (Cplt. ¶¶ 56-63). A majority of the Defendants did not deem Plaintiffs' religious objections relevant, because K.S.A. § 72-1111(f) entitles parents to opt their children out of an "activity which is contrary to the

religious teachings of the child" after filing an appropriate "request." [Def. Mem. Applt. App. at 126 and Min. of Meet. Applt. App. at 1072].

As explained by Plaintiffs in their Response to Defendants' Motion to Dismiss, the opt-out is "grandly illusory," because the Policy seeks to establish the offensive religious worldview incrementally through "a concealed program that is designed to continue for the entire thirteen year public education of the child and to 'cohere with all other curriculum.'.... To take advantage of that right the parent would have to opt the child out of all public education, which the very same statute requires." (Applt. App. 1030).

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 that the standards will be "translated into curriculum and lesson plans that bundle the standards into teachable units," (The Kansas Next Generation Standards Review Committee Report and Recommendation to the Kansas State Baord of Education dated May 14, 2013, the "R&R", Applt. App. 1088, 1095) by local districts with "fidelity" (R&R, Applt. App. 1088) 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.

The Complaint was filed three months after the adoption of the policy and before its implementation in local schools. Documents made publicly available by defendants

show that implementation has been ongoing since adoption. Exhibits C-1 thru C-6.[1] These documents show that (a) "Kansas Schools continue working toward full implementation of the" standards (Exhibit C-6), (b) that the "transition to our new science standards" is underway and is being implemented "at the classroom, building, district, community, and state levels," (Exhibit C-1) and (c) that all " "teachers, schools and districts" are urged to "successfully" implement the Policy with the "tenacity of a honey badger." Exhibit C-4. By the end of a four year "transition" period "Curriculum is [expected to be] written for the Next Generation Science Standards." Exhibits C-4 and C-5. "[T]he full effect [of the Policy will not be known] until a kindergartner entering the system [at the end of the transition period] graduates from high school." Exhibit C-4.

Six of the 21 child Plaintiffs were five years or younger at the time the Complaint was filed. Thus, the "full effect" of the implementation of a Policy that seeks to establish

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[1] Plaintiffs request the Court take Judicial Notice of Exhibits C-1 thru C-6 because they are published by Defendant Kansas State Department of Education and have been made publicly available on Defendant's web site at the addresses indicated in the list of Exhibits. 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) Courts may take judicial notice of facts "not subject to reasonable dispute in that [they are]...capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FRE 201(b). As Defendants have authored and made the documents publicly available, they cannot be subject to reasonable dispute by the Defendants. In connection with its motion to Dismiss, Defendants sought (Applt. App 1056-58) and received (Applt. App. 1147-1148) judicial notice as to similar documents posted on its publicly available web site on the grounds that they are "publicly available records of a public agency." These include minutes of the June 11, 2013 meeting of the Defendant State Board of Education, (Applt. App. 1070) a "streaming video" of the meeting, and a Report and Recommendation of the Next Generation Science Standards Review Committee (Applt. App. 1081).

in them a non-theistic religious worldview will be one which accrues over a span of thirteen years if they start Kindergarten after the transition period.

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.

II. Discussion

A. Summary of Argument

The Complaint was dismissed because the District Court incorrectly characterized the Parents and Children as "bystanders" whose Establishment Clause injuries are nothing more than "abstract stigmatic," injuries, resulting only from "the psychological consequence presumably produced by observation of conduct with which one disagrees," citing the inapposite Valley Forge Christian College v. AUSCS, 454 U.S. 464, 485 (1982). Mem. & Or. at 25. Applt. App. at 1166.

Numerous actual non-stigmatic personal injuries alleged in ¶¶123-125 of the Complaint were given no consideration. These include the Policy's adoption that caused an immediate and actual taking of, and interference with, (a) legally protected interests of the Parents to direct the religious education of their children and (b) the rights of the Children to not be indoctrinated by state schools to accept a non-theistic religious worldview.

The failure to consider all the alleged injuries was compounded by the fact that the injuries of the Parents and Children that were considered are all particularized and

concrete and not abstract. This is because the Parents and Children are not mere bystanders, but are the "object[s] of the action... at issue" and have an enormously important "stake in it." Lujan, 504 U.S. at 561-2.

The idea that Plaintiffs' injuries are abstract rather than concrete and particularized stems from the erroneous speculation that the Policy is merely a "guide" and not a mandate, thereby rending the injuries only conjectural and hypothetical. But the statutory scheme effectively binds local school to follow that guidance. The statutes empower the State Board to ensure its guidance is followed relative to assessments of student performance and learning, professional development, and school accreditation. Sanctions are imposed for failure to comply.

However, even if the Policy is only a "guide," the Defendants guidance of its supervised schools to inculcate the Children with a non-theistic religious worldview does not render the injuries "abstract." This is because an injury is concrete and particularized and not abstract if it is directed personally to the Parents and Children who have a stake in the matter, regardless of its likelihood of occurrence.

The binding effect of the policy is relevant only to Plaintiffs' threatened injuries arising from the Policy's planned future implementation, not their actual injuries, as these have already occurred. The binding effect only affects the imminence of the threat of future injury and whether the threat is only conjectural or hypothetical.

In any event, the Kansas Constitution, Kansas Laws, Kansas Regulations, and Defendants' own conduct show that the Policy is being implemented and is effectively

binding on local schools, thereby making the threatened injuries imminent and not conjectural or hypothetical.

The factually abridged analysis also suffers from a lack of any legal support from this Court's controlling holdings in Bell v. Little Axe ISD, 766 F.2d 1391 (10th Cir 1985), American Atheists, Id. and Awad, Id. In seeking to support its conclusions from jurisprudence outside Tenth Circuit, the District Court also rejected apposite cases such as Catholic League v. City and Cnty. of San Francisco, 624 F.3d 1043, 1062 (9th Cir.2010), and relied on cases which actually undermine its thesis [Newdow v Lefevre, 598 F.3d 638 (9th Cir 2010); Moss v Spartanburg CSD Seven, 683 F.3d 599 (4th Sir 2012) and Valley Forge), or which are completely inapposite [FFRF v. Obama, 641 F.3d 803 (7th Cir 2011) and In re Navy Chaplaincy v. US Navy, 534 F.3d 756 (D.D.C. 2008)].

The faulty Establishment Clause analysis was carried over to its analysis regarding Free Exercise, Equal Protection and Speech clause claims.

In conclusion, that portion of the District Court's Order dismissing the case for a lack of Article III standing should be reversed, and case should be remanded for further proceedings.

B. The Complaint alleges concrete and particularized injuries in fact to legally protected rights of the Parents and Children, both actual and imminent.

1. Injury in fact defined.

“To demonstrate standing, a plaintiff must allege actual or threatened personal injury, fairly traceable to the defendant's unlawful conduct and likely to be redressed by a

favorable decision of the court." American Atheists, 637 F.3d at 1113 citing Foremaster v. City of St. George, 882 F.2d 1485, 1487 (10th Cir.1989).

Plaintiffs' injury must be an "injury in fact" such that they "have suffered ... an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.... In requiring a particular injury, the Court meant 'that the injury must affect the plaintiff in a personal and individual way.'" Ariz. Christian Sch. Tuition Org. v. Winn, 131 S.Ct. 1436, 1442 (2011)" citing Lujan 504 U.S. at 560-61, n.1 In this respect the key question is whether the Plaintiffs have "a personal stake in the outcome of the controversy" Massachusetts v. E.P.A., 549 U.S. 497, 517 (2007) (quotations omitted).

2. Injury Allegations of the Complaint.

Establishment Clause injuries arise from an "endorsement" or an action by government that "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred." Cnty. of Allegheny v. ACLU, 492 U.S. 573, 593 (1989) quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985). The vehicle or instrument that causes the injury is the message itself. Thus, its content and "context" is critical to both its meaning and impact and injury on the recipient.

The Complaint (Applt. App. at 33-85) alleges in Cplt. ¶¶123-126 and other provisions (a) actual and imminently threatened, (b) concrete and particularized injuries to (c) legally protected interests of the Plaintiffs that are not conjectural or hypothetical.

Plaintiffs' injuries arise from both the messages produced by the State Board's adoption/endorsement/establishment/promotion of the Policy [Cplt. ¶¶1, 20, 21, 22, 48

(first clause), 65, 87, 127, VIII.a.)] and by the threatened implementation of the Policy [Cplt. ¶¶24, 25, 48 (second clause)].

Cplt. ¶123 alleges that all Plaintiffs in common, including Kansas residents and taxpayers, "are injured by their State's endorsement and promotion of an Orthodoxy [used by the Policy] that establishes and promotes non-theistic religious beliefs while seeking to suppress competing theistic religious views because [the endorsement and promotion]: (a) "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 (Cplt. ¶123.b); (c) denies their right to be "treated equally with non-theists" (Cplt. ¶123.c); and (d) causes them to pay taxes to fund the state's endorsement (Cplt. ¶123.d).

Cplt. ¶124 alleges injuries that are suffered particularly by the Children who "seek to enforce their rights to not be indoctrinated by Kansas public schools to accept the materialistic/atheistic religious Worldview which the F&S seek to establish." (Cplt. ¶¶28,30, 32, 34, 36, 38, 40, 42). Their alleged injuries from the adoption and implementation or "State use of [a] Policy calculated to cause them to be indoctrinated into accepting a non-theistic religious worldview," include: (a) a violation "of their right to chose what to believe about an origins narrative critical to the formation of their worldviews regarding religion, ethics, morals, and other matters of opinion," (Cplt. ¶124.a.); (b) causing them to be imbued "with, rather than be educated about, a concept fundamental to religious belief" (Cplt. ¶124.b.); (c) causing them to be imbued with "a religious belief that is inconsistent with the beliefs their parents have sought to instill in

them" (Cplt. ¶124.c.); (d) an interference "with the free exercise of their religion" (Cplt. ¶124.d.); (e) the "discouragement of questions that imply any criticism of the [materialistic/atheistic] Orthodoxy (Cplt. ¶123.e.); (f) a loss of "respect for their parents and advisors who hold views inconsistent with the [materialistic/atheistic] Orthodoxy;" (Cplt. ¶124.f.) and (g) a loss of "respect from their peers who have accepted the [materialistic/atheistic] Orthodoxy." (¶124.g.). Cplt. ¶¶ 124.a., d. and e. reflect actual injuries while ¶¶ 124.b., c. f. and g. reflect threatened future injuries.

Cplt. ¶125 alleges injuries suffered by the Parents who wish to "instill in their children a belief that life is a creation made for a purpose, that does not end on death and is not simply a purposeless occurrence that is the product of an unguided evolutionary process." (Cplt. ¶¶27, 29, 31, 33, 35, 37, 39, 41.) Their alleged injuries from the adoption and implementation of the Policy are that it "violates" and "interferes with their rights to direct" (a) "the religious education of their children" (Cplt. ¶¶ 48, 125.a); (b) "the development of their children's worldviews regarding ethics, morals, government, politics, and other matters of opinion;" (¶125.b); and (c) with their "right to freely exercise their theistic religion by causing their children to embrace a materialistic /atheistic Worldview that is inconsistent with that religion;" (¶125.c); and (d) "because it causes them to lose the respect of their children for holding views inconsistent with a materialistic Orthodoxy that their children have been indoctrinated to accept." (¶ 125.d). ¶¶ 125.a., b. and c. reflect actual injuries. ¶¶ 125.d. reflects a threatened future injury.

Implicitly, the most severe actual injury to the Parents is the actual and threatened injuries to their children. There is nothing more precious to a Parent than his or her child.

An injury or threatened injury to a child is not an abstract stigmatic injury to a Parent. It is actual, personal and deeply traumatic to the parent.

Cplt. ¶126 alleges injuries to COPE which are the same as the foregoing, as members of COPE include Kansas Residents, Taxpayers and parents having children in Kansas Public Schools. The interests at stake in this Complaint are germane to the purposes of COPE, and neither the claim asserted nor the relief requested requires the participation of individual members of COPE in the lawsuit. Accordingly, COPE has standing as all individual plaintiffs have standing. Hunt v Washington State Apple Adv. Comm. 432 U.S. 333, 343 (1977); New Mexico Ex Rel. Richardson, 565 F.3d at 697.

3. The injuries are concrete and particularized invasions of legally protected interests which are actual or imminent.

a. Injuries to the Parents and Children

(1) All the Injuries are Concrete and Particularized and not abstract, because the Parents and Children are the objects of the Policy and have a personal stake in it.

"Particularized" means "that the injury must affect the plaintiff in a personal and individual way." Lujan, 504 U.S. at 560, N.1; The injury is concrete, as opposed to abstract, if the Plaintiff has a personal stake in the outcome of the controversy such that the relief requested "'directly and tangibly benefits him' in a manner distinct from its impact on 'the public at large.'" Massachusetts v. E.P.A ., 549 U.S. at 541 Justice Roberts, Dissenting, quoting Lujan id., at 573–574.). "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of

issues upon which the court so largely depends for illumination."' Id at 517 quoting Baker v. Carr, 369 U.S. 186, 204 (1962).

None of the alleged injuries to the Parents and Children is abstract as the Parents and Children are personally the "objects" of the Policy. The injuries are also concrete as they have significant "personal stake[s] in the outcome" of their complaints. This is because the Policy is designed to guide schools to cause the Children to switch from their theistic beliefs to a non-theistic belief by changing their misconceived theistic answers to ultimate questions to materialistic ones. Cplt. ¶¶16-17. The Parents' injuries are all concrete and particularized, because their love and legal reponsibility for their children give them a "personal stake" in their public education. Similarly, the Children's injuries are particularized and concrete for it is their lives the Policy seeks to change. For these reasons, none of the injuries is abstract.

This Court has recognized that parents of schoolchildren typically have standing because they "are directly affected by the laws and practices against which their complaints are directed...These parents are not merely 'concerned by-standers'... airing 'generalized grievances,' ... Rather, they assert a specific injury that falls well within the zone of interests protected by the Establishment Clause." Bell, at 1398 citing Valley Forge, 454 U.S. at 486 n. 22, 102 S.Ct. at 759-760 and 766 n. 22 (quoting Abington School District v. Schempp, 374 U.S. 203, 224 n. 9, 83 S.Ct. 1560, 1572 n. 9, 10 L.Ed.2d 844 (1963)).

(2) The Actual Injuries

(a) ¶¶ 124 and 125 Actual Injuries include breach of trust - violations of legally protected rights and interests.

The primary actual injuries to the Parents and Children alleged in Cplt. ¶¶ 124 and 125 are that prior to the adoption of the policy the Parents enjoyed a legally protected right to direct the religious education of their children, and their children enjoyed the corollary right that their public education would be designed and supervised by Defendants so that the state would not seek to indoctrinate them to accept any religious belief. When the State adopted a contrary policy, the rights of the Parents and Children were taken. The taking injured them immediately, directly and personally, amounting to a deprivation of liberty rights. The Establishment Clause functions not merely to bar government-endorsed religion but also to maximize religious liberty. Wallace v. Jaffree, 472 U.S. at 68 (O'Connor, J., concurring) (stating that the Religion Clauses' "common purpose is to secure religious liberty." (citing Engel v. Vitale, 370 U.S. 421, 430 (1962).

The fact that the adoption of the Policy itself amounts to a breach of trust or a violation of rights the Parents and Children is explained in Edwards v Aguillard, 482 U.S. 578, 583-4 (1987). In Edwards the Court held that it is the right of the parent, not that of the state, to direct the religious education of their children. Parents place their children with the state for public education, under a trust that the State will not use the classroom "to advance religious views that may conflict with the private beliefs of the student and his or her family." Id.

> "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families *entrust* public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary." (citations omitted, emphasis added) (O'CONNOR, J., concurring in judgment).

The Trust is also necessary "because the students' emulation of teachers as role models and the children's susceptibility to peer pressure" causes them to accept without question what their teachers tell them and what their peers have been led to accept. The Edwards Court concluded that because of these factors there is "no activity of the State [where] it is more vital to keep out divisive forces than in its schools..." Id. As a consequence and as a means of enforcing the Trust, the Court indicated that it "has been required often to invalidate statutes which advance religion in public elementary and secondary schools." Id.

Thus, the courts have recognized that a violation of the parents' rights to direct the religious education of their children provides then with Article III Standing. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 224 n. 9 (1963); McCollum v. Board of Education., 333 U.S. 203, 206 (1948); See Wisconsin v. Yoder, 406 U.S. 205, 232-3 (1972); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1532 (9th Cir.,1985), cert. denied; Fleischfresser v. Dir. of Sch. Dist 200, 15 F.3d 680, 683-4 (7th Cir 1994)

This Court agreed in Bell v. Little Axe ISD, 766 F.2d at 1398 where it held that parents have standing on their own behalf, when the "state is unconstitutionally acting to establish a religious preference affecting their children:"

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

The beneficiaries of the Trust include the children (Edwards, Id.) who have the right to not be indoctrinated by the state to accept a particular "religious view." "Looking to our recently decided cases, we articulated three primary criteria to guide the determination whether a government-aid program impermissibly advances religion [in a school context]: (1) whether the aid results in governmental indoctrination . . . ." Mitchell v. Helms, 530 U.S. 793, 844-5 (2000). (emphasis added)

(b) Injuries are actual even if the Policy is not "binding" on local schools.

Even if the Policy is incorrectly construed to be not binding on local schools, that effect does not eliminate the actual taking of the rights of Parents and Children. This is because, at the very least, the Policy seeks to "guide" the local schools to engage in the indoctrination. Supra at 25-29. The Parents and students have the right to attend Kansas public schools which are not so guided by the body charged with their supervision. See, e.g., Wallace v. Jaffree, 472 U.S. at 40-42, 56 (invalidating an Alabama statute merely "authorizing" a daily period in public schools for meditation or voluntary prayer).

This and other Courts have frequently found that parents and children are actually injured by non-binding religious activities: Bell v. Little Axe, at 1399 [children not

required to participate in before the start of school religious exercises conducted by volunteers]; Habecker v. Town of Estes Park, Colo., 518 F.3d 1217, 1226-1227 (10th Cir. 2008) [distinguishing between school children and public officials with respect to optional participation due to "their unique impressionability and the context of school, which includes some of life's most significant occasions."]; School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. at 224-225 n. 9, Syl. at 203 ["State law or a school board" may not promote a particular religion "even if individual students may be excused from attending or participating in such exercises."] Sherman ex rel. Sherman v. Koch, 623 F.3d 501, 507 (7th Cir. 2010), cert. denied (2011) [A child's "status as a student establishes her standing to sue."] Croft v. Governor of Texas, 562 F.3d 735, 745-746 (5th Cir. 2009) [parents have standing to complain about a minute of silence that may be used for any quiet activity] Bell, 766 F.2d *at 1405, citing* Engel v. Vitale, 370 U.S. at 430-31 [standing arises "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, [because] the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."] McCollum v. Board of Educ., 333 U.S. at 206, 232-234 [atheist complaining about voluntary program.] Doe v. Beaumont, 240 F.3d 462, 468 [holding that an opt-out option provides standing. "At bottom, the claim is that the program unconstitutionally prefers religion over non-religion, that the students cannot participate in the school's offered program without taking part in an unconstitutional practice. ... this works a deprivation of a student's right not to be excluded from the benefits of a school-financed educational offering — a concrete, judicially cognizable injury."] Doe v. School Bd. of Ouachita

Parish, 274 F.3d 289, 291–293 (5th Cir. 2001), quoting Doe v. Beaumont, Id. at 466-67: ["The case for standing is made stronger when the plaintiffs are students and parents of students attending public schools, who enjoy a cluster of rights vis-a-vis their schools, and thus are not merely 'concerned bystanders.'"]

(c) Actual and threatened Injuries to the children are actual injuries to the parent

The injuries to the Parents include the actual and threatened injuries to the spiritual lives of the Children, which depend on their having a strong belief in and relationship with God.[2] It is hard to imagine an injury more serious to a parent than an actual or threatened injury to his or her child - one that the parent is helpless to correct or to avoid. Thus, the actual and threatened Cplt. ¶124 injuries to the Children amount to severe actual psychological injuries to the Parents as explained more fully in the next section.

(d) The Policy produces a dilemma that generates fear, anxiety, anger and distrust in the Parents.

Defendants' response to Plaintiffs' Establishment Clause complaints was that Plaintiffs may avoid the religious aspects of the Policy by opting out of it under K.S.A. § 72-1111(f)]. Supra at §I.B at 6. However, an opt-out policy is no defense to an Establishment Clause violation, as an endorsement alone and without coercion is a violation. Furthermore, it actually generates injury as an opt-out requires Plaintiffs to forego the full curriculum. Doe v. Beaumont, Id. Actually, the Policy immediately presents the Parents with the chilling dilemma of either a costly abstention or a costly

[2] Matthew 4:4 Jesus answered, "It is written: 'Man does not live on bread alone, but on every word that comes from the mouth of God.'" (NIV)

participation. Lee v. Weisman, 505 U.S. 577, 578, 593 (1992) [having to abstain from a graduation ceremony or listen to a prayer presents the student with an injurious dilemma].

As explained by Plaintiffs' Response to the Motion to Dismiss (Applt. App. at 1030-31), the dilemma is much more severe than whether to attend a graduation exercise. To effectively opt a child out of the hidden and offensive aspects of the thirteen year period of deceptive indoctrination designed to cohere with all subjects taught, a parent would need to incur the costs of home or private schooling. Otherwise, the Parents would have to incur the costs of making daily inquiries of school teachers and officials to determine when, how and where each instance of the deceptive teaching would occur, make the proper written request in each instance, suffer the indignity of challenging the system, and expose the child to the disrespect of his peers and teachers. The worldview prescribed by the Policy contemplates that it will be inculcated incrementally. Thus one may not recognize an increment taught in Kindergarten as relevant, when it in fact is.

Furthermore, any exercise of the opt-out would cause the child to lose the benefit of objective science and other education provided during the Child's absence. It is also likely that parents without a complete understanding of origins science and the context of any classroom instruction about it would simply not be qualified to know whether or not an opt-out should be applied for. This uncertainty itself renders the opt-out wholly inadequate when it must be exercised knowledgeably, incrementally, repeatedly and consistently. The end result is that the parents have no real alternative except the costly home or private schooling option, which itself will entail not only the economic costs of

providing the home or private school alternative, but also the loss of free public education that in many respects provides benefits not available privately or at home.

Thus, the adoption of the Policy produces only a deep and distasteful dilemma for the Parents, who are left with only unsatisfactory alternatives. The dilemma generates the immediate psychological fear and anxiety of not being able to adequately provide for their Children's education without risking the loss of their spiritual lives. The fear is magnified by the fact that most of the Plaintiffs lack the time and means necessary to even fund a home or private school alternative (the Reimers have 4 children in Kansas schools, aged 5, 8, 9 and 11, Cplt. ¶27). It also generates other "unwanted" psychological consequences of anger and distrust of any Kansas public education program. These psychological injuries are actual and concrete, not conjectural or hypothetical.

(e) The ¶123 injuries are actual and concrete

The Cplt. ¶123 injuries, including the ¶123(b) stigmatic injuries, are actual injuries which are concrete and particularized and not abstract. This is because the Policy that generates them is personally directed at the Plaintiffs - they have a stake in it. The preamble to Cplt. ¶123 alleges that the Policy seeks to replace the theistic beliefs of Plaintiffs' children with non-theistic religious beliefs in all public schools. The injury to the Parents and Children is one that goes far beyond mere disagreement with an activity of the government, as the Policy is carefully designed to exclude theists from its provisions regarding non-discrimination, equal treatment and equity. This generates the ¶123.c. injury of a personal denial of equal treatment.

A governmental action which denies equal treatment is an actual injury even though the injury is yet to occur. "The injury in fact is the denial of equal treatment." ACLU v Santillanes, 546 F.3d 1313, 1319 (10th Cir 2008); Schultz v. Thorne, 415 F.3d 1128, 1133 (10th Cir. 2005), "The `injury in fact'... is the denial of equal treatment.... not the ultimate inability to obtain the benefit." quoting Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 665-66 (1993) and citing Gratz v. Bollinger, 539 U.S. 244, 261-62, S.Ct. 2411, 156 L.Ed.2d 257 (2003) [describing cases where standing found even though plaintiff not denied a benefit); and Cache Valley Elec. Co. v. Utah Dep't of Transportation, 149 F.3d 1119, 1122 (10th Cir. 1998].

The Cplt. ¶123 injuries are essentially the same as the injuries alleged by Mr. Awad, which this court found sufficient to confer standing. infra at §II. C. at 34.

(3) Plaintiffs' Threatened Injuries are not Conjectural or Hypothetical and are Certainly Impending.

The Complaint alleges actual injures arising from the adoption of the Policy and future threatened injuries arising from its future implementation (Cplt. ¶¶1, 48, 127, VIII/a.).

The District Court suggests that the threatened future injuries are only conjectural or hypothetical and therefore not imminent, because it interpreted the last sentence in Subsection (b) of K.S.A. §72-6439 as rendering the "curriculum standards" not binding on local school districts. Mem. & Or. at 17, Applt. App. at 1158.

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

(a) Implementation of the Policy is in process and is not Conjectural or Hypothetical.

1 The non-impingement language does not operate to constrain Laws and regulations outside K.S.A. §72-6439 (b) which effectively require implementation.

The caveat that "Nothing in this subsection (b) shall be construed ... to impinge," obviously does not apply to other provisions of law and regulations outside the subsection. Those outside matters may be construed to effectively or practically require the district to revise its curriculum to implement the State Board's "curriculum standards."

In fact the State Board is provided under the Kansas Constitution with specific authority to effectively require local districts to implement the Policy under laws and regulations outside "subsection (b)." This includes its general authority under the Kansas Constitution to "supervise," "evaluate," and "oversee for direction" local districts. USD No 380 v McMillen, 252 Kan. 451, 460; 845 P.2d 676 (1993) citing State, ex rel., Miller v. Board of Education, 212 Kan. 482, Syl. ¶ 9, 511 P.2d 705 (1973). As explained by Justice Fromme, the holding of the Supreme Court in "Miller" upholding a state board directive requiring a local district to adopt certain regulations "effectively removed any vestige of authority from local school boards." Miller, Id. at 493 (Justice Fromme, dissenting).

Justice Fromme's conclusion was recently underscored by the Court in Gannon v State of Kansas, 298 Kan. 1107, 1170 319 P.3d 1196 (2014). 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." *Id.* The Court defined "adequate" to mean education that "meet[s] or exceed[s]" " the standards ...codified in K.S.A.2013 Supp. §72–1127." Under that law the state board is required by subsection (a) and (c) to adopt and design the specific standards for achieving that adequacy by "adopt[ing]" and "design[ing]" "subjects and areas of instruction" that will "provid[e] each and every child" with certain "capacities" of learning. *Id.* One such "capacity" is to have "sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market." K.S.A. §72–1127(c)(7). The state Board's adoption of the Policy itself reflects the design required by 72-1127, that delivers the capacities "each and every child" is required to have in the "subject and area of instruction" called "science."[3]

[3] The Defendants and the District Court have ignored the command of K.S.A. §72–1127 as they implicitly argue, without logical support or authority, that it is inapplicable because "curriculum standards" are not "subjects and areas of instruction." Mem. & Or. at 18. The argument is incomprehensible 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 that content 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." Id.

Accordingly, all local school districts are effectively mandated by the Constitution and the Supreme Court in Gannon to write curriculum that will implement the Policy. If they ignore the standards they will not be able to demonstrate the required delivery of an adequate education to their students.

Another statutory provision within K.S.A. §72-6439 that specifically contradicts the District Court's conclusion is that of subsection (d). It requires "each school in every district to establish a school site council" that includes the school principal and representatives of the school's teachers to "evaluat[e] state, ... goals and objectives and [to]determin[e] the methods that should be employed at the school site to meet these goals and objectives." K.S.A. §72-6439(d). (emphasis added) Thus, the statute as a whole reflects an intention that the local school will implement the "goals and objectives" set forth in the "curriculum standards" adopted by the Defendants.

2 The District Court and Defendants acknowledge that the standards function to "guide revisions to curriculum" and provisions outside of subsection (b) effectively require local districts to follow the guidance.

The District Court's conclusion that school district implementation is merely speculative and hypothetical is also inconsistent with the Court's own recognition that that the Policy is "'intended to guide revisions to science-related curriculum, instruction, assessment, and professional development for educators.'" Mem. & Or. at 18 quoting Framework at 2 Applt. App. 153. (emphasis added)

Thus, there is a consensus that the "curriculum standards," at a minimum, are to "guide" "revisions to science-related curriculum" by the local districts. The issue then becomes whether the schools are effectively bound or required to follow that guidance.

Provisions which empower the State Board to ensure its guidance is followed include those dealing with assessments of student performance and learning, professional development, and school accreditation, all of which are determined and controlled by the State Board.

To determine whether students actually "know and are able to do" the things specified by the "goals and objectives" of the standards, K.S.A. §72-6439(c) requires the State Board to "provide for statewide assessments" that "measure student learning within the Kansas curriculum standards for .... science.." [K.A.R. 91-31-31 (l)] so that both "individual performance and school performance " can be "measured." (K.S.A. §72-6439(c).

In addition, schools are required to align local assessments with the state standards K.A.R. 91-31-32(c)(3) and R&R at 17 - Applt. App. 1097. The fact that schools must develop their own tests of what the standards require itself indicates that the schools must also develop curriculum that will enable students to pass the tests.

A key incentive for local schools to implement the Policy is that law provides the State Board with the authority to determine the requirements a school must meet to be an accredited school, and to annually make a determination as to the accreditation status of each school in the state. K.S.A. §72-7513 (a)(2) and (3); K.S.A. §72-6439(a); K.A.R. 91-31-38. Accreditation requirements require satisfactory performance on state assessments.

K.A.R. 91-31-32 (b)(1). Whenever the State Board determines that a school has failed to meet its accreditation requirements, it may deny accreditation (K.A.R. 91-31-31), take actions to require the school to supply the necessary curriculum [K.S.A. §72-6439a.], and impose sanctions for a failure to achieve accreditation requirements. K.A.R. 91-31-38(h). Thus, if the schools do not follow the guidance of the State Board to write curriculum that meets the "goals and objectives" of the standards, then both the school and student will be viewed as having failed.

Another mechanism that ensures implementation is the State Board's control over teacher training, development and certification [K.S.A. §72-7513 (a)(4)]. That training and professional development must be "aligned" with the curriculum standards. K.S.A. §72-9606(c); K.A.R. 91-31-32 (c)(3) and (4). In order for a school to secure state financial assistance for a teacher development program, it must receive "approval of the program" from the State Board. K.S.A. §72-9605(a). As a consequence the state has the power to guide curriculum development though its supervision of the training of teachers who write it.

Based on the foregoing, when viewing the Kansas Constitution and education statutes and regulations as a whole, one must read subsection (b) as respecting the authority of local districts to write the curriculum, but in a manner that will implement the "goals and objectives" of "curriculum standards" adopted by the state supervisor that is required to adequately define what "all Kansas students" are to know and be able to do.

This interpretation follows this Court's advice that "‘[i]n ascertaining the plain meaning of [a] statute, [we] must look to the particular statutory language at issue, as

well as the language and design of the statute as a whole,'" [Chickasaw Nation v. United States, 208 F.3d 871, 878 (10th Cir.2000) (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)]..."'in which [a] component [of the statute] operates.' See 2A C. Sands, Southerland on Statutory Construction § 46.05, at 90 (4th ed.1984).'" Oakley v City of Longmont, 890 F.2d 1128, 1132-33 (10th Cir. 1989). "'The court must [then] reconcile different provisions to make them consistent, harmonious, and sensible.'" Smith v Yell Bell Taxi, 276 Kan. 305, 307-8, 75 P.3d 1222 (Kan 2003) quoting from KPERS v. Reimer & Koger Assocs., Inc., 262 Kan. 635, 643–44, 941 P.2d 1321 (1997)." (308).

3 The local districts have in the past implemented state standards, and implementation is in process.

Defendants consider Kansas to be on the "Vanguard" of a revolution in "science education." R&R, Applt. App. at 1099. " "As a lead state Kansas played a significant role in shaping these standards [for the entire nation]," and therefore their faithful implemmentation should not be delayed. Id. at 1087. Consistent with their legal need to be guided by the State Board, local districts have in the past routinely implemented state standards and are now in the process of "fully implementing" new "college and career ready state standards" in math, English and science. Exhibit C-6. They are being encouraged by Defendants to do that with the "tenacity of a honey badger." Exhibit C4. It is believed that implementation of the Common Core math and English will "align with and invigorate" the implementation of the standards. R&R Id. at 1088.

Defendants' "expectation" is that the standards "will be translated into curriculum and lesson plans that bundle the standards into teachable units," Id. at 1095 with "fidelity

to the NGSS and the Framework." Id. at 1088. Defendants actually view the Policy as maintaining a "sharp focus on things that cannot be overlooked in our expectations for every student." They "emphasize what is essential." Id. at 1085-86.

Accordingly, the expectation of continued future implementation is not conjectural or hypothetical, but rather is likely, especially after the state and schools have made implementing investments of time and resources toward that end. Exhibits C1-6, R&R, Id. at 1099.

In conclusion, the implementation of the Policy is likely and not "conjectural" or "hypothetical." This is because the inference is based on the facts that (a) the Kansas Constitution requires it, (b) the defendants have declared their intention and committed its resources to guide the schools to revise their curriculum to implement the policy despite specific objections by Plaintiffs and other Board members, (c) the Defendants have the power to effectively require that implementation through their control over assessments, professional development and school accreditation, (d) Defendants have in the past caused local schools to implement state standards, (e) the state and the districts are now actually in the process of implementation, and because (f) the state and local districts have already made investments of time and resources to effect the full implementation.

The train has left the station and is proceeding toward its destination at full speed. Defendants fully expect its arrival. A wreck along the way other than an injunction to remediate the injuries is purely speculative and hypothetical.

(b) Implementation of the Policy is in process and completion is certainly impending.

"A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." Babbitt v. United Farm Workers Nat'l Union 442 U.S. 289 (1979), citing O'Shea v. Littleton, 414 U.S. 488, 494 (1974). "But '[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is *certainly impending* that is enough.'" Babbitt, Id "Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending,'" Lujan, 504 U.S. at 564.

Thus, in Massachusetts v. EPA the threatened inundation of the Massachusetts coast line that would take one hundred years to manifestation due to an alleged failure to implement certain EPA regulations regarding auto emissions was considered sufficiently imminent and timely. Id. at 1456-7, Roberts dissenting at 1467-68. Other cases finding long term future threats to be imminent include Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2754-55 (2010) [holding that the improbability of a future negative regulation by the Animal and Plant Health Inspection Service was sufficient to render a threatened future injury imminent and that the necessity of taking action to prevent a future threatened injury that might not occur is sufficient to render a threatened injury actual]; Catron County v. U.S. Fish and Wildlife, 75 F.3d 1429, 1433 (10th Cir. 1996) [finding imminent the threat of future flood damage due to the failure to prepare an

environmental impact statement that might have precluded the designation of a 74-mile river habitat for two endangered minnows].

The program of education called for by the Policy and mandated by the Kansas Supreme Court in Gannon contemplates four years of implementation to "transition." Exhibits C-4 and C5, Gannon, 298 Kan. at1170. Implementation is currently in its second year. Exhibit C-5. Defendants are approaching implementation with the "tenacity of a honey badger" and expect it to be fully implemented. Exhibits C- 4 and C-6. Since the state has already implemented similar standards for math and English, Defendants' commitment to complete implementation of the Policy for science is likely. Thus in the context of a Policy which itself relates to a thirteen year period of education, the implementation which is now being carried out is real, immediate and certainly impending.

b. Injuries to Resident Taxpayers are stigmatic and non-stigmatic actual injuries that are concrete and not abstract.

The injuries suffered by the Prathers, who are Kansas residents and taxpayers are not confined to the Cplt. ¶123.d. payment of taxes. ¶123 alleges additional stigmatic and non-stigmatic injuries which are not abstract because they actually involve an attack on their religion that "condemn[s]" it as was the case in Awad, 670 F.3d at 1122-23., and that denies them equal treatment. See §II.B.3.a.(2)(d) supra at 21. That condemnation and denial of equal treatment amounts to actual injury greater than "unwelcome personal contact."

C. This Court's Opinions in Bell, Awad and American Atheists Necessitate a finding of Injury in Fact

Plaintiffs believe the decisions of this Court in Bell, Awad, and American Atheists necessitate a finding of Establishment Clause Standing, particularly for the Plaintiffs that are Parents and Children enrolled in Kansas public Schools.

Bell, Edwards, and others discussed supra at II.B.3.a.(2)(a) at 17-18, establish that parents have a legally protected interest to direct the religious education of their children and that the children have the corollary interest to not be indoctrinated by the state with respect to a particular religious view. They also hold that an infringement of those interests confers standing for the parents in the school context.

Awad is relevant because the actual and threatened injuries alleged by the Plaintiffs are far more serious, personal and particularized then those sufficiently alleged by Mr. Awad.

Mr. Awad's injuries were compared with those asserted in this Court's religious symbols cases. This Court noted that in the symbol cases brought by Atheists injury in fact has been recognized simply by a showing of "personal and unwelcome" momentary contact with a stigmatizing symbol. Awad 670 F.3d at 1122. However, Mr. Awad was not offended by a religious symbol, but rather by an enactment of a law that "condemns [Awad's] religious faith and exposes him to disfavored treatment." Id. The court concluded that such injury exceeds the "personal and unwelcome" contact requirement for standing in religious symbol cases, and thereby provides Mr. Awad with standing

regarding a message delivered through a government enactment rather than one obtained from the fleeting observation of a symbol. The court explained:

> "The plaintiffs in [the religious symbols] cases certainly may have felt that a religious display conflicted with their religious beliefs or non-belief, but those symbols did not expressly target and condemn a specific religion. Mr. Awad alleges that the amendment condemns his religion and prohibits him from relying on his religion's legal precepts in Oklahoma courts, while not prohibiting people of all other faiths to rely on the legal precepts of their religions.8 Mr. Awad's alleged injury goes significantly beyond a 'psychological consequence' from disagreement with observed government conduct, see Valley Forge, 454 U.S. at 485, 102 S.Ct. 752, 'hurt feelings' from a presidential proclamation requesting citizens to pray, Freedom From Religion Found., Inc. v. Obama, 641 F.3d 803, 807 (7th Cir.2011), or 'a person's deep and genuine offense to a defendant's actions,' Catholic League for Religious and Civil Rights v. City and Cnty. of San Francisco, 624 F.3d 1043, 1062 (9th Cir.2010)..." Id. at 1122-23

Similarly, Plaintiffs' alleged injuries go far beyond the injuries alleged by Mr. Awad. The Policy is not content with simply condemning Plaintiff's religion, rather it seeks to replace it in the Children with a diametrically opposed religious worldview, through a long term progressive, comprehensive and misleading program of indoctrination.

In addition, the Plaintiffs' rights include the immediate taking of their right to direct the religious education of their children and the taking of the rights of the children to be free from religious indoctrination in the public schools. Although Mr. Awad's religion was the target of the Oklahoma enactment, Mr. Awad was not personally targeted. The Plaintiffs on the other hand are the targets of the Policy. While the particular effects of the enactment on Mr. Awad in the context of future

judicial application are speculative, the 850 page Policy is extraordinarily particular and its implementation is in progress.

In addition, Mr. Awad is an adult, while 21 of the Plaintiffs are children. The context of Mr. Awad's threatened injury is a courtroom which he may never enter, while the context of the Plaintiffs' injuries is a classroom Plaintiffs' impressionable children are required to attend on a daily basis.

As a consequence, this Court's opinions in Awad, Bell and American Atheists and the holding in [Catholic League v. City and Cnty. of San Francisco, 624 F.3d 1043, 1046-53 (9th Cir.2010) (finding injury in fact from "a non-binding San Francisco Board of Supervisors resolution denouncing a Catholic Church position on homosexual adoptions) necessitate a finding that the adoption and implementation of the Policy causes actual and imminently threatened injuries to the Plaintiffs.

D. The District Court's Standing Analysis and Authorities fail to support its Conclusions

1. Summary of Defendants Argument on Standing

Defendants' standing arguments below depend on the erroneous conclusion that the Complaint only alleges threatened future implementation injuries and not present actual injuries. Applt. App. at 1049. The argument ignores the fact that the message carried by the Policy to produce future injury itself produces current actual injuries. The Policy is a plan to indoctrinate the Children with a non-theistic religious worldview. The adoption of the plan itself "thereby violates the rights" of Parents to direct the Religious

Education of the Children and the rights of Children to not be subjected to religious indoctrination by the State [Cplt. ¶¶ 1, 48, 123-125, 127, VIII.a.]

Defendants' argument that injury is only threatened quotes from the last half of Cplt. ¶ 48 of the Complaint rather than the first half. Applt. App. at 1049. The quoted second half of Cplt. ¶ 48 seeks an injunction against implementation. From this selective reading, Defendants illogically argue that the Complaint alleges that injury flows only from future implementation. The argument fails because the first half of Cplt ¶ 48 specifically alleges that the adoption of the Policy itself "violates the rights of Plaintiffs under the Establishment, Free Exercise and Speech Clauses..." (¶48). Similarly, Cplt. ¶127 states that "[t]he actions of defendants as set forth in paragraphs 1 through 122 amount to a violation of the Establishment Clause... because defendants, acting under color of law, subjected plaintiffs to a deprivation of their rights..." Cplt. ¶ VIII. also seeks a declaration that "the defendants' adoption and implementation of the F&S violates the Establishment Clause...." (emphasis added)

Cplt. ¶¶ 123 -126 then particularize the injuries flowing from the violated rights, including the violation of the Parents' rights to direct the religious education of their children and the rights of children to not be indoctrinated by the state. Defendants arguments fail not only due to a selective reading of the Complaint, but also because governmental endorsements of a particular religious view always carry a present message that itself produces present injury. The extent of the injury depends on the actual content of the message delivered.

Defendants' myopic view that the Complaint fails to allege actual injuries is then tethered to another false idea that the schools are not bound to implement the Policy because of the non-impingement language in K.S.A. § 72-6439(b). This then enables their penultimate argument that the threat is only hypothetical and speculative. The inherent problems with that unlikely conjecture are explained in §II.B.3.a.(3) supra at 24.

2. Summary of the District Court's Argument on Standing

The District Court disagreed with Defendants that the Complaint only alleges injury arising from implementation. Mem. & Or. at 14, Applt. App. at 1155. It also found that Cplt. ¶123 alleges injury arising from the adoption of the Policy as "the Complaint also alleges that plaintiffs have sustained actual, threatened, and redressable injury by a 'message of endorsement.' Plaintiffs allege they sustained this injury by the 'endorsement and promotion of an Orthodoxy that establishes and promotes non-theistic religious beliefs while seeking to suppress competing theistic religious views..'" as alleged in ¶123 of the Complaint. Id.

Thus, the District Court correctly recognizes that both actual and threatened injury flow from the adoption of the Policy.

However, oddly, the District Court's view under its Establishment Clause analysis is confined to the common Cplt. ¶123 injuries that apply to all theistic Kansas residents. It inexplicably ignores the particular injuries or "violat[ions] of rights of Plaintiffs" (See Cplt. ¶48) listed in ¶¶ 27-42 and 124 and 125 relating to the Parents and Children. Those paragraphs allege additional actual injuries or "violat[ions] of rights" arising from the adoption of a Policy that "seeks to establish a program for indoctrinating students in a

non-theistic religious Worldview in public schools." Id. (emphasis added) See §II.B.3.a supra at 15.

The Cplt. ¶123 injuries recognized by the District Court include religious discrimination by "favor[ing] one religious view over another" (¶123.a.); stigmatic injury by sending a message that Plaintiffs are "outsiders in the community" (¶123.b.); and a violation of plaintiffs' equal protection rights by denying their right to be "treated equally with non-theists" (¶123.c).

However, the District Court incorrectly treated all of these ¶123 actual injuries as merely "stigmatic:" "Here, plaintiffs' disagreement with the Board's adoption of the Framework and Standards alleges only an abstract stigmatic injury." Mem. & Or. at 25 Applt. App. at 1166.

This mischaracterizes the nature of the injuries, as two of the three ¶123 injuries allege actual discrimination (¶123.a.) and denial of equal protection (¶123.c.). These latter two injuries are not just "stigmatic." A denial of equal protection itself is sufficient to provide standing as an actual injury in fact. See §II.B.3.a.(2)(e) supra at 23.

After reducing Plaintiffs' only injury to a stigmatic one, the Court then compounded the error by finding that the injury was only "abstract" as the Policy is not binding on the local schools. This conclusion is erroneous as abstraction does not depend on the binding effect of the Policy. It depends on whether the alleged injury is personal to the Plaintiffs. See §II.B.3.a.(1) supra at 15.

Having reduced Plaintiffs' injuries to only stigmatic abstraction, the Court then looked for legal authority to support its conclusion that this injury was insufficient to permit Plaintiffs to complain about the State's 13 year program of religious indoctrination.

In seeking authorities to support its view, it looked first to Tenth Circuit holdings in Awad and American Atheists. Although those cases, together with Bell, actually command a finding of standing for Plaintiffs (See §II.C. supra at 34), the Court rejected them in favor of a search for authority outside the circuit that might be more apposite to its truncated view that Plaintiffs' injuries reduce only to ¶123 abstract stigmatic injuries. The search failed as the foreign cases it cites for its narrow view of Plaintiffs' alleged injury, actually undermine its conclusion or are obviously inapposite.

3. The District Court's Injury Analysis is Factually Incomplete.

District Court's injury analysis considers the injuries alleged in Cplt. ¶123 as if they were all stigmatic. The Court does not consider the other injuries alleged under ¶¶124 and 125, which deal with particularlized personal injuries to the Parents and Children.

The opinion regarding Establishment Clause injury spans Mem. & Or. pages 10 through 27, Applt. 1151-68. A search of this 17 page constrained analysis for the numbers "124" and "125" yields "not found." Similarly a search for the word "parent" will come up empty-handed. The same is true for the word "child" or its derivatives.[4]

[4] On page 22 the Court discusses the decision in *Catholic League,* which mentions "placing children in need of adoption."

The Opinion treats the Parents and Children no differently than citizen bystanders generally offended by the stigma of being cast as second class citizens. The fact that they are the objects of a Policy that seeks to indoctrinate the Children to change their religious beliefs is ignored. Yet, as explained by Lujan the Plaintiffs being the "objects" or targets of the state action is crucial to the entire issue of standing: "standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." Lujan, 504 U.S. at 561-2. (emphasis added) Thus, the District Court neglects to mention that the gun is pointed at the Children, not at the sky.

The narrow focus of the District Court also neglects the fact that the injuries occur within a public education context. This is crucial, as the Courts nearly always find standing in the face of an alleged violation of the Establishment Clause in a public school context. This is because schoolchildren are "impressionable" and are "forced to assume special burdens" to avoid a program of indoctrination. Bell 766 F.2d at 1398 citing Valley Forge, 454 U.S. at 486 n. 22.

Furthermore, if there is any doubt about whether the actual wording of this very detailed Complaint alleges injury arising from the adoption of the Policy, that doubt must be resolved in favor of the Plaintiffs at this pleading stage of the proceedings. The Court is required to construe the allegations of the Complaint "in favor of the complaining party," (Warth v. Seldin, 422 U. S. at 501) and must "presum[e] that general allegations

embrace those specific facts that are necessary to support the claim." Lujan, 504 U.S. at 560-61.

4. None of the injuries to the Parents and Children is Abstract, including the ¶123(b) stigmatic injuries.

As explained under §II.B.3.a.(1) supra at 15, none of the injuries to the Parents and Chidren is abstract as they are all concrete and particularized. They are particularized because they are personal and concrete since they have an enormous stake in the matter.

Even the Cplt. ¶123.b. injury that the Parents and Children will be treated as outsiders in the community is further particularized in Cplt. ¶124.f. and ¶125.d. Those provisions allege that the Policy will cause the Children "to lose respect from their peers who have accepted the [materialistic/atheistic] Orthodoxy" and cause the Parents to lose the respect of their Children.

The Court relies on Valley Forge to support its conclusion that Plaintiffs' injuries are merely abstract and not personal. The case is entirely inapposite since the Plaintiffs in a non-school context "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." Valley Forge, 454 U.S. at 485.

In fact the conclusions of Valley Forge actually support Plaintiffs' claims of standing, as it explains why Abington School District v. Schempp, 374 U.S. 203 (1963) cited by the Plaintiff in Valley Forge to argue standing was inapposite. Schempp was

inapposite, because, unlike the plaintiffs in Valley Forge the plaintiffs in Schempp "are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.' Id.,.. The plaintiffs in Schempp had standing,.... because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them...''' Valley Forge at 487 Note 22. (emphasis added)

5. The Binding Affect of the Policy does not affect the personal nature of the injuries.

At page 17 of Mem. & Or. the Court erroneously concludes that Plaintiffs have not alleged "personal and unwelcome contact" with the offensive message of the Policy because it is not "binding" on local schools:

> "Unlike the plaintiff in *Awad,* plaintiffs here have not alleged 'personal and unwelcome contact' with the Framework and Standards because the Board has only the power to 'supervise' local public schools and is prohibited from impinging upon a local school district's authority to determine its own curriculum. *See* Kan. Const. art. 6, § 2; K.S.A. § 72-6439(b)." Applt. App. at 1158

The conclusion is facially erroneous as the binding effect of the Policy does not affect whether the Policy is alleged to be "personal" or "unwelcome" to the Plaintiffs. It is personal to the Plaintiffs and unwelcome, because it seeks to cause the Children to switch from their theistic beliefs to a non-theistic religious worldview and presents them with a terrifying dilemma (supra II.B.3.a.(2)(d) at 21). They are the "objects" and targets of the Policy.

The binding effect of the Policy does not deal with the issue of whether the Policy produces unwelcome emotions of fear, discomfort and distrust. The binding effect only deals with the severity of those unwelcome feelings and emotions. Standing has been routinely found in School and other contexts where a policy or action of the state is not "binding" on the Plaintiff. See §II.B. 3.a.(2)(b) supra at 19. An analogy might be that of a man pointing a gun at your Child with a finger on the trigger. His declaration that he may not pull the trigger might lesson the fear but not remove it.

In any event, as explained supra at §II.B.3.a.(3) at 24 the Policy does have a binding effect on accredited local schools.

6. The Threatened Injuries are Imminent because the Policy is Binding and is being implemented.

The Court implicitly argues that the Cplt. ¶123 stigmatic injury amounts to nothing more than general disagreement with an activity of the government because the Complaint does not allege that the Policy is "required" to be implemented or has been implemented:

> "Consequently, plaintiffs do not allege that the Board requires local school districts to implement the Framework and Standards. Plaintiffs also do not allege that any local school districts actually have implemented the Framework and Standards in the local public schools attended by the plaintiff students. Rather, plaintiffs complain about the potential for future implementation of the Framework and Standards.[11]" citing *Valley Forge* in note 11 (Doc 50 at 19) (emphasis added)

As previously discussed, the Policy itself and the statutory framework reflect the clear expectation that it will be implemented, not only by local schools but by the Defendants, local school districts, school administrators and teachers. Also, it is being

implemented and Defendants expect it to be fully implemented. Due to laws and regulations that effectively require its implementation, its implementation is not conjectural or hypothetical. See II.B.3.a.(3), supra at 24.

However, regardless of the implementing effect, the State entity provided with the duty to supervise the schools has adopted a Polcy that takes the rights of parents and students. That itself amounts to actual personal injury to legally protected interests.

7. The District Court failed to find any Supporting Authority

In search of a case that would support its truncated view of the Complaint, the Court could not find one from this Court that it found controlling: "The Court has not located a Tenth Circuit case deciding whether a 'message' allegedly transmitted by a non-binding governmental policy—by itself— suffices to confer standing on a plaintiff to assert an Establishment Clause violation. Nor do the parties cite any controlling case law in the Tenth Circuit discussing whether a 'message' of endorsement theory is sufficient to confer standing on a plaintiff asserting an Establishment Clause violation." Mem. & Or. at 21, Applt. App. at 1162. (emphasis added)

The latter assertion is odd because Plaintiffs' Response to the Motion to Dismiss specifically directed its attention to this Court's opinion in Bell. Bell, explains that in the context of K-12 public education even if a message of endorsement is not binding and is "only an encouragement it is an endorsement. All that is needed is an 'aura of school authorization and approval.'" Bell, 766 F.2d at 1405. Mem. in Opp. Applt. App. at 998.

Bell is particularly apposite, for it involved a non-binding before the start of school religious activity the plaintiffs were not required to participate in. The school's

non-binding authorization of the activity itself was sufficient personal injury to a non-participant. In the Plaintiffs' case the policy is directed at the children, and as explained, they have no realistic way to avoid participation without incurring significant economic and other harm. See II.B.3.a.(2)(d) supra at 21.

Although the Court professed no knowledge of apposite Tenth Circuit opinions, it did discuss this Court's apposite decisions in both Awad and American Atheists, which dictate a similar conclusion regarding Plaintiffs' standing, both on the basis of ¶123 alone and, certainly, on the basis of all the other injury allegations of ¶¶124 and 125.

In reaching its decision in Awad. this Court recognized that the threshold for standing set in American Atheists and other religious symbol cases was far exceeded by Mr. Awad's complaints of psychological trauma arising from an enactment banning judicial reliance on Sharia law. Yet, as discussed under §II. C supra at 35, injuries alleged by the Parents and Children far exceed those expressed by Mr. Awad.

Unable to find authority in Bell, Awad, American Atheists, and Catholic League and unable to find any other Tenth Circuit or Supreme Court authority other than the inapposite Valley Forge, the District Court looked to other jurisdictions that would support its hypothesis. In that search the best it could find were two inapposite cases not involving parents and school children (FFRF v Obama and In re Navy Chaplaincy), a third inapposite case that actually found standing for the Plaintiff (Newdow v. Lefevre), and a fourth apposite case which the District Court incorrectly characterized as finding no standing for the "Plaintiffs" (Moss).

In its analysis of the ¶123 stigmatic injury allegation that the Policy "sends a message that they are 'outsiders' within the community," the Court found "This message, [without considering others] even if true, is not sufficient to confer standing because plaintiffs allege only an 'abstract stigmatic injury' rather than a direct and concrete injury." Citing Newdow v. Lefevre, and Moss v. Spartanburg. Mem. & Or. at 24, Applt. App. at 1165. However, Moss undermines the District Court analysis, because the Court held that Mosses had standing to assert their stigmatic injury because they personally received an advertisement about the off-site religious program. Moss, 683 F.3d at 607. Similarly, in Newdow, 598 F.3d at 642-3 the Court found that Newdow had standing to complain about the "In God We Trust" motto on the money because he touched the money but had no personal contact with the general statute that established the motto. In contrast the Plaintiffs' injuries are all concrete and personal, and only the Cplt. ¶123.b. injuries are stigmatic. The rest relate to the taking of actual legally protected interests.

The District Court's reference to Newdow cites Allen v. Wright, 468 U.S. 737, 755-7 (1984). However, Allen does not support its decision because the Plaintiffs' allegations of stigmatic injury arising from alleged racially discriminatory inactions of the IRS were found to not confer standing, because none of the Plaintiffs "allege a stigmatic injury suffered as a direct result of having personally been denied equal treatment." Id. at 755. emphasis added. In contrast, the Complaint does allege Plaintiffs have been personally denied equal treatment (¶123.c.).

The Court seems to argue that because the standards are not binding on the local schools, the Plaintiffs' stigmatic injuries are only abstract. "Here, plaintiffs'... allege only

an abstract stigmatic injury...[as they] have not alleged that defendants have authority to implement the Framework and Standards." Mem. & Or. at 25, Applt. App. at 1166. Of course the Policy is binding, but its binding effect within the school context does not render one's disagreement with it abstract if it is personally offensive to an individual who is the object or target of the action. The programs in Moss, Bell, and Abington, and almost all of the school cases were non-binding or voluntary. However, the fact that plaintiffs are the targets of the programs made their offense personal and concrete and not abstract. §II.B.3.a.(1) supra at 15.

With respect to the inapposite case of FFRF v Obama (7th Cir), two government actions triggered the alleged injuries. The first was a 1952 statute that directs the president to issue "a proclamation designating the first Thursday in May as a National Day of Prayer." FFRF v Obama, 641 F.3d at 805. The second was a non-denominational Proclamation neutral to theists and non-theists that was issued by the President in 2010 which invites "the citizens of our Nation to pray, or otherwise give thanks, in accordance with their own faiths and consciences, for our many freedoms and blessings and I invite all people of faith to join me in asking for God's continued guidance, grace, and protection as we meet the challenges before us." Id. 806. (emphasis added)

The court found that the statute "does not require any private person to do anything or for that matter to take any action." Id. at 805. The Court also concluded that the very broad non-denominational proclamation itself, which on its face appeals to both theists and non-theists, can only produce injuries that can't be classified as anything more than "hurt feelings." Id. at 807. The Proclamation targets no one, while the Policy seeks

to supervise schools in the implementation of a project designed to fill the minds of the Plaintiff children in a compulsory environment with a non-theistic religious worldview. Obama is completely inapposite.

Similarly it is odd that the Court would consider In re Navy Chaplaincy as authority for its dismissal of the Complaint, as it involved a non-school setting where the Plaintiffs were not personally affected by the claimed discrimination. In this respect the court acknowledged that the case involved "'plaintiffs [who] are not themselves affected by a government action except through their abstract offense at the message allegedly conveyed by that action..'" In re. Navy Chaplaincy, 534 F.3d at 760.

In contrast, the Plaintiffs in this case are the very targets of the government action - the filling of their minds is the end to be achieved. The Plaintiffs' contact with the policy is not just personal, it is, for them, terrifying.

E. The Complaint alleges injury in fact relative to Plaintiffs' Free Exercise, Free Speech and Equal Protection Clause Claims

The District Court recognizes that the Complaint alleges injuries to their rights under the Free Exercise, Free Speech and Equal Protection Clause claims. However, the Court concluded that because the standards have not been implemented, the injuries are not actual but only threatened. Furthermore, because the District Court deemed the Policy to have no binding effect on the local schools, the threatened injury is not imminent. Mem. & Or. at 29, Applt. App. at 1170.

As explained above regarding the Establishment Clause, the Plaintiffs' injures are actual, as a taking of the rights of the Parents and Children at the time of adoption

amounts to a taking of their right to freely exercise their religion (Cplt. ¶¶ 124.d. and 125.c.), denies them equal protection (¶ 123.c. and §II.B.3.a.(2)(e) supra at 23). Also "[t]he use of the Orthodoxy to restrict the kinds of explanations permitted in public schools about the natural world infringes on the speech rights of Plaintiffs" (Cplt. ¶ 130). The injuries are all concrete and particularized as they are personal to the Plaintiffs who have a stake in the matter. Furthermore, with respect to the injuries that are only threatened, they are all imminent and not conjectural or hypothetical. Accordingly the Plaintiffs have standing under all of their claims.

F. The injuries alleged are directly caused by and traceable to Defendants' actions and will be redressed by the relief requested.

As explained above the injuries in fact to Plaintiffs are all caused by the actions of Defendants and not by any third party. If the Defendants had acted as requested by Plaintiffs at the state board meetings on May 14 and June 11, 2013, the trust would not have been breached, Plaintiffs would not now have to worry about what their children will be taught, and they would not now need to worry about how to provide alternative forms of education for their children.

It should also be obvious that a granting of either of their prayers in the Complaint would redress the injuries. Accordingly the Court should recognize the standing of COPE and Plaintiffs who are parents and students to assert the claims herein alleged.

The District Court's contrary conclusion relies on Lujan which involved a Plaintiff not the object of the action at issue, which is precisely the case with the Plaintiffs as they are the "objects of the action at issue." The court explained that "standing depends

considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." Lujan, ,504 U.S. at 561-2. (emphasis added)

G. The Prathers have standing as residents and taxpayers.

The District Court's argument that the Prathers lack standing as taxpayers ignores that the Prathers allege all of the injuries of ¶123 in addition to the section 123(d) injury as a taxpayer. Although their injury is not as personal and particularized as the Parents and Children, it is as personal as the injuries alleged by Mr. Awad from Oklahoma's adoption of a law that banned Sharia law from state courts. Accordingly, the Prathers have standing as citizens whose religion has been condemned by the state for the reasons detailed above.

Furthermore, because the parent and student plaintiffs have standing, there is no need to consider the standing of the Prathers. Rumsfeld v. Forum for Acad. & Inst. Rights, Inc, 547 US 47, 52 n. 2 (2006).

III Conclusion and Relief Requested

In conclusion, the Complaint does allege in Cplt. ¶¶ 123-126, 27-42 and in other provisions (a) actual and imminently threatened, (b) concrete and particularized injures to (c) "legally protected" interests of the Plaintiffs that are not "conjectural" or "hypothetical." See Awad, 670 F.3d at 1120. Furthermore, the District Court analysis and authorities does not support the opposite conclusion.

In particular, the Court's analysis deals only insufficiently with the stigmatic injuries generally applicable to all plaintiffs without considering or showing why Plaintiffs do not have standing for the non-stigmatic personal injuries. It also fails to show a lack of standing for the stigmatic injuries, regardless of the binding effect of the Policy, because even those injuries are alleged to be personal and not abstract. Plaintiffs are the targets of the Policy and their personal injuries are alleged with exceeding particularity.

That portion of the District Court's Order dismissing the case for a lack of Article III standing should be reversed, and case should be 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 20th day of March, 2015

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WORD COUNT CERTIFICATE

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains less than fourteen thousand (14,000) words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). That count is based upon use of a work processing 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, font size 13 and type style, *Times New Roman* using Microsoft Word 2013.

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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed on the 20th day of March, 2015 true and correct copies of the foregoing **BRIEF OF APPELLANTS** and also served an electronic copy to:

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ATTACHMENTS

EXHIBIT "A"

Memorandum and Order granting Motion to Dismiss and Denying Motion for Leave to File Surreply
December 2, 2014

EXHIBIT "B"

JUDGMENT ENTERED
Granting Defendants' Motion to Dismiss
December 2, 2014

EXHIBIT "C-1"

Copy of Kansas State Department of Education web page titled:
Science Home - New KSDE Science Home
Publicly accessible on March 17, 2015 at:
http://community.ksde.org/Default.aspx?tabid=5975

EXHIBIT "C-2"

Copy of Kansas State Department of Education web page titled:
KS Science Standards
Publicly accessible on March 17, 2015 at:
http://community.ksde.org/Default.aspx?tabid=5785

EXHIBIT "C-3"

Copy of Kansas State Department of Education web page titled:
Kansas Vision for Science Education
Publicly accessible on March 17, 2015 at:
http://community.ksde.org/Default.aspx?tabid=5918

EXHIBIT "C-4"

Copy of Kansas State Department of Education web page titled:
Standards Implementation Planning
Publicly accessible on March 17, 2015 at:
http://community.ksde.org/Default.aspx?tabid=5675

EXHIBIT "C-5"

Copy of Kansas State Department of Education web page titled:
NGSS Example Implementation Timeline
Publicly accessible on March 17, 2015 under "Implementation" at
http://community.ksde.org/Default.aspx?tabid=5675

EXHIBIT "C-6"

Copy of Kansas State Department of Education web page titled:
2014 Building Report Card
Publicly accessible on March 17, 2015 at: http://online.ksde.org/rcard/

 Exhibit A

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. 13-4119-DDC-JPO

MEMORANDUM AND ORDER

Plaintiffs bring this declaratory judgment action seeking to enjoin the Kansas State Department of Education and the Kansas State Board of Education from implementing new science standards for Kansas schools. Plaintiffs[1] consist of students, parents, Kansas resident taxpayers, and a nonprofit organization. They have sued the Kansas Commissioner of Education,[2] the Kansas State Department of Education, the Kansas State Board of Education, and its individual members.[3]

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

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

[2] Diane DeBaker.

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

parties, the Court grants defendants' Motion to Dismiss (Doc. 29) and denies plaintiffs' Motion for Leave to File a Surreply (Doc. 42).

I. Background

The following facts are taken from plaintiffs' Complaint (Doc. 1) and viewed in the light most favorable to them. *S.E.C. v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014) ("We accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the [plaintiffs]." (citation and internal quotation marks omitted)). On June 11, 2013, the Kansas State Board of Education adopted the Next Generation Science Standards ("the Standards")[4] and the related *Framework for K-12 Science Education: Practices, Crosscutting Concepts and Core Ideas* ("the Framework").[5] Plaintiffs allege that the Kansas State Board of Education's adoption of the Framework and Standards will cause Kansas public schools to establish and endorse a non-theistic religious worldview in violation of the Establishment, Free Exercise, and Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

More specifically, plaintiffs allege that the Framework and Standards take impressionable children, beginning in kindergarten, into the religious sphere by leading them to ask ultimate religious questions such as "what is the cause and nature of life and the universe—'where do we come from?'" Pls.' Compl. (Doc. 1) at ¶ 2. Plaintiffs assert that the Standards fail to inform

[4] Plaintiffs incorporate the Standards into their Complaint by reference and state that the Standards are available at http://www.nextgenscience.org/. Pls.' Compl. (Doc. 1) at ¶ 1. Defendants have submitted the Standards as an exhibit to their Memorandum in Support of their Motion to Dismiss (Doc. 30, Ex. B) (hereinafter, "Standards").

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

children objectively about the actual state of our scientific knowledge on these questions in an age appropriate and religiously neutral manner. Instead, plaintiffs claim the Standards use an "Orthodoxy," called methodological naturalism or scientific materialism, which requires that explanations of the cause and nature of natural phenomena only use natural, material, or mechanistic causes, and must assume that supernatural and teleological or intelligent design conceptions of nature are invalid. Plaintiffs contend that the Standards do not adequately disclose this "Orthodoxy" and use other deceptive methods to lead impressionable children to answer questions about the cause of life with only materialistic or atheistic answers. Plaintiffs characterize this "Orthodoxy" as "an atheistic faith-based doctrine." *Id.* (Doc. 1) at ¶ 9. Plaintiffs argue that the purpose of teaching this Orthodoxy is to indoctrinate children by establishing a non-theistic religious worldview rather than delivering an objective and religiously neutral origins science education.

Plaintiffs seek to enjoin the implementation of the Framework and Standards and ask the Court to enter a declaratory judgment finding that the Framework and Standards violate: (1) the Establishment Clause of the First Amendment; (2) the Free Exercise Clause of the First Amendment; (3) the Equal Protection Clause of the Fourteenth Amendment; and (4) the Speech Clause of the First Amendment. Plaintiffs also seek relief in the alternative, requesting an injunction prohibiting defendants from implementing the portions of the Framework and Standards that seek to teach about the origin, nature, and development of the cosmos and life on earth ("origins science") for children in kindergarten through grade 8 entirely and for grades 9 through 12 unless the origins science instruction also includes additional information such as: "an evidence-based teleological alternative competes with the materialistic explanations

provided by the Orthodoxy, which is an inference to an intelligent rather than a material cause [of origins events]." Pls.' Compl. (Doc. 1) at p. 32 ("Prayer for Relief" ¶ c.2.g).

II. Plaintiffs' Motion for Leave to File a Surreply

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

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

battles over which side should have the last word." *Humphries*, 1998 WL 982903, at *1 (citation and internal quotation marks omitted).

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

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

The Court agrees that plaintiffs' proposed surreply does not respond to "new material." Rather, the majority of plaintiffs' proposed surreply addresses what plaintiffs claim are "important errors" in defendants' arguments. But in so doing plaintiffs have rehashed arguments that they made or could have made in their Memorandum in Opposition, including their responses to defendants' arguments that plaintiffs have mischaracterized the Framework and

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

Defendants' reference to the minutes, video, and Report and Recommendation in their Reply is also not "new material." First, the minutes and video of Kansas State Board of Education meetings were cited in defendants' Reply to rebut plaintiffs' argument that the Kansas State Board of Education acted with the purpose of advancing or inhibiting religion when it adopted the Framework and Standards (Doc. 41 at 14). Thus, it is not "new material" but rather part of a response to an existing argument made by plaintiffs. Defendants also provided hyperlinks for the minutes and video directing the reader to internet websites where the minutes and video are located online. Thus, plaintiffs did have access to these materials. Second, defendants cited the Report and Recommendation in their Memorandum in Support of the

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

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

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

Motion to Dismiss (Doc. 30 at 32–33) and provided a hyperlink in the Reply that directed the reader to the document on the internet. Plaintiffs argued in their Memorandum in Opposition, as they also do in the proposed surreply, that they have never seen this document "because of the moratorium on discovery" (Doc. 40 at 30). Defendants explained in their Reply that the Report and Recommendation is a public document and that they had provided an internet link to that document in their Memorandum in Support (Doc. 41 at 14). By the time defendants filed their Reply, the internet link they had cited previously was broken, and they provided a new internet address where the Report and Recommendation now is located online and explained that the Report and Recommendation is available on the Kansas Next Generation Science Standards homepage and accessible through a Google search (Doc. 41 at 14 n.5). Plaintiffs therefore did have access to the Report and Recommendation.

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

defining when briefed matters are finally submitted and in minimizing the battles over which side should have the last word." (citation and internal quotation marks omitted)).

For these reasons, the Court denies plaintiffs' Motion for Leave to File a Surreply. Although the Court will not consider plaintiffs' proposed surreply in the motion to dismiss analysis below, the Court nevertheless has reviewed plaintiffs' proposed surreply and has determined that its arguments do not alter the outcome of defendants' motion. The Court would reach the same result on defendants' Motion to Dismiss regardless of its consideration of the arguments in plaintiffs' proposed surreply.

III. Motion to Dismiss Standard

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

Generally, a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) takes one of two forms: a facial attack or a factual attack. *Holt v. United States*,

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

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

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

IV. Analysis

Defendants seek dismissal of plaintiffs' Complaint in its entirety for four reasons: (1) the Kansas State Board of Education and the Kansas State Department of Education are entitled to Eleventh Amendment sovereign immunity; (2) plaintiffs lack Article III standing; (3) plaintiffs have failed to state a claim under the Establishment Clause of the First Amendment; and (4) plaintiffs have not stated a claim under either the Free Exercise or Free Speech Clauses of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. Because the Court grants defendants' motion for the first two reasons, it does not reach defendants'

arguments that plaintiffs have failed to state a claim. The Court therefore addresses only defendants' sovereign immunity and standing arguments below.

A. Eleventh Amendment Sovereign Immunity

Defendants assert that the Eleventh Amendment bars plaintiffs' claims against the Kansas State Board of Education and the Kansas State Department of Education because they have sovereign immunity under the Eleventh Amendment. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Eleventh Amendment grants immunity that "accord[s] states the respect owed them as joint sovereigns," "applies to any action brought against a state in federal court, including suits initiated by a state's own citizens," and "applies regardless of whether a plaintiff seeks declaratory or injunctive relief, or money damages." *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1252 (10th Cir. 2007) (citations omitted). "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). Eleventh Amendment immunity applies not only to states but also extends to state entities that are considered "arm[s] of the state." *Steadfast Ins. Co.*, 507 F.3d at 1253 (citing *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977)).

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

State Board of Education and the Kansas State Department of Education from this suit based on Eleventh Amendment sovereign immunity.

B. Standing

Defendants assert that each plaintiff in this lawsuit lacks standing, and therefore the Court must dismiss the case. Article III of the United States Constitution limits federal courts' jurisdiction to "cases" and "controversies." *Clapper v. Amnesty Int'l USA*, ___ U.S. ___, 133 S. Ct. 1138, 1146 (2013). To present a case or controversy under Article III, a plaintiff must establish that he has standing to sue. *Id.* (citations omitted); *see also Ariz. Christian Sch. Tuition Org. v. Winn*, ___ U.S. ___, 131 S. Ct. 1436, 1442 (2011) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Article III standing requires a plaintiff to establish (1) that he or she has "suffered an 'injury in fact'"; (2) that the injury is "'fairly . . . trace[able] to the challenged action of the defendant'"; and, (3) that it is "'likely'" that "the injury will be 'redressed by a favorable decision.'" *Ariz. Christian Sch. Tuition Org.*, ___ U.S. at ___, 131 S. Ct. at 1442 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)); *see also Awad v. Ziriax*, 670 F.3d 1111, 1120 (10th Cir. 2012). "At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007) (citation and internal quotation marks omitted).

First, defendants argue that all plaintiffs lack standing because they have failed to allege an injury that is sufficiently concrete and particularized, actual or imminent, and not conjectural or hypothetical; fairly traceable to the adoption by the Kansas State Board of Education ("the Board") of the Framework and Standards; or redressable by a favorable decision by this Court.

See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). Second, defendants assert that plaintiffs David and Victoria Prather, who allege standing because they are Kansas taxpayers, lack standing for an additional reason—their claims fail to satisfy one of the exceptions to the general prohibition against taxpayer standing. The Court addresses defendants' standing arguments separately, below.

The Court first addresses whether plaintiffs have alleged an injury sufficient to support their claims (the first requirement of *Lujan*). Next, the Court discusses whether plaintiffs have satisfied the second and third requirements of *Lujan* by alleging causation and redressability. Finally, the Court examines whether plaintiffs David and Victoria Prather have standing based on their status as Kansas taxpayers.

1. Injury Requirement

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

a. Establishment Clause Injury

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

The Kansas Constitution limits the Board's authority over local public schools to "general supervision" and reserves the actual operation of local public schools to locally elected school boards: "Local public schools under the general supervision of the state board of

education shall be maintained, developed and operated *by locally elected boards*." Kan. Const. art. 6, §§ 2, 5 (emphasis added). Kansas law requires the Board to establish "curriculum standards" for local public schools, but also prohibits the Board from "imping[ing] upon any district's authority to determine its own curriculum." K.S.A. § 72-6439(b);[10] *see also State ex rel. Miller v. Bd. of Educ. of Unified Sch. Dist. No. 398*, 511 P.2d 705, 713 (Kan. 1973) (explaining that "supervision" by the Board "means something more than to advise but something less than to control"). Thus, defendants argue the Framework and Standards, as adopted by the Board, do not bind local public schools.

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

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

The Court disagrees that plaintiffs have changed their theory of injury. While the Court agrees with defendants that the Complaint alleges injury by the Framework and Standards' implementation, the Complaint also alleges that plaintiffs have sustained actual, threatened, and redressable injury by a "message of endorsement." Plaintiffs allege they sustained this injury by the "endorsement and promotion of an Orthodoxy that establishes and promotes non-theistic religious beliefs while seeking to suppress competing theistic religious views" because it "causes the [S]tate to promote religious beliefs that are inconsistent with the theistic religious beliefs of plaintiffs, thereby depriving them of the right to be free from government that favors one religious view over another" and " sends a message that they, being theists, are outsiders within the community and that non-theists and materialists are insiders within the community." Pls.' Compl. (Doc. 1) at ¶ 123. At the pleading stage, general factual allegations are sufficient to carry plaintiffs' burden of establishing the elements of standing because the Court must "'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *See Lujan*, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)); *see also Dart Cherokee Basin Operating Co., LLC v. Owens*, 730 F.3d 1234, 1236 (10th Cir. 2013) (Hartz, J., dissenting) (explaining "[t]he Supreme Court has not imposed special burdens at the pleading stage with respect to jurisdictional issues;" rather, the "sequence of pleading and proving jurisdiction is described in" *Lujan*, 504 U.S. at 561), *cert. granted*, ___ U.S. ___, 134 S. Ct. 1788 (2014); *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013). Thus, the Court considers whether plaintiffs' alleged injury, as they pleaded it in their Complaint, establishes an injury sufficient to confer standing.

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

The Tenth Circuit has observed that though it often is "not difficult" to determine whether a plaintiff has alleged a sufficient injury in fact, "the concept of injury for standing purposes is particularly elusive in Establishment Clause cases." *Awad*, 670 F.3d at 1120 (citations and internal quotation marks omitted). In the context of Establishment Clause violations, the Tenth Circuit has held that "standing is clearly conferred by non-economic religious values." *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 31 (10th Cir. 1973), *superseded on other grounds by Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005). The Supreme Court requires, however, that plaintiffs alleging non-economic injury must be "'directly affected by the laws and practices against which their complaints are directed.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.22 (1982) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963)). This requires a plaintiff to allege an injury that is more concrete than the mere assertion that he has observed conduct violating the Constitution. *Id.* at 485 ("the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing" under Article III).

The plaintiffs in *Valley Forge* challenged the federal government's transfer of surplus property in Pennsylvania to a Christian college, claiming that it violated the Establishment Clause. The plaintiffs learned about the transfer from a news release. None of the plaintiffs lived in or near Pennsylvania, where the property was located, and none alleged that they would use the property. The Supreme Court held that plaintiffs could not confer standing on themselves simply by claiming a personal constitutional right to a government that does not

establish religion. *Id.* at 483. Instead, the Supreme Court concluded that plaintiffs lacked standing because they "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. The Supreme Court also noted that it was "not retreat[ing] from [its] earlier holdings that standing may be predicated on noneconomic injury," but the *Valley Forge* plaintiffs simply had not "alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing." *Id.* at 486 (citations omitted).

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

Awad outlined several "key principles" that govern the standing analysis in the Establishment Clause context. In that case, a Muslim residing in Oklahoma brought an action alleging that a proposed amendment to the Oklahoma Constitution prohibiting courts from

considering or using international or Sharia law violated the Establishment Clause. 670 F.3d at 1117–19. The Tenth Circuit noted:

> First, in the context of alleged violations of the Establishment Clause, . . . standing is clearly conferred by non-economic religious values. Second, it is not enough for litigants to claim a constitutional violation. They must also identify a personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. Finally, alleging only personal and unwelcome contact with government-sponsored religious symbols is sufficient to establish standing.

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

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

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

The Court agrees that the Framework and Standards are "curriculum standards" and not "subjects and areas of instruction" that accredited schools must teach under K.S.A. § 72-1127(a). *See* Framework at 2 ("The broad set of expectations for students articulated in the framework is intended to guide the development of new standards that in turn guide revisions to science-related curriculum, instruction, assessment, and professional development for educators."); *see also* Standards at 5 ("The [Standards] are standards, or goals, that reflect what a student should know and be able to do—they do not dictate the manner or methods by which the standards are taught. The performance expectations are written in a way that expresses the concept and skills to be performed but still leaves curricular and instructional decisions to states, districts, school[s] and teachers."). As specifically stated in the Kansas statute, the Board has authority to establish

curriculum standards but it must not "impinge upon any district's authority to determine its own curriculum." K.S.A. § 72-6439(b). Thus, the Board's adoption of the Framework and Standards does not require local school districts to implement them in their own curriculum.

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

Consequently, plaintiffs do not allege that the Board requires local school districts to implement the Framework and Standards. Plaintiffs also do not allege that any local school districts actually have implemented the Framework and Standards in the local public schools attended by the plaintiff students. Rather, plaintiffs complain about the potential for future implementation of the Framework and Standards.[11] *See, e.g.*, Pls.' Compl. (Doc. 1) at ¶¶ 1 (the Board's adoption of the Framework and Standards "*will have* the effect of causing Kansas public

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

schools to establish and endorse a non-theistic religious worldview") (emphasis added), 24 (alleging that the Framework and Standards impose a strategy that "*will cause* [the State] to endorse a particular religious viewpoint") (emphasis added), 25 ("implementation of the [Framework and Standards] *will infringe* on [plaintiffs'] rights under the First and Fourteenth Amendments") (emphasis added).

These allegations of potential, future injury do not establish an actual or imminent injury sufficient to confer standing. *See Clapper*, ___ U.S. at ___, 133 S. Ct. at 1147, 1150 (explaining "imminence" requires an "injury is *certainly* impending" and "allegations of possible future injury" are not sufficient and thus holding that plaintiffs lacked Article III standing because they could not demonstrate that a future injury was certainly impending rather than merely speculative (citations and internal quotation marks omitted)). Consequently, plaintiffs have not alleged "personal and unwelcome contact" with the Framework and Standards sufficient to establish an injury in fact to confer standing under the Tenth Circuit's standard for Establishment Clause claims.

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

Plaintiffs also assert an alternative form of injury. They argue that the adoption of the Framework and Standards "sends a message that they, being theists, are outsiders within the community and that non-theists and materialists are insiders within the community." Pls.' Compl. (Doc. 1) at ¶ 123(b). In asserting this argument, plaintiffs cite several cases addressing the merits of Establishment Clause claims where plaintiffs challenged unwelcome government-sponsored religious messages. But in many of those cases, the courts did not address standing. *See, e.g.*, Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss (Doc. 40) at 11–12 (citing *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Cnty. of Allegheny v.*

Am. Civil Liberties Union, 492 U.S. 573 (1989); *Epperson v. Arkansas*, 393 U.S. 97 (1968)). The Supreme Court has cautioned against the use of federal decisions to support standing arguments when such decisions discuss only the merits of a claim but do not address, specifically, whether a plaintiff had standing to bring the action: "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, ___ U.S. ___, 131 S. Ct. 1436, 1448 (2011). Still, the Tenth Circuit has found "the volume and content of Supreme Court merits decisions in Establishment Clause religious display and expression cases involving noneconomic injury . . . instructive." *Awad*, 670 F.3d at 1121 n.6.

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

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

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

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

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

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

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

The Court concludes that the Tenth Circuit would not reach the same conclusion on standing as the Ninth Circuit reached in *Catholic League* on the facts alleged by plaintiffs here. Even if the Tenth Circuit were to apply the reasoning of *Catholic League* to the facts presented in this case, the Court predicts that it would conclude plaintiffs' allegations are more like those made in *Valley Forge* than the allegations at issue in *Catholic League*. Unlike the plaintiffs in *Catholic League*, plaintiffs here have not alleged that the Board's adoption of the Framework and Standards denounces, condemns, or disapproves their religion. Rather, plaintiffs complain that the non-binding Framework and Standards endorse a "non-theistic religious worldview" and

exclude the teaching of the "teleological hypothesis." *See* Pls.' Compl. (Doc. 1) at ¶¶ 1, 71–73, 82. As a consequence, plaintiffs argue that this exclusion of teleological teachings in non-binding curriculum standards discriminates against those who "embrace theistic worldviews." *Id.* at ¶ 21. The Court concludes these allegations are more like those made in *Valley Forge*, where the Supreme Court held that plaintiffs had suffered no injury in fact as a consequence of the challenged action (the government's sale of property to a religious college). Instead, the *Valley Forge* plaintiffs merely complained about conduct they disagreed with, and plaintiffs here do the same thing.

In addition, plaintiffs' claim the adoption of the Framework and Standards sends a message that they are "outsiders" within the community. This message, even if true, is not sufficient to confer standing because plaintiffs allege only an "abstract stigmatic injury" rather than a direct and concrete injury. *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 1612 (2011) (citing *Allen v. Wright*, 468 U.S. 737, 755–56 (1984)); *see also Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 606 (4th Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 623 (2012) (plaintiffs had no standing to bring an Establishment Clause claim challenging a public school district's policy allowing students to obtain academic credit for off-campus religious instruction offered by private educators because, although plaintiffs alleged that the policy made the student feel like an "outsider," they had "no personal exposure" to the policy "apart from their abstract knowledge" of it); *Awad*, 670 F.3d at 1122 (plaintiffs alleging an Establishment Clause violation must identify a "'personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.'" (quoting *Valley Forge*, 454 U.S. at 485)).

Here, plaintiffs' disagreement with the Board's adoption of the Framework and Standards alleges only an abstract stigmatic injury. As explained above, plaintiffs have not alleged that defendants have authority to implement the Framework and Standards within the curriculum of any local public school or that any local school districts actually have implemented them. Consequently, plaintiffs' alleged injury is just speculative and so they have failed to allege that they have suffered a direct or concrete injury. Instead, plaintiffs' only alleged injury is their abstract knowledge of the Board's adoption of the Framework and Standards. Therefore, plaintiffs' allegation that the Framework and Standards sends a message that they are "outsiders" within the community does not establish standing because this allegation, alone, is insufficient to confer standing without an injury in fact. While plaintiffs may have experienced "deep and genuine offense to a defendant's actions," their disagreement with the Board's actions is not sufficient to confer standing absent a direct and concrete injury. *Catholic League*, 624 F.3d at 1062 (Graber, J., dissenting).

While this Court has not located any controlling Tenth Circuit precedent on this question, at least two other circuits have come to similar conclusions when presented with a "government message" theory of standing. In *Freedom From Religion Foundation, Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011), the Seventh Circuit addressed an Establishment Clause challenge to a federal statute requiring the President to issue a proclamation designating a National Day of Prayer. *Id.* at 805. Plaintiffs alleged injury because "they feel excluded, or made unwelcome, when the President asks them to engage in a religious observance that is contrary to their own principles." *Id.* at 806–07. The district court determined that plaintiffs had standing to sue because they had been injured by a "message" from the government that it favors Americans who pray and disfavors plaintiffs' views on religion. *Id.* at 805; *Freedom From Religion Found.,*

Inc. v. Obama, 691 F. Supp. 2d 890, 894–95, 902–906 (W.D. Wisc. 2010), *vacated and remanded by* 641 F.3d 803 (7th Cir. 2011). But the Seventh Circuit reversed, concluding that plaintiffs lacked standing because their only injury was "hurt feelings" which "differ from legal injury" and "'value interests of concerned bystanders' do not support standing to sue." 641 F.3d at 807 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). As the Seventh Circuit summarized, the only injury to plaintiffs was "disagreement with the President's action" and "a feeling of alienation cannot suffice as injury in fact." *Id.* at 808.

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

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

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

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

Although plaintiffs' briefing does not distinguish between their Establishment Clause injury and their Free Speech, Free Exercise, and Equal Protection injury, the Court nevertheless considers whether plaintiffs have alleged an injury sufficient to establish standing for plaintiffs' other three claims. As explained below, the Court concludes that plaintiffs have failed to identify an injury sufficient to confer standing to assert any of their three remaining theories.

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

Second, to establish an injury sufficient to assert a free exercise claim, plaintiffs "must show that the challenged government action infringes on their 'particular religious freedoms.'" *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1186 (10th Cir. 2013) (Matheson, J., concurring in part and dissenting in part), *aff'd*, ___ U.S. ___, 134 S. Ct. 2751 (2014) (quoting *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 224 n.9 (1963)). Plaintiffs allege the Board's adoption of the Framework and Standards "interferes with the free exercise of [the students'] religion by imbuing them with a religious belief that is inconsistent with their existing religious beliefs" and "interferes with [the parents'] right to freely exercise their theistic religion by causing their children to embrace a materialistic/atheistic Worldview that is inconsistent with

that religion." Pls.' Compl. (Doc. 1) at ¶¶ 124(d), 125 (c). Once again, only the plaintiff students and parents have alleged a free exercise injury in their Complaint but again, as shown below, these allegations do not suffice to demonstrate an actual or imminent injury.

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

Although plaintiffs have alleged interference with their free speech and free exercise rights and a denial of equal treatment, these alleged injuries are not actual or imminent injuries sufficient to establish standing because plaintiffs have not alleged either that: (a) the Board has mandated implementation of the Framework and Standards in local school districts; or (b) any local school district actually has implemented the Framework and Standards. Thus, plaintiffs have suffered no injury. Plaintiffs claim only the threat of potential and future injury when the Framework and Standards are implemented by local school districts. *See, e.g.*, Pls.' Compl. (Doc. 1) at ¶ 25 ("implementation of the [Framework and Standards] *will infringe* on [plaintiffs'] rights under the First and Fourteenth Amendments") (emphasis added). But, as already discussed, the Board only can "supervise" local school districts under Kansas law and it is prohibited from controlling any local school district's curriculum. Thus, plaintiffs' allegations that local school districts will implement the Framework and Standards consist purely of their conjecture and it does not establish an actual or imminent injury sufficient to confer standing.

See Clapper v. Amnesty Int'l USA, ___ U.S. ___, 133 S. Ct. 1138, 1147 (2013) (explaining that an alleged injury must be "certainly impending" and not "too speculative for Article III purposes"). Therefore, while plaintiffs may disagree with the Board's decision to adopt the Framework and Standards, they have not alleged an actual or imminent injury that could establish standing to sue for their Free Speech, Free Exercise, and Equal Protection claims. Consequently, plaintiffs lack standing to assert these three claims.

2. Causation and Redressability

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

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

be made in such manner as to produce causation and permit redressability of injury." *Id.* (citation omitted).

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

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

In addition, plaintiffs do not allege that the Board's adoption of the Framework and Standards mandates or requires local school districts to implement them. Nor could they make such a claim, for Kansas law only allows the Board to supervise and it prohibits the Board from impinging on a local school district's authority to determine its own curriculum. Thus, the Board's adoption of the Framework and Standards is a permissive action providing guidance to local school districts, but it does not mandate any action by local schools. The Northern District of Oklahoma recently determined that plaintiffs lacked standing to challenge a permissive federal

law that, like the Board's adoption of the Framework and Standards here, did not mandate any action by states or remove any discretion from states. *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1266 (N.D. Okla. 2014), *aff'd on other grounds*, 760 F.3d 1070 (10th Cir. 2014).

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

Similarly, here, plaintiffs challenge the Board's adoption of the Framework and Standards which they allege local school districts will implement in the future. But the Framework and Standards do not require local school districts to implement them. Rather, local school districts retain their local and independent authority to determine their own curriculum under K.S.A. § 72-6439(b). *See also State ex rel. Miller v. Bd. of Educ. of Unified Sch. Dist. No. 398*, 511 P.2d 705, 713 (Kan. 1973) (explaining that the Board's "supervision" of local school districts "means something more than to advise but something less than to control"). Thus, like the plaintiffs in *Bishop*, plaintiffs here lack standing to challenge the adoption of a permissive set of standards which do not eradicate any of the independent discretion Kansas school districts

possess to control their curriculum. Consequently, plaintiffs have alleged no injury fairly traceable to the Board's adoption of the non-binding Framework and Standards. In addition, the Court cannot redress plaintiffs' claims because, even if the Court grants plaintiffs' requested relief and prohibits the Board from implementing the Framework and Standards, the Board lacks authority under Kansas law to control the curriculum of local school districts. Thus, a favorable decision from the Court would not redress the harm theorized by plaintiffs' claims.

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

3. Taxpayer Standing

Finally, plaintiffs David and Victoria Prather allege standing based on their status as Kansas taxpayers "who pay state and local income and property taxes which are used in part to fund public schools in Kansas." Pls.' Compl. (Doc. 1) at ¶ 43. Defendants argue[13] the Prathers

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

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

cannot establish standing based merely on their status as taxpayers and that their allegations do not satisfy the narrow exception to the general rule prohibiting taxpayer standing for certain Establishment Clause claims. The Court agrees. The Prathers' taxpayer status does not confer standing on them to assert the claims alleged here.

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

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

to invoke a federal court's jurisdiction." *Id.* at 103. Here, plaintiffs have failed to allege facts establishing either prong of the *Flast* test.

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

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

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

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

V. Conclusion

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

lacked subject matter jurisdiction over claim (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 101–02 (1998) (rejecting the doctrine of hypothetical jurisdiction))).

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

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

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

IT IS SO ORDERED.

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

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

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

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Kansas

COPE (a.k.a. CITIZENS FOR OBJECTIVE PUBLIC EDUCATION, INC.), ET AL.

Plaintiff(s)

v.

KANSAS STATE BOARD OF EDUCATION, ET AL.

Defendant(s)

Civil Action No. 13-4119-DDC-JPO

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

❒ the plaintiff *(name)* ______ recover from the defendant *(name)* ______ the amount of ______ dollars ($ ______), which includes prejudgment interest at the rate of ______ %, plus post judgment interest at the rate of ______ %, per annum, along with costs.

☑ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* Kansas State Board of Education, et al. recover costs from the plaintiff *(name)* COPE (a.k.a. Citizens for Objective Public Education, Inc.), et al. .

❒ other:

.

This action was *(check one)*:

❒ tried by a jury with presiding, and the jury has rendered a verdict.

❒ tried by without a jury and the above decision was reached.

☑ decided by U.S. District Judge Daniel D. Crabtree on a motion for dismissal (Doc. 29).

Date: 12/02/2014

TIMOTHY M. O'BRIEN
CLERK OF COURT

s/ Megan Garrett

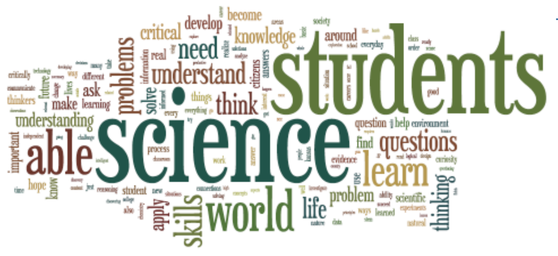
Signature of Clerk or Deputy Clerk

Appellate Case: 14-3280 Document: 01019402492 Exhibit C-1 age: 107

Register Login

KSDE **Science Home** **Kansas Science Standards**

Science Home > New KSDE Science Home



Welcome to the 2014-2015 School Year!

Kansas is using the transition to our new science standards to move our entire system closer to the Kansas vision for science education--at the classroom, building, district, community, and state levels.

Together with partners in business and industry, informal science education, post-secondary science, engineering, and education, and with our communities, we are poised to move Kansas.

"This...is necessary for good citizens to carry out their responsibilities in society"

--Kansas science educator

On this website you will find:

the Kansas Science Standards

Implementation support for teachers and districts as they plan out their transition to the new standards.

The plan for improving the Kansas science assessment to measure the new standards

...and much more!

Kansas MSP Grants opened up to support science! Register for the Workshop to learn more

Learn more about the Kansas Vision for Science Education Project

Tweets Follow

NGSS PLN @ngssblogs 23h
Spread the word folks: NGSSchat this Thurs. Topic is around the new NGSS teaching channel videos released by Achieve! #NGSSchat #scichat
Retweeted by Matt Krehbiel
Expand

Philip Bell @philiplbell 16 Mar

Tweet to @kssciencegu y

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...allowing for more engaging and relevant content and instruction that clearly teaches complicated topics.

The standards and their appendices are provided below as pdfs, but you can search and sort the standards by grade level, or any of the dimensions of the standards online here: **http://www.nextgenscience.org/next-generation-science-standards**.

Kansas Science Standards-- The 2013 Kansas College and Career Ready Standards for Science (KCCRSS)

In this section of documents, you will find the front matter for the standards and the K-12 standards themselves. Read the descriptions about each document for more details.

Title	Description
Introduction to the 2013 Kansas science standards	an executive summary of how these standards are different from previous standards (pdf)
How to Read the KCCRSS	a quick overview of how to interpret the information in the standards documents (pdf)
K-12 Kansas Science Standards --"topic" arrangement	THE 2013 KANSAS K-12 SCIENCE STANDARDS arranged by the topics that were originally used to write the standards (pdf)
K-12 Kansas Science Standards--"Disciplinary Core Ideas" arrangement	THE 2013 KANSAS K-12 SCIENCE STANDARDS arranged by the disciplinary core ideas dimension (pdf)-- for clarification, these are the SAME standards, but just arranged in a different order--use whichever one works better for you
Commonly Used Abbreviations in KCCRSS	a guide to abbreviations that are used frequently within the standards documents (pdf)

Kansas Science Standards--Kansas College and Career Ready Standards for Science--Appendices

The appendices to the standards are fantastic resources to understand what these standards are all about and how to use the standards to advance instruction in our classrooms.

Title	Description
A-Conceptual Shifts in the Next Generation Science Standards	a deeper look at the shifts that make these standards new and different (pdf)
B-Responses to the Public Drafts	a summary of the feedback to the two complete public drafts of these standards (pdf)
C-College and Career Readiness	a discussion of what college and career readiness looks like in science (pdf)
D-Diversity and Equity	advice on how to ensure these standards are for ALL students (pdf)
D-Diversity and Equity--Case Studies	zip file of the seven case studies referenced in Appendix D that provide examples of strategies classroom teachers can use to ensure that the NGSS are accessible to all students. Examples are included for elementary, middle, and high school. (zip file)
E-DCI Progressions	a summary table of how the disciplinary core ideas develop in the standards across K-12 (pdf)
F-Science and Engineering Practices across grades	a summary of how the science and engineering practices dimension develops across K-12 (pdf)
G-Crosscutting Concepts across grade levels	a summary of how the crosscutting concepts dimension develops across K-12 (pdf)
H-Nature of Science in KCCRSS	a summary of how the nature of science is woven throughout the standards (pdf)
I-Engineering Design in KCCRSS	a discussion of how and why engineering is integrated into these standards (pdf)
J-Science, Technology, Society and the Environment	an explanation of how the interdependence of science, engineering and technology, and the influence of science, engineering and technology on society and the natural world are incorporated into the standards (pdf)
K-Course Mapping 6-8 and 9-12	a pragmatic guide to making decisions about how to map out the 6-8 and 9-12 grade banded standards to courses (pdf)
L-Connections to Math Standards	an explanation of how these science standards were developed in a way that compliments the expectations in our Kansas Kansas math standards (pdf)
M-Connections to ELA Standards	an explanation of how these science standards were developed in a way that compliments the expectations in our Kansas Kansas English Language Arts (ELA) standards (pdf)

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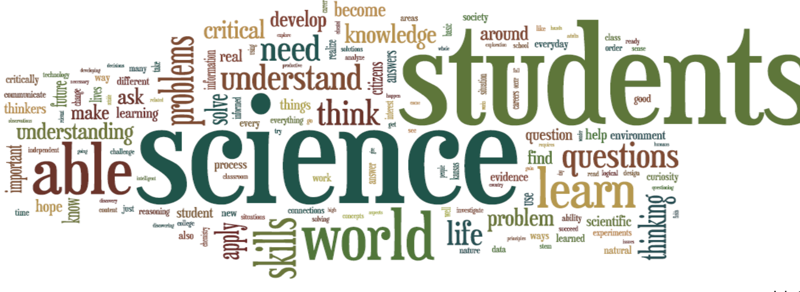
785-296-8108 785-296-3142

Exhibit C-3

The **FOCUS** of science standards implementation is to ***MOVE*** our **SYSTEM** for science education toward the **Kansas Vision**



July 2014

Description of the Kansas Vision for Science Education Project

The word cloud above was started from the vision of teachers from about a dozen districts in Kansas and is regularly updated by registered users of this website. Participants are asked two basic questions:

1. What do you hope that your students learn about science?
2. Why is it important for students to learn about science in this way?

Responses are combined into a single text document and analyzed using Wordle to create the image above.

Registered users can ADD YOUR VOICE to this vision. If you are registered user and logged in, the link to participate in the survey will appear below and answers will regularly be added to the collective text document and graphic.

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Using the Implementation of the Kansas Science Standards as an *opportunity* to

Build Communities for Science Education

Implementation is about casting a grand vision for science education...

NGSS Site Navigation **Implementing to meet the Kansas Vision for Science Education**

KSDE Science Home
Science Standards
Implementation
K-12 Framework
Standards Development
FAQ

Steps for Successful Implementation

1. Cast A Fearless Vision

Far too often we get mired in the muck of the day to day. To successfully implement, you will need a compelling vision for why science education is important for ALL students. This vision should anchor all of your implementation work.

2. Build a Coalition

Bring together the critical stakeholders needed to advance science instruction in your district. This should include parents, educators at all levels (pre-K through post-secondary), informal science educators (zoos, museums, wildlife and parks, etc) and business and industry in your community. To reach the vision for ALL students will take commitment from a variety of stakeholders--involve them early and often in the transition to new standards. As stakeholders are added to the conversation, clearly articulate and be open to revising your vision.

3. Strategically Move Toward the Vision

Change can be overwhelming. Once you cast a critical eye on the components of the system that seem to be holding you back, it will easy to get derailed by these roadblocks. Revisit your vision. Prioritize your needs. Lay out a multi-year plan to address these priorities. This plan should include what needs to be done, who is going to do it, and a way of measuring whether or not the plans recommendations are moving your community toward your vision.

4. Practice Tenacious Patience

We must cling to this vision with the tenacity of a honey badger, but simultaneously be aware that it will take sustained effort to realize. This is a marathon, not a 100m dash. Be prepared for turnover in the stakeholder team, waning interest as the newness of the plan wears off, and other struggles that come with change. A three year time period to transition is ambitious and even then you won't know the full effect until a kindergartner entering the system at that point graduates from high school.

Implementation Planning Documents

These resources were developed by the Kansas NGSS Review Committee as a starting point for teachers, schools, and districts to think carefully about the changes that need to happen in order to successfully implement the Kansas College and Career Ready Standards for Science and are intentionally shared in an editable format so they can be adapted to fit local planning.

Title	Modified Date	Description
Example 4-year implementation plan	3/3/2014	This document was put together with Kansas teachers and curriculum directors as an example of what a multi-year implementation might look like (Excel).
Example 4-year implementation plan	3/3/2014	This document was put together with Kansas teachers and curriculum directors as an example of what a multi-year implementation might look like(pdf).

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DRAFT District Implementation Workbook	7/9/2013	This DRAFT workbook provides support to districts as they think big about their implementation plans. It is shared in an editable format so that teachers, school, and districts can edit to meet their needs.

FAQ and Implementation Discussions

Search Home

Home

View latest 6, 12, 24, 48 hours

FORUMS	THREADS	POSTS	LAST POST
Discussions			
FAQ	1	1	What is NGSS? 6/12/2013 10:21 AM by ksscienceguy
Implementation Planning Please comment on the 4-year plan shared above and implementation plans for your districts.	1	1	Take it slow 6/12/2013 10:39 AM by ksscienceguy

2 Forums In 1 Groups

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Kansas CCR Standards for Science: Implementation Plan

	Year Zero (2013-2014)	
	In the Classroom (what teachers do and what students see)	**Behind the Scenes** (what teachers and admin do, e.g. PD, planning, etc.)
Instructional Practices Outcome: to advance instruction and learning so that students exit school prepared for college and career **Curricula** Outcome: to revise and implement curricula to address college and career readiness in science	Continue existing curricula with special attention to the dimensions of the NGSS; throughout the school year reflect on existing instructional practices and curriculum and which aspects of NGSS they address well and which aspects are targeted for growth; it may be helpful to record which science and engineering practices are being used by students and modeled by instructors in each unit; reflect on how integrated the three dimension of the framework are in curriculum and instruction	Engage in a careful reading of *A K-12 Framework for Science Education* ; designate a strategic leadership team, review your district's capacity for implementation, and create a preliminary timeline for implementation; evaluate and revise what you've done for implementing the 6-12 Literacy History/Social Studies, Science, & Technical Subjects component of the Kansas ELA standards; define district aspiration for science education; build horizontal and vertical teams; evaluate your past and present performance in science education; determine the critical stakeholders for implementation (i.e. teacher leaders, administrators, local school board, business and industry, parents, community, etc.) and develop key messages to engage them; establish baselines and measures that will be used to determine success; evaluate existing curriculum; establish projected district course sequence for middle and high school
Resources, Materials, Textbooks, etc. Outcome: to identify, secure, and implement materials to address college and career readiness	Use existing resources, materials, textbooks, etc., possibly shifting those existing resources and materials as needed to better address NGSS	Find/develop rubrics, questions, methods to evaluate resources, materials, textbooks, etc. for alignment with NGSS; make a decision whether or not this will affect normal adoption cycles; collaborate with other districts to develop resources; mine the NGSS@NSTA database for resources and share local resources

DRAFT

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Kansas CCR Standards for Science: Implementation Plan

	Phase II (2014-2015)	
	In the Classroom (what teachers do and what students see)	**Behind the Scenes** (what teachers and admin do, e.g. PD, planning, etc.)
Instructional Practices Outcome: to advance instruction and learning so that students exit school prepared for college and career	Focus on a deliberate, guided integration of the science and engineering practices (SEPs) outlined in *A K-12 Framework for Science Education* and the Next Generation Science Standards into lessons	Facilitate professional learning and reflection on integrating the SEP; focus walkthroughs on use of practices; collaboration within and across district and state lines
Curricula Outcome: to revise and implement curricula to address college and career readiness in science	Pilot new units and classroom assessments designed to address the three dimensional nature of the NGSS; evaluate effectiveness of units based on criteria established in Phase I.	Begin revising existing curricula with a focus on bundling performance expectations (PEs) into classroom experiences (PEs are not curriculum, but rather student outcomes); vertical and horizontal teaming; structured collaboration within and across district and state lines
Resources, Materials, Textbooks, etc. Outcome: to identify, secure, and implement materials to address college and career readiness	Use existing resources, materials, textbooks, etc., supplementing where needed and feasible to fully address NGSS	Vet any new resources, materials, textbooks, etc. against found/developed rubrics, questions, methods for both alignment with NGSS and school/district needs; structured collaboration within and across district and state lines

DRAFT

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Kansas CCR Standards for Science: Implementation Plan

	Phase III (2015-2016)	
	In the Classroom (what teachers do and what students see)	**Behind the Scenes** (what teachers and admin do, e.g. PD, planning, etc.)
Instructional Practices Outcome: to advance instruction and learning so that students exit school prepared for college and career	Refine and strengthen implementation and expand frequency of use of instructional practices	Continue professional reflection; PD as necessary; walkthroughs; collaboration within and across district and state lines; share effective use in professional venues (KATS, NSTA, etc.)
Curricula Outcome: to revise and implement curricula to address college and career readiness in science	Enhance and extend special attention to topics and subtopics present in the NGSS but not in existing curricula; pare back on topics not covered in NGSS allowing room for depth	Reflect on and revise piloted NGSS instructional units; use knowledge gained from reflection and revision to guide development of additional units by bundling PEs; collaboration within and across district and state lines
Resources, Materials, Textbooks, etc. Outcome: to identify, secure, and implement materials to address college and career readiness	Implement any new resources, materials, textbooks, etc. to address curricular changes	Facilitate on-going reflection on needed resources, materials, textbooks, etc. to implement NGSS; collaboration within and across district and state lines

DRAFT

Appellate Case: 14-3280 Document: 01019402492 Date Filed: 03/20/2015 Page: 116

Kansas CCR Standards for Science: Implementation Plan

	Phase IV (2016-2017 and beyond)	
	In the Classroom (what teachers do and what students see)	**Behind the Scenes** (what teachers and admin do, e.g. PD, planning, etc.)
Instructional Practices Outcome: to advance instruction and learning so that students exit school prepared for college and career	Continue to refine, strengthen, and extend the use of instructional practices	Continue professional reflection; PD as necessary; walkthroughs; share effective use in professional venues (KATS, NSTA, etc.)
Curricula Outcome: to revise and implement curricula to address college and career readiness in science	Curriculum is written for the Next Generation Science Standards	Complete and vet draft of new curricula; provide PD on new curricula; facilitate on-going reflection and revision of new curricula
Resources, Materials, Textbooks, etc. Outcome: to identify, secure, and implement materials to address college and career readiness	Implement any new resources, materials, textbooks, etc. to address curricular changes	Facilitate on-going reflection on needed resources, materials, textbooks, etc. to implement NGSS

DRAFT

State Information
- Demographics
- Definitions
- Summary:
  - 2003-2004
  - 2004-2005
  - 2005-2006
  - 2006-2007
  - 2007-2008
  - 2008-2009
  - 2009-2010
  - 2010-2011
  - 2011-2012
  - 2012-2013
- Comparative Perf. & Fiscal System

Achievement Performance Level Reports

Reading
- All Students
- Race/Ethnicity
- Economically Disadvantaged
- Students with Disabilities
- English Language Learners
- Migrant Students
- Gender

Math
- All Students
- Race/Ethnicity
- Economically Disadvantaged
- Students with Disabilities
- English Language Learners
- Migrant Students
- Gender

Science
- All Students
- Race/Ethnicity
- Economically Disadvantaged
- Students with Disabilities
- English Language Learners

Message from the
Interim Commissioner of Education

2014 Building Report Card

As Kansas schools continue working towards full implementation of the Kansas College and Career Ready Standards (KCCRS), 2014 marked the first year that students transitioned to a new state assessment that addressed the skills currently being taught in the classroom. Kansas launched its pilot of the new state assessment and assessment delivery platform a year in advance of the federal state testing requirement for the purpose of identifying and fixing any system issues and district-level technology compatibility issues. Additionally, the early launch provided the time needed to verify the validity of the new assessment items and provide students the opportunity to interact with the new types of technology-enhanced items prior to the official launch in 2015.

During the early part of the testing window, KSDE's assessment vendor, the Center for Educational Testing and Evaluation (CETE), reported that the assessment delivery platform had been the target of a Distributed Denial of Service (DDoS) attack, which attempted to shut down the servers and severely impacted the testing environment for many students. The impact of this attack resulted in CETE's inability to verify the validity of the results for all students. As such, the Kansas State Board of Education, acting on the recommendations of the Kansas Technical Advisory Committee, CETE and Kansas State Department of Education staff and with approval from the United States Department of Education, voted to not release any results of the 2014 state assessment.

While we are not able to provide assessment scores for 2013-14, we are still able to publish academic indicators, including graduation rates, and demographic information. We are pleased to report that graduation rates as a whole have improved for the fifth straight year in a row. This is great news for Kansas and highlights the great work happening in our classrooms.

Thank you for your support as we continue our transition to higher academic standards for Kansas students.

Brad Neuenswander
Interim Education Commissioner

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- ✓ Migrant Students
- ✓ Gender

History - Govt.

- ✓ All Students
- ✓ Race/Ethnicity
- ✓ Economically Disadvantaged
- ✓ Students with Disabilities
- ✓ English Language Learners
- ✓ Migrant Students
- ✓ Gender

Writing

- ✓ All Students
- ✓ Race/Ethnicity
- ✓ Economically Disadvantaged
- ✓ Students with Disabilities
- ✓ English Language Learners
- ✓ Migrant Students
- ✓ Gender

Additional Academic Indicators

- ✓ Attendance Rate
- ✓ Graduation Rate
- ✓ Dropout Rate

Accountability

- ✓ AMO Reports
- ✓ Teacher Quality
- ✓ Title I Schools

QPA

- ✓School Accred. Status

Other Results

- ✓ ACT Scores
- ✓ NAEP State Results
- ✓ College & Career Ready

Student Demographics

- ✓ Enrollment
- ✓ Race/Ethnicity
- ✓ Economically Disadvantaged
- ✓ Migrant
- ✓ ELL
- ✓ Students with Disabilities
- ✓ Gender

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