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

PETITION FOR HEARING EN BANC

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

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Dated May 6, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Appellants states the following:

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.

s/ Douglas J. Patterson, Esq
Douglas J. Patterson, Esq.
Attorney for Appellants-Petitioners

RULE 35(B) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 35(b), counsel for Appellants states that *En banc* hearing is warranted because:

(A) the Decision raises three questions of exceptional importance:

1. Plaintiffs' complaint alleges that the Standards seek to replace the theistic beliefs of the Children with a "non-theistic religious worldview that is materialistic/atheistic." Must this allegation be deemed to be true and valid for purposes of determining standing at the pleading stage, or is it permissible for the court to mischaracterize the Complaint as alleging that the standards establish a "non-religious" or secular "worldview" that does not "condemn" the Children's theistic beliefs?

2. May government endorse non-theistic religious belief systems that are materialistic/atheistic over theistic belief systems, and should the rules of standing be applied neutrally as between theistic and non-theistic religious belief systems?

3. Should the rules of standing in Establishment Clause cases be applied in a manner so that no person is eligible to complain of state standards that seek to replace a child's theistic religious beliefs with a non-theistic religious worldview that is materialistic/atheistic.

(B) the Panel Decision (the "Decision") cites no decision that supports its denial of standing and conflicts with at least five decisions of this Court, four decisions of the Supreme Court and eight decisions of other U.S. Circuit Courts of Appeal, in the respects set forth in the Argument beginning at 10, and consideration by the full court is therefore necessary to secure and maintain uniformity of the court’s decisions.

s/ Douglas J. Patterson, Esq.
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STATEMENT OF FACTS

COPE, 15 theistic Parents, their 21 theistic Children enrolled or to be enrolled in K-12 schools supervised by Defendants filed a Complaint containing 130 particularized allegations on September 26, 2013. It seeks declaratory and injunctive relief against the Defendants' adoption and implementation of a 402 page Framework for K-12 Science Education and related 446 page Next Generation Science Standards (the "Standards"). The Complaint alleges that the adoption and incremental, progressive, comprehensive and deceptive implementation of the Standards during their Children's 13 years of Kansas K-12 public education is designed to convert their theistic religious beliefs into a "non-theistic religious worldview (the 'Worldview')" that is "materialist/atheistic" in violation of the Establishment, Free Exercise, and Speech Clauses of the First Amendment, and the Equal Protection Clauses of the 14th Amendment." Cplt. ¶¶ 1, 14.

The District Court sustained Defendants' motion to dismiss the Complaint for lack of standing without passing on the merits of their 12b-6 motion and without challenging the Complaint's allegation that "religion" includes non-theistic belief systems. Plaintiffs appealed the dismissal because, among other things, (a) the Court failed to consider the factual allegations of injury contained in ¶¶ 124 and 125 of the Complaint that detail actual direct and personal injuries to the Parents and Children, (b) the holding failed to consider this Court's holding in Bell v. Little Axe, Id. and other decisions of this and other Courts which require a finding of standing, and (c) the opinion failed to cite any apposite legal authority that supports the denial of standing.

Plaintiffs analyzed and produced written objections to the Standards that were given to Defendants prior to their adoption and attached as Complaint Exhibits A and B. Cplt. 58. They were told that if they didn't like the standards they could assert illusory and impracticable opt-out rights. Pltfs. Response, Aplt App at 996, 1005, 1029-1030.

The "methods" by which the Standards seek to convert the theistic beliefs of the Children are described in the first 25 paragraphs. These allege that the Standards are designed to cause the children to ask ultimate questions regarding the "cause and nature of life and the universe - 'where do we come from?'" These are religiously important, as the answers determine how they answer "ancillary religious questions regarding the purpose of life and how it should be lived ethically and morally." Cplt. ¶ 3-4.

The Complaint then explains that, instead of seeking to objectively inform children of the actual state of our scientific knowledge about these ultimate questions in an age appropriate and religiously neutral manner, the Standards use, without adequately disclosing, an "Orthodoxy (defined in paragraphs 8 and 9) and a variety of other deceptive methods to lead impressionable children, beginning in Kindergarten, to answer the questions with only materialistic/atheistic answers." Cplt. ¶¶ 5-10. The balance of the 130 paragraph Complaint provides detailed explanations of the "methods" used to inculcate the non-theistic religious worldview. One of those methods is to classify children's instinctive teleological conceptions of the world that support theistic answers to the ultimate questions to be "misconceptions," and then to train teachers to correct those misconceptions so that their conceptions become materialistic/atheistic, consistent with the non-theistic religious worldview the standards seek to establish. Cplt. ¶¶ 15-16.

The Worldview is to be inculcated not only in science curriculum but also in all other school curriculum. Cplt. ¶¶11-22. Other strategies of indoctrination used by the Policy include: (a) employing the indoctrination during the years that children typically formulate their worldviews and at a time when they are not cognitively mature or sufficiently knowledgeable "to enable them to critically analyze and question any of the information presented and to reach their own informed decision about what to believe about ultimate questions fundamental to all religions" (Cplt. ¶¶14, 18); and (b) excluding "from its policies regarding non-discrimination and equity, children, parents and taxpayers that embrace theistic worldviews, thereby enabling the discriminatory establishment of the non-theistic Worldview under the guise of 'science'" Cplt. ¶21.

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

Defendants expect implementation by all schools. Pltfs. Op. Br. at 7-8.

SUMMARY OF ARGUMENT

Review is necessary as the Decision raises three questions of exceptional importance as discussed below. The questions arise, because the Decision erroneously states that the Complaint alleges that the Standards promote a "non-religious worldview" without "condemn[ing] any religion." In fact the Complaint does the opposite, as it

alleges in detail how the Standards seek to replace the Children's theistic beliefs with a "non-theistic *religious* worldview that is materialistic/atheistic." The error violates the requirement that the Complaint be deemed true and valid. A correction of the error implicitly removes the basis for denial if the rules of standing are applied neutrally.

The Decision should also be reviewed as it is inconsistent with at least five controlling decisions of this Court, four Supreme Court decisions and eight decisions of other Circuits infra at 13. It is inconsistent as the alleged actual injuries are far more personal, particularized, concrete and serious than those qualifying in the listed decisions. Not only is the Decision inconsistent with the cited cases, it also offers no apposite authority, relying instead on unsupported denials of the key allegations of the Complaint.

ARGUMENT

I. Review is necessary because the factual basis of the Decision is false.

A. The allegations construed favorably must be deemed true and valid.

The Decision properly recognizes that "at the pleading stage, we "must assume the Plaintiffs' claim has legal validity," "accept as true all material allegations of the complaint, and construe the complaint in favor of the Plaintiffs" as to whether they allege an injury in fact. Dec. 7-8. Accordingly, the allegations upon which standing is determined are those recited in the Complaint, not extraneous conjecture or speculation.

B. The Denial of Standing is based on key false factual conclusions.

1. The Decision's conclusions that the allegations of the Complaint are "threadbare assertions that the Standards intend to promote a *non-religious* worldview" and that the Complaint "does not offer any facts to support the conclusion that the Standards condemn any religion or send a message of endorsement" are false. Dec. 9 and 11.

a. The Complaint does not allege that the Standards intend to promote a "non-religious" worldview.

Rather, the Complaint repeatedly and consistently alleges that the Standards seek to promote a "non-theistic *religious* worldview" that is "materialistic/atheistic." The phrase "non-theistic religious Worldview" is used seven times in the Complaint, appearing in ¶¶ 1, 19, 48, 80, 123, 124, 125), and "materialistic/atheistic" 21 times. "Atheism and Religious ("Secular") Humanism" are alleged to be non-theistic religions the Standards promote. Cplt. ¶¶ 66, 77 and Cplt. Exhibit A, Aplt. App. 72).

The word "non-religious" does not appear in the Complaint or its two attachments, yet it occurs six times in the Decision. (Dec. at 4,6,9 and 10.) The misstatement is crucial to the Decision as "secular" means "not religious." The Complaint alleges that the Standards are religious and not entirely secular. If the misstatements are corrected the denial of standing has no valid basis and the implicit merits analysis fails.

b. The Decision also asserts contrary to the Complaint that "the Standards do not condemn any or all religions and do not target religious believers for disfavored treatment" and that "COPE does not offer any facts to support the conclusion that the Standards condemn any religion or send a message of endorsement." Dec. 9 and 11.

Given the particularized allegations, the Complaint clearly alleges that the Standards do seek to convert the Children's theistic beliefs into a non-theistic religious worldview. Thus, the injury allegations go far beyond an allegation of condemnation and message of endorsement. They allege a program for the establishment of a non-theistic religious worldview in all public K-12 schools in Kansas and the entire US.

c. Finally, the assertion that the Complaint offers "only threadbare assertions," is itself a false unsupported threadbare assertion.

The Complaint contains 130 particularized assertions of fact and a 20 paragraph prayer, all of which detail the "methods" by which the Standards seek to change the theistic beliefs of the Children into a non-theistic religious worldview and personally and directly injure them by violating legally enforceable rights. These are not "threadbare."

2. The assertion that the injuries amount only to a bystander's psychological consequences produced by disagreement is false.

a. The Plaintiffs Parents and Children are not mere bystanders but rather are the targets and objects of the Standards.

The Supreme Court in Valley Forge Christian College v. AUSCS, 454 U.S. 464, 485 (1982) explained that "the federal courts have abjured appeals to their authority which would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of *concerned bystanders*.'" [emphasis added, citing United States v. SCRAP, 412 U.S. 669, 687 (1973)]. The uninvolved "bystanders" in Valley Forge were non residents complaining of a state transfer of surplus property to a theistic institution.

In discussing Valley Forge, this Court in Awad at 1121 noted that it was not enough for litigants to claim a constitutional violation. "Rather, plaintiffs 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.'"

The Decision's use of the Valley Forge test to deny standing is not supported by the facts. The Parents and Children are not personally unaffected "bystanders," as the Standards define what the Children are "to know and be able to do." (K.A.R. 91-31-31(d). Thus, they are the targets and objects of the Standards. "[S]tanding 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 v. Defenders of Wildlife, 504 U.S. 555, 461-2 (1992)

b. **Second the Decision incorrectly concludes that Plaintiffs' injuries consist only of the "psychological consequences produced by observation of conduct with which it disagrees." Dec. at 9-10.**

The assertion is false. In addition to the psychological consequences of disagreements, the Complaint alleges numerous direct personal injuries resulting from the adoption's violation of legally enforceable religious rights. Cplt. ¶¶ 124-125.

The exclusion of these rights from consideration is curious, because the Decision recognizes that the Complaint does allege that the adoption of the Policy violates the specified rights. However, it fails to explain how the violation of a legally enforceable personal right and breach of trust can be factually classified as a mere disagreement.

The Decision therefore bases its denial of standing on a false characterization of the Parents and Children as mere "bystanders" suffering *only* from "disagreements."

II. The Petition Should be Granted because it addresses three issues of exceptional importance.

1. Is it permissible to mischaracterize the Complaint as alleging that the standards seek to establish a "non-religious" or secular "worldview" that does not impinge on the Children's theistic beliefs when it alleges the opposite?

Allowing the mischaracterization permits the Court to engage in an unsupported merits analysis at the pleading stage when standing is the only issue. This effect favors

non-theistic religion over theistic religion and deprives theistic Parents and children of the right to complain about violations of their legally enforceable religious rights.

2. Is it religiously neutral for government to endorse non-theistic belief systems over theistic belief systems and should the rules of standing be applied neutrally as between theistic and non-theistic religious belief systems?

This question was addressed by Plaintiffs in their Reply (Pltfs. Reply at 10-11). If the application of the abstract rules of standing is not objective and neutral by omitting consideration of important precedents, misstating the alleged facts and using factually unsupported arguments that depend on strained and illogical constructions of the allegations of the Complaint, then the decision will likely favor one religious view over another, which itself is inconsistent with the Establishment Clause.

In Catholic League a narrow En banc majority held that theists had standing to complain about a non-binding resolution adopted by the City of San Francisco that castigated a theistic organization for opposing adoptions by homosexual couples. Catholic League v. City and Cnty. of San Francisco, 624 F.3d 1043, 1049 (9th Cir. 2010). Judge Kleinfeld noted that Establishment Clause standing is subjective because "the Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature." Due to this subjectivity and, perhaps because any judge will likely be affected by a religious bias, the Court explained that care should be used to apply the rules of standing doctrine neutrally:

> "It is, of course, incumbent upon the courts to apply standing doctrine neutrally, so that it does not become a vehicle for allowing claims by favored litigants and disallowing disfavored claimants from even getting their claims considered. Without neutrality, the courts themselves can become accessories to unconstitutional endorsement or disparagement. Standing is emphatically not a

> doctrine for shutting the courthouse door to those whose causes we do not like. Nor can standing analysis, which prevents a claim from being adjudicated for lack of jurisdiction, be used to disguise merits analysis, which determines whether a claim is one for which relief can be granted if factually true." [Id.]

The Court then detailed numerous Ninth Circuit and Supreme Court cases conferring standing in complaints against theists. Id. at 1050. It concluded: "If we reject standing for [theistic] plaintiffs in this case, then those cases must somehow be distinguished convincingly (a difficult task), or overruled." Id. Similarly, if the Decision is left standing, the same question arises with respect to at least 17 inconsistent cases.

Catholic League also discussed the misuse of standing rules to disguise merits analysis. The Decision's merits analysis is implicit in its revisions of facts and this note:

> "Although we do not reach the merits, we note that COPE asks the court to implement a requirement identical to the one imposed by the statute in Edwards. COPE frames the materialism of evolutionary theory as a religious belief competing with COPE's own teleological religion, and demands that if evolution is taught, teleological origins theories must also be taught. The Edwards Court expressly held such a requirement unconstitutional. 482 U.S. at 592." Dec. 11.

The Edwards case involved a law requiring use of a religious orthodoxy (the Biblical Creation Story) whenever objective origins science was to be taught. It did not involve a program of origins science that seeks to objectively inform students of a materialistic orthodoxy that requires materialistic explanations of nature. The Complaint alleges that the Standards are the same as the unconstitutional Arkansas statute, except that the religious orthodoxy is materialistic/atheistic rather than theistic. Thus Edwards supports rather than undermines the merits of the Complaint.

3. Should the rules of standing in Establishment Clause cases be applied in a manner so that no person is eligible to complain of state standards that seek to replace a child's theistic worldview with one that is non-theistic?

If parents and the children to be indoctrinated may not claim an injury due to State guidance of its schools to do so, then neither can the guided teachers and school administrators. Who then has standing to challenge a State Supervisor that guides its supervised schools to violate the Establishment Clause?

It is true that generally the lack of eligibility of others to complain does not confer standing on a plaintiff. However, in this case, the question is exceedingly important as the non-theistic religious program complained about is one designed to be embraced by every state in the US for every child. As of February, 2016 COPE reports 18 states and the District of Columbia as having adopted the Standards. If the allegations of the Complaint are true, then the denial of the right of the targets and "beneficiaries" of the program to complain will allow state establishment of non-theistic religions in the US.

III. The petition should be granted as the Decision cites no apposite authority to support its denial of standing and is inconsistent with 17 controlling cases of this court, the Supreme Court and other circuit courts.

A. The Decision is inconsistent with with Bell, Awad and Davenport.

1. Bell v. Little Axe ISD, 766 F.2d 1391 (10th Cir 1985). The Decision and the District Court ignore requests for consideration of Bell. That error necessitates review, because Bell holds that parents, "have the right to guide their children's religious education without interference at school," and that state establishment of "a religious preference affecting their children" violates that right and provides them with standing," because impressionable schoolchildren [are] subjected to unwelcome

religious exercises, or [are] forced to assume special burdens to avoid them." Bell at 1398. The activity in Bell that established the preference was a policy that permitted local schools to conduct Bible Studies before the start of class on school premises where participation was voluntary, attended by few students and none of the Plaintiffs' children.

As discussed by the Decision at 10-11, the Supreme Court in Edwards v. Aguillard, 482 U.S. 578, 583-4 (1962) recognized not only the right of the parents to direct the religious education of their children, but also the rights of children to not be indoctrinated by the state to accept a particular religious view.

The Plaintiff Parents and Children are directly and personally affected by the religious preference established by the Standards as it is designed to affect the minds and religious beliefs of the Children. They will have to assume enormous burdens to avoid those effects, as they will be required to constantly investigate the extent to which a teacher is implementing the Standards. In Bell this court assumed injury in fact because children are impressionable and come to accept what authority figures tell them.

2. Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012). In Awad an adult Muslim had standing as he was an Oklahoma resident and the Oklahoma Constitutional Amendment condemned his religion and subjected him to disfavored treatment.

The Decision is based on the previously discussed faulty conclusion that the Complaint does not allege a "condemn[ation]" of Plaintiff's religion or target "religious believers for disfavored treatment." Both assertions are inconsistent with allegations that the Standards seek to replace the Children's theistic "misconceptions" with a "non-theistic *religious* worldview." They go beyond a mere condemnation. They seek to replace the

Children's Christian religion. This is particularized and concrete injury as it directly and personally affects them.

The Decision also incorrectly asserts that the *only* injury to Plaintiffs is a "psychological consequence produced by observation of conduct with which it disagrees. Awad, 670 F.3d at 1122. This injury does not suffice. Id." The conclusion that plaintiffs' injuries are limited to the "psychological consequences" of "disagree[ment]" is false as the Complaint alleges additional injuries in ¶¶ 123-126.

3. American Atheists, Inc. v. Davenport, 637 F.3d 1095, 1113 (10th Cir. 2010). The Panel decision cites but is inconsistent with this Court's holding in American Atheists, which holds that an injury in fact arises from the fleeting observation of a symbol that conveys an offensive religious message.

In the Plaintiffs' case the religious message was not conveyed via a religious symbol, but by an 846 page set of Standards that is personal and concrete to them as the Parents and Children are the objects of the Standards and have a stake in them. The Complaint also alleges personal and direct affects by the message, because (a) they analyzed and objected to it, (b) Defendants advised Plaintiffs that if they didn't like the application of the message they could take steps to avoid it by exercising opt-out rights, and (c) because the message violates their legally enforceable ¶¶ 124-125 rights.

B. The Decision is also inconsistent with two additional decisions of this Court, four Supreme Court cases and eight other Circuit Court cases.

Tenth Circuit, Supreme Court and other US Circuit Court cases cited in Note 1 below hold that the establishment of a religious preference in a public school system,

observation of an unwelcome religious symbol or image, or receipt of a message condemning or disfavoring one's religion qualifies as an injury in fact. The decision is inconsistent with each of these[1] as it holds to be non-qualifying the establishment of a thirteen year program of religious indoctrination that more seriously, personally and directly injures the Parents and Children as alleged in the Complaint.

C. The Decision and the District Court decision cite no legal authority that supports their denials of standing for the Parents and Children.

IV. The Decision regarding the threatened injuries from future implementation is inconsistent with decisions of the Kansas Supreme Court and applicable Kansas Statutes which require public schools to implement the Standards.

The issue of standing is not contingent on whether the implementation of the standards is or is not imminent, as Plaintiffs clearly have alleged actual injuries from adoption that are particularized and concrete and not abstract. However, if implementation is deemed imminent then the threat also establishes standing. Plaintiffs

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[1] 1. Establishment of religious preference in school system qualifies: Bell v. Little Axe, Id; Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Edwards v Aguillard, 482 U.S. 578 (1987); Lee v. Weisman, 505 U.S. 577 (1992); and Elk Unified School District et al v Newdow et al. 542 US 1 (2004); Moss v Spartanburg CSD Seven, 683 F.3d 599 (4th Sir 2012): Suhre V. Haywood County, 131 F.3d 1083 (4th Cir. 1997); Steele V. Van Buren Public School Dist, 845 F.2d 1492 (8th Cir. 1988); Freethinkers v. City of Fargo 679 F.3d 1015 (8th Cir. 2012); Doe v Beaumont, 240 F.3d 462 (2001); and Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1532 (9th Cir.,1985).

2. Adult visual observations of an unwelcome religious symbol or image qualifies: American Atheists, Id.; Foremaster v. City of St. George, 882 F.2d 1485 (10th Cir. 1989); O'Connor v. Washburn Univ., 416 F.3d 1216, 1222 (10th Cir. 2005); and Freethinkers v. City of Fargo 679 F.3d 1015 (8th Cir. 2012);

3. Message condemning or disfavoring one's religion qualifies: Awad v. Zirizx, Id; Catholic League v. City and Cnty. of San Francisco, 624 F.3d 1043, 1062 (9th Cir.2010) and ACLU v Deweese 633 F.3d 424 (6th Cir. 2011).

have thoroughly shown why implementation is imminent. State law (K.S.A. 2015 Supp. §72-1127) and a decision of the Kansas Supreme Court requires it. Gannon v State of Kansas, 298 Kan. 1107, 1170 (2014). Furthermore, School Districts do not have the option to adopt standards as the Decision incorrectly asserts. They are by law to be "adopt[ed]" and "design[ed]" by the State and then implemented by training teachers to teach the standards, writing curriculum aligned with the standards and testing students about their knowledge of the content of the standards. (Id., Pltfs. Op. Br. at 24-33)

The word "imminent" is a subjective concept, particularly in a case where a suit is filed prior to implementation to enjoin a thirteen year program of indoctrination. For example the Supreme Court deemed imminent the threatened inundation of the Massachusetts coast in 100 years Massachusetts v. E.P.A., 549 U.S. 497, 1456-7 and 1467-68 (2007). Review is needed to ensure that in a case involving competing religious viewpoints, the subjective concept of imminence is applied objectively and neutrally.

CONCLUSION

Review is essential, as the Decision holds, *without any authority*, that theistic parent and child consumers of K-12 Public Education may not complain about a state's adoption of a program designed to inculcate in the children, beginning in Kindergarten, only materialistic/atheistic answers to religious questions so as to imbue them with a non-theistic religious worldview, and thereby violate their First Amendment rights.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on May 6, 2016, the foregoing PETITION FOR HEARING EN BANC was electronically filed with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I caused twelve (12) paper copies to be delivered by Federal Express to the Clerk's Office.

Dated this 6th day of May, 2016
s/ Douglas J. Patterson, Esq. (KS # 17296)
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CERTIFICATE OF COMPLIANCE

This Petition complies with the type-volume limitations of Fed. R. App. 35 because it does not exceed 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32.

This Petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally-spaced typeface—13-point Times New Roman—using Microsoft Word 2013.

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

I hereby certify that a copy of the foregoing PETITION FOR HEARING EN BANC as submitted in digital form is an exact copy of the written document filed with the Clerk.

I hereby certify that the digital form of the foregoing PETITION FOR HEARING EN BANC has been scanned for viruses using the Sophos Endpoint Security and Control updated daily, and, according to the program, is free of viruses.

Dated this 6th day of May, 2016

s/ Douglas J. Patterson, Esq. (KS # 17296)
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FILED
United States Court of Appeals
Tenth Circuit

April 19, 2016

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

COPE, a/k/a Citizens for Objective Public Education, Inc.; CARL REIMER; MARY ANGELA REIMER; B.R., a Minor, by and through her parents Carl and Mary Angela Reimer as Next Friends; H.R., a Minor, by and through her parents Carl and Mary Angela Reimer as Next Friends; B.R., a Minor, by and through his parents Carl and Mary Angela Reimer as Next Friends; N.R. a Minor, by and through his parents Carl and Mary Angela Reimer as Next Friends; SANDRA NELSON; J.N., a Minor, by and through his parent Sandra Nelson as Next Friend; LEE MORSS; TONI MORSS; L.M., a Minor, by and through her parents Lee and Toni Morss as Next Friends; R.M., a Minor, by and through his parents Lee and Toni Morss as Next Friends; A.M., a Minor, by and through his parents Lee and Toni Morss as Next Friends; MARK REDDEN; ANGELA REDDEN; M.R., a Minor, by and through his parents Mark Redden and Angela Redden as Next Friends; BURKE PELTON; KELCEE PELTON; B.P., a Minor, by and through her parents Burke Pelton and Kelcee Pelton as Next Friends; L.P., a Minor, by and through her parents Burke Pelton and Kelcee Pelton as Next Friends; K.P., a Minor, by and through her parents Burke Pelton and Kelcee Pelton as Next Friends; MICHAEL LEIBY; BRE ANN LEIBY; E.L., a Minor, by and through his parents Michael Leiby and Bre Ann Leiby as Next Friends; P.L., a Minor, by and through his parents Michael Leiby and Bre Ann Leiby

No. 14-3280

as Next Friends; Z.L., a Minor, by and through his parents Michael Leiby and Bre Ann Leiby as Next Friends; JASON PELTON; ROBIN PELTON; C.P., a Minor, by and through her parents Jason Pelton and Robin Pelton as Next Friends; S.P., a Minor, by and through his parents Jason Pelton and Robin Pelton as Next Friends; S.P., a Minor, by and through her parents Jason Pelton and Robin Pelton as Next Friends; C.P., a Minor, by and through her parents Jason Pelton and Robin Pelton as Next Friends; CARL WALSTON; MARISEL WALSTON; H.W., a Minor, by and through his parents Carl Walston and Marisel Walston as Next Friends; DAVID PRATHER; VICTORIA PRATHER,

Plaintiffs - Appellants,

v.

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

State Board of Education, in her official capacity only; JANA SHAVER, Member of the Kansas State Board of Education, in her official capacity only; JIM MCNIECE, Member of the Kansas State Board of Education, in his official capacity only; KANSAS STATE DEPARTMENT OF EDUCATION; BRAD NEUENSWANDER, Acting Commissioner of the Kansas State Department of Education, in his official capacity only,*

Defendants - Appellees.

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

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Dwight R. Carswell, Assistant Solicitor General, (Jeffrey A. Chanay, Chief Deputy Attorney General, Cheryl L. Whelan, Assistant Attorney General, and Stephen O. Phillips, Assistant Attorney General, Office of the Attorney General for the State of Kansas, Topeka, Kansas, and R. Scott Gordon, Kansas State Department of Education, Topeka, Kansas, with him on the briefs), for Defendants-Appellees.

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

LUCERO, Circuit Judge.

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* Pursuant to Fed. R. App. P. 43(c)(2) Brad Neuenswander replaces Diane DeBacker as Commissioner of the Kansas State Department of Education.

In 2013, the Kansas Board of Education (the "Board") adopted curriculum standards establishing performance expectations for science instruction in kindergarten through twelfth grade. Appellants—Citizens for Objective Public Education, Kansas parents, and school children (collectively, "COPE")—contend that although the standards purport to further science education, their concealed aim is to teach students to answer questions about the cause and nature of life with only non-religious explanations. COPE thus claims injury under the Establishment Clause because: (1) the Board's adoption of the Standards has communicated a religious symbol or message and breached plaintiff parents' trust; and (2) Kansas schools' implementation of the Standards is imminent and will result in anti-religious instruction. COPE also asserts two plaintiffs have standing as taxpayers who object to their tax dollars being used to implement the Standards. The district court disagreed, and dismissed the suit without prejudice for lack of standing.

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

I

In 2011, the National Research Council[†] published the Framework for K-12 Science Education: Practices, Crosscutting Concepts, and Core Ideas (the

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

"Framework"). The Framework was intended to "articulate a broad set of expectations for students in science" through twelfth grade. Based on the Framework, a group of 26 states developed and published the Next Generation Science Standards (the "NGSS") to "provide performance expectations that depict what . . . student[s] must do to show proficiency in science." In 2013, the Board adopted the Framework and NGSS (together, the "Standards") pursuant to a Kansas state law requiring the Board to adopt curriculum standards. Kan. Stat. § 72-6479(b).[‡]

As the Standards themselves state, they are "not intended to define course structure." Instead, Kansas law provides that they are guideposts for school districts, which retain control to shape and adopt their own curricula. Kan. Stat. § 72-6479(b) (curriculum standards "shall [not] be construed in any manner so as to impinge upon any district's authority to determine its own curriculum"). Thus, the Standards simply establish performance expectations for what students should "know and be able to do" at each grade level.[§] Kan. Admin. Regs. § 91-31-31(d). Accordingly, they

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

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

acknowledge that they "do not prescribe specific curricula, [although] they do provide some criteria for designing curricula." And they expressly state that teachers may go "beyond the standards to ensure their students' needs are met" and that educators and curriculum developers maintain a "great deal of discretion."

COPE is an organization formed to promote the religious rights of parents, students, and taxpayers. Its members include individuals whose children are, or expect to be, enrolled in Kansas public schools. COPE alleges that the Standards violate the Establishment Clause, U.S. Const. amend. I, by seeking to establish a non-religious worldview in the guise of science education.[**] It argues that such a worldview will be inculcated in children throughout their thirteen-year public school experience by requiring students, beginning in kindergarten, to answer questions about the cause and nature of life with only scientific, non-religious explanations. COPE contends that the Standards omit relevant evidence, and are driven by a covert

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

attempt to guide children to reject religious beliefs. However, COPE appears not to object to the Standards' methods generally, having conceded that the methods "ha[ve] utility in many areas of science." Nor does COPE categorically object to teaching evolution or origins science. Rather, it proposes that all biological theories, including evolution, should be taught "objectively to generate a religiously neutral effect." COPE also objects to teaching origins science to young children before they are mature enough to critically analyze scientific theory. Thus, it seeks a declaration that the Standards violate the Establishment Clause. It further seeks an injunction against implementation of the Standards in their entirety or, in the alternative, an injunction against teaching origins science until high school, and then requiring that it be taught in a manner COPE believes is objective.

II

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

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

COPE argues it suffered three injuries sufficient to support standing. It contends first that the adoption of the standards created an actual injury both by adopting a religious symbol and by breaching parents' trust in the Kansas school system. It also argues that future injury is imminent because the standards compel

Kansas schools to teach objectionable material. Finally, it alleges that two appellants have standing as taxpayers who object to their tax dollars being used for religious (or anti-religious) purposes. Each of COPE's arguments fails.

A

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

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

adoption amount to psychological consequences produced by observation of conduct with which it disagrees. Awad, 670 F.3d at 1122. This injury does not suffice. Id. Similarly, in American Atheists, Inc., we held plaintiffs had standing to challenge the placement of crosses along public roadsides as government-sponsored religious symbols with which they had personal and unwelcome contact. 637 F.3d at 1114-1115. But, again, unlike the plaintiffs in American Atheists, COPE does not offer any allegations to support the conclusion that the Standards are a government-sponsored religious symbol.

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

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

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

B

COPE also asserts injury because local school districts' potential implementation of the Standards will cause science to be taught in a manner that violates religious liberties. For this potential future injury to support standing, the injury must be "certainly impending." Clapper, 133 S. Ct. at 1147. But COPE acknowledges that the statute requiring the Board to adopt curriculum standards expressly preserves districts' authority to determine their own curricula. Kan. Stat.

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

§ 72-6479. And COPE concedes that it is possible that districts may not adopt the Standards, even if it perceives that possibility as remote.[§§] Moreover, even if implementation were certainly impending, we find nothing to suggest that injury from implementation is also impending. COPE alleges injury because it believes the Standards do not reflect an objective or neutral view of evolution, and require schools to teach science to young children who cannot critically analyze scientific theories. These claimed injuries would result from what is allegedly not in the Standards—an objective view of origins science. But nothing prevents school districts from adding to or altering the Standards as they develop curricula.[***] And the Standards themselves encourage districts to teach the limits of scientific knowledge. They state

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

[***] COPE argues that districts will likely implement the Standards without change. It is difficult to grasp how districts would do so, given the Standards' statements that they are not curricula, and their plea that districts reach beyond the Standards to ensure students' needs are met. Nevertheless, COPE asserts that implementation-without-change is an option, and we have assumed that assertion is accurate for purposes of our analysis.

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

In sum, because the districts may choose not to adopt the Standards, or may alter the Standards in ways that alleviate Appellants' concerns, potential future injury

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

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

from the Standards themselves is speculative and insufficient to support standing.[§§§]

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

C

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

III

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