NO. __________

In the

Supreme Court of the United States

NAMPA CLASSICAL ACADEMY, INC., et al.,

Petitioners,

v.

WILLIAM GOESLING, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

GARY S. MCCALEB
JEREMY D. TEDESCO
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444–0020

BRUCE D. SKAUG
GOICOECHEA LAW OFFICE
1226 East Karcher Road
Nampa, ID 83687
(208) 466–0030

DAVID J. HACKER
ALLIANCE DEFENSE FUND
101 Parkshore Drive,
Suite 100
Folsom, CA 95630
(916) 932–2850

DAVID A. CORTMAN
Counsel of Record
J. MATTHEW SHARP
TRAVIS C. BARHAM
RORY T. GRAY
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals
Rd., N.E., Suite D-1100
Lawrenceville, GA 30043
(770) 339–0774
dcortman@telladf.org

JORDAN W. LORENCE
ALLIANCE DEFENSE FUND
801 G. Street, N.W.,
Suite 509
Washington, D.C. 20001
(202) 393–8690

Counsel for Petitioners

QUESTIONS PRESENTED

Nampa Classical Academy—a non-profit corporation operating a charter school with the same authority as an independent local school board under state law—developed a curriculum based on primary sources, both secular and religious, that satisfied all state requirements. The Idaho Public Charter School Commission barred it—and every other state educational institution—from using any "religious documents or text," even if used objectively to study or supplement secular subjects. When the Academy sought to protect the academic expression of its teachers and access to knowledge for its students, the Ninth Circuit refused the school its day in court—saying the Academy was bereft of protection because it was a "political subdivision," and the teachers and students bereft as they had no cognizable protected expression.

A circuit conflict exists on the following questions:

1. Whether a state agency can ban the objective use of all materials it deems "religious" from public schools (including charter schools) and universities without First Amendment scrutiny.

2. Whether the state has either a valid educational interest or a mandate from the Establishment Clause to prohibit the objective use of all religious materials in a secular curriculum.

3. Whether "political subdivisions" are barred *per se* from suing their states in federal court regardless of their degree of independence or type of claim.

PARTIES TO THE PROCEEDING

Petitioners (collectively, the Academy) are Nampa Classical Academy (a non-profit corporation), Isaac Moffett (a founder and a teacher), Maria Kossman (parent of M.K. and teacher), and M.K. (a student). Respondents (collectively, the Officials) are William Goesling, Brad Corkill, Gayann DeMordaunt, Gayle O'Donahue, Alan Reed, Esther Van Wart, Tamara Baysinger,[1] Dr. Michael Rush, Paul Agidius, Richard Westerberg, Kenneth Edmunds, Emma Atchley, Rod Lewis, Don Stolman, Milford Terrell, Tom Luna,[2] and Lawrence Wasden.

CORPORATE DISCLOSURE STATEMENT

Petitioner Nampa Classical Academy is a non-profit corporation that does not have parent companies and is not publicly held.

[1] Mr. Goesling, Mr. Corkill, Ms. DeMordaunt, Ms. O'Donahue, Mr. Reed, and Ms. Van Wart are all members of the Idaho Public Charter School Commission (Commission). Ms. Baysinger is the Commission's Program Manager.

[2] Dr. Rush, Mr. Agidius, Mr. Westerberg, Mr. Edmunds, Ms. Atchley, Mr. Lewis, Mr. Stolman, and Mr. Terrell are all members of the Idaho State Board of Education (Board). Mr. Luna is the State Superintendent of Education.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES viii

INTRODUCTION 1

DECISIONS BELOW 2

STATEMENT OF JURISDICTION 3

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES 3

STATEMENT OF THE CASE 3

I. Factual Background 3

A. The Academy's "great books" curriculum.... 3

B. Commission officials prohibited the Academy from using any religious materials and then revoked its charter. ... 9

II. Procedural Background 13

REASONS FOR GRANTING THE WRIT 14

I. By validating a ban on all religious materials from all public education, the Ninth Circuit conflicts with this Court and numerous other circuits. 15

A. The Ninth Circuit condoned a book ban that cordons off entire areas of knowledge......... 15

1. The Ninth Circuit upheld the Commission's ban. 16

2. The Ninth Circuit upheld the Commission's decision to declare an entire realm of knowledge off limits. . 18

B. By applying the government speech doctrine to the Commission's ban, the Ninth Circuit conflicts with multiple circuits... 20

1. Contrary to the Ninth Circuit, multiple circuits do not immunize curriculum and library decisions from First Amendment scrutiny. 20

2. The few circuits that apply the government speech doctrine use state law to identify the speaker........ 21

3. Most circuits do not apply the government speech doctrine to teachers and professors. 22

II. The Ninth Circuit conflicts with numerous circuits by concluding that the ban serves a valid governmental interest.......................... 24

A. The Ninth Circuit identified no educational interest supporting the ban. . 24

B. Establishment Clause interests do not support banning the objective use of religious materials. 25

III. By concluding that the political subdivision standing doctrine bars the Academy's claims, the Ninth Circuit conflicts with this Court and other circuits. 27

A. The Ninth Circuit conflicts with every circuit by prescribing a *per se* bar against political subdivisions suing their states. ... 27

1. The Ninth Circuit prohibits political subdivisions from suing their states, regardless of their independence or the type of claim they bring. 28

2. No other circuit imposes a *per se* bar against political subdivisions, though they utilize various tests........ 30

B. Circuits diverge on whether the political subdivision standing doctrine applies *per se* to educational institutions. 32

1. The Third, Fifth, and Tenth Circuits do not apply the political subdivision standing doctrine to schools with independent traits. 32

2. The Sixth and Ninth Circuits equate charter schools with municipalities. .. 34

3. The Academy is a school with independent traits not subject to the bar on political subdivision standing. . 36

CONCLUSION 39

APPENDIX CONTENTS .... ia

A. Ninth Circuit Opinion (Aug. 15, 2011) 1a

B. District Court's Memorandum, Decision, and Order Granting Defendants' Motion to Dismiss (May 17, 2010) 1b

C. District Court's Memorandum Order Denying Plaintiffs' Motion for Temporary Restraining Order (Sept. 10, 2009) 1c

D. Ninth Circuit Denial of Petition for Rehearing *En Banc* (Sept. 27, 2011) 1d

E. Ninth Circuit Mandate (Oct. 5, 2011) 1e

F. Pertinent Constitutional Provisions 1f

G. Pertinent Idaho Statutes & Regulations 1g

H. Plaintiffs' Second Amended Verified Complaint (Dec. 15, 2009) 1h

I. Other Pertinent Documents 1i

1. Nampa Classical Academy's 9th–12th Grade Core Reading List 1i

2. Memorandum from the Attorney General's Office 13i

3. Memorandum from the Alliance Defense Fund 22i

4. Partial Transcript of Public Charter School Commission Meeting 43i

5. Notice of Defect Issued to the Academy for Using Religious Texts........................ 46i

TABLE OF AUTHORITIES

CASES

ACLU of Ky. v. McCreary Cnty.,
354 F.3d 438 (6th Cir. 2003) 26

Adams v. Trs. of Univ. of N.C.-Wilmington,
640 F.3d 550 (4th Cir. 2011)......................... 23, 24

Altman v. Bedford Cent. Sch. Dist.,
245 F.3d 49 (2d Cir. 2001).................................. 26

Amato v. Wilentz,
952 F.2d 742 (3d Cir. 1991) 31

Anderson v. Laird,
466 F.2d 283 (D.C. Cir. 1972).............................. 26

Bd. of Educ. v. Allen,
392 U.S. 236 (1968)...................................... 28, 38

Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico,
457 U.S. 853 (1982)...................................... 18, 20

Benjamin v. Malcolm,
803 F.2d 46 (2d Cir. 1986) 31

Bishop v. Arnov,
926 F.2d 1066 (11th Cir. 1991)........................... 23

Blum v. Schlegel,
18 F.3d 1005 (2d Cir. 1994) 23

Branson Sch. Dist. v. Romer,
161 F.3d 619 (10th Cir. 1998)...........30, 31, 34, 37

Burbank-Glendale-Pasadena Airport v. City of Burbank,
136 F.3d 1360 (9th Cir. 1998)............................ 29

Campbell v. St. Tammany Parish Sch. Bd.,
64 F.3d 184 (5th Cir. 1995).......................... 18, 20

Cary v. Bd. of Educ. of Adams-Arapahoe Sch. Dist. 28-J,
598 F.2d 535 (10th 1979)....................... 17, 19, 21

Chiras v. Miller,
432 F.3d 606 (5th Cir. 2005).............................. 21

City of Charleston v. Pub. Serv. Comm'n of W. Va.,
57 F.3d 385 (4th Cir. 1995)................................ 30

City of Hugo v. Nichols,
656 F.3d 1251 (10th Cir. 2011).......................... 31

City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency,
449 U.S. 1039 (1980).. 28

City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency,
625 F.2d 231 (9th Cir. 1980).............................. 28

City of Trenton v. New Jersey,
262 U.S. 182 (1923) 31

Edwards v. Aguillard,
482 U.S. 578 (1987)...................................... 19, 27

Edwards v. Cal. Univ. of Pa.,
156 F.3d 488 (3d Cir. 1998) 23

Epperson v. Arkansas,
393 U.S. 97 (1968)... 19

Evans-Marshall v. Bd. of Educ.,
624 F.3d 332 (6th Cir. 2010)............................... 23

Fleischfresser v. Dirs. of Sch. Dist. 200,
15 F.3d 680 (7th Cir. 1994) 26

Florey v. Sioux Falls Sch. Dist. 49-5,
619 F.2d 1311 (8th Cir. 1980) 26, 27

Garcetti v. Ceballos,
547 U.S. 410 (2006) 23, 24

Gomillion v. Lightfoot,
364 U.S. 339 (1960)................................ 27, 29, 31

Greater Heights Acad. v. Zellman,
522 F.3d 678 (6th Cir. 2008)............................... 35

Griswold v. Driscoll,
616 F.3d 53 (1st Cir. 2010) 22

Hall v. Bd. of Sch. Comm'rs of Conecuh Cnty.,
656 F.2d 999 (5th Cir. 1981) 26

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260 (1988)... 20

Hunter v. City of Pittsburgh,
207 U.S. 161 (1907) 31

Illinois ex rel. McCollum v. Bd. of Educ.,
333 U.S. 203 (1948)...................................... 19, 26

Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk,
91 F.3d 1240 (9th Cir. 1996)............................... 29

King v. Richmond Cnty.,
331 F.3d 1271 (11th Cir. 2003) 26

Kirkland v. Northside Indep. Sch. Dist.,
890 F.2d 794 (5th Cir. 1989)............................... 23

Lassen v. Arizona,
385 U.S. 458 (1967)...................................... 28, 32

Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1,
469 U.S. 256 (1985).. 28

Lee v. York Cnty. Sch. Div.,
484 F.3d 687 (4th Cir. 2007)............................... 23

Mangold v. Albert Gallatin Area Sch. Dist.,
438 F.2d 1194 (3d Cir. 1971)............................... 26

Mellen v. Bunting,
327 F.3d 355 (4th Cir. 2003) 26

Miles v. Denver Pub. Schs.,
944 F.2d 773 (10th Cir. 1991)............................. 23

Milliken v. Bradley,
418 U.S. 717 (1974).. 21

Minarcini v. Strongsville City Sch. Dist.,
541 F.2d 577 (6th Cir. 1976).............16, 17, 18, 20

O'Connor v. Washburn Univ.,
416 F.3d 1216 (10th Cir. 2005) 26

Parker v. Hurley,
514 F.3d 87 (1st Cir. 2008) 26

Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.,
638 F.2d 404 (2d Cir. 1980) 17

Piggee v. Carl Sandburg Coll.,
464 F.3d 667 (7th Cir. 2006) 23

Pleasant Grove City v. Summum,
129 S. Ct. 1125 (2009) 22

Pocono Mtn. Charter Sch. v. Pocono Mtn. Sch. Dist.,
2011 WL 3737443 (3d Cir. Aug. 25, 2011) 34, 37

Polomar Pomerado Health Sys. v. Belshe,
180 F.3d 1104 (9th Cir. 1999) 29

Pope v. E. Brunswick Bd. of Educ.,
12 F.3d 1244 (3d Cir. 1993) 26

Pratt v. Indep. Sch. Dist. No. 831,
670 F.2d 771 (8th Cir. 1982) 17, 18, 21

Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25,
457 F.2d 289 (2d Cir. 1972) 19, 20

Renken v. Gregory,
541 F.3d 769 (7th Cir. 2008) 23

Rogers v. Brockette,
588 F.2d 1057 (5th Cir. 1979) 30, 31, 33, 37

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995).. 21

S. Macomb Disposal Auth. v. Washington Twp.,
790 F.2d 500 (6th Cir. 1986)............................... 31

Sch. Dist. of Abington Twp. v. Schempp,
374 U.S. 203 (1963)... 19

Skoros v. City of N.Y.,
437 F.3d 1 (2d Cir. 2006)..................................... 26

United States v. Alabama,
791 F.2d 1450 (11th Cir. 1986)..................... 30, 31

Virgil v. Sch. Bd. of Columbia Cnty.,
862 F.2d 1517 (11th Cir. 1989)........................... 20

Ward v. Hickey,
996 F.2d 448 (1st Cir. 1993) 23

Washington v. Seattle Sch. Dist. No. 1,
458 U.S. 457 (1982)..........28, 32, 33, 35, 36, 37, 38

Williams v. Eggleston,
170 U.S. 304 (1898)... 30

Williams v. Mayor & City Council of Balt.,
289 U.S. 36 (1933)... 27

Zykan v. Warsaw Cmty. Sch. Corp.,
631 F.2d 1300 (7th Cir. 1980)................. 17, 19, 20

STATUTES

28 U.S.C. § 1254 3

42 U.S.C. § 1983 39

42 U.S.C. § 1988 39

<u>OTHER AUTHORITIES</u>

IDAHO STANDARDS AND TEST SCORES 6

INTRODUCTION

At a local school or university, students are assigned to write research papers about the historical conflict of their choice. One addresses Europe's Reformation-era conflicts, exploring Martin Luther's *Ninety-Five Theses* and the Council of Trent. Another analyzes the post-colonial religious strife between Indian Hindus and Muslims, highlighting Mahatma Ghandi and Muhammad Ali Jinnah. A third plumbs the Arab-Israeli conflict, using the Bible and Koran to outline each side's claims.

As a literature class covers *Moby Dick*, a student asks about its iconic opening line: "Call me Ishmael." The teacher takes the Bible from a bookcase filled with countless classics, explains the Genesis story of the maidservant's son Abraham banished to pacify his wife, and then illustrates how Melville used the name to symbolize Ishmael's outcast status.

At another school, a class studies Western Civilization's most famous artwork, including Botticelli's *The Birth of Venus*, Caravaggio's *Judith Beheading Holofernes*, and Michelangelo's *David*, drawn from Greco-Roman mythology, the Apocrypha, and the Bible, respectively. The music unit features Handel's *Messiah* and *Samson & Delilah*, Verdi's *Aida* with its Egyptian deities, and Purcell's *Dido & Aeneas* with its Greek gods and goddesses.

In most states, these schools or universities would collect accolades for their rigorous, well-

rounded education. In Idaho, they would collect sanctions and ultimately be closed "for violating the law." Other circuits—following this Court's lead—would permit this scrupulously objective teaching from religious sources. In most circuits, such institutions could defend in federal court their educational programs against state interference; in the Ninth Circuit, they are "political subdivisions" barred from seeking judicial remedy. In most circuits, their boards could set their curriculum, which their teachers could supplement. In the Ninth Circuit, the government speech doctrine eliminates this flexibility.

This Court should resolve the conflicting circuit standards on whether public schools—particularly charter schools—are barred from suing their states; and whether a state agency may banish all religious texts from school curricula, even though local school officials are empowered to select those texts to be taught by teachers and studied by students.

DECISIONS BELOW

The U.S. Court of Appeals for the Ninth Circuit's unreported order denying *en banc* rehearing is reprinted in the Appendix (App.) at 1d. Its unreported panel opinion is reprinted at App. 1a. The district court's ruling granting the Officials' motion to dismiss and denying the Academy's motion for preliminary injunction is reported at 714 F. Supp. 2d 1079 and reprinted at App. 1b. Its unreported ruling denying the Academy's motion for a temporary restraining order is reprinted at App. 1c.

STATEMENT OF JURISDICTION

The Ninth Circuit ruled on August 15, 2011, and denied the petition for rehearing on September 27, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

Other pertinent constitutional and statutory provisions are set forth in App. 1–2f, 1–34g.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. THE ACADEMY'S "GREAT BOOKS" CURRICULUM.

In 2003, Mr. Isaac Moffett and other Idaho residents began planning a charter school—Nampa Classical Academy. App. 16h. Idaho charter schools "operate independently from . . . traditional school district[s]" to "[i]mprove student learning," utilize "different and innovative teaching methods," and to "expand[]" parents' and students' educational options. App. 4–5g; *see also* App. 11–12g. As private non-profit corporations, they are exempt from certain

taxes and subject to only limited regulation by the Idaho Code. App. 11–12g. They can sue and be sued, borrow money independently, and must supply their own insurance. App. 12–13g. They must satisfy the general educational thoroughness standards and financial reporting requirements, but are "otherwise exempt from rules governing school districts" with a few limited exceptions.[3] App. 31–33g (Idaho Code § 33-5210(2)–(4)); *see also* E.R. 218–33 (outlining educational thoroughness standards). In short, the hallmark of Idaho charter schools is independence—structurally, legally, and pedagogically.

The Academy's founders wanted to foster "a unique blend of virtue, democratic, and moral classicism using a time-tested classical curriculum." 9th Cir. Excerpts of Record (E.R.) 154. Thus, the Academy emphasized "phonics, classical literature, grammar, composition, mathematics, hands-on science, history, and geography," plus "rhetorical analysis and writing." *Id.* To develop critical thinking skills, it taught these topics by "rely[ing] predominately on primary sources such as historical documents, biographies and autobiographies and the classic works of Western literature" and by "avoid[ing] textbooks that have been subject to over-simplification, historical revisionism and an obsessive focus on real and imaginary problems of American society." *Id.*; *see also* E.R. 162, 167.

---

[3] The few provisions that apply cover topics like accreditation, open meetings and public records laws, financial reporting, the qualifications of employees and students, and business ethics. App. 11–12g, 31–33g.

Hence, the Academy's founders crafted a primary-source-based curriculum drawn from a wide array of sources—some religious but most secular—to teach the history, art, laws, and beliefs of societies throughout time and around the world, including:

- Classical authors (e.g., Plato's *Republic*, Aristotle's *Politics*, Thucydides' *History of the Peloponnesian War*),
- Enlightenment figures (e.g., Locke's *Two Treatises of Government*, Descartes' *A Discourse on Method*),
- Literary luminaries (e.g., Shakespeare's *Hamlet*, Sir Walter Scott's *Ivanhoe*, Jane Austen's *Emma*),
- Founding Era resources (e.g., *The Federalist*, Farrand's *Records of the Federal Convention of 1787*),
- Influential authors (e.g., Harriet Beecher Stowe's *Uncle Tom's Cabin*, Booker T. Washington's *Up from Slavery*), and
- More recent classics (e.g., Alexander Solzhenitsyn's *A Day in the Life of Ivan Denisovich*, President Reagan's *Address to the British Parliament*).

App. 1–12i. They also featured some religious works, including:

- Books that some would consider sacred (e.g., Homer's *Odyssey* and *Iliad*, Confucius'

Analects, Bible, Koran, Hadith, Apocrypha, *Book of Mormon*), and

- Books related in different degrees to various religions (e.g., Hesiod's *Theogony,* Sophocles' *Antigone*, St. Augustine's *Confessions*, Dante's *Inferno*, John Bunyan's *Pilgrim's Progress*, Jonathan Edwards' *Sinners in the Hands of an Angry God*).

Id. But they scrupulously insisted that all religious materials be used objectively, not to inculcate sectarian dogma or influence students' religious beliefs. App. 19h, 14i.

In designing this curriculum, the Academy's founders diligently complied with State Department of Education standards.[4] The Board and Commission frequently assured Idaho educators they could use religious texts objectively in literature and history courses. *See, e.g.*, E.R. 206 (Board Spokesperson McGrath saying that "local school boards should have the discretion over whether or not the Bible can be used as a literary or historical text"); E.R. 212 (Superintendent Luna stating "nothing in Idaho law . . . prohibits public schools from using the Bible as literature or history"). In fact, state geography standards require students to "[d]escribe the historical origins, central beliefs, and spread of major religions, including Judaism, Christianity, Islam, Hinduism, Buddhism, and

---

[4] The Academy's student body surpassed every one of Idaho's standardized testing goals. *See* IDAHO STANDARDS AND TEST SCORES, http://www.sde.idaho.gov/site/assessment/ISAT/docs/results/2010/2010%20ISAT%20School%20Results.pdf.

Confucianism" and to compare their influence on different societies. E.R. 218–20. Language arts, history, humanities, and social studies objectives similarly expect students to be conversant in world religions and their impact on Western Civilization. *See, e.g.*, E.R. 223–26, 230; *see also* App. 19–21h.

Like the Academy, Idaho public schools routinely incorporate religious primary sources into their curricula.

- Independent School District of Boise City: *The Book of the Dead*, *Rig Veda*, *Qur'an*, Praise Songs, Genesis, Proverbs, *Analects*, *The Parable of the Prodigal Son*, *Zen Teachings*, and Edwards' *Sinners in the Hands of an Angry God.* E.R. 127, 235–36, 239, 830.

- Caldwell School District: *The Talmud, Qur'an*, *Bhagavad Gita*, *Epic of Gilgamesh*, *Analects*, *Rig Veda*, Luther's *Ninety-Five Theses*, Calvin's *Institutes of the Christian Religion*, Augustine's *Confessions*, Aquinas' *Summa Theologiae*, and excerpts from Genesis, Exodus, Proverbs, and Matthew. E.R. 290–92.

- Pocatello/Chubbuck School District No. 25: The *Qur'an*, Maimonides' creeds of Judaism, Buddhist sayings, Bible, and sayings from Jainism. E.R. 452–59, 462, 464–70, 478.

- Moscow and Twin Falls School Districts: Religious primary sources. E.R. 128.

These schools also utilize classic works replete with

Biblical allusions (e.g., Shakespeare, *The Grapes of Wrath*, *Of Mice and Men*, *To Kill a Mockingbird*). App. 21–23h.

Idaho charter schools follow suit. The Couer d'Alene charter school has used the Bible and other religious texts since it opened in 1999. E.R.297. The Idaho Virtual Academy's literature course featured the Bible, the *Qur'an*, Greek mythology, and Confucius' wisdom, E.R. 342–43, 346–47, 356, 830; its Latin course uses the Vulgate, E.R. 354; and other classes include stories about Egyptian deities, readings from the Hebrew Bible, and stories from the Hindu *Ramayana*, Buddhist *Jakata Tales*, and Confucius' sayings. E.R. 357–62, 365, 370, 373, 376, 388, 393, 400, 413, 430, 435. Xavier Charter School—a classical, primary-source-based school—uses the Torah, the Bible, and Greek myths. E.R. 491–93, 830.

In October 2007, after about four years of research and planning, the Academy's founders submitted their original sixty-page charter petition to the Commission and the Board. App. 16h. After months of meetings and adjustments, their final petition was submitted in July 2008 and granted in late August. E.R. 173–77. At no point during this process was the Academy's use of religious sources questioned; in fact, it was told that its "intended use of the Bible and other religious texts [was] appropriate, just as it would be in any other public school.'" E.R. 207.

The Board supervises all schools, but its rules governing public school districts do not—with a few

limited exceptions—apply to charter schools.[5] App. 31–32g. Charter schools also "function . . . independently of the Commission except as provided in the charter." App. 11–12g. Nothing empowers the Commission to select a school's curriculum; it merely ensures that schools meet the standards of thoroughness, not how they do so. App. 31–32g. As long as charter schools abide by their charters, a few applicable state laws, and educational thoroughness standards, E.R. 218–33, they may freely craft innovative curricula because they are "exempt from rules governing school districts." App. 31–33g.

State Board and Commission members recognize their own inability to dictate local curriculum. Superintendent Luna admitted that "local school district[s]" and charter school boards have the "constitutional authority" to decide "which curriculum to use, which textbook to adopt." E.R. 634. Respondent Baysinger noted that "[p]ublic charter schools do not need to follow a specific curriculum . . . . [they] may design their own curriculum (that is, determine through which materials and lessons content will be taught)." E.R. 101; *accord* E.R. 857 (quoting School Choice Coordinator saying "charter schools . . . could use any texts they wanted to use").

B. COMMISSION OFFICIALS PROHIBITED THE ACADEMY FROM USING ANY RELIGIOUS MATERIALS AND THEN REVOKED ITS CHARTER.

In June 2009, the Commission's Program

---

[5] *See supra* note 3 (summarizing exceptions).

Manager assured the public that the "Academy's intended use of the Bible and other religious texts [was] appropriate." E.R. 207. A month later, however, Commission members questioned *for the first time* whether the Academy could use the Bible in its curriculum at all. App. 17h. Coming almost a year after the Academy received its charter, the entire inquiry contradicted Department of Education standards, the Board's and Commission's public statements, and the established curricula of other public and charter schools. App. 20–23h.

Nevertheless, the Commission requested legal opinions and received two before its August 14th meeting, one from the Academy's counsel and one from the Attorney General. App. 17h, 13–21i, 22–42i. The Attorney General's "informal and unofficial response," highlighted part of Article IX, § 6 of Idaho's Constitution:

> No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article . . . .

App. 13–14i, 21i. This letter recognized that the Academy intended to use religious texts, not to promote religion, but to highlight their "cultural, historical, and literary significance," and that this Court endorsed such objective teaching. App. 14–16i. But it expanded "sectarian or denominational" to encompass anything "religious" (without defining the term or citing supporting authority), while

ignoring the parallel prohibition on "political"[6] documents in schools. App. 17–21i, 18h, 24i, 38–41i. Because the legal opinion was based on Article IX of Idaho's Constitution, it not only prohibited elementary and high schools from using religious texts, but also universities.[7]

Relying on this letter, the Commission prohibited the Academy from using "religious documents and text" and threatened to issue a notice of defect—the first step in revoking the Academy's charter, App. 28–31g—if it used them. App. 17h; 13–21i.

The Commission further ignored the legal analysis of the Academy's counsel, which explained how the curriculum complied with the state and federal constitutions. Drawing from Idaho's constitutional convention, counsel noted the Bible is not "sectarian" as many different sects and denominations consider it sacred, and showed that Idaho's founders allowed it to be taught in schools. App. 18h, 22–33i. Counsel outlined how banning all

---

[6] If "political" were interpreted as expansively as "sectarian," public schools would be barred from discussing the Mayflower Compact, Declaration of Independence, Constitution, *The Federalist*, and other elementary political—and arguably religious—components of our heritage.

[7] In banning religious sources, the Commission relied on the Attorney General's letter, which cites the Idaho Constitution's ban on "political, sectarian, or denominational" materials from "any schools established under . . . this article." App. 2f, 13–15i. "[T]his article" establishes both "a public school system" and "state educational institutions," App. 1–2f, including public universities. App. 2–3g. Consequently, no doubt exists that a ban predicated on Article IX applies to all schools and universities in the state.

materials deemed "religious" would violate the First Amendment. App. 19h, 33–42i.

Due to the Commission's ban, the Academy filed suit on September 1, 2009. App. 26–27h. Almost immediately, the Commission initiated proceedings to close the Academy. In November 2009, it issued the threatened notice of defect to the Academy for "using and/or intend[ing] to use religious texts as part of its curriculum, in violation of the Idaho State Constitution." App. 46i, 19h, 28h, 6b. Thus, it accepted the Attorney General's flawed interpretation of Article IX, § 6, which equates "sectarian" with "religious" and ignores the parallel provisions prohibiting "political" materials. App. 25–26h. Then it bootstrapped this erroneous construction to the statute's catch-all provision—allowing it to cite schools for "violat[ing] any provision of law"[8] App. 30g—to create the appearance of constitutional impropriety.[9] The

---

[8] Under Idaho law, the Commission may revoke a charter only for six reasons. Five did not apply, so the Commission relied on the last—a catch-all provision—for schools that "[v]iolate[] any provision of law." App. 29–30g.

[9] The Commission initially moved to revoke the Academy's charter based on the book ban. App. 4–5h. When the Academy challenged the ban's legality, the Commission changed tack, issuing voluminous records requests, withholding promised funds, ordering a comprehensive audit, publicly labeling the Academy a "religious school," and threatening to shut it down, all of which dried up public and private sources of funding. App. 26–30h, 44h; E.R. 46–47, 214. The Commission thus created the "financial concerns" it ultimately cited when revoking the Academy's charter. E.R. 48–49. These actions underlie the Academy's retaliation claim below, which demonstrates that this case is about the ban, not resulting fiscal issues. App. 43–45h.

Commission thereby created the very "provision of law" that it accused the Academy of violating. On June 30, 2010, it revoked the Academy's charter, a decision the Board upheld.[10] E.R. 94, 97–98.

II. PROCEDURAL BACKGROUND

Two days after filing suit, the Academy sought a temporary restraining order to enjoin the Commission from enforcing the ban on religious materials, issuing notices of defect, and revoking its charter. App. 48–49h. Though the ban would take effect in just days, the district court concluded that the threatened injuries were too speculative and denied the motion. App. 5–6c.

In January 2010, the Academy requested a preliminary injunction, and the Commission filed a motion to dismiss. App. 4b. The district court denied the Academy's motion as moot even though it was operating and barred from using any "religious documents" in its own curriculum. App. 33b. In granting the Commission's motion to dismiss, the court failed to accept the well-pleaded facts as true. Additionally, it ruled that as a "political subdivision," neither the Academy nor its officers in their official capacities could sue. App. 10–11b. Even though the curriculum was chosen by the

---

Indeed, the Academy seeks damages because the ban prohibited its speech for an entire school year, plus it seeks the invalidation of the ban which currently obstructs its attempts to gain a new charter. App. 49h; E.R. 41–42, 52.

[10] Mr. Moffett, Mrs. Kosmann, and M.K. also remain subject to this ban as a public school teacher, a parent, and a charter school student, respectively. E.R. 41, 52–53, 57–58, 61–62.

Academy and permitted by the Board, the court further ruled that teachers and students do not have a First Amendment right to use religious texts in class because the "state" may control curricular speech and that the Academy's objective use of religious texts would violate the Establishment Clause. App. 20–22b, 28b.

A Ninth Circuit panel affirmed. It agreed that the Academy was a political subdivision incapable of suing the state, but held that Mr. Moffett had standing. App. 2–3a. It also held that the curriculum was government speech immune from First Amendment scrutiny. App. 3–4a. Not only did it fail to accept the well-pleaded facts as true (as is required on a motion to dismiss), but it also overlooked the fact that the Academy was legally responsible for its own curriculum and failed to acknowledge any First Amendment implications for teachers or students.

On September 27, 2011, the Ninth Circuit denied the Academy's petition for rehearing *en banc*. App. 2d.

REASONS FOR GRANTING THE WRIT

All circuits—except the Ninth—recognize the freedom of local school boards and universities to select their own curriculum. With little analysis, the Ninth Circuit declared curricula to be "government speech" and gave *carte blanche* authority to a lone state commission with no statutory authority over curricula. Most circuits carefully apply First Amendment principles to restrictions placed on a few

books; the Ninth Circuit summarily validated a ban on schools', teachers', and students' use of entire libraries of religious works with no First Amendment scrutiny whatsoever. Most circuits—following this Court's lead—acknowledge religion's place in education and that the Establishment Clause does not prohibit a school from using religious materials in an objective fashion. But not the Ninth. This Court should grant review to correct these legal errors.

Also, this Court should resolve an ongoing question that has divided Courts of Appeals for decades, namely, whether a political subdivision may sue its state. The Ninth Circuit—unlike every other circuit—enforces a *per se* bar against political subdivisions suing their parent states. It regards public schools—even charter schools whose hallmark is independence—as municipalities, a position that contrasts starkly with the Third, Fifth, and Tenth Circuits.

I. BY VALIDATING A BAN ON ALL RELIGIOUS MATERIALS FROM ALL PUBLIC EDUCATION, THE NINTH CIRCUIT CONFLICTS WITH THIS COURT AND NUMEROUS OTHER CIRCUITS.

A. THE NINTH CIRCUIT CONDONED A BOOK BAN THAT CORDONS OFF ENTIRE AREAS OF KNOWLEDGE.

In a single paragraph, the Ninth Circuit endorsed a ban of unparalleled scope. App. 3–5a. The Commission ordered the Academy to remove all "religious documents and text" from its program,

even if used as curricular supplements. App. 17h, 46–47i, 46–47i. This content- and viewpoint-based ban is so expansive that not even its creators know its limits. When asked to clarify what materials are "religious," the Commission declined, stating: "[I]t would be impossible . . . to offer a thorough description of what materials you may or may not use." E.R. 205. Respondent Goesling further expanded the ban to encompass "less obviously religious texts." E.R. 105. So the Commission prohibited not discrete books, but an entire category of religious sources and content. And the Ninth Circuit condoned it.

1. THE NINTH CIRCUIT UPHELD THE COMMISSION'S BAN.

By ratifying the Commission's ban on all "religious" texts, the Ninth Circuit diverges sharply from other circuits. In *Minarcini v. Strongsville City School District*, 541 F.2d 577, 579 (6th Cir. 1976), a school board banned three texts from class discussion and the library. The Sixth Circuit condemned this:

> In the absence of any explanation of the Board's action which is neutral in First Amendment terms, we must conclude that the School Board removed the books because it found them objectionable in content and because it felt that it had the power, unfettered by the First Amendment, to censor the school library for subject matter which the Board members found distasteful.

Id. at 582. Moreover, the court recognized a teacher's right to discuss the banned books in class and "his students' right to hear him and to find and read the book." *Id.* The Ninth Circuit dismissed these rights out of hand. App. 4a.

The Ninth Circuit's decision below also conflicts sharply with Eighth Circuit precedent rejecting a school board's efforts to ban a film from the curriculum and library. *Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771, 773–76 (8th Cir. 1982). The Eighth Circuit found that "school boards do not have an absolute right to remove materials from the curriculum." *Id.* at 776 (citing *Minarcini*, 541 F.2d at 581); *see also id.* (citing *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.*, 638 F.2d 404, 433 (2d Cir. 1980)). Instead, "a cognizable First Amendment claim exists if the book was excluded to suppress an ideological or religious viewpoint with which the local authorities disagreed." *Id.* (citing *Minarcini*, *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300 (7th Cir. 1980), and *Cary v. Bd. of Educ. of Adams-Arapahoe Sch. Dist. 28-J*, 598 F.2d 535 (10th 1979)). The film's opponents "focused primarily on [its] purported religious and ideological impact," *id.* at 776, and the board gave no reasons for the ban, *id.* at 777. Thus, the board could not show that "a substantial and reasonable governmental interest exists for interfering with the students' right to receive information," *id.* at 777. Indeed, "[t]he symbolic effect of removing the films from the curriculum" sends an unmistakable message to teachers and students that certain "ideas . . . are unacceptable and should not be discussed or considered," and poses an "obvious" chilling effect.

Id. at 779. Hence, the ban was "impermissible." *Id.*

The Fifth Circuit similarly reversed a decision upholding a school board's ban of a single book from its libraries. *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 185–87 (5th Cir. 1995). It also looked to this Court for guidance. *Id.* at 188–89 (relying on *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982)). Not only did the board fail to explain its decision, *id.* at 187, but its members never read the book and ignored input from their advisors. *Id.* at 190–91. The Fifth Circuit reversed summary judgment, and the case proceeded to trial. *Id.*

The Ninth Circuit allows state officials to ban any materials they deem "religious" without any First Amendment scrutiny. In the Eighth Circuit, this religious targeting creates a "cognizable First Amendment claim." *Pratt*, 670 F.2d at 776. The Sixth Circuit would also apply First Amendment scrutiny. *Minarcini*, 541 F.2d at 582. The Fifth Circuit would condemn efforts to purge schools of content whether for social, political, or religious reasons. *Campbell*, 64 F.3d 184.

2. THE NINTH CIRCUIT UPHELD THE COMMISSION'S DECISION TO DECLARE AN ENTIRE REALM OF KNOWLEDGE OFF LIMITS.

Many circuits recognize that school officials cannot cordon off entire areas of knowledge from students, an example of blatant content and viewpoint discrimination. In the Second Circuit, school boards cannot "ban[] . . . the teaching of any

theory or doctrine." *Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25*, 457 F.2d 289, 292 (2d Cir. 1972). The Tenth Circuit prohibits "the exclusion of an entire system of respected human thought from a course offered by the school." *Cary*, 598 F.2d at 540 (citing *Epperson v. Arkansas*, 393 U.S. 97, 115 (1968) (Stewart, J. concurring)); *see also id.* at 540–41 (quoting *Epperson*, 393 U.S. at 114 (Black, J. concurring) (extending this to "religious subjects")). In the Seventh Circuit, the First Amendment protects "the mention of certain relevant topics in the classroom" and "the student's ability to investigate matters that arise in the natural course of intellectual inquiry." *Zykan*, 631 F.2d at 1306. These cases align with this Court's repeated acknowledgement that objective instruction about religion is a necessary component of any complete education. *See, e.g.*, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (deeming Bible "worthy of study for its literary and historic qualities").[11]

But in the Ninth Circuit, this principle does not necessarily apply. In Idaho, if a source is "religious," studying it is prohibited. Schools and teachers cannot teach from it; students cannot learn from it. Given the Commission's explanation that the ban covers "less obviously religious texts," E.R. 105; *accord* E.R. 205, this marks vast swaths of

---

[11] *See also Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J. concurring) (noting education bereft of religion "would be eccentric and incomplete" and "hardly [worthy of] respect"); *Edwards v. Aguillard*, 482 U.S. 578, 608 n.8 (1987) (Powell, J. concurring) (noting necessity of religion to understand historic and current events).

knowledge—from every century and culture—as forbidden territory.

B. BY APPLYING THE GOVERNMENT SPEECH DOCTRINE TO THE COMMISSION'S BAN, THE NINTH CIRCUIT CONFLICTS WITH MULTIPLE CIRCUITS.

1. CONTRARY TO THE NINTH CIRCUIT, MULTIPLE CIRCUITS DO NOT IMMUNIZE CURRICULUM AND LIBRARY DECISIONS FROM FIRST AMENDMENT SCRUTINY.

The Ninth Circuit employed the government speech doctrine to eliminate First Amendment scrutiny of curriculum and book regulation. This conflicts with several circuits that apply the First Amendment to these decisions. In evaluating a school's decision to ban a few textbooks, the Eleventh Circuit applied *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *Virgil v. Sch. Bd. of Columbia Cnty.*, 862 F.2d 1517, 1522–23 (11th Cir. 1989). But the Ninth here identified no legitimate pedagogical concern for the Commission's book ban.

When facing comparable policies regulating curriculum, the Second, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits inquire whether officials "*intended* . . . to deny [students] access to ideas with which [the officials] disagreed, and if this intent was the decisive factor in [their] decision." *Pico*, 457 U.S. at 871; *see Presidents Council*, 457 F.2d at 292; *Campbell*, 64 F.3d 188–91; *Minarcini*, 541 F.2d at 581–82; *Zykan*, 631 F.2d at 1305–06; *see also Pratt*,

670 F.2d at 773, 775–76; *Cary*, 598 F.2d at 543–44. While seven circuits scrutinize curriculum or text removals, the Ninth Circuit does not.

2. THE FEW CIRCUITS THAT APPLY THE GOVERNMENT SPEECH DOCTRINE USE STATE LAW TO IDENTIFY THE SPEAKER.

The Ninth Circuit also diverges from circuits that apply the government speech doctrine. It found that the speaker was "the Idaho government," App. 4a & n.2, but it never cited (let alone analyzed) Idaho statutes granting local schools—particularly charter schools—the authority to set their curriculum. (*See supra* at 3–9.) Nor did it consider evidence from Board and Commission members, public schools, and other charter schools confirming this authority. (*See supra* at 7–9.) Instead, it blithely gave *carte blanche* discretion to the Commission, an entity with no authority over curriculum under Idaho law.

In contrast, when the Fifth Circuit applied the government speech doctrine, it examined Texas' statutes to determine who selected public school curriculum and textbooks. *Chiras v. Miller*, 432 F.3d 606, 607–09, 612, 615 (5th Cir. 2005). It found that local school boards have control over curriculum, *id.* at 611–12 (quoting *Milliken v. Bradley*, 418 U.S. 717, 741 (1974), regarding local autonomy), and that the speaker is the entity with curricular authority. *Id.* at 612–13. As this Court recognized in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 833 (1995), it was the University of Virginia—not the Virginia government—that had broad discretion in making academic judgments.

Similarly, the First Circuit applied the government speech doctrine to a curriculum guide case. *Griswold v. Driscoll*, 616 F.3d 53, 58–59 (1st Cir. 2010) (Souter, J.). But it first consulted Massachusetts law to identify the entity empowered to create the guide. *Id.* at 54. It found the state board of education—not the state government, nor some interloping commission—was the government speaker entitled to control curricular speech. *Id.* at 59.

Without citing a single statute, the Ninth Circuit ratified the Commission's *ultra vires* actions under the guise of government speech. In contrast, the First and Fifth Circuits would consider the Academy the relevant speaker. After all, it is the Academy that Idaho—like Texas, Virginia, and Massachusetts—empowers to set curriculum. (*See supra* at 3–9.)

3. MOST CIRCUITS DO NOT APPLY THE GOVERNMENT SPEECH DOCTRINE TO TEACHERS AND PROFESSORS.

The Ninth Circuit exacerbated a circuit conflict over whether the government speech doctrine nullifies educators' claims, App. 3–5a, ignoring cautions from several justices about the doctrine's scope. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens & Ginsburg, JJ. concurring) (noting that cases relying on the "recently minted . . . doctrine . . . have been few and . . . of doubtful merit"); *id.* at 1140 (Breyer, J. concurring) (calling it a "rule of thumb"); *id.* at 1141 (Souter, J. concurring in judgment) (advising courts to "go slow in setting its bounds, which will affect

existing doctrine in ways not yet explored").

The Ninth Circuit is one of three circuits to apply the government speech doctrine to university professors and one of three to apply it to elementary and secondary teachers. *See Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488 (3d Cir. 1998) (applying *Rosenberger* to professor's in-class speech); *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (applying *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to professor's speech regarding university grant); *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 343–44 (6th Cir. 2010) (applying *Garcetti* to elementary and secondary teachers, but not professors).

Other circuits employ a range of standards, none resembling the Ninth Circuit's approach. *See Blum v. Schlegel*, 18 F.3d 1005, 1011 (2d Cir. 1994) (applying *Pickering-Connick*); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989) (same); *Evans-Marshall*, 624 F.3d at 337 (same for professors); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 670 (7th Cir. 2006) (same); *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) (applying *Hazelwood*); *Miles v. Denver Pub. Schs.*, 944 F.2d 773 (10th Cir. 1991) (same); *Bishop v. Arnov*, 926 F.2d 1066 (11th Cir. 1991) (same).

The Fourth Circuit stands in starkest relief, where neither professors nor teachers are subject to *Garcetti's* government speech test. *See Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 562–64 (4th Cir. 2011); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 & n.11 (4th Cir. 2007). In taking this position, it rested on this Court's own reservations:

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Adams, 640 F.3d at 563 (quoting *Garcetti*, 547 U.S. at 425); *accord Garcetti*, 547 U.S. at 438–39 (Souter, J. dissenting) (discussing government speech doctrine's impact on educators).

In sum, seven circuits do not dispense summarily with educators' First Amendment claims using the government speech doctrine. This Court should clarify this important area of the law.

II. THE NINTH CIRCUIT CONFLICTS WITH NUMEROUS CIRCUITS BY CONCLUDING THAT THE BAN SERVES A VALID GOVERNMENTAL INTEREST.

A. THE NINTH CIRCUIT IDENTIFIED NO EDUCATIONAL INTEREST SUPPORTING THE BAN.

The Ninth Circuit and District Court identified only one "interest" supporting the Commission's ban: the Establishment Clause. Yet this is a legal determination, not an educational concern. Neither court identified a single educational interest for the ban—because none exist. By definition, banning

entire realms of knowledge only undermines students' education, particularly when the ban targets religion, a topic foundational to students' understanding of current events, social sciences, and the humanities. *See supra* at 18–19, note 11, *infra* at 25–27.

B. ESTABLISHMENT CLAUSE INTERESTS DO NOT SUPPORT BANNING THE OBJECTIVE USE OF RELIGIOUS MATERIALS.

Both lower courts relied entirely on the Establishment Clause to uphold the ban. The District Court held that the Establishment Clause required the book ban. *See* App. 22b ("If the [Commission] allowed [the Academy's] proposed curriculum, [it] would be in violation of the Establishment Clause."); *accord* App. 21b ("[Their] actions here adhere to the Establishment Clause by preventing Plaintiffs from using religious texts in publicly funded schools."); App. 28b. The Ninth Circuit affirmed, saying that the ban served Establishment Clause interests. App. 5a ("The Commission's policy does not violate the Establishment Clause, which generally prohibits governmental promotion of religion, not governmental efforts to ensure that public entities, or private parties receiving government funds, use public money for secular purposes.").[12]

Thus, the Ninth Circuit again departed from the constitutional mainstream. First, every circuit—

---

[12] This rhetoric ignores the uncontested, well-pleaded fact that the Academy always used religious materials objectively in its secular curriculum. App. 19h.

following this Court's clear holdings—recognizes that the Establishment Clause permits schools to use religious materials objectively in a secular curriculum. *See, e.g.*, *Parker v. Hurley*, 514 F.3d 87, 106 n.21 (1st Cir. 2008); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 76 (2d Cir. 2001) ("[T]he Establishment Clause does not prohibit schools from teaching about religion."); *Mangold v. Albert Gallatin Area Sch. Dist.*, 438 F.2d 1194, 1195 (3d Cir. 1971); *Mellen v. Bunting*, 327 F.3d 355, 372 n.10 (4th Cir. 2003); *Hall v. Bd. of Sch. Comm'rs of Conecuh Cnty.*, 656 F.2d 999, 1002 (5th Cir. 1981) ("[S]tudy of the Bible in public schools is not *per se* unconstitutional."); *ACLU of Ky. v. McCreary Cnty.*, 354 F.3d 438, 448–49 (6th Cir. 2003) (noting Ten Commandments could be integrated into school classes); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 687 (7th Cir. 1994); *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311, 1315–16 (8th Cir. 1980); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1230 (10th Cir. 2005) ("The Establishment Clause . . . does not compel the removal of religious themes from public education."); *King v. Richmond Cnty.*, 331 F.3d 1271, 1276 (11th Cir. 2003); *Anderson v. Laird*, 466 F.2d 283, 292 (D.C. Cir. 1972).

Second, many circuits recognize, as has this Court, the pivotal role that religion—including the Bible—plays in producing well-educated students. *See, e.g.*, *Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1253–54 & n.10–12 (3d Cir. 1993) (noting Bible's inherent relationship to high school subjects due to its unparalleled influence on Western civilization); *Skoros v. City of N.Y.*, 437 F.3d 1, 31 (2d Cir. 2006) (quoting *McCollum*, 333 U.S. at 235–36

(Jackson, J., concurring), on the indispensable role of religion in education, and *Aguillard*, 482 U.S. at 608 n.8 (Powell, J. concurring), on its role in understanding historic and current events)); *Florey*, 619 F.2d at 1316 (noting education without the study of religious works would be "truncated").

In short, in any other circuit, the Academy's incorporation of religious materials into objective secular courses on history, art, music, literature, and comparative religion would satisfy Establishment Clause concerns. Only in the Ninth Circuit do they meet a different end.

III. BY CONCLUDING THAT THE POLITICAL SUBDIVISION STANDING DOCTRINE BARS THE ACADEMY'S CLAIMS, THE NINTH CIRCUIT CONFLICTS WITH THIS COURT AND OTHER CIRCUITS.

A. THE NINTH CIRCUIT CONFLICTS WITH EVERY CIRCUIT BY PRESCRIBING A *PER SE* BAR AGAINST POLITICAL SUBDIVISIONS SUING THEIR STATES.

Lower courts have struggled to define the scope of the political subdivision standing doctrine for decades. *Compare Williams v. Mayor & City Council of Balt.*, 289 U.S. 36, 40 (1933) ("A municipal corporation . . . has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."); *with Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960) ("Legislative control of municipalities, no less than other state power, lies within the scope of relevant

limitations imposed by the [U.S.] Constitution."). Their efforts have resulted in one principal point of agreement: circumstances exist in which political subdivisions may sue their creator states. The Ninth Circuit, however, applies a universal ban.

1. THE NINTH CIRCUIT PROHIBITS POLITICAL SUBDIVISIONS FROM SUING THEIR STATES, REGARDLESS OF THEIR INDEPENDENCE OR THE TYPE OF CLAIM THEY BRING.

Over thirty years ago, the Ninth Circuit categorically barred political subdivisions from bringing federal constitutional claims against their fellow subdivisions or parent states. *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 233–34 (9th Cir. 1980). *But see* 449 U.S. 1039, 1041–42 (1980) (White & Marshall, JJ., dissenting from denial of certiorari) ("Such a *per se* rule is inconsistent with [*Bd. of Educ. v. Allen*, 392 U.S. 236 (1968)], in which one of the appellants was a local board of education.").

That *per se* rule stands today despite this Court's contrary decisions. *See, e.g.*, *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259–60 (1985) (resolving dispute between two state subdivisions under the Supremacy Clause); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 n.31 (1982) (deciding school district's suit against "the State for a violation of the Fourteenth Amendment"); *Allen*, 392 U.S. at 240–41 (addressing school board's First Amendment claims against its parent state); *Lassen v. Arizona*, 385 U.S. 458, 460 n.1 (1967) (considering "a controversy between two

[Arizona] agencies"); *Gomillion*, 364 U.S. at 344–45 ("Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the [U.S.] Constitution.").

Several Ninth Circuit judges have noted this conflict, but their attempts to realign the Ninth Circuit's *per se* rule with the precedent of this—and every other—Court have proven unsuccessful. *Polomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1109 (9th Cir. 1999) (Hawkins, J., concurring) ("[O]ur en banc court should take another look at *South Lake Tahoe* and its progeny."); *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240, 1245 (9th Cir. 1996) (Reinhardt, J., dissenting) (criticizing the Ninth Circuit's *per se* rule for "insulating arbitrary and unlawful governmental action from full and fair review"). *But see* App. 2–3a (Reinhardt, J. joining Ninth Circuit below holding the Academy is "a government entity incapable of bringing an action against the state").

Thus, constitutional claims, like the Academy's here, are dead on arrival at the courthouse. *Belshe*, 180 F.3d at 1109 (Hawkins, J., concurring) (acknowledging the Ninth Circuit bars "*any* constitutional challenge by a political subdivision against its parent state"); *Burbank-Glendale-Pasadena Airport v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998) (stating "[t]his court . . . has not recognized any exception to the per se rule"); *Kirk*, 91 F.3d at 1245 (Reinhardt, J., dissenting) (recognizing the Ninth Circuit "den[ies] [political subdivisions] access to the federal courts").

2. NO OTHER CIRCUIT IMPOSES A *PER SE* BAR AGAINST POLITICAL SUBDIVISIONS, THOUGH THEY UTILIZE VARIOUS TESTS.

"The only circuit to bar Supremacy Clause challenges by political subdivisions against their parent state has been the Ninth Circuit." *Branson Sch. Dist. v. Romer*, 161 F.3d 619, 630 (10th Cir. 1998). Every other circuit confronting this issue rejects the proposition that "creature[s] of state government [have] no federally protected rights whatsoever under the constitution or laws of the United States." *United States v. Alabama*, 791 F.2d 1450, 1454 (11th Cir. 1986); *see Williams v. Eggleston*, 170 U.S. 304, 311 (1898) ("[I]t cannot be doubted that the power of the legislature over all local municipal corporations is unlimited, save by the restrictions of the state and federal constitutions."). Thus, the Ninth Circuit alone holds "that a municipality never has standing to sue the state of which it is a" part. *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979).

Every other circuit to consider the matter recognizes that circumstances exist "in which a political subdivision is not prevented, by virtue of its status as a subdivision of the state, from challenging the constitutionality of state" action.[13] *S. Macomb*

---

[13] Although the Second and Fourth Circuits do not define the scope of the political subdivision standing doctrine, they acknowledge that political subdivisions may have standing to lodge constitutional claims against their parent states. *See, e.g.*, *City of Charleston v. Pub. Serv. Comm'n of W. Va.*, 57 F.3d 385, 390 (4th Cir. 1995) ("assum[ing]—without deciding—that [two] cities ha[d] standing to assert [a] Contract Clause claim"

Disposal Auth. v. Washington Twp., 790 F.2d 500, 504 (6th Cir. 1986). The limits of the political subdivision standing doctrine are, however, a matter of significant debate.

Some courts read *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), *City of Trenton v. New Jersey*, 262 U.S. 182 (1923), and related cases as merely precluding federal "interfere[nce] in states' internal political organization." *Rogers*, 588 F.2d at 1069; *see Amato v. Wilentz*, 952 F.2d 742, 755 (3d Cir. 1991) (explaining these cases "reflect the general reluctance of federal courts to meddle in disputes between state government units"). Accordingly, they bar only federal claims that clearly "trench on a state's political prerogatives."[14] *Alabama*, 791 F.2d at 1456 n.5.

Other courts utilize a more nuanced approach. The Tenth Circuit, for example, limits political subdivisions to claims that seek to "vindicate substantive federal statutory rights through the Supremacy Clause." *City of Hugo v. Nichols*, 656 F.3d 1251, 1262 (10th Cir. 2011); *see also Romer*, 161 F.3d at 628 ("[W]e conclude that a political subdivision has standing to bring a constitutional

---

against a state agency); *Benjamin v. Malcolm*, 803 F.2d 46, 54 (2d Cir. 1986) (concluding a city, "[a]s a party facing direct injury from the State's alleged conduct," had standing to sue the state under the Eighth and Fourteenth Amendments).

[14] *See Gomillion*, 364 U.S. at 347 ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.").

claim against its creating state when . . . its claim relies on the Supremacy Clause and a putatively controlling federal law"). Regardless of the particular standard used, it is clear that—outside of the Ninth Circuit—political subdivisions are accorded some constitutional protection.

B. CIRCUITS DIVERGE ON WHETHER THE POLITICAL SUBDIVISION STANDING DOCTRINE APPLIES *PER SE* TO EDUCATIONAL INSTITUTIONS.

The factors this Court and a majority of circuits use to analyze schools' relationship with the state clearly demonstrate that the Ninth Circuit erred in applying the political standing doctrine to the Academy.

1. THE THIRD, FIFTH, AND TENTH CIRCUITS DO NOT APPLY THE POLITICAL SUBDIVISION STANDING DOCTRINE TO SCHOOLS WITH INDEPENDENT TRAITS.

This Court often treats "local school boards"—which in this case includes charter schools—as "separate entities," distinct from the state, "for purposes of constitutional adjudication." *Seattle Sch. Dist.*, 458 U.S. at 482. This treatment results not from any favored status but from the fact that states typically provide school districts "a large measure of local control" over the public education system. *Id.* at 481; *cf. Lassen*, 385 U.S. at 459 n.1 (holding a state officer's "substantially independent" position provided him standing to sue the state). Indeed, "[n]o single tradition in [American] public education is more deeply rooted than local control

over the operation of schools." *Seattle Sch. Dist.*, 458 U.S. at 481 (quotation omitted).

The Third, Fifth, and Tenth Circuits take this principle to heart in determining whether a school has standing to assert a constitutional violation against its parent state. For example, the Fifth Circuit determined a school district had standing to sue Texas primarily because the district was "sufficiently independent of the [S]tate of Texas," "[b]oth legally and practically," "to ensure that a suit between them" did not amount to "a suit by the state against itself." *Rogers*, 588 F.2d at 1065.

This conclusion rested on the school district's authority under state law and Texas' long "tradition of local autonomy in education." *Id.* at 1064. Indicators of the school district's independent status included, *inter alia*, (1) the district's broadly-phrased mandate to "perform all educational functions not specifically delegated to the state education agencies," *id.* at 1065, (2) the existence of "significant legal rights . . . the state agency [could not] take away," *id.*, (3) the fact that local school "boards [were] elected by the people of the district, not appointed from above," *id.* at 1066, and (4) a more generalized inference that the district "seem[ed] likely to have a mind of its own," *id.*

The Tenth Circuit utilized a similar inquiry in concluding that several school districts had standing to sue the State of Colorado. Although school "districts owe[d] their existence as political subdivision[s] to the state," the court held that Colorado law rendered them "'substantially

independent'" entities, *Romer*, 161 F.3d at 629, capable of suing their "parent state" over an alleged violation of "controlling federal law," *id.* at 630. To establish the districts' independence, the court cited (1) school districts' authority to hold property, make contracts, sue, and be sued, (2) the fact that local school boards were elected independently, and (3) the nature of the school district's claim, which related to a federal statute that directly benefitted them. *Id.* at 629.

Recently, the Third Circuit outlined comparable factors in remanding to determine whether a Pennsylvania charter school could lodge First and Fourteenth Amendment claims against a public school district. The Third Circuit focused the district court's inquiry on "the nature of the [charter] [s]chool['s] relationship to the state." *Pocono Mtn. Charter Sch. v. Pocono Mtn. Sch. Dist.*, 2011 WL 3737443, at *3 (3d Cir. Aug. 25, 2011). It first instructed the district court to determine whether the charter school was "sufficiently analogous to a municipality" that the political subdivision standing rule would apply. *Id.* at *4. If so, it directed the court to consider whether the charter school's First Amendment and equal protection claims exceeded the rule's existing scope. *Id.*

2. THE SIXTH AND NINTH CIRCUITS EQUATE CHARTER SCHOOLS WITH MUNICIPALITIES.

The Sixth and Ninth Circuits, however, utilize a simplistic analysis that declines to examine, in any meaningful manner, a school's autonomy from the state. Instead, these circuits merely assume all public and charter schools are political subdivisions

barred from suing their parent states. App. 2–3a; *Greater Heights Acad. v. Zellman*, 522 F.3d 678, 680 (6th Cir. 2008).

The Sixth Circuit, for example, recently characterized charter schools as "political subdivisions." *Zelman*, 522 F.3d at 681. Instead of probing their similarity to municipalities, the Sixth Circuit simply noted that Ohio charter schools share certain characteristics with traditional public schools. *Id.* It then held that charter schools are "barred from invoking the protections of the Fourteenth Amendment" solely because they are "part and parcel of Ohio's system of public education." *Id.*

Here, the Ninth Circuit similarly reasoned that: "Idaho charter schools are creatures of Idaho state law that are funded by the state, subject to the supervision and control of the state, and exist at the state's mercy. [The Academy] is therefore a government entity incapable of bringing an action against the state." App. 3a.

The Sixth and Ninth Circuits thus deprive charter schools of standing to vindicate their constitutional rights solely because they are deemed political subdivisions. But this is not the sole relevant question. All agree charter schools are similar to public schools *in certain respects*. The question is whether a charter school is sufficiently autonomous from the state to constitute a "separate entit[y]" for purposes of the political subdivision standing rule. *Seattle Sch. Dist.*, 458 U.S. at 482.

3. THE ACADEMY IS A SCHOOL WITH INDEPENDENT TRAITS NOT SUBJECT TO THE BAR ON POLITICAL SUBDIVISION STANDING.

Under the tests from the Third, Fifth, and Tenth Circuits, the longstanding prohibition against political subdivision standing does not apply to the Academy. That rule establishes that a political subdivision has standing to sue if it enjoys substantial independence from the state. *Id*. at 482. The Academy enjoys just this sort of independence, being a private, non-profit corporation whose only connection to the state is its contract to provide educational services.

A privately organized charter school, like the Academy, is initially constituted as "nonprofit corporation" without any state input. App. 11–12g. Once its charter is approved, supervisory control over its operation vests in a privately chosen "board of directors," not the "trustees [of] any school district" or the state "public charter school commission." App. 11–12g. This independent board generally ensures the charter school complies with all state and federal laws, standards, regulations, rules, and policies. App. 33g. It also manages the school's finances by exercising the power to "sue or be sued," "purchase, receive, hold and convey real and personal property," "borrow money," and use school property as "collateral for [a] loan." App. 12–13g.

State and local officials merely ensure a charter school complies with "the terms of [its] charter," any applicable "education laws of the state," and "state educational standards of thoroughness." App. 31–

32g. The limitations placed in the Academy's charter are not, however, exacting, and state educational standards are broadly conceived and leave ample room for "different and innovative teaching methods." App. 5g. Moreover, Idaho law "exempt[s]" the Academy from all but a few "rules governing [traditional] school districts." App. 31–33g, 11–12g.[15]

The Academy is thus not only "substantially independent" of the state, it is also "substantially independent" of the regulations apply to local school districts. *Romer*, 161 F.3d at 629. This factor is significant, as traditional public schools are *themselves* commonly viewed as "separate" from the state "for purposes of constitutional adjudication." *Seattle Sch. Dist.*, 458 U.S. at 482. Idaho's approach to charter schools thus takes the American tradition of local school autonomy to an entirely new level—a level ignored by the Ninth Circuit.

Founded by teachers to "expand[] . . . educational opportunities" outside of "the existing . . . school district structure," App. 4–5g, the Academy bears little, if any, resemblance to a municipality, which necessarily operates under pervasive state regulation. *See Pocono Mtn.*, 2011 WL 3737443, at *4. Its position is much closer to a government contractor than a true state subdivision. As such, the Academy's independent corporate status and high degree of "freedom from state authorities" amply demonstrate it has "a mind of its own." *Rogers*, 588 F.2d at 1065–66.

---

[15] *See supra* note 3 (summarizing applicable rules).

Even a cursory analysis of the factors laid down by the Third, Fifth, and Tenth Circuit thus establishes that the Academy may sue its parent state on federal constitutional grounds. This result clearly comports with this Court's prior cases, which allowed school districts to raise several claims that mirror the Academy's.

This Court, for example, previously resolved a local school board's claim that a state law violated the Establishment Clause. *See Allen*, 392 U.S. at 238. Rather than boarding the courthouse door, this Court independently raised the issue of standing and concluded the school board's members had "a personal stake in the outcome of th[e] litigation," and "standing . . . to press their claim." *Id.* at 241 n.5.

A similar issue presented itself when, years later, a school district brought an equal protection challenge to a state law designed to prevent busing students for racial integration purposes. *See Seattle Sch. Dist.*, 458 U.S. at 464. Not only did this Court agree with the district on the merits, it also affirmed the award of attorney's fees. *See id.* at 487 & n.31. In the process, it flatly rejected the state's suggestion that it was "incongruous for a [s]tate to pay attorney's fees to one of its school boards," pointedly replying that it was "no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment." *Id.*

Both of these cases required the Court to consider whether a public school had standing to sue its parent state. If the political subdivision standing doctrine applies, as the Ninth Circuit contends, this Court was wrong to conclude that the school board

members had a personal stake and standing to pursue their claims in *Allen*. It was also wrong to find in *Seattle School District* that the school district could bring a Fourteenth Amendment claim under 42 U.S.C. § 1983 challenging the state's racist educational policies, thus allowing it to receive attorneys' fees under § 1988. This Court's should resolve the conflict in the circuits over the political subdivision standing doctrine.

CONCLUSION

This Court should grant review.

Respectfully submitted,

GARY S. MCCALEB
JEREMY D. TEDESCO
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444–0020

BRUCE D. SKAUG
GOICOECHEA LAW OFFICE
1226 East Karcher Road
Nampa, ID 83687
(208) 466–0030

DAVID J. HACKER
ALLIANCE DEFENSE FUND
101 Parkshore Drive,
Suite 100
Folsom, CA 95630
(916) 932–2850

DAVID A. CORTMAN
Counsel of Record
J. MATTHEW SHARP
TRAVIS C. BARHAM
RORY T. GRAY
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals
Rd., N.E., Suite D-1100
Lawrenceville, GA 30043
(770) 339–0774
dcortman@telladf.org

JORDAN W. LORENCE
ALLIANCE DEFENSE FUND
801 G. Street, N.W.,
Suite 509
Washington, D.C. 20001
(202) 393–8690

December 21, 2011

APPENDIX CONTENTS

A. Ninth Circuit Opinion (Aug. 15, 2011) 1a

B. District Court's Memorandum, Decision, and Order Granting Defendants' Motion to Dismiss (May 17, 2010) 1b

C. District Court's Memorandum Order Denying Plaintiffs' Motion for Temporary Restraining Order (Sept. 10, 2009)............... 1c

D. Ninth Circuit Denial of Petition for Rehearing *En Banc* (Sept. 27, 2011)............ 1d

E. Ninth Circuit Mandate (Oct. 5, 2011)........... 1e

F. Pertinent Constitutional Provisions............. 1f

G. Pertinent Idaho Statutes & Regulations...... 1g

H. Plaintiffs' Second Amended Verified Complaint (Dec. 15, 2009)............................. 1h

I. Other Pertinent Documents........................... 1i

   1. Nampa Classical Academy's 9th–12th Grade Core Reading List 1i

   2. Memorandum from the Attorney General's Office 13i

   3. Memorandum from the Alliance Defense Fund 22i

   4. Partial Transcript of Public Charter School Commission Meeting 43i

   5. Notice of Defect Issued to the Academy for Using Religious Texts........................ 46i

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-35542
D.C. No. 1:09-cv-00427-EJL

NAMPA CLASSICAL ACADEMY; ISAAC MOFFETT; M.K., a minor, by and through her next friend; MARIA KOSMANN, individually and as next friend of M.K., a minor,

Plaintiffs-Appellants,

v.

WILLIAM GOESLING, individually and in his official capacity as Chairman of the Idaho Public Charter School Commission ("Commission"); BRAD CORKILL; GAYANN DEMORDAUNT; GAYLE O'DONAHUE; ALAN REED; ESTHER VAN WART, all individually and in their official capacities as members of the Commission; MICHAEL RUSH, individually and in his official capacity as Executive Director of the State Board of Education; PAUL AGIDIUS, Board Pressident; RICHARD WESTERBERG, Board Vice President; KENNETH EDMUNDS, Board Secretary; EMMA ATCHLEY; ROD LEWIS; DON SOLTMAN; MILFORD TERRELL, all individually and in their official capacities as members of the Board; TOM LUNA, individually and in his official capacities as Superintendent of Public Instruction, as Executive Secretary of the Board, and as Chief Executive Officer of the State Department of Education;

LAWRENCE GARTH WASDEN, in his official capacity as the Attorney General of the State of Idaho; TAMARA BAYSINGER,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding.

Argued and Submitted: June 7, 2011
Seattle, Washington

Before REINHARDT, W. FLETCHER, and RAWLINSON, Circuit Judges.

MEMORANDUM*

Nampa Classical Academy ("NCA"), along with plaintiffs Moffett, Kosmann and M.K., sued the Idaho Public Charter School Commission, alleging that its policy prohibiting the use of sectarian or denominational texts in public schools violated the First and Fourteenth Amendments as well as Idaho state law. Sometime after the district court dismissed all of plaintiffs' claims, the state revoked NCA's charter for a lack of financial viability. We affirm the dismissal.

NCA, as a political subdivision of the state, "has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Ysursa v. Pocatello Educ. Ass'n*,

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

129 S. Ct. 1093, 1101 (2009) (quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)). While NCA itself is a private non-profit corporation, Idaho law contains numerous provisions that, when taken as a whole, demonstrate that Idaho charter schools are governmental entities. *See, e.g.*, Idaho Code § 33-5204(2) (charter schools "may sue or be sued . . . to the same extent and on the same conditions as a traditional public school district"); § 33-5203(1); § 33-5204(1); 33-5208 (funding). Idaho charter schools are also subject to state control that weighs in favor of a finding that they are governmental entities. *See, e.g.*, § 33-5203(2); § 33-5203(5); § 33-5210(1).[1] Like other political subdivisions, Idaho charter schools are creatures of Idaho state law that are funded by the state, subject to the supervision and control of the state, and exist at the state's mercy. NCA is therefore a government entity incapable of bringing an action against the state.

The district court erred in concluding that Moffett lacked capacity to sue the state. Because Moffet's claim that his rights as a teacher were violated by the Commission's policy is neither an official capacity claim on behalf of the school nor a non-justiciable assertion of a generalized public interest, Moffett has standing to pursue this claim. *See Thomas v. Mundell*, 572 F .3d 756, 761 (9th Cir. 2009).

The First Amendment's speech clause does not,

---

[1] In these respects, Idaho law goes beyond Arizona law in characterizing charter schools as public. *Compare Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806, 813–14 (9th Cir. 2010)

however, give Idaho charter school teachers, Idaho charter school students, or the parents of Idaho charter school students a right to have primary religious texts included as part of the school curriculum. Because Idaho charter schools are governmental entities, the curriculum presented in such a school is not the speech of teachers, parents, or students, but that of the Idaho government.[2] The government's own speech is exempt from scrutiny under the First Amendment's speech clause. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009). While this court has never explicitly held that a public school's curriculum is a form of governmental speech, such a holding would necessarily follow from *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003 (9th Cir. 2000). A public school's curriculum, no less than its bulletin boards, is "an example of the government opening up its own mouth," *id.* at 1012, because the message is communicated by employees working at institutions that are state-funded, state-authorized, and extensively state-regulated. *See Mayer v. Monroe County Community School Corp.*, 474 F.3d 477, 479–81 (7th Cir. 2007). Because the government's own speech is not subject to the First Amendment,

---

[2] The school's speech is the state's speech even if, under Idaho law, NCA is the equivalent of a school district, and school districts have broad discretion over public school curriculum. School districts enjoy broad discretion over curricula not because the school district is a crucial part of the American constitutional design with inherent rights over public school curriculum, but because states authorize the existence of school districts as political subdivisions and delegate to them the state government's authority to run state public schools. *See, e.g., Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

plaintiffs have no First Amendment right to compel that speech.

Plaintiffs allege that the state has retaliated against NCA, and not against the other plaintiffs. Because NCA is a political subdivision of the state, it has no constitutional right to sue the state itself, *see Ysursa*, 129 S.Ct. at 1101; further, a political subdivision has no constitutional protection against the actions of the state. *See Hunter*, 207 U.S. at 178 (1907).

The Commission's policy does not violate the Establishment Clause, which generally prohibits governmental promotion of religion, not governmental efforts to ensure that public entities, or private parties receiving government funds, use public money for secular purposes. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589 (1988).

Nor does the policy as applied violate the Equal Protection Clause of the Fourteenth Amendment, which does not apply to the state's disparate treatment of its own political subdivisions. *See Ysursa*, 129 S. Ct. at 1101.

The district court did not abuse its discretion in declining to exercise jurisdiction over the plaintiffs' state law claims, both because the court had dismissed all of the federal claims that formed the basis of its original jurisdiction, *see* 28 U.S.C. § 1367(c)(3), and because the remaining claims addressed novel and complex questions of state law best answered by state courts. *See id.* § 1367(c)(1).

Although plaintiffs have failed to state a claim

under the First or Fourteenth Amendments, their suit is not so “frivolous, unreasonable, or groundless” that the defendants are entitled to attorneys’ fees. *See Hughes v. Rowe*, 449 U.S. 5, 15 (1980) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)).

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT IDAHO

NAMPA CLASSICAL ACADEMY, *et al.*,
Plaintiffs,

vs.

WILLIAM GOESLING, *et al.*,
Defendants.

Case No. CV09-427-S-EJL

MEMORANDUM, DECISION, AND ORDER

Before the Court in the above entitled matter are the Defendants' motion to dismiss, the Plaintiffs' motion for preliminary injunction, and the Defendants' motion to waive. The motions are fully briefed and ripe for the Court's consideration. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, the motions shall be decided on the record before this Court without oral argument. Dist. Idaho Loc. Civ. R. 7.1(d)(2)(ii).

Procedural Background

The Plaintiffs, Nampa Classical Charter Academy ("NCA"), Isaac Moffett, Maria Kosmann,

and M.K. (collectively "the Plaintiffs"),[1] initiated this action following the August 14, 2009 special meeting of the Idaho Public Charter School Commission's (the "Commission")[2] where the Commission adopted the Attorney General's position that the use of religious documents or texts in public school curriculum would violate Article IX, § 6 of the Idaho Constitution. (Docket No. 1, Ex. 1). This position adopted by the Commission, that NCA calls the "Policy," prompted the Plaintiffs to file the instant complaint alleging violations of the First Amendment, Due Process Clause, Equal Protection Clause, Establishment Clause, and violation of Idaho Code § 33-5209 and § 33-5210. (Docket No. 1).[3] The claims allege that the Policy unlawfully prohibits the use of any "religious documents or text in a public school curriculum" or to "use religious text in class or in the classroom." (Docket No. 1, p. 3).

The complaint names several Defendants including: the Commission Chairman, William

---

[1] Plaintiff Isaac Moffett is NCA's founder and a teacher at the school and brings this action both in his official capacity and individually. Plaintiff Maria Kosmann is a teacher at NCA and the mother of Plaintiff M.K., a student at NCA. Ms. Kosmann brings this action both individually and as a school employee and parent of several children attending NCA.

[2] The Commission oversees public charter schools in Idaho, including NCA, under the authority of the State Board of Education.

[3] In the second amended complaint, the Plaintiffs rename the Policy as the "Order." (Docket No. 21, p. 3, Ex. 1). The Court will use the term "Policy" in this Memorandum Decision and Order.

Goesling; the members of the Commission;[4] Tamara L. Baysinger, the Commission's Charter Schools Program Manager; the members of the State Board of Education (the "Board");[5] the Superintendent of Public Instruction, Tom Luna; and the Attorney General of the State of Idaho, Lawrence Wasden.[6] (Docket No. 21, p. 9).[7] The Defendants are each named in both their individual and official capacities. On September 3, 2009, Plaintiffs filed a motion for a temporary restraining order seeking to enjoin the Defendants from "enforcing their Order and Policy prohibiting all religious documents and text from the Academy's curriculum, from issuing and enforcing a Notice of Defect,[8] and from revoking

---

[4] The Commission members named as Defendants are: Brad Corkill, Gayann DeMordaunt, Gayle O'Donahue, Alan Reed, and Esther Van Wart. (Docket No. 21).

[5] Defendant Michael Rush is the Executive Director of the Board. The other members of the Board, Paul Agidius, Richard Westerberg, Kenneth Edmunds, Emma Atchley, Rod Lewis, Don Soltman, and Milford Terrell, have all been sued individually and in their official capacities in this case.

[6] The initial complaint named the Governor of the State of Idaho, C.L. "Butch" Otter. (Docket No. 1). Governor Otter was not named in the Second Amended Complaint. (Docket No. 21).

[7] The Defendants' briefing groups certain of the named Defendants "Commission Defendants" and "Board Defendants." (Dkt. No. 23, pp. 3–4). The Plaintiffs' second amended complaint uses the same designations. (Dkt. No. 21, pp. 8–10). The Court will utilize the same references in this Order where appropriate.

[8] "If the authorized chartering entity has reason to believe that the public charter school has [violated any provision of law], it shall provide the public charter school written notice of the defect and provide a reasonable opportunity to cure the defect." Idaho Code § 33-5209(2)(f) (2009 Supp.).

Plaintiff Academy's charter." (Docket No. 6). This Court denied the motion for temporary restraining order. (Docket No. 13). On, October 2, 2009, Plaintiffs filed an amended complaint followed by a second amended complaint on December 15, 2009. (Docket Nos. 14, 21). The second amended complaint alleges the following claims for relief:

1. Violation of Procedural Due Process Clause under the Fourteenth Amendment;
2. Violation of the Free Speech Clause of the First Amendment;
3. Violation of the Establishment Clause of the First Amendment;
4. Violation of the Equal Protection Clause of the Fourteenth Amendment;
5. Retaliation for Exercising First Amendment Rights; and
6. Violation of Idaho Code §§ 33-5209 and 33-5210.

(Docket No. 21). The second amended complaint seeks relief in the form of declaratory judgment, injunctive relief, damages against the individual capacity defendants, and costs and attorney fees. (Docket No. 21). On January 8, 2010, the Defendants' filed their answer and motion to dismiss. (Docket Nos. 22, 23). On January 27, 2010, Plaintiffs filed their motion for preliminary injunction. (Docket No. 26). The Court now takes up the pending motions in this case.

Factual Background

NCA is a not-for-profit organization incorporated

under the laws of the State of Idaho. Its curriculum is structured in a "classical, liberal arts format, and focuses its study not on textbooks but rather on primary sources as a method of educating its students." (Docket No. 21, p. 5). Teachers at NCA utilize a variety of original/primary source documents for teaching their courses. These primary sources include both secular and religious materials such as the Bible, Koran, the Book of Mormon, the Hadieth, etc. (Docket No. 14, p. 14). By using primary source documents, NCA's staff believes they can better teach students about a wide variety of subjects.

The Board approved NCA's charter petition in September of 2008.[9] In July of 2009, however, the question of whether the Bible could be used as part of NCA's curriculum was raised at a Commission meeting. The Commission requested legal opinions on the issue be submitted before the next meeting set for August 14, 2009.

On August 11, 2009, NCA submitted a legal opinion letter to the Commission concluding that denying NCA's "right to use the Bible in its curriculum cannot pass muster under either the Constitution of Idaho or the United States Constitution." (Docket No. 24, Ex. 3). At the August 14, 2009 Commission meeting, Defendant Goesling advised NCA of the legal opinion the Commission had received from Jennifer Swartz, a Deputy in the Attorney General's Office, stating: "the use of

---

[9] The Board, is the policy-making body for Idaho's educational bodies.

religious documents or text in a public school curriculum will be a violation of the Idaho Constitution." (Docket No. 24, Ex. 2). Defendant Goesling then stated

> on the advice of our counsel, the commission will take the position that the use of religious documents or text in a public school curriculum will be a violation of the Idaho Constitution. Accordingly, the commission wishes to advise the Nampa Classical Academy that if it proceeds to use religious text in class or in the classroom, the commission will be required to issue the school a notice of defect.

(Docket No. 24, Ex. 1). This action was initiated on September 1, 2009.

On November 6, 2009, the Commission issued a Notice of Defect to the NCA on the grounds that they had violated the terms of their charter and a provision of law by failing to respond in a timely fashion to two public records requests. (Docket No. 28, Ex. 4). In total, the Commission issued five Notices of Defect to NCA. (Docket No. 35-2, p. 5). Only one Notice of Defect addressed the use of materials that are not allowed under Article IX, § 6. (Docket No. 22, Att. 1). At the February 11, 2010 special meeting, the Commission adopted Guidelines for Applying the Provisions of Idaho Constitution Article IX, § 6 (the "Guidelines"). (Docket Nos. 35-2, 35-3, 35-4). Plaintiffs' claims allege these actions by the Defendants violated their constitutional rights.

Analysis

I. Federal Law Claims

The Federal law claims raised in this matter arise under 28 U.S.C. § 2201 and 42 U.S.C. §§ 1983 and 1988. Section 1983 is "'not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham v. Connor*, 490 U.S. 386, 393–94 (1989) (quoting *Baker v. McCollan,* 443 U.S. 137, 144 n. 3 (1979)).[10] To establish a prima facie case under 42 U.S.C. § 1983, Plaintiffs "must adduce proof of two elements: (1) the action occurred 'under color of law' and (2) the action resulted in a deprivation of a constitutional right or a federal statutory right." *Souders v. Lucero*, 196 F.3d 1040, 1043 (9th Cir. 1999) (citing *Parratt v. Taylor,* 451 U.S. 527, 535 (1981)). Stated differently, to state a claim under § 1983, a plaintiff must allege four elements: "(1) a violation of rights protected by the Constitution or created by federal statute (2) proximately caused (3) by conduct of a 'person' (4) acting under color of state law." *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The threshold inquiry for § 1983 action is "whether the plaintiff has been deprived of a right

---

[10] 42 U.S.C. § 1983, provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

'secured by the Constitution and laws.'" *Baker v. McCollan,* 443 U.S. 137, 140 (1979). Plaintiffs Federal law claims allege violations of the First and Fourteenth Amendments. Defendants challenge the legal sufficiency of these claims which the Court takes up as follows.

A. Rule 12(b)(1) Motion to Dismiss—Lack of Subject Matter Jurisdiction

Defendants argue both NCA and Mr. Moffett, in his official capacity, are not persons with rights to raise these claims under the Federal Constitution. They are, Defendants contend, "a State-created unit of government and a State-created office" and, thus, not "persons" entitled to the protections of the Federal Constitution and dismissal of these parties' § 1983 federal claims are appropriate.

A Defendant may move to dismiss a complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) in one of two ways. *See Thornhill Publ'g Co., Inc. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). The attack may be a "facial" one where the defendant attacks the sufficiency of the allegations supporting subject matter jurisdiction. *Id.* On the other hand, the defendant may launch a "factual" attack, "attacking the existence of subject matter jurisdiction in fact." *Id.* When considering a "facial" attack made pursuant to Rule 12(b)(1), a court must consider the allegations of the complaint to be true and construe them in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1988). A "factual" attack made pursuant to

Rule 12(b)(1) may be accompanied by extrinsic evidence. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *Trentacosta v. Frontier Pac. Aircraft Indus.*, 813 F.2d 1553, 1558 (9th Cir. 1987). When considering a factual attack on subject matter jurisdiction, "the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill*, 594 F.2d at 733). "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill*, 594 F.2d at 733 (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

However, "[t]he relatively expansive standards of a 12(b)(1) motion are not appropriate for determining jurisdiction . . . where issues of jurisdiction and substance are intertwined. A court may not resolve genuinely disputed facts where 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits.'" *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting *Augustine*, 704 F.2d at 1077). In such a case, "the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine*, 704 F.2d at 1077 (citing *Thornhill*, 594 F.2d at 733–35). This case does not require the Court to resolve substantive issues in determining whether jurisdiction is proper.

In this case, Plaintiffs NCA and Mr. Moffett have alleged violations of several federal rights under § 1983. The Supreme Court recently recognized that "[a] political subdivision . . . is a subordinate unit of government created by the State to carry out delegated governmental functions . . . a political subdivision, 'created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.'" *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1101 (2009) (citations omitted). NCA is such a political subdivision of the State as it is created by the State and, therefore, has no privileges or immunities to invoke against the State. Idaho Code § 33-5204(1) ("a public charter school created pursuant to this chapter shall be deemed a governmental entity."); *see also* Idaho Code §§ 33-5202, 5203 (2008). Likewise, NCA's officers, such as Mr. Moffett, are not "persons" with enforceable rights under the federal constitution. Accordingly, both NCA and Mr. Moffett in his official capacity cannot, as a matter of law state a claim under § 1983 against the State.[11] The motion to dismiss is

---

[11] Plaintiffs counter that charter schools such as NCA are not *per se* subdivisions of the state, citing *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806 (9th Cir. 2010). In *Caviness,* the Ninth Circuit determined that a private non-profit corporation that ran a charter school in Arizona was not functioning as a state actor in a § 1983 case. In Arizona, charter schools are private entities that may contract with a district governing board or the state. This arrangement is distinct from Idaho where charter schools such as NCA are not private entities but are instead created by statute as part of the public education system and, therefore, have the same rights to sue and be sued as school districts. (Docket No. 34, p. 2) (citing

granted as to these plaintiffs' federal claims. Since the remaining Plaintiffs are persons under § 1983, the Court will next address the Defendants' affirmative defense of qualified immunity.

B. Rule 12(b)(6) Motion to Dismiss—Qualified Immunity as to All Defendants

1. Standard on Rule 12(b)(6) Motion

"A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint." *Schimsky v. U.S. Office of Personnel Management*, 2008 WL 5024916 *2 (S.D. Cal. 2008) (citing *Navarro v. Black*, 250 F.3d 729, 731 (9th Cir. 2001)). "A complaint generally must satisfy the notice pleading requirements of Federal Rule of Civil Procedure 8(a)(2) to avoid dismissal under a Rule 12(b)(6) motion." *Id.* (citing *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003)). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

In considering a motion to dismiss pursuant to

Idaho Code §§ 33-5202(2008), 33-5203(1), 33-5204(2) (2008) and 33-5202 (2010 Supp.)). Because charter schools in Idaho are part of the state's program of public education, which is a delegated governmental function, they are not "persons" who can sue under § 1983.

Federal Rule of Civil Procedure 12(b)(6), "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). The court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in plaintiff's complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994). "However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *see also Twombly*, *supra.* There is a strong presumption against dismissing an action for failure to state a claim. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). "'The issue is not whether a plaintiff will ultimately prevail but whether [he] is entitled to offer evidence in support of the claims.'" *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)).

Generally, the Court may not consider any material beyond the pleadings in ruling on a motion to dismiss under Rule 12(b)(6). *See Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994). Each of the parties' pleadings in this case include attachments which the parties refer to in their pleadings and rely on in these motions. Plaintiffs' second amended complaint includes references to three such attachments: 1) minutes from the Commission's August 14, 2009 meeting, 2) opinion of

the Attorney General, and 3) opinion of the Alliance Defense Fund. (Docket No. 21).[12] Likewise, Defendants' answer includes an attachment which is the Commission's November 23, 2009 letter to the NCA Board of Directors stating the Commission "has reason to believe that NCA is using and/or intends to use religious texts as part of its curriculum, in violation of the Idaho State Constitution." (Docket No. 22, Att. 1). These attachments will be considered as part of the pleadings.

However, the parties have each also relied on materials filed in the record beyond the pleadings in their briefing on the motion to dismiss. (Docket No. 23, p. Docket No. 33, p. 4). As such, the Court can only consider these attached materials if the Court converts the motion to dismiss to a motion for summary judgment. *See Jacobson v. AEG Capital Corp.,* 50 F.3d 1493, 1496 (9th Cir. 1995) (If materials outside the pleadings are considered, the motion is converted to a motion for summary judgment governed by Fed. R. Civ. P. 56.). The Court has not relied upon the materials filed outside of the pleadings in reaching its decision on this

---

[12] The only Attachment to the Second Amended Complaint is the Defendants' consent to Plaintiffs' filing the Second Amended Complaint. (Docket No. 21, Att. 1). The First Amended Complaint, however, has three attachments. (Docket No. 14, Atts. 1–3). Plaintiffs have clarified the record by filing a Supplement to the Second Amended Complaint containing the signature pages for the verified complaint and the three attachments that were filed with the First Amended Complaint. (Docket No. 24, Atts. 1–3). The Court can consider these attachments as part of the pleadings and will cite to these attachments as they appear in the record as Docket Number 24.

motion to dismiss.[13] Accordingly, it is not necessary for the Court to convert the motion into a motion for summary judgment.

2. Qualified Immunity Standard

"Qualified immunity serves to shield government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 971 (9th Cir. 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).[14] If the law is not clearly established, or, if the Defendants could have reasonably believed that their conduct was lawful, they are entitled to qualified immunity. *Thompson v. Souza*, 111 F.3d 694, 698 (9th Cir. 1997). The Supreme Court has set forth the following two-pronged inquiry to resolve all qualified immunity claims:

> First, taken in the light most favorable to the party asserting the injury, do the facts alleged show the officers' conduct violated a

---

[13] In this Memorandum, Decision, and Order the Court has cited to a few materials outside of the pleadings mainly in its discussion of the facts of this case. Again, these materials were not the basis for the Court's ruling on the motion to dismiss but served only as background facts.

[14] Because qualified immunity is "an immunity from suit rather than a mere defense to liability . . ." its application here will be examined first in the context of Plaintiffs' allegations against the Defendants. *Pearson*, 129 S. Ct. at 815 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

> constitutional right? Second, if so, was that right clearly established? The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. This inquiry is wholly objective and is undertaken in light of the specific factual circumstances of the case.

Id. (internal quotations and citations omitted); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001) (Whether "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the [defendants'] conduct violated a constitutional right. [I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established."). *Id.*[15] Thus, a district court should "concentrate at the outset on the definition of the constitutional right and determine whether, on

---

[15] This structured two-step analysis, originally required by *Saucier v. Katz*, 533 U.S. 194 (2001), is no longer mandatory in all cases. *See Pearson v. Callahan*, 555 U.S. ___, 129 S. Ct. 808 (2009). In *Pearson,* the Supreme Court recently held:

> On reconsidering the [two-step] procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

Id. at 818. In the case at bar, the Court finds the traditional two-step format is the appropriate order of analysis.

the facts alleged, a constitutional violation could be found." *Billington v. Smith*, 292 F.3d 1177, 1184 (9th Cir. 2002) (internal quotations and citations omitted). If a constitutional violation can be found, the court then decides whether the violation was the source for clearly established law that was contravened in the circumstances of the case. *Id.* "Whether a right is 'clearly established' for purposes of qualified immunity is an inquiry that 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' In other words, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Graves v. City of Coeur D'Alene*, 339 F.3d 828, 846 (9th Cir. 2003) (quoting *Saucier*, 533 U.S. at 201–02 (other citations omitted)).

Defendants argue they are all entitled to qualified immunity, because, as a "general rule 'the state is entitled to prescribe a curriculum for its public schools.'" (Docket No. 23, p. 7) (quoting cases). Thus, no Defendant violated clearly established constitutional rights or statutory law of which a reasonable person would have known. The Defendants further assert that teachers and/or students do no have a constitutional right to teach or receive a curriculum different from that prescribed by the State.

Plaintiffs counter that all of the constitutional rights they have alleged to have been violated were clearly established at the time of the Defendants' "censorship and retaliation." (Docket No. 33, p. 19). Plaintiffs point to their rights under the First

Amendment, Due Process Clause, Equal Protection Clause, Establishment Clause, and Idaho Statutes. In particular, the rights of teachers to choose which materials and sources to use in classroom teaching, the rights of students to receive that information, the rights of parents to ensure that their students receive information, and the right to be free from government action or retaliation against those who exercise their constitutional rights. (Docket No. 33, p. 19). Here in lies the crux of the dispute between the parties; have the Plaintiffs alleged a clearly established constitutional right that a reasonable person would have known and did the Defendants' conduct violate those rights. As discussed below, the Court finds Plaintiffs have not alleged a violation of a clearly established right; thus, there was no violation of a protected right by Defendants.

3. Teachers'/Students' Constitutional Rights

Plaintiffs argue that "[t]eachers have a free speech right to choose which books, sources and supplementary materials to use" and the Commission's Policy banning religious text violates the teachers' free speech rights. (Docket No. 33, p. 11). Likewise, Plaintiffs argue the students have a First Amendment right to receive an education, which is part of their right to free speech. (Docket No. 33, p. 12). In support of these claims, Plaintiffs cite primarily to *Evans-Marshall v. Board of Educ. of Tipp City Exempted Village Sch. Dist.*, 428 F.3d 223 (6th Cir. 2005) and *Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1029 (9th Cir. 1998). Both cases are distinct from the facts and circumstances found in this case.

In *Evans-Marshall,* the plaintiff, a teacher, was fired for using books in the classroom that had been previously approved for use by the school board. 428 F.3d at 226 (The materials in question were the novels Fahrenheit 451, To Kill a Mockingbird, and Siddhartha as well as a movie adaptation of Shakespeare's Romeo and Juliet.). The Sixth Circuit held qualified immunity was not appropriate on the motion to dismiss because the teacher's First Amendment right to be free from retaliation was clearly established. This case, however, is distinct. Here, the books sought to be used by NCA teachers have not been approved by the Commission. Just the opposite, the Commission has stated its position that certain of the materials NCA seeks to use would violate the Idaho Constitution. Further, the materials in question in *Evans-Marshall* were not religious in nature as are the materials at issue in this case.

In *Monteiro,* the Ninth Circuit confronted a dispute between parents seeking to preclude the use of certain literary works from a public school's curriculum and the school board's approval of their use and refusal to remove them from the curriculum. 158 F.3d at 1024 (The disputed materials were The Adventures of Huckleberry Finn and A Rose for Emily.). Though the Ninth Circuit engaged in a thorough discussion of the First Amendment in the school setting, the materials at issue were not religious. As a result, the Ninth Circuit explicitly excluded from its "holding and analysis educational material subject to the prohibitions of the Religion Clauses of the First Amendment." *Monteiro*, 158 F.3d at 1028 n. 6. In doing so, the Ninth Circuit

recognized that the principles designed for religion in the school setting cases are particularly suited to only those type of cases, thus making the *Monteiro* case materially distinct from the case here.[16]

In considering the facts here in the light most favorable to the Plaintiffs, the Court finds they have failed to state a claim under § 1983 because neither the teachers, parents, or students at NCA have clearly established rights as alleged in this case. Plaintiffs' arguments combine recognized constitutional rights in an effort to create a protected individual right not previously recognized. There simply is no law creating a First Amendment right of either teachers or students to use the Bible or any other sacred religious text as part of a public school curriculum.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or . . . the right of the people peaceably to assemble." U.S. Const. amend. I. The First Amendment is applicable to the states and their subdivisions through the Fourteenth Amendment. *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990). The guarantee of free exercise of religion grants citizens the right to believe and profess whatever religious doctrine they choose, and thus forbids government regulation of religious beliefs as such. *Id.* The religion clause further prohibits government

---

[16] In recognizing the distinction between non-religion and religion public school cases, this Court does not foreclose all consideration of non-religion cases.

from imposing special disabilities on the basis of religious views or status or otherwise interfering with the practice of religious beliefs. *Id.* The government violates the Free Speech Clause of the First Amendment when it excludes a speaker from a speech forum the speaker is entitled to enter. *Christian Legal Soc'y v. Walker,* 453 F.3d 853, 865 (7th Cir. 2006).

The Court does not dispute that teachers and students enjoy First Amendment freedom of speech and religion rights both in and out of the classroom. Teachers and students alike enjoy the protections of the First Amendment both inside and outside of the school setting. *See Evans-Marshall*, 428 F.3d at 229 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("[S]tudents and teachers do not shed their constitutional rights to freedom of speech and expression at the schoolhouse gate" is "the unmistakable holding of [the] Court for almost 50 years."). Here, however, the issue involves the Defendants' actions required under Idaho law to prescribe the curriculum for public education in Idaho which is distinct from the rights sought to be invoked here by the Plaintiffs.

The First Amendment allows a speaker to control the content of their speech and protects an individual's right to practice whatever religion they may choose. These rights, however, are not implicated under the circumstances of this case. Nor does the Defendants' conduct infringe upon these rights. The speakers here are not the Plaintiffs. In setting the public school curriculum, the Defendants are the speakers. As such, the Defendants have the

right to lawfully control the content of their speech. Moreover, the Defendants are subject to the requirements of the Establishment Clause which precludes them from promoting religion in the classroom. The Defendants' actions here adhere to the Establishment Clause by preventing Plaintiffs from using religious texts in publicly funded schools.

Plaintiffs' arguments attempt to expand the First Amendment rights of expression and religion in a manner that would allow religion into the curriculum of public schools. Plaintiffs have provided no authority to support this argument. In fact, just the opposite is true. Students and teachers do not have a "First Amendment right to influence curriculum as they so choose." *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003, 1015–16 (9th Cir. 2000) (citing cases). The curriculum taught in public schools is government speech; meaning "First Amendment rights have been limited." *Id.* at 1009 (discussing *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270–73 (1988) and *Planned Parenthood v. Clark County School Dist.*, 941 F.2d 817 (9th Cir. 1991)); *see also Johnson v. Poway Unified School Dist.,* 2010 WL 768856 *7 (S.D. Cal. 2010). As the speaker, Defendants have control over the content of their speech and expressions. *See Id.* at 1015–16 ("[C]urriculum is only one outlet of a school district's expression of its policy."). Were the Plaintiffs operating a private school, their arguments would be correct as they, not the state, would be the speaker and in control of the content of their speech. Here, however, the Plaintiffs are a public charter school which accepts public funds and is organized by, and subject to the same laws as any

other public school.

In addition, the Defendants must comply with the Establishment Clause of the First Amendment which states: "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I. "Neutrality is the fundamental requirement of the Establishment Clause, which prohibits the government from either endorsing a particular religion or promoting religion generally." *Hansen v. Ann arbor Public Schools*, 293 F. Supp. 2d 780, 804 (E.D. Mich. 2003) (citing *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) ("[A] principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion."); *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Gillette v. United States*, 401 U.S. 437, 450 (1971) ("[T]he Establishment Clause prohibits government from abandoning secular purposes to favor the adherents of any sect or religious organization.")). If the Defendants allowed the Plaintiffs' proposed curriculum, they would be in violation of the Establishment Clause.

The Court concludes that the Plaintiffs have not alleged constitutional rights applicable to the context and circumstances of this case. Because the Defendants have not violated Plaintiffs' constitutional rights, they are all entitled to qualified immunity. Further, as discussed below,

even if the Plaintiffs had alleged constitutional rights, such rights were not clearly established. Moreover, the actions complained of by the Defendants were reasonable as it is the Defendants' obligation under the constitution and laws of Idaho to select the curriculum for public schools in Idaho.

4. Public Education Curriculum in Idaho

Even if the Court were to assume the rights asserted by Plaintiffs did apply in this case, the rights have not been defined at the appropriate level of specificity for a court to determine such a right was "clearly established." *Wilson*, 526 U.S. 603, 614–15 (1999) ("[C]learly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." (citations omitted)). "To be established clearly, however, there is no need that 'the very action in question [have] previously been held unlawful.'" *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) (quoting *Wilson*, 526 U.S. at 615). "[T]he law may be clearly established even if there is no case directly on point. It is enough if 'in the light of pre-existing law the unlawfulness [is] apparent.'" *Inouye v. Lemna,* 504 F.3d 705, 715 (9th Cir. 2007) (citations omitted); *see also Blueford v. Prunty*, 108 F.3d 251, 254 (9th Cir. 1997) (To defeat a claim of qualified immunity, a plaintiff need not

establish the defendant's behavior had "been previously declared unconstitutional, only that the unlawfulness was apparent in light of preexisting law.").

Here, as determined above, the Plaintiffs' rights as they have alleged do not apply here and, if they did apply, were not clearly established. What is clear are the requirements placed upon the Defendants by the Establishment Clause to ensure they remain neutral and neither endorse or promote religion. Therefore, the Court finds the Defendants are entitled to qualified immunity because any such rights were not clearly established such that a reasonable person would have known they were violating those rights. Moreover, the Defendants acted reasonably in adopting the Policy, after consulting with the attorney general's office, given the law in Idaho under Article IX, § 2 of the Idaho Constitution and the statutes governing public school curriculum.

The curriculum for public education in Idaho is prescribed by Idaho law. In Idaho, "[a]ll public charter schools are under the general supervision of the state board of education." Idaho Code § 33-5210(1) (2008); *see also* Article IX, § 2 and Idaho Code § 33-101(2008) and 33-5210(1) (2008). Thus, NCA is governed by the provisions of Idaho Code § 33-5200 *et seq.* and subject to the State's general education laws and educational standards as set by the State Board of Education and prescribed by law. The Commission, as NCA's authorized chartering entity, is responsible for ensuring that NCA meets the terms of the charter, complies with general

education laws of the state, and operates in accordance with the state educational standards of thoroughness unless specifically directed otherwise. *See* Idaho Code § 33-5210(2) (2008).[17] "If the authorized chartering entity has reason to believe that the public charter school has [violated any provision of law], it shall provide the public charter school written notice of the defect and provide a reasonable opportunity to cure the defect." Idaho Code § 33-5209(2)(f) (2009 Supp.).

The State Board of Education has the authority and responsibility for setting the curriculum for public education in the state of Idaho with which all public schools in Idaho, including public charter schools such as NCA, must comply. *See* Idaho Code §§ 33-118, 33-118A.[18] In addition, Idaho

---

[17] Public charter school are exempt from rules governing school districts except for five categories of school district rules relating to: waiver of teacher certification, accreditation, student qualification, requirement of criminal history checks for all employees, and rules specifically pertaining to public charter schools. *See* Idaho Code § 33-5210(4) (2008).

[18] **§ 33-118. Courses of study—Curricular materials.** The state board shall prescribe the minimum courses to be taught in all public elementary and secondary schools, and shall cause to be prepared and issued, such syllabi, study guides and other instructional aids as the board shall from time to time deem necessary. The board shall also determine how and under what rules curricular materials shall be adopted for the public schools. The board shall require all publishers of textbooks approved for use to furnish the department of education with electronic format for literary and nonliterary subjects when electronic formats become available for nonliterary subjects, in a standard format approved by the board, from which reproductions can be made for use by the blind.

Constitution, Article IX, § 6 is a provision of law to which NCA is subject and must comply with and states:

> ***§ 6. Religious test and teaching in school prohibited***
>
> No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. No books, papers, tracts or documents of a political, sectarian or denominational character shall be

---

§ 33-118A. Curricular materials—Adoption procedures. All curricular materials adoption committees appointed by the state board of education shall contain at least two (2) persons who are not public educators or school trustees. All meetings of curricular materials adoption committees shall be open to the public. Any member of the public may attend such meetings and file written or make oral objections to any curricular materials under consideration. A complete and cataloged library of all curricular materials adopted in the immediately preceding three (3) years and used in Idaho public schools, and all electronically available curricular materials used in Idaho public schools are to be maintained at the state department of education at all times and open to the public.

"Curricular materials" is defined as textbook and instructional media including software, audio/visual media and internet resources.

> used or introduced in any schools established under the provisions of this article, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article.

These statutes have vested the Defendants with the authority and responsibility for setting the curriculum for public education in Idaho. The actions of the Defendants' drawn into question by the Plaintiffs in this case were premised upon these statutes. The Court finds the Defendants were reasonable in their belief that their conduct was lawful in light of the statutory authority and the legal opinion upon which they acted.

Plaintiffs also couch their argument as not one challenging the State's right to establish a curriculum but, instead challenging the Defendants' Policy of banning books in violation of their constitutional rights. (Docket No. 33, p. 19). Plaintiffs argue they are teaching the State curriculum and not espousing their own personal religious views; they desire only to use religious documents and texts as primary sources for objective teaching of history, literature, and other topics. (Docket No. 33, pp. 19–20). As such, Plaintiffs assert the Defendants violated their constitutional rights by censoring and banning particular books. (Docket No. 33, p. 20) ("protecting the rights of schools, teachers, students and parents to choose which materials to use, to learn from those materials, and to be free from government retaliation for the choice to use those materials. . . ."). Plaintiffs again cite to

Evans-Marshall. As discussed above, this case is different. This is not a book banning case. The materials sought to be used by the Plaintiffs have not been approved for use in the public school curriculum by the Commission or Board who have the responsibility to do so under the law in Idaho. Moreover, the Defendants' Policy upholds the First Amendment in that it prohibits any state sponsored establishing or promoting of religion.

At its August 14, 2009 meeting, the Commission relied on the opinion of the Attorney General when it stated that NCA's proposed use of the Bible and other religious text in its curriculum would violate Article IX, § 6 of the Idaho Constitution. (Docket No. 6, Ex. 2). The opinion noted that Article IX, § 6 "prohibits any use of sectarian or denominational texts in a public school classroom." (Docket No. 6, Ex. 2, p. 2). Thereafter, on February 11, 2010, the Commission approved "Guidelines for Applying the Provisions of Idaho Constitution Article IX, § 6, Regarding Sectarian, Religious or Denominational Teaching or Materials." (Docket No. 35, Ex. B). These actions did not ban books that had previously been approved for use in the public school curriculum as the court confronted in *Evans-Marshall*. The texts Plaintiffs seek to use in the classroom are clearly in violation of Article IX, § 6 since they are sectarian. Therefore, the use of such materials is contrary to Article IX, § 6 of the Idaho Constitution and the Commission appropriately did not approve the use of such text in the public school curriculum.

As determined above, the Plaintiffs have not

alleged a protected right or any clearly established law that was infringed upon by the actions of the Defendants. Moreover, the Defendants reasonably believed their conduct was lawful in that they were given the authority and responsibility for setting the curriculum for public schools in Idaho. As such the Defendants are entitled to the affirmative defense of qualified immunity and the Court will grant the Defendants' motion to dismiss the federal claims on this basis.[19]

II. State Law Claims

The sixth cause of action alleged in the second amended complaint raises a state law claim for violation of Idaho Code § § 33-5209 and 33-5210. Defendants argue because all of the Federal law claims should be dismissed, this Court should not exercise supplemental jurisdiction over the remaining state law claim. Plaintiffs dispute that the Federal law claims should be dismissed and contends that the Court should consider all of their claims as they all raise "core constitutional issues." (Docket No. 33, p. 15).

Supplemental jurisdiction exists where jurisdiction is exercised over a claim that is part of the same case or controversy as another claim over which the court has original jurisdiction. Black's Law Dictionary, p. 931, 9th Ed.; *see also* 28 U.S.C. § 1367. Section 1367(c) identifies four basis for declining supplemental jurisdiction where:

---

[19] Because the Court concludes that qualified immunity applies to all Defendants, the Court need not address the other arguments raised in the Defendants' motion to dismiss.

1. the claim raises a novel or complex issue of State law,
2. the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
3. the district court has dismissed all claims over which it has original jurisdiction, or
4. in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). Here, the first and third factors are the basis for this Court declining jurisdiction. As to the first factor, the parties dispute the clarity of the applicable Idaho law in this matter. Defendants argue the sixth claim asks this Court to resolve state law issues of first impression and interpret Article IX, § 6 of the Idaho Constitution. Such questions, the Defendants assert, should be resolved by the Idaho Supreme Court. Plaintiffs counter that the Court should not abstain from exercising jurisdiction over this claim because jurisdiction is appropriate over all of Plaintiffs' claims and the sixth cause of action does not raise issues upon which only the Idaho Supreme Court should speak. (Docket No. 33, p. 15–17). Having reviewed the allegations, this Court finds the sixth claim raises issues of state law which are best addressed by the Idaho Supreme Court. More importantly, as to the third factor, the state law claim is the sole remaining claim and would be the only claim over which this Court would be exercising jurisdiction. To do so would be improper.

In their briefing on each of these motions, the parties disagree about the state law as applied to the

facts of this case. Such questions should be answered by the state court who is better suited to resolve the parties' dispute regarding the state law. What has given rise to Federal court jurisdiction are the Plaintiffs' claims based upon Federal law regarding the alleged constitutional violations by the Defendants' actions in relation to the NCA's school charter and curriculum. Those Federal law claims which gave rise to original jurisdiction have now been dismissed. Although there may exist grounds upon which jurisdiction could be exercised over the state law claims, having reviewed the briefing on the instant motions the Court concludes the state law matters are more appropriately decided by the state court. Accordingly, the state law claims are dismissed without prejudice.

III.Conclusion

Based on the foregoing, the Court finds the Plaintiffs have failed to allege a protected right applicable to the facts and circumstances of this case. Though the Plaintiffs generally possess the constitutional rights they have asserted, those rights simply are not at issue here. The § 1983 claim draws into question the Defendants' actions in adopting the Policy that religious texts cannot be used in the public school curriculum. In this context, it is the Defendants who are the speakers and who have control over the content of the curriculum. By selecting the school curriculum for public education, the Defendants have not violated Plaintiffs' rights. Just the opposite, Defendants have acted according to the laws of the State of Idaho and the demands placed upon them by the Establishment Clause of

the United States Constitution. The Plaintiffs remain free to speak and believe what they wish where they are the speaker and are not otherwise limited by law. Here, however, Plaintiffs simply are not the master of the content of the public school curriculum in Idaho. That responsibility falls squarely upon the Defendants who have acted appropriately.

Even if the Court were to have determined the Plaintiffs had alleged a constitutional right that was violated, the Court would still grant qualified immunity to the Defendants because the right is not clearly established. Moreover, the Defendants acted reasonably in adopting the Policy based upon the duties imposed upon them under Idaho law to select public school curriculum. For these reasons, the Court finds the Defendants are each entitled to qualified immunity for the actions complained of here by the Plaintiffs. Finally, the Court also declines to exercise supplemental jurisdiction over the remaining state law claims. The state courts are in a better position to decide issues of first impression relating to state statutes and the state constitution.

ORDER

THEREFORE IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss (Docket No. 23) is **GRANTED.** All federal claims are **DISMISSED WITH PREJUDICE** and the state law claims presented in the sixth cause of action is **DISMISSED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that the Motion to Waive (Docket No. 37) and Motion for Preliminary Injunction (Docket No. 26) are **MOOT**.

DATED: **May 17, 2010**

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NAMPA CLASSICAL ACADEMY, *et al.*,
Plaintiffs,

vs.

WILLIAM GOESLING, individually and in his official capacity as Chairman of the Idaho Public Charter School Commission, *et al.*,
Defendants.

Case No. 09-cv-427-EJL

MEMORANDUM ORDER

Pending before the Court in the above-entitled matter is Plaintiffs' motion for temporary restraining order, filed on September 3, 2009. The motion was filed in conjunction with a verified complaint. The certificate of service indicates that the Defendants were served with a copy of the motion on the same date via electronic mail and UPS overnight delivery. The Defendants have filed a response in opposition to the motion.

Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this motion shall be decided on the record before this Court without oral argument. Local Rule 7. 1(d)(2)(ii).

Factual and Procedural Background

The Plaintiffs, Nampa Classical Charter Academy (NCA), Isaac Moffett, Maria Kosmann, and M.K., initiated this action following the August 14, 2009 special meeting of the Idaho Public Charter School Commission's (IPCSC) where the IPCSC adopted the Attorney General's position that the use of religious documents or texts in public school curriculum would violate Article IX, § 6 of the Idaho Constitution. (Dkt. No. 1, Ex. 1). This position, that NCA calls the "Policy," prompted NCA to file a complaint alleging violations of the First Amendment, Due Process Clause, Equal Protection Clause, Establishment Clause, and violation of Idaho Code § 33-5209 and § 33-5210. (Dkt. No. 1). The Policy, Plaintiffs allege, violates their Due Process and First Amendment rights by prohibiting the use of any "religious documents or text in a public school curriculum" or to "use religious text in class or in the classroom." (Dkt. No. 1, p. 3). The Complaint names several Defendants including: the IPCSC, its Chairman, William Goesling, the members of the IPCSC, the state Board of Education and its members, the Superintendent of Public Instruction, Tom Luna, and the Attorney General of the State of Idaho, Lawrence Wasden, and the Governor of the State of Idaho, C.L. "Butch" Otter. (Dkt. No. 1).

NCA also filed this motion for a temporary restraining order seeking to enjoin the Defendants from "enforcing their Order and Policy prohibiting all religious documents and text from the Academy's curriculum, from issuing and enforcing a Notice of Defect, and from revoking Plaintiff Academy's

charter." (Dkt. No. 6). The school was scheduled to open on Tuesday, September 8, 2009. The Notice of Defect, Order, and Policy will irreparably injure Plaintiffs, they argue, by violating their First Amendment rights, damage to reputation and goodwill, loss of enrolled and future students attending Plaintiff Academy, damage to business relationships, eventual closure of NCA, loss of NCA assets, loss of employment for NCA teachers, and NCA's students loss of ability to attend classes. The motion is made pursuant to Federal Rule of Civil Procedure 65(b).

Defendants have filed an opposition to the motion arguing the Plaintiffs lack standing to raise their claims, are unlikely to succeed on the merits of the claims, and have failed to demonstrate the likelihood of an irreparable injury. (Dkt. No. 12). The Court has reviewed the motion, response, and record herein and makes the following ruling.

Standard of Law

Temporary restraining orders are designed to preserve the status quo pending the ultimate outcome of litigation. They are governed by Federal Rule of Civil Procedure 65(b) which requires the moving party to show that "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party . . . can be heard in opposition. . . ." "The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction." *Brown Jordan Int'l, Inc. v.*

Mind's Eye Interiors, Inc., 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council*, __ U.S. __, 129 S. Ct. 365, 374–75 (2008) ("Issuing a preliminary injunction based only a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). No longer are plaintiffs granted the presumption of irreparable harm upon a showing of a likelihood of success on the merits. *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 926 (N.D. Cal. Jan. 5, 2009).

Discussion

In this case, NCA's motion is predicated on violations of the First Amendment, the Due Process Clause, the Establishment Clause, and the Idaho Code. NCA has failed to make the requisite showing for issuance of a TRO. The Plaintiffs' have not demonstrated a likelihood of success on the merits. As pointed out in the Defendants' opposition, there is a serious question as to whether or not the Plaintiffs have standing. (Dkt. No. 12). Moreover, the allegations here involve difficult questions of state law that bear on state policy problems of substantial

public concern that may be more properly resolved in the state system. To grant the TRO would in effect give Plaintiffs the ultimate relief they seek in this case without the matter being fully considered and decided. Further, the TRO is not in the public interest as it would upset the State's efforts to establish a coherent policy with respect to public education.

The Court also finds the Plaintiffs have not established the likelihood of an immediate and irreparable injury. NCA argues is that if the Notice is issued it and the Policy enforced it will result in a chilling effect on the First Amendment rights of the Plaintiffs speech, damage the goodwill and reputation of NCA, loss of students, and damage the business. (Dkt. No. 6, p. 21). Further, the NCA argues issuance of the Notice and enforcement of the Policy would result in an unconstitutional advocation of nontheistic religion over other religious beliefs in violation of the Establishment Clause. The Motion alleges further irreparable harm will be suffered once NCA's charter is revoked. (Dkt. No. 6, p. 24). The motion is supported by several affidavits and exhibits.

Having reviewed the record herein, the Court disagrees that the harm alleged by the Plaintiffs is irreparable. Harm that is speculative, conjectural, attenuated or remote "does not constitute irreparable injury sufficient to warrant granting a [TRO and] preliminary injunction" *Caribbean Marine Servs. Co. Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). The alleged injury here does not appear to be immediate. Although the Defendants voted to adopt

the position of the Idaho Attorney General's Office at the August 14, 2009 Special Meeting, no Notice has been submitted to NCA. The injuries feared by the NCA are not yet ripe.

Similarly, Plaintiffs fail to identify a concrete immediate harm. The injuries alleged by the Plaintiffs include violation of their First Amendment rights, damage to reputation and goodwill, loss of enrolled and future students attending Plaintiff Academy, damage to business relationships, eventual closure of NCA, loss of NCA assets, loss of employment for NCA teachers, and NCA's students loss of ability to attend classes. (Dkt. No. 6, p.). Again, these predictions are mere speculation as to the potential for future harm. *See Caribbean Marine Servs. Co.*, 844 F.2d at 675 (explaining that a plaintiff's prediction of possible injury is too remote and speculative to constitute irreparable injury). Because Plaintiffs can at this juncture only speculate as to what may transpire in the future, the Plaintiffs' motion is premature and denied. *Id.* at 674–76.

ORDER

Based on the foregoing, the Court being fully advised in the premises it is **HEREBY ORDERED** that Plaintiffs' Motion for Temporary Restraining Order is (Dkt. No. 6) is **DENIED**.

DATED: **September 10, 2010**

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-35542

NAMPA CLASSICAL ACADEMY; ISAAC MOFFETT; M.K., a minor, by and through her next friend; MARIA KOSMANN, individually and as next friend of M.K., a minor,

Plaintiffs-Appellants,

v.

WILLIAM GOESLING, individually and in his official capacity as Chairman of the Idaho Public Charter School Commission ("Commission"); BRAD CORKILL; GAYANN DEMORDAUNT; GAYLE O'DONAHUE; ALAN REED; ESTHER VAN WART, all individually and in their official capacities as members of the Commission; MICHAEL RUSH, individually and in his official capacity as Executive Director of the State Board of Education; PAUL AGIDIUS, Board Pressident; RICHARD WESTERBERG, Board Vice President; KENNETH EDMUNDS, Board Secretary; EMMA ATCHLEY; ROD LEWIS; DON SOLTMAN; MILFORD TERRELL, all individually and in their official capacities as members of the Board; TOM LUNA, individually and in his official capacities as Superintendent of Public Instruction, as Executive Secretary of the Board, and as Chief Executive Officer of the State Department of Education; LAWRENCE GARTH WASDEN, in his official capacity as the Attorney General of the State of Idaho; TAMARA BAYSINGER,

Defendants-Appellees.

D.C. No. 1:09-cv-00427-EJL
District of Idaho, Boise

ORDER

Before REINHARDT, W. FLETCHER, and RAWLINSON, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing en banc. The full court has been advised of the petition, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is denied.

Filed: Sep. 27, 2011
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED: OCT. 5, 2011

No. 10–35542
D.C. No. 1:09–cv–00427–EJL
U.S. District Court for Idaho, Boise

NAMPA CLASSICAL ACADEMY, *et al.*,

Plaintiffs-Appellants,

v.

WILLIAM GOESLING, individually and in his official capacity as Chairman of the Idaho Public Charter School Commission ("Commission"); *et al.*,

Defendants-Appellees.

MANDATE

The judgment of this Court, entered August 15, 2011, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court

Theresa Benitez
Deputy Clerk

U.S. CONSTITUTION, Article III, Section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution. . . .

U.S. CONSTITUTION, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION, Amendment 14, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IDAHO CONSTITUTION, Article IX, § 2:

> The general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education, the membership, powers and duties of which shall be prescribed

by law. The state superintendent of public instruction shall be *ex officio* member of said board.

IDAHO CONSTITUTION, Article IX, § 6:

No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article.

IDAHO CODE § 9-343: Proceedings to enforce right to examine or to receive a copy of records—Retention of disputed records.

(1) The sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court of the county where the records or some part thereof are located, to compel the public agency or independent public body corporate and politic to make the information available for public inspection in accordance with the provisions of sections 9-337 through 9-348, Idaho Code. The petition contesting the public agency's or independent public body corporate and politic's decision shall be filed within one hundred eighty (180) calendar days from the date of mailing of the notice of denial or partial denial by the public agency or independent public body corporate and politic. The time for responsive pleadings and for hearings in such proceedings shall be set by the court at the earliest possible time, or in no event beyond twenty-eight (28) calendar days from the date of filing.

(2) The public agency or independent public body corporate and politic shall keep all documents or records in question until the end of the appeal period, until a decision has been rendered on the petition, or as otherwise statutorily provided, whichever is longer.

(3) Nothing contained in sections 9-337 through 9-348, Idaho Code, shall limit the

availability of documents and records for discovery in the normal course of judicial or administrative adjudicatory proceedings, subject to the law and rules of evidence and of discovery governing such proceedings. Additionally, in any criminal appeal or post-conviction civil action, sections 9-335 through 9-348, Idaho Code, shall not make available the contents of prosecution case files where such material has previously been provided to the defendant nor shall sections 9-335 through 9-348, Idaho Code, be available to supplement, augment, substitute or supplant discovery procedures in any other federal, civil or administrative proceeding.

IDAHO CODE § 33-101: Creation of board.

For the general supervision, governance and control of all state educational institutions, to wit: University of Idaho, Idaho State University, Boise State University, Lewis-Clark State College, the School for the Deaf and Blind and any other state educational institution which may hereafter be founded, and for the general supervision, governance and control of the public school systems, including public community colleges, a state board of education is created. The said board shall be known as the state board of education and board of regents of the University of Idaho.

For purposes of section 20, article IV, of the constitution of the state of Idaho, the state

board of education and all of its offices, agencies, divisions and departments shall be an executive department of state government.

Where the term "state board" shall hereafter appear, it shall mean the state board of education and board of regents of the University of Idaho.

IDAHO CODE § 33-1603: Sectarian instruction forbidden.

No sectarian or denominational doctrine shall be taught in the public schools, nor shall any books, tracts, papers or documents of sectarian or denominational character be used therein.

IDAHO CODE § 33-2806: Powers of board—Sectarian tests prohibited.

The board of regents shall enact laws for the government of the university in all its branches, elect a president and the requisite number of professors, instructors, officers and employees, and fix the salaries and the term of office of each, and determine the moral and educational qualifications of applicants for admission to the various courses of instruction; but no instruction either sectarian in religion or partisan in politics shall ever be allowed in any department of the university, and no sectarian or partisan test shall ever be allowed or exercised in the appointment of regents or in the election of professors, teachers, or other officers of the university, or

in the admission of students thereto, or for any purpose whatever. The board of regents shall have power to remove the president or any professor, instructor or officer of the university, when, in their judgment, the interests of the university require it. The board may prescribe rules and regulations for the management of the libraries, cabinets, museum, laboratories and all other property of the university and of its several departments, and for the care and preservation thereof, with penalties and forfeitures, by way of damages for their violation, which may be sued for and collected in the name of the board before any court having jurisdiction of such action.

IDAHO CODE § 33-5202: Legislative Intent.

It is the intent of the legislature to provide opportunities for teachers, parents, students and community members to establish and maintain public charter schools which operate independently from the existing traditional school district structure but within the existing public school system as a method to accomplish any of the following:

(1) Improve student learning;

(2) Increase learning opportunities for all students, with special emphasis on expanded learning experiences for students;

(3) Include the use of different and innovative teaching methods;

(4) Utilize virtual distance learning and on-line learning;

(5) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site;

(6) Provide parents and students with expanded choices in the types of educational opportunities that are available within the public school system;

(7) Hold the schools established under this chapter accountable for meeting measurable student educational standards.

IDAHO CODE § 33-5202A: Definitions.

As used in this chapter, unless the context requires otherwise:

(1) "Authorized chartering entity" means either the local board of trustees of a school district in this state, or the public charter school commission pursuant to the provisions of this chapter.

(2) "Charter" means the grant of authority approved by the authorized chartering

entity to the board of directors of the public charter school.

(3) "Founder" means a person, including employees or staff of a public charter school, who makes a material contribution toward the establishment of a public charter school in accordance with criteria determined by the board of directors of the public charter school, and who is designated as such at the time the board of directors acknowledges and accepts such contribution. The criteria for determining when a person is a founder shall not discriminate against any person on any basis prohibited by the federal or state constitutions or any federal, state or local law. The designation of a person as a founder, and the admission preferences available to the children of a founder, shall not constitute pecuniary benefits.

(4) "Petition" means the document submitted by a person or persons to the authorized chartering entity to request the creation of a public charter school.

(5) "Professional-technical regional public charter school" means a public charter secondary school authorized under this chapter to provide programs in professional-technical education which meet the standards and qualifications

established by the division of professional-technical education. A professional-technical regional public charter school may be approved by an authorized chartering entity and by the terms of its charter, shall operate in association with at least two (2) school districts. Notwithstanding the provisions of section 33-5206(1), Idaho Code, participating school districts need not be contiguous.

(6) "Public charter school" means a school that is authorized under this chapter to deliver public education in Idaho.

(7) "Traditional public school" means any school existing or to be built that is operated and controlled by a school district in this state.

(8) "Virtual school" means a school that delivers a full-time, sequential program of synchronous and/or asynchronous instruction primarily through the use of technology via the internet in a distributed environment. Schools classified as virtual must have an online component to their school with online lessons and tools for student and data management.

IDAHO CODE § 33-5203: Authorization—Limitations.

(1) The creation of public charter schools is

hereby authorized. Public charter schools shall be part of the state's program of public education.

(2) The number of new public charter schools which may begin educational instruction in any one (1) school year shall be limited in number in accordance with the following:

(a) Not more than six (6) new public charter schools may begin educational instruction in any one (1) school year, and

(b) Not more than one (1) new public charter school may begin educational instruction that is physically located within any one (1) school district in any one (1) school year, and

(c) No whole school district may be converted to a charter district or any configuration which includes all schools as public charter schools, and

(d) Public virtual charter schools approved by the public charter school commission are not included in paragraph (b) of this subsection, and

(e) The transfer of a charter for a school already authorized pursuant to section 33-5205A, Idaho Code, is not included in the limit on the annual number of public charter schools approved to begin educational instruction in any given

school year as set forth in paragraph (a) of this subsection, and

(f) A petition must be received by the initial authorized chartering entity no later than September 1 to be eligible to begin instruction the first complete school year following receipt of the petition, and

(g) To begin operations, a newly-chartered public school must be authorized by no later than January 1 of the previous school year.

(3) A public charter school may be formed either by creating a new public charter school, which charter may be approved by any authorized chartering entity, or by converting an existing traditional public school to a public charter school, which charter may only be approved by the board of trustees of the school district in which the existing public school is located.

(4) No charter shall be approved under this chapter:

(a) Which provides for the conversion of any existing private or parochial school to a public charter school.

(b) To a for-profit entity or any school which is operated by a for-profit entity, provided however, nothing herein shall prevent the board of directors of a

public charter school from legally contracting with for-profit entities for the provision of products or services that aid in the operation of the school.

(c) By the board of trustees of a school district if the public charter school's physical location is outside the boundaries of the authorizing school district. The limitation provided in this subsection (4)(c) does not apply to a home-based public virtual school.

(5) A public virtual school charter may be approved by the public charter school commission. In addition, a charter may also be approved by the state board of education pursuant to section 33-5207(5)(b), Idaho Code.

(6) The state board of education shall adopt rules, subject to law, to establish a consistent application and review process for the approval and maintenance of all public charter schools.

(7) The state board of education shall be responsible to designate those public charter schools that will be identified as a local education agency (LEA) as such term is defined in 34 CFR 300.18; however, only public charter schools chartered by the board of trustees of a school district may be included in that district's LEA.

IDAHO CODE § 33-5204: Nonprofit corporation—Liability—Insurance.

(1) A public charter school shall be organized and managed under the Idaho nonprofit corporation act. The board of directors of a public charter school shall be deemed public agents authorized by a public school district, the public charter school commission, or the state board of education to control the public charter school, but shall function independently of any school board of trustees in any school district in which the public charter school is located, or independently of the public charter school commission except as provided in the charter. For the purposes of section 59-1302(15), Idaho Code, a public charter school created pursuant to this chapter shall be deemed a governmental entity. Pursuant to the provisions of section 63-3622O, Idaho Code, sales to or purchases by a public charter school are exempt from payment of the sales and use tax. A public charter school and the board of directors of a public charter school are subject to the provisions of:

(a) Sections 18-1351 through 18-1362, Idaho Code, on bribery and corrupt influence, except as provided by section 33-5204A(2), Idaho Code;

(b) Chapter 2, title 59, Idaho Code, on prohibitions against contracts with officers;

(c) Chapter 7, title 59, Idaho Code, on ethics in government;

(d) Chapter 23, title 67, Idaho Code, on open public meetings; and

(e) Chapter 3, title 9, Idaho Code, on disclosure of public records

in the same manner that a traditional public school and the board of school trustees of a school district are subject to those provisions.

(2) A public charter school may sue or be sued, purchase, receive, hold and convey real and personal property for school purposes, and borrow money for such purposes, to the same extent and on the same conditions as a traditional public school district, and its employees, directors and officers shall enjoy the same immunities as employees, directors and officers of traditional public school districts and other public schools, including those provided by chapter 9, title 6, Idaho Code. The authorized chartering entity that approves a public school charter shall have no liability for the acts, omissions, debts or other obligations of a public charter school, except as may be provided in the charter. A local public school district shall have no liability for the acts, omissions, debts or other obligations of a public charter school located in its district that has been approved by an authorized chartering entity other than the board of trustees of the local school district.

(3) Nothing in this chapter shall prevent the board of directors of a public charter school, operating as a nonprofit corporation, from borrowing money to finance the purchase or lease of school building facilities, equipment and furnishings of those school building facilities. Subject to the terms of a contractual agreement between the board and a lender, nothing herein shall prevent the board from using the facility, its equipment and furnishings, as collateral for the loan.

(4) Public charter schools shall secure insurance for liability and property loss.

(5) It shall be unlawful for:

(a) Any director to have pecuniary interest directly or indirectly in any contract or other transaction pertaining to the maintenance or conduct of the authorized chartering entity and charter, or to accept any reward or compensation for services rendered as a director except as may be otherwise provided in this subsection (5). The board of directors of a public charter school may accept and award contracts involving the public charter school to businesses in which the director or a person related to him by blood or marriage within the second degree has a direct or indirect interest, provided that the procedures set forth in section 18-1361 or 18-1361A, Idaho Code, are

followed. The receiving, soliciting or acceptance of moneys of a public charter school for deposit in any bank or trust company, or the lending of moneys by any bank or trust company to any public charter school, shall not be deemed to be a contract pertaining to the maintenance or conduct of a public charter school and authorized chartering entity within the meaning of this section; nor shall the payment by any public charter school board of directors of compensation to any bank or trust company for services rendered in the transaction of any banking business with such public charter school board of directors be deemed the payment of any reward or compensation to any officer or director of any such bank or trust company within the meaning of this section.

(b) The board of directors of any public charter school to enter into or execute any contract with the spouse of any member of such board, the terms of which said contract require, or will require, the payment or delivery of any public charter school funds, moneys or property to such spouse, except as provided in section 18-1361 or 18-1361A, Idaho Code.

(6) When any relative of any director or relative of the spouse of a director related by

affinity or consanguinity within the second degree is to be considered for employment in a public charter school, such director shall abstain from voting in the election of such relative, and shall be absent from the meeting while such employment is being considered and determined.

IDAHO CODE § 33-5205: Petition to establish public charter school.

(1) Any group of persons may petition to establish a new public charter school, or to convert an existing traditional public school to a public charter school.

(a) A petition to establish a new public charter school, including a public virtual charter school, shall be signed by not fewer than thirty (30) qualified electors of the attendance area designated in the petition. Proof of elector qualifications shall be provided with the petition.

(b) A petition to establish a new public virtual school must be submitted directly to the public charter school commission. A petition to establish a new public charter school, other than a new public virtual school, shall first be submitted to the local board of trustees in which the public charter school will be located. A petition shall be considered to be received by an

authorized chartering entity as of the next scheduled meeting of the authorized chartering entity after submission of the petition.

(c) The board of trustees may either: (i) consider the petition and approve the charter; or (ii) consider the petition and deny the charter; or (iii) refer the petition to the public charter school commission, but such referral shall not be made until the local board has documented its due diligence in considering the petition. Such documentation shall be submitted with the petition to the public charter school commission. If the petitioners and the local board of trustees have not reached mutual agreement on the provisions of the charter, after a reasonable and good faith effort, within sixty (60) days from the date the charter petition is received, the petitioners may withdraw their petition from the local board of trustees and may submit their charter petition to the public charter school commission, provided it is signed by thirty (30) qualified electors as required by subsection (1)(a) of this section. Documentation of the reasonable and good faith effort between the petitioners and the local board of trustees must be submitted with the petition to the public charter school commission.

(d) The public charter school commission may either: (i) consider the petition and approve the charter; or (ii) consider the petition and deny the charter.

(e) A petition to convert an existing traditional public school shall be submitted to the board of trustees of the district in which the school is located for review and approval. The petition shall be signed by not fewer than sixty percent (60%) of the teachers currently employed by the school district at the school to be converted, and by one (1) or more parents or guardians of not fewer than sixty percent (60%) of the students currently attending the school to be converted. Each petition submitted to convert an existing school or to establish a new charter school shall contain a copy of the articles of incorporation and the bylaws of the nonprofit corporation, which shall be deemed incorporated into the petition.

(2) Not later than sixty (60) days after receiving a petition signed by thirty (30) qualified electors as required by subsection (1)(a) of this section, the authorized chartering entity shall hold a public hearing for the purpose of discussing the provisions of the charter, at which time the authorized chartering entity shall consider the merits of the petition and the level of employee and parental support for the petition. In the case

of a petition submitted to the public charter school commission, such public hearing must be not later than sixty (60) days after receipt of the petition, which may be extended to ninety (90) days if both parties agree to an extension.

In the case of a petition for a public virtual charter school, if the primary attendance area described in the petition of a proposed public virtual charter school extends within the boundaries of five (5) or fewer local school districts, the public charter school commission shall provide notice in writing of the public hearing no less than thirty (30) days prior to such public hearing to those local school districts. Such public hearing shall include any oral or written comments that an authorized representative of the local school districts may provide regarding the merits of the petition and any potential impacts on the school districts.

In the case of a petition for a non-virtual public charter school submitted to the public charter school commission, the board of the district in which the proposed public charter school will be physically located, shall be notified of the hearing in writing, by the public charter school commission, no less than thirty (30) days prior to the public hearing. Such public hearing shall include any oral or written comments that an authorized representative of the school district in which the proposed public charter school would be

physically located may provide regarding the merits of the petition and any potential impacts on the school district. The hearing shall include any oral or written comments that petitioners may provide regarding any potential impacts on such school district. If the school district chooses not to provide any oral or written comments as provided for in this subsection (2), such school district shall notify the public charter school commission of such decision. Following review of any petition and any public hearing provided for in this section, the authorized chartering entity shall either approve or deny the charter within sixty (60) days after the date of the public hearing, provided however, that the date may be extended by an additional sixty (60) days if the petition fails to contain all of the information required in this section, or if both parties agree to the extension. This public hearing shall be an opportunity for public participation and oral presentation by the public. This hearing is not a contested case hearing as described in chapter 52, title 67, Idaho Code.

(3) An authorized chartering entity may approve a charter under the provisions of this chapter only if it determines that the petition contains the requisite signatures, the information required by subsections (4) and (5) of this section, and additional statements describing all of the following:

(a) The proposed educational program of

the public charter school, designed among other things, to identify what it means to be an "educated person" in the twenty-first century, and how learning best occurs. The goals identified in the program shall include how all educational thoroughness standards as defined in section 33-1612, Idaho Code, shall be fulfilled.

(b) The measurable student educational standards identified for use by the public charter school. "Student educational standards" for the purpose of this chapter means the extent to which all students of the public charter school demonstrate they have attained the skills and knowledge specified as goals in the school's educational program.

(c) The method by which student progress in meeting those student educational standards is to be measured.

(d) A provision by which students of the public charter school will be tested with the same standardized tests as other Idaho public school students.

(e) A provision which ensures that the public charter school shall be state accredited as provided by rule of the state board of education.

(f) The governance structure of the public

charter school including, but not limited to, the person or entity who shall be legally accountable for the operation of the public charter school, and the process to be followed by the public charter school to ensure parental involvement.

(g) The qualifications to be met by individuals employed by the public charter school. Instructional staff shall be certified teachers as provided by rule of the state board of education.

(h) The procedures that the public charter school will follow to ensure the health and safety of students and staff.

(i) A plan for the requirements of section 33-205, Idaho Code, for the denial of school attendance to any student who is an habitual truant, as defined insection 33-206, Idaho Code, or who is incorrigible, or whose conduct, in the judgment of the board of directors of the public charter school, is such as to be continuously disruptive of school discipline, or of the instructional effectiveness of the school, or whose presence in a public charter school is detrimental to the health and safety of other pupils, or who has been expelled from another school district in this state or any other state.

(j) Admission procedures, including provision for overenrollment. Such admission procedures shall provide that the initial admission procedures for a new public charter school, including provision for overenrollment, will be determined by lottery or other random method, except as otherwise provided herein. If initial capacity is insufficient to enroll all pupils who submit a timely application, then the admission procedures may provide that preference shall be given in the following order: first, to children of founders, provided that this admission preference shall be limited to not more than ten percent (10%) of the capacity of the public charter school; second, to siblings of pupils already selected by the lottery or other random method; and third, an equitable selection process such as by lottery or other random method. If so stated in its petition, a new public charter school may include the children of full-time employees of the public charter school within the first priority group subject to the limitations therein. Otherwise, such children shall be included in the third priority group. If capacity is insufficient to enroll all pupils for subsequent school terms, who submit a timely application, then the admission procedures may provide that preference shall be given in the following order: first, to pupils

returning to the public charter school in the second or any subsequent year of its operation; second, to children of founders, provided that this admission preference shall be limited to not more than ten percent (10%) of the capacity of the public charter school; third, to siblings of pupils already enrolled in the public charter school; and fourth, an equitable selection process such as by lottery or other random method. There shall be no carryover from year to year of the list maintained to fill vacancies. A new lottery shall be conducted each year to fill vacancies which become available. If so stated in its petition, a public charter school may include the following children within the second priority group subject to the limitations therein:

(i) The children of full-time employees of the public charter school;

(ii) Children who previously attended the public charter school within the previous three (3) school years, but who withdrew as a result of the relocation of a parent or guardian due to an academic sabbatical, employer or military transfer or reassignment.

Otherwise, such children shall be included in the fourth priority

group.

(k) The manner in which an annual audit of the financial and programmatic operations of the public charter school is to be conducted.

(l) The disciplinary procedures that the public charter school will utilize, including the procedure by which students may be suspended, expelled and reenrolled, and the procedures required by section 33-210, Idaho Code.

(m) A provision which ensures that all staff members of the public charter school will be covered by the public employee retirement system, federal social security, unemployment insurance, worker's compensation insurance, and health insurance.

(n) The public school attendance alternative for students residing within the school district who choose not to attend the public charter school.

(o) A description of the transfer rights of any employee choosing to work in a public charter school that is approved by the board of trustees of a school district, and the rights of such employees to return to any noncharter school in the same school district after employment at such charter school.

(p) A provision which ensures that the staff of the public charter school shall be considered a separate unit for purposes of collective bargaining.

(q) The manner by which special education services will be provided to students with disabilities who are eligible pursuant to the federal individuals with disabilities education act, including disciplinary procedures for these students.

(r) A plan for working with parents who have students who are dually enrolled pursuant to section 33-203, Idaho Code.

(s) The process by which the citizens in the area of attendance shall be made aware of the enrollment opportunities of the public charter school.

(t) A proposal for transportation services as required by section 33-5208(4), Idaho Code.

(u) A plan for termination of the charter by the board of directors, to include:

(i) Identification of who is responsible for dissolution of the charter school;

(ii) A description of how payment to creditors will be handled;

(iii) A procedure for transferring all

records of students with notice to parents of how to request a transfer of student records to a specific school; and

(iv) A plan for the disposal of the public charter school's assets.

(4) The petitioner shall provide information regarding the proposed operation and potential effects of the public charter school including, but not limited to, the facilities to be utilized by the public charter school, the manner in which administrative services of the public charter school are to be provided and the potential civil liability effects upon the public charter school and upon the authorized chartering entity.

(5) At least one (1) person among a group of petitioners of a prospective public charter school shall attend a public charter school workshop offered by the state department of education. The state department of education shall provide notice of dates and locations when workshops will be held, and shall provide proof of attendance to workshop attendees. Such proof shall be submitted by the petitioners to an authorized chartering entity along with the charter petition.

(6) The public charter school commission may approve a charter for a public virtual school under the provisions of this chapter only if it determines that the petition contains the

requirements of subsections (3) and (4) of this section and the additional statements describing the following:

(a) The learning management system by which courses will be delivered;

(b) The role of the online teacher, including the consistent availability of the teacher to provide guidance around course material, methods of individualized learning in the online course and the means by which student work will be assessed;

(c) A plan for the provision of professional development specific to the public virtual school environment;

(d) The means by which public virtual school students will receive appropriate teacher-to-student interaction, including timely, frequent feedback about student progress;

(e) The means by which the public virtual school will verify student attendance and award course credit. Attendance at public virtual schools shall focus primarily on coursework and activities that are correlated to the Idaho state thoroughness standards;

(f) A plan for the provision of technical support relevant to the delivery of online courses;

(g) The means by which the public virtual school will provide opportunity for student-to-student interaction; and

(h) A plan for ensuring equal access to all students, including the provision of necessary hardware, software and internet connectivity required for participation in online coursework.

IDAHO CODE § 33-5209: Enforcement—Revocation—Appeal.

(1) An authorized chartering entity shall ensure that all public charter schools for which it approved petitions, or for which it has responsibility, operate in accordance with the approved charter. A public charter school or the authorized chartering entity may enter into negotiations to revise its charter at any time. A public charter school may petition to revise its charter at any time. The authorized chartering entity's review of the revised petition shall be limited in scope solely to the proposed revisions. In those instances where a non-virtual public charter school submits a proposed charter revision to the public charter school commission and such revision includes a proposal to increase such public charter school's approved student enrollment cap by ten percent (10%) or more, the commission shall hold a public hearing on such petition. The public charter school commission shall provide the board of the local school district in which the public charter school is physically

located, notice in writing of such hearing, no later than thirty (30) days prior to the hearing. The public hearing shall include any oral or written comments that an authorized representative of the school district in which the public charter school is physically located may provide regarding the impact of the proposed charter revision upon the school district. Such public hearing shall also include any oral or written comments that any petitioner may provide regarding the impact of the proposed charter revision upon such school district.

(2) If the authorized chartering entity has reason to believe that the public charter school has done any of the following, it shall provide the public charter school written notice of the defect and provide a reasonable opportunity to cure the defect:

(a) Committed a material violation of any condition, standard or procedure set forth in the approved charter;

(b) Failed to substantially meet any of the student educational standards identified in the approved charter;

(c) Failed to meet generally accepted accounting standards of fiscal management;

(d) Failed to demonstrate fiscal soundness. In order to be fiscally sound, the public charter school must be:

(i) Fiscally stable on a short-term basis, that is, able to service all upcoming obligations; and

(ii) Fiscally sustainable as a going concern, that is, able to reasonably demonstrate its ability to service any debt and meet its financial obligations for the next fiscal year;

(e) Failed to submit required reports to the authorized chartering entity governing the charter; or

(f) Violated any provision of law.

(3) A charter may be revoked by the authorized chartering entity if the public charter school has failed to cure a defect after receiving reasonable notice and having had a reasonable opportunity to cure the defect. Revocation may not occur until the public charter school has been afforded a public hearing and a reasonable opportunity to cure the defect, unless the authorized chartering entity reasonably determines that the continued operation of the public charter school presents an imminent public safety issue, in which case the charter may be revoked immediately. Public hearings shall be conducted by the governing authorized chartering entity, or such other person or persons appointed by the authorized chartering entity to conduct public hearings and receive evidence as a contested case in

accordance with section 67-5242, Idaho Code. Reasonable notice and opportunity to reply shall include, at a minimum, written notice setting out the basis for consideration of revocation, a period of not less than thirty (30) days within which the public charter school can reply in writing, and a public hearing within thirty (30) days of the receipt of the written reply.

(4) A decision to revoke a charter or to deny a revision of a charter may be appealed directly to the state board of education. With respect to such appeal, the state board of education shall substantially follow the procedure as provided in section 33-5207(5)(b), Idaho Code. In the event the state board of education reverses a decision of revocation, the public charter school subject to such action shall then be placed under the chartering authority of the commission.

IDAHO CODE § 33-5210: Application of school law—Accountability—Exemption from state rules.

(1) All public charter schools are under the general supervision of the state board of education.

(2) Every authorized chartering entity that approves a charter shall be responsible for ensuring that each public charter school program approved by that authorized chartering entity meets the terms of the

charter, complies with the general education laws of the state unless specifically directed otherwise in this chapter 52, title 33, Idaho Code, and operates in accordance with the state educational standards of thoroughness as defined in section 33-1612, Idaho Code.

(3) Each charter school shall comply with the financial reporting requirements of section 33-701, subsections 5. through 10., Idaho Code, in the same manner as those requirements are imposed upon school districts.

(4) Each public charter school is otherwise exempt from rules governing school districts which have been promulgated by the state board of education, with the exception of state rules relating to:

(a) Waiver of teacher certification as necessitated by the provisions of section 33-5205(3)(g), Idaho Code;

(b) Accreditation of the school as necessitated by the provisions of section 33-5205(3)(e), Idaho Code;

(c) Qualifications of a student for attendance at an alternative school as necessitated by the provisions of section 33-5208(3), Idaho Code;

(d) The requirement that all employees of the school undergo a criminal history check as required by section 33-130, Idaho Code; and

(e) All rules which specifically pertain to public charter schools promulgated by the state board of education.

IDAHO ADMINISTRATIVE CODE § 08.02.04.300: Public Charter School Responsibilities.

01. General. The governing board of a public charter school shall be responsible for ensuring that the public charter school is adequately staffed, and that such staff provides sufficient oversight over all public charter school operational and educational activities. In addition, the governing board of a public charter school shall be responsible for ensuring compliance with Title 33, Chapter 52, Idaho Code. (8-11-05)T

02. Compliance with Terms of Charter. The governing board of a public charter school shall be responsible for ensuring that the school is in compliance with all of the terms and conditions of the charter approved by the authorized chartering entity of the school, as reflected in the final approved petition filed with the Board. In addition, the governing board of the public charter school shall be responsible for ensuring that the school complies with all applicable federal and state education standards, as well as all applicable state and federal laws, rules and regulations, and policies. (3-10-05)T

03. Annual Reports. The governing board of a public charter school must submit an

annual report to the authorized chartering entity of the school, as required by Section 33-5206(7), Idaho Code. The report shall contain the audit of the fiscal and programmatic operations as required in Section 33-5205(3)(j), Idaho Code, a report on student progress based on the public charter school's student educational standards identified in Section 33-5205(3)(b), Idaho Code, and a copy of the public charter school's accreditation report. An authorized chartering entity may reasonably request that a public charter school provide additional information to ensure that the public charter school is meeting the terms of its charter. (3-10-05)T

04. Operational Issues. The governing board of the public charter school shall be responsible for promptly notifying its authorized chartering entity if it becomes aware that the public charter school is not operating in compliance with the terms and conditions of its charter. Thereafter, the governing board of the public charter school shall also be responsible for advising its authorized chartering entity with follow-up information as to when, and how, such operational issues are finally resolved and corrected. (3-10-05)T

David A. Cortman*
dcortman@telladf.org
GSB # 188810
Alliance Defense Fund
1000 Hurricane Shoals Road
Bldg. D, Suite 600
Lawrenceville, GA 30043
(770) 339–0774 telephone
(770) 339–6744 facsimile
Counsel for Plaintiffs

David J. Hacker*
dhacker@telladf.org
CSB # 249272
Alliance Defense Fund
101 Parkshore Drive, Suite 100
Folsom, CA 95630
(916) 932–2850 telephone
(916) 932–2851 facsimile
Counsel for Plaintiffs

Bruce D. Skaug
bruce@legaleaglesnw.com
Associated Local Counsel
ISB # 3904
Goicoechea Law Office—Nampa LLP
1226 E. Karcher Road
Nampa, Idaho 83687
(208) 466–0030 telephone
(208) 466–8903 facsimile
Counsel for Plaintiffs

* Admitted Pro Hac Vice

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

<table>
<tr>
<td>NAMPA CLASSICAL ACADEMY; ISAAC MOFFETT; M.K., a minor, by and through her next friend; MARIA KOSMANN, individually and as next friend of M.K, a minor,

Plaintiffs,

vs.

WILLIAM GOESLING, individually and in his official capacity as Chairman of the Idaho Public Charter School Commission ("Commission"); BRAD CORKILL, GAYANN DEMORDAUNT, GAYLE O'DONAHUE, ALAN REED, and ESTHER VAN WART, all individually and in their official capacities as members of the Commission; TAMARA L. BAYSINGER, individually and in her official capacity as the Commission's Charter Schools Program Manager; DR. MICHAEL RUSH, individually and in his official capacity as Executive Director of the State Board of Education ("Board"); PAUL AGIDIUS, Board President;</td>
<td>Case No. 1:09-cv-00427-EJL

PLAINTIFFS' SECOND AMENDED VERIFIED COMPLAINT</td>
</tr>
</table>

RICHARD WESTERBERG, Board Vice President; KENNETH EDMUNDS, Board Secretary; EMMA ATCHLEY, ROD LEWIS, DON SOLTMAN, MILFORD TERRELL, all individually and in their official capacities as members of the Board; TOM LUNA, individually and in his official capacities as Superintendent of Public Instruction, as Executive Secretary of the Board, and as Chief Executive Officer of the State Department of Education; and LAWRENCE WASDEN, in his official capacity as the Attorney General of the State of Idaho,

Defendants.

I. INTRODUCTION[1]

1. The Bible is arguably the most influential book that has ever been written. Along with being the best-selling book of all time, its influence in music, art, and literature is unparalleled. References to its stories, lessons and history can be found in innumerable books, movies, plays, artwork, and even in our every day language. It was one of the first resources ever used in this country's public schools to teach students to read.

[1] Defendants have consented to Plaintiffs filing this Second Amended Complaint.

2. Defendants have decided that the Bible, and every other "religious document and text," are now banned books in every public school throughout the State of Idaho.

3. The vast amount of legitimate educational material that Defendants are banning is simply astounding.

4. Nampa Classical Academy (the "Academy"), through its founders, has spent the last six years developing a charter school that employs a classical teaching curriculum. Defendants have known of the school's intended use of primary texts, both secular and religious.

5. Approximately one week before the Academy was originally scheduled to open its doors to over 500 students, and nearly one year after approving its charter, the Idaho Public Charter School Commission ("Commission") ruled that it was illegal to use any "religious documents or text in a public school curriculum" or to "use religious text in class or in the classroom." ("Order") *See* Exhibit ("Ex.") 1.

6. Defendants initially targeted the Bible, but later broadened their prohibition to include all religious texts. Defendant Commission issued the final Order on August 14th, based largely on an opinion issued by the Attorney General's office, holding that if Plaintiffs were to utilize any religious text, even objectively as a resource to teach history, literature, art, music, or other subject, the Commission would issue a notice of defect for the purpose of revoking the Academy's charter. *See* Ex.

2 (Attorney General's opinion letter).

7. This Order was issued despite the fact that the State Department of Education has included a Bible as literature course among its list of courses in public education curricula, and despite the fact that public schools across the State utilize the Bible and other religious texts in their curriculum.

8. Defendants have since issued a notice of defect to the Academy for using religious documents and text as part of their curriculum and are rapidly moving to revoke the Academy's charter in order to close down the school.

9. Out of the hundreds of public schools throughout the State of Idaho, Defendants have singled out Plaintiffs for this censorship.

10. Defendants' newly crafted Policy and practice violate Plaintiffs' rights.

II. JURISDICTION AND VENUE

11. This action arises under the United States Constitution, specifically the First and Fourteenth Amendments, and under federal law, particularly 28 U.S.C. § 2201 and 42 U.S.C. §§ 1983 and 1988.

12. This Court has jurisdiction over Plaintiffs' federal claims by operation of 28 U.S.C. §§ 1331 and 1343, and over the supplemental state law claim under § 1367.

13. This Court is vested with authority to grant Plaintiffs' requested declaratory relief by operation

of 28 U.S.C. §§ 2201 and 2202 and under Federal Rule of Civil Procedure 57.

14. This Court is authorized to grant Plaintiffs' requested injunctive relief under 42 U.S.C. § 1983 and Rule 65 of the Federal Rules of Civil Procedure.

15. This Court can award Plaintiffs' damages (against the individual capacity Defendants only) under 28 U.S.C. § 1343.

16. This Court can award Plaintiffs' attorneys' fees and costs under 42 U.S.C. § 1988.

17. Venue is proper under 28 U.S.C. § 1391 in the District of Idaho because the claims arose there, the parties reside there, and the cause has the greatest nexus there.

III. IDENTIFICATION OF PLAINTIFFS

18. Plaintiff Nampa Classical Academy is incorporated as a not-for-profit organization under the laws of the State of Idaho and may sue and be sued.

19. Plaintiff Academy (through its founders and board members) has structured its entire curriculum in a classical, liberal arts format, and focuses its study not on textbooks but rather on primary sources as a method of educating its students.

20. Such primary sources are both secular and religious, the majority being secular.

21. Plaintiffs believe that many students are

receiving an inadequate education and therefore Plaintiffs are utilizing a historical, classical teaching model.

22. For example, unlike the Academy, many schools do not even require reading primary sources when studying a particular document (*e.g.*, the Constitution of the United States or of Idaho), but rather rely on secondary sources, such as textbooks.

23. By contrast, the Academy's historical model features a traditional, value-centered curriculum stressing subject mastery and critical analysis. Rather than reading from secondary or even tertiary sources, such as textbooks, as do traditional public schools, the Academy utilizes primary sources in their stead, including both secular and religious documents and texts.

24. Plaintiff Isaac Moffett is a founder of the Academy, and is currently a teacher.

25. Mr. Moffett has had the primary role of drafting the curriculum.

26. Teachers are permitted to utilize a variety of sources for teaching their respective courses, including those that are religious documents or text.

27. Mr. Moffett teaches several classes, including 7th and 8th grade geography and 11th grade history, in which he incorporates references to the religions of both the time period and the particular region being studied, and does so by utilizing applicable religious documents or text.

28. Mr. Moffett and all other teachers cannot adequately teach students about history and geography (and other courses) while they are required by Defendants to censor the religious documents and texts of these cultures.

29. These religious documents serve to inform the students about the history of each culture in many ways, including their choice of food, shelter, architecture, customs, habits, laws, beliefs, etc.

30. Defendants through their actions, including through the Order, specifically and directly prohibit Mr. Moffett and all other teachers from including any religious documents or text in the school curriculum or in the class or in the classroom.

31. Defendants' censorship of all religious documents prohibits Mr. Moffett and all other teachers from teaching from a vast array of educationally valuable resources that happen to be religious.

32. Plaintiff Mrs. Kosmann is the mother and legal guardian of Plaintiff M. K. and brings this action both individually as a school employee and parent of several children attending the Academy, and as next friend of M.K.

33. Mrs. Kosmann has chosen to work at and send her children to the Academy precisely because it uses the time-tested classical curriculum, which includes many primary sources, including those that are religious.

34. Mrs. Kosmann, as both a parent and school

employee, believes that the quality of her children's education will suffer without the religious texts.

35. Mrs. Kosmann teaches certain classes and also is a substitute teacher. In one of the classes, she taught/teaches Egyptian history, which includes the religious ceremonies and beliefs of the Egyptians.

36. The Order prevents Mrs. Kosmann from using any religious documents or text to teach this facet of Egyptian history.

37. Defendants' Order and actions have harmed Mrs. Kosmann in several ways, including prohibiting her from using any religious documents or text when teaching any of the classes, including when she is teaching about Egyptian history.

38. As a result of Defendants' Order and actions, Mrs. Kosmann also faces the uncertainty of whether the school will remain viable, whether she will lose her job, will have her six children who attend the Academy displaced, or will have lost the tremendous investment of time and money that she has already expended in assisting the Academy and her children.

39. Plaintiff M.K. is currently a 9th grade student who began school on September 8th, 2009.

40. M.K. desires to learn about U.S. history, geography, civics, art, music, literature and other courses and to study the applicable secular and religious documents in such courses.

41. M.K. desires to learn about the various

religions historically found in western civilization, to read primary religious and secular documents, and to include these documents in her class work.

42. M.K. also desires to better understand the many religious and Biblical allusions and teachings found in many secular texts that she will be reading, such as *Of Mice and Men*, *The Hunchback of Notre Dame*, and *The Adventures of Huckleberry Finn*, to name a few.

43. She will only be able to obtain this knowledge by studying the primary religious sources that are quoted or alluded to in these works, but is prohibited from doing so by Defendants' Order and actions.

44. One of the main reasons that M.K. and her parents decided that she would attend the Academy was so that she would be able receive such classical instruction, including learning directly from the religious and secular primary sources that are integrated into the curriculum.

45. Defendants' actions, including the Order and Notice, force Plaintiffs to censor the use of all religious documents and text, and directly affect M..K.'s right to receive information that has legitimate educational value.

46. Defendants' actions, including the Order and Notice, which prohibit all religious documents and text from the curriculum and the classroom also directly prohibit M.K. from utilizing religious documents such as the Bible in class when she is completing course work, research papers or projects.

47. As Plaintiffs continue to utilize religious documents they remain in violation of the Commission's Order and Notice.

48. The school, the teachers, and the students, including all Plaintiffs, are unlawfully being chilled in the exercise of their rights to use religious documents and texts by the continued punishment at the hands of the Defendants, including moving towards revocation of their Charter.

IV. IDENTIFICATION OF DEFENDANTS

49. The Public Charter School Commission ("Commission"), acting through its members, is tasked with oversight of public charter schools, including the Academy.

50. The Commission and its members are under the authority of the State Board of Education.

51. The Commission's, and therefore its members', authority is limited to that which is expressly enumerated in Idaho statutes and administrative code. *See* I.C. 33-5201, *et seq.* and IDAPA 08.02.04.

52. The Commission is comprised of seven members, all appointed by the Governor.

53. The Commission, acting through its members, has issued the Order and Notice of Defect ruling that Plaintiffs cannot utilize any religious documents or text in their curriculum or in the classroom.

54. William Goesling is the Chairman of the

Commission and is sued in both his individual capacity and in his official capacity as Chairman of the Commission.

55. In retaliation for Plaintiffs' exercising their rights to use religious documents in the curriculum and for filing this lawsuit, Mr. Goesling has made inappropriate and untrue comments concerning the Academy, including his accusation that it is a "religious school."

56. Such inappropriate and inaccurate comments are harming the Academy.

57. Brad Corkill, Gayann DeMordaunt, Gayle O'Donahue, Alan Reed and Esther Van Wart are all sued individually and in their official capacities as members of the Commission.

58. The members have voted to issue the challenged Order and Notice of Defect that prohibit Plaintiffs from utilizing any and all religious documents or text in the classroom or as part of the curriculum, followed by revocation of the Academy's charter if Plaintiffs continue to refuse to remove all such religious documents.

59. Defendants' actions, including those mentioned herein, and the Order and Notice of Defect, have already irreparably harmed Plaintiff by causing loss of students, loss of reputation, instability and chilling of speech, among others.

60. Revocation of the Academy's charter would, among other things, close the school, leave over 500 students without a school to attend, eliminate the

jobs of dozens of teachers and employees, and require that all the Academy's assets be transferred to the Commission.

61. Plaintiffs are challenging Defendants' actions, the Order and Notice, on their face and as applied to them.

62. Tamara L. Baysinger is Charter Schools Program Manager of the Commission and is sued in both her individual capacity and in her official capacity as an employee of the Commission.

63. In this position, Ms. Baysinger has harassed and is continuing to harass Plaintiffs by issuing multiple notices of defect, by making several improper and negative statements publicly concerning the Academy, by issuing several improper public records requests to the Academy, all after the Commission decided that the Academy could not use any and all religious documents or texts in the classroom or as part of the curriculum and all in retaliation for the Academy exercising its right to use religious documents in the curriculum and for filing the instant lawsuit.

64. The Idaho State Board of Education ("Board"), acting through its members, is the designated policymaking body for all of Idaho's educational institutions, agencies and schools, including the Charter School Commission and the Academy.

65. The Board's power is prescribed by law. *See* Idaho Const. Art. IX, § 2.

66. The Board, acting through its members, is

responsible for all acts of the Commission and for ensuring that its policies and procedures are followed.

67. The Board, through all of its members, has adopted a new Policy and practice of prohibiting all religious documents and text from being utilized as educational resources in all public schools in the state, including at the Academy.[2]

68. Dr. Michael Rush is the Executive Director of the Board and is sued individually and in his official capacity as Executive Director of the Board.

69. In this capacity, Dr. Rush is responsible for adopting rules and regulations that govern all Idaho public schools, including the Idaho Charter School system, and for ensuring its rules and regulations are followed, including the Policy challenged herein prohibiting Plaintiffs from utilizing any religious text in the curriculum or in class. He is sued in his official and individual capacities.

70. Idaho State Board of Education members include Paul Agidius, Board President, Richard Westerberg, Board Vice President, Kenneth Edmunds, Board Secretary, Emma Atchley, Board member, Rod Lewis, Board member, Don Soltman, Board member, and Milford Terrell, Board member. The members are all sued individually and in their

---

[2] Since Plaintiffs are challenging the Order, the Notice of Defect, the Policy, and the practice, which include all of Defendants' actions, each reference herein to the Order, Notice, Policy, practice or actions, encompasses all whether or not individually mentioned, and also pertains to each Defendant.

official capacities as members of the Board. All members are responsible for adopting rules and regulations that govern the all Idaho public schools, including the Idaho Charter School system, and for ensuring its rules and regulations are followed, including the Policy challenged herein prohibiting Plaintiffs from utilizing any religious text in the curriculum or in the classroom.

71. Tom Luna is the Superintendent of Public Instruction, the Chief Executive Officer of the State Department of Education, and the Executive Secretary of the Board.

72. Mr. Luna is sued individually and in his official capacities as Superintendent, Chief Executive Officer, and as Executive Secretary.

73. In these positions, Mr. Luna is responsible for adopting rules and regulations that govern all Idaho public schools, including the Idaho Charter School system. He is responsible for executing and enforcing the policies, procedures, and duties authorized by applicable state and federal statutes and the policies and procedures of the Board for all the elementary and secondary schools in Idaho. He is responsible for carrying out and enforcing the policies, procedures and duties authorized by law, including the Policy challenged herein.

74. Defendant Lawrence Wasden is the Attorney General of the State of Idaho. In this capacity, Mr. Wasden is responsible for advising all state agencies, including the Board and the Commission, regarding matters of law. His office provided the legal opinion

upon which the Commission relied in Ordering Plaintiffs to discontinue use of all religious documents and text in the curriculum or in the classroom. Mr. Wasden is also charged under the Idaho Constitution with representing the Board and Commission in enforcing their rules, regulations, and policies, along with generally enforcing state law. Mr. Wasden is responsible for enforcing the Policy prohibiting Plaintiffs from utilizing any religious documents and texts. He is sued in his official capacity.

V. STATEMENT OF FACTS

75. Plaintiffs Academy and Moffett originally began the process for developing a charter school in 2003.

76. After years of researching, drafting and planning, Plaintiffs Academy and Moffett presented their original Charter Petition—which was over sixty pages long—to the Commission and the State Board of Education in October of 2007.

77. Plaintiffs Academy and Moffett presented their Final Petition in July of 2008.

78. The State Board of Education officially approved the Charter in September of 2008.

79. Plaintiffs Academy and Moffett met several additional times with the Commission, or associated bodies, throughout 2007, 2008 and 2009.

80. Each time, Plaintiffs Academy and Moffett received positive responses from the Commission.

81. The Commission was aware that the curriculum focused on utilizing primary sources and not on traditional textbooks.

82. In a meeting that occurred in late July, 2009, however, Defendant Commission members, for the first time, raised the question whether it was permissible to use the Bible in any manner as part of the curriculum.

83. Commission members requested a legal opinion letter, which was to be submitted by August 11th, three days prior to a specially called meeting to decide the issue.

84. Plaintiffs retained counsel and submitted the letter. Attached as Ex. 3.

85. At the August 14th meeting, Defendant Comission members voted to prohibit Plaintiffs from using any "religious documents and text" in its curriculum or in the classroom, *see* Ex. 1, based on an opinion letter that the Commission had requested and received from the Office of the Attorney General of Idaho, *see* Ex. 2.

86. The Order warned that if Plaintiffs proceeded to use any such religious documents or text it would be issued a notice of defect for the purpose of revoking the charter.

87. This Order was issued despite the fact that officials from the State Department of Education and the Commission routinely made public statements about the legality of using the Bible and other religious texts in public schools.

88. Moreover, the Idaho Constitution, article IX, section 6, upon which the denial was based, does not prohibit "religious documents or text." Rather it prohibits "books, papers, tracts or documents of a political, sectarian or denominational character" and prohibits "sectarian or religious tenets or doctrines."

89. Defendants conveniently ignore the Constitution's prohibition on political documents, which exists in precisely the same Constitutional provision, and which has not been enforced at all against any public school. According to Defendants' hyper-strict construction of this provision, it would be unconstitutional for public schools to study the Declaration of Independence or the Mayflower Compact; two obviously political (and arguably religious) documents.

90. In its letter, Plaintiffs' counsel pointed out that use of the Bible, for example, is not prohibited by this section for several reasons: first, based on the history of the constitutional convention, the Commission was engaging in an incorrect and overly-strict reading of this provision because the Bible was not and is not a "sectarian or denominational" book (there are many different denominations and sects that follow the Bible's teachings); second, the founders' primary focus was to prohibit doctrinal disputes but not to attack religion generally, hence the narrow prohibition of sectarian or religious tenets or doctrines being taught; third, the votes of the delegates to the convention made clear that the Bible could be taught in public schools. *See* Ex. 3.

91. Plaintiff also pointed out that Defendants' prohibition would violate several federal constitutional rights of Plaintiffs.

92. In November of 2009, Defendants made good on their promise and issued a Notice of Defect based on Plaintiffs' decision to objectively use religious documents as part of the curriculum.

93. Defendants are in the process of revoking Plaintiffs' charter and will do so unless Plaintiffs censor all religious documents from the curriculum and classroom use.

94. Plaintiffs have no intent, nor have they ever, to use any religious text in devotional manner, nor will any sectarian or religious tenets or doctrines be taught.

95. Religious materials, like all other documents and text, are utilized in an appropriate study of western civilization in classes such as history, literature, art or music.

96. Plaintiffs currently use many different religious and political documents and texts, similar to many other public schools in the State.

97. Some examples of "religious documents or text" that Plaintiffs use include the Bible, the Koran, the Book of Mormon, the Hadieth, the Epic of Gilgamesh, Hesiod Theogony Works and Days (Greek gods), the Code of Hammurabi (Babylonian), teachings of Confucianism, Hinduism, ancient Egyptian religions, Assyrian religions, Roman gods, Eastern religions, Mesopotamian religions, etc.

Other Public Schools and the Use of Religious Documents and Text

98. The State Department of Education has issued curriculum content standards that contain religious and political studies.

99. The Department has included in its list of public school courses a Biblical Literature class.

100. State geography objectives include describing the historical origins, central beliefs, and spread of major religions, including Judaism, Christianity, Islam, Hinduism, Buddhism, and Confucianism.

101. Geography standards also include the requirement to compare and contrast cultural and religious patterns in the eastern hemisphere, including a discussion of how religion influences behavior in different societies.

102. Likewise, state language arts standards require an evaluation of political and religious influences of the relevant historical period.

103. Similarly, state world history and civilization standards include the objectives of explaining how religion affected people's understanding of the natural world, how it shaped the development of western civilization, and how it influenced social behavior.

104. Despite the indisputable educational value of studying primary religious (and political) sources, the Commission's remarkable position forces

Plaintiffs to shut these sources out of the classroom.

105. Prior to the recent ruling, the spokesperson for the Board publicly stated that it is permissible to use the Bible in literature or history courses.

106. The Commission's program manager has stated publicly its position that it is permissible to use the Bible as a text in history or literature courses.

107. So too has Defendant Luna stated his position that it is permissible to objectively teach utilizing religious texts, such as the Bible, in public schools.

108. Just by way of example of the many schools across the state that utilize religious documents as part of their curriculum in accordance with the state curriculum content standards, the Independent School District of Boise City incorporates into its curriculum or studies: "sacred texts: the Book of the Dead, Hebrew: Genesis [the Bible], Rig Veda [Hinduism], and the Koran [Islam];" native American spiritual world, Puritan theological studies, Theism, and Transcendentalism.

109. The Boise City School District also incorporates into their curriculum as literature: "Praise Songs, Proverbs, The Parable of the Prodigal Son [Bible], Zen Teaching and Zen Parables [Buddhism]."

110. This does not even take into account the plethora of documents utilized by Plaintiffs, and in

other public schools in the State, that themselves reference the Bible or Biblical teachings, such as *Shakespeare*, *The Grapes of Wrath*, *Of Mice and Men*, *The Old Man and The Sea*, and *To Kill a Mockingbird*.

Other Charter Schools and the Use of Religious and Political Documents and Text

111. Other charter schools also incorporate religious and political documents and text into their curriculum.

112. Idaho Virtual Academy ("IDVA") is one such school.

113. IDVA's literature courses incorporate religious documents such as the Bible as part of the lessons.

114. Xavier Charter School utilizes a classical based curriculum and relies on primary sources.

115. Xavier teaches about the major religions and belief systems throughout history utilizing the Hebrew scriptures (the Torah), the Bible, and Greek mythology.

116. Classes such as History, Civic Responsibility and Political Novel Discourse emphasize Judeo-Christian and Greco-Roman thought and establish the religious and/or political contexts crucial to understanding western civilization. These courses utilize religious and/or political documents and text as primary sources.

117. K12 curriculum, which is used by charter schools, likewise utilizes religious and/or political documents and text as primary sources in, for example, history, government, and politics classes where students investigate major religions and belief systems throughout history and examine the roles of political parties and culture.

118. Unsurprisingly, the inclusion of religious and political writings in curricula used in public schools statewide, including original documents and text, is undeniable.

The State Board of Education

119. The State Board of Education through its members has authority over charter schools and over the Commission and has promulgated rules for its governance. *See* Idaho Administrative Code "ADAPA" 08.02.04, "Rules Governing Public Charter Schools."

120. The Board, through its members, also grants or withholds charter approvals.

121. The Board, through its members, has approved the Academy's charter.

122. The Board, through its members, has the authority to overrule the Commission's decision regarding their overly restrictive and incorrect reading of the applicable constitutional provision as it pertains to prohibiting any "religious documents or text."

123. The Board members refuse to exercise such

authority and have therefore approved of and acquiesced in the Commission's decision.

124. The Board members have approved the Order and Notice and therefore have created a Policy and procedure of the Board.

125. Ironically, the State Board of Education has included a Bible as Literature course in its course list for the state's public schools.

126. Such a course violates the Order as issued by the Commission and as adopted by the Board members.

127. Further, the Order of the Commission members and Policy of the Board members are outside their statutory authority.

128. Charter schools are statutorily exempt from rules governing school districts, except for a short enumerated list that has no application here. *See* I.C. 33-5210(4).

129. As such, charter schools are exempt from state curriculum requirements that are issued by the Board which mandate choice of state-approved textbooks in the curriculum. *Id.*

130. Thus, Defendants are violating state law by trying to do indirectly (control Plaintiffs' curriculum) that which they cannot legally do directly.

The Authority of the Commission

131. The Commission members only hold as much authority as is provided in the law.

132. The laws relating to the formation of charter schools and the Commission members' authority is clearly delineated in the Idaho Code, sections 33-5201, *et seq; see also* ADAPA 08.02.04.

133. For instance, as discussed above, Commission members do not have complete authority over the curriculum of charter schools, and specifically as it relates to choice of textbooks or use of primary sources. *See* I.C. 33-5210(4).

134. Also, the Commission members' authority to issue a notice of defect is limited to certain grounds. *See* I.C. 33-5209.

135. Plaintiffs have not violated any of the enumerated grounds for issuance of a notice of defect or revocation of its charter.

136. Defendants are apparently relying on the catch-all provision that if a charter school has "violated any provision of law," they may issue a notice of defect. *See* I.C. 33-5209 (2)(f).

137. But the only "violation" of any law has been concocted by Defendants themselves.

138. It is Defendants' incorrect reading of the Idaho constitution that created the alleged violation.

139. Defendants base their prohibition of

"religious documents or text" on the language found in article IX, section 6 of Idaho's Constitution.

140. This section, however does not prohibit "religious documents or text," but rather prohibits "sectarian or religious tenets or doctrines" and "books, papers, tracts or documents of a political, sectarian, or denominational character" from being introduced in public schools.

141. There exists a tremendous difference between what Defendants have prohibited and what the constitution actually prohibits: the Idaho founders intended on prohibiting doctrinal disputes (the truth or accuracy of denominational tenets), not the objective study of the Bible or other religious texts.

142. As stated above, Defendants ignore the Constitution's prohibition on political documents, which exists in the same Constitutional provision, and which has not been enforced at all against any public school. According to Defendants strict construction of this provision, it would be unconstitutional for public schools to study any "political" documents or text (whatever that may include).

143. Since Plaintiffs have not violated any provision of law, Commission members are without any authority to issue the notice of defect.

Defendants' Retaliation Against the Plaintiffs

144. After Plaintiffs filed the instant lawsuit on September 1, 2009, Tamara Baysinger and the

Commission began issuing voluminous public records requests to the Academy on issues related to the present litigation.

145. In October 2009, Baysinger issued public records requests to the Academy for voluminous documents from July 2009 (which is, not so coincidentally, the date on which the Commission first applied its unconstitutional Policy to the Academy) to the present.

146. Baysinger gave the Academy only one week to comply with this request which does not comply with any law and is beyond her authority.

147. Plaintiffs gathered and sent most of the documents as requested, and asked for a short extension for the remainder of the documents.

148. Baysinger denied the Plaintiffs' request for extension and issued a notice of defect for failure to comply with her public records request.

149. In November, 2009, Baysinger issued a public records request to the Academy requesting all curricular materials relating to the seventh grade assignment on "Comparing the Codex Hammurabi with the Mosaic Law."

150. Also in November, 2009, Baysinger issued another public records request relating to the Academy's curriculum.

151. In November, 2009, Baysinger and the Commission issued several notices of defect.

152. On or about November 23, 2009, Baysinger and the Commission issued a notice of defect because the Academy uses religious text as a part of its curriculum, as do many other schools.

153. Defendant Goesling has stated that the Academy is a "religious school" merely because the Academy uses religious documents and texts as part of its curriculum.

154. After the filing of this lawsuit, the Commission also notified the Academy that it is required to undergo a programmatic audit of all its activities.

155. The Commission insists that Baysinger serve on the programmatic audit committee.

156. Under Idaho law, a programmatic audit is not required until the charter school's second year of operation.

157. Baysinger has no legal right to serve on the programmatic audit committee.

158. In fact, Baysinger has commented publicly about the Academy's lawsuit against the Commission, stating her disagreement with the Academy's practice of using religious texts. She has a conflict of interest for her participation on the programmatic audit committee.

159. Baysinger and the Commission engaged in their actions, including issuing public records requests, ordering a programmatic audit, and making negative and inappropriate public

comments, all in retaliation for Plaintiffs filing this federal lawsuit and for Plaintiffs exercising their constitutional right to free expression by use of religious texts in the curriculum.

160. Plaintiffs are complying with all of Baysinger's proper public records requests. In the mean time, Baysinger and the Commission are issuing notices of defect to the Academy based on these retaliatory requests.

161. Baysinger and the Commission issued public records requests on factual matters that pertain to this litigation which violates the law.

162. Plaintiffs' employees have been required to work full time to respond to Defendants' public records requests and prepare for the programmatic audit, and Plaintiffs have been required to pay Academy employees overtime to comply with these requests.

163. The Defendants's public records requests are arbitrary and impose deadlines that are impossible to meet by the Academy.

164. The Defendants' notices of defect were issued, negative comments were made publicly, and the programmatic audit instituted as a result of the Plaintiffs filing the instant lawsuit and as a result of Plaintiffs exercise of their constitutional right to use religious texts as a part of their curriculum.

165. Defendants took these actions in order to threaten, harass, and punish Plaintiffs for filing the lawsuit and for exercising their constitutional right

to use religious texts as part of the curriculum.

166. Plaintiffs are chilled from engaging in future First Amendment activity as a direct and proximate result of the Defendants' actions.

VI. ALLEGATIONS OF LAW

167. All of the acts of Defendants, their officers, agents, employees, and servants were executed and are continuing to be executed under the color and pretense of the policies, statutes, ordinances, regulations, customs, and usages of the State of Idaho.

168. The decision to deny Plaintiffs' right to incorporate religious documents into the curriculum and the classroom is a direct result of Laws, policies, practices, customs, and usages officially adopted and promulgated by the Defendants.

169. Unless Defendants' censorship of Plaintiffs' curriculum materials is enjoined, along with the Policy, practice and actions upon which it is based, Plaintiffs will continue to suffer irreparable harm to their constitutional and statutory rights.

170. Plaintiffs have no adequate or speedy remedy at law to correct or redress the deprivation of their rights.

171. Plaintiffs desire to utilize religious and political texts and documents in the curriculum and in the classroom without being prohibited from doing so, without a determination of illegality, without receiving a notice of defect for violating the law, and

without revocation of the Academy's charter.

172. Unless Defendants' unconstitutional Policy is enjoined, the Academy will be unable to open its doors as scheduled on September 8th, 2009, without Plaintiffs being in violation of the Policy.

173. It is impossible for Plaintiffs to abide by Defendants' Policy for several reasons: first, it is unconstitutionally vague and Plaintiffs cannot know what "religious and/or political documents or texts" would violate the Order; second, there would exist tremendous gaps in the curriculum if all such documents were required to be removed; and third, it has taken many years to prepare and draft the curriculum, and it cannot so easily be rewritten to satisfy Defendants' Policy.

174. If the Academy is forced to close its doors, over 600 students, teachers and administrators, including Plaintiffs, will be displaced.

175. If Plaintiff Academy remains open but must comply with the Order, which in fact states that it is operating in violation of the law, Plaintiffs will be irreparably harmed in a myriad of ways: they will be unable to teach or learn from a vast amount of educationally valuable resources; they will be unable to exercise their First Amendment rights to use such materials, they will lose their good reputation, they will continue to lose students who do not want to attend a school with an uncertain future (they have already had several students withdraw over this issue), they would be forced to operate without a complete curriculum, which would

significantly diminish the quality of the education they are offering, and their federal and state constitutional and statutory rights will be violated.

176. Plaintiffs therefore request that this Court maintain the status quo and enjoin Defendants' unconstitutional Order, enjoin Defendants' Notice of Defect, and enjoin Defendants from revoking the charter, until such time as this issue can be fully litigated.

177. There should be no rush on the part of Defendants as this issue carries much constitutional significance, particularly since it applies to all schools across the State, regardless of whether Defendants enforce it in that manner.

178. Many public schools across the state are utilizing both religious and political documents and text (which violates Defendants' Policy), as they have for decades.

179. There is no harm to Defendants to allow Plaintiffs to utilize the same resources as other schools across the state until this issue has been analyzed and litigated more thoroughly.

180. Defendants' entire premise is based on a misreading of the constitution and their actions are violating Plaintiff's rights.

181. If Defendants are permitted to enforce the Order, Notice and Revocation against Plaintiffs and are proved wrong, the harm to Plaintiffs cannot be undone; if Defendants are proved correct, no harm would have come to them.

182. If Defendants are permitted to continue issuing public records requests, notices of defect, and making inappropriate public comments against the Plaintiffs, then Plaintiffs will continue to endure retaliation because they filed a federal lawsuit and because they are engaging in protected speech.

183. The First Amendment to the United States Constitution protects the right to petition the government for redress of grievances, which includes the right to file a lawsuit against the government, and protects the speech that plaintiffs are engaging in by using religious sources as part of the curriculum.

184. Defendants' public records requests regarding issues that pertain to this lawsuit violate Idaho state law and constitute illegal retaliation under federal law.

185. Defendants' programmatic audit violates Idaho state law and constitutes illegal retaliation under federal law.

186. Defendants' continued negative and untrue public comments constitute illegal retaliation under federal law.

FIRST CAUSE OF ACTION
VIOLATION OF PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION

187. Plaintiffs reallege the preceding paragraphs and incorporate them herein.

188. Defendants have violated Plaintiffs procedural due process rights by issuing the Policy that is contrary to the Constitution's written terms, that is overly restrictive of the use of religious texts in public schools, and that violates Plaintiffs' rights.

189. The Policy is an unconstitutionally vague restriction on its face and as applied because it fails to adequately advise, notify, or inform persons subject to its requirements, such as Plaintiffs, including the requirement as to exactly what it prohibits.

190. The Policy is an unconstitutionally vague restriction on its face and as applied because it fails to provide fair notice and warning to individuals, such as Plaintiffs, as to what constitutes religious documents or text.

191. The Policy is unconstitutionally vague because it lacks any standards or criteria to guide those charged with enforcing it and thus gives Defendants unbridled discretion to determine what documents or texts are, and are not, religious, and therefore, permissible or impermissible within public schools.

192. Defendants have admitted they do not even know what documents are considered religious.

193. Consequently, there are innumerable instances in which the Policy's intended application is unclear, causing a real and substantial deterrent effect on a broad range of constitutionally-protected expression.

194. Plaintiffs and other school officials and students will be forced to steer far clear of using any prohibited documents to avoid the substantial penalties for non-compliance, which will further chill constitutionally-protected expression.

195. The Policy's vagueness also creates a significant risk of arbitrary and discriminatory enforcement, because it fails to adequately define what it prohibits.

196. In fact, this arbitrary and discriminatory enforcement has already occurred. Defendants have arbitrarily and discriminatorily enforced the Order against Plaintiffs, but have not imposed similar restrictions on any other public school, including charter schools, within the state.

197. The Policy imposes irrational and unreasonable restrictions on the exercise of Plaintiffs' constitutional and statutory rights.

198. Defendants have violated Plaintiffs' due process rights by acting arbitrarily, capriciously, unreasonably, and with improper motives by selectively enforcing the Policy as to Plaintiffs, but not as to other public schools, teachers, or students within the state.

199. Defendants are arbitrarily and discriminatorily targeting Plaintiffs' choice of curriculum, including selective enforcement of the alleged "religious" prohibition in the Idaho constitution while ignoring the "political" prohibition that appears in the very same sentence of the same constitutional provision.

200. Defendants do not have a compelling, or even rational, reason to prevent Plaintiffs from the objective utilization of religious documents as part of the curriculum or classroom.

201. The Policy violates Plaintiffs' procedural due process rights on its face and as applied in violation of the Fourteenth Amendment to the United States Constitution.

202. Wherefore, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the prayer for relief.

SECOND CAUSE OF ACTION: VIOLATION OF THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION

203. Plaintiffs reallege all matters set forth in the paragraphs 1–186 and incorporate them herein.

204. The Defendants' discretion to manage school affairs is limited by the imperatives of the First Amendment.

205. Defendants' Policy prohibits speech in advance if it taking place, discriminates against speech based on its content and viewpoint, violates academic freedom, violates the right to receive information, and is an overbroad restriction on speech.

206. Defendants' Policy prohibits a substantial amount of free expression in public schools, including a vast array of documents and texts that

Plaintiffs currently use.

207. Plaintiffs' curriculum includes both secular and religious documents and text, but only those that are religious are singled out for prohibition.

208. The Policy prohibits any speech from a religious document or text, even if it is relevant, appropriate, and applicable to the particular educational study.

209. Defendants have complete and unbridled discretion, without any guidelines whatsoever, to determine what speech is from a religious document or text.

210. Is it only primary sources that are banned, and if so, who determines what constitutes a primary source? Does the Order's ban apply to secondary sources? And if a secondary source quotes religious text from a prohibited primary source, is that prohibited or allowed?

211. Defendants' Policy is an unconstitutional prior restraint because it prohibits speech in advance of it taking place and Defendants have no guidelines to govern their *ad hoc* decision making.

212. Defendants' Policy also discriminates against the content and viewpoint of speech.

213. Defendants permit any curriculum or class work to include secular content and viewpoints, but they simultaneously prohibit religious content and viewpoints discussing the same subjects.

214. It is permissible to study literature, for example, from a secular point of view, but not from a religious point of view.

215. In American History, for example, it would be permissible to read from any book that was utilized in the drafting our country's laws (assuming, of course, such books were not deemed impermissibly political in nature and did not incorporate "too much" religious text), but it would be impermissible to read from the Bible, even though much of our legal code is derived from the Old Testament.

216. The same holds true for all subject matters.

217. Such content and viewpoint based discrimination is unconstitutional.

218. Defendants' Policy likewise violates educators' academic freedom protected by the First Amendment.

219. Schools and teachers have a constitutional right to teach and utilize materials that are in accordance with their established curriculum.

220. Defendants' Policy censors Plaintiffs Moffett and Kosmann, and all other teachers, and prohibits them from using any religious texts, even objectively as a resource to teach literature, history, art, music, geography, or any other subject, even though the material is of educational value.

221. Defendants' Policy also violates Plaintiffs Kosmann's and M.K.'s, and all other parents' and

students', fundamental right to receive information that is of educational value.

222. The right to receive information is an inherent corollary of the right of free speech and is a necessary predicate to Plaintiffs Kosmann's and M.K.'s meaningful exercise of their own rights of speech, press, and political freedom.

223. Religious documents and text are invaluable educational resources for many subject matters, including history, literature, art, music, civics, geography and law.

224. The Policy also prohibits M.K.'s right to use the Bible or other religious texts in class when doing coursework, projects, presentations, etc.

225. Completely censoring any and all religious documents and text eliminates a large amount of Plaintiffs' appropriate educational materials and is both content and viewpoint based.

226. The Policy is also extremely and substantially overbroad.

227. It covers an enormous amount of protected, non-disruptive speech for prohibition.

228. The Policy is not properly aimed at any specific government interest and is not reasonably related to any legitimate pedagogical concern.

229. Wherefore, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the prayer for relief.

THIRD CAUSE OF ACTION: VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION

230. Plaintiffs reallege all matters set forth in the paragraphs 1–186 and incorporate them herein.

231. The Establishment Clause of the First Amendment requires the government to act with a secular purpose, to neither promote nor inhibit religion, and forbids excessive entanglement with religion.

232. The removal of all religious documents and text is not a secular purpose.

233. Defendants are inhibiting religion to such an extent that every public school, teacher and student cannot include any religious documents or text in the curriculum or in class.

234. By specifically prohibiting religious documents from the classroom, any objective observer would understand that the Defendants disapprove of religion and believe that it has no place in our educational system.

235. Every court to consider the issue has acknowledged that it is constitutionally permissible to teach the Bible in an objective manner as part of history, literature, geography, art or music, etc.

236. Defendants' hostility is evinced by the fact that Plaintiffs can utilize poetry reading from every secular source, but not from a religious source, such

as the Book of Lamentations.

237. Plaintiffs are permitted to study every great literary work, but none that are religious.

238. Even a secondary source that quotes the Bible or other religious documents includes religious text and therefore must be excluded from public school classrooms under the Policy.

239. Defendants' Policy also creates excessive entanglement with religion.

240. The Policy requires that government officials scrutinize and continually monitor every aspect of every public school's curriculum and other classroom-related expression to determine whether it introduces religious text or documents in the classroom.

241. Government officials are not qualified to determine what a religious document may be, what comprises religious text, how much text it takes for a document to be religious, what type of text makes a document religious, or to distinguish between primary and secondary religious sources.

242. This broad-reaching prohibition would exclude reading many of our founding documents which contain many Biblical quotations and text.

243. Defendants have violated the Federal Establishment Clause as applied to the states through the Fourteenth Amendment by failing to have a secular purpose, by inhibiting religion and by becoming excessively entangled with religion.

244. Wherefore, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the prayer for relief.

FOURTH CAUSE OF ACTION:
VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION

245. Plaintiffs reallege all matters set forth in the paragraphs 1–186 and incorporate them herein.

246. The Policy allows other public schools, teachers and students similarly situated to Plaintiffs to utilize religious documents in their curriculum and in class.

247. The Policy also allows other charter schools, teachers and students similarly situated to Plaintiffs to utilize religious documents and text in their curriculum and in class.

248. The Policy treats Plaintiffs differently by not permitting them to utilize similar resources.

249. Defendants have intentionally discriminated against Plaintiffs by issuing their illegal Policy, and through its discriminatory and selective enforcement.

250. Defendants have also enacted their Policy in a manner that selectively enforces sections of the constitutional provision that they are allegedly following.

251. Defendants are enforcing the alleged

religious prohibition while they completely ignore the political prohibition found in the same provision.

252. Such selective enforcement shows that Defendants are indeed targeting Plaintiffs for discrimination in their use of religious texts as part of their curriculum and in class because many schools in the state utilize such documents as part of their curriculum and in class.

253. Further, this selective enforcement is proven by the fact that Defendants allow the prohibited political documents to be used, but only enforce the religious prohibition.

254. Defendants can offer no rational or compelling interest to justify their discriminatory treatment against Plaintiffs as compared to others who are similarly situated, or their discriminatory enforcement of one part of the constitutional provision while ignoring another.

255. The Policy facially and as applied violates Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

256. Wherefore, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

FIFTH CAUSE OF ACTION:
FIRST AMENDMENT RETALIATION

257. Plaintiffs reallege all matters set forth in the paragraphs 1–186 and incorporate them herein.

258. Defendants have violated Plaintiffs' First Amendment rights by issuing public records requests, notices of defect, and by making damaging and untrue public statements, among other things, as a result of Plaintiffs filing this lawsuit to challenge Defendants' Policy and as a result of Plaintiffs engaging in protected speech by using religious texts in their curriculum.

259. The First Amendment to the United States Constitution protects the right to petition the government for redress of grievances, which includes the right to file a lawsuit against the government.

260. The First Amendment protects the right to speak, including the right to use religious texts and documents as a part of school curriculum.

261. Plaintiffs filed this lawsuit in order to protect their rights under the Constitution and federal and state law and to seek redress from Defendants' Policy.

262. After the Plaintiffs filed this lawsuit, the Defendants issued at least four voluminous public records requests and four notices of defect on issues related to this lawsuit.

263. After the Plaintiffs filed this lawsuit, the Defendants ordered a programmatic audit of the Academy in order to retaliate against the Plaintiffs' protected activity.

264. Plaintiffs lawsuit and decision to use religious texts in the curriculum were substantial or motivating factors in the Defendants' issuance of the

public records requests, notices of defect, improper statements, and other actions.

265. Defendants engaged in these actions in order to threaten, harass, and punish Plaintiffs for filing their federal lawsuit and for engaging in protected speech by using religious texts in their curriculum.

266. But for Plaintiffs filing this lawsuit and engaging in protected speech, the Defendants would not have engaged in these retaliatory actions.

267. Defendants can prove no facts that would show that they would have taken the same actions absent the Plaintiffs' lawsuit and choice to engage in their protected speech.

268. Defendants' actions place a chilling effect on Plaintiffs ability to conduct future First Amendment activity.

269. Defendants knew or should have known that they explicitly and implicitly discriminated and retaliated against Plaintiffs for exercising their clearly established right to petition the government for redress of grievances and engaging in protected speech by using religious texts in their curriculum, both of which are protected secured by the First Amendment to the United States Constitution.

270. Wherefore, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

SIXTH CAUSE OF ACTION:
***ULTRA VIRES* ACTIONS BY DEFENDANTS:**
VIOLATION OF IDAHO CODE SECTIONS 33-5209 AND 33-5210; DEFENDANTS' POLICY AND ORDER DO NOT COMPLY WITH THE ENUMERATED POWERS FOR ISSUING A NOTICE OF DEFECT OR REVOCATION, AND ARE IN VIOLATION OF STATE LAW EXEMPTING CHARTER SCHOOLS FROM STATE CURRICULUM REQUIREMENTS

271. Plaintiffs reallege all matters set forth in the paragraphs 1–186 and incorporate them herein.

272. The parameters of Defendants' authority are prescribed by state law.

273. Defendants are not empowered to exceed their statutorily-granted authority.

274. Defendants are prohibited from issuing any orders, notices of defect, or enacting any policies that violate general laws, including provisions of the Idaho Constitution, acts of the state legislature, and the Constitution and laws of the United States.

275. Idaho Code section 33-5209 enumerates the conditions under which Commission members can issue a notice of defect, followed by revocation.

276. In order to bring such actions, Plaintiffs must have violated at least one or more of the listed provisions.

277. Plaintiffs have not violated any of the enumerated provisions.

278. Defendants have exceeded their authority under this statute by claiming that Plaintiffs have violated the catch-all provision, which requires a violation of any law by Plaintiffs.

279. But Plaintiffs have violated no law.

280. Defendants have concocted this violation by claiming that using the Bible or any other religious document or text—even in an objective manner—as part of Plaintiffs' curriculum or class work violates article IX, section 6 of the Idaho Constitution.

281. But this section does not prohibit any use of religious documents or text, it only prohibits political, sectarian or denominational documents.

282. An objective study of the Bible and the additional religious documents are not prohibited by this section.

283. Since Plaintiffs have not violated this section, or any other, Defendants are without authority to issue the challenged Order, the concurrent Policy, a notice of defect, or revoke the charter.

284. Defendants have also acted outside the scope of their authority by attempting to exert greater control over Plaintiffs' curriculum and choice of text usage than currently granted by law.

285. Idaho Code section 33-5210 specifically exempts the curriculum of charter schools from the reach of Defendants' authority.

286. This section states that "each public charter school is otherwise exempt from rules governing school districts which have been promulgated by the state board of education. . . ."

287. The section includes five exceptions to this rule that have no application here.

288. According to this statute, Defendants have no authority to determine what books or resources Plaintiffs' may include in their curriculum or class work.

289. Defendants are trying to control Plaintiffs' curriculum indirectly under their Order, Policy and threat of revoking the charter, when state law forbids them from doing the same directly.

290. Wherefore, Plaintiffs respectfully pray that the Court grant the relief set forth hereinafter in the prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for judgment against Defendants as follows:

A. Declare Defendants' Order, Notice of Defect, Revocation, and Policy, which prohibit Plaintiffs from utilizing any religious document or text in the curriculum or in the classroom, unconstitutional on their face because they violate Plaintiffs' statutory and constitutional rights;

B. Declare Defendants' Order, Notice of Defect, Revocation and Policy, which prohibit Plaintiffs from

utilizing any religious document or text in the curriculum or in the classroom, unconstitutional as applied because they violate Plaintiffs' statutory and constitutional rights;

C. Declare Defendants' retaliatory actions in issuing the public records requests, notices of defect, revocation, making untrue public statements, among other things, which chill Plaintiffs' First Amendment rights, unconstitutional because they violate Plaintiffs' statutory and constitutional rights.

D. Issue a preliminary and permanent injunction enjoining the Defendants, their agents, servants, employees, and officers from enforcing their Order, Notices of Defect, Revocation and Policy prohibiting Plaintiffs inclusion of religious documents or texts in the classroom or as part of the curriculum, enjoining Defendants from issuing a notice of defect, and enjoining Defendants from revoking Plaintiffs' charter, based on the use of religious documents or text in the curriculum or in the classroom.

E. Grant Plaintiffs damages against the individual capacity defendants based on the violation of Plaintiffs' civil rights as alleged herein;

F. Grant Plaintiffs their costs of litigation, including reasonable attorneys' fees and costs; and

G. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted this 15th day of December, 2009.

/s/ David A. Cortman
DAVID A. CORTMAN*
dcortman@telladf.org
GSB # 188810
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Road, NE
Building D, Suite 600
Lawrenceville, GA 30043
Telephone: (770) 339–0774
Facsimile: (770) 339–6744

/s/ Bruce D. Skaug
BRUCE D. SKAUG
bruce@legaleaglesnw.com
IBN # 3904
GOICOECHEA LAW OFFICE—NAMPA LLP
1226 E. Karcher Road
Nampa, Idaho 83687
Telephone: (208) 466–0030
Facsimile: (208) 466–8903

GARY S. MCCALEB*
gmccaleb@telladf.org
ASB # 018848
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444–0020
Facsimile: (480) 444–0028

DAVID J. HACKER*
dhacker@telladf.org
CSB # 249272
ALLIANCE DEFENSE FUND
101 Parkshore Drive, Suite 100

Folsom, CA 95630
(916) 932–2850 telephone
(916) 932–2851 facsimile

* Admitted Pro Hac Vice

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of December, 2009, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Office of the Attorney General
Mike Gilmore, Deputy Attorney General
700 West State Street
Boise, ID 83720
Attorneys for Defendants

/s/ David A. Cortman
DAVID A. CORTMAN
Attorney for Plaintiffs

9th–12th Core Reading List

Title	Author/ Editor
Politics	Aristotle
Works and Days	Hesiod
Histories	Herodotus
On the True Doctrine	Celsus
Theogony	Hesiod
Stories of Rome	Livy
The Last Days of Socrates: Euthyphro, Apology, Crito, Phaedo	Plato
The Republic	Plato
St. Anthony of the Desert	St. Athanasius
Annals	Tacitus
History of the Pelloponnesian Wars	Thuchdides
The Epic of Gilgamesh	
Selected Works	Cicero
Histories	Herodotus
The Iliad	Homer
The Odyssey	Homer
Julius Caesar	Shakespeare
Three Theban Plays: Antigone, Oedipus the King and Oedipus at Colonus	Sophocles
Bible	
Mythology: Timeless Tales of Gods and Heroes	Hamilton
The Greek Way	Hamilton
Introduction to the Ancient World	De Blois & Spek
Reflections on the Revolution in France	Burke
All Quiet on the Western Front	Remarque

Title	**Author/ Editor**
The Life of Charlemagne	Einhard
An Inquiry into the Nature and Causes of the Wealth of Nations	Smith
The Prince	Machiavelli
A Western Heritage Reader	Hillsdale
The History of the Modern World Vol. I & II	Palmer & Colten
Political Writings	Kant
Sources of the Western Tradition: From Ancient Times to the Enlightenment, Vol. I	Perry, *et al.*
The Inferno	Alighieri
Sources of the Western Tradition: Renaissance to the Present, Vol. II	Perry, *et al.*
Everyman and Medieval Miracle Plays	Cawley
Memoirs of the Second World War	Churchill
The Longman Anthology of World Literature	Damrosch
The Tail of Two Cities	Dickens
Selections from his Writings	Luther
Utopia	More
The Erasmus Reader	Rummel
The Tragedy of Hamlet	Shakespeare
The Tragedy of Richard III	Shakespeare
A Day in the Life of Ivan Denisovich	Solzhenitsn
The Sogn of Roland	Sayers
The Guns of August	Tuchman
Novum Organum	Bacon
A Discourse on Method	Descartes
The Brothers Karamazov	Dostoyevski

Title	**Author/ Editor**
Leviathan	Hobbes
Two Treatises of Government	Locke
The History of England	Macaulay
The Education of Henry Adams	Adams
The Portable Emerson	Bode
The Portable Thoreau	Bode
The Autobiography of Calvin Coolidge	Coolidge
The Boisterous Sea of Liberty: A Documentary History of America from Discovery Through the Civil War	Davis & Mintz
Narrative of the Life of Frederick Douglass, an American Slave	Douglass
Early American Writing	Gunn
The American Intellectual Tradition: A Sourcebook, Vol. I & II	Hollinger
The Life and Morals of Jesus of Nazareth	Jefferson
Major Problems in the History of the American West	Milner
The Birth of the Republic, 1763–1789	Morgan
A History of Christianity in the United States and Canada	Noll
The Portable Thomas Jefferson	Peterson
Uncle Tom's Cabin	Stowe
History, Frontier and Sectionalism	Tuner
Up From Slavery	Washington
The Complete Short Stories of Nathaniel Hawthorne	Hawthorne

Title	**Author/ Editor**
The Founders Constitution, Vol. I	Kurland & Lerner
Thomas Jefferson: Writings	Jefferson
Paul Revere's Ride	Fischer
American Political Rhetoric: A Reader	Lawler & Shaefer
Washington: A Collection	Allen
Selected Writings of John and John Quincy Adams	Koch
Papers of Alexander Hamilton, Vol. XIX	Syrett
Records of the Federal Convention of 1787, Vol. I	Farrand
Writings	Franklin
The Correspondence and Public Papers of John Jay, Vol. III	Johnston
Thomas Jefferson: Writings	Peterson
Gorge Washington: A Collection	Allen
Selected Essays	Emerson
American Constitutional Law: Cases and Interpretations	Rossum & Tarr
The Collected Works of Abraham Lincoln, Vol. IV, 1860–61	Basler
The Collected Works of Abraham Lincoln, Vol. II	Basler
How the Other Half Lives	Riis
Plunkitt of Tammany Hall: A Series of Very Plain Talks on Very Practical Politics	Riordan
Victorian American: Transformations in Everyday Life	Schlereth
Autobiography	Roosevelt

Title	**Author/ Editor**
The Papers of Woodrow Wilson, Vol. XVII: 1907–1908	Link
The Papers of Woodrow Wilson, Vol. XVIII: 1908–1909	Link
The Harlem Renaissance Reader	Lewis
The Great Gatsby	Fitzgerald
Adventures in American Literature	Fuller
The Scarlet Letter	Hawthorne
The Concise Anthology of American Literature	McMichael
The Crucible	Miller
What is an American	Crevecoeur
Poetry of Anne Bradstreet	Bradstreet
Poetry of Edward Taylor	Taylor
Sinners in the Hands of an Angry God	Edwards
Selections from Sarah Kemble Knight	Knight
Selections from William Byrd	Byrd
Poor Richards Almanac	Franklin
Letters, documents and speeches from Revolutionary leaders and writers	Various
United States Constitution	
United States Bill of Rights	
The Grand Inquisitor	Dostoyevsky
Major Problems in American History Since 1945: Documents and Essays	Griffith & Baker
Brave New World	Huxley
The Anti-Federalist Papers	
The Federalist Papers	

Title	Author/ Editor
Animal Farm	Orwell
The Anti-Federalist and the Constitutional Convention Debates	Ketcham
A Citizen's Guide to the Economy	Sowell
All the Kings Men	Warren
Magna Carta	
The Declaration of Rights, 1689	
Two Treatises of Government	Locke
Articles of Confederation	
Idaho Constitution	
The Collected Works of Abraham Lincoln, Vol. II, III, & IV	Balser
The Longman Anthology of British History	Damrosch
Wuthering Heights	Bronte
The British Tradition	Prentice Hall
Paradise Lost and Other Poems	Milton
Gulliver's Travels and Other Writings	Swift
The Tragedy of King Lear	Shakespeare
Confessions	Augustine
The Persians and Seen Against Thebes	Aeschylus
The Robe	Douglas
The Consolation of Philosophy	Boethius
Quo Vadis	Sinkiewicz
Pygmalion and Androcles and the Lion	Shaw
Robinson Crusoe	Defoe
Plutarch's Lives and Noble Greeks and Romans	White
The Three Musketeers	Dumas

Title	Author/ Editor
A Man for All Seasons	Bolt
Ivanhoe	Scott
Morte d'Arthur	Mallory
Idylls of the King	Tennyson
Treasure Island	Stevenson
Koran	
A Connecticut Yankee in King Arthur's Court	Twain
Hadieth	
The Analects	Confucius
The Book of Mormon	Smith
1944 Message on the State of the Union	Roosevelt
New Conditions Impose New Requirements upon Government and Those who Conduct Government	Roosevelt
The New Negro	Locke
When the Negro Was in Vogue	Hughs
The Negro Renaisance and Its Significance	Johnson
If We Must Die	McKay
Yet Do I Marvel	Cullen
Address of President Coolidge at the Celebration of the 150th Anniversary of the Declaration of Independence	Coolidge
The Authors and Signers of the Declaration of Independence	Wilson
The Big Stick and the Square Deal	Roosevelt
Victorian America: Transformations in Everyday Life	Schlereth

Title	Author/ Editor
Plunkitt of Tammany Hall: A Series of Very Plain Talks on Very Practical Politics	Riordan
How the Other Half Lives	Riis
Speech in Independence Hall	Lincoln
Fragment of the Constitution and the Union	Lincoln
Dred Scott v. Sandford	
The Over-Soul	Emerson
Letter to the Hebrew Congregation	Washington
A Bill for Establishing Religious Freedom	Jefferson
Letter to the President of the English Society for Promoting the Manumission of Slaves	Jay
Letter to John Holmes	Jefferson
Letter to Henry Gregoire	Jefferson
Manners, Notes on the State of Virginia	Jefferson
An Address to the Public from the Pennsylvania Society from Promoting the Abolition of Slavery	Franklin
Speech at the Constitutional Convention	Madison
Philo Camillus No. 2	Hamilton
Letter to Evans, June 8, 1819	Adams
Letter to Morris, April 12, 1786	Washington
Selections of the U.S. Constitution Concerning Slavery	Lawler & Schaefer
Address to the British Parliament	Reagan
An Introduction to the Ancient World	Routledge

Title	Author/ Editor
The Ancient World	Longman
Egyptian History and Culture	Aling
Egypt and Bible History From Earliest Times to 1000 B.C.	Aling
A Short History of the Ancient Near East	Schwantes
I Maccabbees	
Apocrypha	
The Twelve Caesars	Grant
The Historical Jesus	Hebermas
Chronological and Background Charts of Church History	Walton
Documents of the Christian Church	Bettenson
The Life of the Blessed Emperor Constantine	Eusebius
St. Athanasius	
Christianity Through the Centuries	Cairns
Islam Unveiled	Caner
Genesis	Alter
The David Story	Alter
The Five Books of Moses	Alter
The Book of Psalms	Alter
The Art of Biblical Poetry	Alter
Give Me Liberty, or Give Me Death	Henry
George Washington's Farewell Address	Washington
1809 Letter from John Adams to Benjamin Rush	Adams
Abraham Lincoln's Second Inaugural Address	Lincoln
Benjamin Franklin's Letter to Thomas Paine	Franklin

Title	**Author/ Editor**
Founders view of the Importance of Morality and Religion in Government	Adams, *et al.*
Should Christians or Ministers Run for Office	Witherspoon
The Importance of Voting and Christian Involvement in the Political Arena	Adams, *et al.*
Easter Sermon—1910	Moody
George Washington's Birthday Sermon—1863	Richards
Moral View of Rail Road's Sermon—1851	Aiken
Qualifications for Public Office	Webster
Christian Patriot Sermon—1840	Motte
Dueling Sermon—1838	Sprague
Oration—1837	Adams
Marriage Sermon—1837	Norris
Oration—1826	Bancroft
1816 Election Sermon	Dickenson
John Jay on the Biblical View of War	Jay
Doctrine and Covenants	Varies
Our Heritage	
1812 Proclamation for a day of Humiliation and Prayer	Madison
Letter from John Adams to Benjamin Rush—1809	Adams
Artillery Serman—1809	Foster
Solar Eclipse Serman—1806	Lathrop
Letters Between the Danbury Baptists and Thomas Jefferson	

Title	Author/ Editor
Thomas Paine Criticizes the Current Public School Science Curriculum	Paine
Proclamation for Solemn Thanksgiving and Praise	U.S. Congress
Benjamin Franklin's letter to Thomas Paine	Franklin
Liberty Sermon—1775	Duche
U.S. Congress Proclamation	U.S. Congress
The Bible and its Influence	Schippe & Stetson
Jane Eyre	Bronte
Pride and Prejudice	Austen
Emma	Austen
Pilgrim's Progress	Bunyan
The Count of Monte Cristo	Dumas
Silas Marner	Eliot
The Mill on the Floss	Eliot
Lord of the Flies	Golding
Far from the Maddening Crowd	Hardy
Jude the Obscure	Hardy
The Hunchback of Notre Dame	Hugo
The Chosen	Potok
Anna Karenina	Tolstoy
War and Peace	Tolstoy
Founding Father: Rediscovering George Washington	Brookhiser
Death Comes for the Archbishop	Cather
The Autobiography of Calvin Coolidge	Coolidge
The Red Badge of Courage	Crane
Life in August	Faulkner

Title	Author/ Editor
Paul Revere's Ride	Fischer
A Farewell to Arms	Hemmingway
Notes on the State of Virginia	Jefferson
To Kill a Mockingbird	Less
The Grapes of Wrath	Steinbeck
Up From Slavery	Washington
The Virginian	Wister
Speeches that Changed the World	Smith & Davis
The Greatest Speeches of Ronald Reagan	Reagan

[1] This overview is currently being reevaluated and will continue for some years to come.

MEMORANDUM

TO: BILL GOESLING, CHAIRMAN, PUBLIC CHARTER SCHOOL COMMISSION; COMMISSIONERS, PUBLIC CHARTER SCHOOL COMMISSION

FROM: JENNIFER SWARTZ, DEPUTY ATTORNEY GENERAL

SUBJECT: USE OF RELIGIOUS TEXTS IN PUBLIC CHARTER SCHOOLS

DATE: AUGUST 13, 2009

CC: TAMARA BAYSINGER, PUBLIC CHARTER SCHOOL PROGRAM MANAGER

A question regarding the use of the Bible as a text in public school classrooms was raised during the Public Charter School Commission (Commission) meeting on July 22, 2009. In its pre-opening update presentation, Nampa Classical Academy (NCA), a Commission authorized school, discussed its intention to use the Bible and other religious texts in its curriculum. As discussed in the July 22 meeting, use of any religious texts within Idaho's classrooms, would likely violate of the Idaho State Constitution. For your reference, this issue is analyzed more fully below.

IDAHO'S CONSTITUTION LIMITS USE OF RELIGIOUS TEXTS EXPRESSLY

Article IX, § 6 of the Idaho Constitution provides as

follows:

> Religious test and teaching in schools prohibited. No religious test or qualification shall ever be required of any person as a condition of admission into any public education institution of the State, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious services whatever. *No sectarian or religious tenants or doctrines shall ever be taught in the public schools*, nor shall any distinction or classification of pupils be made on account of race or color. *No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article*, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provision of the article.

(Emphasis added.)

NCA has explained that it does not intend to use any religious text for the purpose of teaching or promoting religion, but rather in the context of its cultural, historical, and literary significance. However, the express language of the above referenced provision of our state constitution does not provide an exception based upon *how* the text is intended to be used. Instead, § 6 prohibits *any* use of sectarian or denominational texts in a public school

classroom. That this interpretation was indeed the intent of the drafters of the Idaho Constitution is expressly demonstrated in documentation of the State's Constitutional Convention. During the Idaho Constitutional Convention of 1889, an amendment to § 6 (then § 8) was proposed as follows: "Provided, that nothing herein contained shall be construed to forbid the reading of the Bible in public schools in any commonly received version, nor to enjoin its use." Hart, I.N. *Proceedings and Debates of the Constitutional Convention of Idaho 1889, Vol. 1 at pp. 684–702.* That amendment was defeated, and therefore not incorporated in the Idaho Constitution. *Id*, at 702.

THE FEDERAL CONSTITUTION MAY PERMIT CERTAIN LIMITED USES BASED ON A VARIETY OF FACTORS

With respect to the United States Constitution, no doubt exists that under current U.S. Supreme court cases interpreting the First Amendment, the Bible cannot be used in public schools for any sectarian or religious purpose. *Abington School District v. Schempp*, 374 US 203, 224, 83 S. Ct. 1560, 1572 (1963). The First Amendment to the US Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. The prohibition against using the Bible for religious purposes in public schools holds true whether the use is by student choice, is student led, or whether student attendance is voluntary. *Id.* However, the *Schempp* case gave rise to oft-quoted language regarding the secular use of the Bible in an

educational setting:

> *[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with First Amendment.* But the exercises here did not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the government maintain strict neutrality, neither aiding nor opposing religion.

Schempp 374 US at 225, 83 S. Ct. at 1573 (emphasis added). The difficulty under the First Amendment lies in the details—developing a course that is truly non-sectarian in nature, rather than one that is only an excuse to use the Bible to promote a religious purpose. Perhaps for that reason, case law upholding the use of the Bible as a text in a public school is rare if not nonexistent. A number of courts have made note of the *Schempp* comment regarding the literary and historic significant of the Bible. However, even while doing so, those same courts were finding that Bible-related or religious programs in public schools violated the first Amendment.[1]

---

[1] See, *Stone v. Graham*, 449 US 39, 101 S. Ct. 192 (1981)

IDAHO'S MORE LIMITED CONSTITUTIONAL PROVISION IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

The Idaho Constitution and Idaho courts are consistently more restrictive with respect to the separation of church and state in connection with public schools. For example, in *Epeldi v. Engelking*, 94 Idaho 390, 395, 488 p. 2d 860, 865 (1971), the Idaho Supreme Court specifically held that providing public funds to parents of students attending parochial schools to aid the students' attendance at those schools violated Article IX, § 5[2] of the Idaho

---

(posting of ten commandment in classroom found unconstitutional); *Illinois ex rel. McCollum v. Board of Education*, 333 US 203, 68 S. Ct. 461 (1940) (public school buildings cannot be used for religious purposes); *Berger v. Rensselaer Central School Corporation*, 982 F. 2d 1160 (7th Cir 1993) (distribution of Bibles in public schools unconstitutional); *Herdahl v. Pontotoc County School District*, 933 F. Supp 582 (ND Miss. 1996) (bible class violates First Amendment); *Hall v. Board of School Commissioners of Conecuh County*, 656 F. 2d 999 (DC Ala. 1981) (elective Bible class unconstitutional); *Mangold v. Albert Gallatin Area School District*, Payette County, Pa., 438 F. 2d 1194 (3rd Cir. 1971) (Bible reading and prayer in school unconstitutional); *Doe v. Potter*, 188 F. Supp. 2d 904 (ED Tenn. 2002) (teaching from the bible as religious truth unconstitutional); *Chandler v. James*, 985 F. Supp 1068 (MD Ala. 1997) (prayer and distribution of bibles in public schools unconstitutional); *Crockett v. Sorenson*, 568 F. Supp. 1422 (WD Va. 1983) (bible class in public school unconstitutional); *Vaughn v. Reed*, 313 F. Supp. 431 (WD. Va. 1983) (religious education program in elementary public schools unconstitutional); *Johns v. Allen*, 231 F. Supp. 852 (DC Del. 1964) (reading of Bible verses in public school unconstitutional).

[2] Sectarian appropriations prohibited—neither the legislature nor any county, city, town, township, school district,

Constitution, despite the fact that the provision of such funds did *not* violate the first Amendment of the U.S. Constitution.

> This section in explicit terms prohibits any appropriation by the legislature or others (city, county, etc.) or payment from any public fund, anything in aid of any church or to help support or sustain any sectarian school, etc. *By the phraseology and diction of this provision it is our conclusion that the framers of our constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution.* Had that not been their intention there would have been no need for this particular provision, because under Idaho Const. art. 1, § 3, the exercise and enjoyment of religious faith was guaranteed (comparable to the free exercise of religion guaranteed by First Amendment of the United States Constitution) and it further provides no person could be required to attend religious services or support any particular religion, or pay tithes against his consent (comparable to the establishment clause of the First

---

or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church or for any sectarian or religious purpose.

Amendment).

Epeldi, 94 Idaho at 395–96 (emphasis added).

In fact, the courts holding in *Epeldi* stands in direct contrast to that of the U.S. Supreme court on the same issue when it held that public tax dollars could be used to bus pupils to parochial schools in New Jersey under a First Amendment analysis. *Everson v. Board of Education of Ewing Township*, 330 US 1, 675 S. Ct. 504 (1947). Further, in holding that busing parochial students violated Article IX, § 5 of the Idaho Constitution, the Idaho Supreme court also rejected the argument that doing so violated the equal protection rights of the parochial students and their parents under the Fourteenth Amendment to the US Constitution of the Free Exercise of the First Amendment of the US Constitution. *Epeldi*, 94 Idaho at 396, 488 p. 2d at 866.

The Idaho Supreme Court has emphasized the more restrictive nature of the Idaho Constitution[3] as compared to the U.S. Constitution with respect to the separation of church and state in other cases as

---

[3] Within published accounts of the discussion of this issue, NCA has publicly stated that federalism and preemption prohibit the Idaho's Constitution's express limitation on the use of religious texts. This analysis is incorrect. Generally, federalism prohibits a state from making permissive that which the Federal Constitution prohibits, but permits the state to regulate within the area provided it does not allow at the state level those things which are prohibited at the Federal level. A preemption analysis of Idaho's Constitutional provisions would likely be found to be well within the province of state regulation.

well.[4]

The rejection by the *Epeldi* court of the First Amendment standards established by the U.S. Supreme Court is significant given the fact that religious activities including use of the Bible in public school instruction have been struck down as unconstitutional under the First Amendment according to the standards articulated in federal cases such those cited above.[5] It is therefore difficult to imagine that NCA's proposed use of the Bible and other religious texts would survive the prescriptions of the First Amendment, let alone Article IX § 5 or Article IX § 6 of the Idaho Constitution.

CONCLUSION

Idaho Supreme Court has not specifically ruled on

---

[4] See, *Doolittle v. Meridian Joint School District No. 2*, Ada County, 128 Idaho 805, 813, 919 p. 2d 334, 342, (1996) (The Idaho constitution has been held to provide greater restriction on the State's involvement in parochial activities than the Establishment clause of the First Amendment."); *Board of County Commissioners of Twin Falls County v. Idaho Health Facility Authority*, 96 Idaho 498, 509, 531, p.2d 588, 599 (1975) ("The Idaho Constitution places much greater restriction upon the power of state government to aid activities undertaken by religious sects than does the First Amendment to the Constitution of the United States.")

[5] See, *Stone v. Graham*, *supra*; *Illinois ex rel. McCollum v. Board of Education, supra*; *Berger v. Rensselaer Central School Corporation, supra*; *Herdahl v. Pontotoc County School District, supra*; *Hall v. Board of School Commissioners of Conecuh County, supra*; *Marigold v. Albert Gallatin Area School District, supra*; *Doe v. Potter, supra Chandler v. James, supra*; *Crockett v. Sorenson, supra*; *Vaughn v. Reed, supra*; *Johns v. Allen, supra.*

this issue. Article IX § 6 of the Idaho Constitution specifically states that "no books... papers, tracts or documents of a political, sectarian, or denominational character shall be used or introduced in any schools established under the provisions of this article...." Assuming that the Idaho Supreme Court follows the approach set forth in *Epeldi v. Engleking, supra*, and relies on the literal meaning of the language of the Idaho Constitution, it would conclude that the Bible cannot be used in a public school classroom. However, based on federal and state case law, as well as the strict language of the Idaho Constitution, it is likely that any effort to use the Bible as a text in an Idaho public school would be found unconstitutional under the Idaho constitution.

This memorandum is provided to assist you. It is an informal and unofficial response of the Office of the Attorney General based upon the research of the author.

TO: Idaho Public Charter School Commission

C/O: Tamara Baysinger, Charter Schools Program Manager
Bill Goesling, Commission Chair

FROM: David A. Cortman, Senior Legal Counsel

RE: Nampa Classical Academy: Use of the Bible as an educational resource in Idaho public charter schools

INTRODUCTION

The Alliance Defense Fund ("ADF") has been retained by Nampa Classical Academy for the purpose of defending its right to determine the curriculum of its choosing, including utilizing the Bible as one educational resource among many. The Public Charter School Commission (hereinafter "Commission")[1] has requested Nampa's position regarding the legality of using religious texts as part of its curriculum. The Commission will also decide its stance on this issue at an upcoming special meeting.

[1] Each reference to the Commission throughout this brief applies either to the Commission itself, or to the Commission acting through its legal counsel.

Nampa Classical Academy is endeavoring to exercise its right to provide the best possible education for its students and has decided to include the Bible, along with dozens of other religious and secular writings, as resources in its school curriculum to enrich instruction of literature, history, and culture, among other topics. It is undeniable that the Bible is an invaluable primary source that sheds light on the history and culture of western civilization, literature, etc. and would promote insightful discussions in the classroom and critical thinking among students. Unfortunately, the Commission has informed Nampa Classical Academy that if it determines that the Bible may not be used as an educational resource and if it is not immediately removed from the school's curriculum, the school's charter may either be denied or revoked if already approved.

The Commission will be basing its decision on Article IX, section 6 of Idaho's Constitution, which reads in full:

> No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrine shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. No books, papers, tracts or documents of a political,

> sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article, not shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article.

Idaho Const. art. IX, § 6.

Will the Commission read this provision in a manner that requires it to begin a search and destroy mission seeking to censor all curriculum resources of every public school in the state that *the Commission believes* may be political or sectarian? And what would that include? The Mayflower Compact? The Federalist Papers? The Declaration of Independence? Dr. Martin Luther King, Jr.'s "I Have a Dream" speech or his "Letter From Birmingham Jail"? It can easily be concluded that these are either political, sectarian, or both.[2]

---

[2] The first and most obvious problem is who gets to decide what is political or sectarian? Further, a quick review of the State's curriculum content reveals that many political and religious subjects are discussed and many of these documents are indeed part of the curriculum at public schools, as they should be. *See e.g.* www.sde.idaho.gov/site/content_standards/ss_standards.htm (visited last on August 6, 2009) (includes discussions concerning religious and political motives of immigrants, how religion has been an important influence in American history, and descriptions of origins, beliefs and the spread of religions, including Judaism and Christianity, etc); *see also* Idaho State Dep't of Education, Idaho Basic Education Data System, 16 (includes Biblical Literature in grades 9–12). The problem, however, as raised herein, is attempting to draw an artificial (and unconstitutional) line between what is

Contrary to what has been suggested, this provision does not forbid the Bible from being part of a public school's curriculum, as evidenced by the intent of the framers of Idaho's Constitution. Furthermore, to hold that the Bible may not be used as part of Nampa Classical Academy's curriculum under these circumstances offends the United States Constitution.

ARGUMENT

I. THE ORIGINAL DRAFTERS MADE CLEAR THAT ARTICLE IX, SECTION 6 DOES NOT PRECLUDE USE OF THE BIBLE IN PUBLIC SCHOOLS.

The proceedings and debates of the Constitutional Convention of Idaho show that this state's founding fathers did not intend article IX, section 6 to preclude use of the Bible in public school education. To the contrary, the framers of Idaho's Constitution sought assurances that the right of public schools to use the Bible as a teaching tool would be protected. The Commission should not reinterpret this provision to contravene the original intent of Idaho's founders.

During Idaho's Constitutional Convention, the framers specifically addressed the issue of whether article IX, section 6 may be construed to keep the Bible completely out of public schools and they passionately argued against such a result. Reacting to a superintendent of instruction who had declared

---

considered political or sectarian and what is not. The current standards would arguably violate the Commission's proposed interpretation of article IX, section 6.

the Bible sectarian and thus banned from public schools, the delegates engaged in a lengthy debate as to whether this provision allowed the Bible's use in public schools. *Proceedings and Debates of the Constitutional Convention of Idaho, 1889* 684–701 (I.W. Hart ed., vol. 1, Caxton Printers, Ltd. 1912).

The result of this debate was a clear message from the majority of founding fathers of this state that the Bible can be used in public schools without offending the state's constitution. There is much evidence to support this conclusion. For example, Mr. Poe of Nez Perce County proclaimed that "the Bible contains sweeter poetry, finer strains of eloquence and purer morals that can be found in any other book." *Id.* at 688. He went on to say that it would be wrong to "deprive the school of the right to have the Book of all books read to its pupils if the directors and parents of that school desire it. To say that the Bible shall be excluded from the public schools, I would consider an act which would do more than all other acts to condemn the work of this convention." *Id.* at 689. Mr. Claggett of Shoshone County reiterated this sentiment when he declared that "to exclude in any way, shape or form, to exclude the children of the state from access to this great reservoir of moral principles and practical maxims of daily duty is doing an injustice to them and doing an injustice to the state at large." *Id.* at 694. Many framers echoed this sentiment.

A. The True Intent of the Framers of Idaho's Constitution was to Exclude Sectarian Tenets and they did not Consider the Bible to be a Sectarian Book.

This provision was never intended to push all religious texts out of Idaho's public schools regardless of the intended use, but to serve an entirely different motive; to stop particular denominations or sects from introducing their tenets in Idaho's public schools. The ban against "sectarian or religious tenets or doctrines" and books of "sectarian or denominational character," Idaho Const. art. IX, § 6, was intended only to keep "sects" from preaching in the public schools and the Bible was not considered a sectarian book by a majority of Idaho's founders. This sentiment was expressed by many of the framers. Mr. Poe commented that the Bible is not itself sectarian, but the book upon which "the different creeds are founded which are called sectarian." Hart at 688. This understanding is in line with the current definition of sectarian as being "[o]f or related to a *particular* religious sect." Black's Law Dictionary (8th ed. 2004) (emphasis added). Clearly, the Bible, is not exclusive to any one *particular* religious sect and thus, not sectarian.

This point is even more compelling considering the intended use of the Bible at Nampa Classical Academy. There is a distinct difference between reading the Bible devotionally and studying it as a historical or literary text. The school seeks to use the Bible along with other primary sources to improve literary, historical, and cultural education and not to promote religious, sectarian, or

denominational tenets or doctrine. This use is entirely in line with the intentions of the framers of Idaho's Constitution and to disallow it would run contrary to their intent.[3] Mr. Mayhew of Shoshone County summed up the overall sentiment of the framers when he said "it is not the reading of the Bible in the school that creates a feeling of sectarianism. I do not believe in the theory that the Bible teaches sectarianism. . . . I, for one, . . . desire that the Bible may be read in our schools, but that no sect shall teach in the schools any sectarian doctrine." *Id.* at 698. The record shows that this was the understanding of most of Idaho's founders, as evidenced by the votes on two proposed amendments.

B. The Debate Surrounding the First Amendment to This Section Which was Presented Showed the Framers' Understanding that the Bible's Use Would be Allowed in Public Schools.

The first proposed amendment was offered by Mr. Clark to clarify that the Bible may indeed be used and stated that article IX, section 6 shall not "be construed to forbid the reading of the Bible in public schools in any commonly received version, nor enjoin its use." *Id.* at 684. This amendment failed by the narrowest of margins (23 to 25), *id.* at 702, but tellingly, two of the "nay" voters, Mr. Beatty of Alturas County and Mr. Wilson of Ada County, both opined that the amendment was not needed because

---

[3] To disallow the use of the Bible under these facts would also violate the United States Constitution (discussed *infra*).

the provision as it stood already allowed the Bible to be read in public schools. This proves that at a minimum, a majority of the founders believed that it was permissible to use the Bible in public schools even with the presence of article IX, section 6.

Mr. Beatty stated his position by saying that "the section as it now reads does not preclude the use of the Bible in the schools" and "I believe as it reads that the Bible can be used and no objection made to it." *Id.* at 689–91. Mr. Beatty again restated his position that "[t]he section, as I remarked a while ago, does allow the use of the Bible to be read in the schools where the people desire it, and the section, I think as drafted, does exclude all sectarian books." *Id.* at 691.

Likewise, Mr. Wilson noted that "if the Bible is not a sectarian book, then the Bible can be read and will not be prohibited. . . . I do not myself believe it is a sectarian book. The supreme courts of a good many states have decided it is not a sectarian book. . . . therefore the reading of it would not be prohibited" by the provision "as it stood originally." *Id.* at 697. These two "swing" votes, added to the 23 founders that voted for this amendment that explicitly stated that the Bible can be used, show that a majority of the framers approved of the Bible's use in public schools.[4]

---

[4] J.W. Reid reintroduced the Clark amendment at the convention itself. *Proceedings and Debates of the Constitutional Convention of Idaho 1889*, 1438 (I.W. Hart ed., vol. II, Caxton Printers, Ltd. 1912). This amendment was defeated by a vote of 25–18. *Id.* at 1443. Because there is

In addition, the debate on the second amendment, which was adopted and is currently part of article IX, section 6, also proves that the framers intended the Bible to be a permissible resource in public schools.

C. The Debate Surrounding the Approval of The Second Amendment at Issue Also Showed the Framers' Understanding that the Bible's Use Would be Allowed in Public Schools.

During the discussions concerning the permissibility of using the Bible in public school instruction, Mr. Hasbrouck of Washington County offered another amendment to article IX, section 6 that read, "No books, papers, tracts, or documents of a political, sectarian or denominational character, shall be used or introduced in any public schools

---

much less testimony than when voted on in committee, there is no sound basis to rebut the conclusion that a majority of the founders believed the Bible could be used in public schools. This is so because many of the reasons for the "nay" votes, as seen in both debates, are unknown. What we do know, however, is that the original debates provide ample evidence that there was a majority of the founders that either voted for the Clark amendment, which explicitly stated that the Bible could be used in public schools, or only voted "nay" because they thought the language without the amendment already allowed the Bible's use. *See supra.* Finally, as an important side note, there is a vast difference, both politically and legally, between reading the Bible devotionally and utilizing it as an educational resource. After reviewing both the committee debates and the convention debates, there is much more evidence that the founders believed that the Bible was permitted to be read in the public schools, even considering the final language that was adopted.

established under the provision of this article . . ." *Id*. at 701. Prior to voting on Mr. Hasbrouck's amendment, the delegates made specific inquiry as to whether the amendment would allow the superintendent of public instruction "to exclude the Bible on the ground that it was sectarian . . . . under any ordinary construction." *Id.* The delegates only approved the amendment after Mr. Hasbrouck replied, "I don't think it would." *Id.*[5]

Clearly, the framers approved this amendment with the understanding that the provision would not exclude the use of the Bible in Idaho's public schools. As evidenced by their proclamations and their votes, the framers never intended the language of this provision to be interpreted as a ban on the Bible in public schools, but sought assurances that this right would be protected under Idaho's Constitution.

II. NAMPA CLASSICAL ACADEMY HAS A STATUTORY RIGHT TO CHOOSE ITS OWN CURRICULUM.

The majority of the founders believed that public school districts had a right to use the Bible in

---

[5] The importance of this question—and the response thereto—should not be underestimated considering that the context of this entire debate was framed by, and somewhat in response to, the superintendent's decision to ban the Bible in public schools, and considering that the question, and more importantly, the answer given, would inform the delegates whether supporting this amendment would permit or preclude the Bible's use. It is safe to say that the answer to this question directly influenced the votes that were then cast. It is thus an important consideration in reaching any conclusion of how the final vote affected the use of the Bible in public schools.

education and this provision did not infringe upon this right. Further, as discussed *supra*, there is a vast difference between exposure to sectarian devotionals and instruction from the Bible as a literary or historical resource. Parents and community members who believe that this form of classical education is superior and will benefit their children should not be robbed of the opportunity to utilize this option, especially when the framers of Idaho's Constitution recognized a right for districts to use such resources as part of their curriculum.

Throughout their debates, the framers held that the Bible was allowed to be read in public schools if the people desired it. *Id*. at 686, 688, 690–91. Mr. Maxey of Ada County summed up this sentiment best, stating "[i]f people want the Bible read, let them read it; if they do not want it read, let them keep it out." *Id*. at 688. Here, the people want the Bible included and the Commission has no authority to repress this right. This holds all the more true under these facts because charter schools are not subject to the same restrictions applied to other public schools, including the rules governing curriculum. Idaho's Code states that charter schools must comply with the same financial reporting requirements of other public schools, but "[e]ach public charter school is otherwise exempt from rules governing school districts which have been promulgated by the state board of education with the exception of" a short list of rules that are not applicable in the instant case. Idaho Code § 33-5210 (3), (4) (West 2009). The Commission simply does not have the authority to prevent the charter school from exercising its right to use the Bible to enrich

literary, historical, and cultural education. This is a right that the founders of this state intended to be protected and the Commission has no right under Idaho law to suppress it.[6] Furthermore, to do so would offend the United States Constitution.

III. THE UNITED STATES SUPREME COURT HAS CONSISTENTLY HELD THAT IT IS APPROPRIATE FOR PUBLIC SCHOOLS TO UTILIZE THE BIBLE FOR ITS LITERARY OR HISTORICAL VALUE.

The United States Constitution has been consistently interpreted by the Supreme Court and the Ninth Circuit to permit the objective study of the Bible for its literary or historical value. *Stone v. Graham*, 449 U.S. 39, 42 (1980) ("[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) ("[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization.")[7]; *Grove v. Mead School Dist.*, 753 F.2d. 1528, 1534 (9th Cir. 1985) (recognizing that the

---

[6] The Commission may attempt to rely on Idaho Code section 33-5209(2)(f) that permits charter revocation upon showing that the charter school "violated any provision of law." But such reliance is misplaced since it would be based on a faulty and overly restrictive reading of the Idaho Constitution, as discussed herein.

[7] The *Schempp* case also demonstrates the distinction between reading the Bible as a religious exercise, and reading the Bible as part of a secular study. Such is the current distinction.

literary or historic study of the Bible is not a prohibited religious activity). In addition, the Eighth Circuit held in *Florey* that "when the primary purpose served by a given school activity is secular, that activity is not made unconstitutional by the inclusion of some religious content" and therefore, to not include such content "would give students a truncated view of our culture." *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1316 (8th Cir. 1980). The *Florey* court went further by holding that "music, art, literature, and drama" with a cultural and religious heritage may be included in a school's curriculum in an objective manner. *Id.* at 1317. This is the precise manner in which Nampa Classical Academy wishes to use the Bible in its curriculum.

A. Idaho's "Stricter" Establishment Clause does not Prohibit the use of the Bible in Public Schools.

It has been held that the Constitution of the State of Idaho was intended to "more positively enunciate the separation between church and state" than the United States Constitution, *Epeldi v. Engelking*, 488 P.2d 860, 865 (Idaho 1971) (ruling on article 9, section 5), *Board of County Comm'rs v. Idaho Health Facilities Auth.*, 531 P.2d 588, 599 (Idaho 1975) (same). Section 6 prohibits "sectarian or religious tenets or doctrines" from being taught and prohibits the introduction or use of "books, papers, tracts or documents of a political, sectarian, or denominational character" in the public schools. Idaho Const. art. IX, § 6. If this provision is interpreted to preclude all use of the Bible for its

historic or literary value then Idaho's constitution not only far surpasses the requirements of the Establishment Clause of the United States Constitution, it may also violate several of its provisions.

Simply because the Idaho Constitution may more clearly enunciate such separation does not answer the question of whether it is appropriate to use the Bible as an instructional resource in public schools. In fact, they are two distinct inquiries. Even with a "stricter" separation, the use of the Bible remains permissible. Detractors conflate Idaho's Establishment Clause standard and the issue of the Bible's use in public schools in a simplistic attempt to keep the Bible out of public school curriculum. As discussed *supra*, the majority of the framers voted to make sure that when drafting article IX, section 6 of Idaho's Constitution it did not preclude the use of the Bible in public schools. In addition to the permissibility of using the Bible as an instructional resource under Idaho's Constitution, to hold that this practice is impermissible would offend the United States Constitution.

B. The Supremacy Clause Prevents Censorship of the Bible as an Instructional Resource Because to do so Would Violate Multiple Constitutional Rights.

Simply concluding that the Idaho Constitution contains more stringent establishment provisions than the U.S. Constitution, and concluding that such provisions prohibit any educational use of the Bible,

does not foreclose the question of the constitutional validity of those provisions. Under the Supremacy Clause, state constitutional or statutory provisions must yield to the higher authority of federal constitutional mandates. When state law not only restricts conduct that is permitted under the federal constitution, but further violates a constitutional mandate, the enforcement of that law is void under the Supremacy Clause.

> If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Ex Parte Young, 209 U.S. 123, 159–60 (1908). The Ninth Circuit has acknowledged this effect of the Supremacy Clause with respect to state laws that conflict with federal constitutional guarantees, saying that "when federal law mandates rather than simply permits certain activity . . . the Supremacy Clause takes over and prohibits the states from using their own constitution to block the federal law." *Hoppock v. Twin Falls School District*, 772 F. Supp. 1160, 1164 (9th Cir. 1991). The Supreme Court of Idaho concurs. *See e.g. Doolittle v. Meridian Joint School Dist.*, 919 P.2d 334, 342 (Idaho 1996) ("Where there is a conflict between a federal law and our state constitution, federal statutes that are made in pursuance of the United States Constitution will

prevail over our state constitution") (citations and internal quotations omitted).

In addition to Nampa's position that the Idaho Constitution does not even bar the introduction of the Bible's use as a primary historical and literary source, the cramped reading that is being proposed by the Commission would violate a host of federal constitutional provisions. Primarily, such a restrictive reading of the Idaho Constitution would violate the mandates of the Establishment Clause of the First Amendment applicable to the states through the Fourteenth Amendment, which prohibits the government from engaging in hostility toward religion. This constitutional mandate is well established under ample Supreme Court precedent. *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("[The Constitution] affirmatively mandates accommodation, not merely tolerance of all religions, and *forbids* hostility toward any") (emphasis added); *McCollum v. Board of Education*, 333 U.S. 203, 211–12 (1948) ("A manifestation of such hostility [to religion] would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."); *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (saying that hostility could undermine the neutrality required by the First Amendment). An interpretation of the Idaho Constitution to prohibit the objective use of the Bible for its literary and historical value would be the kind of hostile targeting of religion for suppression and exclusion prohibited by the First Amendment. This violation would render this state constitutional provision unenforceable under the Supremacy Clause and

would subject its enforcing officers to liability for federal constitutional violations.

Enforcing article IX, section 6 against Nampa Classical Academy and their plan to incorporate the Bible as a primary literary and historical source would also violate the Equal Protection Clause of the Fourteenth Amendment. A reading of article IX, section 6, wherein the Bible is excluded as a sectarian document, would also require that the prohibition on the use or introduction of tracts, documents, or papers of a political character be as strictly enforced. It is hardly imaginable that Idaho wants to exclude all political papers, books, and documents from use or introduction in the schools. How could a school ever teach its students about government and the political process without introducing documents of a political character? Furthermore, many of the greatest documents from American History were written from a particular political or religious point of view and are replete with references to and quotations from the Bible. Should these too be excluded? Without engaging in a devastating censorship campaign, the state cannot enforce this provision consistently with reference to all documents of a political and sectarian character. To target those who would use the Bible for exclusion, when there are innumerable other documents regularly used in the schools that equally violate this expansive reading of article IX, section 6, would violate the Constitution's Equal Protection guarantee that those similarly situated be treated alike. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). Enforcing article IX, section 6 against Nampa Classical Academy when all

other public schools are equally in violation of this provision (as restrictively interpreted) would also give rise to an additional Equal Protection claim of selective enforcement.

Such an overly restrictive reading also raises Due Process issues of vagueness. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . [W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. . . . Where a vague [law] abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). What exactly is a sectarian document? What is a document of a political character? The Gettysburg Address? Washington's Inaugural Address? Patrick Henry's famous "Give me Liberty or Give me Death" speech? Can students be taught our republican form of government along with the differences between the parties? How would a person of ordinary intelligence know what is permitted to be taught? Is it an "I know it when I see it" test? In the midst of all of these questions, one thing is clear: the reading proposed by the Commission will not bring clarity to this issue but will only escalate the debate exponentially.

To adopt an overly stringent reading of article IX, section 6 would also raise a host of other constitutional concerns. Such a reading would conflict with the widely recognized broad discretion of the individual school board to manage their own

affairs and to craft and apply a curriculum based on their understanding of the local community. *See* Idaho Code § 33-5210(4) (giving charter schools the right to create their own curriculum by exempting them from applicable rules governing school districts); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (saying that school boards have broad discretion in managing their own affairs); *Board of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) (supporting the proposition that local school boards may establish and apply curriculum that is representative of community values).

A restrictive application of article IX, section 6 would also interfere with Nampa's teachers' academic freedom "to exercise professional judgment in selecting topics and materials for use in the course of the educational process." *Fowler v. Board of Education*, 819 F.2d 657, 661 (6th Cir. 1987). Additionally, the Supreme Court has held that the states are not free to impose conditions on the rights of teachers that are based upon violations of constitutional guarantees, like those found in the Establishment Clause. *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968).

Finally, prohibiting the use of the Bible as a primary literary or historical text on the grounds that the state constitution forbids it would interfere with the students' right to receive information of educational value. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1028 (9th Cir. 1998) (recognizing the student's rights to receive information that the school board has deemed to be

of legitimate educational value). This right to receive information has been recognized by the Supreme Court which found a violation of the First Amendment when a school removed books from the library in a content based manner. *Pico*, 457 U.S. at 866.

This restrictive reading would likewise create unconstitutional viewpoint discrimination. *See e.g. Good News Club v. Milford Central School*, 533 U.S. 98, 112 ("speech discussing otherwise permissible subjects cannot be excluded . . . on the ground that the subject is discussed from a religious viewpoint"). Students have a right to address assignments from a religious or Biblical perspective, including using both religious and secular sources. Would the Commission's reading of this provision prohibit students from using the Bible as a resource for completing their work (*e.g.,* a paper on comparative religion, a biography of President Washington or Lincoln, a report on the founders of our country, or the founding of Idaho and the contribution of missionaries), even when it was relevant and appropriate to the assignment?

To eliminate otherwise permissible books such as the Bible from use in an educational context in a content or viewpoint based manner would open the responsible state parties up to extensive, costly, and public litigation.

CONCLUSION

The Commission's proposal to deny Nampa Classical Academy's right to use the Bible in its

curriculum cannot pass muster under either the Constitution of Idaho or the United States Constitution. The framers of Idaho's Constitution never intended for the Bible to be banned from public schools, especially not under the circumstances in the instant case. The Bible is not a sectarian book, as prohibited under article IX, section 6, and it is not being used here to promote sectarian tenets. In addition, to ignore the intent of the framers and hold that the Bible can never be used in Idaho public schools would offend the United States Constitution. Such a result is impermissible and Nampa Classical Academy must be allowed to exercise its right to use the Bible, along with many other documents, as resources in its school curriculum.

PARTIAL TRANSCRIPT OF PUBLIC CHARTER SCHOOL COMMISSION MEETING

August 14, 2009
Special Meeting

Ok, well thank you very much for your patience. I would like to make a few comments before we start our commission discussion today and I think one is though I appreciate your interest and attendance today and we, the commission, have received a variety of written comments from, not only the Nampa Classical Academy, but also from members of the public prior to the meeting. At today's meeting, we will not take any additional verbal testimony that will be accepted at this time.

I think I would like to make a statement, that, on the advice of our counsel, the commission will take the position that the use of religious documents or text in a public school curriculum will be a violation of the Idaho Constitution. Accordingly, the commission wishes to advise the Nampa Classical Academy that if it proceeds to use religious text in class or in the classroom, the commission will be required to issue the school a notice of defect. Is there a motion at this time from any of the commissioners?

Mister Chairman, this is Commissioner Corkill, I'd like to make a motion to release the attorney client privilege documents given to us by our legal advisor.

Chair—ok

Corkill—ok

Female voice—I second that.

Chair—is there a second?

Female voice—yes after I arelady second that.

Chair—(cant understand what is said)

Is there any discussion about releasing the memorandum prepared by our counsel following today's meeting? Please said aye.

Several ayes.

Chair—All those opposed.

Ok, the motion carries.

I believe that concludes our discussion today. Chair leader taking a motion to adjourn.

Mr. Chairman, I make a motion to adjourn.

Chair—Is there a second?

Second

Chair—Any of those have any comments or discussion with respect to that motion?

All those in favor of the motion say aye.

Several ayes.

Chair—All opposed.

We are adjourned. Thank you. (Several good byes, thank you's, have a nice weekend)

IDAHO PUBLIC CHARTER SCHOOL COMMISSION
650 W. State Street • P.O. Box 83720 • Boise, ID 83720-0037
208/334-2270 • FAX: 208/334-2632
e-mail: charter@osbe.idaho.gov

November 23, 2009

Board of Directors
Nampa Classical Academy
1701 Smith Avenue
Nampa, ID 83651

Dear Nampa Classical Academy Board of Directors:

As you are aware, Idaho Code § 33-5209 requires the authorized chartering entity of a public charter school to provide written notice of defect to any school which it has reason to believe has committed a defect. This letter is to serve as written notice of defect to Nampa Classical Academy (NCA) on the grounds that the Public Charter School Commission (PCSC) has reason to believe that NCA has violated any provision of law.

Specifically, the PCSC cites the following defect:

1) The PCSC has reason to believe that NCA is using and/or intends to use religious texts as part of its curriculum, in violation of the Idaho State Constitution.

Pursuant to IDAPA 08.02.04.301.03, please submit to the PCSC office by December 23, 2009, a corrective action plan detailing the means by which NCA will cure this defect.

Sincerely

William H. Goesling, Chairman, PCSC

Cc: Michelle Clement Taylor, School Choice Coordinator, SDE
Michael Gilmore, Deputy Attorney General