No. 16-229

In the Supreme Court of the United States

COPE (A.K.A. CITIZENS FOR OBJECTIVE PUBLIC EDUCATION, INC.), *et al.*,
Petitioners,

v.

KANSAS STATE BOARD OF EDUCATION, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners' Question Presented mischaracterizes the determinative issue in this case and the Tenth Circuit's holding. The proper question is:

Whether schoolchildren and their parents have standing to challenge curriculum standards adopted by the Kansas State Board of Education when state law allows locally elected school boards to determine their districts' own curricula?

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STATEMENT OF THE CASE

1. Petitioners are a group of Kansas schoolchildren, their parents, two Kansas taxpayers, and the nonprofit organization Citizens for Objective Public Education ("COPE"). They seek to enjoin implementation of the Next Generation Science Standards and the related Framework for K-12 Science Education Practices, Crosscutting Concepts and Core Ideas (collectively "Science Standards" or "NGSS"), which the Kansas State Board of Education adopted on June 11, 2013. Petitioners sued the State Board of Education, the individual members of the State Board of Education in their official capacities, the Kansas State Department of Education, and the Kansas Commissioner of Education in his official capacity.

The Science Standards adopted by the State Board of Education do not prescribe a specific curriculum. Instead, as the Executive Summary of the Standards explains, they establish "performance expectations" for student learning:

> The NGSS are standards, or goals, that reflect what a student should know and be able to do—they do not dictate the manner or methods by which the standards are taught. The performance expectations are written in a way that expresses the concept[s] and skills to be performed but still leaves curricular and instructional decisions to states, districts, school[s] and teachers. The performance expectations do not dictate curriculum; rather, they are coherently developed to allow flexibility in the instruction of the standards. . . . [T]he

> NGSS do not dictate nor limit curriculum and instructional choices.

See http://www.nextgenscience.org/get-to-know (under "NGSS Front Matter").[1]

Petitioners allege that the Science Standards endorse a "non-theistic religious worldview" in violation of the Establishment Clause.[2] Pet. 4. In particular, they appear to challenge the teaching of scientific concepts such as evolution, and they advocate "objective" science education, by which they presumably mean a science curriculum that includes the teaching of "intelligent design." Pet. App. 80-94.

Although Kansas law requires the State Board of Education to establish curriculum standards, locally elected school boards remain free to determine their own curricula. *See* K.S.A. 2016 Supp. 72-6479(b) ("Nothing in this subsection shall be construed in any manner as to impinge upon any district's authority to determine its own curriculum."). The Petitioners have not alleged that any Petitioner children attend a school district where the Science Standards have been implemented. *See* Pet. App. 40.

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[1] The Science Standards were incorporated into Petitioners' complaint by reference and therefore may be considered in the context of a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

[2] Petitioners also raised Free Exercise, Free Speech, and Equal Protection claims in the district court, but the Tenth Circuit held that any challenge to the district court's dismissal of those claims was not raised on appeal and was therefore waived. Pet. App. 7 n.4.

2. The district court dismissed Petitioners' complaint for lack of standing.[3] The court held that Petitioners had not alleged "personal and unwelcome contact" with the Science Standards because the State Board of Education "has only the power to 'supervise' local public schools and is prohibited from impinging upon a local school district's authority to determine its own curriculum." Pet. App. 37. The court noted the Petitioners had not alleged that any of them attend a school that actually has implemented the Science Standards; instead, Petitioners' concern was with future, *possible* implementation. *Id.* at 40. Because local districts remain free to adopt their own curriculum, the district court concluded that any potential future injury was not "certainly impending" as required for standing. *Id.* at 39-40.

The district court also rejected Petitioners' claim that they were injured by the State Board's mere adoption of the Science Standards based on the "message" such adoption conveyed. The court distinguished the Tenth Circuit's decision in *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012) (holding that a Muslim individual had standing to challenge a constitutional amendment forbidding courts from considering or using Sharia law), by noting that in *Awad*, the constitutional amendment conveyed more than just a message; it imposed a binding constitutional command. Pet. App. 44. By contrast, the Science Standards are not binding on local school

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[3] The court also dismissed Petitioners' claims against the State Board of Education and the State Department of Education based on sovereign immunity, Pet. App. 28-29, a decision Petitioners have not challenged on appeal.

districts, which remain free to determine their own curricula. After reviewing cases from other circuits, the district court concluded that any "offense" Petitioners allege as a result of the purported "message" conveyed by the mere adoption of the Science Standards, standing alone, was not a cognizable injury that confers standing. Pet. App. 49.

The district court held that Petitioners also failed to establish causation and redressability. The court noted this Court's "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors," such as the local school districts here. Pet. App. 54 (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (2013)). And the court held that a decision favorable to Petitioners would not redress their alleged injuries because "even if the Court grants plaintiffs' requested relief and prohibits the Board from implementing the [Science Standards], the Board lacks authority under Kansas law to control the curriculum of local school districts." Pet. App. 56.

3. The Tenth Circuit affirmed for substantially the same reasons. First, the Tenth Circuit held Petitioners had not alleged a cognizable injury because they were not directly affected by the State Board of Education's adoption of the Science Standards. The court noted that any alleged injury based on potential future implementation of the Science Standards in local schools was legally cognizable only if that injury was "certainly impending." Pet. App. 12 (citing *Clapper*, 133 S. Ct. at 1147). Petitioners' alleged injury was not certain to occur, however, because Kansas law "expressly preserves districts' authority to determine their own curricula." *Id.* And even if the Science

Standards are implemented in local schools, Petitioners' alleged injury stems "from what is allegedly *not* in the Standards—an objective view of origins science. But nothing prevents school districts from adding to or altering the Standards as they develop curricula." Pet. App. 13.

The court also rejected Petitioners' claim that the State Board's mere adoption of the Science Standards, apart from any implementation in local schools, caused them to suffer a cognizable injury. The court distinguished cases finding injury caused by governmental messages, noting that the Science Standards are not a symbol with which Petitioners experience personal and unwelcome contact (as in *American Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010)) and do not expressly condemn Petitioners' religious beliefs (as in *Awad*). Pet. App. 10-11.

Finally, the Tenth Circuit held that Petitioners failed to demonstrate causation and redressability. Petitioners' alleged injuries are not traceable to the State Board of Education because "COPE would fear objectionable teaching of origins sciences even without the Standards' recommendations." Pet. App. 14 n.10. Likewise, Petitioners' alleged injuries are not redressable by a decision in their favor because "schools may incorporate the Standards or other curricula regardless of whether the Board has officially adopted them. And even with a favorable ruling from this court, schools could teach evolution in a manner COPE finds objectionable." Pet. App. 15 n.11.

REASONS FOR DENYING THE WRIT

There are three fundamental reasons to deny review in this case: (1) Petitioners seriously misrepresent the lower courts' actual rationales and holdings; (2) there is no conflict of authority on any question presented here; and (3) a determination of state law, *i.e.*, an issue not of federal importance, is central to this case. Respondents briefly explain each of these reasons to deny review below.

I. Petitioners Misrepresent the Basis of the Tenth Circuit's Decision.

The question presented by Petitioners, and much of the argument in their Petition, has nothing to do with the actual issue in this case. Petitioners falsely accuse the Tenth Circuit of holding that theistic parents and their children categorically lack standing to challenge non-theistic religious practices in public schools. This is a gross mischaracterization of the Tenth Circuit's decision.

Contrary to Petitioners' claims, the Tenth Circuit's reference to the Science Standards as "non-religious" (as opposed to Petitioners' allegation that the Science Standards are "atheistic") was not the basis for that court's holding, as is evident from a review of the Tenth Circuit's opinion reprinted in the Petition appendix. Instead, as explained above in the Statement of the Case, the Tenth Circuit held that Petitioners lacked standing to challenge the Science Standards because Kansas law allows local school districts to determine their own curricula. None of the Tenth Circuit's reasoning turns on whether the Science Standards are described as "non-religious" or "atheistic," and the

Tenth Circuit certainly did not hold that theists categorically lack standing to challenge non-theistic religious practices.

II. There Is No Split of Authority.

Petitioners incorrectly claim that the Tenth Circuit's decision conflicts with decisions of this Court and decisions of other circuits.

All of the decisions Petitioners cite where this Court found standing involved religious practices that were *actually occurring* in schools.[4] For example, in *Abington School District v. Schempp*, 374 U.S. 203 (1963), schoolchildren and their parents sought to enjoin a school district from *continuing to conduct* religious exercises in public schools. *Id.* at 206-07. As this Court later explained, the schoolchildren in *Schempp* "were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 n.22 (1982).

Likewise, *every one* of the seven circuit cases Petitioners cite as allegedly conflicting with the Tenth Circuit's decision here, *see* Pet. 30-33, involves religious practices that were actually occurring in schools (or, in

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[4] Two of the cases Petitioners cite, *Engel v. Vitale*, 370 U.S. 421 (1962), and *Wallace v. Jaffree*, 472 U.S. 38 (1985), did not even address standing and therefore provide no authority on that issue. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."). Even so, in both cases, the challenged religious practices were actually being carried out in local schools.

one case, in a public housing development). *See Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391, 1399-1400 (10th Cir. 1985) (religious meetings held on school premises); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 683 (7th Cir. 1994) (reading curriculum adopted by local school district and used in the classroom); *Moss v. Spartanburg County Sch. Dist. Seven*, 683 F.3d 599, 601-04 (4th Cir. 2012) (school conferring academic credit for off-campus religious instruction); *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1493-94 (8th Cir. 1988) (teacher leading band class in prayer before practices and performances); *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 464-65 (5th Cir. 2001) ("Clergy in the Schools" program); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1531 (9th Cir. 1985) (allegedly offensive book assigned as part of school's literature curriculum); *Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1103-04 (2d Cir. 1992) (after-school Bible study in public housing development community center).

Here, by contrast, Petitioners have not alleged that any challenged action actually has been implemented (nor with any certainty will be implemented in the future) in any school attended by the Petitioner children. That plainly distinguishes this case from *all* of the cases Petitioners cite.

III. Review by this Court Is Not Warranted Because the Tenth Circuit's Decision Was Based on an Interpretation of State Law.

The Tenth Circuit's decision rested on the fact that Kansas law allows locally elected school boards to determine their own curricula. Petitioners spend only one paragraph of their Petition addressing this point, claiming that "implementation of the full set of standards is effectively required" by Kansas law and that the Tenth Circuit *misinterpreted Kansas law* in concluding otherwise. Pet. 29-30. As the Tenth Circuit noted, however, many of Petitioners' arguments on this score were not raised in the district court and are therefore waived. Pet. App. 13 n.7.

In any event, Petitioners' argument is wrong. The Kansas Constitution provides that public schools "shall be maintained, developed and operated by locally elected boards" under the "general supervision" of the State Board of Education. Kan. Const. art. VI, §§ 1 and 5. The Kansas Supreme Court has interpreted the State Board's "general supervision" to mean "something more than to advise but something less than to control." *See State ex rel. Miller v. Bd. of Educ. of Unified Sch. Dist. No. 398*, 212 Kan. 482, 492, 511 P.2d 705 (1973).

K.S.A. 2016 Supp. 72-6479, the statute giving the State Board of Education authority to adopt curriculum standards, reflects this constitutional relationship. While subsection (b) of the statute provides that the State Board "shall establish curriculum standards which reflect high academic standards for the core academic areas of mathematics, science, reading, writing and social studies," it goes on to provide that

"[n]othing in this subsection shall be construed in any matter so as to impinge upon any district's authority to determine its own curriculum." K.S.A. 2016 Supp. 72-6479(b). Thus, although the State Board may adopt curriculum standards to guide local schools, it has no authority to actually set their curricula.

Even if the Tenth Circuit had misinterpreted Kansas law, however, such an error would not warrant this Court's review. The state law relationship between the Kansas State Board of Education and local Kansas school boards is not a question of federal importance. The centrality of that state law question to the lower courts' standing analysis is yet another reason this case does not merit plenary review by this Court.

CONCLUSION

Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted.

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October 2016