IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

COPE (a.k.a. CITIZENS FOR OBJECTIVE, PUBLIC EDUCATION, INC.), *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case. No. 13-CV-4119-KHV-JPO**
KANSAS STATE BOARD OF EDUCATION, *et al.*,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

OFFICE OF KANSAS ATTORNEY GENERAL
DEREK SCHMIDT

Jeffrey A. Chanay, KS Sup. Ct. No. 12056
Deputy Attorney General, Civil Litigation Division
Stephen O. Phillips, KS Sup. Ct. No. 14130
Assistant Attorney General
Memorial Bldg., Third Floor
120 SW Tenth Avenue
Topeka, Kansas 66612
Phone: 785-296-2215
Fax: 785-291-3767
E-mail:jeff.chanay@ksag.org
steve.phillips@ksag.org

Cheryl L. Whelan, KS Sup. Ct. No. 14612
General Counsel
Kansas State Department of Education
Office of General Counsel
Landon State Office Building
900 SW Jackson St., Suite 102
Topeka, KS 66612
E-mail: cwhelan@ksde.org

Attorneys for Defendants

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NATURE OF THE MATTER BEFORE THE COURT

Under 42 U.S.C. § 1983, Plaintiffs seek to enjoin the Kansas State Board of Education and Kansas State Department of Education from implementing new science standards for Kansas schools. The State Board of Education adopted the Standards to lay the foundation for Kansas K-12 schools to provide students an internationally-benchmarked science education that prepares them for college and careers, and equips them to compete in the ever-changing global marketplace. The Standards identify concepts that all students should know, starting in kindergarten through high school graduation. These concepts cut across biology, chemistry, physics, and engineering; they include the structure and function of various organisms, the solar system and seasonal patterns, chemical reactions, the properties and effects of light and sound waves, and the effect of various forces on objects. The Standards also include basic concepts of evolution and natural selection. Plaintiffs claim that the Standards, and the Framework used to develop the Standards, conflict with their particular theistic religious beliefs. They allege that the Framework and Standards are inherently "atheistic" and endorse "a non-theistic religious worldview," which they argue is itself functionally religious. Plaintiffs claim that the Framework and Standards violate their rights under the First Amendment's Establishment, Free Exercise, and Free Speech Clauses, as well as the Equal Protection Clause of the Fourteenth Amendment.

SUMMARY OF THE ARGUMENTS

The Court should dismiss all four of Plaintiffs' claims because the Court lacks jurisdiction and because the Complaint fails to state a claim for which relief may be granted. ***First***, the Kansas State Board of Education and the Kansas State Department of Education are entitled to Eleventh Amendment sovereign immunity to this suit.

Second, Plaintiffs lack standing. They have not, and cannot show that they have suffered an injury in fact that is traceable to Defendants' conduct and is redressable by a favorable ruling of this Court. Plaintiffs' claims turn on the potential ripple effect the Framework and Standards may have on local school boards, then local school districts, then local public schools, and finally teachers who ultimately decide how and what to teach their students. But because the School Board's power over local public schools is limited to "general supervision," it has no power to direct when or how local public schools implement the Standards. The State Department of Education and its Commissioner have even less influence over the operation of local public schools. Because Plaintiffs' claims depend on the manner in which local school boards, districts, and schools exercise their broad discretion, Plaintiffs have not, and cannot, allege that the State Board's adoption of the Framework and Standards has caused an injury that an order regarding the State Board or Department of Education could remedy.

Third, Plaintiffs' have not stated an Establishment Clause claim. Plaintiffs' Establishment Clause claim turns on the flawed premise that teaching secular scientific principles is tantamount to teaching religion. The U.S. Supreme Court and federal circuit courts across the country have rejected this reasoning, or some version of it. Plaintiffs' Complaint fares no better; it fails all three prongs of the Tenth Circuit's Establishment Clause test. Plaintiffs have not, and cannot, allege that the Framework and Standards have no secular purpose, have the primary effect of advancing or inhibiting religion, or excessively entangle the State with religion. Not only does Plaintiffs' Complaint fail to state an Establishment Clause claim, it asks the Court to turn Establishment Clause jurisprudence on its head by ruling that secular scientific principles are actually religious.

Fourth, Plaintiffs have not stated a Free Exercise, Free Speech, or Equal Protection Clause claim. It is nearly impossible to discern from the Complaint what exactly these claims entail. The Framework and Standards do not compel students to accept or adopt any particular religious beliefs, and expressly state that science does not answer all of life's questions. They do not compel students to speak, discourage different points of view, or treat one student differently than any other. Defendants respectfully ask the Court to dismiss Plaintiffs' Complaint in its entirety.

STATEMENT OF FACTS

By this lawsuit, parents of students in Kansas public schools and others (Plaintiffs) seek to enjoin the Kansas State Board of Education and Kansas State Department of Education from implementing new nationally-accepted science standards for Kansas schools.

I. Plaintiffs.

There are three categories of Plaintiffs. Citizens for Objective Public Education (COPE) alleges that it is a nonprofit organization that promotes religious rights in public education. Complaint (Doc. #1) ¶ 26. While COPE alleges that its members include Kansas taxpayers and parents with children in Kansas schools, *id.*, none of the other Plaintiffs allege they are members of COPE. Most of the other Plaintiffs are parents and their minor children who are either enrolled, or expect to enroll in Kansas public schools. *Id.* ¶¶ 27-42. Plaintiffs David and Victoria Prather, however, do not allege they have children in public schools; they merely allege they pay taxes used to support public schools. *Id.* ¶ 43. Plaintiffs are represented by, among others, John H. Calvert, Managing Director of the Intelligent Design Network, Inc., a nonprofit organization formed in Kansas to promote intelligent design.

II. Defendants.

Plaintiffs have sued three categories of defendants. The main defendant is the ten-member Kansas State Board of Education (State Board). *Id.* ¶ 44. Plaintiffs have also sued the individual board members, but "only in their official capacities." *Id.* ¶ 45. The Board is established by the Kansas Constitution. Kan. Const. Art. 6, § 2. It has "general supervision" over K-12 public schools, which includes setting education standards but does not include developing curriculum. *Id.* Local public schools, while under the supervision of the State Board, are "maintained, developed and operated by locally elected [school] boards." *Id.* Art. 6, § 5. A more detailed explanation of the State Board's legal authority is set forth below.

Plaintiffs also sue Diane DeBacker, the Kansas Commissioner of Education "in her official capacity only." *Id.* ¶ 47. Article 6, Section 4 of the Kansas Constitution establishes the position of Commissioner of Education. It states: "The state board of education shall appoint a commissioner of education who shall serve at the pleasure of the board as its executive officer." The Kansas Constitution does not set forth any of the Commissioner's duties or authorities. Kansas statutes state that the Commissioner "shall serve at the pleasure of the state board and perform such duties as are prescribed by law or by the state board," K.S.A. 72-7601, but grant the Commissioner no authority other than various administrative duties. Because the Commissioner is not a member of the State Board, she has no authority to vote with the State Board or otherwise adopt the Framework and Standards.

Plaintiffs have sued the Kansas State Department of Education (Department), which is a governmental entity established by statute, K.S.A. 72-7701. *Id.* ¶ 46. Kansas Statutes say very little about the Department's duties or authority, except that it is "under the administrative supervision of the commissioner as directed by law and by the state board." *Id.*

III. The Constitutional and Statutory Framework.

Article 6 of the Kansas Constitution provides the framework for Kansas' system of public education. It provides three distinct roles for three distinct institutions: First, the "legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law." Kan. Const. Art. 6 § 1. Second, the "state board of education . . . shall have general supervision of public schools, educational institutions and all the educational interests of the state, except educational functions delegated by law to the state board of regents," and "shall perform such other duties as may be provided by law." *Id.* Art. 6 § 2(a). Third, "[l]ocal public schools under the general supervision of the state board of education shall be maintained, developed and operated by locally elected boards." *Id.* Art. 6 § 5. Article 6 of the Kansas Constitution makes clear that the State Board has limited general supervisory authority over local public schools. Only the locally elected school boards have authority directly to maintain, develop, and operate local public schools. *See id.*

This deliberate constitutional structure limits the power of the State Board, and, in turn, the effect of any resolutions or standards it may adopt. Numerous Kansas laws and regulations confirm the State Board's circumscribed role. For example, the Kansas legislature has tasked the State Board with "establish[ing] curriculum standards which reflect high academic standards for the core academic areas of mathematics, science, reading, writing and social studies." K.S.A. 2012 Supp. § 72-6439(b); *see also* K.A.R. 91-31-31(d) (defining "curriculum standards" as "statements, adopted by the state board, of what students should know and be able to do in specific content areas"). This is what the State Board did when it adopted the Framework and Standards. Section 72-6439(b) goes on to make explicit what the structure of the Kansas

Constitution implies; that "[n]othing in this subsection shall be construed in any manner so as to impinge upon any district's authority to determine its own curriculum."

Article 6 of the Kansas Constitution and Section 72-6439(b) make clear that the Board's adoption of the Framework and Standards will not – as a matter of Kansas law – automatically "caus[e] Kansas public schools to establish and endorse a non-theistic religious worldview." Complaint (Doc. #1) ¶ 1. Only local school boards and school districts have the authority to determine how subjects are taught in local public school classrooms. *See* Kan. Const. Art. 6 §§ 2(a), 5; K.S.A. 2012 Supp. § 72-6439(b); *see also* K.S.A. 72-1128 (allowing State Board to "*assist* in the development of a grade appropriate curriculum for character development programs," but only "[u]pon request of a school district") (emphasis added); K.S.A. 72-7535(a), (b) (requiring the State Board to "*authorize* and *assist* in the implementation of programs on teaching personal financial literacy," which local school boards and districts "*may* use in implementing the program of instruction on personal financial literacy," and requiring the State Board to "*encourage*" local school districts to select certain textbooks) (emphasis added).

This structure comports with the State Board's responsibility for managing the "subjects and areas of instruction" that schools must teach to be accredited, K.S.A. § 72-1127(a); *see also* K.S.A. § 72-1117(a), selecting "subject matter within the several fields of instruction," K.S.A. § 72-1101, and organizing the subject matter "into courses of study and instruction for the *guidance of* teachers, principals and superintendents" who teach classes, develop curriculum, and manage the schools, *id.* (emphasis added). Again, the State Board's role is limited to "general supervision." K.S.A. 2012 Supp. § 72-6439a, which was enacted with Section 72-6439 discussed above, reiterates this division of power between the State Board and local districts. It states that "[w]henever the state board of education determines that a school has failed either to

meet the accreditation requirements established by rules and regulations or standards adopted by the state board or provide the curriculum required by state law, the state board shall so notify the school district in which the school is located." K.S.A. 2012 Supp. § 72-6439a. But even then, the State Board's authority is limited – "upon receipt of such notice, the board of education of such district are [sic] *encouraged* to reallocate the resources of the district to remedy all deficiencies identified by the state board." *Id.* (emphasis added).

The Kansas Supreme Court has long acknowledged these limitations on the State Board's authority to control local public schools. It has held that Kansas law "entrust[s] the operation of local public schools to local boards of education subject to the general supervision of the state board of education, such supervision being restricted, however, by the limitations which inhere in the nature of supervision." *State ex rel. Miller v. Bd. of Educ. of Unified Sch. Dist. No. 398, Marion County (Peabody)*, 212 Kan. 482, 490, 511 P.2d 705, 712 (1973). "Supervision," although hard to define precisely, "means something more than to advise but something less than to control." *Id.* at 492, 511 P.2d at 713. *See also Nat'l Educ. Ass'n – Ft. Scott v. Bd. of Educ., Unified Sch. Dist. No. 234*, 225 Kan. 607, 611-12, 592 P.2d 463, 466-67 (1979) (finding that "general supervision" does not include collective bargaining negotiations between teachers and school boards).[1]

[1] In several legal opinions, the Kansas Attorney General has applied this definition of the State Board's limited authority. *See, e.g.*, Kan. Att'y Gen. Op. No. 2007-43 (finding that although the Kansas Supreme Court had held that it was incompatible for a teacher to serve as a member of his school's local board, the more limited role of the State Board made the "duties and functions" of a member of the State Board and a school teacher not "inherently inconsistent and repugnant"); Kan. Att'y Gen. Op. No. 97-95 (finding that the 1966 amendments to Article 6 of the Kansas Constitution were "intended to give constitutional credence to the long-standing tradition of local control and operation of public schools by locally elected boards of education"); Kan. Att'y Gen. Op. No. 90-30 ("The Kansas Constitution limits rather than confers power" on the State Board; the State Board's authority has been "deemed to be limited to matters which will equalize and promote the quality of education for the students of this state, including such matters as the accreditation of schools, certification of school personnel, and establishment of minimum curriculum and graduation requirements"); Kan. Att'y Gen. Op. No. 83-154 (finding that "the constitutional power of the State Board of Education is limited to accomplishing its basic mission of equalizing and promoting the quality of education for the students of this state," specifically "matters which relate to the quality of education, such as 'statewide accreditation and certification of teachers and schools'") (quoting *NEA – Ft. Scott*, 225

As discussed in more detail below, the Standards themselves recognize the limitations of the State Board and do not purport to set curriculum or otherwise dictate what must be taught in local public school classrooms. With respect to implementation, the Standards state:

> 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 and skills to be performed but still leaves curricular and instructional decisions to states, districts, school and teachers. The performance expectations do not dictate curriculum; rather, they are coherently developed to allow flexibility in the instruction of the standards. While the NGSS have a fuller architecture than traditional standards . . . [they] do not dictate nor limit curriculum and instructional choices.

NGSS, Executive Summary, at 2; *see also* NGSS, Introduction, at 5-6;[2] NGSS, Implementation.[3]

IV. The Framework and Standards.

Plaintiffs seek to enjoin the State Board's adoption and implementation of the Next Generation Science Standards, dated April 2013, and the related Framework for K-12 Science Education Practices, Crosscutting Concepts and Core Ideas. They allege that the Framework and Standards "endorse a non-theistic religious worldview (the "Worldview") in violation of the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment." Complaint (Doc. #1) ¶ 1. Plaintiffs' Complaint, however, relies on a gross misrepresentation of the Framework and Standards. And

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Kan. 607, 611, 592 P.2d 463, 466 (1979)); Kan. Att'y Gen. Op. No. 74-253 (finding that "general supervision" does not include authority to "assign individual school districts to participation in any particular athletic league" because "[s]uch a regulation would involve the intrusion of the State Board into the control of individual districts' activities").

[2] The NGSS Executive Summary and Introduction are combined into a single document, which the website calls "NGSS Front Matter."

[3] For the Court's convenience, Defendants have embedded hyperlinks in our citations to NGSS documents instead of spelling out the unwieldy Internet addresses. We have also attached copies to this brief. The Framework is attached as Exhibit A. The Standards are attached as Exhibit B.

because Plaintiffs do not tie their arguments to any particular Standard, Defendants are left to guess the standards to which they object.

Plaintiffs' Complaint provides the websites where the complete text of the Framework and Standards can be found: www.nextgenscience.org (Framework) and www.nap.edu/catalog.php?record_id=13165# (Standards). Complaint (Doc. #1) ¶ 1.[4] Because Plaintiffs' Complaint incorporates the Framework and Standards by reference, the Court may consider both documents in their entirety for purposes of ruling on this motion. *See infra* Motion to Dismiss Standards.

As the Foreword to the Framework explains, the "Framework for K-12 Science Education represents the first step in a process to create new standards in K-12 science education." Framework, Foreword, at R9. In other words, the Framework simply provided guidance for developing the Standards.[5] Looking at the Standards generally, they simply set "performance expectations," *i.e.*, expectations for what students should know and be able to do in the fields of science and engineering at each grade level. The Standards do not set forth a curriculum for schools to follow. As the Standards' Implementation section states:

> The Next Generation Science Standards identifies content and science and engineering practices that all students should learn from kindergarten to high school graduation. . . . As the standards will not define a curriculum, states and local districts will have the responsibility for providing more detailed guidance to classroom teachers, and will have room to fill in specific content to help students learn the key ideas in the standards.

NGSS, Implementation. The Executive Summary of the Standards is in accord:

[4] A downloadable PDF of the complete Framework is found at http://www.nap.edu/catalog.php?record_id=13165#. Downloadable PDFs of the different components of the Standards are available at http://www.nextgenscience.org/next-generation-science-standards.

[5] Plaintiffs allege that the State Board adopted the Framework and Standards. To be precise, the State Board adopted the Standards, which essentially incorporate the Framework. For purposes of this Motion to Dismiss, Defendants refer to both the Framework and the Standards as having been adopted by the State Board.

> 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 and skills to be performed but still leaves curricular and instructional decisions to states, districts, school and teachers. The performance expectations do not dictate curriculum; rather, they are coherently developed to allow flexibility in the instruction of the standards. While the NGSS have a fuller architecture than traditional standards . . . [they] do not dictate nor limit curriculum and instructional choices.

NGSS, Executive Summary, *The NGSS are Standards, not Curriculum*, at 2.

Plaintiffs' Complaint attempts to transform the Framework and Standards into implements of religious indoctrination. To do this, Plaintiffs rely on conclusory allegations, none of which are tied to specific standards. It also contains numerous words and phrases in quotation marks, many of which do not appear anywhere in the Framework or Standards. *See, e.g.*, Complaint (Doc. #1) ¶¶ 12, 15, 66, 89, 91, 105.

The Complaint begins by alleging the Standards will cause schools to "establish and endorse a non-theistic religious worldview (the 'Worldview')." *Id.* ¶ 1. Plaintiffs reach this conclusion because, they argue, the Standards lead students to contemplate "ultimate religious questions like what is the cause and nature of life and the universe – 'where do we come from?'" *Id.* ¶ 2. But the Framework and Standards, simply do not ask this question. The phrase "where do we come from" is not in them. That students may contemplate this question as they study natural selection and evolution is not unique to studying these topics. Moreover, the Standards are tailored to specific age groups and do not claim that science has all the answers to life's deepest questions.

Plaintiffs also make philosophical assertions about the Framework and Standards that simply are not found in, or warranted by, the Framework and/or Standards. They repeatedly refer to the Framework and Standards as "materialistic/atheistic," *see, e.g.*, *id.* ¶ 19, and as

having "no secular purpose", s*ee, e.g.*, *id.* ¶ 17. Plaintiffs state that the Framework and/or Standards encourage the conclusion that the only reality is physical, and that life ends at death. *Id.* ¶ 77. They accuse the Framework and Standards of being "atheistic" and "preclude[ing] any natural or teleological explanation" of life. *Id.* ¶ 83. All of this is a gross and unfair characterization of the Framework and Standards, which simply do not address these questions at all.

To repeat, the Framework and Standards do not address philosophical or religious questions. The Standards do not set out a curriculum for schools to follow. The Standards simply set performance expectations of students in various subject areas at each grade level. Take for example a Standard relevant to Plaintiffs' suit – Middle School Standards for Biological Evolution (MS0LS4).[6] This Standard provides the following performance expectations:

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[PERFORMANCE EXPECTATION CHART BEGINS ON NEXT PAGE]

[6] The first digit of a specific Standard indicates a grade K-5, or specifies MS (middle school) or HS (high school). The next alpha-numeric code specifies the discipline, core idea and sub-idea. The number at the end of each code indicates the order in which that statement appeared in the Framework. Standards can be searched by topic ("Disciplinary Core Idea" or "DCI") and by grade level. NGSS, Topical Arrangements of Standards; NGSS, DCI Arrangements of Standards.

Students who demonstrate understanding can:

MS-LS4-1. **Analyze and interpret data for patterns in the fossil record that document the existence, diversity, extinction, and change of life forms throughout the history of life on Earth under the assumption that natural laws operate today as in the past.** [Clarification Statement: Emphasis is on finding patterns of changes in the level of complexity of anatomical structures in organisms and the chronological order of fossil appearance in the rock layers.] [Assessment Boundary: Assessment does not include the names of individual species or geological eras in the fossil record.]

MS-LS4-2. **Apply scientific ideas to construct an explanation for the anatomical similarities and differences among modern organisms and between modern and fossil organisms to infer evolutionary relationships.** [Clarification Statement: Emphasis is on explanations of the evolutionary relationships among organisms in terms of similarity or differences of the gross appearance of anatomical structures.]

MS-LS4-3. **Analyze displays of pictorial data to compare patterns of similarities in the embryological development across multiple species to identify relationships not evident in the fully formed anatomy.** [Clarification Statement: Emphasis is on inferring general patterns of relatedness among embryos of different organisms by comparing the macroscopic appearance of diagrams or pictures.] [Assessment Boundary: Assessment of comparisons is limited to gross appearance of anatomical structures in embryological development.]

MS-LS4-4. **Construct an explanation based on evidence that describes how genetic variations of traits in a population increase some individuals' probability of surviving and reproducing in a specific environment.** [Clarification Statement: Emphasis is on using simple probability statements and proportional reasoning to construct explanations.]

MS-LS4-5. **Gather and synthesize information about the technologies that have changed the way humans influence the inheritance of desired traits in organisms.** [Clarification Statement: Emphasis is on synthesizing information from reliable sources about the influence of humans on genetic outcomes in artificial selection (such as genetic modification, animal husbandry, gene therapy); and, on the impacts these technologies have on society as well as the technologies leading to these scientific discoveries.]

MS-LS4-6. **Use mathematical representations to support explanations of how natural selection may lead to increases and decreases of specific traits in populations over time.** [Clarification Statement: Emphasis is on using mathematical models, probability statements, and proportional reasoning to support explanations of trends in changes to populations over time.] [Assessment Boundary: Assessment does not include Hardy Weinberg calculations.]

This Standard expects students to understand the concept of natural selection. But like all of the Standards and the Framework, it simply does not address the existence of a god or gods, or whether any god or gods created the world. The Standards do not even address how to teach natural selection; as discussed above, local school boards, school districts, and teachers set the curriculum – not the State Board of Education or the State Department of Education.

Plaintiffs' Complaint stands reason on its head; it alleges that by implementing Standards based on accepted science the State is "endors[ing] a particular religious viewpoint." Complaint (Doc. #1) ¶ 24. Plaintiffs state that the Framework and Standards "implicitly exclude[] from [their] policies . . . children, parents and taxpayers that embrace theistic worldviews." *Id.* ¶ 21. Plaintiffs want the Court either to enjoin the Standards, or to require local public schools to incorporate Plaintiffs' own religious beliefs into public school curricula. *See id.* at 30-34. Plaintiffs criticize the Framework and Standards for not offering "evidence of the teleological alternative" and "fail[ing] to provide standards that will inform students about the fine-tuning of the Universe for life." *Id.* ¶¶ 113, 115. Plaintiffs advocate teaching "intelligent design." They want their religion taught in schools, rather than the science of natural selection.

Plaintiffs assert four causes of action. For the most part, Plaintiffs' "Counts" do not explain how their causes of action relate to the rest of their Complaint, so Defendants are left to guess. Plaintiffs allege that the Framework and Standards violate the Establishment Clause (Count 1, *id.* ¶ 127), Free Exercise Clause (Count 2, *id.* ¶ 128), and Free Speech Clause (Count 3, *id.* ¶ 129) of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment (Count 4, *id.* ¶ 130).

MOTION TO DISMISS STANDARD

This Motion to Dismiss makes two sets of arguments for dismissal. The first set of arguments is jurisdictional: the State Board of Education and State Department of Education request dismissal based on Eleventh Amendment sovereign immunity, and all defendants request dismissal because Plaintiffs lack standing. The second set of arguments show that Plaintiffs have not stated a claim for which relief may be granted.

Fed. R. Civ. P. 12(b)(1) governs the jurisdictional grounds for dismissal. Federal courts have limited jurisdiction, and they presume they lack jurisdiction. *Marcus v. Kan. Dep't of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999) (citing *Penteco Corp. v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991); *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)). Plaintiffs bear the burden of alleging sufficient facts to overcome this presumption. *Id.* Conclusory allegations like those in Plaintiffs' Complaint are not enough. *Semchyshyn v. Univ. of Kan.*, No. 08-2627-KHV, 2009 WL 5170162, at *1 (Dec. 11, 2009) (citing *Jensen v. Johnson County Youth Baseball League*, 838 F. Supp. 1437, 1439-40 (D. Kan. 1993).

Fed. R. Civ. P. 12(b)(6) governs dismissal for failure to state a claim. It requires that Plaintiffs' Complaint contain sufficient factual matter to state a claim that is plausible – not merely conceivable – on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 679-80 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In ruling on Defendants' motion under Fed. R. Civ. P. 12(b)(6), the Court assumes as true all well-pleaded factual allegations and determines whether they plausibly give rise to an entitlement of relief. *Iqbal*, 556 U.S. at 679. Plaintiffs bear the burden of alleging enough facts to suggest that they are entitled to relief; they must do more than make threadbare recitals of a cause of action accompanied by conclusory statements. *Twombly*,

550 U.S. at 556. The Court need not accept Plaintiffs' conclusory allegations. *Loggins v. Cline*, 568 F. Supp. 2d 1265, 1268 (D. Kan. 2008).

When ruling on a motion to dismiss, a court generally "considers only the contents of the complaint." *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 (10th Cir. 2013).[7] But the Court may consider "documents incorporated by reference in the complaint; documents referred to in and central to the complaint, when no party disputes [their] authenticity; and matters of which a court may take judicial notice." *Id.*; *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007); *Zhu v. Fed. Housing Fin. Bd.*, 389 F. Supp. 2d 1253, 1271 (D. Kan. 2005) (treating documents incorporated by reference in the complaint as not outside the complaint). Here, the Framework and Standards are central to Plaintiffs' Complaint, which incorporates both by reference by providing their Internet addresses. Complaint (Doc. #1) ¶ 1. Defendants also cite the Framework and Standards, and have attached both to this brief. The Court may consider the Framework and Standards in their entirety without converting this motion to a motion for summary judgment. *See Berneike*, 708 F.3d at 1146.

ARGUMENTS AND AUTHORITIES

I. The Kansas State Board of Education and Kansas State Department of Education are Entitled to Eleventh Amendment Sovereign Immunity to Plaintiffs' Suit.

The Eleventh Amendment bars Plaintiffs' claims against the Kansas State Board of Education and Kansas State Department of Education. Subject to a few narrow exceptions not applicable here, the Eleventh Amendment doctrine of sovereign immunity bars private individuals from suing nonconsenting states in federal court. *Ex Parte Young*, 209 U.S. 123

[7] An exception exists for motions to dismiss under Fed. R. Civ. P. 12(b)(1) that take the form of factual attacks on the accuracy of a complaint's allegations. *See Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995); *Semchyshyn*, 2009 WL 5170162, at *1. For the reasons discussed herein, regardless whether Defendants' jurisdictional arguments amount to a factual attack on Plaintiffs' Complaint, the Court may consider the Framework and Standards in their entirety without converting the Motion to Dismiss to one for summary judgment.

(1908); *see also, Opala v. Watt*, 454 F.3d 1154, 1157 (10th Cir. 2006) (citing *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1286 (10th Cir. 1999)). Eleventh Amendment immunity applies not only to the state itself, but also to agencies of the state. *See Aaron v. Kansas*, 115 F.3d 813, 814 (10th Cir. 1997). And it applies regardless of the nature of the relief sought – declaratory, injunctive, or money damages. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-02 (1984); *Ex Parte Young*, 209 U.S. at 159-60; *Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1196 (10th Cir. 1998) (finding that state or state agency sued in its own name is not subject to federal compensatory or injunctive relief). The only suits allowed under the *Ex Parte Young* exception for injunctive relief, are suits against individual defendants in their official capacities. *See, e.g., Cunningham v. Univ. of N.M. Bd. of Regents*, 2013 WL 4492168 *5 (10th Cir. 2013) (*citing Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 495 (10th Cir. 1998); *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995)).[8]

Likewise, under 42 U.S.C. § 1983 only "persons" can be sued. States and state agencies are not "persons" for purposes of Section 1983. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989); *McLaughlin v. Bd. of Trustees of State Colls. of Colo.*, 215 F.3d 1168 (10th Cir. 2000). The State Board and Department are therefore not "persons" for purposes of 42 U.S.C. § 1983. The Court should therefore dismiss all claims against the State Board and Department.

II. Plaintiffs Lack Article III Standing.

Plaintiffs lack Article III standing because the Framework and Standards they challenge have no binding effect on local public schools. Plaintiffs allege that the Framework and

[8] To the extent Plaintiffs' Complaint asserts a claim for money damages, such a claim is barred by the Eleventh Amendment, not only as against the State Board of Education and Department of Education, but it is also barred as against individual defendants in their official capacities. *See Aaron v. Kansas*, 115 F.3d 813, 814 (10th Cir. 1997); *see also* Complaint (Doc. #1) ¶ 48 (seeking nominal damages).

Standards "will have the effect of causing Kansas public schools to establish and endorse a non-theistic religious worldview." Complaint (Doc. #1) ¶ 1. The relationship between the State Board's adoption of the Framework and Standards, and how students will actually be taught in class, is so attenuated that Plaintiffs have not alleged an injury that is fairly traceable to the State Board's adoption of the Framework and Standards or likely to be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). Plaintiffs David and Victoria Prather, who allege standing solely on the basis of their status as Kansas taxpayers, lack standing for an additional reason – their claims do not fit within any recognized exception to the general prohibition on taxpayer standing.

A. Because the State Board's Authority is Limited to "General Supervision" of Local Public Schools, Plaintiffs Have Not Alleged an Injury in Fact that is Traceable to Defendants' Conduct and Redressable by a Favorable Ruling.

Article III standing is a threshold matter, central to the Court's subject matter jurisdiction, and "fundamental to the judiciary's proper role in our system of government." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (compiling cases). To have standing, Plaintiffs must show that (1) they suffered injury in fact, *i.e.*, an injury that is sufficiently concrete and particularized, actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to Defendants' conduct and not the result of the independent action of some third party not before the Court, and (3) the injury is likely to be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 561-62. These "are not mere pleading requirements"; they are "an indispensable part" of Plaintiffs' case. *Id.* As the party invoking federal jurisdiction, Plaintiffs bear the burden of establishing each element. *Id.* Here, Plaintiffs cannot satisfy any of the three elements of standing.

Plaintiffs allege that they have been (or will be) injured because the Standards "will have the effect of causing Kansas public schools to establish and endorse a non-theistic religious worldview." Complaint (Doc. #1) ¶ 1. Thus Plaintiffs allege an injury that hinges on the purported effect the Standards might have once local school boards decide to adopt the Standards and – in conjunction with local school districts, schools, and teachers – decide to implement them. *See, e.g., id.* ¶¶ 1, 24, 25, 43. Because Plaintiffs' "asserted injury arises from the government's allegedly unlawful regulation . . . of *someone else*," *i.e.*, local public school boards and schools, they must allege "much more" than if Plaintiffs were a direct "object of the action." *Defenders of Wildlife*, 504 U.S. at 562. This is not a case where Plaintiffs challenge a government regulation that reaches into the classroom and directly affects students by requiring or prohibiting certain teaching. *Compare, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987) (challenging law that *forbade* teaching evolution in public schools unless accompanied by teaching "creation science"); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (challenging school board rule *requiring* schools to begin each day with Bible readings). Rather Plaintiffs assert a more attenuated claim based on the potential ripple effects of the State Board's adoption of the Framework and Standards. *See, e.g., Defenders of Wildlife*, 504 U.S. 555. Based on Plaintiffs' theory of injury, the "existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Id.* at 562 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Kennedy, J., opinion)). Plaintiffs bear the burden of alleging that "those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.*

First, Plaintiffs have not sustained their burden of stating an actual or imminent injury because their Complaint does not allege a single fact about how or when the Standards will be implemented. At this point, Plaintiffs' alleged injury is purely speculative. Moreover, Plaintiffs' injury is conjectural and hypothetical because the State Board has no power to tell local public schools how to implement the Standards, and therefore cannot effect the injury Plaintiffs allege. The State Board's authority over public schools is limited to "general supervision." Kan. Const. Art. 6 § 2(a). It can set "standards," K.S.A. 2012 Supp. § 72-6439(b), for broad "subjects" and "areas of instruction," K.S.A. § 72-1127(a); *see also* K.S.A. § 72-1117(a), and "courses of study," K.S.A. § 72-1101, but it cannot "impinge upon any district's authority to determine its own curriculum," K.S.A. 2012 Supp. § 72-6439(b); *see also Miller*, 212 Kan. at 492, 511 P.2d at 713.

The State Board certainly will encourage local public schools to implement the Standards, but that is not enough to confer standing. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976) (holding that indigent plaintiffs lacked standing to sue the Secretary of the Treasury and Commissioner of the Internal Revenue Service where defendants "encouraged" hospitals to deny services to indigents by giving hospitals favorable tax treatment). Because the State Board cannot "mandate or direct" public schools to adopt any particular curriculum, Plaintiffs' alleged injury is "necessarily conjectural." *Clapper*, 133 S. Ct. at 1149; *see also Miller*, 212 Kan. at 492, 511 P.2d at 713 ("[s]upervision . . . means something more than to advise but something less than to control").

Second, Plaintiffs' alleged injury is not fairly traceable to the State Board. To satisfy Article III's causation requirement, Plaintiffs must allege a "substantial likelihood" that Defendants' conduct caused Plaintiffs' injury in fact. *Defenders of Wildlife*, 504 U.S. at 560; *see*

also Nova Health Sys. v. Gandy, 416 F.3d 1149, 1156 (10th Cir. 2005). At the very least, this "requires the named defendants to possess authority to enforce the complained-of provision." *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007). Here, Plaintiffs have not alleged that Defendants have any authority to direct how local public schools implement the Standards, and the statutory framework reveals that Defendants have very limited authority to do so. Plaintiffs have not satisfied their burden of showing causation for purposes of Article III standing.

Moreover, the U.S. Supreme Court has "been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 133 S. Ct. at 1150. Here, implementation of the Standards – which is the basis for Plaintiffs' alleged injury – is left to local school boards, districts, schools, and teachers who will exercise their independent judgment about when and how they wish to implement the Standards. Because Plaintiffs' claims rely on speculation about "the unfettered choices made by independent actors not before the court," *Defenders of Wildlife*, 504 U.S. at 562, they have not sufficiently alleged causation for purposes of Article III standing.

Third, Plaintiffs' alleged injury is not redressable because even if the Court granted Plaintiffs' requests to repeal the Framework and Standards or to amend them to conform to Plaintiffs' religious beliefs, it would not remedy Plaintiffs' alleged injury because the State Board does not control what public schools teach and cannot directly cause (or redress) the injury Plaintiffs allege. *See Defenders of Wildlife*, 504 U.S. at 568 (plurality opinion). The nature of Plaintiffs' alleged injury makes standing "'substantially more difficult' to establish," *id.* at 562 (majority opinion) (quoting *Allen v. Wright*, 468 U.S. 737, 757 (1984), and Plaintiffs have not carried their burden here. Even if Plaintiffs have standing to sue the State Board of Education, they clearly lack standing to sue the State Department of Education and its

Commissioner who had nothing to do with the State Board's adoption of the Standards, and little if anything to do with their implementation. The Court should dismiss Plaintiffs' claims because they have not sufficiently alleged any of the three elements of standing.

B. Taxpayer Plaintiffs Lack Standing.

Plaintiffs David and Victoria Prather (Taxpayer Plaintiffs), who assert claims solely on the basis of their status as Kansas taxpayers, lack standing because their alleged injury is not particularized, and "rest[s] on unjustifiable . . . speculation." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1443 (2011) (finding that taxpayers lacked standing to bring Establishment Clause claim challenging Arizona's school voucher program). Taxpayer Plaintiffs do not allege any particularized injury; their alleged injury arises, if at all, based only on their status as taxpayers. Complaint (Doc. #1) ¶ 43. "Absent special circumstances, . . . standing cannot be based on a plaintiff's mere status as a taxpayer." *Id.* at 1443-45; *see also Frothingham v. Mellon*, 262 U.S. 447 (1923) (explaining doctrinal basis for general rule against taxpayer standing). Although *Flast v. Cohen*, 392 U.S. 83 (1968) established a "narrow exception" to the "general rule against taxpayer standing" for certain Establishment Clause claims, *Ariz. Christian Sch. Tuition Org.*, 131 S. Ct. at 1445 (quoting *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988)) (internal quotation marks omitted), it does not apply here.[9]

Under the *Flast* exception, Plaintiffs must allege (1) "a logical link between [their taxpayer] status and the type of legislative enactment attacked," and (2) "a nexus between that status and the precise nature of the constitutional infringement alleged." 392 U.S. at 102. The

[9] It appears that Taxpayer Plaintiffs only assert an Establishment Clause claim. See Complaint (Doc. #1) ¶ 43 (stating that Taxpayer Plaintiffs "object to the use of such funds by the State of Kansas for the establishment and promotion of a non-theistic religious worldview through its implementation of the F&S."). To the extent they assert other claims, they lack standing to do so under the general prohibition on taxpayer standing. "[O]nly the Establishment Clause has supported federal taxpayer suits since *Flast*." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347 (2006) (internal quotation marks omitted).

Supreme Court has narrowly limited taxpayer standing under *Flast* to Establishment Clause "challenges directed only at exercise of congressional power under the Taxing and Spending Clause." *Hein v. Freedom From Religion Found. Inc.*, 551 U.S. 587, 604 (2007) (plurality opinion) (quoting *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982)) (internal quotation marks and alteration omitted); *see also Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1399 (1992). The general rule against taxpayer standing, and the limited *Flast* exception, apply equally to state taxpayer claims as federal taxpayer claims. *See Ariz. Christian Sch. Tuition Org.*, 131 S. Ct. at 1442-49 (applying these principles to state taxpayers' claims); *Colo. Taxpayers Union*, 963 F.2d at 1402 ("state taxpayers must be likened to federal taxpayers").

Here, Taxpayer Plaintiffs do not challenge the exercise of legislative power to tax and spend. Rather, they challenge the State Board's adoption of the Framework and Standards for supervising local public schools. This claim does not fit within *Flast*'s narrow exception to the prohibition on taxpayer standing. *See Valley Forge*, 481-82, 485-86, 488-89 (finding taxpayers lacked standing to challenge a decision by the federal Department of Health, Education and Welfare to transfer a parcel of federal property to a religious college). The Court should therefore dismiss Taxpayer Plaintiffs' claims.

III. The Court Should Dismiss Plaintiffs' Establishment Clause Claim Because the Framework and Standards (1) Have a Secular Purpose, (2) Do Not Have the Primary Effect of Advancing or Inhibiting Religion, and (3) Do Not Excessively Entangle Government With Religion.

The Establishment Clause of the First Amendment, which applies to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1; *Everson v. Bd. of Educ.*, 330 U.S. 1, 14-15 (1947). The Clause "mandates governmental neutrality between religion and religion, and

between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The Framework and Standards are neutral regarding religion. Yet Plaintiffs strain to imbue the Framework and Standards with religious meaning, primarily by misusing "religious" labels like "Orthodoxy," "indoctrinate," and "evangelize" to describe them. When stripped of these misleading labels, it is clear that the Kansas State Board of Education adopted the Framework and Standards for the secular purpose of providing all students an internationally-benchmarked science education. *See* NGSS, Executive Summary, at 1; *see generally* NGSS, Executive Summary; NGSS, Introduction.

The Standards do not advance or inhibit religion. Nor do they endorse religion or excessively entangle the State with religion. This lawsuit, however, risks injecting Plaintiffs' personal religious beliefs into the Standards. The U.S. Supreme Court has already rejected similar attempts in other contexts. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act); *Epperson*, 393 U.S. 97 (striking down Arkansas anti-evolution statutes). Moreover, several federal circuit courts have rejected similar claims regarding the purported establishment of anti-theist or secular humanist religion. *See, e.g.*, *Brown v. Woodland Joint Unified Sch.*, 27 F.3d 1373 (9th Cir. 1994); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 687 (7th Cir. 1994); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *Smith v. Bd. of Sch. Comm'rs of Mobile County*, 827 F.2d 684 (11th Cir. 1987); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985). For similar reasons, this Court should reject Plaintiffs' Establishment Clause Claims.

A. The Establishment Clause Framework.

In determining whether a state has violated the Establishment Clause, the Tenth Circuit applies the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as modified by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 796-97 (10th Cir. 2009) [hereinafter *Green I*].[10] To survive under this test, "the governmental action (1) 'must have a secular legislative purpose,' (2) its 'principal or primary effect must be one that neither advances nor inhibits religion,' and (3) it 'must not foster an excessive government entanglement with religion.'" *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1031 (10th Cir. 2008) (quoting *Lemon*, 403 U.S. at 612-13). Under Justice O'Connor's "endorsement test," "government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that 'religion or a particular religious belief is favored or preferred.'" *Bauchman v. W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) (quoting *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 593 (1989)); *see also Lynch*, 465 U.S. at 687-97 (O'Connor, J., concurring).

1. The "Purpose" Prong.

The "purpose" and "primary effect" prongs of the *Lemon* test are objective inquiries. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000); *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring); *Weinbaum*, 541 F.3d at 1031. The "purpose" prong tests

[10] The Tenth Circuit has repeatedly recognized widespread criticism of the *Lemon* test, but it has not yet abandoned it. *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1030 (10th Cir. 2008) (noting harsh criticism of the *Lemon* test, but holding that "[d]espite scattered signals to the contrary, the touchstone for Establishment Clause analysis remains the tripartite test set out in *Lemon*); *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1258-59 (10th Cir. 2005) (recognizing that the *Lemon* test has come under "vigorous attack," but concluding that it "remains the starting point for our Establishment Clause analysis"); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 124 (2005); *Bauchman v. W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) (noting "vigorous attack" on *Lemon* "by Justices and commentators alike"); *see also Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) [hereinafter *Green II*] (Kelly, J., dissenting from denial of rehearing en banc) (assuming that the *Lemon* test with Justice O'Connor's refinement applies); *id.* at 1244-45 (Gorsuch, J., dissenting) (urging reconsideration of *Lemon* test).

"whether the government's 'actual' purpose is to endorse or disapprove of religion." *Bauchman*, 132 F.3d at 551 (citing *Edwards*, 482 U.S. at 585; *Jaffree*, 472 U.S. at 56). In determining a government's actual purpose, courts view the challenged government action through the eyes of an "objective observer" familiar with its history and context. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309; *Edwards*, 482 U.S. at 594-95 (1987); *Jaffree*, 472 U.S. at 76 (O'Connor, J., concurring); *Weinbaum*, 541 F.3d at 1031. While the Supreme Court "has invalidated legislation or governmental action on the ground that a secular purpose was lacking," it has done so only where "there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680 (compiling cases).

In applying this standard, the Court should consider the Framework and Standards as a whole, and not view in isolation the portions to which Plaintiffs object. *Lynch*, 465 U.S. at 680; *Bauchman*, 132 F.3d at 554. The Court's inquiry into the government purpose should be "'deferential and limited.'" *Bauchman*, 132 F.3d at 554 (quoting *Jaffree*, 472 U.S. at 74 (O'Connor, J., concurring)). This means "consider[ing] the government's secular justification for its challenged conduct," and "[u]nless the secular justification is a 'sham' or is 'secondary' to a religious purpose, . . . defer[ring] to the government's professed purpose for using the symbol." *Weinbaum*, 541 F.3d at 1031; *see also Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (noting it is the duty of the courts to distinguish "'a sham secular purpose from a sincere one'") (quoting *Jaffree*, 472 U.S., at 75 (O'Connor, J., concurring)). The Court should "resist attributing unconstitutional motives to the government," particularly where, as here, the government relies on a "plausible secular purpose." *Bauchman*, 132 F.3d at 554.

2. The "Primary Effect" Prong.

The "primary effect" prong is also objective. It tests "whether a 'reasonable observer,' aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval" of religion. *Id.* at 551-52 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 779-81 (O'Connor, J., concurring)). Because it is an objective inquiry, it is irrelevant "whether particular individuals might be offended by [the government action]." *Id.* at 555. "[N]ot every governmental activity that confers a remote, incidental, or indirect benefit upon religion is constitutionally invalid." *Id.* at 555; *see also Lynch*, 465 U.S at 683; *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

The "school context changes these objective inquiries only slightly." *Weinbaum*, 541 F.3d at 1032. State and local school boards have "considerable discretion in operating public schools." *Edwards*, 482 U.S. at 583. The "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," yet courts "do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems which do not directly and sharply implicate basic constitutional values." *Epperson*, 393 U.S. at 104. The proper standard is an "objective standard based on reasonableness and informed knowledge with due consideration for the concern that school children will see the governmental message." *Weinbaum*, 541 F.3d at 1032 (compiling cases).

3. The "Excessive Entanglement with Religion" Prong.

The final prong of the *Lemon* test – excessive government entanglement with religion – considers the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious

authority." *Lemon*, 403 U.S. at 615. In other words, "neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." *Everson*, 330 U.S. at 16; *see also Lee v. Weisman*, 505 U.S. 577, 602 n.3 (1992).

Under this test, courts have not been inclined to find that the discussion of certain topics or use of certain books in public schools violate the Establishment Clause. *See, e.g.*, *Fleischfresser*, 15 F.3d at 687 (rejecting claim that school district's supplemental reading program violated the Establishment Clause by indoctrinating children in values directly opposed to plaintiffs' Christian beliefs); *Brown*, 27 F.3d 1373 (rejecting claim that portions of teaching aids violated the Establishment Clause by promoting the practice of witchcraft); *Smith*, 827 F.2d 684 (rejecting claim that the use of certain textbooks violated the Establishment Clause by advancing secular humanism or inhibiting theistic religion); *Grove*, 753 F.2d 1528 (rejecting claim that the school board's refusal to remove books from sophomore English literature curriculum based on plaintiffs' religious objections violated the Establishment Clause); *see also Crowley v. Smithsonian Inst.*, 636 F.2d 738 (D.C. Cir. 1980) (rejecting claim that Smithsonian evolution exhibit established a religion of secular humanism); *cf. Mozert*, 827 F.2d 1058 (rejecting claim that requiring students to study a basic reader series violated the Free Exercise Clause, noting that it would violate the Establishment Clause to tailor a public school's curriculum to satisfy the principles or prohibitions of any religion).

The Framework and Standards at issue here pose even less Establishment Clause concern than the teaching aids, reading lists, and textbooks in these cases because the Framework and Standards do not dictate what students must read or study; they are simply broad guidelines that leave implementation up to local school boards, schools, and teachers. The Court should follow

the lead of the Seventh, Ninth, and Eleventh Circuits, and dismiss Plaintiffs' Establishment Clause claims.

B. By Conflating the Terms "Secular" and "Non-Theistic Religion," Plaintiffs Ask the Court to Adopt an Impossible Establishment Clause Test.

Plaintiffs allege that the Framework and Standards will cause Kansas public schools to "establish and endorse a non-theistic religious worldview," which they also call "Religious ('secular') Humanism." *See* Complaint (Doc. #1) ¶¶ 1, 66. To reach this conclusion, Plaintiffs allege that teaching non-teleological hypotheses or explanations establishes non-theistic religion. Although the Tenth Circuit has "assume[d], without deciding, that atheism is a religion for First Amendment purposes," *Wells v. City and Cnty. of Denver*, 257 F.3d 1132 (2001), this does not mean that teaching science or other secular topics is tantamount to teaching atheism. In assessing these claims, the Court should heed Judge Canby's caution in *Grove*:

> The analytical difficulty with plaintiffs' approach is that it tends to divide the universe of value-laden thought into only two categories – the religious and the anti-religious. By adopting this dualistic social outlook, and by denominating the anti-religious half of their universe as "secular," plaintiffs erect an insurmountable barrier to meaningful application of the establishment clause to controversies like this one. . . .
>
> It is apparent that so long as plaintiffs deem that which is "secular" in orientation to be anti-religious, they are not dealing in the same linguistic currency as the Supreme Court's establishment decisions. If the establishment clause is to have any meaning, distinctions must be drawn to recognize not simply "religious" and "anti-religious," but "non-religious" governmental activity as well. In the parlance of *Lemon v. Kurtzman*, "secular" must mean "non-religious." Therefore, plaintiffs cannot succeed in demonstrating a violation of the establishment clause by showing that the school authorities are somehow advancing "secular" goals.

753 F.2d at 1536 (Canby, J., concurring).

C. The History and Context of the State Board's Adoption of the Framework and Standards, and the Text of the Standards, Provide Plausible Secular Purposes to Which the Court Should Defer.

Although the State Board did not make an explicit statement of its purpose in adopting the Framework and Standards, the context of their adoption and the text of the Standards as a whole clearly show that the State Board adopted the Standards for a permissible, secular purpose – to improve science education for the benefit of Kansas students and the State. *See Edwards*, 482 U.S. at 594-95 (stating that in determining the legislative purpose of a statute, the Court considers the historical context of the statute; "enhancing the effectiveness of science instruction" is a "clear secular intent"). The context comes from the purpose of the Framework, the purpose of the Standards, and the Next Generation Science Standards Review Committee's Report and Recommendation to the Kansas State Board of Education.

The purpose of the Framework was to "build students' proficiency and appreciation for science over multiple years of school" by "integrating understanding the ideas of science with engagement in the practices of science." Framework, Foreword, at x. The purpose of the Standards was to help "provide all students an internationally benchmarked science education" because science education is "central to the lives of all Americans" and is key to "comprehending current events, choosing and using technology, or making informed decisions about one's healthcare." NGSS Executive Summary, at 1. More specifically, the Report and Recommendation of the Next Generation Science Standards Review Committee stated five reasons for adopting the Standards as the Kansas College and Career Ready Standards for Science: (1) "science competency unlocks the goal of all students becoming college- and career-ready upon graduation from high school and/or college"; (2) the Kansas economy demands increased proficiency in science, technology, engineering and mathematics (STEM); (3)

developing intellectual capital in Kansas to compete nationally and internationally; (4) to promote equal opportunity for all students to pursue careers in STEM fields; and (5) preparing students to be informed citizens and knowledgeable consumers. Report and Recommendation of the Next Generation Science Standards Review Committee, at 8-13 [hereinafter R&R]. The Committee recommended that the State Board adopt the Standards to "provide a solid foundation of skills, knowledge, and broader understanding of science than our current standards and better align with what has been learned about how students learn science." R&R at 19.

The Standards, taken as a whole, confirm that the State Board's purpose in adopting the Standards was not to endorse or disapprove of religion, but to improve science education, *see, e.g.*, NGSS, Executive Summary, at 1; *see generally* NGSS, Executive Summary; NGSS, Introduction – a wholly appropriate purpose under the Establishment Clause. *Edwards*, 482 U.S. at 594. Plaintiffs' conclusory allegations that the Framework and Standards "reflect a purpose to establish in impressionable minds the materialistic/atheistic Worldview rather than to provide an objective and religiously neutral origins science education," Complaint (Doc. #1) ¶ 13, and that "[n]o secular purpose exists for the state seeking to teach impressionable young children about a materialistic/atheistic view of origins," *id.* ¶ 17, are unfounded and contrary to the history, context, and plain text of the Standards. Nothing about the Standards suggests that the State Board "was motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. Because the State Board's decision to adopt the Framework and Standards is supported by the "plausible secular purpose[s]" described above, which are not shams or secondary to a religious purpose, the Court should defer to them. *See, e.g.*, *Edwards*, 482 U.S. at 594 (improving science instruction is a clear secular intent); *Bauchman*, 132 F.3d at 554 & n.9 ("acknowledging prevalent, archetypical secular purposes for defendants' conduct"); *Fleischfresser*, 15 F.3d at 688

(finding secular purpose in relying on "fantasy and 'make-believe' to hold a student's attention and to instill a sense of creativity and imagination").

D. The Framework and Standards Are Neutral – They Do Not Have the Primary Effect of Advancing Secular Humanism or Inhibiting Theistic Religious Beliefs.

Plaintiffs allege that the Framework and Standards "will have the effect of causing Kansas public schools to establish and endorse a non-theistic religious worldview." Complaint (Doc. #1) ¶ 1. As discussed above, the primary effect of the Framework and Standards is yet unknown, and Plaintiffs have not alleged any facts that indicate how local public school boards and schools will implement the Standards, much less that they will implement the Standards in the way Plaintiffs allege. On this basis alone, the Court should find that Plaintiffs have not alleged that the primary effect of adopting the Standards is to advance or inhibit religion. *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988) (stating that it has not been the Court's practice to strike down statutes under the Establishment Clause "in anticipation that particular applications may [be] unconstitutional"); *Bauchman*, 132 F.3d at 554 ("We will not infer an impermissible purpose or effect in the absence of any supporting factual allegations."); *see also Lynch*, 465 U.S. at 680; *O'Connor*, 416 F.3d at 1227; *Weinbaum*, 541 F.3d at 1038.

More specifically, Plaintiffs allege that the Standards promote a single, anti-theist viewpoint "that employs 'tunnel vision' that necessarily leads to only atheistic explanations of the cause and nature of life and the universe." *Id.* ¶ 82. They also allege that the Standards "cause the student to ultimately 'know' and 'understand' that the student is not a design or creation made for a purpose, but rather is just a 'natural object' that has emerged from the random interactions of matter, energy and the physical forces via unguided evolutionary processes which are the core tenets of Religious ('secular') Humanism." *Id.* ¶ 66. These

allegations do not even resemble the actual Standards. For example, Appendix H to the Standards titled, "Understanding the Scientific Enterprise: The Nature of Science in the Next Generation Science Standards," states that "Science is *a* Way of Knowing," "Science findings are limited to what can be answered with empirical evidence," "Science is *a* unique way of knowing *and there are other ways of knowing*," "Not all questions can be answered by science," and "Science and technology may raise ethical issues for which science, by itself, does not provide answers and solutions." NGSS, Appendix H at 6 (emphasis added). The actual Standards, therefore, would not lead a reasonable observer to conclude that they advance secular humanism or inhibit theistic religious beliefs.[11]

Even when taken at face value, Plaintiffs' Complaint falls short of alleging that the Framework and Standards have the primary effect of advancing or inhibiting religion. This is an objective standard; that Plaintiffs are obviously offended by the Standards does not render the Standards invalid. *Bauchman*, 132 F.3d at 555. Moreover, "not every governmental activity that confers a remote, incidental or indirect benefit upon religion is constitutionally invalid." *Id.*

Although "the state may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe,'" *Abington*, 374 U.S. at 226, the neutrality the Establishment Clause mandates does not itself equate with hostility towards religion. *Smith*, 827 F.2d at 692; *see also, e.g.*, *Abington*, 374 U.S. at 226; *Engle v. Vitale*, 370 U.S. 421, 433-35 (1962); *McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 211-12 (1948). Here, the Standards convey a message of neutrality: the Standards neither endorse anti-theism as a

[11] Although on a motion to dismiss, the Court would ordinarily assume that Plaintiffs' allegations are true, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), the Court should not accept Plaintiff's conclusory allegations that clearly misrepresent the Framework and Standards, which are properly before the Court. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Loggins v. Cline*, 568 F. Supp. 2d 1265, 1268 (D. Kan. 2008); *cf. Scott v. Harris*, 550 U.S. 372, 378-81 (2007) (relying on video of events instead of plaintiff's version of events).

religion, nor do they discredit theistic religion as a system of belief. As discussed above, the Standards do not require teachers to teach that science is the exclusive "way of knowing," and they certainly do not advance or inhibit religious belief. *See* NGSS, Appendix H at 6. To the extent the Standards coincide with the amorphous naturalistic/materialistic religious concept Plaintiffs describe, the "Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." *Smith*, 827 F.2d at 691 (quoting *McGowan*, 366 U.S. at 422); *see also Fleischfresser*, 15 F.3d 680; *Brown*, 27 F.3d 1373; *Grove*, 753 F.2d 1528. Since "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like," *Stone v. Graham*, 449 U.S. 39, 42 (1980) (citing *Abington*, 374 U.S. at 225), teaching secular, scientific principles in the objective manner laid out in the Standards certainly does not violate the Establishment Clause.

Just as the Framework and Standards do not "convey a message of governmental approval of secular humanism, neither [do they] convey a message of governmental disapproval of theistic religions merely by omitting certain [statements] concerning them." *Smith*, 827 F.2d at 694. Plaintiffs allege that the Standards violate the Establishment Clause because they do not state that "the cause and nature of life and the universe deal with deeply religious issues that can dramatically affect the student's religious belief and religious worldview," and that "science has not provided definitive answers to the questions." Complaint (Doc. #1) ¶ 110. As discussed in more detail below, the omission of these statements does not cause the Standards to discriminate against the very concept of religion. *See Smith*, 827 F.2d at 694. And including such statements in the Standards could raise serious Establishment Clause questions.

E. The State Board's Adoption of the Standards Does Not Excessively Entangle It with Religion.

Plaintiffs allege that the "effect of seeking to establish the Worldview, particularly in the minds of impressionable primary school students, amounts to an excessive governmental entanglement with religion." Complaint (Doc. #1) ¶ 20. The facts of this case, however, do not implicate the excessive-entanglement-with-religion prong, as it has been traditionally interpreted. The entanglement prong of the *Lemon* test "typically is applied to circumstances in which the state is involving itself with a recognized religious activity or institution." *Bauchman*, 132 F.2d at 556; *see also Lemon*, 403 U.S. at 615.

Because "[t]otal separation between church and state is not possible," *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1261 (10th Cir. 2005), *Lemon* instructs courts to "determine whether the government entanglement with religion is excessive" by examining the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon*, 103 U.S. at 615. Here, Plaintiffs do not allege that the Standards excessively entangle the State Board with a religious organization or authority. *See Fleischfresser*, 15 F.3d at 689 (finding that school's mere exercise of discretion over curriculum does not constitute excessive entanglement with religion).

The State Board's adoption of the Framework and Standards therefore does not excessively entangle it with religion. Indeed, by limiting the State Board's authority to "general supervision" of public schools, the Kansas Constitution ensures that the State Board does not become excessively entangled with the day-to-day operation of public schools. Kan. Const. Art. 6, § 2(a).

F. To the Extent Plaintiffs Ask the Court to Incorporate Their Religious Beliefs Into the Standards, this Relief Would Violate the Establishment Clause.

At least part of Plaintiffs' problem with the Standards is that they do not incorporate Plaintiffs' religious beliefs. *See, e.g.*, Complaint (Doc. #1) ¶¶ 110-114, 118, 120, 122; *see also, e.g.*, *id.* at 30 (seeking alternative relief requiring teaching of Plaintiffs' religious beliefs regarding "origins science"). Plaintiffs are entitled to their sincerely held religious beliefs, which many Kansans no doubt share. It would be antithetical to the Establishment Clause, however, to amend the Standards – by court order or otherwise – to incorporate the religious beliefs of a particular group. *See Epperson*, 393 U.S. at 106-07 ("There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.") After all, "[b]alance in the treatment of religion lies in the eye of the beholder. Efforts to achieve the particular 'balance' desired by any individual or group by the addition or deletion of religious material would lead to a forbidden entanglement of the public schools in religious matters, if done with the purpose or primary effect of advancing or inhibiting religion." *Mozert*, 827 F.2d at 1065 (citing *Epperson*, 393 U.S. at 107; *Abington*, 374 U.S. at 222).

For all of these reasons, Plaintiffs' Complaint fails to state a claim that the State Board's adoption of the Framework and Standards violates the Establishment Clause. The Framework and Standards are neutral; they have a secular purpose, they do not advance or inhibit religion, and they do not excessively entangle the State Board in religion.

> If an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a "curriculum review committee" unto himself or herself. . . . [T]his result is improper.

Brown, 27 F.3d at 1379 (citing *Empl. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 885 (1990)). The Court should therefore dismiss Plaintiffs' Establishment Clause claim.

IV. Plaintiffs Have Not Stated a Claim Under the Free Exercise Clause Because the Framework and Standards Do Not Have a Coercive Effect on Plaintiffs' Practice of Religion, and Because the Framework and Standards are Neutral, Generally Applicable, and Rationally Related to a Legitimate Government Purpose.

The Free Exercise Clause of the First Amendment, which applies to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I, cl. 1; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Clause guarantees "the right of every person to freely choose his own course with reference [to religious training, teaching and observance], free of any compulsion from the state." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963). To state a Free Exercise Clause claim, Plaintiffs must "show the coercive effect" of the Framework and Standards as they "operate[] against [Plaintiffs] in the practice of [their] religion." *Abington*, 374 U.S. at 223; *see also Bauchman v. W. High Sch.*, 132 F.3d 542, 557 (10th Cir. 1997).

The Tenth Circuit has held that the opportunity to opt out of activities that offend a plaintiff's religious beliefs "negates the element of coercion and therefore defeats [a] Free Exercise claim." *Bauchman*, 132 F.3d at 557. Under Kansas law, "[n]o child attending public school in this state shall be required to participate in any activity which is contrary to the religious teachings of the child," so long as the child's parent or guardian requests in writing for the child to be excused. K.S.A. § 72-1111(f). This alone is a sufficient basis for dismissing Plaintiffs' Free Exercise Clause claim.

Moreover, "[n]eutral rules of general applicability" – like the Framework and Standards – do not raise free exercise concerns if they only "incidentally burden a particular religious practice or belief." *Grace United Methodist Church v. Cheyenne*, 451 F.3d 643, 649 (10th Cir.

2006) (citing *Empl. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990)). Such rules "need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Id.*

A law is "neutral so long as its object is something other than the infringement or restriction of religious practices," *Grace United Methodist Church*, 451 F.3d at 649-50 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)); *see also Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1232-33 (2009); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004), and so long as it does not subtly depart from neutrality, *Church of the Lukumi Babalu Aye*, 508 U.S. at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)), or covertly suppress particular religious beliefs, *id.* (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (Burger, C.J., opinion)). A law is generally applicable if it does not selectively burden only conduct motivated by religious belief. *Id.* at 543. In determining whether a law is neutral and generally applicable, the Tenth Circuit looks to whether it "was enacted based on religious animus." *Grace United Methodist Church*, 451 F.3d at 651.

Here, Plaintiffs allege that Defendants violated the Free Exercise Clause by "imbuing [Student Plaintiffs] with a religious belief that is inconsistent with their existing religious beliefs," Complaint (Doc. #1) ¶ 124(d), and "causing [them] to embrace a materialistic/atheistic Worldview that is inconsistent with" Parent Plaintiffs' religious education of their children, *id.* ¶ 125(d). The Framework and Standards that Plaintiffs challenge are neutral rules of general applicability. The object of the Framework and Standards is to provide all students an internationally-benchmarked science education – not to infringe or restrict Plaintiffs' religious practices or to selectively burden only conduct motivated by religious belief. *See* NGSS, Executive Summary, at 1; *see generally* NGSS, Executive Summary; NGSS, Introduction. In

adopting the Framework and Standards, the State Board did not act with animus toward Plaintiffs' religious beliefs. Moreover, the Framework and Standards do not coerce Plaintiffs to abandon their beliefs or adopt beliefs contrary to their own. NGSS, Appendix H at 6 ("Science is *a* unique way of knowing *and there are other ways of knowing*"; "Not all questions can be answered by science"; and "Science and technology may raise ethical issues for which science, by itself, does not provide answers and solutions.") (emphasis added). Because the Framework and Standards are neutral and generally applicable, and because the State Board had a rational basis in adopting them, *see supra* Arguments and Authorities Part III.C, the Court should dismiss Plaintiffs' Free Exercise Clause claim.

The Free Exercise Clause does not convene on an individual the right to dictate that a school's curricula to conform to her religion. *Bauchman*, 132 F.3d at 557. The Court should reject Plaintiffs attempts to do exactly that. *See* Complaint (Doc. #1) at 30-34. The "government's ability to carry out public policy, cannot depend on measuring the effects of a government action on a religious objector's spiritual development." *Smith*, 494 U.S. at 885 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)) (internal quotation marks and alteration omitted).

V. Plaintiffs Have Not Stated a Claim for Violation of The Equal Protection Clause Because the Framework and Standards Treat Everyone Equally.

Plaintiffs allege that the Framework and Standards violate the Equal Protection Clause of the Fourteenth Amendment. Complaint (Doc. #1) ¶ 129. But their threadbare allegation that the Framework and Standards "cause[] Kansas to discriminate against Plaintiff theists who reject the Orthodoxy and in favor of those who hold religious and other beliefs," *id.*, does not state an equal protection claim. Other than conclusory allegations, Plaintiffs provide no basis for determining that the Framework and Standards treat them any differently than anyone else. They

do not explain the nature of the alleged discrimination and apparently confabulate their dislike and disagreement of the Framework and Standards into discrimination allegations.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Equal protection 'is essentially a direction that all persons similarly situated should be treated alike.'" *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 659 (10th Cir. 2006) (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985)). To assert a viable equal protection claim, Plaintiffs must first make a threshold showing that by adopting the Framework and Standards, the State Board intentionally treated Plaintiffs differently from others who were similarly situated. *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 53-54 (10th Cir. 2013); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1233-34 (10th Cir. 2009); *Grace United Methodist Church*, 451 F.3d at 659; *see also SECSYS, LLC v. Vigil*, 666 F.3d 678, 688 (10th Cir. 2012) (*quoting Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)); *Campbell v. Buckley*, 203 F.3d 738, 747 (10th Cir. 2000).

Plaintiffs do not allege any facts that indicate the Framework and Standards treat them differently than anyone else. The Standards set performance expectations for all Kansas students based on "the most current research on science and scientific learning." NGSS, Introduction, at 1. The Framework "identifies the science *all* K-12 students should know," *id.* at 1 (emphasis added), and the Standards "represent what *all* students should know," *id.* at 4 (emphasis added). As discussed above, the Framework and Standards are grounded in the latest educational research and designed "to provide *all* students an internationally benchmarked science education" so that students are better prepared for college and careers. NGSS, Executive Summary, at 1 (emphasis added). The Framework and Standards are not religious in any way,

see Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985); the Framework and Standards do not treat anyone differently on the basis of religious belief. *See Taylor*, 713 F.3d at 53-53; *Corder*, 566 F.3d at 1233-34; *Grace United Methodist Church*, 451 F.3d at 659.

Absent differential treatment, Plaintiffs' equal protection claim fails at the most basic level, and the Court need look no further. *See Taylor*, 713 F.3d at 53-54. The Plaintiffs' disagreement with, and dislike of, the Framework and Standards are insufficient to state an equal protection claim. Otherwise every law and regulation would be subject to an equal protection challenge just because someone does not like it.

Even if Plaintiffs have sufficiently alleged that the Framework and Standards somehow disparately impact them, they have not alleged that the State Board acted with a discriminatory purpose. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.* 429 U.S. 252, 264-65 (1977) (Equal Protection Clause requires discriminatory purpose, as well as effect); *Washington v. Davis*, 426 U.S. 229, 238 (1976) (same); *see also Wirzburger v. Galvin*, 412 F.3d 271, 284 (1st Cir. 2005). Discriminatory purpose requires Plaintiffs to allege that the State Board adopted the Framework and Standards "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (footnote omitted). As discussed above, Plaintiffs have not alleged a discriminatory purpose, and the Framework and Standards belie any such purpose. *See supra* Arguments and Authorities Part III.C.

Because the Framework and Standards treat all students the same, Plaintiffs fail to state an equal protection claim. Moreover, the Framework and Standards evince no discriminatory purpose.

VI. Plaintiffs Have Not Stated a Claim for Violation of Their Free Speech Rights Because the Framework and Standards do not Restrict Students' Free Speech.

Plaintiffs assert that the Framework and Standards violate the Free Speech Clause of the First Amendment. Complaint (Doc. #1) ¶ 130. Again, this claim is difficult to understand because Plaintiffs baldly allege that "the use of the Orthodoxy to restrict the kinds of explanations permitted in public schools about the natural world infringes on the speech rights of Plaintiffs." *Id.* They do not allege what part of the Framework or which particular Standard restricts their speech. Plaintiffs do not even allege generally what speech the Framework and Standards purportedly restrict.

The Free Speech Clause, which applies to the states through the Due Process Clause of the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I; *see, e.g., Gitlow v. New York*, 268 U.S. 652, 666 (1925). Like the rest of Plaintiffs' case, this claim represents a profound misinterpretation of the Framework and Standards – the Framework and Standards do not restrict Plaintiffs' thoughts or speech in any way. As discussed above, the State Board has only general supervisory authority over local school boards; it does not set curriculum for the local school boards or tell teachers how to teach. The Standards set performance expectations, and expressly make clear that they are not curriculum. The Framework and Standards do not dictate or discuss religious matters. Contrary to Plaintiffs' assertions, the Framework and Standards do not dictate that students be instructed on the non-existence of a theistic god. Nothing in the Framework or Standards purports to restrict students' thought or discussion in the classroom.

As the Standards recognize, "not all questions can be answered by science." NGSS, Appendix H at 6. There is no "Orthodoxy" in the Framework or Standards, both of which

encourage discussion and analysis. For example, the Framework section *Practices for the K-12 Classrooms* states:

> We consider eight practices to be essential elements of the K-12 science and engineering curriculum:
>
> 1. Asking questions (for science) and defining problems (for engineering)
> 2. Developing and using models
> 3. Planning and carrying out investigations
> 4. Analyzing and interpreting data
> 5. Using mathematics and computational thinking
> 6. Constructing explanations (for science) and designing solutions (for engineering)
> 7. Engaging in argument from evidence
> 8. Obtaining, evaluating, and communicating information

Framework, *Practices for the K-12 Classrooms*, at 64.

Plaintiffs have failed to plead the most basic elements of a Free Speech Clause claim. The Court should dismiss Plaintiffs' Free Speech Clause claim on this basis alone. To the extent that more analysis is required, Defendants assume that Plaintiffs' vague and unsupported claim relates to protected speech under the First Amendment. The legal standards that apply to regulation of protected speech depend on the nature of the forum in question. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106, (2001). School classrooms are "nonpublic forum[s], meaning that school officials could regulate the speech that takes place there 'in any reasonable manner.'" *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004) (*quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 36, 46 n.7, 47 (1983)).

> [T]he Court has emphasized that "the First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (internal quotation marks and citations omitted). Nowhere is this more true than in the context of a school's right to determine what to teach and how to teach it in its classrooms.

356 F.3d at 1284.

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988), provides the legal framework for analyzing free speech claims in a classroom setting. Under *Hazelwood*, an educator's decision to restrict or compel speech does not violate the First Amendment so long as it is "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. There must be "no valid educational purpose" before classroom restrictions or compulsion on speech implicates the Free Speech Clause. *Id.* Under this framework, courts give "substantial deference" to the educator's stated pedagogical concerns. *Id*. at n.7. Even if the Framework and Standards were somehow to restrict Plaintiffs' speech in the classroom, any restriction would be reasonably related to legitimate pedagogical concerns based on the goals expressed in the Framework and Standards, *i.e.*, to teach "what a student should know and be able to do" and provide an internationally-benchmarked science education. *See* NGSS, Executive Summary, at 1; *see generally* NGSS, Executive Summary; NGSS, Introduction. The Court should therefore dismiss Plaintiffs' Free Speech Clause claim.

VII. Defendants John W. Bacon and Kenneth Willard.

Paragraph 63 of Plaintiffs' Complaint asserts that the State Board adopted the Framework and Standards "over the objections of two members of the State Board." The two Defendants, John W. Bacon and Kenneth Willard, respectfully ask that they be dismissed because they voted against the Framework and Standards.

CONCLUSION

Plaintiffs' Complaint presents no reason for judicial interference with the Kansas Board of Education's decision to adopt the Framework and Standards. The Complaint does not allege any facts that raise substantive constitutional issues. "[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of

federal judges." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. State of Arkansas*, 393 U.S. 97, 104 (1968).

Respectfully submitted,

OFFICE OF KANSAS ATTORNEY GENERAL DEREK SCHMIDT

By: s/ Jeffrey A. Chanay
Jeffrey A. Chanay, KS Sup. Ct. No. 12056
Deputy Attorney General, Civil Litigation Division
Stephen O. Phillips, KS Sup. Ct. No. 14130
Assistant Attorney General
Memorial Bldg., Third Floor
120 SW Tenth Avenue
Topeka, Kansas 66612
Phone: 785-296-2215
Fax: 785-291-3767
E-mail:jeff.chanay@ksag.org
steve.phillips@ksag.org

Cheryl L. Whelan, KS Sup. Ct. No. 14612
General Counsel
Kansas State Department of Education
Office of General Counsel
Landon State Office Building
900 SW Jackson St., Suite 102
Topeka, KS 66612
E-mail: cwhelan@ksde.org

Attorneys for Defendants

.

CERTIFICATE OF SERVICE

This is to certify that on this 5th day of December, 2013, the above and foregoing **DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS** was electronically filed with the Clerk of the Court by using the CM/ECF system with notice electronically sent to:

Douglas J. Patterson	doug@propertylawfirm.com
Kellie K. Warren	kellie@propertlylawfirm.com
Michelle W. Burns	michelle@propertylawfirm.com
John H. Calvert	jcalvert@att.net
Kevin T. Snider	ksnider@pji.org

Attorneys for Plaintiffs

s/Jeffrey A. Chanay
Jeffrey A. Chanay