

APPEAL NO. 10-35542

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NAMPA CLASSICAL ACADEMY, INC., ET AL.,
Plaintiffs-Appellants,

v.

WILLIAM GOESLING, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Idaho
Civil Case No. 1:09-cv-00427-EJL (Honorable Edward J. Lodge)

PLAINTIFFS-APPELLANTS' OPENING BRIEF ON APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Nampa Classical Academy, Inc. states it is an Idaho non-profit corporation and has no parent corporation or stock.

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants Nampa Classical Academy, Isaac Moffett, M.K., and Maria Kosmann (collectively, “Educators/Student”) sued Defendants-Appellees for banning the objective use of any religious documents from all Idaho public schools. Defendants-Appellees are officials of three Idaho agencies (collectively, “Government Officials”): the Idaho Public Charter School Commission (“Commission”), the Idaho State Board of Education and Idaho’s Superintendent of Public Instruction (collectively, “Board”), and Idaho’s Attorney General. The Educators/Student sued to vindicate their rights arising under the First and Fourteenth Amendments to the U.S. Constitution (pursuant to 42 U.S.C. §§1983 and 1988), and under Idaho Code §§33-5209 and 33-5210.

The District Court’s federal question jurisdiction arose under 28 U.S.C. §§1331 and 1343. The District Court had authority to award injunctive relief under 42 U.S.C. §1983 and Fed. R. Civ. P. 65; damages under 28 U.S.C. §1343; declaratory relief under 28 U.S.C. §2201–02 and Fed. R. Civ. P. 57; and costs and attorneys’ fees under 42 U.S.C. §1988. It had supplemental jurisdiction over the state law claim under 28 U.S.C. §1367.

Appellate jurisdiction exists under 28 U.S.C. §1291. On June 14, 2010, Educators/Student timely appealed from the District Court’s May 19, 2010 Judgment and May 17, 2010 Memorandum, Decision, and Order dismissing the

federal claims with prejudice, the state law claims without prejudice, and finding Educators'/Student's Motion for Preliminary Injunction moot.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal presents five issues:

1. May government officials censor the objective, educational use of all “religious documents and text” in every public school and college in Idaho?
2. May a public school, its teachers, and students use religious documents and text as part of the curriculum in an objective and educational manner in order to teach Idaho educational standards without violating the Establishment Clause of the United States Constitution?
3. May a public school, its teachers, and students sue state Government Officials to enforce federal constitutional rights?
4. Did the District Court err in granting the Government Officials qualified immunity on the Educators'/Student's claims for damages?
5. Having ruled on qualified immunity, which only involves the Educators'/Student's claims for damages, did the District Court commit clear error when it failed to rule on the Educators'/Student's claims for injunctive and declaratory relief, finding that these claims were moot based solely on the dismissal?

STATEMENT REGARDING ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, there is a separately bound addendum (cited as “Add.” below) to this Brief that reproduces relevant portions of the Idaho Constitution, Idaho Code, and Idaho regulations.

STATEMENT OF THE CASE

I. Nature of the Case.

[N]early everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity-both Catholic and Protestant-and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

McCullum v. School Dist. No. 71, 333 U.S. 203, 236 (1948) (Jackson, J., concurring). Yet that is exactly the system of education that the Government Officials have created.

Can the government ban an entire category of literature, one that the Supreme Court acknowledged has educational value, from objective use in all public schools? As the Supreme Court has stated, the government may not ban literature “simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 872 (1982).

This civil rights action concerns the ability of the Academy (a non-profit corporation set up to operate a public charter school), Isaac Moffett (a teacher and founder), Maria Kosmann (a teacher and parent of M.K.), and M.K. (a student) to use religious primary sources—along with dozens of secular ones—in an objective manner in the classroom.¹ The Academy desires to “provide its students with a comprehensive educational experience that exposes the students to the original historical texts, including some religious texts,” rather than textbooks subject to “a textbook editor’s biases or revisionism.” ER137-38. On numerous occasions, the Government Officials affirmed that schools and teachers have the “constitutional authority” to decide “which curriculum to use, which textbooks to adopt.” ER634 (Statement of Defendant-Appellee Luna, Superintendent of Public Instruction). After publicly approving the Academy’s curriculum, stating that the “Academy’s intended use of the Bible and other religious texts...[is] appropriate, just as it would be in any other public school,” ER207, the Government Officials soon reversed course.

In an unprecedented act of censorship, and in defiance of overwhelming legal precedent, the Government Officials, acting outside of their Constitutional and statutory authority, banned all public schools and colleges in Idaho, and the

¹ “Primary source” refers to any document or text in original form as opposed to an edited or abridged version in a textbook or anthology. “Supplemental resource” refers to a document or text selected by a school or teacher to supplement an approved textbook for a course.

teachers and students at those institutions, from using any “religious documents and text” for educational purposes (the “Book Ban”). The Book Ban was based in part upon Defendant-Appellee Attorney General’s erroneous interpretation of Article IX, §6 of the Idaho Constitution given in a non-binding, advisory opinion. ER724-28. Section 6, however, does not prohibit all “religious documents and text;” it actually prohibits “books, papers, tracts or documents of a political, sectarian, or denominational character” from being used in public schools. Add. 1.² The Government Officials have changed the actual wording of §6 to fit their broad goals of censorship. The Educators/Student challenge this Book Ban and the Government Officials’ actions facially and as-applied.

This case is not about the Government Officials’ authority to set general educational standards. The Academy’s compliance with such standards is not in dispute. Nor is this case about Idaho’s ability to require schools to use particular textbooks. Rather, the issue is whether the government has the authority to ban an entire category of literature used to teach such educational standards. If so, then nothing prevents the Government Officials from banning any other literary categories (i.e. Black History). And under the Government Officials’ theory of the case, no one would have standing to challenge such censorship.

² An in-depth legal analysis explaining why this provision does not prohibit any use of the Bible can be found at ER729-43.

II. Course of Proceedings.

The Educators/Student filed a Verified Complaint on September 1, 2009, and moved for a temporary restraining order. The District Court denied the motion. The Educators/Student filed a Second Amended Verified Complaint on December 15, 2009. ER814. The Government Officials filed an Answer, ER745, and a Motion to Dismiss on January 8, 2010. The Educators/Student filed a Motion for Preliminary Injunction on January 27, 2010.

III. Disposition Below.

On May 17, 2010, the District Court granted the Government Officials' Motion to Dismiss with prejudice against the federal claims and without prejudice against the state law claim and denied the Educators'/Student's Motion for Preliminary Injunction as moot. ER2. The Educators/Student timely appealed. ER35.

The Government Officials moved for attorney's fees on May 25, 2010, outrageously claiming that the Educators'/Student's challenge was frivolous, which the Educators/Student opposed. The District Court has yet to rule on this motion. The Government Officials also intend to pursue attorney's fees in this appeal. Defs.-Appellees' Mot. to Dismiss Inj. Relief at 10 [9th Cir. Dkt. 8-1]. The Government Officials cannot overcome the difficult burden to establish that the Educators'/Student's arguments are "wholly without merit" to prevail in their

request. *Gibson v. Office of Atty. Gen.*, 561 F.3d 920, 929 (9th Cir. 2009). In addition to the sound legal argument presented by the Educators/Student, even the Government Officials admit that, while general educational standards are set by the Board, local schools and teachers select which curriculum and supplemental resources to use. Defendant-Appellee Luna recently stated:

[A]t the state level we set the standards and we set the academic achievement goals that we expect from every school. . . . How the local school and local district chooses to get there, decisions are made at the local level. . . . if it's a charter school, they have their own board. That's their decision, that's where the decision is made specifically as to which curriculum to use, which textbooks to adopt. . . . I respect the authority, the constitutional authority that we give the locally elected board to make those decision at the local level.

ER634. Even though the Government Officials freely admit that local schools have the “constitutional authority” to select textbooks, their attorneys argue that it is somehow frivolous for the Educators/Student to make the same exact argument. This Court can and should reject the Government Officials’ claim that the Educators’/Student’s case is frivolous.

STATEMENT OF FACTS

I. Local Schools Are Given the Authority to Select the Curriculum to Teach State Educational Standards

The true nature of the Government Officials’ unprecedented Book Ban becomes fully apparent when one considers that not only does Idaho require schools to teach about religion, including the beliefs of Judaism, Christianity,

Islam and other religions, but also—as the Government Officials repeatedly admit—that local schools (not the Government Officials as the District Court incorrectly held, ER17) have control over the curricular materials they will use to teach these topics.

A. Idaho Requires Public Schools to Educate Students on the Beliefs, Practices, and History of Many World Religions.

Defendant-Appellee Board sets general educational standards for all Idaho schools. Add. 6-7. Despite inexplicably banning all public schools from using any religious documents or text, the Board still requires all schools to teach about religion in many subjects. Among the state’s religious educational standards are:

Geography	<ul style="list-style-type: none"> • Describe the historical origins, central beliefs, and spread of major religions, including Judaism, Christianity, Islam, Hinduism, Buddhism, and Confucianism. ER218. • Compare and contrast cultural patterns in the Eastern Hemisphere, such as...religion. ER219. • Discuss how social institutions, such as...religion...influence behavior in different societies in the Eastern Hemisphere. ER220.
Language Arts	<ul style="list-style-type: none"> • Evaluate the influences (political, religious...) of the historical period. ER222.
World History and Civilization	<ul style="list-style-type: none"> • Explain the relationship between religion and the peoples understanding of the natural world. ER223. • Explain how religion shaped the development of western civilization. <i>Id.</i> • Discuss how religion influenced social behavior and created social order. <i>Id.</i>
U.S. History	<ul style="list-style-type: none"> • Analyze the religious, political...motives of European immigrants who came to North America. ER224.

	<ul style="list-style-type: none"> • Describe the role of...religion...on the development of individual/political rights. ER225.
Humanities	<ul style="list-style-type: none"> • Describe the influence of religion on government, culture, artistic creation, technological development, and/or social conduct. ER226.
Social Studies	<ul style="list-style-type: none"> • Identify different examples of how religion has been an important influence in American history. ER230.

B. The Government Officials Admit That Local Schools Have Control Over Curriculum Selection.

On multiple occasions, the Government Officials publicly acknowledged that charter schools are given authority to select their curriculum to meet the state’s educational standards. Defendant-Appellee Luna admitted that curriculum decisions “are made at the local level.” ER634. As recent as June 1, 2010, Defendant-Appellee Baysinger, the Public Charter School Commission Program Manager, likewise stated that “[p]ublic charter schools do not need to follow a specific curriculum, but they do need to meet the thoroughness standard...[p]ublic charter schools may design their own curriculum (that is, determine through which materials and lessons content will be taught).” ER101. Dr. William Proser, Founder of the Couer d’Alene Charter Academy, confirmed that “[o]ur charter school, as all others, is given independence in formulating our curriculum...we are not required to use State selected and approved textbooks.” ER297.

But Defendant-Appellee Attorney General, whose office not only concocted the Book Ban but now also defends it, contradicts the Government Officials. It was

the Attorney General's non-binding advisory opinion that first claimed that the "use of any religious texts within Idaho's classrooms would likely violate...the Idaho State Constitution." ER724 (emphasis added). And it was that same advisory opinion that the Government Officials relied upon when enacting the Book Ban. ER722 (Book Ban was based "on the advice of [the Attorney General]"). There is no way to reconcile the Government Officials' repeated statements that "[p]ublic charter schools may design their own curriculum," ER101, and the Attorney General's arguments to this Court that the State can ban an entire category of books.

C. The Book Ban Flies in the Face of the Long History of Idaho School Districts Using Religious Texts to Teach State Educational Standards.

Defendant-Appellee Attorney General created the Book Ban out of whole cloth and now pretends that no school has ever used, or still uses, religious documents or text. The evidence proves otherwise. In addition to using secular textbooks, many Idaho public schools use supplemental religious materials to teach state educational standards. According to Dr. Wayne Carroll, a U.S. Department of Education consultant, a Professor of Education at Lewis-Clark State College, and a history teacher for 25 years, "one of [Idaho's] goals has been to encourage teachers to supplement instruction with primary documents as a way to strengthen students' historical knowledge and understanding." ER613.

In furtherance of this goal, the Independent School District of Boise City uses religious primary sources, including: the *Book of the Dead*, *Rig Veda*, *Qur'an*, Praise Songs, Genesis, Proverbs, *Analects*, *The Parable of the Prodigal Son*, Zen Teachings, and Jonathan Edwards's "Sinners in the Hands of an Angry God."³ ER127, 235-36, 239, 830.⁴

The Caldwell School District's curriculum "includes references to and quotations from many primary religious sources." ER111.⁵ One of Caldwell's middle school textbooks includes the following religious sources: *The Talmud for Today*, the *Qur'an*, the *Bhagavad Gita*, excerpts from Genesis, Exodus, Proverbs, and Matthew, the *Epic of Gilgamesh*, Confucius's *Analects*, the *Rig Veda*, Luther's *Ninety-five Theses*, Calvin's *Institutes of the Christian Religion*, St. Augustine's *Confessions*, St. Francis of Assisi's *Admonitions*, and St. Thomas Aquinas's *Summa Theologiae*. ER291-93.

³ Although found in state-approved textbooks, ER707, the Government Officials claim that Jonathan Edwards's sermon is banned because it is "a 'denominational' or 'sectarian' paper by a pastor explaining his and his denomination's understanding of the Bible and God." ER113.

⁴ The Independent School District of Boise City's learning objectives include the Hebrew religion, ER251, "the spread of Christianity," ER253, "Islam and its basic beliefs," ER254, "the influence of St. Augustine," *id.*, and Luther's Ninety-Five Theses, ER258.

⁵ The Caldwell School District requires students to learn about "Hinduism, Judaism, Christianity," ER286, "the Protestant Reformation," ER287, and "the effect of Hinduism, Buddhism and Islam on Africa and Asia," ER288.

Finally, the Pocatello/Chubbuck School District No. 25 uses portions of the *Qur'an*, ER452-53, 455-57, 459, Maimonides' creeds of Judaism, ER462, Buddhist sayings, ER464-67, the Bible, ER468-70, and sayings from Jainism, ER475. The Moscow School District and Twin Falls School District likewise use religious primary sources in their curriculum. ER128. Each of these school districts has the authority to select religious sources to teach the State's educational standards.

D. The Book Ban Usurps the Authority Given to Local Schools, Including Charter Schools, to Use Both Secular and Religious Sources to Teach State Educational Standards.

Using this same authority, many Idaho charter schools chose to incorporate religious sources into their curriculum. The Couer d'Alene charter school has used the Bible and other religious texts since its inception in 1999 according to William Proser. ER297. "We utilize religious documents in our curriculum in various courses and grades, and specifically include the Bible because it is of historic importance, undeniable influence, and continuing relevance." *Id.*⁶

The Idaho Virtual Academy's literature courses include religious resources, such as the Bible, the *Qur'an*, Greek mythology, and the wisdom of Confucius.

⁶ The Couer d'Alene School District, which is the authorizing district for the Coeur d'Alene Charter Academy, has learning objectives that include "the origins of Christianity" and "Jewish traditions of Messiah," ER308, "the origins and central beliefs of the Islamic religion" and the "various movements within Islam," ER310, "Martin Luther's ideas," ER311, and "the beliefs and tenants of...Judaism, Christianity, and Islam," ER315.

ER342-43, 346-47, 356, 830. Students learn Latin from the Vulgate Bible. ER354. They learn Egyptian myths and even draw pictures of Amun-Ra, an Egyptian god. ER357-62. The curriculum includes reading from the Hebrew Bible to learn about Abraham, Joseph, and Moses, ER365, 370, 376, 388, 393, uses Genesis to find the names of Jacob's sons, ER373, and recommends that students use the *Doubleday Illustrated Children's Bible* to learn about King David, ER400. Students also read a story from the Hindu *Ramayana*, ER413, Buddhist *Jakata Tales*, ER430, and the sayings of Confucius, ER435.

Lastly, Xavier Charter School uses a classical-based curriculum incorporating primary sources. ER491-93, 830. It teaches about the major religions and belief systems by using the Torah, the Bible, and Greek mythology. ER830-31. In sum, the right of Idaho public schools to use religious materials to teach state educational standards is well-established.

II. In Addition to the Government Officials Originally Approving the Academy's Use of Religious Documents and Text, It is Beyond Their Authority to Censor Books Chosen by Local School Districts.

Relying on this long-standing curricular freedom, the Academy, a private not-for-profit Idaho corporation, established a new charter school that provided a classical education focused on the study of primary sources. ER151, 154, 606-07, 826. The Academy chose the classical model because it "prepares students better than any other form of education." ER152. *See also* ER613 (Dr. Carroll testifying

that students exposed to primary sources are “better able to make judgments and arrive at independent conclusions” and that “use of primary sources helps to provide or expand upon the historical, cultural, and social context in which historical topics are studied”).

The primary sources used by the Academy include both secular and religious works, the majority being secular. ER607, 818, 828. For example, the Academy intended to use Plato’s *Republic*, Aristotle’s *Politics*, Descartes’s *A Discourse on Method*, the Bible, the *Qur’an*, the *Book of Mormon*, the *Hadieth*, the *Epic of Gilgamesh*, Hesiod’s *Theogony Works and Days*, numerous works by Shakespeare and our Founding Fathers, the Code of Hammurabi, and works on Confucianism, Hinduism, ancient Egyptian religions, Roman gods, and Middle-Eastern religions. See ER187-91 (the Academy’s 9th-12th Grade Core Reading List). The religious materials would be used “in an appropriate manner in the context of history, literature, art, and music,” ER856, and “not as a means for influencing students’ religious beliefs,” ER859. See also ER854.

On September 2, 2008, after six years of development, the Academy’s charter was approved by the Commission. ER126, 173, 826. The Commission and Board knew of the Academy’s intended use of primary sources for years and even acknowledged the value in using these documents. ER816, 826; see also ER207 (Defendant-Appellee Baysinger stating that “[t]he [Commission] has...determined

[the Academy's use of religious texts] to be appropriate, just as it would be in any other public school"); ER206 (Board Spokesperson McGrath stating "local school boards should have the discretion over whether or not the Bible can be used as a literary or historical text"). "[Defendant-Appellant] Luna said that there is nothing in Idaho law that prohibits public schools from using the Bible as literature or history." ER212. Yet the District Court erroneously determined that the Academy's curriculum had "not been approved for use in the public school curriculum." ER 23.⁷

Based on the right of local school districts to choose curriculum resources, along with the Government Officials' express approval of the Academy's classical education model and use of primary sources, including religious sources, some of the Academy's teachers chose to use religious supplemental resources where appropriate to teach the State educational standards. Isaac Moffett taught several classes at the Academy, including geography, Chinese History, Current Events, and America's Founding. ER40-41, 818-19. In these courses, he chose to incorporate primary sources of the religions of the relevant time period being studied, such as Confucius's *Analects*. ER137-38, 819. Maria Kosmann taught

⁷ Nor is it even under the purview of the Government Officials to approve or disapprove of curriculum resources chosen by local school districts. ER634 (charter school chooses "which textbooks to adopt").

Egyptian history at the Academy.⁸ ER682, 819-20. She chose to use select religious texts as supplemental resources to teach about the religious ceremonies and beliefs of the Egyptians. *Id.*

Many parents and students who supported the Academy's classical education likewise relied on the state's approval of the Academy's curriculum. ER685, 820. M.K. attended the Academy to receive classical instruction, including learning directly from religious and secular primary sources. ER681-82, 685-86, 820-21. M.K. desires to study the applicable secular and religious primary sources in such courses and to include them in her class work. *Id.* The use of primary sources enables her to better understand religious and Biblical allusions and references found in many secular texts she will be studying. *Id.*

III. The Government Officials Censored All Religious Documents and Text at Every Idaho Public School and University Through the Book Ban.

A. The Government Officials Enacted a State-wide Book Ban On All Religious Documents and Text Based Upon an Erroneous, Non-Binding, Advisory Opinion from the Idaho Attorney General's Office.

Even though the Government Officials approved the "Academy's intended use of the Bible and other religious texts," ER207, the Commission reversed course in July 2009 and began claiming that the Academy was not permitted to use the Bible in any manner in its curriculum, ER826.

⁸ Kosmann brought this action as a teacher, parent of several children enrolled in Idaho public schools, and as next friend of M.K. ER819.

On August 14, 2009, about a week before the Academy was scheduled to open to over 500 students, and nearly a year after approving its charter, the Commission voted to prohibit the Academy from using—even objectively—any “religious documents or text in a public school curriculum.” ER722. This Book Ban “appl[ies] equally to all public charter schools and traditional public schools.” ER662. The Commission warned that “if [the Academy] proceed[ed] to use religious text in class or in the classroom, the commission will be required to issue the school a notice of defect,” which led to revocation of the Academy’s charter. ER722.

The Commission enacted the Book Ban based in part on an “informal and unofficial response” from the Idaho Attorney General that use of such documents “would *likely* violate” Article IX, §6 of the Idaho Constitution. ER724, 728. However, the Attorney General ignored the unambiguous wording of §6, which does not prohibit “religious documents or text” but rather prohibits “books, papers, tracts or documents of a political, sectarian, or denominational character” from being used in public schools.⁹ Add. 1.

⁹ While broadly interpreting “sectarian or denominational” to mean “religious,” the Government Officials ignored the Idaho Constitution’s prohibition on the use of political documents, which exists in precisely the same section and which has not been enforced against any public schools. Add. 1; ER827, 833. According to the Government Officials’ broad construction of §6, it would be unconstitutional for public schools to study the Declaration of Independence or the Mayflower Compact—two political, and arguably religious, documents. ER615.

A “religious” document is vastly different from one that is “sectarian or denominational.” The word “sectarian,” as used in Article IX, §6 (ratified in 1889) does not mean religious. “Opposition to aid to ‘sectarian’ schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment...and it was an open secret that “sectarian” was code for “Catholic.” *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (emphasis added). Thus, it was the Government Officials’ incorrect interpretation of Article IX, §6 that led to the erroneous Book Ban.

B. The Government Officials’ Book Ban Harms the Academy, Its Teachers, Students, and Parents.

The Government Officials’ Book Ban affects the abilities of the Academy, along with all other public schools and teachers, including Moffett and Kosmann, to use supplemental resources that may be considered religious, and of all students, such as M.K., to receive information they desire and use resources of their choice in appropriate assignments. ER819-21. Moffett and Kosmann cannot adequately teach history, geography, and other subjects without using the religious documents and text of the cultures being studied. ER682, 819-20. For example, they were prohibited from teaching a lesson comparing the similarities of the Codex Hammurabi (one of the oldest known written legal codes) with the Mosaic Code from the Pentateuch. ER213, 672, 674. The Book Ban prevents Kosmann from

using any religious sources to teach about the religious ceremonies and beliefs of the Egyptians out of fear that doing so would violate the Book Ban. ER682, 820.

The Book Ban prevents M.K. from obtaining the knowledge she desires through studying primary religious sources that are quoted or alluded to in famous works of literature. ER686, 820-21. As a result, the Book Ban directly limits M.K.'s right to receive information that has legitimate educational value and prohibits M.K. from using religious sources in her coursework. ER686, 821.

On November 23, 2009, the Commission issued a Notice of Defect to the Academy for "intend[ing] to use religious texts as part of its curriculum." ER813. The Commission eventually revoked the Academy's charter on June 30, 2010. The Academy appealed the retaliatory revocation to Defendant-Appellee Board which, unsurprisingly, upheld the revocation. ER94, 97-98.

IV. The Educators/Student Continue to Face Censorship of Their Speech as a Result of the Book Ban.

After the Government Officials closed the Academy, M.K. enrolled at Vision Charter School which, like the Academy, provides a classical education with an emphasis on reading primary sources, including documents and text that are considered religious under the Book Ban. ER57-58, 61-62, 83-91. Vision Charter School is under the jurisdiction of Defendant-Appellee Commission and, like all Idaho public schools, is subject to the Book Ban. ER501, 662.

Moffett and Kosmann are both career educators who are actively seeking and applying for teaching jobs in public schools in Idaho. Moffett has applied for various teaching positions at surrounding public schools. ER41. Kosmann has applied for several full and part-time teacher positions at nearby public schools. ER56. They will continue to have their right to use relevant religious texts trampled upon as long as the Book Ban remains in effect. ER41, 56-57.

After the revocation, the Academy's Board and Founder Moffett have decided to submit petitions in order to re-establish a charter school using the same classical education model focusing on both secular and religious primary sources. ER41-42, 52. As long as the Book Ban remains in effect, the Educators/Student, and all other Idaho schools, teachers, and students, will continue to face censorship of important literary works.

SUMMARY OF ARGUMENT

In an unprecedented act of censorship, the Government Officials banned the use of all "religious documents and text" by all teachers and students in every public school and university in Idaho. While the Government Officials certainly have the authority to set educational standards, they may not censor relevant materials chosen by local school districts to meet those standards.

The Book Ban is both content and viewpoint based because it singles out religious documents and text for censorship while allowing secular materials on the

same topics to be used. Thus, a teacher desiring to use a religious text would face censorship while a teacher using a secular book to teach the same subject would not. The Book Ban, which fails to define “religious documents and text” and does not provide clear standards on what is prohibited, includes more than just the “sectarian” and “denominational” documents prohibited by the Idaho Constitution, rendering it unconstitutionally vague and overbroad. The Book Ban gives the Government Officials unbridled discretion to pick and choose which documents and texts they think are “religious” and thus banned.

Furthermore, the ban is an *ultra vires* action by the Government Officials because they lack any authority to enact it, and because Idaho law specifically gives charter schools, like the Academy, control over the selection of curriculum resources to teach state educational standards.

The District Court incorrectly ruled that the Academy is a division of the state, despite clear precedent from this Court holding that schools are not per se state subdivisions and have standing to sue the state for violations of the school’s constitutional rights.

Finally, the District Court improperly determined that the Government Officials are entitled to qualified immunity even though the rights of the Academy, its teachers, and students to use relevant supplemental resources, including

appropriate religious ones, are clearly established, as is the impropriety of censorship of educational materials.

ARGUMENT

I. Standards of Review.

At the outset, it is important to keep in mind that “when the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *U.S. v. Playboy Entm’t Grp.*, 529 U.S. 803, 817 (2000). *See also Bd. of Trustees of SUNY v. Fox*, 492 U.S. 469, 481 (1989) (the “[s]tate bears the burden of justifying its restrictions” on speech).

This Court reviews de novo a district court’s dismissal of a complaint under Rule 12(b)(1) or 12(b)(6). *Stacy v. Rederiet Otto Danielsen*, 609 F.3d 1033, 1035 (9th Cir. 2010); *Kingman Reef Atoll Invs. v. U.S.*, 541 F.3d 1189, 1195 (9th Cir. 2008). The Court must accept as true the factual allegations contained in the complaint and view all inferences in the light most favorable to the plaintiff. *Stacy*, 609 F.3d at 1035; *Ojo v. Farmers Grp.*, 565 F.3d 1175, 1183 (9th Cir. 2009).

A preliminary injunction may issue when a plaintiff shows a likelihood of success on the merits, irreparable harm, that the balance of equities tips in its favor, and that an injunction serves the public interest. *Winter v. Nat’l Res. Def. Council*, 129 S. Ct. 365, 374 (2008). This Court reviews a denial of a preliminary injunction for abuse of discretion. *Lands Council v. McNair*, 537 F.3d 981, 986-87 (9th Cir.

2008) (en banc). Legal conclusions are reviewed de novo and findings of fact for clear error. *Id.* This Court reviews de novo the district court's ruling on qualified immunity. *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009).

II. This Court Should Rule Upon the Merits of the Educators'/Student's Claims.

As an initial matter, the Educators/Student request this Court to rule upon the merits of their claims. While ruling on the Government Officials' Motion to Dismiss, the District Court considered the entire record, which is fully developed and not in dispute, and made several rulings as a matter of law, including: (1) “[t]here simply is no law creating a First Amendment right of either teachers or students to use the Bible or any other sacred religious text as part of a public school curriculum,” ER16, (2) “students and teachers do not have a First Amendment right to influence curriculum as they so choose,” ER18,¹⁰ and (3) “[i]f the Defendants allowed the Plaintiffs' proposed curriculum, they would be in violation of the [federal] Establishment Clause,” ER19.

Rather than merely overturning the dismissal, reinstating the Complaint, and remanding the case to the District Court for consideration of the Educators'/Student's Motion for Preliminary Injunction, which will result in the

¹⁰ It is the Educators'/Student's position that the court below asked and answered the wrong question. The proper question is “whether the state, having given local school boards the authority to develop a curriculum that conforms to the state educational standards, may then censor certain books chosen by the local board to teach those standards?”

same exact ruling from the District Court and the same appeal, this Court should now take up the merits of the case and issue a final ruling. “[I]f a district court’s ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance,’ the court may undertake ‘plenary review of [the] issues’ rather than ‘limit its review in a case of this kind to abuse of discretion.’” *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (quoting *Thornburgh v. Am. Coll. of OB/GYN*, 476 U.S. 747, 756-57 (1986)).

III. The Book Ban Violates the First and Fourteenth Amendments.

Despite their claims to the contrary, the Government Officials are accountable to the U.S. Constitution. States have “important, delicate, and highly discretionary functions,” with respect to public education, “but none that they may not perform within the limits of the Bill of Rights.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

The Educators/Student seek to protect their constitutional rights to use appropriate supplemental resources to teach the state educational standards and to protect against broad-based censorship. “Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). “When

academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion...into this constitutionally protected domain.” *Barenblatt v. U.S.*, 360 U.S. 109, 112 (1959).

A. The Book Ban is Content and Viewpoint Based.

By targeting the use of “religious texts...for any purpose,” ER660, the Book Ban discriminates based on content and viewpoint. “[S]peech discussing otherwise permissible subjects cannot be excluded...on the ground that the subject is discussed from a religious viewpoint.” *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 112 (2001). “[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.” *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993). And viewpoint discrimination is a particularly “egregious form of content discrimination” that is presumptively unconstitutional regardless of the type of forum. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

The Government Officials admit that the ban is viewpoint based. The “Guidelines” produced by the Government Officials state that banned sacred texts include works that “convey or prescribe a religious viewpoint essential or central to the adherents’ religious belief,” ER116-17, and any that “would promote or

oppose a particular religious viewpoint.” ER117. When a religious viewpoint is banned while a secular viewpoint is allowed, there can be no question that the Book Ban is viewpoint discriminatory.

In *Epperson*, the Court struck down a ban on textbooks teaching evolution in part because it discriminated based upon the particular viewpoint. “The overriding fact is that Arkansas’ law selects from the body of knowledge a particular segment which it proscribes....” 393 U.S. at 103. “Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law’s effort was confined to an attempt to blot out a particular theory.” *Id.* at 109.

The Book Ban is discriminatory because it allows classroom work to include secular viewpoints, but “blots out” religious content and viewpoints discussing the same subjects. For example, teachers may discuss different secular texts that influenced Shakespeare’s writings, but they could not read the religious text that influenced him even though his works allude to the Bible over 1300 times. ER549, ER571-72 (Biblical quotes and references are included in *Hamlet*, *The Tempest*, etc.). Similarly, students could write reports on any assigned secular books that were used to help draft our country’s founding documents, but they could not discuss the Bible’s influence—even though 34% of quotes in the Founders’ political writings are from the Bible. *See* Donald S. Lutz, The Origins of American Constitutionalism 141 (1988).

This is similar to the ban in *Epperson* where teachers could teach about the origins of man as long as they didn't use documents teaching evolution to do so. Here, teachers can talk about Shakespeare, U.S. history, and even world religions, as long as they don't use religious documents and text to do so. This is blatant and unconstitutional content and viewpoint discrimination.

B. The Book Ban Is Unconstitutionally Vague and Overbroad.

In the educational context, when a “statute or regulation by its vagueness or overbreadth threatens to deter the exercise of first amendment freedoms, we require of it greater precision and specificity.” *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996.)

1. The Book Ban is Vague.

A government policy is void for vagueness when persons “of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The Book Ban is vague because it (1) denies the Educators/Student fair notice of prohibited materials; (2) permits unrestricted enforcement, thereby inviting arbitrary, discriminatory, and overzealous enforcement; and (3) chills the Educators'/Student's speech. *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998).

First, the Book Ban fails to provide fair warning of prohibited conduct. Schools and teachers need to know what they can use as supplemental materials. In

Dean v. Timpson Indep. Sch. Dist., the court held that “a warning to Mrs. Dean...not to bring material like the Ethics Survey into the classroom...would not give a reasonably prudent person knowledge of what conduct it sought to prohibit. The alleged warning...could have a number of logical meanings.” 486 F. Supp. 302, 309 (E.D. Tex. 1979). *See also Keefe v. Geanakos*, 418 F.2d 359, 362 (1st Cir. 1969) (school failed to provide the teacher with adequate notice that using certain supplemental resources was impermissible); *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass. 1971), *aff’d*, 448 F.2d 1242 (1st Cir. 1971) (school violated Constitution by punishing teacher who assigned supplemental reading material without notice that such materials were prohibited).

The Book Ban purports to prohibit all religious documents and text, a term subject to “a number of logical meanings.” A document might be “religious” to an adherent of the faith, but “historical” or even “mythological” to an outsider. ER613-14. The Book Ban sweeps in a substantial amount of materials that are religious in nature, like the *Iliad*, *Odyssey*, Bible, *Qur’an*, and *Song of Hiawatha*, but that “could be appropriately used in historical or other academic studies as primary source documents.” ER614. According to Dr. Carroll, “[i]t is difficult for me to imagine teaching history without inclusion of some text or document...that someone...might consider as ‘religious’ in nature.” *Id.*

The Government Officials also refuse to define the scope of their Book Ban. On multiple occasions, the Academy requested “written documentation specifically telling us what will constitute religious materials and what won’t.” ER860. The Commission’s response: “it would be impossible...to offer a thorough description of what materials you may or may not use.” ER205. Commission Chairman Goesling instructed the Academy to “use good judgment.” ER342. But he then warned that the Book Ban encompasses even “less obviously religious texts.” ER105.

The “Guidelines” further contribute to the Book Ban’s lack of notice by banning the Bible, *Qur’an* and *Book of Mormon* “because they are considered by some or all adherents to the religions...to be divinely inspired or revealed.” ER116. Yet, the *Epic of Gilgamesh* and *Code of Hammurabi* were considered sacred texts by the cultures who created them. Even though these works are also banned under the Government Officials’ definition, they continue to be permitted.

Second, the Book Ban allows for arbitrary and discriminatory enforcement. Other public and charter schools throughout Idaho continue to use the Bible and other texts that fall within the Book Ban’s scope, *supra* Statement of Facts (“SOF”) Part I.C & D, but the Government Officials have not issued notices of defect or shut down any of these schools. And the Government Officials may and do arbitrarily decide which books are banned. ER111-15 (declaring that a speech

by Rev. Martin Luther King, Jr. is not religious, while one from Jonathan Edwards is).

Third, the Book Ban has a “chilling effect” on the Educators/Student who simply avoided much mention of religion rather than risk using documents and text that might be religious. ER615 (Dr. Carroll expressing concern over the “negative impact on the student of literature, art, and music” when teachers avoid important works out of fear that they are “religious”). “When a teacher is forced to speculate as to what conduct is permissible and what conduct is proscribed, he is apt to be overly cautious and reserved in the classroom.” *Parducci v. Rutland*, 316 F. Supp. 352, 357 (M.D. Ala. 1970). At the cost of losing their jobs, Moffett and Kosmann—and all teachers in Idaho—will simply avoid discussion of religion and “self-censor” any supplemental resources that might be religious. ER42-43, 52-53. Likewise will M.K., and all students, in fear of negative consequences for using a religious text in an assignment.

2. The Book Ban Is Overbroad.

A law is facially overbroad when there is a “likelihood that the statute’s very existence will inhibit free expression” by “inhibiting the speech of third parties who are not before the Court.” *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799-800 (1984). In *Bd. of Airport Comm’rs v. Jews for Jesus*, the Supreme Court struck down a ban on all First Amendment activities at an airport. 482 U.S.

569, 570-71, 577 (1987). The policy was substantially overbroad because it prohibited talking, reading, wearing symbolic clothing, and affected every individual who entered the airport who engaged in any type of expression. *Id.* at 575.

The Book Ban is strikingly similar to the policy in *Jews for Jesus*. Both involve complete bans on speech. The Book Ban here applies to all religious documents and text, no exceptions exist on the face of the Book Ban, and none can be inferred because its vague language sweeps so broadly. “[N]o conceivable governmental interest would justify such an absolute prohibition of speech,” 482 U.S. at 575, particularly when the Government Officials require the study of religion in all Idaho public schools.

C. The Book Ban Is an Illegal Prior Restraint on Speech.

By prohibiting the use of “religious documents and text,” the Book Ban creates a prior restraint on speech, which carries a “heavy presumption against its constitutional validity.” *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963). In *Cary v. Bd. of Educ. of Adams-Arapahoe Sch. Dist.*, 427 F. Supp. 945, 955 (D. Colo. 1977), the court held that a “school board's policy...prohibiting the use of any material not [on a book list] without first obtaining approval...is the kind of broad prior restraint which is particularly offensive to First Amendment freedom.” The

Government Officials' Book Ban creates an even more egregious prior restraint by banning any document or text that might be considered religious.

To survive constitutional scrutiny, a prior restraint (1) must not delegate overly broad discretion to the government, (2) must be content-neutral, (3) must be narrowly tailored to serve a significant governmental interest, and (4) must leave open ample alternatives for communication. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

As previously described, the Book Ban grants the Commission overly broad discretion to determine what constitutes a "religious document or text." *Supra* Argument Part III.B.1. Likewise, the Book Ban is content-based. *Supra* Argument Part III.A. The Book Ban is also not narrowly tailored to any significant government interests. If the Government Officials' interest truly was to ensure schools do not violate Article IX, §6, then it would prohibit all political, sectarian and denominational texts, not ones that might be "religious."

Further, the Book Ban does not provide educators or students with other channels of communicating the religious material. The Government Officials warn that even some anthologies and textbooks are not permitted. "Although...an anthology in and of itself likely would not violate [the] Idaho Constitution...improper use of an otherwise allowable text could violate the First Amendment," and "[o]ne's imagination would be the only limit on possible misuse

of an otherwise allowable anthology.” ER119. And that is the point of this case. What matters is not what supplemental resources are used (which is left to the Educators’ discretion) but rather how they are taught. According to Dr. Carroll, the focus should be on preventing “instruction whose purpose is religious indoctrination and/or proselytizing.” ER617. Just as the Bible can objectively be used “for its literary and historic qualities,” *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 2225 (1963), which is what the Educators seek to do, even a secular, neutral text can be taught in a manner that violates the Establishment Clause.

D. The Book Ban Violates The Academy’s Right to Select Curricular Materials.

“The Court has long recognized that local school boards have broad discretion in the management of school affairs.” *Pico*, 457 U.S. at 864; *see also Pratt v. Indep. Sch. Dist.*, 670 F.2d 771, 775 (8th Cir. 1982) (local school board has “the authority to determine the curriculum”). This Circuit has repeatedly upheld the constitutional right of local school boards to choose curricular materials. *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002) (“[T]he curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere”); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 (9th Cir. 1998) (“[S]chool boards generally retain a broad discretion in managing school affairs”).

Even the Government Officials admit that Idaho's schools have the "constitutional authority" to choose the curriculum. ER634. *See also* ER101 ("Public charter schools do not need to follow a specific curriculum...[they] may design their own curriculum"); ER212 (the selection of supplemental resources is "a local decision that local school boards will decide"); ER297 (charter schools are "given independence in formulating...curriculum"); ER302 (the State Board "does not approve supplemental materials"); ER604 ("[C]urriculum design was one of the areas...of flexibility for charter schools"); ER635 ("I don't think we want the state directing what curriculum schools can choose"); ER660 ("[P]ublic charter schools are encouraged to...offer expanded educational choices"); ER 750-51 ("The State Department of Education...does not prescribe the curriculum to be taught in public elementary and secondary schools").

The District Court erred by holding that the Government Officials were "the speaker" who controlled curriculum selection. ER18. But *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003, 1015-16 (9th Cir. 2000), the very case relied on by the District Court, reaffirms that "curriculum is only one outlet of a school district's expression of its policy." (Emphasis added). It is the local school board—here, the Academy—that selects the curriculum. *See Johnson v. Poway Unified Sch. Dist.*, 2010 WL 768856 *7 (S.D.Cal. 2010) (cited by the District Court and holding that a school district has control over "the selection of school curriculum").

The Academy has the constitutional right to decide which curricular materials it will use. The Government Officials, while having authority to set educational standards, cannot censor the Academy's selection of materials used to teach the standards simply because it disagrees with the Academy's choices. Because the Academy's instructional speech is protected by the First Amendment, any regulations on it "must be (1) reasonably related to (2) legitimate pedagogical concerns." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 (9th Cir. 2001).

1. The Book Ban is Not Reasonable.

The Book Ban is an unreasonable restriction on the Academy's speech because it prevents the Academy, through its teachers such as Moffett and Kosmann, from using religious primary sources to teach students about history, literature, and other subjects. ER137-41, 682, 818-20. For example, the Book Ban would prohibit the Academy's teachers from using "any original sacred texts from Egyptian history...to teach Egyptian history." ER758-59. *See e.g. Loewen v. Turnipseed*, 488 F. Supp. 1138, 1151 (N.D. Miss. 1980) (exclusion of textbook from state-wide use violated constitutional rights of public schools, teachers, and students).

In *Wilson v. Chancellor*, 418 F. Supp. 1358, 1361-62 (D. Or. 1976), a school board banned "all political speakers" from a school after a teacher invited a

Communist to speak to his class. The teacher and a student sued. The court held that the ban was unreasonable because it barred speakers absolutely, yet no disruptions had occurred in the teacher's classes and none were expected, the use of outside speakers was widely used, and political subjects were frequently discussed at the school. *Id.* at 1362.

Like *Wilson*, the Book Ban is unreasonable for several reasons. First, the Book Ban allows schools to use a "textbook with excerpts from the sacred texts or...textbooks that describe the sacred texts," but not the sacred texts themselves. ER758-59. According to Defendant-Appellee Baysinger, "it is generally acceptable to use texts that refer to, or even quote from, religious texts, so long as the texts you are using are not, in and of themselves, religious documents." ER205. "Other texts which contain excerpts from religious texts, but are not in and of themselves religious in nature, may be used." ER661. So schools could use an anthology that contains entire books of the Bible, but not those same exact books if alone or in the Bible itself. *See e.g.* ER665-66. How does the Book of Job, for example, cease to be "religious" simply because it is printed between Plato and Shakespeare? Job remains "religious" regardless. Such distinction is unreasonable.

Second, it is unreasonable for the Government Officials to require schools to teach about religion, *supra* SOF Part I.A, and then ban schools from using any

religious documents or text to do so, especially since the Academy has “broad discretion in the management of school affairs.” *Pico*, 457 U.S. at 863.

2. The Book Ban is Not Related to Any Legitimate Pedagogical Interest.

The Government Officials further lack any legitimate pedagogical interest in enacting the Book Ban. First, the Book Ban allows religious documents and text to be reprinted in certain textbooks or anthologies—whether in whole or in part. ER205. Any possible government interest in prohibiting religious “text” is totally undermined under these facts. Second, if the Government Officials had an interest in banning religious documents and text, then the Book Ban would extend to the schools’ libraries. But it “do[es] not apply to libraries.” ER115. “It is hard to think that any student could walk into the library and receive a book, but that his teacher could not subject the content to serious discussion in class,” *Keefe*, 418 F.2d at 362, but that is what the Book Ban causes in this case.

Furthermore, the Book Ban prohibits the use of religious texts, but not political texts, even though Article IX, §6 bans “documents of a political, sectarian or denominational character.” Add. 1. If the Commission truly had a pedagogical concern with complying with the Idaho Constitution, then it would ban political documents also.

E. The Book Ban Violates Teachers' Rights to Free Speech.

“It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees.” *Epperson*, 393 U.S. at 107; *see also Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001) (“[T]he argument that teachers have no First Amendment rights when teaching...is totally unpersuasive”). The First Amendment’s guarantee of free expression gives teachers the freedom to use supplemental materials and texts in class. “[T]eachers by necessity have wide discretion over the way course material is communicated to students.” *Ambach v. Norwick*, 441 U.S. 68, 78 (1979). The court in *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1055 (6th Cir. 2002), for example, ruled that a teacher’s free speech rights were violated when she was punished for inviting a speaker to discuss industrial hemp, especially given the “government’s express decision permitting the [teacher] to engage in that speech.” Likewise, the school district here—the Academy—has chosen to permit both secular and religious texts to teach state educational standards. It tramples on the Educators’ rights for the Government to now ban the Educators from using those sources.

The First Circuit also ruled in favor of a teacher who was suspended for assigning a magazine article to his students that, although it contained a vulgar word, also had serious educational merit. *Keefe*, 418 F.2d at 362. Here, the

Government Officials admit that the banned religious materials “could inform students about history or culture.” ER757. As the First Circuit warned, courts must guard against the “general chilling effect of permitting such rigorous censorship.” *Keefe*, 418 F.2d at 362.

Likewise, in *Dean*, 486 F. Supp. at 307, the court held that a teacher who was warned against using certain controversial supplemental resources “has a constitutional right protected by the First Amendment to engage in a teaching method of his or her own choosing, even though the subject matter may be controversial or sensitive.” If a teacher has a constitutional right to use supplemental resources that are prohibited by a school board, how much more does she have the right when such materials have been approved by the Academy’s Board, as was the case here.

Similarly, the court in *Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F. Supp. 657, 659 (S.D. Tex. 1972) ruled in favor of a teacher who was told by the school board “to confine his teaching to the text and to avoid controversial issues.” “It would be ill-advised to presume that a teacher would be limited, in essence, to a single textbook in teaching a course today in civics and social studies.” *Id.* at 661. A teacher “must have the freedom to use the tools of his profession as he sees fit.” *Id.* at 662. Yet the Government Officials restrict this very freedom by prohibiting

the Educators from using the “tools of [their] profession” to provide the best education possible to Idaho students.

Finally, in *Parducci*, 316 F. Supp. 352, the court ruled that a school violated the First Amendment when it dismissed a teacher who assigned a Kurt Vonnegut story as outside reading. “Since the defendants have failed to show either that the assignment was inappropriate reading for high school juniors, or that it created a significant disruption to the educational processes of this school, this Court concludes that plaintiff’s dismissal constituted an unwarranted invasion of her First Amendment right to academic freedom.” *Id.* at 356. Here, the Government Officials have never claimed that the Educators’ objective use of religious sources is inappropriate or that it created a disruption. The sole justification for the Book Ban is the erroneous interpretation of the Idaho Constitution.

Even in *Downs*, where this Court ruled that a teacher could not post his personal views on a school bulletin board when they contradict the school’s view, this Court reaffirmed that a school can “allow[] [a teacher] to be its voice.” 228 F.3d at 1015-16. “Teachers at [the Academy] are permitted...to use supplement resources ...whether or not the resources are listed on the core reading list.”

ER134-35. When the teacher is given such authority by the school board, she is the “speaker,” and her speech is protected.¹¹

F. The Book Ban Violates Students’ Rights to Free Expression and to Receive Information.

Students have a First Amendment right to speak freely at school, *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969), and to “acquire useful knowledge,” *Epperson*, 393 U.S. at 105. *See also Pico*, 457 U.S. at 867 (“[T]he Constitution protects the right to receive information and ideas”); *Johnson v. Stuart*, 702 F.2d 193, 197 (9th Cir. 1983) (students and parents had standing to challenge a ban on textbooks that belittled the Founding Fathers because the “students [were] being denied free access to information in the continuing process of their education”). “The Supreme Court has long recognized that the freedom to receive ideas, and its relation to the freedom of expression, is particularly relevant in the classroom setting: The classroom is peculiarly ‘the marketplace of ideas.’” *Monteiro*, 158 F.3d at 1027 n.5.

The Book Ban violates M.K.’s right to receive information. In *Pratt*, 670 F.2d 771, a school board’s removal of a film from the curriculum because of its objections to the film’s religious content violated students’ First Amendment rights to receive information. The court found that the board failed to establish it had a

¹¹ These many cases defeat the accusations of frivolity in the Government Officials’ request for fees.

substantial and reasonable governmental interest for interfering with students' right to receive information. *Id.* at 777-78.

Similarly, the Government Officials irrationally banned all "religious documents and text." Prior to instituting the Book Ban, the Government Officials admitted that public schools may use "the Bible and other religious texts." ER206-07. Only after receiving the Attorney General's misguided advisory opinion did the Government Officials institute the Book Ban. But "a student's First Amendment rights are infringed when books that have been determined by the school district to have legitimate educational value are removed." *Monteiro*, 158 F.3d at 1029. Thus, M.K. is likely to succeed on her claim that the Book Ban infringes her ability to receive information.

M.K. also has a First Amendment right to free speech in the classroom and in her assignments, unless her speech would "substantially interfere with the work of the school or impinge upon the rights of other students." *Tinker*, 393 U.S. at 509. When the government "censor[s] a...vehicle of student expression" without a valid educational purpose, it is "so directly and sharply implicat[ing]" the First Amendment "as to require judicial intervention to protect students' constitutional rights." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

M.K. desires to use religious texts in appropriate classroom assignments. For example, when studying Shakespeare, M.K. could not read from the Bible when

discussing his use of metaphor. ER610 (“Students cannot fully appreciate the works of Shakespeare or other classic literature without having an understanding of the Bible”). M.K. would also be prohibited from reading or incorporating any religious book, newspaper article, or other educational materials, at the suggestion of a teacher. The Book Ban prohibits these uses without any demonstration that they would cause disruption. The Government Officials claim that the Book Ban would not apply to M.K.’s speech, ER760-61, but as written, it has no limiting instructions of that nature on its face.

G. The Book Ban Violates the Establishment Clause.

The District Court erroneously found that the Book Ban was mandated by the Establishment Clause. ER19-21. In fact, the Book Ban violates it. The undeniable purpose of the Establishment Clause is to ensure that the government does not “demonstrate a preference for one particular sect or creed.” *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 605 (1989). “Government...must be neutral in matters of religious theory, doctrine, and practice.” *Epperson*, 393 U.S. at 103-04. The Book Ban violates the Establishment Clause because it (1) does not have a secular purpose, (2) has a primary effect of inhibiting religion, and (3) fosters excessive state entanglement with religion. *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994).

The Book Ban lacks a secular purpose because it only targets religion. Article IX, §6 prohibits the use of “books, papers, tracts or documents of a *political...character.*” Add. 1. Yet the Government Officials have not banned political books, one of the express categories of documents prohibited under §6, while banning “religious” documents, which is not found in §6. This shows the Book Ban lacks a secular purpose and is aimed solely at religious books.

The Book Ban also has the primary effect of disapproving of religion because it completely bans the Educators from using religious primary sources in an objective manner to study history, culture, and art. *Supra* SOF Part III.B. It also bans M.K. from receiving educational information concerning religion and disallows her from using religious sources when completing coursework. *Id.* By singling out religion for censorship in public schools, the Government Officials “demonstrate not neutrality but hostility toward religion.” *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248 (1990).

Comparatively, the “literary or historic study of the Bible is not a prohibited religious activity.” *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1534 (9th Cir. 1985); *see also Stone v. Graham*, 449 U.S. 39, 42 (1980) (“[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like”); *Woodland Joint Unified Sch. Dist.*, 27 F.3d at

1380 (“reading, discussing or contemplating” religion in school curriculum is permissible).

Finally, the Book Ban excessively entangles the Government Officials with religion. In *Widmar v. Vincent*, 454 U.S. at 265, 267, 272 n.11 (1981), the Supreme Court found that a policy that prohibited the use of university facilities for “religious teaching” required substantial and continuous entanglement. The Book Ban requires the same continuing entanglement. The Commission issued voluminous public records requests to determine if the Academy’s curriculum violated the Book Ban. ER674-75. It also sent letters to other charter schools inquiring into their use of “religious documents and text.” ER121-24. These inquiries require the Government Officials to comb through documents to scrutinize them for content the Government Officials believe to be too religious. The Government Officials’ “Guidelines” create further entanglement by poorly attempting to define what documents and text are religious—an exercise fraught with grave constitutional dangers. As Dr. Carroll testified, deciding which works are religious “can quickly be taken to absurd places. Will the Declaration of Independence be banned because someone believes it represents Deist religious beliefs?” ER615. The Book Ban lacks a secular purpose, disapproves of religion, and entangles government with religion.

H. The Book Ban Violates the Equal Protection Clause.

The Book Ban violates equal protection because the Government Officials do not enforce the regulation against similarly-situated entities. “The Equal Protection Clause [directs] that all persons similarly situated should be treated alike.” *Serrano v. Francis*, 345 F.3d 1071, 1081 (9th Cir. 2003). The Government Officials have not applied the Book Ban to any other public schools. Only the Academy has been shut down by the Government Officials, despite the fact that other schools use religious primary sources. *Supra* SOF Part I.C & D. Only as a show to the District Court did the Government Officials send letters to other charter schools after the Academy pointed out the dissimilar treatment ER121-24, but no other charter school has been investigated and shut down pursuant to the Book Ban.

Discriminatory intent is not only found here, but it is presumed when the differential treatment implicates fundamental rights. *See Bush v. Gore*, 531 U.S. 98 (2000) (striking down standardless recounts under the Equal Protection Clause without any finding of discriminatory intent because they infringed on a fundamental right); *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (classifications that impinge upon the exercise of a fundamental right are “presumptively invidious”). The Book Ban implicates the fundamental rights of the Educators/Student to use

relevant religious primary sources as supplemental resources to teach state educational standards regarding religion.

I. The Government Officials Retaliated Against the Academy Because of its Speech.

First Amendment retaliation consists of government actions that would chill or silence a person of ordinary firmness from future First Amendment activity, and a showing that the protected conduct was the “substantial or motivating” factor in the defendants’ action. *Mendocino Env’tl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999).

After the Educators/Student filed suit on September 1, 2009 to challenge the unlawful Book Ban, the Government Officials almost immediately began retaliating against the Academy. They first issued voluminous public records requests to the Academy, more than had ever been requested from any other charter school, ER71, on issues related to the litigation, ER672-75 (which is illegal under public records laws, Add. 5, 22), and many more unrelated to the litigation, *see e.g.* ER78-79, while beginning their new quest to shut down the school. They also began making negative public comments about the Academy. Defendant-Appellee Chairman Goesling publicly accused the Academy of being a “religious school,” ER214, 835, and later publicly warned, “If I was a parent, I’d be looking at alternatives,” ER89, while the Academy was still open.

The Commission continued its retaliation campaign by singling out the Academy for investigation of its “fiscal soundness” even though the Academy was financially stable. ER46-47. The Government Officials denied two grants that the Academy was waiting on, resulting in a \$250,000 reduction of expected funds. ER47. Furthermore, the Government Officials’ threats of revocation scared off potential investors and even committed investors who withdrew over \$150,000 in pledged funds. *Id.*

Most shocking is that the Government Officials added the unwarranted attorney’s fees that they requested in District Court to the budgetary shortfalls they accused the Academy of having. ER68 (asking the Academy’s Chairman “[i]s there any provision in your budget for paying those attorney fees”).

The Government Officials then pounced, using the very shortfalls it helped to create as an excuse to revoke the Academy’s charter just a few short months after the Notice of Defect for alleged “financial soundness” was issued. ER48. Additional facts exposing the retaliation against the Academy were that the entire state was in financial trouble, ER48-49, 77, 93, with Superintendent Luna declaring a “financial emergency...for all school districts in Idaho,” ER93. And another charter school that was issued a notice of defect for “financial reasons” was given 14 months to resolve the financial concerns before it was issued a notice of intent to revoke (which was later withdrawn by the Commission). ER48, 72-73.

Despite the on-going state-wide financial crisis, no other school has been shut down by the Government Officials for financial reasons. ER49.

Filing a lawsuit is protected speech activity under the First Amendment that can be the basis for a retaliation claim. *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989). The Academy's protected activity of filing a federal lawsuit to challenge the Book Ban was the substantial or motivating factor for the Government Official's retaliatory actions that not only chilled the speech of the Educators/Student, but silenced it.

IV. The Book Ban Is an *Ultra Vires* Act Over Which the District Court Had Supplemental Jurisdiction.

A. The District Court Had Supplemental Jurisdiction Over the Sole State Law Claim.

Supplemental jurisdiction is constitutional so long as the pendent state law claim is part of the same "case or controversy" as the federal claim. *See* 28 U.S.C. § 1367(a). State law claims are part of the same "case" as federal claims when they "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them in one judicial proceeding." *Finley v. U.S.*, 490 U.S. 545, 549 (1989).

The District Court declined to exercise supplemental jurisdiction for two reasons: (1) "the claim raises a novel or complex issue of State law," and (2) it had "dismissed all claims over which it has original jurisdiction." ER25. As to the first

reason, this case need not turn on an issue of state law because, regardless of the proper interpretation of the Idaho Constitution, the “Supremacy Clause takes over and prohibits the states from using their own constitution to block the federal law.” *See Hoppock v. Twin Falls Sch. Dist.*, 772 F. Supp. 1160, 1164 (D. Idaho 1991).

Regarding the second reason, the Educators/Student stated federal claims sufficient to survive dismissal. Reversal of the District Court’s decision on the federal claims serves to reinstate the Educators’/Student’s state law claim. *Brodheim v. Cry*, 584 F.3d 1262, 1273 (9th Cir. 2009) (“[s]ince the district court declined to exercise its discretion to exercise supplemental jurisdiction over Brodheim's state law claims solely on the basis of summary judgment on the federal claims, these claims are also reinstated”).

B. The Government Officials’ Actions in Creating the Book Ban Are *Ultra Vires*.

The Government Officials acted *ultra vires* by creating and enforcing the Book Ban against the Academy. “An administrative agency is a creature of statute, limited to the power and authority granted it by the Legislature.” *In re Bd. of Psychologist Examiners’ Final Order*, 224 P.3d 1131, 1137 (Idaho 2010). Accordingly, any regulation from the Government Officials that “is in conflict with a state law of general application is invalid.” *Black v. Young*, 122 Idaho 302, 308 (1992).

Idaho charter schools “operate independently from the existing traditional school district structure.” Add. 9. “Each public charter school is otherwise exempt from rules governing school districts which have been promulgated by the [Board],” except for certain provisions not applicable here. Add. 17. Charter schools have the “constitutional authority” to select curriculum, ER634, and the Government Officials lack any statutory authority to prevent charter schools from using religious documents and texts as supplemental resources. Their actions against the Educators/Student are *ultra vires* and void.

Most important, the Government Officials do not mandate an individualized curriculum for the over 700 schools in the state, nor do they choose every book or other curriculum resources for those schools. They simply set out general educational standards, *supra* SOF Part I.A, that each school district is required to meet. They have no authority to censor particular books chosen, nor do they want to get into the business of micromanaging over 700 schools. ER 635 (Defendant-Appellee Luna stating “I don’t think we want the state directing what curriculum schools can choose”).

V. The Academy Is Suffering Irreparable Injury.

The “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The mere existence of the Book Ban chills the Educators’/Student’s right

to use religious documents and text in all public schools. *See supra* Argument Part III.E & F. The Academy, through its Board/Founders, cannot operate a charter school which uses religious texts, Moffett and Kosmann are unable to use the curricular materials they desire to teach in their classes, and M.K. cannot receive the education she desires, or speak freely using religious primary sources in a public school. *Supra* SOF Part III.B.

VI. The Balance of Equities Favors an Injunction.

The Academy's request for injunctive relief will cause no legally cognizable harm to the Government Officials. Enjoining the Book Ban will not alter the Government Officials' ability to carry out their statutory duties in setting educational standards. When it has been shown that the challenged Book Ban is unconstitutional, "no substantial harm to others can be said to inhere in its enjoinderment." *Déjà Vu of Nashville v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001). But the Educators/Student will continue to suffer irreparable harm if the injunction does not issue, thereby tipping the balance of hardships in their favor. *See Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973-74 (9th Cir. 2002) ("[W]hen the harm claimed is a serious infringement on core expressive freedoms, a plaintiff is entitled to an injunction even on a lesser showing of meritoriousness").

VII. The Public Interest Favors an Injunction.

There is a “significant public interest in upholding First Amendment principles” particularly when “[t]he ongoing enforcement of the potentially unconstitutional regulations...would infringe not only the free expression interests of the [Appellants], but also the interests of other people.” *Sammartano*, 303 F.3d at 974. Here, an injunction on the Book Ban would benefit the public interest, especially those of the hundreds of public schools, thousands of teachers, and hundreds of thousands of students at schools and universities all across Idaho that are affected by the Book Ban.

VIII. The District Court Erred by Dismissing the Academy’s Claims for Lack of Jurisdiction.

A. There Is No Need to Reach the Question of Whether the Academy Has Standing.

Importantly, “[i]f any one of [the plaintiffs] has standing, we may reach the merits...without considering whether the other [plaintiffs] also have standing.” *Bd. of Natural Resources v. Brown*, 992 F.2d 937, 942 (9th Cir. 1993). The District Court found that Moffett, Kosmann and M.K. have standing to bring their claims, and therefore, this Court need not decide whether the Academy has standing in order to rule.

B. The District Court Had Subject Matter Jurisdiction Over the Academy's Claims.

The District Court also erred in holding it lacked subject matter jurisdiction over the Academy's claims because the Academy is a private corporation that may sue under §1983, and even if it is considered a public school, it could still sue the state to enforce its constitutional and statutory rights.¹²

1. Federal Courts Have Subject Matter Jurisdiction Over the Federal Claims of Private Corporations Like the Academy.

“A private corporation enjoys constitutional protections” under the First and Fourteenth Amendments that they may enforce under §1983. *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1101 (2009); *see also Citizens United v. F.E.C.*, 130 S. Ct. 876, 899-900 (2010) (“First Amendment protection extends to corporations”). The Academy is a private, non-profit corporation that contracts with Idaho to operate a charter school. ER147, 818; Add. 9. And it functions “independently of the public charter school commission.” Add. 9.

In *Caviness v. Horizon Cmty. Learning Ctr.*, 590 F.3d 806, 818 (9th Cir. 2010), this Court held that charter schools are not per se “state actors,” and enjoy the same constitutional protections as private corporations. In both Arizona and Idaho, charter schools are established by contract, Add. 10, must be sponsored by a

¹² The Academy also has standing to raise claims of third parties who are not before the Court, because the Ban is written so broadly that it “may inhibit the constitutionally protected speech of third parties, even if his own speech may be prohibited.” *Foti*, 146 F.3d at 635.

school district, the state board of education or the state board for charter schools, Add. 10, 12, are autonomous, Add. 14, are considered “public agents,” *id.*, and are exempt from all statutes and rules relating to public schools, Add. 17. *See* 590 F.3d at 808-10 (discussing similar Arizona laws).

In *Caviness*, Arizona charter schools were not “state actors” for several reasons. First, the state’s “statutory characterization of a private entity as a public actor...is not necessarily dispositive” of whether it is a “state actor” under §1983. 590 F.3d at 814. Second, Arizona’s creation of charter schools did not turn the private organizations operating them into state actors because the schools are not serving a “function that is traditionally and exclusively the prerogative of the state.” *Id.* at 816. Third, Arizona charter schools are not state actors even though Arizona regulates them because the challenged conduct was not compelled by any state regulation. *Id.*

Like *Caviness*, the Academy’s board members are characterized as public agents, but this does not divest the Academy of its private constitutional rights. Idaho charter schools are also not performing a function traditionally and exclusively the prerogative of the state. While Idaho imposes some regulations on charter schools, the schools have “constitutional authority” to create their own curriculum. *Supra* Argument Part III.D.

The District Court erroneously held subject matter jurisdiction was absent because the Academy is a political subdivision of Idaho that “has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.” ER9 (quoting *Ysursa*, 129 S. Ct. at 1101). But *Ysursa* does not support finding a lack of jurisdiction because, even if considered a public school, the Academy is not utilizing the Privileges and Immunities Clause to enforce its constitutional rights. *See infra* Argument Part VIII.B.2.

Moreover, the Academy is not a political subdivision because it is not a “state actor.” *Caviness*, 590 F.3d at 816, 818. It simply contracts with the state to provide educational services. Nor is it “a subordinate unit of government created by the State.” *Ysursa*, 129 S. Ct. at 1101. Idaho law does not classify the Academy as a “subordinate unit of government.” *See* Add. 9 (“[P]ublic charter schools...operate independently from the existing traditional school district structure”); Add. 14 (a charter school’s board controls it “independently of the public charter school commission”). The Academy is not a state actor.

2. Federal Courts Also Have Subject Matter Jurisdiction Over a School’s Federal Claims Against Its State.

In addition, the District Court had subject matter jurisdiction over the Academy’s federal claims, because even if it is considered a public school, the United States Supreme Court has made it clear that the Academy may sue its state “when state power is used as an instrument for circumventing a federally protected

right.” *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960). In *Washington v. Seattle School District*, 458 U.S. 457, 464 (1982), affirming a public school district’s ability to sue Washington state to challenge a school bussing statute, the Court noted that the “issue here...[is] whether the State has exercised that authority in a manner consistent with the Equal Protection Clause.” *Id.* at 476.

The Supreme Court in *Seattle School District* also explicitly held that school districts are “persons” under 42 U.S.C. § 1983 and therefore have standing to enforce their rights under the Constitution. This Circuit properly followed this holding in *Bd. of Natural Resources*, 992 F.2d at 942-43, as have at least five other circuits. See *Sch. Bd. of City of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987); *S. Macomb Disposal Auth. v. Washington*, 790 F.2d 500, 504 (6th Cir. 1986); *Rogers v. Brockett*, 588 F.2d 1057, 1070-71 (5th Cir. 1979); *Brewer v. Hoxie Sch. Dist.*, 238 F.2d 91, 95 (8th Cir. 1956); *Branson School Dist. v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998).

The Supreme Court reaffirmed this principal in *Ysursa*, which the District Court relied on to errantly rule that Academy lacked standing, and held that while a state has the power to restrict the rights and privileges of its political subdivisions, such restrictions are “of course subject to First Amendment and other constitutional scrutiny.” 129 S.Ct. at 1100.

The Supreme Court also has held that a board of education, which took “an oath to support the United States Constitution,” had “a “personal stake in the outcome” of a challenge to a policy the board believed to be unconstitutional. *Bd. of Educ. v. Allen*, 392 U.S. 236, 241 n.5 (1968); *see also Baliles*, 829 F.2d at 1311 (school board can challenge state action which “has impeded [its] ability to carry out its own constitutional duty”). Like the school board in *Allen*, the Academy “shall be responsible for ensuring that the school complies with...all applicable state and federal laws.” Add. 21.

And this Court, clarifying its prior holding in *City of South Lake Tahoe v. Cal. TRPA*, 625 F.2d 231 (9th Cir. 1980),¹³ recently held that a political subdivision lacks standing only when its interest “is official, not personal.” *Thomas v. Mundell*, 572 F.3d 756, 761 (9th Cir. 2009). “[A] litigant’s standing cannot be based on the generalized interest of all citizens in constitutional governance.” *Id.*

¹³ The Supreme Court twice rejected a broad interpretation of *South Lake Tahoe*’s ruling on standing. *See Seattle School District*, 458 U.S. at 464; *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 259-60 & n.6 (1985) (school district could challenge a state statute under the Supremacy Clause). Justice White, dissenting from the denial of certiorari in *South Lake Tahoe*, stated that the 9th Circuit’s holding “is inconsistent with *Allen*.” 449 U.S. 1039, 1042 (1980). Furthermore, several of this Circuit’s judges have questioned the broad reading of *South Lake Tahoe*. *See e.g. Palomar Pomerado Health System v. Belshe*, 180 F.3d 1104, 1110 (9th Cir. 1999) (Hawkins, J., dissenting).

However, when a political subdivision suffers a “personal,” concrete injury as a result of the actions of the state, then it has standing. *Id.*

The Academy, using its “constitutional authority” to select curriculum, chose to use a classical education model that focused on primary sources, including religious sources. However, the Book Ban “personally” injures the Academy’s ability to implement this curriculum and to function as a school. For over six years, the Academy’s founders labored to develop its unique curriculum. ER136. Its curriculum and the freedom to use and study primary sources, both secular and religious, was the reason why many teachers and students came to the Academy. ER681, 685. Thus, the Academy’s challenge to the Book Ban is not a mere “abstract outrage at the enactment of an unconstitutional law.” *South Lake Tahoe*, 625 F.2d at 233. Rather, the Academy’s very ability to operate a charter school teaching a classical education is directly injured by the Book Ban.

IX. The Government Officials Do Not Merit Qualified Immunity From the Educators’/Student’s Claims for Damages.

In addition to qualified immunity affording no shield to the Government Officials from the Educators’/Student’s claims for injunctive relief (which was overlooked by the District Court), *Hydrick v. Hunter*, 500 F.3d 978, 988 (9th Cir. 2007), the Government Officials are not entitled to qualified immunity from the claims for damages because they violated the clearly established rights of schools, teachers, and students to use supplemental resources. ER212 (the selection of

supplemental resources is “a local decision that local school boards will decide”); ER634-35. Courts resolve qualified immunity questions by asking first whether the facts alleged show a constitutional violation, then, whether the right at issue was “clearly established” at the time of the misconduct. *Pearson v. Callahan*, 129 S. Ct. 808, 815-16, 818 (2009).

Many, many cases have found book censorship, such as that at issue here, violated well-established constitutional rights. *Supra* Argument Part III.E. Conversely, no court has ever upheld such broad and blatant censorship of educational books. Cases in this context have found school officials are not entitled to qualified immunity. *Evans-Marshall v. Bd. of Educ. of Tipp City Sch. Dist.*, 428 F.3d 223, 232-33 (6th Cir. 2005) (denying qualified immunity to school officials who terminated a teacher for using certain texts in class); *Poway Unified Sch. Dist.*, 2010 WL 768856 *21 (denying qualified immunity to school that censored teacher’s speech because it “has been clearly established since *Tinker* that school teachers enjoy First Amendment rights inside the schoolhouse gates”).

Additionally, the Educators’/Student’s rights were clearly established when the Government Officials created the Book Ban because these rights were “sufficiently clear that a reasonable official would understand that what he is doing violates the right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Prior cases do not have to be “fundamentally similar” for defendants must simply receive “fair

warning” that their conduct is illegal, and general statements of the law can suffice. *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002).

Multiple circuits, including this Circuit have confirmed the rights of local school districts to decide how to teach curriculum (which has also been confirmed by the many statements in the record made by the Government Officials themselves), have protected the rights of teachers to choose which supplemental resources to use in classroom teaching, and have protected the rights of students to receive that information and use books of their choosing during appropriate classroom activities. *Supra* Argument Parts III.D, E, & F. The Government Officials are not entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the Academy respectfully request that this Court reverse the District Court’s decision, issue an injunction against the Book Ban, and remand the case for further proceedings.

Dated: January 7, 2010

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants state that they are not aware of any related cases pending in the Ninth Circuit.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation,
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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,821 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: January 7, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2011, I electronically filed the foregoing Opening Brief and the attached Addendum with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

The undersigned also certifies that one copy of Appellants' Excerpts of Record was this day served, via U.S. Mail, upon:

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The undersigned also certifies that four copies of Appellants' Excerpts of Record were this day mailed, via UPS Ground (guaranteed delivery by end of second business day), to:

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