NO. _____

In the

Supreme Court of the United States

NAMPA CLASSICAL ACADEMY, INC., et al.,

Petitioners,

v.

WILLIAM GOESLING, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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

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

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

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

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

Counsel for Petitioners

QUESTIONS PRESENTED

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

A circuit conflict exists on the following questions:

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

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

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

PARTIES TO THE PROCEEDING

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

CORPORATE DISCLOSURE STATEMENT

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

---

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

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

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

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

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

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

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

DECISIONS BELOW

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

STATEMENT OF JURISDICTION

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

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

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

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

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

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

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

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

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

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

---

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

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

- Classical authors (e.g., Plato's *Republic*, Aristotle's *Politics*, Thucydides' *History of the Peloponnesian War*),

- Enlightenment figures (e.g., Locke's *Two Treatises of Government*, Descartes' *A Discourse on Method*),

- Literary luminaries (e.g., Shakespeare's *Hamlet*, Sir Walter Scott's *Ivanhoe*, Jane Austen's *Emma*),

- Founding Era resources (e.g., *The Federalist*, Farrand's *Records of the Federal Convention of 1787*),

- Influential authors (e.g., Harriet Beecher Stowe's *Uncle Tom's Cabin*, Booker T. Washington's *Up from Slavery*), and

- More recent classics (e.g., Alexander Solzhenitsyn's *A Day in the Life of Ivan Denisovich*, President Reagan's *Address to the British Parliament*).

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

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

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

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

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

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

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

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

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

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

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

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

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

These schools also utilize classic works replete with

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

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

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

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

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

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

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

In June 2009, the Commission's Program

---

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

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

II. PROCEDURAL BACKGROUND

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

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

---

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

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

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

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

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

REASONS FOR GRANTING THE WRIT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

existing doctrine in ways not yet explored").

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

CONCLUSION

This Court should grant review.

Respectfully submitted,

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

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

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

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

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

December 21, 2011