NO. 11-786

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

REPLY BRIEF FOR PETITIONERS

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

> *Facts are stubborn things, and whatever may be our wishes, our inclinations, or the dictums of our passions, they cannot alter the state of facts and evidence.*[1]

When John Adams told a Boston jury this, he was not referring to Respondents' Brief in Opposition ("Resp."), but he could have been. For they try to "alter the state of facts and evidence" and the state of the law. In both endeavors, they fail to undermine the reasons this Court should grant review.

Nampa Classical Academy, a charter school granted independence in curriculum matters, seeks to teach religious works objectively (alongside countless secular ones). The Public Charter School Commission—whom Respondents concede lacks any authority over curriculum, Resp.10—declared this violated its expansively reworded version of Idaho's Constitution and ultimately revoked the Academy's charter. Respondents try to cloud—but ultimately concede—these core facts.

Respondents concede each of the core issues in the questions presented:

1. They concede that they have enacted a policy that bans any "religious documents or text."

2. They concede that the Establishment Clause

---

[1] JOHN ADAMS, 3 LEGAL PAPERS OF JOHN ADAMS 269 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965), *quoted in* DAVID MCCULLOUGH, JOHN ADAMS 68 (2001).

is the interest asserted to justify this censorship.

3. They concede that political subdivisions are barred *per se* from suing their states in federal court.

As to the circuit conflicts, Respondents admit circuits use differing tests, apply tests differently, and reach different results. Though they obfuscate the issues and divert attention to straw-men, their ploys cannot conceal the chasms separating the circuits.

Finally, neither the injunctive nor damages claims are moot. The ban prevents the Academy—an on-going corporation that is currently reapplying for a charter—from utilizing religious documents. E.R.41-43, 52. It prevents Mr. Moffett, an active public school teacher, from utilizing religious materials. E.R.41. It keeps M.K., a current charter school student, from studying them, preserving her and Mrs. Kossman's claims. E.R.57-58, 61-62; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718-20 (2007).

Hence, this Court should grant review.

I. RESPONDENTS ADMIT THE CORE FACTS SUPPORTING THIS COURT'S REVIEW.

A. ON CURRICULUM MATTERS, THE COMMISSION HAS NO AUTHORITY, AND THE ACADEMY HAS GREAT INDEPENDENCE.

By banning "religious documents or text" from the

Academy, the Commission usurped authority given charter schools: the right to select curriculum. Pet.3-4, 8-13. Despite Respondents' claims, neither teachers, parents, nor students want to change the curriculum. Resp.19-20, 23-24. The Academy designed a curriculum satisfying all state standards, and Petitioners have a constitutional interest in using the Academy's selected curriculum. Pet.6-8, Pet.App.19-20g. The Commission altered it by banning "religious documents or text," including "less obviously religious texts." Pet.App.43i; E.R.105; Pet.8-13.

Now, Respondents finally concede what has been true all along: "the Commission does not have the right to select [the Academy's] curriculum … because the [State Board of Education] has curriculum-setting authority, not the Commission." Resp.10; *accord* Resp.2. But the Board has not issued the book ban; the Commission has.[2]

Later, Respondents attempt to minimize charter schools' independence by distinguishing Board rules from statutes. Resp.3. But under Idaho statutes, the Board issues "rules" governing what "curricular materials shall be adopted." Resp.App.18. These are the same "rules governing school districts" from which charter schools are exempt. Pet.App.32-33g. Regardless, the Commission lacks "curriculum-setting authority." Resp.10; Pet.App.31-33g. Hence, the Academy retained vast leeway in selecting materials for its classes. Pet.3-4, 8-9.

---

[2] The Board has issued the educational thoroughness standards, with which the Academy has fully complied. Pet.4-8; E.R.218-20, 223-26, 230.

B. IDAHO SCHOOLS HAVE LONG USED RELIGIOUS MATERIALS AS OBJECTIVE RESOURCES IN THEIR CURRICULUM.

Even the state's education officials recognize the long-established practice of using religious materials as objective resources, and they have publicly approved of it. Spokeswoman McGrath (whose job is to speak for the Board) and Superintendent Luna (Idaho's top education official) clearly stated that public schools could use the Bible objectively.[3] Pet.6. Even Program Manager Baysinger (whose job is to speak publicly for the Commission) did not give a "mistaken statement of law" when endorsing the Academy's curriculum. Resp.9-11. She thoughtfully summarized the Commission's decision. E.R.207 ("The … Commission office has reviewed [the] Academy's intended use of the Bible and other religious texts and determined it to be appropriate, just as it would be in any other public school.").

Respondents admit other charter schools used "the Bible and other religious texts in [their] curriculum," Resp.8, something prior testimony established. E.R.297. Indeed, even Spokeswoman McGrath "read the book of Job in [her] AP English class for its literary value." E.R.206. Moreover, Idaho Virtual Academy uses "the Bible and other religious texts" in its curriculum, E.R.343, including literature and history classes. Pet.App.22h, E.R.346-

---

[3] Not wanting to suggest these officials were lying or incompetent, Respondents now shift the focus to their Answer. Resp.7 (generally disclaiming these statements). But as it is not verified, it is not evidence, let alone "legally significant" evidence. Resp.6.

47. Xavier Charter School does not just teach about religion; it teaches the "analysis of primary sources," E.R.491-92, sources the Commission now bans. Importantly, when notified of this use, the Commission and Attorney General sent threatening letters to these schools, instructing them to cease using religious documents and text. E.R.121-24.

C. THE COMMISSION BANNED THE ACADEMY FROM USING "RELIGIOUS DOCUMENTS OR TEXT."

This case began—as Respondents admit, Resp.10, 17—when the Commission exceeded its authority by banning "religious documents or text" from all public schools and universities. Pet.App.43i. To "justify" this action, it substituted "religious" where Idaho's Constitution says "political, sectarian or denominational." Pet.10-11. Respondents try to minimize this anomaly using rhetorical sleights of hand.

Respondents *now* claim the Commission only bans "sectarian or denominational materials." Resp.i; *accord* Resp.4, 19, 25. But the Commission's policy bans "religious documents or text," Pet.App.43i, and it punished the Academy for "us[ing] religious texts." Pet.App.46i. Its Chairman said the ban includes "less obviously religious texts" and urged schools to "use good judgment" in determining what materials are "religious." E.R.105, 342. Trying to change the wording again after the fact does not help Respondents.

Moreover, Respondents mischaracterize their own "Guidelines." They say the Guidelines only

"apply to schools, not to students" and govern only what is introduced "*into the curriculum*." Resp.3-4. But the Guidelines say they provide "working guidance" on "what materials can or cannot be 'used or introduced' in public charter schools," which includes students' assignments and supplements. Resp.App.31. And "sacred texts" encompass far more works than suggested, Resp.4, because Respondents omitted two of the three definitions.[4] Resp.App.32.

Respondents also tout the scholarly support for their Guidelines, Resp.4-5, but they once again changed the wording of their sources by removing the admonition of "teachers" not promoting or disparaging religion and replacing it with "books." Resp.App.36. By so doing, they convert works that support teaching the Bible objectively in schools into tools for achieving the opposite. They present anthologies as a refuge, Resp.8, 20; however, the Guidelines clearly state that even anthologies may cross the Commission's line. Resp.App.38-39 & n.6.

So nothing changes this fact: the Commission banned all religious materials from Idaho's schools and universities.

---

[4] Respondents' examples fall within the first definition of "sacred texts": works that adherents "consider[] … to be divinely inspired or revealed." Resp.App.32. But this term also includes works that "prescribe doctrines or tenets of religious belief or practice" and those that "otherwise convey … a religious viewpoint essential or central to the adherents' religious belief." Resp.App.32. All of the Petition's hypothetical scenarios fall into at least one of these prohibited categories. Pet.1-2.

D. THE ACADEMY'S ONLY ALLEGED "LEGAL VIOLATION" WAS NOT FOLLOWING THE COMMISSION'S *ULTRA VIRES* BOOK BAN.

Respondents repeatedly accuse the Academy of violating the law, Resp.3, 10, 12, but they admit the only "problem" with its curriculum was its use of religious materials. Resp.12. This was the alleged "legal violation" that sparked the initial Notice of Defect that led to its closure.[5] *Id.*

But the Commission created the "legal violation" that it accused the Academy of violating. Pet.App.46i. The Commission cannot create "law." And Respondents' Guidelines, Resp.3-5, admittedly "do not have the force and effect of law." Resp.App.31. The Commission cannot thus fabricate a legal violation by creating its *ultra vires* book ban. Pet.12-13.

In sum, Respondents concede core facts about the Academy's independence, the Commission's ban, and the rationale for the Academy's closing. These facts set up the conflicts that merit this Court's review.

II. RESPONDENTS SIMPLY IGNORE HOW THE NINTH CIRCUIT CONFLICTS WITH NUMEROUS CIRCUITS BY UPHOLDING THE COMMISSION'S BAN.

Confronted with the circuit conflicts surrounding

---

[5] Respondents claim finances caused the Academy's closure. Resp.1, 12-13. But the Commission created those financial problems, retaliating for this lawsuit. Pet.12 n.9. Underscoring this retaliation does not "relitigate" the financial issue. Resp.13 n.7.

the Commission's content- and viewpoint-based book ban, Respondents selectively don blinders, alternately acknowledging and ignoring how other circuits use different tests or apply them differently than the Ninth Circuit. But circuit conflicts—even under other names—are still circuit conflicts.

A. THE NINTH CIRCUIT DIVERGES FROM MANY CIRCUITS BY UPHOLDING A BOOK BAN OF UNPARALLELED SCOPE.

Put simply, the Fifth, Sixth, and Eighth Circuits invalidated school book bans affecting a few volumes, while the Ninth Circuit blithely upheld an infinitely broader one. Pet.16-18. Respondents dismiss these cases as "not reflect[ing] current holdings" or as insufficiently "modern." Resp.18-19. But none have been overturned, and cases that survive decades are "established," "settled," and even "venerable," but not outdated. *See, e.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 574 (2007) (drawing a "venerable principle" from *Marbury v. Madison*, 1 Cranch 137 (1803)); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 165 (4th Cir. 2000) (citing *Roe v. Wade*, 410 U.S. 113 (1973), for "well-established" principles). The divide among circuits remains.

Even Respondents' "modern" cases—*Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005) and *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004)—accentuate the circuit conflict by applying the government speech doctrine. The Second, Fifth,[6]

[6] The Fifth Circuit straddles this divide. *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184 (5th Cir. 1995), applies *Pico*; *Chiras* applies the government speech doctrine.

Sixth, Seventh, Eighth and Tenth Circuits apply different tests. Pet.20-21.

Similarly, the Commission's ban sets an entire category of works—"religious documents or text," Pet.App.43i—off-limits to schools, students, and teachers. Yet this Court and the Second, Seventh, and Tenth Circuits invalidated efforts to "cordon off entire areas of knowledge from students." Pet.18. Respondents dismiss these precedents (as if these courts did not distinguish between finite course offerings and content- and viewpoint-based book bans), Resp.19, but deriding a circuit conflict does not diminish it.

B. THE NINTH CIRCUIT CONFLICTS WITH MANY CIRCUITS BY USING THE GOVERNMENT SPEECH DOCTRINE TO IMMUNIZE EDUCATIONAL DECISIONS FROM SCRUTINY.

Respondents ignore the conflict over whether the government speech doctrine applies to educational decisions. Resp.20-21. Seven circuits apply First Amendment scrutiny to these decisions; the Ninth Circuit just dubs them "government speech." Pet.20-21.

Even among the circuits that use the government speech doctrine in this context, the Ninth Circuit remains an outlier. To it, identifying the government speaker is irrelevant (a concept Respondents embrace). Resp.22-23. But to the First and Fifth Circuits, identifying the speaker—the entity with statutory authority over the contested curriculum materials—remains critical to the First Amendment

analysis. *Chiras*, 432 F.3d at 612-13; *Griswold v. Driscoll*, 616 F.3d 53, 54, 59 (1st Cir. 2010).

Likewise, when this Court discussed government speech in *Rosenberger*, it clearly referenced that the speaker was the university, not just any branch of state government. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Respondents want to skip this step to justify an unprecedented content- and viewpoint-based book ban from an entity with no "curriculum-setting authority." Resp.10.

Last, the circuits diverge over whether the government speech doctrine applies to teachers, Pet.22-24, though Respondents ignore all but two of the conflict-creating cases. Resp.23-24. And those they do address, they get wrong. For example, the Fourth Circuit does *not* apply the government speech doctrine to teachers. It declines to extend *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to them and "continues to apply the *Pickering-Connick* standard." *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007). So three circuits apply the government speech doctrine to educators; seven do not. Pet.22-24. That is a circuit conflict.

C. THE NINTH CIRCUIT CONFLICTS WITH ALL OTHERS BY RULING THAT BANNING THE OBJECTIVE USE OF RELIGIOUS MATERIALS SERVES ESTABLISHMENT CLAUSE INTERESTS.

Respondents implicitly concede the circuit split on the Establishment Clause. After all, every other circuit says the Establishment Clause allows the

objective use of religious materials, including the Bible, in public schools. Resp.25. The Ninth Circuit alone holds that banning the objective use of religious materials serves Establishment Clause interests.[7] Pet.App.5a, 22b; Pet.25-27.

Rather than addressing the conflict, Respondents attack a straw-man: "the First Amendment *requires* schools to use [religious] materials." Resp.25. That is not the Academy's position. Rather, it chose to use these materials, and the Commission banned them (despite lacking "curriculum-setting authority," Resp.10). Pet.App.43i. The Academy's pedagogical choice does not violate the Establishment Clause, except in the Ninth Circuit. Pet.25-27.

III. RESPONDENTS IGNORE THE NINTH CIRCUIT'S CONFLICT WITH THIS COURT AND OTHER CIRCUITS ON POLITICAL SUBDIVISION STANDING.

A. THE SCOPE OF THE POLITICAL SUBDIVISION STANDING DOCTRINE IS A FEDERAL MATTER.

Respondents erroneously insist that "Idaho law" governs whether "charter schools [are] sufficiently independent that they ... may sue the State under §1983." Resp.33. Standing to sue under 42 U.S.C. §1983—a federal statute—is a federal question. *See, e.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (recognizing that "claims under 42 U.S.C. §1983" arise under "federal

---

[7] The Fifth Circuit provides the Ninth no company. Resp.25. The school at issue (unlike the Academy, Pet.5-6) was not teaching religious materials objectively. *Hall v. Bd. of Sch. Comm'rs of Conecuh Cnty.*, 656 F.2d 999, 1001-03 (5th Cir. 1981).

law" and present matters cognizable under "federal-question jurisdiction").

After all, "[a]ny determination of who has standing to assert constitutional rights is a federal question to be decided by the Court itself." *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 n.1 (1982). State law affects this analysis, but only to inform each circuit's standing test. Pet.32-35.

B. RESPONDENTS IGNORE THE CIRCUIT CONFLICT ON POLITICAL SUBDIVISION STANDING.

Respondents wholly rely on the efficacy of the Ninth Circuit's universal ban on political subdivision standing. Despite protesting that "this case is not an appropriate vehicle to" review the Ninth Circuit's standing ban, Respondents baldly assert the Academy lacks standing because "under Idaho law [it] is a part of the Legislatively-created system of public education." Resp.26. This simply regurgitates the Ninth and Sixth Circuit's logic, as both held public schools lack standing merely because they are a part of the state educational system. Pet.35.

But Respondents fail to address the issue presented: whether all "political subdivisions," including public schools, are barred from suing their parent states or whether they may be sufficiently independent to constitute separate entities under §1983. Pet.32-35. Every public school—ordinary or charter—is part of the state educational system. The question is whether that factor alone bars them from suing their states, "regardless of their degree of independence or type of claim." Pet.i.

Respondents cannot side-step this clear circuit conflict by glibly assuming the Ninth Circuit's answer is correct. Resp.32 (insisting no "city or county in the Nation" may ever "sue [its] creator State[]").

C. RESPONDENTS' INCORRECT LEGAL ANALYSIS ACCENTUATES THE CONFLICT.

Respondents' arguments accentuate the conflict between this Court's precedents and the Ninth Circuit's universal ban on political subdivision standing.[8] Their attempt to distinguish *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968), fails because Petitioners are in a position directly comparable to the *Allen* school board members this Court found to have "'a personal stake in the outcome' of th[e] litigation." Indeed, the Academy's board members—who spent years organizing the Academy and developing its curriculum—arguably have more of a "personal stake" in this litigation than the *Allen* plaintiffs, particularly as they desire to obtain a new charter using the same model. E.R.41-43, 52.

Nor can Respondents diminish the obvious force of *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). States are not the proper object of suits under §1983, but "official-capacity actions for prospective relief are not treated as actions against

---

[8] By dismissing how this Court resolved conflicts between political subdivisions, Respondents merely illustrate the breadth of the Ninth Circuit's ban, which applies "whether the defendant is the state itself or another of the state's political subdivisions." *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980); Pet.28.

the State," *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). And concerns based on "the pre-Civil War structure of the Constitution," Resp.28, are misplaced because *Seattle School District* was decided after the Fourteenth Amendment's 1868 ratification.

Respondents' reliance on *Ysura v. Pocatello Education Association*, 555 U.S. 353 (2009), further highlights the Ninth Circuit's misreading of this Court's precedent. For *Ysura* recognized that "[a] private corporation enjoys constitutional protections" even when it is subject to pervasive "State regulat[ion]." *Id.* at 363. The Academy's private, nonprofit corporate status is a primary indicator of its independence, a factor the Ninth Circuit ignored.

Respondents' attempts to deny a meaningful circuit conflict are unavailing. The Ninth Circuit alone universally bars political subdivisions from suing their states. That other circuits have set boundaries that vary by degree (but not as Respondents describe, *see* Pet.28-35) only sharpens the need for this Court to establish the proper standard.

CONCLUSION

Despite Respondents' best efforts to ignore and obfuscate the facts and law, the circuits remain divided on the questions presented here: far-reaching school and university book bans, whether the Establishment Clause requires this censorship, and political subdivision standing. 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

March 12, 2012