

**In The  
Supreme Court of the United States**

—◆—  
NAMPA CLASSICAL ACADEMY, INC., et al.,  
*Petitioners,*

v.

ALAN REED, et al.,  
*Respondents.*

—◆—  
**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

—◆—  
**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

—◆—  
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## QUESTION PRESENTED

Article IX, §6, of the Idaho Constitution of 1890 has a unique provision prohibiting use of sectarian or denominational documents in public schools:

**§6. Religious test and teaching in school prohibited.** – No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or a student, and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. 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, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article.

The question presented is:

Does the First Amendment forbid Idaho from setting its curriculum as provided by Article IX, §6's exclusion of sectarian or denominational materials?

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## INTRODUCTION

**Mootness.** Respondents first address jurisdiction. Supreme Court Rule 15.4. All issues relating to injunctive relief are moot. Petitioner Nampa Classical Academy (NCA) was an Idaho public charter school during the 2009-10 school year. Before the 2010-11 school year began, the Idaho Public Charter School Commission revoked NCA's charter for failing statutory standards for fiscal soundness. Resp.App., 1-3. NCA appealed to the Idaho State Board of Education, which affirmed the revocation when NCA's data showed a one-year operating deficit of over \$600,000 on revenues of \$2.85 million. Resp.App., 4-13.

Petitioner NCA is no longer an Idaho public charter school; Petitioners Moffett and Kosmann are not teaching at NCA; Petitioner Kosmann is not the parent of a student at NCA; and Petitioner M.K. is not a student at NCA. All issues regarding injunctive relief are moot.

NCA's claims for damages are moot because any assets that it may have after payment of its debts must be returned to the State for distribution in accordance with applicable law. Idaho Code §33-5206(8); Resp.App., 22. The teacher-parent-student claims for damages are not moot.

**Misstatements of Fact and Law.** Respondents next address the Petition's misstatements of fact and law. Supreme Court Rule 15.2. To better identify the

misstatements of law, Respondents provide a background in the Idaho law of public schools in general and of public charter schools in particular.

Idaho Constitution, Art. IX, §1, requires the Legislature “to establish and maintain a general, *uniform* and thorough system of public, free common schools.” Resp.App., 14 (emphasis added). The “uniformity” provision applies to curriculum: “[T]he uniformity requirement in the education clause requires . . . uniformity in curriculum.” *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 573, 579-580, 850 P.2d 724, 730-731 (1993).

Art. IX, §2, provides, “general supervision of the . . . public school system is vested in a state board of education.” Resp.App., 14. Statute gives the State Board of Education (“SBE”) authority over curriculum. Idaho Code §33-118 (SBE “determine[s] how and under what rules curricular materials shall be adopted for the public schools”); §33-118A (procedure for adopting curricular materials). Resp.App., 18-19.

Public charter schools are “part of this state’s program of public education.” Idaho Code §33-5203(1); Pet.App., 7g-8g. Public charter schools can be created by local school districts or by the Idaho Public Charter School Commission (“Commission”) under SBE rules for the public charter school application and review process. §33-5202A(1), §33-5203(3), -(6); Pet.App., 5g, 9g, 10g. The Commission is an independent body within the SBE composed of seven part-time members. §33-5213(1), -(3)(a); Resp.App., 27-28.

The Commission has investigatory and adjudicatory authority over public charter schools that it charters, §33-5209(2)-(3), and must ensure that those schools “compl[y] with the general education laws of the state unless specifically directed otherwise in this chapter,” §33-5210(2). Pet.App., 29g-32g.

Idaho public charter schools must be organized as non-profit corporations; they “may sue and be sued . . . to the same extent and on the same conditions as a traditional public school district.” §33-5204(1), -(2); Pet.App., 12g. Public charter schools are government entities like school districts that, like other government entities, cannot sue for libel or slander. *Nampa Charter School, Inc. v. DeLaPaz*, 140 Idaho 23, 27-28, 89 P.3d 863, 867-868 (2004).

Public charter schools “are under the general supervision of the state board of education,” but are “exempt from [SBE] *rules* governing school districts.” §33-5210(1), -(4); Pet.App., 31g-32g (emphasis added). The exemption from SBE *rules* is not an exemption from general education *statutes* or from *the Idaho Constitution itself*. Given that the Idaho Constitution applies to public charter schools, the Commission adopted Guidelines for Applying the Provisions of Idaho Constitution Article IX, §6, Regarding Sectarian, Religious or Denominational Teaching or Materials (“Guidelines”). Resp.App., 30-40.

The Guidelines do not, see Petition, pp. 1-2, sanction public schools whose students select research paper topics like Reformation-era Europe,

post-colonial religious strife in the Indian sub-continent, or the religious bases for Middle-East conflict.<sup>1</sup> The Guidelines apply to schools, not to students, and do not restrict students' choices of research paper topics or sources. Neither do the Guidelines prevent a teacher from referring to the Genesis story of Ishmael to answer a question about *Moby Dick* or from teaching art or music with works that have religious themes, all as suggested at p. 1.

Rather, the Guidelines explain that Art. IX, §6, prevents the introduction *into the curriculum* of, “[t]o give some examples, the various Christian Bibles, the Torah, the Koran, the Book of Mormon, the Shruti (Hindu), and various Nikayas or Sutras (Buddhist)” because “these books are . . . denominational or sectarian . . . they embody the religious ‘tenets’ or ‘doctrines’ of existing religions.” Drawing upon materials including *The Bible & Public Schools: A First Amendment Guide*, published jointly by The Bible Literacy Project, the First Amendment Center, and the Society of Biblical Literature, and the First Amendment Center’s “*A Teacher’s Guide to Religion in the Public Schools*” and “*Religion in the Public School Curriculum*”, the Guidelines explain that “Sacred

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<sup>1</sup> The Guidelines do not apply to universities, although the Petition states seven times, beginning on p. 1, that this case affects university as well as K-12 education. The Guidelines themselves say: “These Guidelines provide working guidance to public charter schools on how to apply Article IX, §6, to decide what books, papers, tracts or documents are religious, sectarian or denominational.” Resp.App., 31.

texts are *per se* sectarian or denominational,” but that other books must be evaluated by their content to determine whether they are sectarian or denominational. Resp.App., 32-34. The Guidelines’ seven “bullet points” explaining whether books are sectarian or denominational under Art. IX, §6, include:

- Books may expose students to a diversity of religious view, but may not impose, discourage, or encourage any particular view. Books may inform the student about various beliefs, should not seek to conform him or her to any particular belief.
- Books that adopt any particular Bible or translation are likely to suggest to students that is normative, the best Bible. One solution is to use an anthology of translations.
- A book must contain an approach to religion that is *academic*, not *devotional*; must strive for student *awareness* of religions, not student *acceptance* of any particular religion; must *expose* students to a diversity of religious views, but not *impose* any particular view; must *educate* about all religions and not *promote* or *denigrate* religion; and must *inform* students about various beliefs but not seek to *conform* students to any particular belief.

Guidelines, Resp.App., 36-37 (citations and internal punctuation omitted).

The Petition says that public charter schools are “subject to only limited regulation by the Idaho Code.” P. 4. On the contrary, public charter schools must “compl[y] with the general education laws of the state.” Idaho Code §33-5210(2); Pet.App., 31g-32g. Public charter schools are exempt from State Board *rules*, §33-5210(4), Pet.App., 32g, but are not exempt from general education *statutes* or the *Idaho Constitution*. Thus, there is no basis for Petitioners to state, p. 4, that “the hallmark of Idaho charter schools is independence – structurally, legally, and pedagogically,” if that statement implies independence from Idaho law and independence from the Commission’s obligation to assure itself that NCA “complies with the general education laws of this state.” §33-5210(2); Pet.App., 31g.

The Petition reviews NCA’s 9th-12th Core Reading List, pp. 5-6, which includes several sectarian or denominational books, but omits the fact that the list was not given to the Commission until after the lawsuit was filed. Second Affidavit of Tamara Baysinger, ¶7; Resp.App., 44.

The Board and the Commission did not “frequently assure[] Idaho educators they could use religious texts objectively in literature and history courses,” Petition, p. 6, certainly not in any sense that was a legally significant assurance.<sup>2</sup> The two

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<sup>2</sup> Like the Federal Government, Idaho cannot be estopped by administrative officer’s mistaken statements of law. *Compare*  
(Continued on following page)

“assurances” cited at p. 6 are an E-mail from Department of Education<sup>3</sup> employee Melissa McGrath, ER 206,<sup>4</sup> and a newspaper article quoting Superintendent of Public Instruction Tom Luna, ER 212. Petitioners further ignore Superintendent Luna’s official position that he has publicly stated “that it is permissible to objectively teach utilizing religious texts,” but he “recognizes that it may be necessary to amend the Idaho Constitution to give school districts that flexibility.” Defendants’ Answer to Second Amended Complaint, ¶78; Resp.App., 53.

The Petition is correct that Idaho geography standards require students to learn about religion, pp. 6-7, but is incorrect that the school districts listed on page 7 “routinely incorporate religious primary

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*Office of Personnel Management v. Richmond*, 496 U.S. 414, 419-424 (1990) with *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 137-138, 997 P.2d 591, 598-599 (2000).

<sup>3</sup> The Department of Education is neither the Board nor the Commission; it is a separate entity within the Board of Education headed by the State Superintendent of Public Instruction. Idaho Code §33-125; Resp.App., 19. The E-mail at ER 206 does not show that Ms. McGrath was a public employee, let alone whether she had authority to give assurances. Another part of the record, ER 302, identifies Ms. McGrath as a Department spokeswoman.

<sup>4</sup> Petitioners frequently cite to the Ninth Circuit Excerpts of Record (“ER”) to refer to documents not in their Appendix. The ERs were not filed electronically and are not available on the Ninth Circuit’s website. Respondents’ Appendix, pp. 55-58, contains a table of cross-references to the ECF filings in the District Court for all ER references in Petitioners’ and Respondents’ Briefs.



sources into their curricula,” p. 7. Each instance cited on p. 7 refers to anthologies or textbooks that excerpt primary religious texts (not to primary religious texts themselves) or to websites for further study. See, *e.g.*, ER 234-236, 238-239 (references to excerpts from sacred texts in two textbooks, *The Language of Literature: World Literature* and *Timeless Voices, Timeless Themes: The American Experience*, used by the Independent School District of Boise City); ER 288-293 (similar references in *World History Journey Across Time The Early Years* used by Caldwell School District); ER 452-459, 462, 464-470, 478-481, SER 132 (Pocatello-Chubbuck School District social studies class’s links to supplemental resource materials from Mankato State University); ER 305-315, SER 136-154 (Twin Falls and Coeur d’Alene School Districts use materials that refer to sacred texts, but are not sacred texts).

It appears that the Coeur d’Alene Charter Academy (“CDCA”) used the Bible and other religious texts in its curriculum. ER 297. Petition, p. 7. Upon learning this, counsel for Respondents promptly notified CDCA’s authorized chartering entity so that it could respond appropriately. Second Baysinger Aff., ¶7; Resp.App., 44; also SER 40, 112-114.

The record does not show that Idaho Virtual Academy (“IVA”) literature courses included sacred texts listed on Petition, p. 8. The ER citations there are (1) to a High School Course Catalog published by the vendor k<sup>12</sup> and to a k<sup>12</sup> E-mail to parents, not to materials published by IVA, ER 354, 356; and (2) to

on-line materials that teach about religion but are not sacred religious texts themselves, ER 357-362, 365, 370, 373, 388, 393, 400, 413, 430, 435. Likewise, the materials cited on p. 8 for the Xavier Charter School at ER 491-493 and 830 are for teaching about religion, among other things.

The Petition refers to NCA's "original sixty-page charter petition" and to the Commission's approval of its application in August 2008. P. 8. The Petition is correct that "[a]t no point during this process was the Academy's use of religious materials questioned." *Id.* The reason why is that in no point of the process through approval in August 2008 had NCA disclosed its plans to use religious texts. The Revised NCA Petition to become a charter school, ER 143-172, devoted 13 pages to "Educational Program and Goals," ER 156-168, none of which informed the Commission that NCA intended to teach from primary religious sources. "[N]either Mr. Moffett nor any other representative of the Academy supplied that reading list [reproduced in Pet.App., pp. 1i-12i] to the Commission with the Academy's application, before the Academy's charter was granted, or at any time before the initiation of this lawsuit."<sup>5</sup> Second Baysinger Aff., ¶6; Resp.App., 43-44. The quotation that NCA cites to show that its use of sacred texts

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<sup>5</sup> NCA's Chairman Kyle Borger E-mailed Ms. Baysinger after the issue of NCA's use of sacred texts came to light: "The Bible was not indicated in our charter because no other specific document or text book was listed either." ER 854.

was appropriate, ER 207, p. 8, is explained below as Ms. Baysinger's mistaken statement of law to a reporter.

The Petition, p. 9, quotes from Idaho Code §33-5204(1) that public charter schools function independently of the Commission, which is true in the context of charter school board governance, which that subsection addresses. The Commission does not contend that it has the right to choose NCA's directors or to tell them how to vote. Petitioners are also technically correct on p. 9 that the *Commission* does not have the right to select NCA's curriculum; that is because the *SBE* has curriculum-setting authority, not the Commission.

The Petition is incorrect, however, that "State Board . . . members recognize their own inability to dictate local curriculum." P. 9. The three examples cited on p. 9 belie Petitioners' assertion. First, Superintendent Luna's radio interview, ER 634, discussing local school district's "constitutional authority" does not override the SBE's statutory and constitutional authority over public charter schools. Second, Ms. Baysinger's E-mail, ER 101, stated that charter-school-designed curricula "must meet the applicable requirements of statute" and did not relieve public charter schools of State oversight. Third, Mr. Moffett's hearsay statement of what a former Department employee told him, ER 857, is not evidence or authority that overrides State law. Idaho law can and does regulate public charter school curriculum.

Petitioners state that the Academy's Program Manager "assured the public that the 'Academy's intended use of the Bible and other religious texts was appropriate,' ER 207." P. 10. They add: "A month later, . . . Commission members questioned *for the first time* whether the Academy could use the Bible in its curriculum at all." *Id.*

There is more than these two statements suggest. The Program Manager's "assurance" was a statement to a newspaper. As Ms. Baysinger explained, ¶15, Resp.App., 47, she "was quoted in the media in late June 2009 and made an unofficial statement [concerning use of the Bible] in response to an unexpected media request and without opportunity for research." In short, she made a mistake. But she did what a good staffer does – she brought the matter to her bosses' attention for them to address the issue, which they were seeing for the first time. *Id.*, ¶¶6, 14; Resp.App., 43-44, 47.

As Petitioners note, p. 10, the Commission addressed use of sacred texts in the curriculum on August 14, 2009, after receiving legal opinions from the Idaho Attorney General's Office and NCA's counsel. Pet.App., 13i-42i (legal opinions) and 43i-45i (partial transcript of Commission meeting). Later that day NCA's Chairman Kyle Borger E-mailed Ms. Baysinger, stating, *inter alia*: "We will comply and we will provide any documentation and cooperation you require." District Court Dkt. 12-3, p. 10. NCA neither complied nor cooperated.

The Petition says NCA filed suit and, “Almost immediately, the Commission initiated proceedings to close the Academy.” P. 12. Respondents disagree. The Commission followed statute, which provides that if the Commission “has reason to believe that the public charter school has done any of the following,” it “shall provide the public charter school written notice of the defect and provide a reasonable opportunity to cure.” Idaho Code §33-5209(2); Pet.App., 29g. The statute’s stated purpose for a Notice of Defect is curative, but it also provides for revocation of charters for schools that do not cure a defect.

Statute provided for the Commission’s issuance of a Notice of Defect if a public charter school “Violated any provision of law.” §33-5209(2)(f); Pet.App., 30g. NCA’s proposed curricular use of sectarian or denominational materials violated Article IX, §6. A Notice of Defect was issued for that reason,<sup>6</sup> but more was happening with NCA.

NCA did not follow other State laws, either, so the Commission also issued Notices of Defect regarding lack of teacher certification, lack of fiscal soundness, failure to submit required reports, violations of

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<sup>6</sup> NCA moved for a Temporary Restraining Order (TRO) that, among other things, asked to enjoin the Commission “from issuing a Notice of Defect, or otherwise declaring illegal Plaintiffs’ use of religious texts in its curriculum.” SER 193. The District Court denied the TRO. ER 28-33. Thus, there was no Court Order against the Commission’s issuing a Notice of Defect as provided by Idaho law.

Idaho's Public Records Act, and violations of NCA's charter. Second Baysinger Aff., ¶16; Resp.App., 47-48. NCA's charter was revoked after it "Failed to demonstrate fiscal soundness," a statutory ground listed in §33-5209(2)(d).<sup>7</sup> Pet.App., 29-30g.

Petitioners state that the District Court denied their TRO Motion because "the threatened injuries were too speculative." P. 13. That is accurate in part but incomplete. The District Court also noted that "there is a serious question . . . whether . . . Plaintiffs have standing" and that a TRO was not in the public interest because it "would upset the State's efforts to establish a coherent policy with respect to public education," *id.*, Pet.App., 4c, 5c.

Petitioners state that the district court "denied the Academy's [Motion for Preliminary Injunction] as moot even though it was still operating," p. 13, perhaps implying there was no basis for that ruling. The

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<sup>7</sup> Petition p. 12, n.9, attempts to relitigate NCA's fiscal soundness by suggesting that the Commission drove it out of business by improperly withholding funds. NCA's fiscal soundness was litigated before two administrative fora: the Commission and the State Board of Education. See Resp.App., 1-13.

Footnote 9's references to ER 46-47 and 48-49 are to a Declaration created after NCA presented similar issues in its administrative hearings and lost. In Idaho, State administrative decisions like the revocation of NCA's charter for lack of fiscal soundness are *res judicata*. *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 844, 70 P.3d 669, 682 (2003). This Court gives State administrative decisions the same preclusive effect that they have under State law. *University of Tennessee v. Elliott*, 478 U.S. 788, 798-799 (1986).

District Court's mootness ruling was proper under the circumstances.

The District Court considered Respondents' Motion to Dismiss and Petitioners' Motion for a Preliminary Injunction in the same Memorandum, Decision and Order. Pet.App., 1b-33b. The District Court held that NCA was a political subdivision of Idaho and thus neither NCA nor its officers could sue the State. *Id.*, 10b-11b, in particular n.11. Next, the District Court conducted a *Saucier* analysis that first held that Petitioners had not alleged violations of constitutional rights: "There 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." *Id.*, 19b. The District Court further held under Idaho law that Respondents were government speakers who set the curriculum. *Id.*, 20b-28b. Lastly, to provide a belt and suspenders under *Saucier*, the District Court also held that the Respondents who were sued for damages were entitled to qualified immunity because they did not violate clearly established law. *Id.*, 14b-17b. The District Court's Conclusion summarized its holdings and declined to reach State law issues. *Id.*, 31b-32b. The District Court granted Respondents' Motion to Dismiss the Federal claims with prejudice, after which it properly dismissed Petitioners' Motion for a Preliminary Injunction as moot. *Id.*, 32b-33b.

Petitioners state that NCA's curriculum was as "permitted by the Board." Pp. 13-14. The Board did not permit its curriculum. See pp. 2-5, *supra*. They

also state the District Court held that “the Academy’s objective use of religious texts would violate the Establishment Clause.” That is correct. However, Respondents did not ask the District Court to make that ruling and disavowed that argument in the Ninth Circuit.<sup>8</sup> That point is a red herring here.

Petitioners state again on p. 14 “that the Academy was legally responsible for its own curriculum.” It was not. See pp. 2-5, *supra*.

This ends Respondents’ identification of misstatements of fact or law in Petitioners’ Statement of the Case, pp. 3-14. Respondents also disagree with other descriptions of cases in the remainder of the Petition, and they address them in the following pages.



## **REASONS FOR DENYING THE WRIT**

***First***, all issues of prospective relief are moot, and NCA’s claims for damages are moot. The only issues remaining are teachers’-parents’-students’

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<sup>8</sup> Respondents’ Ninth Circuit Answering Brief, Dkt. 18-1, said the following at page 36 of the pdf, page 28 of the text:

Plaintiffs focus some of their Argument on the District Court’s sentence that NCA’s proposed curriculum would violate the Establishment Clause. . . . This part of the District Court’s opinion was not necessary for its decision, was not argued by Defendants below, and is not argued by Defendants on appeal.



claims for damages. See p. 1, *supra*. Respondents would be entitled to qualified immunity given the lack of clearly established law in the area.

**Second**, there are no splits among the Circuits on who may set the curriculum. Petitioners state on p. 14: “All circuits – except the Ninth – recognize the freedom of local school boards and universities to select their own curriculum.”

This is incorrect. Circuit law does not determine who has curriculum-setting authority; State law does. To take some examples from the briefing before the Ninth Circuit, *compare Griswold v. Driscoll*, 616 F.3d 53, 59 (1st Cir. 2010), *cert. denied*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1006 (2011) (State had curriculum-setting authority: “there is no denying that the State Board of Education may properly exercise curricular discretion”); *and Chiras v. Miller*, 432 F.3d 606, 611 (5th Cir. 2005) (same: “Our conclusion that the SBOE’s selection and use of textbooks in public school classrooms is government speech and not a forum for First Amendment purposes means . . . Chiras may not assert a cognizable right of access to the approved list of textbooks”); *with Evans-Marshall v. Board of Ed. of Tipp City Exempted Village Sch. Dist.*, 624 F.3d 332, 341 (6th Cir. 2010), *cert. denied*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 3068 (2011) (under Ohio law, “the board of education of each city . . . shall prescribe a curriculum” (internal punctuation omitted)). The First Amendment – indeed, the whole Constitution – is indifferent to how the State apportions the curriculum-setting authority among State and local public

education entities. *Cf. Ysursa v. Pocatello Education Assoc.*, 555 U.S. 353 (2009).

**Third**, Petitioners ask this Court to “resolve an ongoing question that has divided Courts of Appeals for decades . . . whether a political subdivision may sue its state. The Ninth Circuit . . . regards public schools – even charter schools whose hallmark is independence – as municipalities, a position that contrasts sharply with the Third, Fifth, and Tenth Circuits.” P. 15.

There is no such Circuit law. Whether a charter school is a political subdivision of a State is decided under State law, not Circuit law. The Ninth Circuit decided that NCA was a political subdivision of Idaho based on Idaho law. Pet.App., 3a. It compared Idaho charter schools with those in Arizona, which are not political subdivisions under Arizona law, citing *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806 (9th Cir. 2010). Thus, there is no Ninth Circuit law that public charter schools are political subdivisions – there are State laws that the Ninth Circuit reviews to answer the question.

**Fourth**, the Petition says that the Commission ordered NCA “to remove all ‘religious documents and texts’ from its program, even if used as curricular supplements. App. 17h, 46i-47i.” Pp. 15-16. The Commission’s Notice of Defect said: “The [Commission] has reason to believe that NCA is using and/or intends to use religious texts as part of its curriculum, in violation of the Idaho State Constitution. . . .

[P]lease submit . . . a corrective action plan detailing the means by which NCA will cure this defect.” Pet.App., 46i-47i.

**I. THERE IS NO SPLIT AMONG THE CIRCUITS THAT AUTHORITIES WITH CURRICULUM-SETTING AUTHORITY UNDER STATE LAW MAY SET THE CURRICULUM AND THAT TEACHERS AND STUDENTS HAVE NO FIRST AMENDMENT RIGHTS TO VARY THE CURRICULUM**

Petitioners try to create a split among the Circuits on whether the State, public schools, or teachers/students may set curriculum. There are different conclusions on that issue among and within Circuits because they apply different State laws that give different answers to who has curriculum-setting authority. But, there are no ongoing splits among the Circuits on the following principle: The entity designated by State law to prescribe curriculum may do so over others’ claimed First-Amendment right to prescribe a different curriculum.

**Petition Part I.A.1, pp. 16-18**, refers 23 times to six cases from the 1970s and early 1980s, an era before this Court used “government speech” analysis, and an era that was the high-water mark of lower court decisions that teachers or students had First Amendment rights to demand that certain materials be added to, deleted from, or retained in the curriculum. These cases do not reflect current holdings.

Modern cases do not conflict with the Ninth Circuit. *E.g.*, *Evans-Marshall, supra*, 624 at 340-344 (no First Amendment right for teacher to prescribe or vary curriculum); *Grossman v. South Shore Public Sch. Dist.*, 507 F.3d 1097, 1099-1100 (7th Cir. 2007) (First Amendment not a license for teacher’s expression at variance with curricular content); *Chiras, supra*, 432 F.3d at 618 (“selection of curricular materials by the [State] Board [of Education] is clearly government speech”); *Planned Parenthood of South Carolina Inc. v. Rose*, 361 F.3d 786, 796 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005) (curriculum is government speech).

**Petition Part I.A.2, pp. 18-20**, is similar, with nine citations to six cases, ranging from 1948 to 1987, arguing for the proposition “school officials cannot cordon off entire areas of knowledge from students,”<sup>9</sup> p. 18. Respondents have not “cordoned off” an entire area of knowledge, but have required that one area – study of religion – be done without use of sectarian or denominational materials. This is no different from the State Board prescribing what may be taught in any other area of the curriculum.

This Court did not hold that “objective instruction about religion is a necessary component of any

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<sup>9</sup> Schools “cordon off” areas of knowledge from the curriculum all the time. Schools may or may not offer classes in AIDS awareness, CPR, declension of Latin verbs, or modern dance. In a sense, every decision to prescribe a curriculum “cordons off” those areas of knowledge not included in the curriculum.

complete education. *See, e.g., Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963),” Petition, p. 19, at least not in the sense of *requiring* such instruction. This Court said in *Schempp* that “it might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization,” 374 U.S. at 225, not that the Constitution required such study, and not that the Constitution prohibited such study by textbooks, anthologies, etc., rather than by use of sectarian or denominational texts. As a case cited on Petition, p. 19 explains, where a student challenged the removal of several books from the English curriculum: “[W]hatever rights secondary school students may have outside the classroom to meet and discuss with a particular teacher, their associational interests do not afford them a right to be taught in the classroom by that instructor or in accordance with that teacher’s own sense of the best material.” *Zykan v. Warsaw Community Sch. Corp.*, 631 F.2d 1300, 1307-1308 (7th Cir. 1980).

**Petition Part I.B.1, pp. 20-21**, cites cases dealing with high school newspapers, libraries, and books and movies in the curriculum. No case cited there holds that teachers or students have a First Amendment right to add books to the curriculum.

The Petition also states “the Ninth Circuit identified no legitimate pedagogical concern for the Commission’s” actions. P. 20. Whether the Ninth Circuit identified Art. IX, §6’s proscription against sectarian

or denominational materials in the curriculum as a legitimate pedagogical concern or not, it is. *Cf. LeVake v. Ind. Sch. Dist. No. 656*, 625 N.W.2d 502, 508 (Minn. App. 2001) (school had pedagogical interest in maintaining religiously neutral curriculum).

**Petition Part I.B.2, pp. 21-22**, says that the Ninth Circuit found that the speaker was the Idaho government and “never cited (let alone analyzed) Idaho statutes granting local schools – particularly charter schools – the authority to set their curriculum.” The reason why there was no such analysis is there are no such statutes. See pp. 2-5, *supra*.

As for the Ninth Circuit not “considering evidence from Board and Commission members” confirming NCA’s claimed authority to set curriculum, Petition, p. 21, there was no such evidence. See pp. 6-7, 9-10, *supra*.

The Petition states at p. 21 that *Chiras* “examined Texas’s statutes to determine who selected public school curriculum . . . 432 F.3d 606, 607-09, 612, 615 . . . [and] found that local school boards have control over curriculum, *id.* at 611-12.” This is inaccurate. *Chiras* stated that Texas statutes put curricular authority in the Texas State Board of Education: “The Texas State Board of Education . . . is a body . . . given a wide degree of authority over education policy in Texas, including the authority to . . . ‘establish curriculum . . . requirements,’ and ‘adopt and purchase or license textbooks’ . . .” 432 F.3d at 607-608 (footnotes with statutory citations omitted). *Chiras’s*

discussion, pp. 611-612, cited by the Petition was not about the authority of school boards in Texas, but reviewed other decisions, some of which involved local school boards that had curriculum setting authority under their States' laws.

*Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 833 (1995), does not support the position “that it was the University . . . – not the Virginia government – that had broad discretion in making academic judgments.” Petition, p. 21. *Rosenberger* does not distinguish between the State and University on page 833, but it does support Respondents' point that Idaho, which appropriates funds to public charter schools, is entitled to set those schools' curricula if it wishes: “[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When [it] disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted . . . .” 515 U.S. at 833 (citations omitted).

Petitioners cite *Driscoll* at p. 22 to say that “the state board of education – not the state government, nor some interloping commission – was the government speaker entitled to control curricular speech.” But, for Federal Constitutional purposes, the State, the State Board of Education, and the Commission are all the same – they are the State of Idaho, and the divisions of authority among them are of no Federal Constitutional consequence. *City of Boerne v. Flores*,

521 U.S. 507, 527 (1997) (citing *Oregon v. Mitchell*, 400 U.S. 112, 280 (1970) (Opinion of Harlan, J.) “The Fourteenth Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit”).

On p. 22, Petitioners say: “Without citing a single statute, the Ninth Circuit ratified the Commission’s . . . actions.” This is false. In the decision’s second paragraph, Pet.App., 2a-3a, the Ninth Circuit cited Idaho Code §§33-5204(2), 33-5203(1), 33-5204(1), 33-5208, 33-5203(2), 33-5203(5), and 33-5210(1) to hold: “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. NCA is therefore a government entity . . . .” From that the Ninth Circuit concluded: “Because Idaho charter schools are governmental entities, the curriculum presented in such a school is not the speech of teachers, parents, or students, but that of the Idaho government.” Pet.App., 4a.

**Petition Part I.B.3, pp. 22-24**, posits that most Circuits do not apply governmental speech analysis to teachers and professors. Only two of the cases on pp. 23-24 involve both K-12 education, which is the issue presented here, and were decided since 2000, to have the benefit of the evolution of the government speech doctrine. They are addressed below.

*Evans-Marshall, supra*, does not use the words government speech, but arrives at the same place – teachers have no First Amendment right to vary the



curriculum as they prefer: “[T]he right to free speech protected by the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools made ‘pursuant to’ their official duties.” 624 F.3d at 334. *Lee v. York County Sch. Div.*, 484 F.3d 687 (4th Cir. 2007), is similar: “Lee, who teaches high school . . . maintains on appeal that he possesses a First Amendment right to post his materials on the classroom bulletin boards. This contention is contrary to the relevant precedent . . . .” 484 F.3d at 689. Whatever rubric is used – government speech or something else – the Circuits reach the same result.

## **II. THERE IS NO SPLIT AMONG THE CIRCUITS THAT AVOIDING POTENTIAL ESTABLISHMENT CLAUSE ISSUES IS A LEGITIMATE EDUCATIONAL PURPOSE**

Petitioners try to create a split among the Circuits from the Ninth Circuit’s reference to the Establishment Clause (“The Commission’s policy does not violate the Establishment Clause,” Pet.App., 5a), arguing that the Establishment Clause is not a recognized educational interest. There is no split; no Circuit holds that avoiding Establishment Clause issues is not a legitimate educational interest.

**Petition Part II.A, pp. 24-25**, states that the educational interest identified by the Ninth Circuit and District Court – the Establishment Clause – is not an educational interest. Respondents counter that

the exclusion of sectarian and denominational materials from the curriculum was so important to the Framers of the Idaho Constitution of 1890 that they included it in the State Constitution. Respondents cannot find any cases holding that exclusion of sectarian or denominational materials from the curriculum is not a legitimate educational purpose.

**Petition Part II.B, pp. 25-27**, states, “the Ninth Circuit departed from the constitutional mainstream” because “every circuit . . . recognizes that the Establishment Clause permits schools to use religious materials objectively in a secular curriculum,” pp. 25-26. Indeed, every Circuit has a case citing *Schempp’s dictum* that religious materials may be objectively taught in a secular curriculum, 374 U.S. at 225, in the cases cited on Petition, p. 26.

But no case on Petition, p. 26, holds that the First Amendment *requires* schools to use sectarian or denominational materials. The only case on p. 26 addressing use of religious materials in the curriculum, *Hall v. Board of School Com’rs of Conecuh County*, 656 F.2d 999, 1002-1003 (5th Cir. 1981), held that there was an Establishment Clause violation. No case on p. 26 suggests that the Establishment Clause prohibits Idaho from avoiding Establishment Clause issues entirely by excluding sectarian and denominational materials from the curriculum.

The Petition states that many Circuits and this Court recognize “the pivotal role that religion – including the Bible – plays in producing well-educated

students,” p. 26, but none of the cases cited on pp. 26-27 *require* a State to introduce sectarian or denominational materials into the curriculum, and none of them prohibit teaching about religion by textbooks, anthologies, etc.

### **III. THERE IS NO SPLIT AMONG THE CIRCUITS THAT PUBLIC CHARTER SCHOOLS ORGANIZED UNDER IDAHO LAW ARE POLITICAL SUBDIVISIONS THAT CANNOT SUE THE STATE**

Petitioners try to create a split among the Circuits by arguing that the Ninth Circuit’s *per se* rule that political subdivisions cannot sue the State that created them is at odds with other Circuits’ decisions in the area. The rejoinder is that this case is brought by a public charter school that under Idaho law is a part of the Legislatively-created system of public education and that by statute has the same rights to sue and be sued as a school district, which in Idaho is no right to sue the State except as allowed by statute. Thus, this case is not an appropriate vehicle to explore whether there are nuances between Ninth Circuit and other Circuits’ law in this area.

**Petition Part III.A.1, pp. 28-29**, is preceded by a paragraph setting the stage for Part III.A.1. It says, “lower courts have struggled to define the scope of the political subdivision standing doctrine,” and other Circuits have “one principal point of agreement: circumstances exist in which political subdivisions

may sue their creator States. The Ninth Circuit . . . applies a universal ban.” Petition, pp. 26-27.

Rather than focusing exclusively on political subdivisions’ attempts to sue their creator States, Part III.A.1 includes political subdivisions’ suits against one another, an issue not present here, and suits among State officers and agencies, another issue not present here. The two cases that were political subdivisions’ suits against their creator States are distinguishable, dated and inconsistent with current jurisprudence in the area.

The first is *Board of Ed. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968). This Court said that members of a local school board may have faced expulsion from office if they did not implement a potentially unconstitutional State law, so they had a personal stake in the outcome and could sue State officers who administered the statute. *Id.* at 241, n.5. *Allen* did not hold that the school district had standing to sue, although the State court below explicitly ruled that it did.

The second is *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), in which standing was not discussed at all, perhaps because the school districts that sued the State in Federal Court were joined by several private intervenor-plaintiffs who participated in the briefing before this Court. 458 U.S. at 459, 464, n.8. *Seattle Sch. Dist.* is problematic because that suit against a State would not now be allowed for two reasons: (1) A State is not person who may be sued

under §1983, *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989); and (2) the pre-Civil War structure of the Constitution did not empower Congress to extend the Federal Judicial Power to suits against States by their own citizens (and by implication, by their own subdivisions), *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 79-80 (2000).

Further, as this Court has noted, the unanalyzed exercise of jurisdiction in a case is not precedent for the existence of jurisdiction. *United States v. Los Angeles Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Thus, *Allen and Seattle Sch. Dist.* do not suggest that the Ninth Circuit's decision is in error.

**Petition Part III.A.2, pp. 30-32**, strives to find a split among the Circuits on political subdivisions' standing to sue their States. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998), cited p. 30, does not create a split. *Romer* said: "It is well-settled that a political subdivision may not bring a federal suit against its parent state based on rights secured through the Fourteenth Amendment," but held that a school district had standing to enforce provisions of Colorado's enabling act. *Id.* at 628-630. *Romer* does not create a split for this case, which is brought under the Fourteenth Amendment.

*Rogers v. Brockett*, 588 F.2d 1057, 1060-1067 (5th Cir. 1979), like *Romer*, also dealt with the issue of whether a Federal statute (the school lunch program) conferred standing on a school district, not on standing under the Fourteenth Amendment. As *City*

of *Hugo v. Nichols*, 656 F.3d 1251 (10th Cir. 2011), cited Petition, pp. 31-32, explained:

The parties have not identified, and this court has not found, a single case in which the Supreme Court or a court of appeals has allowed a political subdivision to sue its parent state under a substantive provision of the Constitution. Instead, courts have allowed such suits only when Congress has enacted statutory law specifically providing rights to municipalities.

656 F.3d at 1257.

Respondents cannot say it better. There is no split among the Circuits that a political subdivision cannot sue under a substantive provision of the Constitution like the First Amendment. *Cf. Virginia Office for Protection and Advocacy v. Stewart*, \_\_\_ U.S. \_\_\_, \_\_\_, 131 S.Ct. 1632, 1642 (2011) (for a State agency to sue a State officer in Federal court, it must have a Federal right conferred upon it and the freedom to sue independent of the State's veto).

**Petition Part III.B.1, pp. 32-34**, tries to create a split among the Circuits regarding whether school districts and/or charter schools are a category distinct enough from the State to sue the State. The only cases in this section that involved school districts' suits against States are *Seattle Sch. Dist.*, in which this Court did not address or resolve school district standing, and *Rogers* and *Romer*, which were based upon statutory rights, not constitutional rights.

That leaves *Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, 442 Fed.Appx. 681 (3d Cir. 2011), the only case in Part III.B.1 in which a charter school sued. The charter school did not sue the State; it sued a school district and the district's officers. *Pocono* is not like this case, in which the charter school directly challenges State actions. Further, the Third Circuit did not hold that the charter school could sue; it remanded to determine under Pennsylvania law whether the charter school was an entity that can sue under §1983. Interestingly, the Third Circuit suggested that *Seattle Sch. Dist.* might be controlling while ignoring more recent law. Regardless, *Pocono* is a remand to determine what State law provides for charter schools regarding their ability to sue, not a holding that charter schools may sue under §1983. There still is no split.

**Petition Part III.B.2, pp. 34-35**, states that the Ninth Circuit's "simplistic analysis" "merely assume[s] all public and charter schools are political subdivisions barred from suing their parent states" rather than asking "whether a charter school is sufficiently autonomous from the state to constitute a separate entity for purposes of the political subdivision standing rule." This is inaccurate.

Idaho law provides the rule of decision. Idaho holds that public charter schools are government entities for defamation law. *Nampa Charter School, supra*, 140 Idaho at 27-28, 89 P.3d at 867-868. As noted on p. 23, *supra*, the Ninth Circuit's analysis relied upon specific Idaho statutes, not upon an assumption that all charter schools were political

subdivisions that cannot sue their State. Pet.App., 3a. Petitioners ignore that the Ninth Circuit ruled, based upon Arizona law, that Arizona charter schools are not public entities acting under color of State law in their hiring and firing. *Caviness, supra*, 590 F.3d at 813-814. This shows that the Ninth Circuit does not “merely assume” the status of charter schools, but examines each State’s law on the topic to determine charter schools’ status under that State’s law.

**Petition Part III.B.3, pp. 36-39**, says that NCA is sufficiently independent of the State that it should be able to sue. This is a matter of State law upon which the District Court and the Ninth Circuit have ruled, not an issue of Federal law at all. Nevertheless, Respondents address it.

Justice Holmes famously observed that “a page of history is worth a volume of logic.” *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). That is true here. The history of Idaho law on whether school districts can sue the State for claims under the Idaho Constitution is telling.

In 1993 the Idaho Supreme Court held that statute authorized school districts to sue the State under the Idaho Constitution. *Idaho Schools for Equal Educational Opportunity, supra*, 123 Idaho at 585, 850 P.2d at 736. In 1996, the Legislature responded by passing the Constitutionally Based Educational Claims Act, Idaho Code §§6-2201 *et seq.*, which, among other things, preserved school patrons’ right to sue under the Idaho Constitution, but repealed school districts’ statutory authority to sue



under the Idaho Constitution. *Compare* subsections (1) and (4) of Idaho Code §6-2205;<sup>10</sup> Resp.App., 16-17.

This was the backdrop against which Idaho enacted the Public Charter School Act of 1998, Idaho Code §§33-5201 *et seq.* Resp.App., 19. In particular this was the backdrop against which statute provided that public charter schools “may sue and be sued . . . to the same extent and on the same conditions as a traditional public school district.” §33-5204(2); Pet.App., 12g. The 1996 Idaho statute did not anticipate that thirteen years later NCA would sue State officers under the Federal Constitution, not the Idaho Constitution, but given this history it is far-fetched to suggest that the public charter school statutes carved out an exception for public charter schools to sue under the Federal Constitution.

To show that public charter schools have the requisite independence to sue the State, Petitioners cite statutes giving NCA the right to choose its board of directors, to manage its own finances, to sue and be sued, to manage its own property, and to incur debt. P. 36. But that could be said of almost any city or county in the Nation, none of which have constitutional rights to sue their creator States.

NCA returns to *Seattle Sch. Dist.*, but ignores *Yursa*. Petition, p. 37. *Seattle Sch. Dist.*'s limitations

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<sup>10</sup> The Idaho Supreme Court upheld the constitutionality of the 1996 Act in *Osmunson v. State*, 135 Idaho 292, 17 P.3d 236 (2000).

as precedent concerning the “right” of a school district to sue the State that created it were discussed earlier.

NCA says that it “is much closer to a government contractor than a true state subdivision.” It is not. NCA did not contract to provide services; it was chartered by the State and received money from the State under a statutory formula, not by contract. Idaho Code §33-5208; Resp.App., 22-27. It was exempt from payment of State sales tax and was subject to State laws on bribery and corrupt influence, prohibitions against contracts with officers, ethics in government, open meetings, and public records. §33-5204(1); Pet.App., 11g-12g. Its employees were in the Idaho Public Employee Retirement System. §33-5205(3)(m); Pet.App., 24g. The list could go on.

What Petitioners really ask is that this Court overturn the District Court and the Ninth Circuit on an issue of Idaho law, namely: Do Idaho statutes make public charter schools sufficiently independent that they are not subdivisions of the State and may sue the State under §1983? That is an issue of Idaho law upon which the Circuits are not split and upon which there is no reason to grant the Petition.

The State law issue discussed in the preceding paragraph is symptomatic of the larger issues raised by the Petition. There is no Federal law giving persons who are not charged with setting public school curriculum the right to demand that certain books (be they sectarian or denominational books or something else) be added to the public school curriculum.

Petitioners' "Federal case" is really a State law case that Idaho education officials have misconstrued Art. IX, §6; that Idaho law places curriculum-setting authority in public charter schools, not in the State Board of Education; that Idaho education officials do not follow Idaho law; etc. There is a forum for such issues: Idaho State Court, not Federal Court.



## CONCLUSION

The Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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June 25, 2010

Nampa Classical Academy Board of Directors

1701 Smith Avenue

Nampa, ID 83651

Dear Nampa Classical Academy Board of Directors:

As you are aware, the Public Charter School Commission (PCSC) moved on June 24, 2010, to revoke the charter for Nampa Classical Academy effective at 11:59 p.m., June 30, 2010, on the following grounds:

NCA has failed to demonstrate fiscal soundness. In order to be fiscally sound, the public charter school must be: Fiscally stable on a short-term basis, that is, able to service all upcoming obligations; and fiscally sustainable as a going concern, that is able to reasonably demonstrate its ability to service any debt and meet its financial obligations for the next fiscal year (I.C. 33-5209(2)(d)).

On November 13, 2010, the PCSC issued to NCA a notice of defect on the above grounds. NCA's respondent corrective action plan and related updates were considered at regular meetings of the PCSC on January 7, 2010, and March 4, 2010.

On March 4, 2010, the PCSC determined that NCA had failed to cure the defect and moved to direct staff

to issue to NCA a notice of intention to revoke the charter. The notice of intention to revoke was issued on March 5, 2010.

NCA was given a reasonable opportunity to reply in writing to the notice of intention to revoke, and such written reply was received on May 13, 2010.

A public hearing with respect to the PCSC's intention to revoke the charter was conducted by hearing officer Kenneth Mallea on June 11, 2010. The hearing officer received evidence as a contested case in accordance with Section 67-5242, Idaho Code, and the hearing was transcribed by a court reporter.

On June 17, 2010, Hearing Officer Mallea provided to the PCSC his recommending findings of fact, conclusions of law and recommended order. The recommended order states:

“Based upon the foregoing Findings of Fact and Conclusions of Law, it s [sic] recommended that the NCA charter be revoked due to its failure to demonstrate fiscal soundness as required by I.C. § 33-5209(2)(d).”

NCA declined to submit any written exception to findings.

Following review of Hearing Officer Mallea's recommendation, the PCSC heard a final statement from NCA at its regular meeting on June 24, 2010. The PCSC then moved to revoke the charter for Nampa Classical Academy on the grounds of failure to demonstrate fiscal soundness as defined by I.C.

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33-5209(2)(d), effective at the end of the day June 30, 2010.

Therefore, the charter for Nampa Classical Academy is revoked effective at 11:59 p.m. MDT, June 30, 2010. As of that time, NCA will no longer be authorized to operate as a public charter school in the State of Idaho.

Pursuant to I.C. 33-5210(4), a decision to revoke a charter may be appealed directly to the State Board of Education.

Sincerely,

/s/ P.P. Tamara L Baysinger  
William H. Goesling  
Chairman, Public Charter School Commission

Cc: Tom Luna, Superintendent of Schools,  
State of Idaho  
Idaho Public Charter School Commission  
Michelle Clement Taylor, School Choice  
Coordinator, SDE

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**Nampa Classical Academy Inc.**  
**A/P Aging Summary**  
**As of June 30, 2010**

|  | <b>Current</b> | <b>1-30</b> | <b>31-60</b> | <b>61-90</b> | <b>&gt; 90</b> | <b>TOTAL</b> |
|--|----------------|-------------|--------------|--------------|----------------|--------------|
| <b>2M Data Systems</b>                             | 4,550.00       | 0.00        | 0.00         | 0.00         | 0.00           | 4,550.00     |
| <b>A Plus Benefits</b>                             | 203,195.40     | 0.00        | 0.00         | 0.00         | 0.00           | 203,195.40   |
| <b>Advocates for<br/>Inclusion</b>                 | 5,842.50       | 9,339.25    | 14,762.75    | 0.00         | 12,030.25      | 41,974.75    |
| <b>Anderson, Julian<br/>&amp; Hall, LLP</b>        | 13,548.85      | 10,360.60   | 0.00         | 0.00         | 0.00           | 23,909.45    |
| <b>Boise Office<br/>Equipment</b>                  | 295.70         | 989.50      | 1,599.75     | 0.00         | 0.00           | 2,884.95     |
| <b>Brown Bus Company</b>                           | 0.00           | 65,493.78   | 30,596.00    | 42,267.78    | 0.00           | 138,358.56   |
| <b>Carolina Sciwence [sic]</b>                     | 0.00           | 4,127.70    | 0.00         | 0.00         | 0.00           | 4,127.70     |
| <b>Caxton Printers</b>                             | 731.25         | 16,235.55   | 0.00         | 0.00         | 0.00           | 16,966.80    |
| <b>Center point, INC</b>                           | 4,722.30       | 0.00        | 0.00         | 0.00         | 0.00           | 4,722.30     |
| <b>Copies Plus</b>                                 | 0.00           | 1,067.67    | 296.11       | 0.00         | 0.00           | 1,363.78     |
| <b>Dairy Fresh Farms</b>                           | 1,041.60       | 0.00        | 0.00         | 0.00         | 0.00           | 1,041.60     |
| <b>Dana Van<br/>Dergiessen</b>                     | 844.00         | 0.00        | 0.00         | 0.00         | 0.00           | 844.00       |
| <b>Daniel Beukers</b>                              | 0.00           | 0.00        | 0.00         | 0.00         | 0.00           | 0.00         |
| <b>Darcys</b>                                      | 0.00           | 99.64       | 0.00         | 0.00         | 0.00           | 99.64        |
| <b>Dell</b>  | 0.00           | 27,451.62   | 0.00         | 0.00         | 0.00           | 27,451.62    |
| <b>Demco</b>                                       | 0.00           | 2,192.00    | 0.00         | 0.00         | 0.00           | 2,192.00     |
| <b>Department of<br/>Health &amp; Welfare</b>      | 0.00           | 162.67      | 0.00         | 0.00         | 0.00           | 162.67       |
| <b>Entorage Yearbooks</b>                          | 0.00           | 0.00        | 687.50       | 0.00         | 0.00           | 687.50       |
| <b>Fishers Science</b>                             | 1,934.56       | 0.00        | 0.00         | 0.00         | 0.00           | 1,934.56     |
| <b>Gitty Up Go Web<br/>Development</b>             | 24.75          | 0.00        | 0.00         | 0.00         | 0.00           | 24.75        |
| <b>Idaho Charter<br/>School Network</b>            | 2,070.00       | 0.00        | 0.00         | 0.00         | 0.00           | 2,070.00     |
| <b>Idaho Power</b>                                 | 1,158.70       | 0.00        | 0.00         | 0.00         | 0.00           | 1,158.70     |
| <b>Idaho Press Tribune</b>                         | 0.00           | 0.00        | 227.56       | 0.00         | 0.00           | 227.56       |
| <b>Idaho State<br/>Billing Service</b>             | 2,063.30       | 0.00        | 0.00         | 0.00         | 0.00           | 2,063.30     |
| <b>Idaho State<br/>Department of<br/>Education</b> | 967.59         | 0.00        | 0.00         | 0.00         | 0.00           | 967.59       |
| <b>Integra Telcom</b>                              | 1,555.89       | 0.00        | 0.00         | 0.00         | 0.00           | 1,555.89     |
| <b>Isaac Moffett</b>                               | 1,900.99       | 0.00        | 0.00         | 0.00         | 0.00           | 1,900.99     |
| <b>Lease Group<br/>resources</b>                   | 1,485.80       | 1,485.80    | 1,485.80     | 0.00         | 0.00           | 4,457.40     |
| <b>Longleaf services</b>                           | 0.00           | 24.18       | 0.00         | 0.00         | 0.00           | 24.18        |
| <b>Memoria Press Inc.</b>                          | 1,967.46       | 0.00        | 0.00         | 0.00         | 0.00           | 1,967.46     |
| <b>Meuleman Mollerup,<br/>LLP</b>                  | 0.00           | 0.00        | 3,080.09     | 0.00         | 0.00           | 3,080.09     |

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|                            |                   |                   |                  |                  |                  |                   |
|----------------------------|-------------------|-------------------|------------------|------------------|------------------|-------------------|
| <b>Micro Clean</b>         | 0.00              | 489.50            | 0.00             | 0.00             | 0.00             | 489.50            |
| <b>Nampa School</b>        |                   |                   |                  |                  |                  |                   |
| <b>District #131</b>       | 392.34            | 0.00              | 0.00             | 0.00             | 0.00             | 392.34            |
| <b>NerdLine LLC</b>        | 5,785.00          | 749.20            | 9,271.31         | 0.00             | 0.00             | 15,805.51         |
| <b>Office Depot</b>        | 27.56             | 0.00              | 0.00             | 0.00             | 0.00             | 27.56             |
| <b>One West</b>            | 0.00              | 33,885.00         | 37,853.20        | 0.00             | 0.00             | 71,738.20         |
| <b>PCI Education</b>       | 3,402.90          | 0.00              | 0.00             | 0.00             | 0.00             | 3,402.90          |
| <b>Peak Broadcasting</b>   | 1,350.00          | 525.00            | 0.00             | 0.00             | 0.00             | 1,875.00          |
| <b>PERSI</b>               | 35,611.62         | 0.00              | 0.00             | 0.00             | 0.00             | 35,611.62         |
| <b>School Specialty</b>    | 2,589.16          | 0.00              | 0.00             | 0.00             | 0.00             | 2,589.16          |
| <b>Teacher Supply</b>      | 0.00              | 3,956.60          | 0.00             | 0.00             | 0.00             | 3,956.60          |
| <b>TecCon</b>              | 71.32             | 0.00              | 47.50            | 0.00             | 0.00             | 118.82            |
| <b>The Circe Institute</b> | 6,520.00          | 0.00              | 0.00             | 0.00             | 0.00             | 6,520.00          |
| <b>The University of</b>   |                   |                   |                  |                  |                  |                   |
| <b>Chicago Press</b>       | 0.00              | 1,568.00          | 0.00             | 0.00             | 0.00             | 1,568.00          |
| <b>Thunder</b>             |                   |                   |                  |                  |                  |                   |
| <b>Mountain Tent</b>       | 0.00              | 0.00              | 25.00            | 0.00             | 0.00             | 25.00             |
| <b>Verizon</b>             | 203.14            | 0.00              | 0.00             | 0.00             | 0.00             | 203.14            |
| <b>Vernier</b>             | 0.00              | 11,410.04         | 0.00             | 0.00             | 0.00             | 11,410.04         |
| <b>TOTAL</b>               | <b>305,853.68</b> | <b>191,613.30</b> | <b>99,933.57</b> | <b>42,267.78</b> | <b>12,030.25</b> | <b>651,698.58</b> |

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**Nampa Classical Academy Inc.**  
**Balance Sheet**  
**As of June 30, 2010**

| <b>Accrual Basis</b>                  | <b><u>Jun 30, 10</u></b>        |
|---------------------------------------|---------------------------------|
| <b>ASSETS</b>                         |                                 |
| <b>Current Assets</b>                 |                                 |
| <b>Checking/Savings</b>               |                                 |
| 111101 Home Fed 0142                  | 1,570.48                        |
| 111102 Home Fed 0094                  | 150,777.35                      |
| 111103 Home Fed 4565                  | 0.01                            |
| 111104 Home Fed 0143                  | 1.21                            |
| 111105 Home Fed 4647                  | <u>0.01</u>                     |
| <b>Total Checking/Savings</b>         | <u>152,349.06</u>               |
| <b>Total Current Assets</b>           | <u>152,349.06</u>               |
| <b>TOTAL ASSETS</b>                   | <b><u><u>152,349.06</u></u></b> |
| <b>LIABILITIES &amp; EQUITY</b>       |                                 |
| <b>Liabilities</b>                    |                                 |
| <b>Current Liabilities</b>            |                                 |
| <b>Accounts Payable</b>               |                                 |
| 213000 Accounts payable               | <u>651,698.58</u>               |
| <b>Total Accounts Payable</b>         | <u>651,698.58</u>               |
| <b>Total Current Liabilities</b>      | 651,698.58                      |
| <b>Long Term Liabilities</b>          |                                 |
| 220001 Dan Bukers LOC / Loan          | <u>150,000.00</u>               |
| <b>Total Long Term Liabilities</b>    | <u>150,000.00</u>               |
| <b>Total Liabilities</b>              | 801,698.58                      |
| <b>Equity</b>                         |                                 |
| 300000 Fund Balance                   | 53,388.00                       |
| Net Income                            | <u>-702,737.52</u>              |
| <b>Total Equity</b>                   | <u>-649,349.52</u>              |
| <b>TOTAL LIABILITIES &amp; EQUITY</b> | <b><u><u>152,349.06</u></u></b> |

**Nampa Classical Academy Inc.**  
**Profit & Loss**  
**July 2009 through June 2010**

**Jul '09 – Jun 10**

|                                 |                            |
|---------------------------------|----------------------------|
| <b>Income</b>                   |                            |
| 410007 Donations                | 35,213.35                  |
| 410011 Music Man sales          | 2,137.00                   |
| 410017 Yearbooks                | 1,978.00                   |
| 410022 Textbook sales           | 17.00                      |
| 410024 Milk money               | 10,310.82                  |
| 410025 Chess Club               | 0.00                       |
| 410026 Snow Team                | 320.00                     |
| 410027 Newspaper                | 271.50                     |
| 410028 – Calendar               | 660.00                     |
| 410029 – Wonka                  | 1,977.00                   |
| 410099 Other fundraising        | 1,801.94                   |
| 415100 Interest                 | 39.07                      |
| 415199 Other income             | 3,450.39                   |
| 431100 Entitlement              | 1,366,907.91               |
| 431901 Classroom supplies       | 7,054.00                   |
| 431903 Salary allowance         | 976,179.37                 |
| 431904 Textbook allowance       | 8,970.30                   |
| 431905 Technology allowance     | 9,914.00                   |
| 431908 Medicaid funds           | 91,318.67                  |
| 437000 Lottery Revenue          | 22,508.00                  |
| 445200 Title 2                  | 18,709.48                  |
| 445300 Special Ed revenue       | 134,371.51                 |
| 445901 ARRA state stabilization | 155,779.00                 |
| <b>Total Income</b>             | <b><u>2,849,888.31</u></b> |
| <b>Gross Profit</b>             | <b>2,849,888.31</b>        |

**Expense**

|   |            |
|---|------------|
| <b>100-512-110 Certified</b>              | 738,555.18 |
| <b>100-512-115 Classified</b>             | 123,018.98 |
| <b>100-512-160 sub pay</b>                | 12,867.75  |
| <b>100-512-200 Benefits</b>               | 295,961.72 |
| <b>100-512-222 APLUS admin costs</b>      | 3,245.00   |
| <b>100-512-370 Prof Devp</b>              | 4,998.98   |
| <b>100-512-380 Travel Expenses</b>        | 5,335.17   |
| <b>100-512-390 Other purchased se</b>     | 8,640.84   |
| <b>100-512-410 Supplies</b>               | 24,701.75  |
| <b>100-512-419 Luna</b>                   | 2,686.76   |
| <b>100-512-430 Media supplies</b>         | 4,513.21   |
| <b>100-512-440 Textbooks</b>              | 215,995.72 |
| <b>100-512-490 Other Supplies</b>         | 337.00     |
| <b>100-512-491 Newspaper</b>              | 93.50      |
| <b>100-512-492 Drama expenses</b>         | 18.00      |
| <b>100-512-550 Equipment</b>              | 17,045.39  |
| <b>100-512-555 Furniture</b>              | 33,799.12  |
| <b>100-515-110 Certified</b>              | 211,244.09 |
| <b>100-515-115 Classified</b>             | 7,709.43   |
| <b>100-515-200 Benefits</b>               | 99,456.47  |
| <b>100-515-310 Prof &amp; Tech Servic</b> | 95.00      |
| <b>100-515-390 Other purchased se</b>     | 392.34     |
| <b>100-515-410 Supplies</b>               | 12,161.29  |
| <b>100-515-440 Textbooks</b>              | 9,739.87   |
| <b>100-515-550 Equipment</b>              | 305.99     |
| <b>100-521-200 Benefits</b>               | 3,307.73   |
| <b>100-521-390 Other purchased se</b>     | 31,310.69  |
| <b>100-532-410 Snow team</b>              | 233.40     |
| <b>100-632-310 Prof &amp; Tech Servic</b> | 751.39     |
| <b>100-632-380 Travel Expenses</b>        | 2,211.42   |
| <b>100-632-390 Other purchased se</b>     | 4,590.09   |
| <b>100-632-490 Other Supplies</b>         | 1,445.21   |
| <b>100-641-110 Certified</b>              | 88,108.90  |
| <b>100-641-115 Classified</b>             | 68,084.96  |

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|   |            |
|---|------------|
| <b>100-641-200 Benefits</b>               | 58,300.70  |
| <b>100-641-222 payroll exp</b>            | 1,640.69   |
| <b>100-641-310 Prof &amp; Tech Servic</b> | 16,182.06  |
| <b>100-641-321 Rental of Building</b>     | 420.00     |
| <b>100-641-330 Utilities</b>              | 31,283.10  |
| <b>100-641-350 Communications</b>         | 1,477.56   |
| <b>100-641-380 Travel Expenses</b>        | 2,202.25   |
| <b>100-641-390 Other purchased se</b>     | 43,775.92  |
| <b>100-641-391 Audit Fee</b>              | 16,800.00  |
| <b>100-641-393 Legal Fees</b>             | 40,590.35  |
| <b>100-641-410 Supplies</b>               | 18,450.01  |
| <b>104-641-490 Other Supplies</b>         | 10.19      |
| <b>100-641-550 Equipment</b>              | 32,785.36  |
| <b>100-661-110 Certified</b>              | 0.00       |
| <b>100-661-115 Classified</b>             | 33,400.26  |
| <b>100-661-200 Benefits</b>               | 11,185.02  |
| <b>100-661-222 payroll expenses</b>       | 99.00      |
| <b>100-661-310 Prof &amp; Tech Servic</b> | 97,477.61  |
| <b>100-661-320 Property Services</b>      | 145.00     |
| <b>100-661-321 Rental of Building</b>     | 342,909.23 |
| <b>100-661-330 Utilities</b>              | 24,754.22  |
| <b>100-661-390 Other purchased se</b>     | 12,011.20  |
| <b>100-661-410 Supplies</b>               | 9,026.48   |
| <b>100-661-550 Equipment</b>              | 5,436.46   |
| <b>100-661-590 Other capital item</b>     | 3,968.20   |
| <b>100-681-340 Transport – Contra</b>     | 326,019.36 |
| <b>100-710-340 Transport – Contra</b>     | 967.59     |
| <b>100-710-410 Supplies</b>               | 12,541.25  |
| <b>251-512-370 Prof Devp</b>              | 2,139.44   |
| <b>257-521-110 Certified</b>              | 51,284.94  |
| <b>257-521-115 Classified</b>             | 21,662.59  |
| <b>257-521-200 Benefits</b>               | 26,741.91  |
| <b>257-521-222 Payroll processing</b>     | 44.00      |
| <b>257-521-390 Other purchased se</b>     | 144,999.14 |
| <b>257-521-410 Supplies</b>               | 2,243.08   |

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|   |                           |
|---|---------------------------|
| <b>271-512-370 Prof devp</b>              | 11,375.68                 |
| <b>271-512-380 Travel Expenses</b>        | 781.67                    |
| <b>271.512-410 Supplies</b>               | 445.02                    |
| <b>271-632-390 Other purchased se</b>     | 120.45                    |
| <b>271-641-310 Prof &amp; Tech Servic</b> | 3,940.00                  |
| <b>271-641-370 Prof devp</b>              | 5,992.50                  |
| <b>271-641-380 Travel Expenses</b>        | 60.56                     |
| <b>283-512-390 Other purchased se</b>     | 5,250.00                  |
| <b>283-512-440 Textbooks</b>              | 3,402.90                  |
| <b>283-515-440 Textbooks</b>              | 23,115.60                 |
| <b>283-515-550 Equipment</b>              | 51,072.52                 |
| <b>283-641-310 Prof &amp; Tech Servic</b> | 10,008.42                 |
| <b>283-641-350 Communications</b>         | 5,304.00                  |
| <b>283-641-380 Travel Expenses</b>        | 1,270.00                  |
| <b>283-641-590 Other capital item</b>     | 4,550.00                  |
| <b>Clearing for account set up</b>        | <u>0.00</u>               |
| <b>Total Expense</b>                      | <u>3,552,625.83</u>       |
| <b>Net Income</b>                         | <u><u>-702,737.52</u></u> |

**APPEAL TO THE IDAHO STATE  
BOARD OF EDUCATION**

**In the Matter of:** )  
**NAMPA CLASSICAL ACADEMY,** ) **NOTIFICATION**  
**Public Charter School** ) **OF DECISION**  
\_\_\_\_\_ )

This matter came before the Idaho State Board of Education (the “Board”) in a public hearing held in conjunction with its regularly scheduled meeting on August 11 and 12, 2010, and continued on August 17, 2010. The Board has received and reviewed the appeal filed by Nampa Classical Academy Public Charter School from the decision of the Idaho Public Charter School Commission (the “Commission”) to revoke its charter in accordance with Idaho Code §33-5209.

Having reviewed and considered all materials of record, and having fully been apprised of the record and the presents of this case, the Board determined as follows:

1. The legal standard of review relating to this appeal, as provided in Idaho Code §33-3705(5)(b), is whether the Commission failed to appropriately consider the decision to revoke the charter, or acted in an arbitrary manner in determining to revoke the charter.
2. The record before the Board and additional evidence presented supports the decision of the Commission and does not demonstrate that the Commission failed to appropriately

consider or acted in an arbitrary manner in determining to revoke the charter. In particular, the evidence shows that Nampa Classical Academy Public Charter School failed to demonstrate fiscal soundness, as provided in Idaho Code §33-5209(d)(i) and (ii) In order to be fiscally sound under the statute the public charter school must be (i) fiscally stable on a short-term basis, that is able to service all upcoming obligations; and (ii) fiscally sustainable as a going concern, that is, able to reasonably demonstrate its ability to service any debt and meet its financial obligations for the next fiscal year.

Based on these findings and conclusions, the Board voted to deny the appeal and to uphold the decision of the Commission on the grounds that the Nampa Classical Academy failed to establish that the Commission did not appropriately consider the revocation, and/or acted in an arbitrary manner in determining to revoke the charter.

DATED EFFECTIVE this 17TH day of AUGUST, 2010.

IDAHO STATE BOARD  
OF EDUCATION

By /s/ Richard Westerberg  
RICHARD WESTERBERG  
President, Idaho State  
Board of Education

**NOTIFICATION OF APPEAL RIGHTS**

Idaho Code §33-5207(7) provides that the decision of the Idaho State Board of Education shall be subject to review pursuant to chapter 52, title 67, Idaho Code.

[Certificate Of Service Omitted In Printing]

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**Article IX, § 1. Legislature to establish system of free schools.** – The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.

**Article IX, § 2. Board of education.** – The general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education, the membership, powers and duties of which shall be prescribed by law. The state superintendent of public instruction shall be ex officio member of said board.

**Article IX, § 6. Religious test and teaching in school prohibited.** – No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. 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, nor shall any teacher or any district receive any of the public school moneys in which the schools

have not been taught in accordance with the provisions of this article.

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**§ 6-2205. Right of action – Standing to sue. –**

(1) Patron suits against local school districts. Any person who is a schoolchild, the parent or guardian of a schoolchild, or the parent or guardian of a child who will enter public school in the next two (2) years has standing to sue and may bring suit against the local school district in which the schoolchild or potential schoolchild resides on the ground that the local school district is not providing constitutionally required educational services. These complaints may be known as patron complaints, and the persons who are plaintiffs may be known as patrons. The patron complaint must list with specificity the manner in which the patrons contend that the local school district is not providing constitutionally required educational services. No other person, except the state as *parens patriae*, has standing to bring suit against a school district on the ground that the school district is not providing constitutionally required educational services.

(2) *Parens patriae* suit against districts. The state of Idaho, through the legislature or through the superintendent of public instruction, may bring suit against a school district on the ground that the school district is not providing constitutionally required educational services.

(3) Patron suits against the state. No person other than a patron authorized to bring suit against a school district under subsection (1) of this section has standing to bring suit against the state, the legislature, or any of the state's officers or agencies on the

ground that the state has not established and maintained a general, uniform and thorough system of public, free common schools. No patron with standing to bring suit against a school district may bring suit against the state, the legislature, or any of the state's officers or agencies on the ground that the state has not established and maintained a general, uniform and thorough system of public, free common schools unless the patron has first brought suit against its local school district pursuant to subsection (1) of this section and the district court has later authorized the patron to add the state as a defendant as authorized by this section. Any patron suit against the state, the legislature, or any of the state's officers or agencies not authorized by the district court pursuant to this section shall be dismissed.

(4) No other suits recognized. School districts are agents of the state for purposes of providing a general, uniform and thorough system of public, free common schools, and they have no standing to bring suit against the state for failure to establish and maintain a general, uniform and thorough system of public, free common schools. Any suit brought by a school district against the state, the legislature, or any of the state's officers or agents contending that the state has not established a general, uniform and thorough system of public, free common schools shall be dismissed. There shall be no right of action by any person contending that there is not a general, thorough and uniform system of free common schools in this state except those authorized in subsections (1),

(2) and (3) of this section naming with specificity the local school districts in which the plaintiffs live and with specificity the manner in which they contend that the public schools in that district are not providing constitutionally required educational services. Any other suit contending that there is not a general, thorough and uniform system of free, common schools shall be dismissed.

**§33-118. Courses of study – Curricular materials.** – The state board shall prescribe the minimum courses to be taught in all public elementary and secondary schools, and shall cause to be prepared and issued, such syllabi, study guides and other instructional aids as the board shall from time to time deem necessary. The board shall also determine how and under what rules curricular materials shall be adopted for the public schools. The board shall require all publishers of textbooks approved for use to furnish the department of education with electronic format for literary and nonliterary subjects when electronic formats become available for nonliterary subjects, in a standard format approved by the board, from which reproductions can be made for use by the blind.

**§33-118A. Curricular materials – Adoption procedures.** – All curricular materials adoption committees appointed by the state board of education shall contain at least two (2) persons who are not public educators or school trustees. All meetings of curricular materials adoption committees shall be open to the public. Any member of the public may attend such meetings and file written or make oral

objections to any curricular materials under consideration. A complete and cataloged library of all curricular materials adopted in the immediately preceding three (3) years and used in Idaho public schools, and all electronically available curricular materials used in Idaho public schools are to be maintained at the state department of education at all times and open to the public.

“Curricular materials” is defined as textbook and instructional media including software, audio/visual media and internet resources.

**§33-125. State department of education – Creation – Duties.** – There is hereby established as an executive agency of the state board of education a department known as the state department of education. The state superintendent shall serve as the executive officer of such department and shall have the responsibility for carrying out policies, procedures and duties authorized by law or established by the state board of education for all elementary and secondary school matters, and to post a fiscal report card on each school district and charter school on the department’s internet site. The department shall perform the duties assigned to it as specified in section 67-5745D, Idaho Code, relating to the Idaho education network.

**§33-5201. Short title.** – This chapter shall be known and may be cited as the “Public Charter Schools Act of 1998.”

**§33-5206. Requirements and prohibitions upon approval of a public charter school.** – (1) In addition to any other requirements imposed in this chapter, a public charter school shall be nonsectarian in its programs, affiliations, admission policies, employment practices, and all other operations, shall not charge tuition, levy taxes or issue bonds, and shall not discriminate against any student on any basis prohibited by the federal or state constitutions or any federal, state or local law. Admission to a public charter school shall not be determined according to the place of residence of the student, or of the student's parent or guardian within the district, except that a new or conversion public charter school established under the provisions of this chapter shall adopt and maintain a policy giving admission preference to students who reside within the attendance area of that public charter school. The attendance area of a charter school, as described in the petition, shall be composed of compact and contiguous area. For the purposes of this section, if services are available to students throughout the state, the state of Idaho is considered a compact and contiguous area.

(2) No board of trustees shall require any employee of the school district to be involuntarily assigned to work in a public charter school.

(3) Certified teachers in a public charter school shall be considered public school teachers. Educational experience shall accrue for service in a public charter school and such experience shall be counted

by any school district for any teacher who has been employed in a public charter school.

(4) Employment of charter school teachers and administrators shall be on written contract in form as approved by the state superintendent of public instruction, conditioned upon a valid certificate being held by such professional personnel at the time of entering upon the duties thereunder.

(5) No board of trustees shall require any student enrolled in the school district to attend a public charter school.

(6) Upon approval of the petition by the authorized chartering entity, the petitioner shall provide written notice of that approval, including a copy of the approved petition, to the state board of education. For the purpose of implementing the provisions of section 33-5203(2), Idaho Code, the state board of education shall assign a number to each petition it receives. Petitions shall be numbered based on the chronological order in which notice of the approved petition is received by the state board of education.

(7) Each public charter school shall annually submit a report to the authorized chartering entity which approved its charter. The report shall contain the audit of the fiscal and programmatic operations as required in section 33-5205(3)(k), Idaho Code, a report on student progress based on the public charter school's student educational standards identified in section 33-5205(3)(b), Idaho Code, and a copy of the public charter school's accreditation report.



(8) When a charter is revoked pursuant to section 33-5209, Idaho Code, or the board of directors of the public charter school terminates the charter, the assets of the public charter school remaining after all debts of the public charter school have been satisfied must be returned to the authorized chartering entity for distribution in accordance with applicable law.

**§ 33-5208. Public charter school financial support.** – Except as provided in subsection (8) of this section, from the state educational support program the state department of education shall make the following apportionment to each public charter school for each fiscal year based on attendance figures submitted in a manner and time as required by the department of education:

(1) Per student support. Computation of support units for each public charter school shall be calculated as if it were a separate school according to the schedules in section 33-1002(4), Idaho Code, except that public charter schools with fewer than one hundred (100) secondary ADA shall use a divisor of twelve (12) and the minimum units shall not apply, and no public charter school shall receive an increase in support units that exceeds the support units it received in the prior year by more than thirty (30). Funding from the state educational support program shall be equal to the total distribution factor, plus the salary-based apportionment provided in chapter 10, title 33, Idaho Code. Provided however, any public charter school that is formed by the conversion of an

existing traditional public school shall be assigned divisors, pursuant to section 33-1002, Idaho Code, that are no lower than the divisors of the school district in which the traditional public school is located, for each category of pupils listed.

(2) Special education. For each student enrolled in the public charter school who is entitled to special education services, the state and federal funds from the exceptional child education program for that student that would have been apportioned for that student to the school district in which the public charter school is located.

(3) Alternative school support. Public charter schools may qualify under the provisions of sections 33-1002 and 33-1002C, Idaho Code, provided the public charter school meets the necessary statutory requirements, and students qualify for attendance at an alternative school as provided by rule of the state board of education.

(4) Transportation support. Support shall be paid to the public charter school as provided in chapter 15, title 33, Idaho Code, and section 33-1006, Idaho Code. Each public charter school shall furnish the department with an enrollment count as of the first Friday in November, of public charter school students who are eligible for reimbursement of transportation costs under the provisions of this subsection and who reside more than one and one-half ( $1\frac{1}{2}$ ) miles from the school. For charter schools in the initial year of operation, the petition shall include a

proposal for transportation services with an estimated first year cost. The state department of education is authorized to include in the annual appropriation to the charter school sixty percent (60%) of the estimated transportation cost. The final appropriation payment in July shall reflect reimbursements of actual costs pursuant to section 33-1006, Idaho Code. To be eligible for state reimbursement under the provisions of section 33-1006, Idaho Code, the student to be transported must reside within the public charter school's attendance zone, and must meet at least one (1) of the following two (2) criteria:

- (a) The student resides within the school district in which the public charter school is physically located; or
- (b) The student resides within fifteen (15) miles of the public charter school, by road.

The limitations placed by this subsection on the reimbursement of transportation costs for certain students shall not apply to public virtual schools.

(5) Payment schedule. The state department of education is authorized to make an advance payment of twenty-five percent (25%) of a public charter school's estimated annual apportionment for its first year of operation, and each year thereafter, provided the public charter school has an increase of student population in any given year of twenty (20) students or more, to assist the school with initial start-up costs or payroll obligations.

(a) For a state public charter school to receive the advance payment, the school shall submit its anticipated fall membership for each grade level to the state department of education by June 1.

(b) Using the figures provided by the public charter school, the state department of education shall determine an estimated annual apportionment from which the amount of the advance payment shall be calculated. Advance payment shall be made to the school on or after July 1 but no later than July 31.

(c) All subsequent payments, taking into account the one-time advance payment made for the first year of operation, shall be made to the public charter school in the same manner as other traditional public schools in accordance with the provisions of section 33-1009, Idaho Code.

A public charter school shall comply with all applicable fiscal requirements of law, except that the following provisions shall not be applicable to public charter schools: section 33-1003B, Idaho Code, relating to guaranteed minimum support; that portion of section 33-1004, Idaho Code, relating to reduction of the administrative and instructional staff allowance when there is a discrepancy between the number allowed and the number actually employed; and section 33-1004E, Idaho Code, for calculation of district staff indices.

(6) Nothing in this chapter shall be construed to prohibit any private person or organization from

providing funding or other financial assistance to the establishment or operation of a public charter school.

(7) Nothing in this chapter shall prevent a public charter school from applying for federal grant moneys.

(8)(a) For the period July 1, 2003, through June 30, 2005, all public virtual schools shall be assigned divisors, pursuant to section 33-1002, Idaho Code, that are no higher than the median divisor shown for each respective category of pupils, among the possible divisors listed, for each respective category of pupils that contains more than one (1) divisor. If there is an even number of possible divisors listed for a particular category of pupils, then the lesser of the two (2) median divisors shall be used. For the period July 1, 2005, through June 30, 2007, all public virtual schools shall be assigned divisors, pursuant to section 33-1002, Idaho Code, that are no higher than the second highest divisor shown, among the possible divisors listed, for each respective category of pupils that contains more than one (1) divisor. The divisor provisions contained herein shall only be applicable to the number of pupils in average daily attendance in such public virtual schools for the period July 1, 2003, through June 30, 2004. If the number of pupils in average daily attendance in any particular category of pupils increases, during the period July 1, 2004, through June 30, 2005, to a number above that which existed in the prior fiscal year, then those additional pupils in average daily attendance shall be assigned the divisor, pursuant to section

33-1002, Idaho Code, that would have otherwise been assigned to the school district or public charter school had this section not been in force.

(b) Each student in attendance at a public virtual school shall be funded based upon either the actual hours of attendance in the public virtual school on a flexible schedule, or the percentage of coursework completed, whichever is more advantageous to the school, up to the maximum of one (1) full-time equivalent student.

(c) All federal educational funds shall be administered and distributed to public charter schools, including public virtual schools, that have been designated by the state board of education as a local education agency (LEA), as provided in section 33-5203(7), Idaho Code.

(9) Nothing in this section prohibits separate face-to-face learning activities or services.

(10) The provisions of section 33-1021, Idaho Code, shall apply to public charter schools provided for in this chapter.

**§33-5213. Public charter school commission.**

– (1) There is hereby created an independent public charter school commission, referred to hereinafter as the commission, to be located in the office of the state board of education, pursuant to section 33-105, Idaho Code. It shall be the responsibility and duty of the executive director of the state board of education acting at the direction of the commission to administer and enforce the provisions of this chapter, and the

director or his designee, shall serve as secretary to the commission.

(2) The public charter school commission shall adopt rules, subject to law, regarding the governance and administration of the commission.

(3) The commission shall be composed of seven (7) members:

(a) Three (3) members shall be current or former members of boards of directors of Idaho public charter schools, and shall be appointed by the governor, subject to the advice and consent of the senate; provided however, that no current board member of a public charter school authorized by the commission shall be eligible for appointment;

(b) Three (3) members shall be current or former trustees of an Idaho school district, and shall be appointed by the governor, subject to the advice and consent of the senate; and

(c) One (1) member shall be a member of the public at large not directly associated with the Idaho public education system, and shall be appointed by the governor, subject to the advice and consent of the senate.

For the purpose of establishing staggered terms of office, the initial term of office for three (3) commission members shall be four (4) years and thereafter shall be four (4) years; the initial term of office for two (2) members shall be three (3) years and thereafter shall be four (4) years; and the initial term of

office for two (2) members shall be two (2) years and thereafter shall be four (4) years. In making such appointments, the governor shall consider regional balance. Members of the commission shall hold office until the expiration of the term to which the member was appointed and until a successor has been duly appointed, unless sooner removed for cause by the appointing authority. Whenever a vacancy occurs, the appointing authority shall appoint a qualified person to fill the vacancy for the unexpired portion of the term.

(4) All members of the commission shall be citizens of the United States and residents of the state of Idaho for not less than two (2) years.

(5) The members of the commission shall, at their first regular meeting following the effective date of this act, and every two (2) years thereafter, elect, by a majority vote of the members of the commission, a chairman and a vice-chairman. The chairman shall preside at meetings of the commission, and the vice-chairman shall preside at such meetings in the absence of the chairman. A majority of the members of the commission shall constitute a quorum. The commission shall meet at such times and places as determined to be necessary and convenient, or at the call of the chair.

(6) Each member of the commission not otherwise compensated by public moneys shall be compensated as provided in section 59-509(h), Idaho Code.

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**Guidelines for Applying the Provisions  
of Idaho Constitution Article IX, § 6,  
Regarding Sectarian, Religious or  
Denominational Teaching or Materials**

**Prepared Under the Direction of the  
Idaho Public Charter School Commission  
and Approved by the Commission  
on February 11, 2010**

Article IX, § 6, of the Idaho Constitution provides:

**Section 6. Religious test and teaching in school prohibited.** – No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. 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, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article. [Emphasis added.]

***Legal Effect of the Guidelines.*** These Guidelines provide working guidance to public charter schools on how to apply Article IX, § 6, to decide what books, papers, tracts or documents are religious, sectarian or denominational. These Guidelines do not have the force and effect of law. They are agency guidance documents under Idaho Code § 67-5250(2).

These Guidelines divide books, papers, tracts, and documents into three categories that illustrate what materials can or cannot be “used or introduced” in public charter schools: sacred texts, other sectarian or denominational materials, and materials discussing or addressing religion that are not religious, sectarian or denominational.

**What Are Sacred Texts?** A sacred text is the most easily defined category of sectarian, religious or denominational “books, papers, tracts or documents.” To give some examples, the various Christian Bibles,<sup>1</sup>

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<sup>1</sup> There are at least four canons of the Christian Bible: The Protestant Old Testament contains 39 books; the Roman Catholic Old Testament contains additional books called the Apocrypha for a total of 46; the Greek Orthodox Old Testament contains up to 53 books (not all 53 books are used by all Greek Orthodox churches); and the Slavonic Old Testament also contains up to 53 books. In addition, books that have one name in one canon (*e.g.*, the Protestant canon’s 1st and 2nd Samuel and 1st and 2nd Kings) have other names in a different canon (*e.g.*, the Roman Catholic canon’s 1st, 2nd, 3rd and 4th Kings). None of the four Christian canons’ Old Testament exactly coincides with the Tanakh, which is the English transliteration of the Hebrew acronym for the Torah (“Teaching”, or the Five Books of Moses),

(Continued on following page)

the Torah, the Koran, the Book of Mormon, the Shruti (Hindu), and various Nikayas or Sutras (Buddhist) are sacred texts because they are considered by some or all adherents to the religions that subscribe to them to be divinely inspired or revealed, and/or to prescribe doctrines or tenets of religious belief or practice, and/or to otherwise convey or prescribe a religious viewpoint essential or central to the adherents' religious belief. All of these books are therefore denominational or sectarian because they embody the religious "tenets" or "doctrines" of existing religions.

**In General, What Are Sectarian or Denominational Materials, and What Are Not?** The broad category of sectarian or denominational materials includes sacred texts, but is larger. This category includes additional materials – *e.g.*, a hypothetical book called "Why Religion A Is Right and Religion B is Wrong" would be sectarian<sup>2</sup> or denominational<sup>3</sup> because it would promote or oppose a particular religious viewpoint. This hypothetical book is a useful

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Nevi'im ("Prophets") and Ketuvim ("Writings"), from which the Christian Old Testament is derived.

<sup>2</sup> "Sectarian" mean [sic]: "adjective 1. Of, relating to, or characteristic of a sect 2. Adhering or confined to the dogmatic limits of a sect or denomination; partisan 3. Narrow-minded; parochial." American Heritage® Dictionary of the English Language, Third Edition (1992) (electronic version).

<sup>3</sup> "Denomination" means: "noun 1. A large group of religious congregations united under a common faith and name and organized under a single administrative and legal hierarchy." *Id.*

tool for discussion not because charter public schools are likely to use such a book, but because such a book is springboard for discussion of books that may actually be encountered. The subtler issue is whether there are books that implicitly do the same thing as the hypothetical.

In an article titled “Review of the *Bible in History and Literature*,” 34 Religion and Education No. 3 (Fall 2007), pages 94-102, University of Northern Iowa, Brennan Breed and Kent Harold Richards explain how *The Bible in History and Literature* (“TBHL”) is not, in their view, merely a survey of the Bible from an historical or literary perspective, but a book that implicitly weighs in on many theological issues: For example, one of the main differences between the Protestant canon and other Christian canons is the Apocrypha, which is not in the Protestant canon, but is in the others. Rather than explaining the differing views on the Apocrypha, or explaining how and why Protestants excised the Apocrypha from what other Christians included in the canon, TBHL says that Christians typically paid little heed to the Apocrypha, a statement that elevates Protestant theology over Roman Catholic, Orthodox and Slavonic theologies. Another example is the treatment of Moses – TBHL accepts the King James Bible’s stories of Moses as historical fact without discussing the different but similar Moses stories in the Koran (does TBHL thus imply that King James is right and the Koran is wrong?) or even discussing differing perspectives on whether Moses

was or was not an historical figure. Another example is describing William Tyndale, whose translations were incorporated into portions of the King James Bible, as “the greatest translator of Scripture into English who ever lived.” This statement implies that the works that Mr. Tyndale translated were indeed “Scripture” and that his choices of words in translation were superior to others’ translations, a topic of some theological debate.

Messrs. Breed and Richards’s examples of implicitly sectarian or denominational materials identify constitutional shortcomings that might be found in some “books, papers, tracts or documents.” The examples do not, however, yield a working “yardstick” for determining which “books, papers, tracts or documents” are “sectarian or denominational [in] character.” Nonetheless, there is academic writing that describes what is permissible teaching about religion and what is impermissible religious teaching that can guide public charter schools concerning what “books, papers, tracts or documents” are or are not “sectarian or denominational [in] character.”

*The Bible & Public Schools: A First Amendment Guide*, published jointly by The Bible Literacy Project, the First Amendment Center, and the Society of Biblical Literature, is endorsed by a spectrum of religious and lay organizations.<sup>4</sup> Chico State University’s

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<sup>4</sup> *The Bible & Public Schools: A First Amendment Guide*, is endorsed by: American Association of School Administrators;  
(Continued on following page)

“*A Teacher’s Guide to Religion in the Public Schools*” (“*Teacher’s Guide*”) and “*Religion in the Public School Curriculum*” (“*RITPSC*”) are similarly endorsed.<sup>5</sup>

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American Federation of Teachers; American Jewish Committee; American Jewish Congress; Anti-Defamations League; Association for Supervision and Curriculum Development; Baptist Joint Committee on Public Affairs; Christian Educators Association International; Christian Legal Society; Council on Islamic Education; National Association of Evangelicals; National Association of Secondary School Principals; National Council of Churches of Christ in the U.S.A.; National Council for the Social Studies; National Education Association; National School Boards Association; People for the American Way Foundation; Society of Biblical Literature; and Union of American Hebrew Congregations.

<sup>5</sup> The Chico State publications are endorsed by: American Academy of Religion (*RITPSC*); American Association of School Administrators (both); American Federation of Teachers (both); American Jewish Committee (*Teacher’s Guide*); American Jewish Congress (both); Americans United Research Foundation (*RITPSC*); Anti-Defamation League (*Teacher’s Guide*); Association for Supervision and Curriculum Development (both); Baptist Joint Committee on Public Affairs (both); Catholic League for Religious and Civil Rights (*Teacher’s Guide*); Christian Educators Association International (*Teacher’s Guide*); Christian Legal Society (both); Church of Jesus Christ of Latter-day Saints (*RITPSC*); Council on Islamic Education (*Teacher’s Guide*); First Amendment Center (both); National Association of Elementary School Principals (*Teacher’s Guide*); National Association of Evangelicals (both); National Association of Secondary School Principals (*Teacher’s Guide*); National Conference of Community and Justice (*RITPSC*); National Council of Churches of Christ in the U.S.A. (both); National Council for the Social Studies (both); National Educational Association (both); National PTA (*Teacher’s Guide*); National Education Association (*RITPSC*); National School Boards Association (both); Union of Hebrew Congregations (*Teacher’s Guide*); and Union of Orthodox Jewish Congregations of America (*Teacher’s Guide*).

Substituting the word “book” (as a shorthand for the words “books, papers, tracts or documents”) for the words “instruction”, “teaching”, “schools” or similar words in materials prepared by these organizations gives the following practical tests for distinguishing between “books, papers, tracts or documents” that are “sectarian or denominational [in] character” and those that are not.

- Books “should neither promote nor disparage religion” or particular religions, nor should they explicitly or implicitly adopt “a particular sectarian point of view.” From the *Bible & Public Schools*.
- Books that discuss “divine action” described in sacred texts should not implicitly or explicitly view them “as historical fact.” *Id.*
- Books “may strive for student awareness of religion, but should not press for student acceptance of any [particular] religion.” *Id.*
- Books “may expose students to a diversity of religious view [sic], but may not impose, discourage, or encourage any particular view.” Books “may inform the student about various beliefs, should not seek to conform him or her to any particular belief.” *Id.*
- Books that “adopt any particular Bible – or translation – [are] likely to suggest to students that is normative, the best Bible. One solution is to use . . . an anthology of . . . translations.” *Id.*
- A book must contain an “approach to religion that is *academic*, not *devotional*”; must “strive[ ]

for student *awareness* of religions,” not “student *acceptance* of any [particular] religion”; must “*expose* students to a diversity of religious views,” but not “*impose* any particular view”; must “*educate*[ ] about all religions” and “not *promote* or *denigrate* religion”; and must “*inform*[ ] students about various beliefs” but not “seek to *conform* students to any particular belief.” *Teacher’s Guide*, pages 75-76. See similar materials in *RITPSC*, page 90.

- Books about religion must be “free of advocacy” regarding particular religious viewpoints. They may often contain descriptive modifiers like “most [adherent [sic] of Religion A] believe” or “according [Hebrew, Christian, Muslim, Hindu, etc.] scriptures.” *Id.*, p. 76.

Photocopies from sacred texts and Internet downloads of sacred texts cannot easily satisfy these guidelines because there is no context surrounding them. There are many English translations of the Psalms that might be used to study poetry, but photocopying one of them from among many available translations and five available Christian and Jewish canons and presenting it without any context elevates that translation and that canon in the way that Breed and Richards earlier described. On the other hand, an anthology that includes a Shakespearean sonnet and a King James translation of a Psalm and presents them as examples from the two most influential bodies of work in Early Modern English would give a context to the Psalm that neither supposes nor



opposes the King James translation's religious validity or primacy.<sup>6</sup>

The previous discussions leave open the question: On which side of the line is a given book in a given public charter school's proposed curriculum? The Public Charter School Commission does not have the resources to review every book. It is the responsibility of each public charter school not to use or introduce any "books, paper [sic], tracts or documents" of a "sectarian or denominational character"; otherwise, Article

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<sup>6</sup> Although such an anthology in and of itself likely would not violate Idaho Constitution, Article IX, § 6, the Breed and Richards article, the pamphlet *The Bible & Public Schools: A First Amendment Guide* and the Chico State University materials explain that improper use of an otherwise allowable text could violate the First Amendment.

For example, let us say an otherwise neutral anthology contained the King James Bible's translation of the 23rd Psalm and a Shakespearean sonnet as examples of the poetic potential of writing in Early Modern English, but a class was asked to memorize and then recite the 23rd Psalm at the start of every day. A court would almost certainly find that use of the anthology for such purposes was devotional rather than educational and would run afoul of the First Amendment. Similarly, a court would almost certainly find that an exercise in which a religious quotation in a neutral anthology were selected for an exercise in setting poetry to music was so close to one contemporary method of religious worship that it would violate the First Amendment. And one can hypothesize similar examples – asking students to write a poem in contemporary English that expressed the same sentiments as the Psalm, asking students to write a short story that captured the lessons of the Psalm – would almost certainly be found to be religious instruction that would violate the First Amendment. One's imagination would be the only limit on possible misuse of an otherwise allowable anthology.

IX, § 6 provides “nor shall [it] receive any of the public school moneys [if] the schools have not been taught in accordance with this article.”

Sacred texts are *per se* sectarian or denominational. As for the rest, the discussions on pages 2-4 of these Guidelines offer practical descriptions of books, paper [sic], tracts or documents that satisfy or do not satisfy the Idaho Constitution. It is no answer that a public charter school may desire to select a “balance” of sectarian or denominational materials; the Constitution does not forbid “unbalanced” selections of sectarian or denominational materials; it forbids the sectarian or denominational materials themselves. Thus, a theological work by Thomas Aquinas cannot be “balanced” against a theological work by Maimonides and another by the Dalai Lama. However, an anthology that surveyed the ideas of these and other religious philosophers and that provided context for the quotations or excerpts from their works would likely contain the necessary explanation to neither implicitly or explicitly promote or disparage their views. But, the public charter school would need to review the anthology to make sure that the anthology itself was not structured in a manner to promote or disparage any particular religious views.

Finally, a public charter school has a safe harbor – using curricular materials approved pursuant to Idaho Code §§ 33-118 and 33-118A. The Commission will not entertain Article IX, § 6 challenges to books approved under those statutes because they have already been vetted by a procedure authorized by

statute. Any challenge to such books would have to go back to the bodies that approved them.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

|                                    |   |                  |
|------------------------------------|---|------------------|
| NAMPA CLASSICAL                    | ) | Case No.         |
| ACADEMY, <i>et al.</i> ,           | ) | CV 09-427-S-EJL  |
|                                    | ) |                  |
| Plaintiffs,                        | ) | <b>SECOND</b>    |
|                                    | ) | <b>AFFIDAVIT</b> |
| vs.                                | ) | <b>OF TAMARA</b> |
|                                    | ) | <b>BAYSINGER</b> |
| WILLIAM GOESLING,                  | ) |                  |
| individually and in his            | ) |                  |
| official capacity as Chairman      | ) |                  |
| of the Idaho Public Charter        | ) |                  |
| School Commission, <i>et al.</i> , | ) |                  |
|                                    | ) |                  |
| Defendants.                        | ) |                  |

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STATE OF IDAHO )  
) ss.  
COUNTY OF ADA )

Your affiant, Tamara Baysinger, being first duly sworn upon oath, and states upon personal knowledge as follows:

1. My name is Tamara Baysinger. Earlier in this case I filed an Affidavit that became identified as Docket No. 12-2. As I was at the time of that earlier Affidavit, I am still employed by the Idaho State Board of Education in the position of Charter Schools Program Manager and still serve as staff to the Idaho Public Charter School Commission (the Commission). My duties as staff to the Commission include attending its regular and special meetings.

2. I have personal knowledge of the matters set forth in this Affidavit, which are true and correct to the best of my knowledge.

3. On Thursday, February 11, 2010, the Commission held a special meeting to consider the adoption of Guidelines for Applying the Provisions of Idaho Constitution Article IX, § 6, Regarding Sectarian, Religious, or Denominational Teaching or Materials ("Guidelines") that public charter schools may use. A copy of the agenda for that special meeting is attached as Exhibit PIOpp-A to this Affidavit.

4. At the special meeting of February 11, 2010, the Commission adopted the Guidelines that are attached as Exhibit PIOpp-B to this Affidavit. The Guidelines are now posted on the Commission's website at:

[http://www.chartercommission.id.gov/  
documents/religious\\_text\\_guidelines.pdf](http://www.chartercommission.id.gov/documents/religious_text_guidelines.pdf),

where they are available to the public. In addition, Nampa Classical Academy ("the Academy") was informed of the adoption of these Guidelines by an e-mail sent to each member of the Academy's Board.

5. Those Guidelines refer to and principally rely upon research from four sources:

- Brennan Breed and Kent Harold Richards, "Review of the Bible in History and Literature," 34 Religion and Education No. 3 (Fall 2007), pages 94-102, University of Northern Iowa, accessible on the internet at:

[http://www.\\_sbl-site.org/assets/pdfs/BreedRichardsReview.pdf](http://www._sbl-site.org/assets/pdfs/BreedRichardsReview.pdf).

- The Bible & Public Schools: A First Amendment Guide, published jointly by The Bible Literacy Project, the First Amendment Center, and the Society of Biblical Literature, accessible on the internet at:

[http://www.firstamendmentcenter.org/PDF/bible\\_guide\\_graphics.PDF](http://www.firstamendmentcenter.org/PDF/bible_guide_graphics.PDF)

and

[http://www.firstamendmentcenter.org/PDF/bible\\_guide\\_nographics.PDF](http://www.firstamendmentcenter.org/PDF/bible_guide_nographics.PDF).

- “A Teacher’s Guide to Religion in the Public Schools,” accessible on the internet at: <http://www.freedomforum.org/publications/first/findingcommonground/B06.TeachersGuide.pdf>.
- “Religion in the Public School Curriculum,” accessible on the internet at: <http://www.freedomforum.org/publications/first/findingcommonground/B07.inPublicSchool.pdf>.

I have attached downloads of these four sources as Exhibits [sic] PIOpp-C, PIOpp-D, PIOpp-E, and PIOpp-F to this Affidavit, respectively.

6. I have reviewed Mr. Moffett’s Affidavit, MPI Exhibit 2, Dkt. 26-3, ¶ 8, in which he states that he “drafted an overview of the curriculum for the Academy which includes a reading list. The reading lists include both textbooks and supplemental resources. A true and accurate copy is attached as Exhibit 7.”

A review of the reading list of MPI Exhibit 7 shows that it includes the *Bible* (which canon of the *Bible* is not stated), Thomas Jefferson's *Life and Morals of Jesus of Nazareth*, St. Augustine's *Confessions*, the *Koran*, the *Hadieth*, and the *Book of Mormon*. See MPI Exhibit 7, Dkt. 26-7, pp. 11-14. I now make explicit what I implied in my earlier Affidavit, Dkt. 12-2, ¶¶ 3-5, that neither Mr. Moffett nor any other representative of the Academy supplied that reading list to the Commission with the Academy's application, before the Academy's charter was granted, or at any time before the initiation of this lawsuit. That is why I stated in those paragraphs of my earlier Affidavit that before June of 2009 neither the members of the Commission nor I had been notified of and did not become aware of the Academy's intention to use religious texts like these in the Academy's curriculum.

7. Paragraph 14 of Mr. Moffett's Affidavit, Dkt. 26-3, pp 4-5, refers to the Coeur d'Alene ***School District's*** curriculum, but MPI Exhibit 13, to which Mr. Moffett refers, is an Affidavit from Dr. William S. Prosser of the Coeur d'Alene ***Charter Academy***, and the curricular materials that Dr. Prosser identifies are those of the Coeur d'Alene ***Charter Academy***. The Coeur d'Alene School District and not the Commission is the authorized chartering entity for the Coeur d'Alene Charter Academy. For that reason Michael S. Gilmore, Deputy Attorney General, forwarded a copy of Dr. Prosser's Affidavit to the Coeur d'Alene School District for its consideration. A copy of that letter is attached as Exhibit PIOpp-G to my Affidavit.

8. Paragraph 8 of the Affidavit of Erik Makrush, MPI Exhibit 14, Dkt. 27-1, p. 3, states that his children, who are in first and fourth grade, attend the Idaho Virtual Academy. Paragraph 9 of his Affidavit, *id.*, p. 4, states: “The Idaho Virtual Academy curriculum does not use only state approved textbooks, but rather it also incorporates the use of the Bible and other religious texts.”

9. Paragraphs 2-3 of the Affidavit of Kimberly Slater, MPI Exhibit 14, Dkt. 27-1, p. 7, state that she once had two children enrolled in the Idaho Virtual Academy, most recently during the 2008-2009 school year. Paragraph 5 of her Affidavit, *id.*, states: “The Idaho Virtual Academy curriculum does not use only state approved textbooks, but rather it also incorporates the use of the Bible and other religious texts.”

10. I forwarded copies of Mr. Makrush’s and Ms. Slater’s Affidavits to the Idaho Virtual Academy and asked for its response to their statements. A copy of my letter to the Idaho Virtual Academy is attached as Exhibit PIOpp-H to this Affidavit.

11. Paragraph 19 of Mr. Moffett’s Affidavit, Dkt. 26-3, pp. 5-6, states: “Xavier Charter School utilizes primary sources, including those that are religious. In fact, I was personally told by a history teacher that the Bible is used as a curriculum resource in the class.” I have forwarded a copy of these pages of Mr. Moffett’s Affidavit to Xavier Charter School and asked for its response to Mr. Moffett’s statement.



A copy of my letter to Xavier Charter School is attached as Exhibit PIOpp-I to this Affidavit.

12. Paragraph 20 of Mr. Moffet's Affidavit, Dkt. 26-3, p. 6, refers to MPI Exhibit 20, Dkt. 27-7, pp. 14-12 [sic], which he describes as a Department of Education list of all public charter schools in the State. However, as MPI Exhibit 20 states on its face, it is a list of public charter schools for the 2008-2009 school year. I have attached as Exhibit PIOpp-J a list of all public charter schools in Idaho current for the 2009-2010 school year.

13. Paragraph 48 of Mr. Moffett's Affidavit, Dkt. 26-3, p. 12, states: "We originally gave the Commission an overview of our curriculum." That "overview", see MPI Exhibit 5, Nampa Classical Academy Petition, Dkt. 26-5, pp. 21-26, included references to original works by Aristotle, Montesquieu, Curie, and Plato, *id.*, p. 21, to works by Founding Fathers James Madison and Benjamin Rush, *id.*, p. 23, to Cicero, Ovid, Augustine's *Confessions*, and C.S. Lewis's *Four Loves*, *id.*, p. 25, but no explicit references to sacred texts like the Bible, the Torah, the Koran or the Book of Mormon. The overview on textbooks, *id.*, p. 26, simply said:

**Textbooks**

Nampa Classical Academy will avoid textbooks and other literature that has been subject to oversimplification, historical revisionism and obsessive focus on real and imaginary problems of American society. Instead, we

will use primary source documents, autobiographies and biographies.

14. Paragraph 51 of Mr. Moffett's Affidavit, Dkt. 26-3, p. 12 states: "We have publicly stated for over two years that we would use the Bible and other religious text [sic] in their proper context." I was unaware of those public comments before June 2009.

15. Paragraph 52 of Mr. Moffett's Affidavit, Dkt. 26-3, p. 12, states: "In July 2009, Commission officials stated publicly that charter schools, as all schools, could use the Bible and after reviewing our use, determined it was legal to do so." I do not know of any other Commission "officials" who addressed the matter in a manner suggesting that use of the Bible would be legal. As Defendants explained in ¶ 77 of their Answer, Dkt. 22, p. 33, I "was quoted in the media in late June 2009 and made an unofficial statement [concerning use of the Bible] in response to an unexpected media request and without opportunity for research." As ¶ 77 of the Answer continued, "the Commission later received legal advice to the contrary and officially clarified its position on the issue, . . . the clarification was made during public meetings on July 22-23, 2009, and August 14, 2009, and . . . Ms. Baysinger's June 2009 media statement was not and is not the Commission's official position."

16. Paragraph 64 of Mr. Moffett's Affidavit, Dkt. 26-3, p. 13, refers to "numerous threats of the [Commission] to revoke the charter of the [Academy]." The purpose of a Notice of Defect is identify [sic] a

deficiency in a public charter school that needs to be corrected, not to revoke a charter. The Commission has issued 5 Notices of Defect to the Academy, only one of which explicitly concerns use of materials that are not allowed under Article IX, § 6 (another addressed failure to provide information requested in that Notice of Defect). The others concerned teacher certification, finances, failure to submit required reports, violations of the Public Records Act and violations of the Academy's charter. The Commission has not yet scheduled any hearings that could lead to revocation the [sic] Academy's charter.

17. The Second Amended Verified Complaint, Dkt. 21, stated a retaliation claim based in part upon the following allegation in its ¶ 263, p. 35: "After the Plaintiffs filed this lawsuit, the Defendants ordered a programmatic audit of the Academy in order to retaliate against the Plaintiff's protected activity." This statement is not true. Before the Academy opened, it applied for a Federal Charter Start Grant that was conditioned in part upon programmatic audits to be performed during every year in which grant monies are received. The Academy first scheduled a programmatic audit for October 9-10, 2009, then re-scheduled for December 7-8, 2009. The programmatic audit was conducted under the auspices of the Idaho Charter School Network, and I was asked to be on the audit team by Diane Demarest of the Network. However, in the end I did not serve on the audit team. I have attached a copy of the Academy's application as Exhibit PIOpp-K to this Affidavit. The assurance

pages certifying that NCA will comply with the grant's accountability requirements, including annual programmatic audits, is [sic] contained on pages 4-5 of that Exhibit.

18. This concludes my Affidavit.

/s/ Tamara Baysinger  
Tamara Baysinger  
Charter Schools Program Manager

SUBSCRIBED AND SWORN to before me this  
22nd day of February, 2010.

/s/ Mary Jane Markland  
Notary Public  
Residing at: Boise, ID  
My Commission Expires: March 5, 2014

[Certificate Of Service Omitted In Printing]

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

|                                    |   |                      |
|------------------------------------|---|----------------------|
| NAMPA CLASSICAL                    | ) | Case No.             |
| ACADEMY, <i>et al.</i> ,           | ) | CV 09-427-S-EJL      |
| Plaintiffs,                        | ) | <b>DEFENDANTS'</b>   |
| vs.                                | ) | <b>ANSWER TO</b>     |
| WILLIAM GOESLING,                  | ) | <b>SECOND AMEND-</b> |
| individually and in his official   | ) | <b>ED COMPLAINT</b>  |
| capacity as Chairman of the        | ) |                      |
| Idaho Public School Charter        | ) |                      |
| School Commission, <i>et al.</i> , | ) |                      |
| Defendants.                        | ) |                      |

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Defendants, by and through one of their attorneys of record, Michael S. Gilmore, Deputy Attorney General, file this Answer to the Second Amended Complaint, Dkt. 21. Defendants answer each paragraph of the Second Amended Complaint as shown below. Any allegation of fact in the Second Amended Complaint not specifically admitted is denied. Any allegation of fact that Defendants do not have sufficient knowledge or information to admit or deny is generally denied. Any statement that a portion of the Second Amended Complaint is a statement of opinion and not a [sic] an allegation of fact or is a legal conclusion and not an allegation of fact is a denial if that portion of the Second Amended Complaint is an allegation of fact rather than a statement of opinion

or a legal conclusion. Failure to dispute a legal conclusion is not agreement with the legal conclusion.

\* \* \*

**IV. DEFENDANTS' ANSWER TO PARAGRAPHS LABELED  
"IDENTIFICATION OF DEFENDANTS"**

\* \* \*

50.

Paragraphs 71 and 72 of the Second Amended Complaint state:

71. Tom Luna is the Superintendent of Public Instruction, the Chief Executive Officer of the State Department of Education, and the Executive Secretary of the Board.

72. Mr. Luna is sued individually and in his official capacities as Superintendent, Chief Executive Officer, and as Executive Secretary.

Defendants admit Paragraphs 71 and 72.

51.

Paragraph 73 of the Second Amended Complaint states:

73. [a] In these positions, Mr. Luna is responsible for adopting rules and regulations that govern all Idaho public schools, including the Idaho Charter School system. [b] He is responsible for executing and enforcing the policies, procedures, and duties authorized by applicable state and federal statutes

and the policies and procedures of the Board for all the elementary and secondary schools in Idaho. [c] He is responsible for carrying out and enforcing the policies, procedures and duties authorized by law, including the Policy challenged herein.

Defendants deny sentence [a] of Paragraph 73 and allege that the rulemaking power is generally in the Board, not in the Superintendent, and that the administrative rules contained in IDAPA 08 regarding Idaho public schools, including Idaho public charter schools, were promulgated by the Board pursuant to its rulemaking authority. Defendants deny sentence [b] of Paragraph 73 but admit that the Superintendent is responsible for executing and enforcing *some* State and Federal policies for elementary and secondary schools in Idaho, including public charter schools. Defendants deny sentence [c] of Paragraph 73 to the extent that [sic] implies that the Superintendent is responsible for carrying out and enforcing for public charter schools the same policies, procedures and duties authorized by law that he carries out or enforces for public schools and further deny that the Superintendent is responsible for enforcing Idaho Constitution, Article IX, § 6, for public charter schools.

\* \* \*

**DEFENDANTS' ANSWER TO PARAGRAPHS LABELED  
"OTHER PUBLIC SCHOOLS AND THE USE OF  
RELIGIOUS DOCUMENTS AND TEXT"**

\* \* \*

78.

Paragraph 107 of the Second Amended Complaint states: "107. So too has Defendant Luna stated his position that it is permissible to objectively teach utilizing religious texts, such as the Bible, in public schools." Defendants admit Paragraph 107 to the extent that Superintendent Luna has expressed such an opinion and allege that Superintendent Luna has stated that such use should be a matter decided on the local level and that the State should neither prohibit nor require such use and that Superintendent Luna recognizes that it may be necessary to amend the Idaho Constitution to do [sic] give school districts that flexibility.

\* \* \*

**PRAYER FOR RELIEF**

Wherefore, Defendants respectfully pray for judgment as follows:

A. That the Court deny all legal and equitable relief requested by Plaintiffs under Federal law and enter judgment for every Defendant under Federal Law;

B. That the Court abstain from reaching and decline to exercise any supplemental jurisdiction over issues of State law, but if it reaches any issues of



State law, that the Court deny all legal and equitable relief requested by Plaintiffs under State law and enter judgment for every Defendant under State law;

C. That the Court award Defendants their costs and reasonable attorneys fees under 42 U.S.C. § 1988 and/or Federal Rule of Civil Procedure 11.

DATED this 8th day of January, 2010.

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL

By /s/ Michael S. Gilmore  
MICHAEL S. GILMORE  
Deputy Attorney General

[Certificate Of Service Omitted In Printing]

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**Cross References Between Ninth Circuit  
Excerpts of Record (ER) and  
Supplement Excerpts of Record (SER)  
and District of Idaho ECF Filings**

The District of Idaho's PACER Website is:

<https://ecf.idd.uscourts.gov/cgi-bin/login.pl>

The web address for this case is:

[https://ecf.idd.uscourts.gov/cgi-bin/  
DktRpt.pl?120759021515484-L\\_942\\_0-1](https://ecf.idd.uscourts.gov/cgi-bin/DktRpt.pl?120759021515484-L_942_0-1)

Alternatively, it may be accessed by  
entering the case number: 09-00427.

The Ninth Circuit's PACER Website is:

[https://ecf.ca9.uscourts.gov/cmecf/servlet/  
TransportRoom?servlet=CaseSearch.jsp](https://ecf.ca9.uscourts.gov/cmecf/servlet/TransportRoom?servlet=CaseSearch.jsp)

The web address for this case is:

[https://ecf.ca9.uscourts.gov/cmecf/servlet/Transport  
Room?servlet=CaseQuery.jsp&cnthd=310878300  
&caseid=207451&csnum1=10-35542&  
shorttitle=Nampa+Classical+Academy%2C+  
et+al+v.+William+Goesling%2C+et+al](https://ecf.ca9.uscourts.gov/cmecf/servlet/TransportRoom?servlet=CaseQuery.jsp&cnthd=310878300&caseid=207451&csnum1=10-35542&shorttitle=Nampa+Classical+Academy%2C+et+al+v.+William+Goesling%2C+et+al)

Cross References to ERs and SERs in  
Petition for Writ of Certiorari by Petition Page,  
ER or SER Reference, and District Court  
Docket and Page Number

| <b>Cert.<br/>Pet.<br/>Page</b> | <b>ER or SER<br/>Reference</b> | <b>District Court<br/>Documents</b> |
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| 4                              | ER 218-33                      | Dkt. 26-8, pp. 19-38                |
| 4                              | ER 154                         | Dkt. 26-5, p. 13                    |

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| 4 | ER 162, 167                     | Dkt. 26-5, pp. 21, 26                |
| 6 | ER 206                          | Dkt. 26-8, p. 3                      |
| 6 | ER 212                          | Dkt. 26-8, p. 9                      |
| 7 | ER 218-20                       | Dkt. 26-8, pp. 19-21                 |
| 7 | ER 223-26, 230                  | Dkt. 26-8, pp. 24-27, 33             |
| 7 | ER 127                          | Dkt. 26-3, p. 4                      |
| 7 | ER 235-36, 239                  | Dkt. 26-9, pp. 3-4, 9                |
| 7 | ER 830                          | Dkt. 21, p. 17                       |
| 7 | ER 290-92                       | Dkt. 26-10, pp. 6-8                  |
| 7 | ER 452-59                       | Dkt. 27-6, pp. 6-8, 10-14            |
| 7 | ER 462, 464-70                  | Dkt. 27-6, pp. 22, 27-30, 35-37      |
| 7 | ER 478                          | Dkt. 27-6, p. 49                     |
| 7 | ER 128                          | Dkt. 26-3, p. 5                      |
| 8 | ER 297                          | Dkt. 26-11, p. 3                     |
| 8 | ER 342-343                      | Dkt. 27-1, pp. 3-4                   |
| 8 | ER 346-347                      | Dkt. 27-1, pp. 7-8                   |
| 8 | ER 356                          | Dkt. 28-1, p. 20                     |
| 8 | ER 830                          | Dkt. 21, p. 17                       |
| 8 | ER 354                          | Dkt. 27-1, p. 18                     |
| 8 | ER 357-362                      | Dkt. 27-2, pp. 1-6                   |
| 8 | ER 365, 370, 373, 376, 388, 393 | Dkt. 27-2, pp. 9, 14, 17, 21, 33, 38 |
| 8 | ER 400, 413                     | Dkt. 27-3, pp. 6, 19                 |
| 8 | ER 430, 435                     | Dkt. 2-4, pp. 14, 19                 |
| 8 | ER 491-493                      | Dkt. 27-7, pp. 11-13                 |
| 8 | ER 830                          | Dkt. 21, p. 17                       |

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| 8                      | ER 173-177                 | Dkt. 26-6, pp. 2-6                                |
| 8                      | ER 207                     | Dkt. 26-8, p. 4                                   |
| 9                      | ER 218-33                  | Dkt. 26-8, pp. 15-16, 19-27. 29-30, 32-34, 36, 38 |
| 9                      | ER 634                     | Dkt. 28-4, p. 47                                  |
| 9                      | ER 101                     | Dkt. 46-1, p. 2                                   |
| 9                      | ER 857                     | Dkt. 12-3, p. 6.                                  |
| 10                     | ER 207                     | Dkt. 26-8, p. 4                                   |
| 12, n.9                | ER 214                     | Dkt. 26-8, p. 12                                  |
| 16                     | ER 205                     | Dkt. 26-8, p. 2                                   |
| 16                     | ER 105                     | Dkt. 46-2, p. 4                                   |
| 19                     | ER 105                     | Dkt. 46-2, p. 4                                   |
| 19                     | ER 205                     | Dkt. 26-8, p. 2                                   |
| <b>Cert. Pet. Page</b> | <b>ER or SER Reference</b> | <b>Ninth Circuit Documents</b>                    |
| 12, n.9                | ER 46-47                   | Dkt. 9-2, pp. 8-9                                 |
| 12, n.9                | ER 48-49                   | Dkt. 9-2, pp. 10-11                               |
| 12                     | ER 94, 97-98               | Dkt. 9-19, p. 2                                   |
| 12                     | ER 98                      | Dkt. 8-6, pp. 1-2                                 |
| 12, n.9                | ER 41-42, 52               | Dkt. 9-2, pp. 3-4                                 |
| 12, n.9                | ER 52                      | Dkt. 9-3, p. 2                                    |
| 12, n.9                | ER 41                      | Dkt. 9-2, p. 3                                    |
| 12, n.9                | ER 52-53                   | Dkt. 9-3, pp. 2-3                                 |
| 12, n.9                | ER 57-58                   | Dkt. 9-4, pp. 3-4                                 |
| 12, n.9                | ER 61-62                   | Dkt. 9-5, pp. 2-4                                 |

Cross References to ERs and SERs in  
 Opposition to Petition for Writ of Certiorari  
 by Opposition Page, ER or SER Reference,  
 and District Court Docket and Page Number

| <b>Cert.<br/>Opp.<br/>Page</b> | <b>ER or SER<br/>Reference</b>     | <b>District Court<br/>Documents</b>         |
|--------------------------------|------------------------------------|---|
| 7                              | ER 206                             | Dkt. 26-8, p. 3                             |
| 7                              | ER 212                             | Dkt. 26-8, p. 9                             |
| 7                              | ER 302                             | Dkt. 26-11, p. 8                            |
| 8                              | ER 234-236                         | Dkt. 26-9, pp. 2-4                          |
| 8                              | ER 238-239                         | Dkt. 26-9, pp. 6-7                          |
| 8                              | ER 288-293                         | Dkt. 26-10, pp. 5-10                        |
| 8                              | ER 452-459                         | Dkt. 27-6, pp. 6-8, 10-14                   |
| 8                              | ER 462, 464-70                     | Dkt. 27-6, pp. 22, 27-30,<br>35-37          |
| 8                              | ER 478-481                         | Dkt. 27-6, pp. 49-50, 52-53                 |
| 8                              | SER 132                            | Dkt. 26-2, p. 4                             |
| 8                              | ER 305-315                         | Dkt. 26-11, pp. 11-21                       |
| 8                              | SER 136-154                        | Dkt. 27-5, pp. 16-27;<br>Dkt. 27-7, pp. 1-7 |
| 8                              | ER 297                             | Dkt.  |
| 8                              | SER 40                             | Dkt. 35-2, p. 3                             |
| 8                              | SER 112-114                        | Dkt. 35-9, pp. 1-3                          |
| 8                              | ER 354, 356                        | Dkt. 27-1, pp. 18, 20                       |
| 9                              | ER 357-362                         | Dkt. 27-2, pp. 1-6                          |
| 9                              | ER 365, 370, 373,<br>376, 388, 393 | Dkt. 27-2, pp. 9, 14, 17,<br>21, 33, 38     |

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| 9        | ER 400, 413 | Dkt. 27-3, pp. 6, 19                                 |
| 9        | ER 430, 435 | Dkt. 2-4, pp. 14, 19                                 |
| 9        | ER 491-493  | Dkt. 27-7, pp. 11-13                                 |
| 9        | ER 830      | Dkt. 21, p. 17                                       |
| 9        | ER 143-172  | Dkt. 26-4, pp. 3-7; Dkt. 26-6, pp. 1-2, 10-27, 60-63 |
| 9        | ER 156-168  | Dkt. 26-6, pp. 15-27                                 |
| 9, n. 5  | ER 854      | Dkt. 12-3, p. 2                                      |
| 10       | ER 207      | Dkt. 26-8, p. 4                                      |
| 10       | ER 634      | Dkt. 28-4, p. 47                                     |
| 10       | ER 101      | Dkt. 46-1, p. 2                                      |
| 10       | ER 857      | Dkt. 12-3, p. 6.                                     |
| 11       | ER 207      | Dkt. 26-8, p. 4                                      |
| 12, n. 6 | SER 193     | Dkt. 6, p. 2   |
| 12, n. 6 | ER 28-33    | Dkt. 13, pp. 1-6                                     |

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