

CASE NO. 04-15032

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONAS EKLUND, et al.,

Plaintiffs/Appellants,

vs.

BYRON UNION SCHOOL DISTRICT, et al.,

Defendants/Appellees.

APPEAL FROM the United States District Court for the Northern District of
California - Hon. Phyllis J. Hamilton, Presiding
Civil No. C-02-3004-PJH

**AMICI CURIAE BRIEF OF CALIFORNIA SCHOOL BOARDS
ASSOCIATION and NATIONAL SCHOOL BOARDS ASSOCIATION IN
SUPPORT OF DEFENDANTS/APPELLEES**

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[FILED WITH CONSENT OF ALL PARTIES]

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INTERESTS OF AMICI

The California School Boards Association (CSBA) is a California nonprofit corporation duly formed and validly existing under the laws of the State of California. CSBA is a member-driven association composed of the governing boards of over 980 K-12 school districts and county boards of education throughout California, including the Contra Costa County Office of Education, whose territory includes the Byron Union School District. CSBA's Education Legal Alliance (Alliance) is composed of over 790 CSBA members dedicated to addressing public education legal issues of statewide concern to school districts and county offices of education. The purpose of the Alliance, among other things, is to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy decisions for their local educational agencies. The Alliance's activities have included, as in this appeal, joining in litigation where the interests of public education are at stake.

The National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards, including CSBA. NSBA believes local school boards are the ultimate expression of grassroots democracy. NSBA assists each school board – acting on behalf of and in close concert with the people of its community – to shape the future of education in its community, to establish a structure and environment that allows all students to reach their potential, to provide accountability for the community on

performance in the schools, and to serve as the key community advocate for children and their public schools. Founded in 1940, NSBA now represents 95,000 local school board members. These local officials govern 14,890 local school districts serving more than 47 million public school students.

PRELIMINARY STATEMENT

As this Court determines how to apply a Constitutional standard to teaching about religion in the classroom, *Amici Curiae* respectfully request that the Court be mindful of the great importance of local, expert control of curriculum content and instructional methodology, the need for students to learn about cultural and religious traditions around the world as part of a complete education, and the negative impact upon school districts should this Court reverse the District Court and allow individual lawsuits over curriculum and instructional technique.

The Supreme Court has cautioned that courts lack the “specialized knowledge and experience” necessary to resolve “persistent and difficult questions of educational policy.”¹ The Court stated, “the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.”² In California, the California Department of Education has directed that school districts teach seventh grade

¹ San Antonio Independent School District v. Rodriguez, 411 U.S.1, 42 (1973).

² Rodriguez, 411 U.S. at 43.

students about Islam, the teachings of Muhammad, and the significance of key Islamic texts, including their influence on Muslims' daily life.³

The California Department of Education also emphasizes differentiated instruction that “presents “[c]urricular content . . . in multiple ways—deductively, inductively, aurally, orally, visually, or by ‘hands-on’ doing.”⁴ Such hands-on activities, games, and simulations are considered best practices in education and serve the pedagogical purpose of motivating students to learn⁵. The Court should not interfere with these sound instructional methods. As stated by the Supreme Court, “[c]ourts must be careful to avoid imposing their view of preferable educational methods upon the States.”⁶

This Court has previously addressed these issues in a very similar case. In Brown v. Woodland Joint Unified School Dist., 27 F.3d 1373 (9th Cir. 1994), this Court found that teachers may use accepted instructional methods, even in the context of discussion about religion. In finding that participatory “fantasy activities” and student-developed

³ Standard 7.2, History-Social Science Content Standards for California Public Schools, Kindergarten Through Grade Twelve, California State Board of Education (1998), ER 512.

⁴ Taking Center Stage: A Commitment to Standards-based Education for California Middle Grades Students, Executive Summary, California Department of Education, School Improvement Division, Middle and High School Improvement, p.2., ER 1024.

⁵ ER1011-12(¶¶4-5).

⁶ Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207-208 (1982).

chants in teaching about witchcraft were not contrary to the Establishment Clause, this

Court stated:

Some student participatory activity involving school-sponsored ritual may be permissible even under [the Establishment Clause] where the activity is used for secular pedagogical purposes. For example, having children act out a ceremonial American Indian dance for the purpose of exploring and learning about American Indian culture may be permissible even if the dance was religious ritual. Similarly, a reenactment of the Last Supper or a Passover dinner might be permissible if presented for historical or cultural purposes.⁷

While the Establishment Clause limits curriculum and instructional methods, well-established jurisprudence supports instruction about religion when, in context, the instruction is part of a secular curriculum and does not therefore appear to endorse a particular religion. Applied to the present case, the challenged curriculum constitutes only a very small part of an otherwise clearly nonreligious program of the study of world history, including study of other religions.⁸ The context also includes a clear record that the instruction at issue did not occur in a sacred or worshipful manner, but was done for the clear secular goal of teaching students about Islam in an engaging manner⁹. When combined with the physical context of instruction in a clearly non-Muslim community from a non-Muslim teacher, teaching vital lessons about world religions in the wake of the

⁷ Brown, 27 F.3d at 1380 n.6.

⁸ ER 1332, 1354, 1359-65.

⁹ ER 440-41(¶¶9, 11), 580(¶6), 617-18(¶20), 626(¶54).

September 11 terrorist attacks¹⁰, it does not appear that the Byron Union School District endorsed the Muslim faith above others.

Without careful limits on any holding, imposition of a strict Constitutional standard would create an incentive for parents to attempt to impose their personal choices for curriculum and instructional techniques in court, resulting in removal of important decisions regarding curriculum and instructional techniques from local experts, placing those decisions in the hands of judges far removed from the rigors of classroom teaching.

School districts instead request reaffirmation of their authority to make choices within clear constitutional boundaries, with practical guidance regarding application of these boundaries to the classroom, and reaffirmation of school district authority to develop curriculum and instructional methodologies neutrally without regard to subject. Reaffirmation of these fundamental principles will reduce the likelihood of future litigation over a variety of curricular choices and allow Districts to teach vital subjects without fear of lawsuit.

¹⁰ER 492, 496-497, 490, 592, 610, 616, 634.

ARGUMENT

1. The Court Should Defer to State and Local Curricular Standards

A. California Has Directed School Districts to Teach About Islamic Beliefs, and Byron Union School District Adopted Local Standards to Fulfill That Mandate

In October 1998, the California State Board of Education adopted history and social science content standards for all California public school students in kindergarten through grade twelve.¹¹ These standards “reflect guidance and input from countless members of the California teaching community and other citizens who attended the meetings of the State Board and Standards Commission,” including “parents, teachers, administrators, and business and community leaders [who] helped define key issues.”¹² During development, California’s standards were reviewed by eminent historians, geographers, economists, and political scientists to “strengthen the[ir] rigor and quality.”¹³

By adopting these standards, California has “stat[ed]—*explicitly*—the content that students need to acquire at each grade level.”¹⁴ While the standards “emphasize

¹¹ ER 503-16.

¹² ER 508.

¹³ ER 509.

¹⁴ ER 507 (emphasis added).

Western civilization as the source of American political institutions, laws and ideology, they also expect students to analyze the changing political relationships within and among other countries and regions of the world, both throughout history and within the context of contemporary global interdependence.”¹⁵

For seventh grade public school students in California, such as those attending Byron Union School District, the standards encompass learning “about . . . the dogma of belief,” including the geographic, political, economic, *religious*, and social structures of Islam.¹⁶ In relevant part, California’s content standards conclusively direct that seventh grade students shall “trace the origins of Islam and the life and teachings of Muhammad,” as well as “explain the significance of the Qur’an as the primary sources of Islamic beliefs, practice and law, and their influence on Muslims’ daily life.”¹⁷

While school district teachers are required to teach specific content regarding Islamic history, culture, and religion pursuant to California’s content standards, California’s Education Code permits local school district governing boards to adopt

¹⁵ ER 508.

¹⁶ ER 508 (emphasis added).

¹⁷ ER 512.

supplemental instructional materials for their students.¹⁸ As mandated by California’s Legislature, locally adopted materials must “accurately portray the cultural and racial diversity of our society . . . ,” which would include Islam and the Muslim peoples.¹⁹

In accordance with the local curricular standards permitted under California law, and as mandated by the Legislature, the Byron Union School District approved local rules and standards which granted the District’s teachers individual authority to present certain supplemental instructional materials to best meet their students’ learning needs.²⁰

B. The Court Should Not Regulate State and Local Control of Curriculum

Through adoption of content standards, the California State Board of Education maintained California’s tradition of “respect for local control of schools,” allowing school districts to “develop specific curricular and instructional strategies that best deliver the content to their students.”²¹ This Court should do the same.

As so clearly stated by Justice Brennan, writing in concurrence with the majority in Abington School Dist. of Abington Township v. Schempp, 374 U.S. 203, 300

¹⁸ See, e.g., Cal. Ed. Code, § 60040.

¹⁹ Id.

²⁰ ER 495, 2533.

²¹ ER 507.

(1963), courts should refrain from announcing curricular standards for public schools.

Justice Brennan articulated this view as follows:

The holding of the Court today plainly does not foreclose teaching about . . . the differences between religious sects in classes of literature or history. Indeed, . . . it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion. To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our nation's public schools. They are experts in such matters, and we are not. We should heed Mr. Justice Jackson's caveat that any attempt by this Court to announce curricular standards would be "to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes."²²

Federal Circuit Courts follow the approach that school districts, not courts, retain discretion to adopt instructional curriculum. This approach is evidenced in the decision rendered by the Seventh Circuit in Fleischfresser et al. v. Directors of School Dist. 200, 15 F.3d 680 (7th Cir. 1994), which determined that a school curriculum, which included "make-believe," "witches," and "goblins" in a few stories, did not violate the Establishment Clause. In reaching its decision, the Fleischfresser Court averred that "[s]chool boards have broad discretion in determining curricula in their schools. Surely,

²² Abington, 374 U.S. at 300, *quoting* Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 237 (1948).

the mere exercise of this discretion cannot constitute excessive entanglement with religion.”²³

Further, in more specialized matters, such as the instruction of special education students, the Supreme Court has directly advised courts to avoid directing educational policy. In Rowley, the Supreme Court proclaimed that courts are not free “to substitute their own notions of sound educational policy for those of the school authorities which they review.”²⁴ The Court confirmed the States’ traditional role “in the formulation and execution of educational policy,” averring that, historically, “the States have had the primary responsibility for the education of children at the elementary and secondary level.”²⁵

²³ Fleischfresser, 15 F.3d at 689.

²⁴ Rowley, 458 U.S. at 206.

²⁵ Id. at 208, n.30; see also Lachman v. Illinois State Board of Education (7th Cir. 1988) 852 F.2d 290, 297 (deferring to local discretion regarding instructional methodology in special education case); Epperson v. Arkansas (1968) 393 U.S. 97, 104-108 (“By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values”).

2. **The Court Should Defer to State and Local Choice of Instructional Methodologies**

A. Interactive Techniques Are Sound Instructional Methods

Hands-on activities, games, and simulations are considered best practices in education and serve the pedagogical purpose of motivating students to learn.²⁶ Indeed, the California Department of Education recommends differentiated “hands on” instruction.²⁷ The Department of Education’s emphasis on differentiated instruction does not distinguish between subjects or provide separate instructional methodologies for use with controversial subjects.

B. Courts Should Defer to the Expertise of Professional Educators in the Choice of Instructional Methods

In Brown, this Court found that teachers may use accepted instructional methods, even in the context of discussion about religion. In finding that participatory “fantasy activities” and student-developed chants in teaching about witchcraft were not contrary to the Establishment Clause, this Court stated:

Some student participatory activity involving school-sponsored ritual may be permissible even under [the Establishment Clause] where the activity is used for secular pedagogical purposes. For example, having children act out a ceremonial American Indian dance for the purpose of exploring and learning about American Indian culture may be permissible even if the dance was religious ritual. Similarly,

²⁶ ER1011-12(¶¶4-5).

²⁷ ER 1024-25.

a reenactment of the Last Supper or a Passover dinner might be permissible if presented for historical or cultural purposes.²⁸

Under Brown, use of hands-on activities, games, and simulations as instructional methods to further the secular, pedagogical purpose of teaching students about Islam in a history class does not run afoul of the Establishment Clause.²⁹

3. The Court Should Not Require Separate Instructional Methodologies For Teaching About Religion

Requiring separate methodologies for instruction about religion, when those methodologies are widely used in other areas of the curriculum, would itself be unconstitutional violation of the requirement of neutrality towards religion. As stated by the Supreme Court:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of nonreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the

²⁸ Brown, 27 F.3d at 1380 n.6.

²⁹ See also Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 226 (1985) (federal courts are not well suited “to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions”); Immediato v. Rye Neck School Dist., 73 F.3d 454, 462 (2d Cir. 1996) (“The District was also reasonable in concluding that [the] goals [of its community service program] were best achieved by having students actually perform service for a limited amount of time, and discuss that service, as opposed to merely reading about service opportunities.”); Fleischfresser, 15 F.3d at 688 (“public school curricula traditionally rely on fantasy and “make-believe” to hold a student’s attention and to develop reading skills and to instill a sense of creativity and imagination”).

militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.³⁰

The Court may not avoid the mandate identified in Epperson by ordering school districts to prohibit particular methods for teaching about religion in public schools, but permit those same methods for teaching about nonreligious topics. Such interference by the Court would conflict with a public school's obligation to maintain the neutrality required between religion and non-religion. Advancing a differential standard for religious versus nonreligious subject matter and works would also prevent students from receiving a complete education.

For example, in Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir. 1980), the Eighth Circuit Court of Appeals addressed the prohibition against the use of a different educational methodology for religious works. In Florey, the Court undertook an examination of, among other items, a school district's rule permitting the presentation of music, art, literature and drama with a religious theme or basis as a traditional part of the cultural and religious heritage of a particular holiday. When considering the articulated rule, the Eighth Circuit acknowledged that "(t)o allow students only to study and not to perform (religious art, literature and music when) such works have developed an

³⁰ Epperson et al. v. Arkansas , 393 U.S. 97, 103-104 (1968).

independent secular and artistic significance would give students a truncated view of our culture.”³¹

4. Educational Policy Requires, and the Law Permits, Teaching About Religion

A. Teaching About Religion is Vital to a Complete Education

The California Department of Education has determined that teaching about religion is vital to the education of its students, incorporating this imperative into its curricular goals as set forth above. In a statement regarding religion in the classroom, the Department of Education declared:

To seek to understand ourselves, others, and the world is an educational imperative. Religion has been a decisive factor in the development of civilizations. Students should comprehend the religious ideas that have helped to shape Western and Eastern cultures and civilizations; they should become aware of the influence of religion on lifestyles (work, prayer, devotion, ritual, worship, meditation) and on the development of ideas.

The teacher should assist students to understand religious views that can be quite unfamiliar in the United States. Care should be taken, however, to avoid emphasizing unusual religions or religious practices so that respect for religion will not be undermined. Of importance in Western religious thought and practice are the various formative periods of Western civilization. To become educated in Western religious thought and practice, students should be exposed to the major religious heritages

³¹ Florey, 619 F.2d at 1316.

of Judaism, Christianity, and Islam. Similarly, students should study the major Asian religions.³²

Courts around the country have repeatedly supported these ideals. As stated by the Supreme Court, “[t]he history of man is inseparable from the history of religion.”³³ This statement from the Supreme Court of the United States conclusively acknowledges the intimate connection between people and religion throughout history. The study of one is not divisible from the study of the other.

As Supreme Court Justice Clark expressed when writing for the majority in Abington v. Schempp, 374 U.S. 203, 225 (1963), 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 . . . Nothing that we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment.”

Further, United States Circuit Courts have adopted the Supreme Court’s view that teaching about religion and its relationship to civilizations is a vital component of

³² Handbook on the Rights and Responsibilities of School Personnel and Students in the Areas of Providing Moral, Civic and Ethical Education, Teaching About Religion, Promoting Responsible Attitudes and Behaviors and Preventing and Responding to Hate Violence, California Department of Education, 1994.

³³ Engel v. Vitale, 370 U.S. 421, 434 (1962).

a public school student's education. In Florey, the Eighth Circuit Court of Appeal affirmed a decision allowing a school board to adopt rules permitting observance of holidays with both a religious and a secular basis. In so doing, the court attested that "it is unquestioned that public school students may be taught about customs and cultural heritage of the United States and other countries," allowing "the presentation of material that, although of religious origin, has taken on an independent meaning."³⁴

B. The Establishment Clause Permits Teaching About Religion

In determining whether an action violates the Establishment Clause, the proper question is whether the objective observer, with knowledge of the context of the issue, would perceive the acts in question as state endorsement of religion.³⁵ In answering this question, it is a constant principle that any challenged practice must be considered in its full context. As the Supreme Court noted in Lynch v. Donnelly, 465 U.S. 668 (1984), to "[f]ocus exclusively on the religious component of any activity would

³⁴ Florey, 619 F.2d at 1316.

³⁵ See Sante Fe v. Doe Independent School District, 530 U.S. 290, 308 (2000) (school sanctioned student prayer at football game over school loudspeakers violated Establishment clause); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (court recognized that a religious symbol sends a different message when it is included as part of a general holiday display than when it is erected by itself in the main public area of a courthouse).

inevitably lead to its invalidation under the Establishment Clause.”³⁶ Similarly, the Supreme Court has held that one must “examine the history, language, and administration” of a statute or practice as a whole “to determine whether it operates as an endorsement of religion.”³⁷ As such, the entirety of a challenged government program or practice, the totality of the circumstances, is the key inquiry in determining whether an objective observer would find an endorsement of religion.³⁸

The Supreme Court has made it clear that a school’s curriculum is the type of program that must be reviewed as a whole to provide the context for any one item taught. In Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam), while finding that a Kentucky statute that required the posting of the Ten Commandments on schoolroom walls violated the Establishment Clause, the Court stated that “[t]his is not a case in which the Ten Commandments are integrated into the school curriculum, where the

³⁶ Lynch, 465 U.S. at 680.

³⁷ Wallace v. Jaffree, 472 U.S. 38, 74 (1985) (O’Connor, J., concurring); see also Pinette, 515 U.S. at 780.

³⁸ See Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 393-95 (1993) (use of a public school facility after school hours by a group that intended to present religiously oriented programs must be considered in the context of the use of the facility by a wide range of groups); Zobrest v. Catalina Foothills School District, 509 U.S. 1, 8-11 (1993) (provision of an interpreter to a deaf student who attended a religious school considered only within the context of the program as a whole, which provided many interpreters to many schools).

Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.” Courts of appeal have also recognized the necessity of reviewing curriculum in the larger context, including the totality of the circumstances. In Fleischfresser, the court held that, “in evaluating the primary effect of the use of the [reading] series, we must focus on the entire series, not simply the passages the parents find offensive because to focus exclusively on the religious component of any activity would inevitably lead to its invalidation.”³⁹

This Court has applied these principles to curricular and instructional issues in Brown, which clearly establish that teaching about Islam is not an “endorsement” of the religion.⁴⁰ In Brown, plaintiffs raised an Establishment Clause challenge to the use of an elementary school reading text that included suggestions for various role-playing activities. This Court held that “a practice’s mere consistency with or coincidental resemblance to a religious practice does not have the primary effect of endorsing religion.”⁴¹ The Court’s

³⁹ See also Bauchman v. West High Sch., 132 F.3d 542, 554 (10th Cir. 1997) (concluding that choir program's use of religious songs did not violate the Establishment Clause; one cannot focus “solely on the religious component of [a] classroom activity”); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406-08 (5th Cir. 1995) (examining school context and concluding that the use of religious music in a school choral program was constitutional but that prayer before a basketball game was unconstitutional); Edwards v. Aguillard, 482 U.S. 578, 595 (1987) (“enhancing the effectiveness of science instruction” would constitute a valid secular purpose for purposes of establishment clause analysis).

⁴⁰ Brown, 27 F.3d at 1378-83.

⁴¹ Id. at 1380.

non-endorsement conclusion was also driven by the fact that the challenged selections “are only a very small part of an otherwise clearly nonreligious program.”⁴²

In this case, as in Brown, the challenged curriculum constitutes only a very small part of an otherwise clearly nonreligious program of the study of world history. The students studied Christianity, including church influence on society, in addition to Islam.⁴³

Students also made monuments regarding aspects of daily life, including religion, in one historical period, and one of the students who testified in this case made a monument about prayer.⁴⁴

The context also includes a clear record that the instruction at issue did not occur in a sacred or worshipful manner. For example, the record is clear that in using modified portions of the Interact publication, the curricular purpose was to further the entirely secular goal of teaching students about Islam in an engaging manner.⁴⁵ Moreover, the record clearly indicates that no students engaged in any activity with devotional intent, as

⁴² Id. at 1381.

⁴³ ER 1332, 1354, 1359-65. Such practices are consistent with California law. California Education Code section 51511 provides: “Nothing in this code shall be construed to prevent, or exclude from the public schools, references to religion or references to or the use of religious literature, art, or music or other things having a religious significance when such references or uses do not constitute instruction in religious principles or aid to any religious sect, church, creed, or sectarian purpose and when such references or uses are incidental to or illustrative of matters properly included in the course of study.”

⁴⁴ ER 454-55, 1480.

⁴⁵ ER580(¶6), 617-18(¶20), 626(¶54).

the simulations at issue were clearly presented as a tool for learning about what Muslims believe.⁴⁶

It is worth noting that the context of the community, and the timing of the teaching, indicates a secular, not a religious, motive in the instruction. The community at issue is clearly not a Muslim community, nor was the teacher involved a Muslim teacher.⁴⁷ In this non-Muslim community, the issue of Islam was addressed in the context of the September 11 terrorist attacks, and specifically during the same time that many students used derogatory terms to describe Muslims.⁴⁸ Under these circumstances, given the state curricular guidelines, the clear need to use interactive techniques in teaching, and the related contextual facts about the community and the timing of the instruction, there can be little doubt that the school would not be seen by an objective observer to be endorsing Islam.⁴⁹

C. The Court Should Give Deference to a School District's Asserted Secular Purpose

Given these legitimate pedagogical reasons for using the challenged instructional practices like games and simulations, case law is clear that courts should give deference to

⁴⁶ ER440-41(¶¶9, 11).

⁴⁷ ER 492, 496-497, 490, 592, 610.

⁴⁸ ER 616, 634.

⁴⁹ See Duncanville, 70 F.3d at 407 (“Given the dominance of religious music in this field, [the District] can hardly be presumed to be advancing or endorsing religion by allowing its choirs to sing a religious theme song”).

the asserted secular purpose and find no Establishment Clause violation. As stated by the Supreme Court in Santa Fe, “[w]hen a governmental entity professes a secular purpose for an arguably religious policy, the government’s characterization is, of course, entitled to some deference.”⁵⁰

5. The Court Should Be Mindful of the Potential Chilling Effect of Reversal Upon Teaching Vital Curricular Subjects

A. Reversing The District Court Could Open the Floodgates to Litigation Over Curricular and Instructional Issues

Plaintiffs have argued that the educators in this case could have relied solely on the textbook and that the methods and content that the school district chose should be found unconstitutional. The constitutional question, however, is not whether a school

⁵⁰ Santa Fe, 530 U.S. at 308; See also Chaudhuri v. Tennessee, 130 F.3d 232, 236 (6th Cir. 1997) (“[t]he government’s assertion of a legitimate secular purpose is entitled to deference”); United States v. Allen, 760 F.2d 447, 450 (2d Cir. 1985) (“anything ‘arguably non-religious’ should not be considered religious in applying the Establishment Clause”).

district could achieve its civic education goals with alternative approaches.⁵¹ Instead, “[t]o what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation’s public schools.”⁵² So long as constitutional restrictions are honored, “it is not the business of this Court to gainsay the judgments of experts on matters of pedagogy.”⁵³

Although this case is ostensibly about a single school class teaching about Islam in conformance with state directed curricular standards, supplemental instructional materials, and well established teaching methodologies, its implications are far-reaching. This challenge is only one in a long line of challenges brought by parents attacking school decisions regarding educational activities. Litigation has been steady during the past two decades, with challenges to programs, teaching methods and curricular materials used in civic education, history, language arts, literature, biology, health and sex education.⁵⁴

⁵¹ Brown, 27 F.3d at 1382 (“the School District’s decision not to use alternative educational tools did not endorse [religion]”).

⁵² Abington, 374 U.S. at 300 (Brennan, J., concurring).

⁵³ Id. at 279.

⁵⁴ See, e.g., Leebaert ex. rel Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) (challenging health education program); PLANS, Inc. v. Sacramento City Unified Sch. Dist., 319 F.3d 504 (9th Cir. 2003) (challenging entire educational program); Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49 (2d Cir.), cert. denied, 534 U.S. 827 (2001) (challenging several school activities including Earth Day celebrations), the Drug Abuse Resistance Education (DARE) Program, and poetry); Brown v. Hot, Sexy & Safer Prods. Inc., 68 F.3d 525 (1st Cir. 1995) (objecting to AIDS and sex education program);

Several of these challenges were based on the parents' objection that the content of the program or activity conflicted with the parents' religious beliefs.⁵⁵ However, the authority to design curriculum necessarily requires that education officials must make "sensitive choices between subjects to be offered and competing areas of academic emphasis."⁵⁶ For this reason, courts faced with these challenges by and large have properly recognized that school districts must be free to make choices if they are to fulfill their function of educating large numbers of students from diverse backgrounds, and that parents do not have "a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject."⁵⁷

Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680 (7th Cir. 1994) (challenging elementary-reading program); Smith v. Board of Sch. Comm'rs, 827 F.2d 684 (11th Cir. 1987) (challenging history, home economics, and social studies textbooks); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (challenging reading textbooks for grades one through eight); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985) (challenging novel assigned in tenth grade English class).

⁵⁵ See, e.g., Fleischfresser, 15 F.3d at 683 (parents alleged that the reading selections indoctrinated their children "in values directly opposed" to their religious beliefs); Smith, 827 F.2d at 688 (parents alleged that textbooks promoted secular humanism and "unconstitutionally inhibited Christianity").

⁵⁶ Board of Educ. of Island Trees v. Pico, 457 U.S. 853, 882 n. 1 (1982) (Blackmun, J., concurring); see also McCullum v. Board of Educ., 333 U.S. 203, 235 (1948) (Jackson, J., concurring) ("If we are to eliminate everything that is objectionable to any [religious group] or inconsistent with any of their doctrines, we will leave public schools in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.")

⁵⁷ Swanson v. Guthrie Independent School Dist., 135 F.3d 694, 699 (10th Cir. 1998); See also Hooks v. Clark County School Dist., 228 F.3d 1036, 1042 (9th Cir. 2000) (no parental right to exempt student from required attendance to receive speech therapy

In the present case, the school district had a standard policy to allow parents to opt children out of instructional materials to which they object.⁵⁸ This opt-out option may be done without grade penalty.⁵⁹ While not mandated by law, this parental option is the appropriate solution to Appellant’s concerns, as it maintains sensitivity to individual religious concerns, but does not open a Pandora’s Box of lawsuits based upon individual parent choice of curriculum or instructional methodology. The correct result is to allow school districts wide latitude in curriculum and instructional methodology when, in context, there is no appearance of endorsement of religion.

B. School Districts Need Assurance That They Will Not Be Readily Subject to Litigation Every Time They Offer Lessons or Activities That Refer to or Teach About Religion

The decision below provides several layers of assurance to school districts and teachers that they may constitutionally build lessons that focus on historical events, world literature, world religions and world politics. The concern reaches beyond the study of social studies to all subject matters. Kindergarten teachers need assurance that they can tell their pupils why the Pilgrims left England and how “Thanksgiving” became a national holiday. Speech teachers need assurance that they can require memorization and

instruction); Sherman v. Community Consul. School Dist. 21 of Wheeling TP., 980 F.2d 437, 444-445 (7th Cir. 1992) (stating that schools are entitled to promote certain values “as worthy subjects of approval and adoption” and “to persuade even though they cannot compel,” even though some students may find the discourse offensive or immoral).

⁵⁸ER 161, 164-165, 178.

performance of great world speeches, such as the Gettysburg Address, that have religious content. Drama teachers need assurance that they can select a play for performance even if the play includes a scene with religious utterances, contents or reflections.⁶⁰ English teachers need assurance that class assignments can include studying poetry or novels with religious references and themes.

Well established jurisprudence supports these and similar activities when the activities are integrated into a secular curriculum. Such activities, including the study

⁵⁹ ER 155, 167-168.

⁶⁰ If Plaintiff/Appellants' are correct, then students in a drama program could object to having to participate in a play involving religious lines or acts that are part of the script. Similarly, students in choirs could bring suit for singing historical songs containing religious lyrics.

of world religions using creative, sound, interactive instructional techniques, do not conflict with basic constitutional values or constitute an endorsement of religion. School districts request reaffirmation of their authority to make choices within constitutional boundaries, with practical guidance regarding application of these boundaries to the classroom, and reaffirmation of school district authority to develop curriculum and instructional methodologies neutrally without regard to subject. Reaffirmation of this fundamental principle will reduce the likelihood of future litigation over a variety of curricular choices and allow Districts to teach vital subjects without fear of lawsuit.

CONCLUSION

The judgment of the district court should be affirmed.

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Respectfully submitted,

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