United States Court of Appeals

for the

Third Circuit

Case No. 20-3474

LIBBY HILSENRATH, On behalf of her minor child, C.H.,

Appellant,

– v. –

SCHOOL DISTRICT OF THE CHATHAMS; BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CHATHAMS; MICHAEL LASUSA, In his official capacity as the Superintendent of the School District of the Chathams; KAREN CHASE, In her official capacity as the Assistant Superintendent of Curriculum and

(*For Continuation of Caption See Inside Cover)*

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY IN CASE NO. 2:18-CV-00966, HONORABLE KEVIN MCNULTY, U.S. DISTRICT JUDGE

BRIEF ON BEHALF OF DEFENDANT-APPELLEE, BOARD OF EDUCATION FOR THE SCHOOL DISTRICT OF THE CHATHAMS

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Instruction at the School District of the Chathams; JILL GIHORSKI, In her official capacity as the Principal of Chatham Middle School; STEVEN MAHER, In his official capacity as the Supervisor of Social Studies for the School District of the Chathams; MEGAN KEOWN, In her official capacity as a Social Studies teacher for Chatham Middle School; CHRISTINE JAKOWSKI, In her official capacity as a Social Studies teacher for Chatham Middle School,

Defendants.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant/Appellee, Board of Education for the School District of the Chathams certifies that such disclosure is not required as it is not a non-governmental corporation but is the governing body for a public entity, namely the School District of the Chathams.

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the District Court err in granting Appellees' Motion with respect to Ms. Hilsenrath's Establishment Clause claim on behalf of her son C.H., a former 7th grade student at Chatham Middle School, and now an 11th grade student at Chatham High School, when there were included hyperlinks to videos involving religious beliefs and tenets of Islam in connection with studying about the region of the Middle East over the course of two class periods as part of a year-long world cultures and geography course? A21-A30 (Opinion).

2. Did the District Court abuse its discretion in dismissing Appellant's claims for permanent injunctive relief to prevent the Board, "their supervisors, employees, agents and successors in office from funding and implementing religious instruction that endorses Islam or favors Islam over other religions or non-religion, including the conversion and pillars videos," as set forth in the Wherefore Clause of the Complaint. A70 (Complaint) and A15 (Opinion).

STATEMENT OF THE CASE

In her opening brief, Ms. Hilsenrath relies solely on her own biased characterizations and unwarranted inferences about certain select portions contained within secondary sources that contained both religious and non-religious elements so as to urge this Court to find that the Board had endorsed and/or promoted Islam in C.H.'s 7th grade World Cultures and Geography course in violation of the

Establishment Clause. Despite admittedly having watched the videos of her own volition with C.H. at home on January 23, 2017 and lack of any evidence of an actual homework assignment directing C.H. to watch the videos that are at the crux of her appeal, Ms. Hilsenrath completely ignores the broader academic curriculum of the Board, and instead improperly focuses solely on certain hearsay statements in the subject videos that were intended to be utilized overall as a teaching tool for studying and learning about the culture and daily lives of a majority of people living in the Middle East in a vacuum. This myopic focus is contrary to the manner in which the United States Supreme Court has directed that Establishment Clause challenges in a school setting should be evaluated when balancing a student's right to be free from government establishment of religion and a school district's First Amendment right to academic freedom so as to properly educate students in matters of the world and become global 21st Century citizens. The District Court concluded as much, and this Court should do likewise. A23-27; A30 (Opinion).

STATEMENT OF FACTS

During the 2016-2017 school year (the "Relevant Period"), C.H. was a 7th grade middle school student at Chatham Middle School, a public school that is located within the School District of the Chathams, and operated by the Appellee, the Board of Education of the School District for the District of the Chathams ("Board"). A47-A53 (Complaint). During the relevant period, the Board had in place

a formal policy to address the study of religion for the "advancement of pupils' knowledge of society's cultural and religious heritage" if presented in a prudent and respectful manner, and to "inform pupils of many beliefs and customs stemming from religious, racial, ethnic, and cultural heritages" in instructional lessons that are "designed to broaden the pupil's understanding of the many cultures of the world." A167 (Policy 2270).

The Curriculum for the World Cultures and Geography ("WCG") class that is taught in 7th grade as part of the Board's Social Studies curriculum was developed by the Board in order to meet the "learning standards" required by the State of New Jersey for middle school students to acquire in its social studies curriculum. A180-A183 (Curriculum). Those State-mandated standards require middle school students to learn about various religions, including Islam, and to be able to compare and contrast those religions and make assessments therefrom, by 8th grade. A150 (State standards). In order to assure that Chatham Middle School children are intellectually and socially prepared to become self-reliant members of 21st Century society, the study of a different religion for its cultural and social impact was included as part of the broader units of certain regions in the WCG class. A183 (Curriculum). One of the units of the WCG class was entitled North Africa and the Middle East ("MENA" unit). A180 (Curriculum).

While the Board's teachers are required to teach specified content and objectives as set forth in the Curriculum for the WCG class, delivery of the content of the Board-approved Curriculum is an "art." A137 (Board Representative Transcript, P.10 L.24-P.12 L.10). As such, teachers have the academic freedom to prepare individual lessons and to use instructional methods and supplemental secondary source material, that, in the exercise of their professional judgment, they believe aligns with the State learning standards and the Board's Social Studies Curriculum, and that best meet their students' learning needs. A328-329 (Dr. LaSusa Transcript, P.27, L.15-25; A195 (Maher Transcript, P.36, L.3-8); and A171-A172 (Keown Transcript, P.22, L.2-5; P.23L.5-P.24 L.1; P.26; L.8-16). Formal review and approval of instructional materials and resources relied upon by teachers to develop lessons are normally not required to be obtained from their supervisors or the Superintendent. A195 (Maher Transcript, P. 33 L.11 to P.36 L.2); A329; A343 (Dr. LaSusa Transcript, P.8 L.3-12; P28 L.5-15; P.50 L.4-10); and Defendants' Summary Judgment "Exhibit I," (Board Representative Transcript P.43 L.2-P.44 L.2).

The Syllabus prepared for the WCG class included the study of the history, culture, geography, and religious heritage of several different world regions including Latin America, Middle East and North Africa, Europe, Sub-Saharan Africa, Australia/Oceania and Asia. A443 (Syllabus); and A196 (Maher Transcript, P.54 L.13-16). While the syllabus also set forth the various percentages which

generally make up a student's final grade, it did not itself inform any student that all materials presented in any form on Google Classroom website would be graded and tested. A443 (Syllabus). C.H. confirmed as much when he denied that he was threatened with lower grades or failed assignments if he did not watch the videos hyperlinked within the PowerPoint presentations posted on Google Classroom by his teachers. A310; A314; A324 (C.H. Transcript, P32 L.15-20; P36 L.24 to P37 L.2); A277 and Defendants' Summary Judgment "Exhibit E" (Hilsenrath Transcript, P24 L.6-22; and P.68 L.1-8; p.112 L.1-3).

During the 2016-2017 school year, the Chatham Middle School had three WCG classes that were taught by three different social studies teachers. A173 (Keown Transcript, P.30, L.5-10). C.H. was enrolled in a class that was assigned to be taught by Megan Keown. A172 (Keown Transcript, P.29 L.9-15); and A55 (Complaint). Ms. Keown was replaced by a substitute teacher, for the period of time that she was on a maternity leave of absence beginning on November 7, 2016 and ending on or about April 23, 2017. A169 (Keown Transcript, P.5 L.11-25). When Ms. Jakowski first started teaching the WCG class as a substitute, the class was at the "tail end of the Latin America unit." A209 (Jakowski Transcript, P.7 L.25 to P.8 L.7). At no time in class or at home was C.H. instructed by Ms. Jakowski, who never discussed her religious beliefs with the class, to read from the Quran itself, to listen to or recite any type of prayer, or to engage in any religious practice. A215 (Jakowski

Transcript, P.39 L.17-20); A304-A305; A318; A320; A323 (C.H. Transcript, P.24 L.18 to P.25 L.7; P.40 L.2-24; P.44 L.8-13; P.47 L.10-23). Likewise, Ms. Hilsenrath had no knowledge that anyone from the school directly encouraged or required any student to engage in Islamic prayer, visit a mosque, study the Quran, or to subscribe to the words, such as, "find the true faith, Islam." A275; A284 (Hilsenrath Transcript, P.31 L.4-23; P.84 L.2 to P.85 L.9).

In addition to the topic of Christianity being discussed during the Latin America unit, C.H. received classroom instruction and viewed videos about the religious belief systems of Hinduism and Buddhism while studying the region of Asia during the latter part of the WCG class. A226 (Lesson Plan 6.8-6.9); A211 (Jakowski Transcript, P.18 L.1-8); A276 and Defendants' Summary Judgment "Exhibit E" (Hilsenrath Transcript, P.40 L.3-19; P.58 L.2-4); A304-A306; A309 (C.H. Transcript, P24 L.14-17; P25 L.8 to P26 L.10; P.31 L.2-7). As it pertained to the lessons involving Buddhism during the Asia Unit 6 of the WCG class, C.H. learned about "nirvana" and that Buddhists believe that it was almost heaven and "like how they had to be a good person to not get reincarnated to go into nirvana." A308 (C.H. Transcript P.29 l.10-20); and A237 (Class Notes from Videos). C.H. was also required to watch two different videos regarding the beliefs of Hinduism and Buddhism in class and to take notes on the key characterization of each religion, as well as to compare both belief systems. A231 (Hinduism and Buddhism

PowerPoint); A235 (Hinduism and Buddhism Videos Worksheet). C.H. was also asked to compare Buddhism with what he learned about the Islamic faith earlier in the school year. A240 (C.H. handwritten notes).

The lessons that involved the topic of Islam during the MENA unit spanned a total of two class periods out of a total of 135 class periods in the year-long WCG Class. Defendants' Summary Judgment "Exhibit CC" (Christine Jakowski Answers to Interrogatories, #9); and A196 (Maher Transcript, P.55 L.1-16). In addition to Islam, the MENA unit instructed and consisted of discussions about current events in the Middle East and North Africa, the geography, about the water crisis in MENA, the Syrian War and its global impact, and about obesity in Qatar. A242-A245 (Unit 4 Lesson Plan). As part of the MENA unit lessons 4.5 and 4.6, two PowerPoint presentations that had been created collaboratively by the social studies teachers and Supervisor of Social Studies many years prior to the 2016-2017 school year were posted on Ms. Keown's Google Classroom website for the WCG class. A417-A426 (Generalizations Presentation); A395-A415 (Islam Presentation). Google Classroom is an online "tool" where materials that were already presented during a physical class period may be made available and where "a teacher has the ability to post assignments or communicate with her students" A328 (LaSusa Transcript, P.27 L.9-14; P.43 L.6-9; P. 44 L.15-19); A174 (Keown Transcript, P.36 L.4-12); and A194 (Maher Transcript, P.30 L.12-18). Access to Google Classroom was password

protected and available only via a student's network credentials that are issued by the District and for use only by the student. A336-A337 (LaSusa Transcript, P.43 L.6 to P.44 L.6); A161 (Chase Transcript, P. 64, L.10-21); A389 (District Representative Transcript, P.32 L.10-21). In fact, C.H., understood that, in the absence of any specific instructions to do so from his teacher, he was not expected to complete "assignments" solely found in any PowerPoint slides posted to his teacher's Google Classroom page. A197 (Maher Transcript P.62 L.3-8); A217 (Jakowksi Transcript, P.46 L.8 to P.47 L.7). Additionally, as part of the overall curriculum, Chatham Middle School students were specifically instructed how to utilize third-party websites as sources and to determine for themselves the validity and reliability of the information being presented to them by said third party websites. A195 (Maher Transcript, P.35 L.11-20).

The first PowerPoint presentation posted to Google Classroom for the MENA unit on January 19, 2018 was entitled, Critical Thinking Lesson-Making Generalizations with Content (PowerPoint #1), and did not expressly include an assignment to be completed at home. A417-A426; and A212 (Jakowski Transcript, P.29 L.2-18). While the presentation did include a hyperlink to Video #1, and the statement "watch this video," appears above, it was plainly intended to be utilized in class, "if time," to develop critical thinking skills which required students to, in part, assess the credibility of sources by identifying bias and prejudice in documents,

media and computer-generated information. A247 (Critical Thinking Lesson Plan 4.5). The video itself was not intended to instruct students in its contents as though they were facts, nor to take any position on questions of the religious statements contained therein, but for an academic critical thinking exercise designed to elicit vocabulary "words that come to mind when describing Islam," which was to then be used for an in-class discussion about what generalizations (good or bad) may be made from the video. A426 (Generalizations presentation). The goal of the generalizations lesson was confirmed by C.H. to have been achieved since he learned that the effect of making generalizations is that, "most of the time they are not true and that it could be used to hurt some people." A311 (C.H. Transcript, P33 L.1-13).

The second PowerPoint presentation was entitled Introduction to Islam (PowerPoint #2), and also did not expressly contain an assignment to watch any videos at home. A396-A415; and A213 (Jakowski Transcript, P.33 L.12-21). C.H. was shown the presentation on a Smart Board with his entire class. A319 (P.43 L.5-18). PowerPoint #2 was prepared to educate the students about the manner in which religious beliefs and traditions of Islam influence the language, arts, and daily lives of Muslim people in the region, amongst other facts regarding the Middle East and to draw similarities between the 5 Pillars of Faith to other belief systems of the world. A248 (Foundation of Islam Belief Lesson Plan 4.6). C.H. admittedly did not feel pressured to convert to Islam after watching the 5 Pillars video linked in

PowerPoint #2 at home with his mother. A315; A324 (C.H. Transcript, P.37 L.20-22; P.61 L.6-15). He also did not interpret any of the instruction he received at school as sending any type of religious message, but only that his mother thought that his rights had been violated. Plaintiff's Summary Judgment "Exhibit 2" (C.H.'s Transcript P.70 L.25 to P.71 L.14). All he could remember about Islam was learning about "Allah" and "Muhammad." A306 (C.H. Transcript, P.26 L.14-18). And, although Ms. Hilsenrath was "confused" because she (not C.H.) equated the music and singing in the background of Video #1 to be "prayer music," both she and C.H. admittedly did not understand any of the non-English words being sung in the video. A287 (Hilsenrath's Transcript, P.105 L.3-23); A324 and Plaintiff's Summary Judgment "Exhibit 2" (C.H. Transcript P.61 L.16-P.62 L.4).

Neither video at the heart of C.H.'s appeal was shown in class, or assigned as homework. A214; A216-A217 (Jakowski Transcript P.35 L.5-14; P.36 L.4-6; P.45 L.11-to P.46 L.7); and Defendants' Summary Judgment Exhibit "CC" (Christine Jakowski's Answers to Interrogatories, #10 and #11). In fact, C.H.'s entire recollection of the videos is based solely on his review and discussion of said videos with his mother on a third-party platform, YouTube, and not in conjunction with any lesson prepared by his social studies teachers for the MENA unit in the classroom. A312-A314; A316; A324 (C.H. Transcript, P.34 L.23-P.36 L.9; P.38 L.7-21; P.62 L.6-25); A288 (Hilsenrath Transcript, P.108 L.9-19). Nor were the videos directly

posted or displayed on Google Classroom itself. A56; A59 (Complaint ¶57 and ¶63); and A319 (C.H.'s Transcript, P.43 L.7-P.44 L.3). Rather, it was only through hyperlinks that Ms. Hilsenrath was able to access the videos, and which then led her to a third-party platform, YouTube, where the videos could be played. A280; A288-A289 (Hilsenrath Transcript, P.17 L.1-23; P.108 L.9-P.109 L.8). The last time that the two videos were purportedly viewed on Google Classroom was one year before she filed the Complaint (and not on January 4, 2018 when access to the Google Classroom was no longer available to C.H. after having graduated from 7th grade). A280 (Hilsenrath Transcript, P.71 L.8-22).

Shortly after discovering the videos and watching them voluntarily together with C.H. at home on January 23, 2017, Ms. Hilsenrath voiced her religious objections to including lessons about Islam in the WCG class, but not together with Christianity or Judaism during the MENA unit, at a meeting of the Board of Education on February 6, 2017. Defendants' Summary Judgment "Exhibit VV" (Feb. 6, 2017 Meeting Minutes). The Board and the Superintendent did not specifically examine the subject videos that caused Ms. Hilsenrath to complain in any committee meetings or in public; nor did the Board formally approve said videos as part of the curriculum at its public meeting on March 7, 2017, rather than to broadly approve of Islam being generally taught as a part of the WCG class in light of the entire curriculum of the Board at every grade level. A138-A139 (Board

Representative Transcript, P.22 L.3-5; P.24 L.1-7; P.25 L.17-22; and P.27 L.11-P.29 L.4); A377 (Dr. LaSusa Transcript P.97 L.3-5).

Ms. Hilsenrath then appeared on the Fox News Channel at the Tucker Carlson show to complain, despite the fact that other religions had been topics of instruction and homework when C.H. was in 6th grade, including, but not limited to, Christianity, Judaism, Hinduism, Islam, and Buddhism, that no other religions were taught at Chatham Middle School, except for Islam. Defendants' Summary Judgment "Exhibit E" (Hilsenrath Transcript, P. 40 L.3-25; 47 L.10-P.48 L.8; P.52 L.2-5). Due to the disruption to the school environment and community that was caused by Ms. Hilsenrath's unsupported public accusations on a national level, a decision was made in conjunction with the Supervisor of Social Studies, to remove the YouTube links from both the Critical Thinking and Generalizations PowerPoint presentation and Introduction to Islam PowerPoint presentation. A177 (Keown Transcript, P.51 L.3-22;) A214 (Jakowksi Transcript P.36 L.18-P.37 L.4); A366-A367 (Dr. LaSusa Transcript P.86 L.25-P.87 L.16). The removal of the YouTube links was accomplished by Ms. Keown in March or April immediately upon her return from maternity leave to teaching C.H.'s WCG class and was later confirmed to have remained omitted prior to the start of the next 2017-2018 academic year, which began in September 2017, and are no longer being stored or used in any lessons at any school in the District. A178 (Keown Transcript, P.55 L.25 to P.56

L.8); A142 (Board Representative Transcript, P.50, L.9-23); A165 (Chase Transcript, P.82 L.20 to P.83 L.13); A392; A394 (District Representative Transcript, P.36 L.1-10; P.38 L.4-13); and Defendants' Summary Judgment "Exhibit U" (Maher Transcript, P.99 L.17 to P.100 L.14). Furthermore, at no point in the future will C.H. likely encounter the religion of Islam as a topic in any class after having graduated from the seventh grade since the only course in the High School that C.H. has argued could potentially encounter the topic of Islam in any depth is in 11th grade in an elective course entitled Advanced Placement Modern World History Course. A205 (Chart of religious references); and Defendants' Summary Judgment "Exhibit W" (Grades K-12 Board Presentation Overview of Religion in Social Studies Curriculum). In fact, upon information and belief, C.H. is currently in the 11th grade, and has not enrolled in the 11th Grade Advanced Placement Modern World History course.

Several months after the links to the objectionable videos were removed, on January 27, 2018, Libby Hilsenrath filed a single count Complaint on C.H.'s behalf alone asserting claims pursuant to 42 U.S.C. §1983 for a violation of the Establishment Clause. A12-A39 (Complaint). The gravamen of C.H.'s Establishment Clause claim against the sole Defendant against whom this appeal was filed, the Board, was that its policy makers authorized, approved of, or ratified certain hyperlinks that were posted on C.H.'s teachers' 7th grade WCG class online

resource known as Google Classroom and that were last viewed by Plaintiff's counsel on YouTube on January 4, 2018 and an in-class fill-in-the-blank worksheet containing the words to the Shahada. *See* Plaintiff's Appellate CIS; and A53-A63; A67; A69 (Complaint, ¶¶46-83, ¶¶101-103, and ¶¶112-113). In addition, C.H. claimed that liability against the Board should alternatively lie as the result of an alleged failure to train the individual defendants to not violate a student's right to freedom of religion protected by the First Amendment. A69 (Complaint, ¶114). Nowhere in the Complaint was there included any individualized claim under the Free Exercise Clause for an alleged violation of C.H. 's First Amendment right to free speech or free exercise of his religion. Also absent is any claim by Ms. Hilsenrath individually alleging that any of her parental rights or rights as a taxpayer had been violated.

On February 26, 2018, Defendants filed a motion to dismiss the Establishment Clause claims pursuant to *F.R.C.P.* 12(b)(6) for the failure to state a claim. In opposition to the Motion to Dismiss, Plaintiff's counsel represented that C.H. was only seeking injunctive relief against the individual defendants in their official capacities, while the claims for declaratory relief, nominal damages and reasonable attorneys' fees pursuant to 42 U.S.C. §1988 were being sought against the Defendant District and Board only. (Plaintiff's Opposition Brief to Motion to Dismiss, P.6). On June 13, 2018, the District Court issued its memorandum and Order denying the

motion to dismiss on the basis that it was premature and required development of a factual context about the broader curriculum and educational process in which the videos and worksheet were presented. (Opinion and Order denying Motion to Dismiss dated June 13, 2018).

During the course of ensuing discovery, Ms. Hilsenrath had flatly denied that her Complaint was based on any individual specifically instructing C.H. to "view any videos on Chathams' Google Classroom at home alone." *See* Defendants' Summary Judgment "Exhibit B" (Plaintiff's Answer to Interrogatory #6) and Defendants' Summary Judgment "Exhibit D" (Supplemental Answer to Interrogatory #6 dated February 14, 2019). She also had denied that the content of two videos to which she takes exception on religious grounds were ever tested or graded for the WCG class. *See* Defendants' Summary Judgment "Exhibit B" (Answer to Interrogatory Number 14); Defendants' Summary Judgment "Exhibit DD" (Plaintiff's Responses to Admissions #24 and #32). She also could not identify a single date on which C.H. was allegedly assigned to watch the "Intro to Islam" video at home. Defendants' Summary Judgment "Exhibit B" (Plaintiff's Answer to Interrogatory #9, #10, and #11). Thereafter, she never formally produced any evidence of a written homework assignment to specifically watch any videos about Islam that had been hyperlinked in any PowerPoint slides posted on Google Classroom by C.H.'s teachers. Instead, she readily admits to having voluntarily

clicked on links in order to view the videos of her own volition at home on January 23, 2017. A274; A288 and Defendants' Summary Judgment "Exhibit E," (Hilsenrath Transcript, P.17 L.17-23; P.108 L.9 to P.109 L.8; and P.112 L.14-24). In fact, no such assignment exists. Defendants' Summary Judgment "Exhibit CC," Answers to Interrogatories of Christine Jakowski, #3, #9 #10; and A217 (Jakowski Transcript, P.46 L.25 to P.47 L.7).

Insofar as C.H. relies upon a study guide to assert on appeal that review of the information and videos linked on the PowerPoint presentation slides was required as homework, this was not a document that had been formally produced in discovery in this case by any party as evidenced by a lack of an identifying Bates-stamped number, but was revealed only at the deposition of Dr. LaSusa. A352 (Dr. LaSusa Transcript, P.70 L.6-12). No one identified same, including C.H., to be a study guide that was utilized or handed out to students in C.H.'s class. (Id). In fact, the name Lukasiewicz in reference to a "note packet handout" (which also was never produced) appears on the study guide itself, and therefore, this study guide was from a different WCG class that C.H. did not attend, and was ostensibly created by a second non-party WCG teacher (Ms. Lukasiewicz). A428. Thus, no competent evidence was produced to demonstrate that C.H.'s failure to review the PowerPoint presentations and to click on any hyperlinks contained therein would have affected his grades in any negative manner. A322 (C.H.'s Transcript P.46 L.10-P.47 L.1);

A277 (Hilsenrath Transcript, P.68, L.1-8); and Defendants' Summary Judgment "Exhibit B" (Plaintiff's Answers to Interrogatories, #14).

Similarly, there was no competent evidence submitted by C.H. that the words quoted from a portion of the translation (Section 8 only) of the Qaseedah Burdah poem is a true and accurate translation of the non-English words being sung in the Video #1. In fact, Defendants had no prior notice that C.H. would be relying upon an English translation of a select portion of the Qaseedah Burdah after she declined to identify a translation expert and before same materialized as an exhibit to C.H.'s Motion for Summary Judgment. A468-A469 (Defendants' Counterstatement to Plaintiff's Material Facts, #54-57). Thus, Defendants had no opportunity to counter the conclusions being made by C.H. as it pertains to the translation of the non-English singing heard in Video #1 and now, again, being advanced on appeal.

C.H. also failed to produce any evidence to support the contention that the Board had actually viewed the videos that had been selected by the 7th grade Social Studies teachers in collaboration with the Supervisor of Social Studies and had specifically approved their use for the MENA unit lessons in the WCG class, either before or after the 2016-2017 school year. A513; A568 (Plaintiff's response to Defendants' Statement of Material Facts #49 and #203). Nor did C.H. produce any evidence of the specific training, supervision and screening of its teachers that was actually available to the Board and missing in support of his claim that a policy or

custom of indifference to violations of the Establishment Clause existed at Chatham Middle School. A456 (Defendants' Response to Plaintiff's Statement of Material Facts, #8); Defendants' Summary Judgment "Exhibit B" (Plaintiff's Interrogatory Answer to #5); Defendants' Summary Judgment "Exhibit D," (Plaintiff's Supplemental response to Interrogatory #5). In fact, no such training exists. A159-160 (Chase Transcript, P.26 L.1 to P.27 L.5; P.57 L.1 to 8); and A140 (Board Representative Transcript, P31, L.1 P.32 L.11). Last but not least, no evidence was produced that C.H. would ever be compelled to encounter the topic of Islam or the videos again as a student enrolled in the District after having graduated to Chatham High School (A258-A270) (Plaintiff's Statement of Material Facts).

Following the close of discovery, on May 5, 2020, the Board and Appellant both filed motions for summary judgment. With regard to the Establishment Clause claim, the Board had argued that the secondary sources and teaching aids at issue were part of a social studies class unit about the culture and geography of the Middle East, and the videos relating to Islam merely provided information necessary to teach the children to use their critical thinking skills to make their own decisions about bias and generalizations based on the entirety of Video #1 and about the basic tenets and beliefs of Islam amongst other facts about Islam, which provided context about the culture and daily lives of a majority of people living in the Middle East; and that the undisputed record demonstrated that neither video was presented or intended to

be presented for a religious purpose or in a manner that constituted endorsement, approval, or excessive entanglement of Islam.

On November 12, 2020, the District Court entered an Order granting Appellees' Motion and denying Plaintiffs' Motion. A1-31. Of note, the District Court found that while "parents have a cognizable interest in 'the conditions in their children's schools,'" C.H.'s claims clearly fall into the category of those in which schools permissibly asked students to 'read, discuss, and think' about a religion" and that in the matter at bar, "the curriculum never progressed from the academic to the liturgical." A25-A28 (Opinion).

SUMMARY OF THE ARGUMENT

In this case, Ms. Hilsenrath has created a fiction as to whether, under the threat of lower grades, certain statements concerning Islamic beliefs and explaining Islamic practices contained in two separate videos that were intended to be a teaching tool as part of a 7th grade social studies WCG class were required viewing at home, and thus, violated the prohibition against government established religion under the First Amendment. She perpetuates this fiction by focusing exclusively on certain statements in two teaching aids alone, and without reference to the other non-religious images, words, and information about Islam and the Middle East contained in the subject videos, and by ignoring the PowerPoint slides and lesson plans for the MENA unit and the other religions covered during the WCG class. The District

Court correctly declined to myopically focus on such select statements in a vacuum and without reference to the broader curriculum of the Chatham Middle School.

The District Court also correctly granted the Board's Motion with regard to C.H.'s Establishment Clause claim because no evidence was submitted by Ms. Hilsenrath that satisfied her burden to establish C.H. had standing to obtain prospective declaratory and injunctive relief against the Board and there was no evidence that the curriculum and instruction in the case *sub judice* did not satisfy each prong of the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). Assuming *arguendo*, that the videos at issue on appeal were demonstrated to have been assigned as required viewing as homework, and not voluntarily viewed by C.H. with his mother while at home, it is clear that, in the context of the broader curriculum, they could not have violated the Establishment clause since the videos: (1) had a secular purpose in that it was part of a Middle Eastern unit and intended to be utilized to inform the students about the culture and daily lives of people who follow Islam and to develop critical thinking skills related to bias and making generalizations as 21st Century global citizens, (2) did not have the primary effect of advancing or inhibiting religion insofar as they were being used as a teaching tool for wholly academic critical thinking exercise and secular lessons related to the culture and traditions of people living in the region of the Middle East, other religions were also studied during the year-long WCG class when other regions

were introduced, and no teacher expressed a preference for or approval of Islam or the beliefs expressed in the videos; and (3) did not constitute an excessive entanglement between government and religion insofar as merely including the video links on a PowerPoint presentation did not provide any direct benefit to Muslims, did not aid Muslims, and did not infer or suggest any relationship between the school system and any Islamic organization.

As it pertains to standing for an injunction to issue, there was no evidence that C.H. suffered a direct constitutional injury or that he would ever encounter the challenged materials in any class beyond 7th grade again. Thus, the District Court did not abuse its discretion in denying said relief.

LEGAL ARGUMENT

POINT I
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION TO DECLINE TO AWARD INJUNCTIVE RELIEF IN THE FORM REQUESTED AGAINST THE BOARD ON THE BASIS THAT C.H. DID NOT ESTABLISH STANDING FOR SUCH RELIEF

Scope and Standard of Review

A District Court's decision not to grant declaratory or injunctive relief is reviewed under the deferential abuse of discretion standard. *Free Speech Coalition, Inc. v. Attorney General United States*, 974 F.3d 408, 430 (3d Cir. 2020). Furthermore, at the summary judgment stage, a plaintiff cannot rest on mere allegations and unsupported conclusions to establish standing, "but must 'set forth' by affidavit of other evidence, 'specific facts,' which for purposes of the summary judgment motion will be taken to be true." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (*citing Fed. R. Civ. P.* 56(e)).

Argument

The District court correctly determined that C.H. did not have standing to obtain a declaratory judgment or an injunction against the Board as requested in the Complaint. To establish Article III standing to sue, a plaintiff bears the burden at the outset and each successive stage of the litigation of establishing 1) an "injury that is concrete, particularized, and actual or imminent;" 2) that the injury is "fairly traceable" to the conduct of defendant, and 3) that the injury is "likely to be redressed

by a favorable ruling." *FOCUS v. Allegheny Cty. Court of Common Pleas*, 75 F.3d 834, 838 (3d Cir. 1996), *quoting Lujan*, 504 U.S. 560-561; *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (internal quotations omitted).

Furthermore, a plaintiff requesting multiple forms of relief, "must demonstrate standing separately for each form of relief sought." *Friends of Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 185, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), *citing City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). Where a plaintiff is seeking equitable relief, a critical question is whether it can be shown "he or she is likely to suffer future injury from the defendant's illegal conduct." *Bostrom v. New Jersey Div. of Youth & Family Servs.*, 969 F.Supp.2d 393, 417 (D.N.J. 2013). "Past exposure to illegal conduct does not in itself present a case or controversy regarding injunctive relief…" *Brown v. Fauver*, 819 F.2d 395, 400 (3d Cir. 1987), *quoting O'Shea v. Littleton*, 414 U.S. 488, 495, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). *See also Lujan*, *supra*, 504 U.S. at 564, *citing Lyons*, 461 U.S. at 102. Instead, the plaintiff must show the likelihood of a "real and immediate threat that he [or she] would again be [the victim of the allegedly unconstitutional practice]." *Id*. *quoting Lyons*, 461 U.S. at 105. Accordingly, a plaintiff who is merely a victim of discretionary *ad hoc* violations normally does not have standing to sue

for prospective equitable relief. *Steel Company v. Citizens for a Better Env't*, 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

Likewise, to obtain a declaratory judgment for any challenged practice or custom, it is the plaintiff's burden to demonstrate a "practical interest" in the specific declaration being sought. *Steffel v. Thompson*, 415 U.S. 452, 466, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (opining that an actual case or controversy must be present at all stages of litigation and not just at time Complaint is filed). Since there can be no standing to sue where parties merely seek an advisory opinion, or where litigation presents merely an abstract, academic or hypothetical question, then prior to granting a request for declaratory judgment, a second inquiry is whether it will terminate the controversy giving rise to the proceeding. *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 137 (3d Cir. 2009). In fact, '[n]o federal court…has jurisdiction to pronounce any statute…void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Golden v. Zwickler*, 394 U.S. 103, 110, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). Accordingly, to be accorded declaratory relief, a plaintiff must demonstrate more than a "psychic satisfaction" that a wrongdoer gets his just desserts, or that the Nation's laws are faithfully enforced." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. at 106-107 (relief must do something to remedy injury suffered beyond simply punishment and deterrence). Thus, an essential question in

determining the appropriateness of a declaratory judgment is whether, under the facts alleged, there is sufficient immediacy and reality to warrant the issuance of a declaratory judgment that will actually remedy the constitutional injury going forward. *The American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471, 1477, n. 3 (3d Cir. 1996).

Here, Ms. Hilsenrath is appealing the denial of her request for an injunction to permanently enjoin the Board, their supervisors, employees, agents and successors in office from funding and implementing religious instruction that endorses Islam or favors Islam over other religions or non-religion. Injunctive relief, however, is a drastic and extraordinary remedy that should only be granted in very limited circumstances. *Marilyn Manson, Inc. v. New Jersey Sports & Exp.*, 971 F.Supp. 875, 883 (D.N.J. 1997). In addition, it "should be no broader than is necessary to provide full relief to the aggrieved party." *Free Speech Coalition*, *supra*, 974 F.3d at 430. Thus, if there is a lack of evidence of a likely and realistic threat of repetition of the same alleged harm to C.H., (i.e., funding and implementing religious instruction) it was appropriate for the District Court to decline to issue an injunction. *Lyons*, 415 U.S. at 109 (explaining that injunction without imminent violation is inappropriate).

In the matter at bar, the cognizable interest on the part of C.H. is asserted to be the right to not to encounter secondary source teaching aids which allegedly

endorse Islam as contained within two PowerPoint slides as hyperlinks. While the Supreme Court in *Sch. Dist. of Abington Twp., PA v. Schempp*, 374 U.S. 203, 224, n. 9, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) had observed that parents and their children have a cognizable interest in receiving a public education that comports with the Establishment Clause, this does not eliminate the requirement for standing purposes that C.H. prove "direct and unwelcome personal contact" with an allegedly offensive religious symbol, message, display, or religious exercise on Chatham Middle School property or as part of a Board sponsored event. *Freedom from Religion Foundation Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016) (noting that an "injury in fact" requirement on an Establishment Clause claim requires "direct and unwelcome personal contact with the alleged establishment of religion"). Yet, no such direct and unwelcome personal contact by C.H. with an allegedly offensive display in school or at a school sponsored event that is necessary to establish standing to bring an Establishment Clause claim against the Board has been argued to have occurred in the matter at bar. To the contrary the evidence clearly establishes that the allegedly offensive videos themselves were not posted on Google Classroom. Instead, the videos could only be accessed via a hyperlink embedded in PowerPoint slides that were intended for an in-class presentation over the course of two class periods. A336-A337 (Dr. LaSusa Transcript, P.43 L.6–P.44 L.11). Ms. Hilsenrath then welcomed the contact with the

videos when she perused through Google Classroom using her son's credentials and voluntarily clicked on the links and watched said videos with C.H. on a third-party platform in the comfort of her home. A288 (Hilsenrath Transcript, P.108 L.9-P.109 L.8); A54-A55 (Complaint, ¶¶49-51; ¶56).

Furthermore, it was undisputed that the videos themselves were never played by C.H.'s teacher in class or assigned as homework. A217 (Jakowski Transcript, P. 45 L.1 to P.47 L.7). C.H. himself could not remember either video being played in class but only recalls being coerced to watch the videos at home with his mother. Thus, no direct contact, much less unwelcome contact, with the videos by C.H. was ever established to have occurred. In the absence of any evidence of such direct, unwelcome and unavoidable contact with the alleged videos, no standing to bring a claim for an abstract violation of the Establishment Clause may exist. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, *supra*, 454 U.S. at 489, n. 26 (declining to recognize right to relief for an alleged injury resulting solely from the constitutional right to "a government that does not establish religion").

Additionally, the record is devoid of any evidence that C.H. interpreted the videos as conveying a religious message and, in fact, he denied that said videos had the effect of coercing him to subscribe to any of the religious beliefs of Islam. A315, A324 (C.H. Transcript, P.37 L.20-22; P.61 L.6-45). He also did not personally

believe that any of his rights to receive an education free from religious references in the classroom were violated, but rather his mother believed as much. *See* Plaintiff's Summary Judgment "Exhibit 2" (C.H. Transcript, P.70 L.25 to P.71, L.14). The failure of C.H. to unequivocally describe his personal reaction to the videos as conveying a religious message is entirely fatal to Ms. Hilsenrath's ability to bring an Establishment Clause claim on his behalf. *FFRF v. New Kensington Arnold Sch. Dist.*, *supra*, 832 F.3d at 480 (holding that child lacked standing for nominal damages when she failed to describe her reaction to the religious display and it was unclear that she understood the monument as conveying that the school wanted students to subscribe to religious beliefs at the time that the Complaint was filed).

Furthermore, it bears noting that "local autonomy of school districts is a vital national tradition" *Horne v. Flore*, 557 U.S. 433, 448, 129 S.CT. 2579, 174 L.Ed. 406 (2009). Thus, declarations and injunctions which "improperly deprive future officials of their designated legislative and executive powers in allocating revenues and resources" are not appropriate when same are "aimed at eliminating a condition that does not violate federal law or [that] does not flow from such a violation." *Id*. at 449-450, *citing Milliken v. Bradley*, 433 U.S. 267, 282 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). For example, in *Citizens for Equality Education San Diego v. Barrera*, 333 F.Supp. 3d 1003 (S.D. Cal. 2018), the plaintiffs argued that the Board's initiative

and "action steps" to address Islamophobia and Anti-Muslim bullying were mere pretext to establish the district's preference for Islam and Muslim students in violation of the First and Fourteenth Amendments. The Court held that where the parents of students failed to identify any specific tax dollars spent solely on the challenged conduct, they did not have standing to seek a preliminary injunction to prevent same from being spent by the District. *Id*. at 1022-23.

Analogous to the plaintiffs in *Citizens for Equality*, nowhere in the Complaint or otherwise, does Ms. Hilsenrath clearly identify the "funding" or the "religious instruction" that she contends was implemented in the District. To the contrary, the evidence clearly established that no such "religious instruction" ever existed, nor was any religious instruction ever implemented or funded by any policy maker in the District. Same is merely a fiction created by Ms. Hilsenrath and consists of nothing more than speculation in light of her admitted lack of knowledge of the manner in which the materials were presented to C.H. in the classroom. *See* Defendants' Summary Judgment "Exhibit E" (Hilsenrath Transcript, P.30 L.22 to P.31 L.23).

Moreover, C.H. had already graduated from Chatham Middle School by the time the Complaint had been filed, and is currently in the 11th grade. Nothing in the curriculum adopted by the School Board requires Islam to be introduced in any class mandated by the State for C.H. to complete his high school education and obtain a

degree from the School District of the Chathams. In addition, it is undisputed that the links from the videos had been removed from the PowerPoints posted to Google Classroom and were confirmed by the Superintendent to remain omitted prior to the start of the following 2017-2018 academic year. *See* Defendants' Summary Judgment "Exhibit U" (Maher Transcript, P.99 L.17 to P.100 L.14). Therefore, the specific request for an injunction against unspecified instruction and unidentified funding sought by C.H. is wholly inappropriate and cannot be issued to deprive Defendants of their autonomy to allocate resources and money necessary to meet State of New Jersey mandated goals for the well-rounded education of its middle school students as global citizens in the 21st Century. *Friends of Earth, Inc.*, *supra*, 528 U.S. at 190-191 (opining that a plaintiff who lacks standing at the inception because the Complaint was filed after the conditions complained about no longer exist is not capable of being saved by the "capable of repetition, yet evading review" doctrine); *and Renne v. Geary*, 501 U.S. 312, 320, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991) (opining that the 'capable of repetition, yet evading review' doctrine cannot be used to "revive a dispute which became moot before the action commenced").

To the extent that C.H. had also sought a retrospective declaration from the District Court that "Defendants violated Plaintiffs' fundamental and clearly established rights as set forth in the Complaint" and that "Defendants' training, supervision, policies, practices, customs, and procedures" that promote Islam violate

the Establishment Clause of the First Amendment, this claim relates solely to alleged past conduct and not to any threatened future harm. *Lyons*, at 108-109; *see Emory v. Peeler*, 756 F.2d 1547, 1552 (11th Cir. 1985). Although C.H. argues that he may encounter the videos at issue again in the 11th grade Advanced Placement Modern World History course, there is no evidence in the motion record to suggest that C.H. was actually enrolled in, or eligible to enroll in, that class.[1] Thus, any retrospective declaration pertaining to C.H.'s exposure to the religion in the 7th grade WCG class would not remedy the alleged harm, but would merely be "a gratuitous comment without any force or effect." *Malowney v. Federal Collection Deposit Group*, 193 F.3d 1342, 1348 (11th Cir. 1999) (holding that a declaration regarding past conduct "would be nothing more than a gratuitous comment without any force or effect.") (*citing Northern Va Women's Medical Center v. Balch*, 617 F.2d 1045, 1049 (4th Cir. 1980)). As such the District Court appropriately exercised its discretion to dismiss Plaintiff's claim for declaratory judgment and permanent injunction as set forth in the Prayer for Relief section of her Complaint. *Freedom from Religion Foundation Inc. v. Connellsville Area School District*, 127 F.Supp.3d 283, 298 (W.D.Pa 2015) (holding that child's graduation from Junior High School where offensive religious monument was located mooted her Establishment claim for declaratory and

[1] In fact, C.H. is not enrolled in the Advanced Placement Modern World History Class, but is instead enrolled in an alternative class offered to 11th grade students by the High School.

injunctive relief); and *Clark v. Burger King Corp.*, 255 F.Supp.2d 334, 342 (D.N.J. 2003) ("'some day' intentions—without any description of concrete plans…do not support a finding of the 'actual or imminent' injury…" requirement). In other words, the District Court properly used its discretion to dismiss C.H.'s claim for relief for an injunction as being unsupported and not appropriate.

Last, but not least, due to the fact that this appeal is directed solely at a public entity, C.H. could only be entitled to an injunction in the matter at bar if Ms. Hilsenrath was able to prove that an official policy or custom resulted in a violation of the Establishment Clause. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990). She, however, failed to demonstrate that she has any evidence that Defendants' training, supervision, policies, practices, customs or procedures in instructing any one of its pupils was deficient or constitutionally unsound. Nor did the Board specifically review and adopt each and every religious statement in the videos at issue. A138-A139 (Board Representative Transcript, P.22 L3-5, P.24 L.1-17, P.25 L. 17-22); A377 (Dr. LaSusa Transcript P.97 L.3-5). To the contrary, as demonstrated in Defendants' Motion for Summary Judgment, the Board's official practices with respect to their neutral treatment of all religions in the classroom comported with the First Amendment at all times, and there is no indication that those policies will be changed any time between now and C.H.'s graduation from the District in June 2022.

For all of the foregoing reasons, it is clear that Ms. Hilsenrath failed to demonstrate with any competent evidence that C.H. actually suffered from the instruction sought to be enjoined or that he is likely to suffer any such injury in the future. Thus, C.H. did not have standing to obtain an injunction or a declaration that is not concrete, particularized, actual or imminent, nor "fairly traceable" to the conduct of the Board. Accordingly, this Court should find that Appellant's motion for summary judgment seeking such declaratory and injunctive relief was properly denied by the District Court.

POINT II

THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE BOARD AS TO C.H.'S ESTABLISHMENT CLAUSE CLAIM

Scope and Standard of Review

Where the First Amendment is involved, the Third Circuit will undertake exacting review of the whole record with a particularly close focus on facts that are determinative of a constitutional right. *Armour v. County of Beaver, Pa*, 271 F.3d. 417, 420 (3d. Cir. 2001). Thus, review of a district court's grant or denial of summary judgment on a First Amendment claim is *de novo*, such that, the Third Circuit may affirm on any basis supported by the record. *Gorum v. Sessoms*, 561 F.3d 179, 184 (3d Cir. 2009).

It also bears noting that unsupported allegations, subjective beliefs, or argument alone, cannot preclude a grant of summary judgment on a claim for violation of one's constitutional rights. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L.Ed.2d 695 (1990) (nonmoving party may not successfully oppose summary judgment motion by simply replacing "conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."). Thus, if the nonmoving party fails "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial ... there can be 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Katz v. Aetna Cas. & Sur. Co.*, 972 F.2d 53, 55 (3d Cir. 1992) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

Argument

Here, Ms. Hilsenrath bases her appeal entirely on the fiction that as part of his WCG class, C.H. was required to view two videos that she contends "require public school students, under threat of lower grades, to view videos that [allegedly] present religious opinion as fact, that encourage Islamic prayer, and that include an explicit call for conversion," as homework (emphasis supplied). Plaintiff's Brief, P.1. The uncontroverted evidence however demonstrates that no such requirement existed,

despite C.H. now framing his Establishment Clause challenge as one based on an alleged "discovery" of a homework assignment on Google Classroom on or about January 2017 by his mother. In fact, C.H. had failed to produce any evidence that either Ms. Keown or Ms. Jakowski had instructed C.H. to view the You Tube videos linked in either PowerPoint Presentation as homework. A277 (Hilsenrath Transcript, P.68 L.1-8); Defendants' Summary Judgment "Exhibit B" (Plaintiff's Answer to Interrogatory Number 6) and Defendants' Summary Judgment "Exhibit D" (Plaintiff's Supplemental Answers to Interrogatories Number 6). Moreover, Ms. Hilsenrath unequivocally denied any of the material or information conveyed in the videos were tested or graded or that any individual directed C.H. to view the videos for homework. Defendants' Summary Judgment "Exhibit B" (Plaintiff's Answer to Interrogatory Number 14); Defendants' Summary Judgment "Exhibit D" (Plaintiff's supplemental Answer to Interrogatory number 14). Indeed, nothing contained within the PowerPoint slides themselves directs any student to watch the videos outside of the exercise for discussion in the classroom. A417-A426 (Generalizations Presentation); A395-A415 (Introduction to Islam Presentation). Instead, the record clearly demonstrates that Ms. Hilsenrath watched the videos with her son on a third-party platform of her own volition at home. A324 (C.H. Transcript, P.61 L.6-12); A54-A55 (Complaint, ¶¶49-51; ¶56).

Insofar as Appellant urges this Court to make a sweeping inference from the syllabus for C.H.'s WCG class setting forth the percentages which make up a student's final grade and an unauthenticated "study guide" so as to conclude that the videos were "required" viewing by C.H. in preparation for an Open Notes Test on the lessons taught during the MENA unit, this would be improper. The Syllabus itself did not inform any student that all materials presented in any form on Google Classroom website would be graded and tested. The Syllabus refers to "homework and classwork, unit assessment, map assessment, group assessment and individual assessment" as components of grading only. A444. In addition, C.H. denied that he was threatened with lower grades or failed assignments if he did not watch the videos contained in the PowerPoint Presentations posted on Google Classroom by his teachers. A324 (C.H. Transcript, P.61 L.2-5).

Likewise, the Study Guide upon which Ms. Hilsenrath relies is from another WCG teacher's class, Ms. Lukasiewicz, who would have had her own password protected Google Classroom website to which C.H. would not have had access. In fact, no one, including C.H. identified it as being part of Ms. Keown's WCG class. A352 (Dr. LaSusa Transcript, P.70 L.6-12). Accordingly, it is hearsay without an exception. There is also no evidence of a "Lukasiewicz note packet handout" having been reviewed by the Board, nor evidence that the videos at issue were the subject of any end of unit MENA test in Ms. Jakowski's class. Thus, Ms. Hilsenrath's

reliance upon an unauthenticated Study Guide as the basis of her conclusion that the Board required C.H. to review the PowerPoint slides, and consequently the videos on a third-party platform, under the threat of lower grades, is improper, and cannot support C.H.'s First Amendment Establishment Clause claim. *Roberts v. Madigan*, 921 F.3d 1047, 1052 (10th Cir. 1990) ("[S]tudents cannot claim First Amendment violations . . .for actions against a teacher in whose class they were not enrolled." (internal quotation marks and citations omitted)).

Despite failing to set forth any evidence to support her contentions that any Defendant acted to "require public school students, under threat of lower grades, to view videos that present religious opinion as fact, that encourage Islamic prayer, and that include an explicit call for conversion," Ms. Hilsenrath seeks for this Court to solely review select portions of two videos in isolation to find that mere exposure to C.H. of the music, non-English singing, certain excerpts from the Quran, and the words, "May God help us all find the true faith, Islam. Ameen" as displayed in Video #1 and mere exposure to the detailed explanation of the Five Pillars of Islam, as well as an email address for viewers to request an information pack and schedule a mosque tour from DiscoverIslamUK in Video #2, means that the Board should be held liable for violating C.H.'s First Amendment right to be free from government establishment of religion. Plaintiff's Brief, P.12. These arguments all ignore the fact that Establishment Clause challenges are to be evaluated, not from the view of Ms.

Hilsenrath or C.H. alone, but from the perspective of the reasonable observer with respect to the larger context and ubiquitous history of the challenged practice. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 284-285 (3d Cir. 2011) (adopting viewpoint of reasonable observer in light of the "history and ubiquity" of the practice to provide context to find that opening Board meetings with prayer conveys a message of endorsement of religion); *see also Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014) and *American Legion v. American Humanist Society*, 139 S.Ct. 2067, 2089, 204 L.Ed.2d 452 (2019). This comprehensive analysis is particularly salient where a curriculum decision of a school is involved. *McCreary County v. ACLU*, 545 U.S. 844, 862, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (a determination as to whether the Establishment Clause was violated by a curriculum decision can only be made by considering the academic framework in which the challenged materials were presented); and *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings College of Law v. Martinez*, 561 U.S. 661, 685-686, 130 S.Ct. 2971, 2976, 177 L.ED.2d 838 (2010) (First Amendment rights must be analyzed in light of the special characteristics of the school environment); *see also California Parents for Equalization of Educ. Materials v. Noonan*, 600 F. Supp. 2d 1088, 1119-1122 (E.D. Cal. 2009) (holding that when the challenged passages of a textbook that portrayed a specific religion negatively were viewed as a whole and as part of the larger curriculum, it was clear that the primary

effect of the textbooks were to educate students about ancient history and not to serve as a religious primer); and *Brown v. Woodland Joint Unified Sch. Dist*., 27 F.3d 1373, 1381 (9th Cir. 1994).

For purposes of all three *Lemon* test prongs, it is also well-established that in a school setting, mere exposure to a religious belief that a parent might find offensive does not violate the Establishment Clause. *Lee v. Weisman*, 505 U.S. 577, 597, 112 S. Ct. 2649, 120 L.Ed.2d 467 (1992) (opining that not every state action implicating religion is invalid if one or a few citizens find it offensive," since "[p]eople may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation."); *see also Parker v. Hurley*, 514 F.3d 87, 105 (1st Cir. 2008) *cert. denied*, 555 U.S. 815 (2009) (holding that a mere exposure to a child to a concept offensive to a parent's religious belief does not violate the First Amendment when balanced against state's interest and academic freedom to inculcate values through instruction); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1069 (6th Cir., 1987), *cert. denied*, 484 U.S. 826 (1988) (holding that mere exposure to ideas in a textbook that were contrary to religious beliefs is not the same as coercion for purposes of finding a Free Exercise Clause Violation); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985); and *Williams v. Bd. of Educ. of Kanawha Cty.*, 388 F. Supp. 93 (S.D.W.Va.), *aff'd* 530 F.2d 972 (4th Cir. 1975). In fact, the Constitution has long permitted

schools to teach about religion, explain tenets of various faiths, discuss the role of religion in history, literature, science and other endeavors, and the like, as long as it has a secular purpose to promote an academic goal, and there is no concerted effort to promote or inhibit any religious belief. *Stone v. Graham*, 449 U.S. 39, 42, 101 S.Ct. 192, 193-94, 66 L.Ed.2d 199 (1980) ("the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, and the like"). Similarly, there is no prohibition against displaying religious symbols in a school when teaching about religion and cultural diversity to students, as long as the displays are used on a temporary basis as part of a wholly secular academic program of study. *Id*. (emphasis added); *see Clever v. Cherry Hill*, 838 F.Supp. 929, 932 (D.N.J. 1993) (holding that a school policy of permitting the recognition of religious holidays as part of the instructional program through temporary central displays at each school of religious symbols, along with one cultural and/or ethnic symbol and a written explanation that described the significance of the symbols used for purpose of advancing student's knowledge about the cultural ethnic and religious heritage and diversity of its students, did not violate the Establishment Clause).

Indeed, "total separation between church and state is never possible in the absolute sense." *Lemon*, 403 U.S. at 613; and *Lee v. Weisman*, *supra*, 505 U.S. at 597 (recognizing that outside of school sponsored prayer, there will be instances when religious values, religious practices, and religious persons will have some

interaction with the public schools and their students throughout the course of the educational process), *citing Board of Ed. Of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990). Thus, a decision respecting the subject matter to be taught in public schools and a school district's First Amendment academic freedom does not violate the Establishment Clause simply because the material to be taught happens to coincide or harmonize with the tenets of some or all religions. *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (Powell, J., concurring); *see McCollum v. Board of Educ.*, 333 U.S. 203, 235, 68 S.Ct. 461, 477, 92 L.Ed. 649 (1948) (Jackson, J. concurring) ("if we are to eliminate everything that is objectionable to any person or inconsistent with any of their doctrines, we will leave public school in shreds"). This is the reason that interference with the curriculum decisions of locally elected school boards 'is warranted only when the purpose for their decisions is clearly religious." *Id*. (emphasis added).

Against this backdrop, it is evident that the District Court did not err in refusing to examine each select statement contained in the videos in a vacuum and without reference to the broader curriculum to determine whether any "is an Establishment Clause violation in itself," or in analyzing the undisputed facts in favor of the Board under the three prong *Lemon* test. This is because, if courts were to find an Establishment Clause violation every time that a student or parent thought that a single statement by a teacher either advanced or disapproved of a religion,

instruction in New Jersey's public schools "would be reduced to the lowest common denominator." *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d at 1379. Indeed, to "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause," and in turn, impermissibly transform each student, parent, and by extension, the courts, into *de facto* "curriculum review committee[s]," monitoring every sentence for a constitutional violation. *Id*., *citing Lynch v. Donnelly*, 465 U.S. 668, 679-80, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). Likewise, it was not error for the District Court to conclude that no clear violation of the Establishment Clause was committed in the case *sub judice* after analyzing each of the three *Lemon* prongs for the reasons that follow.

A. The Videos Had A Secular Purpose In The Broader Context Of The Curriculum

When viewing the entire curriculum of the Board as a whole, it is clear that the primary purpose of the videos was academic exercise, not religious indoctrination. Appellant goes to great lengths to argue otherwise. However, the purpose prong of *Lemon* only requires some secular purpose and not that the purpose be exclusively secular. *Doe v. Indian River Sch. Dist.*, *supra*, 653F.3d at 283. And so long as the stated purpose is sincere and not a mere sham, it survives scrutiny under the purpose prong and should be deferred to. *Id*. Here, the stated purpose was clearly to "read, discuss, and think," about Islam in the context of a lesson about bias and making generalizations and to learn about the daily lives of Muslims and the

region in which they live, as evidenced by the surrounding text in the PowerPoint presentations and the Board's curriculum objectives for the WCG class.

Appellant's argument that there could not have been a valid secular purpose for those videos to educate students about the world's major religions because the videos at issue did not objectively present the topic of Islam with facts, but in her opinion, Video #1 contained certain proselytizing statements and both videos allegedly sought to recruit followers to Islam, is unavailing. There is no requirement, as Ms. Hilsenrath argues, that the videos selected by the teachers for the WCG class should present only factual information about Islam. *See California Parents for Equalization of Educational Materials v. Torlakson*, 267 F.Supp.3d 1218, 1228 (N.D. Cal. 2017) (curriculum did not have primary effect when it did not "call for the teaching of biblical events or figures as historical fact"); *and Edwards v. Aguillard*, *supra*, at 594 (teaching of creationism alongside science of evolution as fact furthers religion in violation of Establishment Clause). Indeed, nothing in the First Amendment requires a school district to "cast a pall of orthodoxy over a classroom." *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968) (*quoting Keyishian v. Bd. of Regents*, 385 U.S. 589, 603, 87 S. Ct. 675, 683, 17 L.Ed.2d 629, 640 (1967)). Nor does the First Amendment forbid every mention of God or religion by or at the direction of a governmental entity in a public school, if presented objectively as part of a secular program of study. *Id* at 106, *See School District of*

Abington v. Schempp, *supra*, 374 U.S. at 225 ("Nothing we have said here indicates that study of bible or religion when presented objectively); *Aguillard*, *supra*, ("teaching a variety of scientific theories about origins of humankind to school children may be validly done with clear secular intent of enhancing effectiveness of science instruction"); and *Bowen v. Kendrick*, 487 U.S. 589, 604 n.8, 108 S.Ct. 2562, 2571 n.8, 101 L.Ed.2d. 520 (1988).

Consequently, the meaning of "objective" in the school setting does not always mean factual when it involves exposure to religion in connection with an entirely secular academic exercise, but instead requires the persons charged with educating students to remain neutral. *Lemon*, at 618 (doctrines and faith are not inculcated or advanced by neutrals); *see McCreary County, Ky v. ACLU*, *supra*, 545 U.S. at 860 (opining that all that is required under Establishment Clause is governmental neutrality and respect toward religious views of all citizens); and *Mitchell v. Helms*, 530 U.S. 793, 795 (2000) (aid that is "allocated on basis of neutral, secular criteria that neither favor nor disfavor religion" does not create "a financial incentive to undertake religious indoctrination"). Nothing in this case suggests that any of the portions of text in the videos were taught as fact or intended by C.H.'s teacher, who did not discuss her own religious beliefs, to convey any approval of Islam or its practices. Rather, it is clear that from the wholly secular educational goals of the Board's Policy and Curriculum that the WCG class

remained at all times neutral in its treatment of Islam and all other religions studied in the class, and therefore could not possibly have a religious purpose. Indeed, Ms. Hilsenrath could not supply any evidence that C.H.'s teacher treated the topic of Islam differently than any other religion studied in the class. Nor was there evidence of any instruction in the classroom that "exalted" Islam over all other religions. Thus, there is absolutely no basis for this Court to find that there was not a genuine secular purpose for including the videos as part of the Lessons in PowerPoint #1 and #2.

B. Videos Containing Religious And Non-Religious Content As Part Of An Academic Exercise And To Achieve An Educational Objective Did Not Have A Primary Effect Of Favoring Islam.

The reasonable observer of the WCG class in C.H.'s shoes would not view the videos and worksheet to be an endorsement of religion or sending a message of disapproval of any religion. The videos themselves contain non-religious material and were presented in conjunction with other non-religious information relating to the culture and daily lives and conditions affecting people in the Middle East as evidenced by the surrounding text in the PowerPoint slides and, therefore, could not possibly have had the primary effect of advancing Islam. *See Freedom from Religion Foundation, Inc. v. Concord Community Schools*, 885 F.3d 1038, 1049-1050 (7th Cir. 2018) (opining that inclusion of other songs about Hanukkah and Kwanzaa, even if brief, does not detract from the stated and varied educational purposes for including Christian religious hymns and a short nativity scene in a school sponsored

December Holiday Spectacular production). Moreover, it cannot be disputed that C.H. himself admitted to learning the lessons taught about making generalizations, and furthermore, did not convey that he believed that the school district was attempting to encourage him to convert to or adopt the beliefs of Islam.

There is also no merit to Appellant's argument that the Board was required to teach Christianity and Judaism, or Hinduism and Buddhism in the exact same manner as Islam in order for the District Court to find that the primary effect of the MENA lessons over the course of two class periods did not favor Islam during the year-long WCG class. *Id*. at 1050 (opining that nothing in the Constitution requires each holiday to get exactly the same number of minutes on stage and finding that a reasonable audience member would not understand a holiday production to be ratifying a religious message where it included a few songs about two other non-Christian holidays in a December Spectacular performance, along with mostly songs about Christmas, a Christian religious hymn, and a short, passive display of a nativity scene). This argument completely misses the mark of the intended purpose of the subject videos which was to teach the students about 1) bias and making generalizations from Video #1 (Critical Thinking Skills) and 2) the manner in which religious beliefs and traditions in Video #2 (Five Pillars of Islam) influence the language, arts, and daily lives of people in the region of the Middle East and North Africa. As there is no evidence that said videos were not intended to be presented

objectively as a part of a valid educational goal within a secular program of education, the mere fact that the videos contained quotes from the Quran, but no other religious statements from other religious texts were presented during the course of the WCG class, does not mean that the First Amendment has been violated. *Wood v. Arnold*, 915 F.3d 308, 317 (4th Cir. 2019), *cert. denied*. 140 S.Ct. 399 (2019) (opining that students who are required to "read, discuss, and think" about a religion would understand that they are simply learning to "identify the views of a particular religion" not to follow the religion); *see also Eklund v. Bryon Union Sch. Dist.*, 154 Fed Appx. 648 (9th Cir. 2005), *cert. den.* 549 U.S. 942 (2006) (holding that an Islam program at an elementary school which lasted 45 days did not raise any Establishment Clause concerns since none of the children were required to engage in "overt religious exercises" involving Islam). To wit, "[i]t takes more than the presence of words with religious content to have the effect of advancing religion, let alone to do so as a primary effect." *Freedom from Religion Foundation v. Hanover Sch. Dist.*, 626 F.3d 1, 10 (1st Cir. 2010).

This "primary effect" analysis is considerably weakened where the challenged activity, ie. viewing the videos at issue, is not one which takes place on school grounds or at a Board sponsored event, nor to a "captive audience" such as in the cases cited by Appellant of *Berger v. Rensselaer Cent. School Corp.*, 982 F2d 1160 (7th Cir. 1993) (permitting religious organization to distribute bibles in classroom

or while fifth graders were assembled for short presentation by Gideons); *Doe v. Indian River School District*, 653 F.3d 256 (3d Cir. 2011) (prayer) and *Borden v. Sch. Dist. of Twp. of East Brunswick*, 523 F.3d 153 (3d Cir. 2008) (faculty participation in student initiated prayer prior to football games), but is based entirely on the fiction that the videos at the heart of C.H.'s appeal were required viewing for C.H. at home, under the threat of lowered grades. Indeed, because Ms. Hilsenrath has taken the position that the videos were required viewing at home, and not in the classroom, this case does not present the same considerations as the cases Appellant cites in the Opening Brief to urge this Court to take into account the purported impressionability and alleged subtle coercive effects that select portions of the videos (but not the entire video and context of the lesson for which it was included) may have on a 7th grader in the instructional setting. No court has recognized that the same coercive effects of religious symbols or practices recognized to exist in "impressionable" school children apply to materials presented outside of the school grounds or separate from school-sponsored events, such as graduations, sporting events, and the like. *Child Evangelism Fellowship of Maryland Inc. v. Montogomery*, 373 F.3d 589, 597 (4th Cir. 2004) ("Supreme Court has only found unconstitutional government coercion when the government singled out a religious group for a special benefit not afforded to other similarly situated groups"); and *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680, 689, n. 9 (7th Cir. 1994) (noting

heightened concerns that arise from classroom activities in the elementary school context only, and declining to adopt generally an "impressionable child" standard since our Supreme Court has not yet done so).

Nor does this case fit neatly within the facts of display cases such as *Allegheny County v. ACLU*, 492 U.S. 573 (1989) and *FFRF v. New Kensington School District*, *supra* since the videos themselves were indisputably never posted on Google Classroom, nor played in the physical classroom to have been construed to be a display of any type, much less as actually favoring a particular religion. *Modrovich v. Allegheny County Pa.*, 385 F.3d 397, 414 (3d Cir. 2004) (applying *Lemon* test to holding that Ten Commandments plaque which was affixed discretely to side of a County courthouse did not violate Establishment Clause as it lacked historical context to make a reasonable observer perceive it to be an endorsement of religion). Indeed, Appellant has not cited to a single decision in which any court has held that the Establishment Clause could be violated by a homework assignment, much less a fictional one. *See Wood v. Arnold*, *supra*. 915 F.3d at 319 (homework assignment to fill in the blanks of the Shahada was not a religious exercise and did not require student to profess her faith in Islam or views with which she did not agree).

Assuming *arguendo* that a homework assignment could form the basis for an Establishment Clause claim, no coercive effects can be found to exist under the circumstances in this case, because Ms. Hilsenrath admittedly watched the videos at

home with C.H. and therefore, she and not the teacher, was at all times in control of the environment and manner in which the videos were presented and the discussion of the religious information being presented in the videos. *See Fleischfresser*, *supra*, 15 F.3d at 690 (no coercion can exist where the parents are not precluded from meeting their religious obligation to instruct their children and the use of the curricular materials does not compel parents or children to do or refrain from doing anything of a religious nature). It is beyond the stretch of the Establishment Clause's prohibition against establishing religion in a school to suggest that parental control over a child's religious upbringing can be adversely affected by a homework assignment to passively watch a video created by a third party, as opposed to what a teacher might say or do in a classroom during instructional time. *See Child Evangelism Fellowship*, *supra*, 373 F.3d at 600-601(finding that simply issuing an invitation to a religious activity by a third-party organization during non-instructional time to be brought home to parents does not render such communication state speech, nor does it invariably create a perception of endorsement or coercion by government officials since it would not rise to the level of support or participation in religion or its exercise); *Dougherty v. Vanguard Charter School Academy*, 116 F.Supp.2d 897, 905 (W.D. Mich. 2000) (activities that do not directly affect the student cannot be said to have burdened the child's freedom of conscience or father's right to guide religious upbringing and are thus

not actionable). For these reasons, it is clear that this case does not present any basis upon which to conclude that a reasonable observer would discern, in the context of reading the entire PowerPoint presentation, the primary effect of the videos to be an endorsement by the Board of Islam.

C. The Adoption Of Religious Curriculum Material In Itself Does Not Amount To Excessive Entanglement With Religion

The adoption and use of a religious curriculum material in public education alone is not sufficient to constitute excessive entanglement with a religion. *Brown v. Woodland Joint Unified School Dist.*, 27 F.3d at 1383-1384. Nor is a one-time review of the curriculum materials in response to Ms. Hilsenrath's complaint sufficient to demonstrate that the Board became entangled with religion. *Id* at 1384; *see also Fleischfresser*, *supra*, at 689 (mere exercise of discretion in determining curricula in schools cannot constitute excessive entanglement with religion). Last, but not least, passively watching a video about religious beliefs from the perspective of a third party who has created same, if not directly promoted by the teacher herself in the classroom, also does not run afoul of becoming excessively entangled with a religion. *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 44, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (O'Connor, J., concurring) ("The compulsion of which Justice Jackson was concerned ... was of the direct sort—the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree"). Thus, assuming *arguendo*, that the Board had taken a formal position as to whether the

videos in question specifically violated their Religion in Schools Policy, and found that they did not, in light of the broader curriculum, this hardly can be construed as the Board endorsing any one religion. Thus, in the absence of any evidence that the Board's position regarding the propriety of religious references in their K-12 curriculum, including the WCG class, had directly benefited any one religious organization, there can be no finding of an excessive entanglement with religion.

CONCLUSION

For all of the foregoing reasons, the Appellee/Board respectfully requests that the Third Circuit affirm the judgment of the District Court denying summary judgment to the Appellant and granting summary judgment against the Defendants.

Respectfully submitted,

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Dated: April 1, 2021

CERTIFICATION OF BAR MEMBERSHIP PURSUANT TO LAR 28.3(d)

I, Ruby Kumar-Thompson, Eq., am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit. I certify under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. § 1746.

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RUBY KUMAR-THOMPSON

Dated: April 1, 2021

CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(g)

1. This document complies with the word volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,781 words.
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I declare under penalty of perjury the foregoing is true.

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RUBY KUMAR-THOMPSON

Dated: April 1, 2021

CERTIFICATIONS PURSUANT TO LAR 31.1(c)

I hereby certify that the text of the Appellee/Defendants' electronic responding brief is identical to the text of the paper copies thereof. A virus detection program was run on the filing and no viruses were detected. The virus detection used was Malwarebytes version 1.2.0.857 and Symantec Endpoint Protection version 25.3.3580.1100. I declare under penalty of perjury the foregoing is true.

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By: *s/ Ruby Kumar-Thompson*
RUBY KUMAR-THOMPSON

Dated: April 1, 2021

CERTIFICATE OF FILING AND SERVICE PURSUANT TO LAR 31.1

On April 1, 2021, I caused Defendant/Appellee's responding brief to be electronically filed through CM/ECF system and served upon counsel for Plaintiff-Appellant, through the CM/ECF system.

I declare under penalty of perjury the foregoing is true.

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