

No. _____

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

LIBBY HILSENATH, on behalf of her minor child,
C.H.,
Petitioner,

v.

SCHOOL DISTRICT OF THE CHATHAMS, et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Richard Thompson
Counsel of Record
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
Tel: (734) 827-2001
rthompson@thomasmore.org

Michael P. Hrycak
129 Beech Street
Cranford, NJ 07016
Tel: (908) 789-1870
michaelhrycak@yahoo.com

Counsel for Petitioner

QUESTIONS PRESENTED

In *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 587 (2022), this Court expressly rejected *Lemon*’s “ambitious[] attempt[] to find a grand unified theory of the Establishment Clause.” *American Legion v. American Humanist Ass’n*, 588 U.S. 29, 60 (2019). The majority in *Hilsenrath v. Sch. Dist. of Chathams*, 136 F.4th 484 (3d Cir. 2025) replaced that unified test with one of its own—a “hallmarks” test—that the concurrence, the Fifth Circuit, and two district courts have rejected.

Moreover, the majority’s newly minted hallmarks test is inconsistent with *Lee v. Weisman* and *Edwards v. Aguillard*, which recognize that the Establishment Clause provides much broader protection in the public school context, including protection from even “subtle coercive pressure” that violates the government’s “duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.” *Lee v. Weisman*, 505 U.S. 577, 592 (1992). And *Mahmoud v. Taylor* confirms that the principle identified in *Lee* and *Edwards*—that a parent has the right to direct the upbringing of her child—“receives a generous measure of protection from our Constitution.” 145 S.Ct. 2332, 2351 (2025); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (explaining that “the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student or his or her family”).

The questions presented are:

Whether a public school violates the Establishment Clause by assigning content that proselytizes for, extols, and gives favored treatment

to Islam (or any other religion) that conflicts with the religious beliefs of parents and their children.

Whether, given the “complementary purposes” of the Religion Clauses, the protection that the Establishment Clause provides to parents and their children in public schools under *Edwards* and *Lee* is coextensive with the protection the Free Exercise Clause provides them under *Mahmoud* and, therefore, prohibits public schools from assigning, without notice, content that conflicts with their religious beliefs.

PARTIES TO THE PROCEEDING

Petitioner is Libby Hilsenrath, the parent of C.H., who was a student enrolled in the course at issue in this case.

Respondent is the Board of Education of the School District of the Chathams.

CORPORATE DISCLOSURE STATEMENT

Petitioner Libby Hilsenrath is an individual person.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING.....	iii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	vi
TABLE OF AUTHORITIES	vii
DECISIONS BELOW.....	1
STATEMENT OF JURISDICTION	1
PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES	1
STATEMENT OF THE CASE.....	2
I. Factual Background.....	2
II. Procedural Background.....	4
REASONS FOR GRANTING THE WRIT.....	7
I. Certiorari should be granted because in the wake of <i>Kennedy</i> lower courts have adopted conflicting tests to determine the level of coercion necessary to support an Establishment Clause claim in the context of public schools and because the <i>Hilsenrath</i> majority’s hallmarks test conflicts with <i>Lee</i> and <i>Edwards</i>	9

A. In the wake of <i>Kennedy</i> 's rejection of <i>Lemon</i> , lower courts have proffered at least four different Establishment Clause analyses when determining whether a school has impermissibly coerced parents and students in public schools.....	11
B. The Third Circuit's decision disregards binding precedent, does not account for the "special context" of public schools, and, as a result, improperly limits the scope of protection from coercion that the Establishment Clause provides parents and students in the public school setting	17
II. By recognizing that content in public schools can conflict with a parent's religious beliefs, <i>Mahmoud v. Taylor</i> further undermines the Third Circuit's unduly narrow view of the types of coercion that violate a parent's right to direct the religious upbringing of her child under the Establishment Clause.....	26
CONCLUSION.....	33

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED MAY 5, 2025	1a
APPENDIX B — SUPPLEMENTAL OPINION ON REMAND OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED OCTOBER 16, 2023.....	27a
APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED OCTOBER 16, 2023.....	56a
APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JUNE 3, 2025	58a
APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JULY 20, 2022.....	60a
APPENDIX F — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED NOVEMBER 12, 2020	62a
APPENDIX G — COMPLAINT AND DEMAND FOR JURY TRIAL OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED JANUARY 23, 2018.....	103a

TABLE OF AUTHORITIES

	<i>Page</i>
<u>Cases:</u>	
<i>Agostini v. Felton</i> , 521 U.S. 203 (1997).....	4, 8, 17
<i>American Legion v. American Humanist Ass’n</i> , 588 U.S. 29 (2019)	10, 13, 20
<i>Bethel Sch. Dist. No. 403 v. Fraser</i> , 478 U.S. 675 (1986).....	22
<i>Carson v. Makin</i> , 596 U.S. 767 (2022).....	19
<i>Edwards v. Aguillard</i> , 482 U.S. 578 (1987).....	4, 7, 8, 9, 10, 11, 12, 13, 14, 17, 18, 20, 22, 25, 26, 28, 30, 31, 32
<i>Espinoza v. Montana Dept. of Rev.</i> , 591 U.S. 464 (2020).....	19
<i>Firewalker-Fields v. Lee</i> , 58 F.4th 104 (4th Cir. 2023).....	16
<i>Jacobellis v. Ohio</i> , 378 U.S. 184 (1964).....	14
<i>Kennedy v. Bremerton Sch. Dist.</i> , 597 U.S. 507 (2022).....	4, 5, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 26, 32
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992).....	4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 32
<i>Lemon v. Kurtzman</i> , 411 U.S. 192 (1973).....	4, 7, 9, 10, 11, 12, 13, 15, 17, 19, 32

<i>Loffman v. California Dep't of Educ.</i> , 119 F.4th 1147 (9th Cir. 2024)	7, 15
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984).....	21
<i>Mahmoud v. Taylor</i> , 145 S.Ct. 2332 (2025).....	8, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961).....	21
<i>Roake v. Brumley</i> , 141 F.4th 614 (5th Cir. 2025)	7, 15
<i>Sch. Dist. of Abington Tp., PA v. Schempp</i> , 374 U.S. 203 (1963).....	21, 23, 27, 31
<i>Shurtleff v. City of Bos.</i> , 596 U.S. 243 (2022).....	6, 7, 8, 9, 11, 12, 15, 18, 20
<i>Stinson v. Fayetteville Sch. Dist. No. 1</i> , 2025 WL 2231053 (W.D. Ark. Aug. 4, 2025)	7-8, 16
<i>Stone v. Graham</i> , 449 U.S. 39 (1980).....	31
<i>Tinker v. De Moines Indep. Sch. Dist.</i> , 393 U.S. 503 (1969).....	26
<i>Town of Greece v. Galloway</i> , 572 U.S. 565 (2014).....	11
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 582 U.S. 449 (2012).....	19
<i>W.V. Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943).....	21, 27, 33

<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985).....	20-21
<i>Williams v. Bd. of Educ. of City of Chicago</i> , 673 F. Supp. 3d 910 (N.D. Ill. 2023)	8, 16
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	25, 26, 31, 32, 33

Constitutional Provisions:

U.S. Const. Amend. I	1, 5, 18, 20, 26, 27, 28
----------------------------	--------------------------

Statutes and Other Authorities:

28 U.S.C. § 1254(1).....	1
--------------------------	---

DECISIONS BELOW

The opinion of the Court of Appeals is reported at 136 F.4th 484, No. 23-3030 (May 5, 2025) and reprinted in Pet. App. A1-A26. The opinion of the district court granting summary judgment to the defendants is reported at 698 F. Supp. 3d 752 (D.N.J. 2023) and reprinted in Pet. App. 27a-55a. The initial decision of the district court granting summary judgment to the defendants is reported at 500 F. Supp. 3d 272 (D.N.J. 2020) and reprinted in Pet. App. 62a-102a because it is referenced in the district court's later decision.

STATEMENT OF JURISDICTION

The Court of Appeals issued its opinion on May 5, 2025, and entered an order denying the Appellant's Petition for Panel and for En Banc Rehearing on June 3, 2025. App. 58a-59a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part:

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

U.S. CONST. AMEND. I.

STATEMENT OF THE CASE

I. Factual Background

Petitioner, Libby Hilsenrath, is the mother of C.H., her minor child. App. 73a. During the 2016-17 school year, C.H. was twelve years old and attended Seventh Grade at Chatham Middle School in the School District of the Chathams, Chatham, N.J. (“District”). App. 64a. As a seventh grader, C.H. was required to take and successfully complete a course in World Cultures and Geography. App. 64a-65a. The World Cultures and Geography Course included a unit that discussed the Middle East and North Africa (the “MENA unit”). App. 65a.

In January of 2017, C.H. and his mother reviewed his assignments for the MENA unit. App. 66a. She discovered that the District directed students to watch an “Intro to Islam Video.” App. 69a. Upon review, Hilsenrath learned that the video stated the articles of Islamic faith as if Islam were the one, true, faith, including assertions that “Allah is the one God....,” “Allah has no equal and is all powerful...,” “Muhammad ... is the last and final Messenger of God...,” “God gave [Muhammad] the Noble Quran...,” “Islam [is a] shining beacon against the darkness of repression, segregation, intolerance and racism...,” and Islam is “perfected” religion and the only religion for mankind. App. 4a-5a. This video ended with the prayer “May God help us all find the true faith, Islam. Ameen.” App. 6a. Hilsenrath also learned that her son was required to complete a worksheet which included a fill-in-the-blank written profession of the Shahada, “There is no god but __ and __ is his messenger.” App. 7a.

Troubled that Islamic doctrine was being promoted and taught in a tone suggesting that Islam was the one true faith, Hilsenrath, a Christian, probed further and discovered that C.H. had also been assigned a video about the pillars of Islam (“Islamic Pillars”), which they viewed together. App. 7a. The Islamic Pillars video featured a discussion between two adolescents, Alex (a non-Muslim) and Yusuf (a Muslim), with Yusuf explaining Islamic doctrine to Alex and inviting him to prayer. App. 6a-7a; App. 36a-37a.¹

Hilsenrath brought her concern—that her son was being exposed to materials that featured Islamic proselytizing while ignoring Judaism and Christianity in the Middle East—to the attention of the District. App. 37a, 70a-72a. The District

¹ The descriptions of the video by the courts below do not adequately convey the basis for Hilsenrath’s objection. The video is described adequately in the Complaint, App. 118a-120a, and was part of the Joint Appendix filed below (Jt. App.). It features two young children, Alex (a non-Muslim) and Yusuf (a Muslim) who stop their soccer game to discuss Islam when the Muslim call for prayer sounds. Yusuf instructs Alex in the Shahada, the Islamic credal prayer, which appears in bright letters (“there is no God except Allah and Prophet Muhammad is his messenger”) and discusses the second pillar of Islam which requires Muslims to pray to Allah five times a day. When Alex asks Yusuf if it is hard to pray that often, Yusuf responds, “No.... We are praying to god. And when I remember that it is god that keeps me healthy and my heart beating it make me want to pray.” Alex then looks down, sees his own heart beating, and smiles, signaling that he understands why he should pray to Allah. The video ends with Yusuf explaining to Alex that he must leave for midday prayer causing Alex to look down in sadness, but then Yusuf returns and invites Alex to come pray with him, and Alex happily goes off to pray to Allah with Yusuf. App. 118a-120a (Complaint at ¶¶63-72).

decided that no change to the curriculum was necessary. App. 39a.

II. Procedural Background

Hilsenrath filed suit on behalf of C.H., alleging that the District had violated the Establishment Clause by assigning her son materials that extolled Islamic doctrine and proselytizing in the context of an overall presentation that portrayed Islamic faith favorably while ignoring the importance of Judaism and Christianity in the Middle East. App. 73a. At the close of discovery, the parties filed cross-motions for summary judgment. App. 62a. Hilsenrath relied upon this Court’s decision in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), and relevant precedent applying the *Lemon* test in the public school setting, *Edwards v. Aguillard*, 482 U.S. 578 (1987), *Agostini v. Felton*, 521 U.S. 203 (1997), and *Lee v. Weisman*, 505 U.S. 577 (1992). See United States District Court District of New Jersey Case #2:18-cv-00966-KM-MAH at Doc. 63. The district court ruled that the District’s curriculum passed muster under *Lemon*, granted the District’s motion for summary judgment, and entered a final judgment. App. at 62a-102a.

Hilsenrath appealed to the Third Circuit. App. 8a-9a. After hearing oral argument, the Third Circuit vacated the decision below and remanded with instructions for the district court to consider the case in light of this Court’s decision in *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). App. 9a.

Upon remand, the district court observed that “[l]urking behind the Supreme Court’s analysis [in

Kennedy] is the well-recognized trade-off between the First Amendment Establishment Clause and the Free Exercise Clause in particular cases.” App. at 48a. The court reasoned that “[i]n a very general sense, *Kennedy* may be seen as restricting the scope of the Establishment Clause and, in the name of Free Exercise, granting a bit more leeway for the presence of religion in the setting of public education.” App. 48a. The court proceeded to “analyze whether the challenged materials ... bear any of the historical ‘hallmarks of religious establishments.’” App. 49a.

Believing its charge on remand was to “revisit the case in light of the largely coercion-based standard adopted by the majority in *Kennedy*,” App. 54a, the court noted that the curriculum did “not present any of the ‘hallmarks’ associated with establishment of religion to which *Kennedy* alluded.” App. 54a. After listing those “hallmarks,” it observed that “[t]hese sole guides that *Kennedy* has furnished the lower courts for the assessment of ‘coercion’ for the purposes of the Establishment Clause challenge in the context of public education, do not fit the facts of this case.” App. 55a. It granted the District’s motion for summary judgment because “the curriculum and materials ... were not coercive and do not otherwise bear or resemble the hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.” App. 55a.

Hilsenrath appealed to the Third Circuit, which affirmed the decision below in a divided opinion. The majority opinion took this Court’s decision in *Kennedy* to have “instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings,” App. 13a, and used

Justice Gorsuch's concurrence in *Shurtleff v. City of Bos.*, 596 U.S. 243 (2022), as the basis for its conclusion that "to prevail on her Establishment Clause claim, Hilsenrath must show that the Board's MENA curriculum resembles one of the[] hallmarks of religious establishment." App. at 13a-14a. Employing this approach, the majority concluded that "[b]ecause the Intro to Islam" and "5 Pillars" videos were presented in an academic rather than devotional context, they did not come close to crossing any line separating permissible curricular materials from impermissible proselytization." App. 18a. The majority also rejected Hilsenrath's argument (that the MENA lesson favored Islam because of its proselytizing content and because it extolled Islam over other faiths and encouraged conversion) on the grounds that the curriculum included coverage of many religions, the videos referred to Muslims in the third person, and there was no evidence that the teacher ever tried to convert her students to Islam. App. 19a-20a.

Writing separately, Judge Phipps observed that "the Majority Opinion uses a 'hallmarks' test: whether the challenged action bears any characteristic historically associated with an established church ...[,] but I posit that history and tradition are more effective as exegetical tools ... than as freestanding constitutional norms." App. 22a. In his view, "a hallmarks test ... is not needed to conclude the materials about Islam assigned to seventh-grade students at Chatham ... do not establish a religion. Instead, all that is needed is a recognition that teaching on matters of religion or even encouraging religious belief or practice in public

school does not constitute a law respecting an establishment of religion.” App. 23a-24a. The Third Circuit denied Hilsenrath’s petition for rehearing. App. 58a-59a.

Hilsenrath now petitions this Court because she believes that the courts below erred by taking *Kennedy* to overrule *Edwards* and *Lee*, *sub silentio*, and by invoking *Kennedy* to reject her claim based on reasoning that creates conflict with the Religion Clause principles articulated in *Edwards*, *Lee*, and *Mahmoud*.

REASONS FOR GRANTING THE WRIT

Review is warranted in this case for at least three reasons. First, five courts have reached at least four different conclusions about the proper Establishment Clause test to apply in the wake of *Lemon*’s possible demise. The majority in *Hilsenrath*, drawing on *Kennedy* and *Shurtleff*, adopted a new “hallmarks” test. The concurrence and Fifth Circuit rejected that grand unification project in favor of a “recognition” test and a “‘fits within’ or is ‘consistent with a broader tradition’ at the time of the Founding or incorporation” test, respectively. *Roake v. Brumley*, 141 F.4th 614, 646 (5th Cir. 2025). The Ninth Circuit has concluded that “*Kennedy* ‘has called into doubt much of our Establishment Clause case law,’” without hazarding a guess as to the actual test. *Loffman v. California Dep’t of Educ.*, 119 F.4th 1147, 1171 (9th Cir. 2024) (citation omitted). And two district courts have denied that *Kennedy* has the dramatic impact that the Ninth Circuit suggested. *Stinson v. Fayetteville Sch. Dist. No. 1*, 2025 WL

2231053, at *7 (W.D. Ark. Aug. 4, 2025); *Williams v. Bd. of Educ. of City of Chicago*, 673 F. Supp. 3d 910, 921 (N.D. Ill. 2023).

Second, the majority's new test is inconsistent with *Edwards* and *Lee* and the broad protection that the Establishment Clause affords parents and students in the school setting from subtle coercive pressures. Whereas *Kennedy* and *Shurtleff* limit the government's ability to invoke the Establishment Clause to justify restricting the expression of private speakers, *Lee* and *Edwards* teach a different lesson. In the public-school setting, the Establishment Clause provides parents and students with broad protection, ensuring that "the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards*, 482 U.S. at 584. While *Hilsenrath* reads *Kennedy* as effectively overruling these opinions (such that its new hallmarks test governs), this Court cites both cases favorably throughout the majority opinion in *Kennedy*. And this Court has explained that, "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (cleaned up).

Third, the Third Circuit's narrow view of the forms of coercion that count under the Religion Clauses contradicts *Mahmoud*, which safeguards "the right of parents 'to direct the religious upbringing of their' children." *Mahmoud*, 145 S.Ct. at 2351. Given the "complementary purposes" of the Religion

Clauses, *Kennedy*, 597 U.S. at 533, it is not surprising that the rights of parents and their children are safeguarded by the Free Exercise and Establishment Clauses. But instead of affording *Hilsenrath* and her minor son the “generous measure of protection” given parents and their children in the school setting, the Third Circuit read *Kennedy* and Justice Gorsuch’s concurrence in *Shurtleff* as narrowing the protection parents and children enjoy under the Establishment Clause. *Hilsenrath*, therefore, presents important questions about the proper Establishment Clause test to apply in the public-school context post-*Kennedy* and the type of coercive pressure that infringes the Religion Clauses in that setting. Only this Court can resolve the lower court confusion and confirm the ongoing vitality of *Lee* and *Edwards*, thereby preventing conflict between the Clauses and impermissible limiting of the scope of their protection.

I. Certiorari should be granted because in the wake of *Kennedy* lower courts have adopted conflicting tests to determine the level of coercion necessary to support an Establishment Clause claim in the context of public schools and because the *Hilsenrath* majority’s hallmarks test conflicts with *Lee* and *Edwards*.

Now that this Court has expressly “abandoned *Lemon* and its endorsement test offshoot,” *Kennedy*, 597 U.S. at 534, lower courts have struggled to determine whether *Kennedy* articulated a new Establishment Clause test, what that test is, and what impact that test has on longstanding Establishment Clause precedents, like *Lee* and

Edwards, which safeguard parents and their students against coercion in the public schools. In *Hilsenrath*, the majority and concurrence disagree as to the answers to these questions. The majority contends that *Kennedy* created a “hallmarks” test, replacing *Lemon*’s “ambitious[] attempt[] to find a grand unified theory of the Establishment Clause” with its own test. *American Legion*, 588 U.S. at 60. The concurrence rejects the grand unification project in favor of “a recognition that teaching on matters of religion or even encouraging religious belief or practice in public school does not constitute a ‘law respecting an establishment of religion.’” *Hilsenrath*, 136 F.4th at 495 (Phipps, J., concurring in the judgment) (citation omitted).

The Fifth Circuit disagrees with both Third Circuit opinions and advances its own post-*Kennedy* analysis. The Ninth Circuit is confident that *Kennedy* had a dramatic impact on Establishment Clause cases but has not entered the fray of picking a specific new test. And all four of these interpretations are at odds with two district courts that do not think the post-*Kennedy* Establishment Clause landscape has changed all that much. Of course, at most one (and perhaps none) of these conflicting views is correct. And deciding the appropriate test is critically important given the Establishment Clause right at stake—freedom from even “subtle coercive pressure” that undermines a parent’s right to direct the religious upbringing of her child. *Lee*, 505 U.S. at 592; *Edwards*, 482 U.S. at 584 (“Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict

with the private beliefs of the student and his or her family.”).

Moreover, despite recognizing that “[c]ontext is key,” the majority never considers the fundamental differences between the government’s use of the Establishment Clause in *Kennedy* and *Shurtleff* (as justification for restricting speech by private speakers) and a parent’s invocation of that Clause to shield her child from materials that are proselytizing in nature and inconsistent with their religious beliefs. In the former situation, this Court has narrowed the government’s ability to invoke the Establishment Clause; in the latter, this Court “has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.” *Id.* at 583-84. Review is necessary, therefore, because the Third Circuit majority disregards the teachings of *Edwards* and *Lee*, allowing the District to ignore its “duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.” *Lee*, 505 U.S. at 592.

A. In the wake of *Kennedy*’s rejection of *Lemon*, lower courts have proffered at least four different Establishment Clause analyses when determining whether a school has impermissibly coerced parents and students in public schools.

Having abandoned *Lemon*, *Kennedy* explained “that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” 597 U.S. at 535 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). What

Kennedy requires going forward has been anything but clear, fostering broad-based confusion among lower courts as to the appropriate approach and *Kennedy*'s impact on Establishment Clause precedents that previously applied *Lemon*: “[w]hile clearly rejecting the *Lemon* test, the majority in *Kennedy* was less clear about what would replace it—*i.e.*, what would constitute a proper ‘historical analysis’ of a party’s Establishment Clause claim in all cases.” App. 44a.

For its part, the *Hilsenrath* majority concluded that *Kennedy* replaced *Lemon* with a different unified Establishment Clause test, one grounded in the six “‘telling traits’” of “‘established churches’” that Justice Gorsuch articulated in *Shurtleff*. App. 14a (quoting *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring)). To “prevail on [an] Establishment Clause claim,” *Hilsenrath* “*must* show that the Board’s MENA curriculum resembles one of these hallmarks of religious establishment.” App. 14a. (emphasis added). Yet as *Lee* and *Edwards* demonstrate, not all establishments of religion involve the government’s establishing a church. And the majority never considered that a test developed outside the public-school context may not apply to parents and students who are in that setting given the “heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.” *Lee*, 505 U.S. at 592.

Consequently, even if coercion is a “hallmark” of an Establishment Clause violation, no post-*Kennedy* opinion of this Court has specified what constitutes “impermissible coercion” in the public school context. *Kennedy*, 597 U.S. at 537 (“Members of this Court

have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause.”) (citing the majority opinion in *Lee* and Justice Scalia’s dissent). *Kennedy* did not attempt to undertake that project, and the majority never explains how its new unified theory is consistent with *Lee* and *Edwards*. Furthermore, given that *American Legion* sought to replace *Lemon* with “a more modest approach that focuses on the particular issue at hand and looks to history for guidance,” the majority’s new unified theory seems anything but “modest.” 588 U.S. at 60; *Kennedy*, 579 U.S. at 535-36 (citing *American Legion* favorably).

The majority’s approach creates additional uncertainty. Despite recognizing that this type of “historical inquiry ‘requires serious work’”—“work [that] is especially challenging” in the public-school setting, App. 13a—the majority never directly engages that challenge. Yet important questions remain unanswered. How does the majority’s historical test mesh with *Edwards*, which disclaims such an approach in the public school context: “Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted”? 482 U.S. at 583 n.4. The majority does not say. Instead of engaging in a meaningful analysis of this Court’s public-school precedents, the majority devotes one short paragraph to a cursory review of “decisions addressing proselytization in public schools.” App. 17a. *Lee* and *Edwards*, however, go beyond proselytization, recognizing that the Establishment

Clause ensures “that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.” *Edwards*, 482 U.S. at 584.

The concurrence rejects the majority’s novel “hallmarks” test positing that: “history and tradition are more effective as exegetical tools for construing the text and structure of the Constitution than as freestanding constitutional norms.” App. 22a (Phipps, J., concurring in the judgment). But it ignores *Edwards* and *Lee* entirely, contending that “all that is needed is a recognition that teaching on matters of religion or even encouraging religious belief or practice in public school does not constitute a ‘law respecting an establishment of religion.’” App. 22a (Phipps, J., concurring) (citation omitted). Unless it does. After all, *Lee* and *Edwards* recognize that the “transmission of religious beliefs ... is a responsibility and a choice committed to the private sphere,” which is why the schools have a “duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.” *Lee*, 505 U.S. at 589, 592. Judge Phipps’s “recognition” test provides no objective way to distinguish the constitutional use of religious lessons and the unconstitutional, and threatens to devolve into a form of Justice Stewart’s “I know it when I see it” approach to obscenity. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

As it turns out, the Fifth Circuit has rejected both views, creating a circuit split and furthering the need for Supreme Court review. According to the Fifth Circuit, “*Kennedy* did not adopt these ‘hallmarks’ as the exclusive Establishment Clause test and the

Shurtleff concurrence is nonbinding.” *Roake*, 141 F.4th at 645-46. In its place, the Fifth Circuit “formulated the following standard to evaluate historical record evidence: Whether the challenged practice ‘fits within’ or is ‘consistent with a broader tradition’ at the time of the Founding or incorporation.” *Id.* at 646. But the court acknowledged that the Establishment Clause test might differ in the school setting: “neither we nor the Supreme Court have decided an Establishment Clause case involving the public school context since *Kennedy*.” *Id.* at 646 n.24. As a result, the Fifth Circuit panel “assume[d] without deciding that the historical framework ... is applicable here.” *Id.*

While the Ninth Circuit has not adopted a specific test, it has indicated that *Kennedy* has had a significant impact on this Court’s Establishment Clause jurisprudence: “in light of its methodological mandate, *Kennedy* ‘has called into doubt much of our Establishment Clause case law.’” *Loffman*, 119 F.4th at 1171 (citation omitted). At the same time, two federal district courts have claimed that *Kennedy*’s impact is not as broad or deep as the Ninth Circuit suggests:

Despite the *Kennedy* Court’s rather sweeping announcement that the *Lemon* test had been ‘abandoned,’ there is no cause to believe that all Supreme Court precedent that relied on the *Lemon* test has been—or will be—overruled. The *Kennedy* opinion itself makes that crystal clear. *Kennedy* cited two public-school Establishment Clause cases, *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*—both of which applied the

Lemon test—and treated them as still-binding precedent.

Stinson v. Fayetteville Sch. Dist. No. 1, 2025 WL 2231053, at *7; *id.* at *11 (“But *Kennedy* did not overrule any public-school Establishment Clause cases involving a state’s or school district’s imposition of religious doctrine or practices on public-school children.”); *Williams v. Bd. of Educ. of City of Chicago*, 673 F.Supp.3d 910, 921 (N.D. Ill. 2023) (“The Court stated in *Kennedy* that it did not overrule prior decisions in which ‘[the Supreme Court] has found prayer involving public school students to be problematically coercive.’”) (citation omitted).

Yet even if *Kennedy* does advance a single test, unanswered questions abound. The concurrence in *Hilsenrath* highlighted two: whether the government must violate one or all the majority’s six traits for an Establishment Clause violation and whether, if one or more traits are present, the government can defend by showing that its offending action comports with history and tradition. While noting that *Kennedy* “provided *some* clarity,” such that courts should “[i]dentify the relevant tradition, then determine whether the challenged practice is in or out,” the Fourth Circuit stressed that “many questions remain,” like “What kinds of evidence are relevant? What kinds of evidence are the most useful? Which periods of history are relevant—the era of the Bill of Rights, 1791, or the era of the incorporation of the Bill of Rights, 1868—and which period is most important?” *Firewalker-Fields v. Lee*, 58 F.4th 104, 121, 122 n.6 and n.8 (4th Cir. 2023) (citations omitted). The facts of this case—involving instruction in a public school that was required without any

warning about or notice of the religious content of the assigned videos—implicates all of these unanswered questions.

If *Kennedy* espoused a test, courts need to know what that test is. If *Kennedy* overturned certain Establishment Clause precedents, then courts need guidance as to which cases still apply in the public-school setting. Only this Court can answer these important questions.

B. The Third Circuit’s decision disregards binding precedent, does not account for the “special context” of public schools, and, as a result, improperly limits the scope of protection from coercion that the Establishment Clause provides parents and students in the public school setting.

Although the majority acknowledges the importance of context, it never considers how the Establishment Clause differs depending on who is invoking that Clause and for what purpose. The majority seems to take *Kennedy* to overrule *Lee* and *Edwards*, two of the leading Establishment Clause cases dealing with coercion in the public schools, and, therefore, reaches a result that is inconsistent with both opinions. As this Court explained in *Agostini v. Felton*, however, “if a precedent of this Court has direct application in a case [*Lee* and *Edwards*], yet appears to rest on reasons rejected in some other line of decisions [*Kennedy*’s rejection of *Lemon*], the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” 521 U.S. at 237. The

Third Circuit ignores this directive, fashioning its own test based on cases (*Kennedy* and *Shurtleff*) that dealt with strikingly different factual situations and, in the process, impermissibly narrowing the Establishment Clause protection given parents and their students in the special context of public schools.

The confusion started with the district court, which interpreted *Kennedy* as limiting the scope of the Establishment Clause despite the “vigilant ... monitoring,” *Edwards*, 482 U.S. at 583, that *Lee* and *Edwards* call for in public schools: “[i]n a very general sense, *Kennedy* may be seen as restricting the scope of the Establishment Clause and, in the name of Free Exercise, granting a bit more leeway for the presence of religion in the setting of public education.” App. 48a. In *Kennedy*, the government invoked the Establishment Clause to justify its suppression of private religious speech. The school district argued “its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause.” *Kennedy*, 597 U.S. at 532. Even though his post-game prayers at midfield “might have been protected by the Free Exercise and Free Speech Clauses[, ...] his rights were in ‘direct tension’ with the competing demands of the Establishment Clause.” *Id.* And “[t]o resolve that clash, the District reasoned, Mr. Kennedy’s rights had to ‘yield’ ” to the Establishment Clause. *Id.*

This Court expressly rejected the school’s reasoning. Given that Kennedy’s post-game prayers were private expression that the school never endorsed, the school could not invoke the Establishment Clause to justify restricting Kennedy’s “otherwise protected First Amendment activities.” *Id.* at 533. Having prohibited Kennedy’s private

religious expression, the school could not, when challenged, claim that it had done so to comply with the strictures of the Establishment Clause: “In this way, the District effectively created its own ‘vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other,’ placed itself in the middle, and then chose its preferred way out of its self-imposed trap.” *Id.*

Similarly, in *Trinity Lutheran, Espinoza*, and *Carson*, this Court rejected the government’s “the Establishment Clause made me do it” defense. In each of these cases, the government sought to exclude religious groups from receiving otherwise generally available public benefits. In *Trinity Lutheran*, this Court rejected the Department’s attempt to hide behind “Missouri’s policy preference for skating as far as possible from religious establishment concerns.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 462 (2012). In *Espinoza*, this Court denied that Montana could exclude religious schools from “a scholarship program for students attending private schools” by “assert[ing] that the no-aid provision serves Montana’s interest in separating church and State ‘more fiercely’ than the Federal Constitution.” *Espinoza v. Montana Dept. of Rev.*, 591 U.S. 464, 468, 484 (2020). And in *Carson v. Makin*, this Court held that Maine’s “antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.” 596 U.S. 767, 781 (2022).

The lesson is clear yet unheeded by the courts below. By rejecting *Lemon* and the endorsement test, the Court has made it harder for the government to

invoke the Establishment Clause to justify “discriminat[ion] against disfavored religious speakers,” *Shurtleff*, 596 U.S. at 285 (Gorsuch, J., concurring in the judgment), because the government can no longer argue that the Establishment “Clause ‘compel[s] the government to purge from the public sphere’ anything an objective observer could reasonably infer endorses or ‘partakes of the religious.’” *Kennedy*, 597 U.S. at 535 (citation omitted). This is so because “no historically sensitive understanding of the Establishment Clause can be reconciled with a rule requiring governments to ‘roa[m] the land, tearing down monuments [or other forms of expression] with religious symbolism and scrubbing away any reference to the divine.” *Shurtleff*, 596 U.S. at 288 (Gorsuch, J., concurring in judgment) (quoting *American Legion*, 588 U.S. at 84-85).

Yet this case is critically different from *Kennedy*. Here, a parent acting on behalf of her child is invoking the Establishment Clause in the “special context” of a public school to stop the District’s use of “the classroom ... to advance religious views that may conflict with [Hilsenrath’s] private beliefs.” *Edwards*, 482 U.S. at 584. In this setting, “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure,” *Lee*, 505 U.S. at 592, and the District’s educational “discretion must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.” *Edwards*, 482 U.S. at 583. As a result, this Court has afforded parents and their children broad Establishment Clause protection from the coercive pressures within public schools. *Wallace v. Jaffree*,

472 U.S. 38, 61 (1985) (explaining the need for courts to “[k]eep[] in mind ... ‘both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded’”) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring)); *W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual.”).

The majority’s narrow view of Establishment Clause protection—limited only to overt proselytization and forced participation in religious exercises—is inconsistent with the “generous measure of protection” the Religion Clauses provide parents and students in the public school context. *Mahmoud*, 145 S.Ct. at 2351. The Establishment Clause not only protects students from overt coercion, but also helps “to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.” *Lee*, 505 U.S. at 592; *McGowan v. Maryland*, 366 U.S. 420, 441-42 (1961) (“Thus, this Court has given the [establishment of religion] a ‘broad interpretation ... in the light of its history and the evils it was designed forever to suppress.’”) (citation omitted); *Sch. Dist. of Abington Tp., PA v. Schempp*, 374 U.S. 203, 227 (1963) (Douglas, J., concurring) (noting that the “Establishment Clause, serv[es] the same goal of individual religious freedom,” as “the Free Exercise Clause”).

The threats to “conscience and belief” are “heightened” in the school context given the “subtle coercive pressure” that comes from the age of the

students and the government's control over public schools. *Lee*, 505 U.S. at 592. In “the classroom setting, ... the risk of compulsion is especially high,” *id.* at 596, because “[s]tudents in such institutions are impressionable and their attendance is involuntary.” *Edwards*, 482 U.S. at 584. Through its schools, a State “exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.” *Id.* at 584; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (“Consciously or otherwise, teachers [are] ... [i]nescapably, like parents, ... role models.”).

The majority apparently ignores the special nature of the classroom and downplays the threat the lessons on Islam posed to Hilsenrath’s and C.H.’s religious beliefs. While the lessons on Islam “may seem nothing more than a reasonable request that [a student] respect [and learn about Muslims’] religious practices, in a school context may appear to [the student or parent] to be an attempt to employ the machinery of the State to [favor] a religious orthodoxy.” *Lee*, 505 U.S. at 592. Yet the majority repeatedly minimizes the intrusion and impact of the religious content in the assignments, emphasizing that the lessons on Islam covered only “two class periods,” included a “five-minute video” that had only two minutes of “quotations from the Quran and a series of questions and answers about Islam” with background chanting that Hilsenrath and her son “did not understand,” did not show the videos in class, and did not “explicitly instruct the students to view the[videos].” App. 17a. “C.H. nonetheless watched [the two] videos at home

with his mother,” *id.* at 7a, but did so “‘as part of a secular program of education.’” App. 17a (quoting *Schempp*, 374 U.S. at 225).

Lee instructs, however, that “the intrusion of the religious [lessons] cannot be refuted by arguing that these [videos] ... are of a *de minimis* character” because “the intrusion is greater than the two minutes or so of time consumed [watching videos] like these.” *Lee*, 505 U.S. at 594. As in *Lee*, courts must “[a]ssum[e] ... that the [proselytizing content and] prayers were offensive to the student and the parent who now object.” App. 7a-8a (“Concerned about the MENA curriculum, Hilsenrath emailed administrators and aired her complaints at a school board meeting in February 2017.”). Accordingly, there is no doubt that “the intrusion was ... real” and that the Third Circuit should have focused on whether the lessons on Islam were, “in the context of a [middle] school, a violation of the objectors’ rights.” *Lee*, 505 U.S. at 578.

To borrow from *Lee* once again, the majority’s claim that the teacher did not require students to watch the videos “is formalistic in the extreme.” *Lee*, 505 U.S. at 595. Students were assigned the PowerPoint slides discussing Islam and knew they would be tested on the course materials. The PowerPoints included links to the two videos, and the “Intro To Islam” slide directed students to “Watch this video;” it was a directive, not a suggestion. Jt. App. at 416. And as part of the assignment, students were instructed: “As you watch this video clip, write down words that describe Islam as presented by this video.” *Id.* The class was mandatory, and the teacher assigned—and tested students on—the PowerPoint

slides, which included links to the challenged videos on Islam. In fact, the superintendent acknowledged that C.H. watched the videos because they were assigned class materials. Jt. App. 343-44.

The majority also suggests that the fact the instruction about Islam was part of a larger curriculum somehow makes a constitutional difference. It does not. The secular storybooks mandated in *Mahmoud* were also one part of a broader reading program, but this Court focused on the subtle pressure that the storybooks—not the larger educational program—imposed on students: “For young children, to whom this and the other storybooks are targeted, such celebration is liable to be processed as having moral connotations. If this same-sex marriage makes everyone happy and leads to joyous celebration by all, doesn’t that mean it is in every respect a good thing?” 145 S.Ct. at 2353. And the Third Circuit should have done the same thing here—analyze the subtle coercive pressures exerted on students and parents to watch, study, and affirm (through testing and discussion) the positive views about Islam that the videos conveyed.²

² The majority dismisses the religious nature of the Arabic chants that played during the “Intro to Islam” video, suggesting that such religious music has no bearing on the Establishment Clause analysis because “neither [Hilsenrath] nor C.H. speaks Arabic, so they did not understand the meaning of the chants when they first watched the video.” App. 4a n.7. But such music reinforces the religious nature of the lessons just as recordings of monks chanting the “Pater Noster” during a class on Christianity could impact how students experienced the lessons even if they do not speak Latin and, consequently, do not understand the specific words.

When younger students, like C.H., are taught that a particular religion is widely followed, is the foundation for “a tradition of unsurpassable splendor, scientific thought and timeless art,” and has made many “contributions to society,” art, and architecture, they are apt to take Islam to be a good thing or perhaps to be as good as their own religious traditions. App. 5a; *Mahmoud*, 145 S.Ct. at 2353 (“High school students may understand that widespread approval of a practice does not necessarily mean that everyone should accept it, but very young children are most unlikely to appreciate that fine point.”). While many Americans might agree with that view, “and it goes without saying that they have every right to do so,” “other Americans wish to present a different moral message to their children [about different faith traditions]. And their ability to present that message is undermined when the exact opposite message is positively reinforced in the public school classroom at a very young age.” 145 S.Ct. at 2354.

What is critical here is that the videos are coercive because they “carry with them ‘a very real threat of undermining’ the religious beliefs that the parents wish to instill in their children.” *Id.* at 2355 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)). The videos “impose upon children a set of values and beliefs that are ‘hostile’ to their parents’ religious beliefs” and “exert upon children a psychological ‘pressure to conform’ to their specific viewpoints.” *Id.* (quoting *Yoder*, 406 U.S. at 211). And the Third Circuit panel’s differing tests did not consider, let alone discuss, these “heightened concerns” or how *Lee* and *Edwards* affected the Establishment Clause analysis.

II. By recognizing that content in public schools can conflict with a parent’s religious beliefs, *Mahmoud v. Taylor* further undermines the Third Circuit’s unduly narrow view of the types of coercion that violate a parent’s right to direct the religious upbringing of her child under the Establishment Clause.

Although *Mahmoud* was decided after *Hilsenrath*, *Mahmoud*’s discussion of the Religion Clauses and the broad protection accorded parents and students in school settings bears directly on this case. First, *Mahmoud* confirms that neither parents nor students “shed” their First Amendment rights “at the schoolhouse gate.” *Tinker v. De Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). Second, *Mahmoud* explains that Free Exercise Clause safeguards parents and their children from instruction that undermines religious beliefs. *Mahmoud*, 145 S.Ct. at 2349 (discussing parents’ “right ‘to direct the religious upbringing of their children.’”) (quoting *Yoder*, 406 U.S. at 218). If this sounds familiar, it should. As discussed above, *Lee* and *Edwards* make clear that subtle pressures interfering with this right in public school instruction violate the Establishment Clause. *Edwards*, 482 U.S. at 584; *Lee*, 505 U.S. at 592.

Given the “complementary purposes” of the Religion Clauses, *Kennedy*, 597 U.S. at 533, this overlap is not surprising. After all, the Religion Clauses work together to prevent the government from coercing both religious beliefs and participation

in religious exercises, ensuring that “the preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.” *Lee*, 505 U.S. at 589; *Schempp*, 374 U.S. at 217 (describing “[t]he interrelationship of the Establishment and the Free Exercise Clauses”). Accordingly, the Free Exercise and Establishment Clauses prevent even subtle forms of coercion that interfere with a parent’s right to direct the religious training of her son. *Mahmoud*, 145 S.Ct. at 2350.

Mahmoud makes this connection express. While “*Barnette* dealt with an especially egregious kind of direct coercion ...[,] that does not mean that the protections of the First Amendment extend only to policies that *compel* children to depart from the religious practices of their parents.” *Id.* at 2352. The Free Exercise Clause also “protects against policies that impose more subtle forms of interference with the religious upbringing of children.” *Id.* And *Lee* said the same thing in the Establishment Clause context—that the State’s “duty to guard and respect that sphere of inviolable conscience and belief” includes “protecting freedom of conscience from subtle coercive pressure.” 505 U.S. at 592.

Just as the parents in *Mahmoud* were not required to “‘show direct or indirect coercion arising out of the exposure’ to the storybooks,” 145 S.Ct. at 2349. Hilsenrath should not have been required to do so in relation to the lessons on Islam. Yet the district court and majority did just that. The district court demanded “evidence of significant coercion,” imposing a robust requirement on plaintiffs based on Justice Scalia’s dissent in *Lee*: “Even through an objective lens,

however, the materials cannot be viewed as tending to compel a student ‘by force of law and threat of penalty,’ to adhere to a particular religious belief or participate in a particular religious practice.” App. 50a (quoting *Lee*, 505 U.S. at 640-42 (Scalia, J., dissenting)). The majority required Hilsenrath to demonstrate that the District “force[d her son] to engage in a formal religious exercise” or engaged in “impermissible proselytization.” App. 16a, 18a. (cleaned up).

But *Mahmoud* confirms what *Lee* first indicated—that this is a false dichotomy. To establish a First Amendment claim, parents are not required to show that a school’s policy “would *compel* [their] children to make an affirmation that was contrary to their parents’ or their own religious beliefs” or that their “children would be compelled to commit some specific practice forbidden by their religion.” *Id.* at 2352; *id.* at 2349 (rejecting the Fourth Circuit’s claim that parents could succeed on their free exercise claim only if they “show[ed] direct or indirect coercion arising out of the exposure” to the storybooks). Given the age of the students and the nature of the school context, impermissible coercion includes “more subtle forms of interference with the religious upbringing of children.” *Id.*

Because *Mahmoud* was decided after *Hilsenrath*, the Third Circuit did not have the benefit of *Mahmoud*’s analysis. Because the Free Exercise and Establishment Clauses both protect Hilsenrath’s right to direct her son’s religious upbringing, the panel should be given that opportunity. *Edwards*, 482 U.S. at 584 (explaining how the Establishment Clause ensures “that the classroom will not purposely

be used to advance religious views that may conflict with the private beliefs of the student and his or her family”); *Lee*, 505 U.S. at 589 (“The design of the [Religion Clauses] is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.”); *Mahmoud*, 145 S.Ct. at 2351 (“The practice of educating one’s children in one’s religious beliefs ... receives a generous measure of protection from our Constitution.”).

This is especially important given the significant similarities between the storybooks in *Mahmoud* and the Islam lessons here. The District assigned videos about Islam that “present certain values and beliefs as things to be celebrated.” *Id.* at 2353. These videos were created to support and promote Islam. Not surprisingly, then, the videos, like the storybooks in *Mahmoud*, “are unmistakably normative.” *Id.* at 2353. They celebrate Islam as well as “Muslim contributions to society.” App. 6a. The second video concludes “by providing an email address,” so viewers can obtain more information, and “a website through which viewers can ‘organise a mosque tour, or order an information pack.’” App. 7a.

No matter how well-intentioned they might be, the videos and lessons “carry with them ‘a very real threat of undermining’ the religious beliefs that the parents wish to instill in their children,” because of the content of the videos coupled with “the potentially coercive nature of classroom instruction of this kind.” 145 S.Ct. at 2355. Given “the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure,” the District “exerts great authority and coercive power through” its

curriculum. *Edwards*, 482 U.S. at 584; *Lee*, 505 U.S. at 592. As *Mahmoud* instructs, “[y]oung children, like [petitioner’s son], are often ‘impressionable’ and ‘implicitly trus[t]’ their teachers.” 145 S.Ct. at 2355.

Consider what is apt to happen if a student disagreed with the positive views about Islam that were presented in the videos and PowerPoint slides. The lessons on Islam were part of a larger lesson on “Critical Thinking[:] Making Generalizations with Content.” App. 17a. And the slides provided examples of, what the school (apparently) viewed as, true generalizations about Muslims, teaching students that the media (and possibly the students’ parents) have an improperly negative or dismissive view of Muslims and Islam. Jt. App. at 414 (requiring students to determine whether “There’s rarely a mention of Muslims in the media that doesn’t have to do with violence” and “In day-to-day coverage, Muslims are largely absent: Muslim festivals like Ramadan often come and go with little note” are true generalizations).

Suppose a student said that “The Qur’an preaches violence” or “Many Muslims want to destroy America, the Great Satan”? Based on the positive nature of all the materials presented on Islam, a teacher might (understandably) tell the student that such claims are faulty generalizations and, in so doing, might (unknowingly) challenge the religious beliefs of the student or his parents. The problem is that normative lessons on Islam “advance religious views that may conflict with the private beliefs of the student and his or her family,” *Edwards*, 482 U.S. at 584, thereby violating the principles articulated in *Mahmoud* and *Lee*.

Moreover, in *Mahmoud* it did not matter that the LGBTQ+-inclusive books were required “‘as part of a secular program of education’” or that the lessons on gender identity were “‘integrated into the school curriculum’ as part of ‘an appropriate study of’ children’s literature. App. 17a (quoting *Schempp*, 374 U.S. at 225 and *Stone v. Graham*, 449 U.S. 39, 42 (1980)). The constitutional problem stemmed from the storybooks’ “pos[ing] ‘a very real threat of undermining’ the religious beliefs and practices that the parents wish to instill.” 145 S.Ct. at 2342 (quoting *Yoder*, 406 U.S. at 218). Like the storybooks in *Mahmoud*, the District’s lessons on Islam undermined the religious beliefs and practices that Hilsenrath sought to instill in her son by teaching the tenets of that faith, promoting the virtues of Islam, and requiring students to watch a video that encouraged a non-Muslim to join in Muslim prayer after learning about the Five Pillars of that faith. App. 6a. The videos also extolled the virtues of Islam, discussing how “Muslims created a tradition of unsurpassable splendor, scientific thought and timeless art” and concluding with “May God help us all find the true faith, Islam ... Ameen.” App. 5a; *Mahmoud*, 145 S.Ct. at 2345-46 (“The parent felt that the Board was ‘implying to [children] that their religion, their belief system, and their family tradition is actually wrong.’”).

The Establishment Clause ensures, among other things, “that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.” *Edwards*, 482 U.S. at 584. This protection stems directly from “the lesson of history that was and is the

inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.” *Lee*, 505 U.S. at 591-92. While learning that there are different religious holidays or about “the doctrinal disputes ... that fueled the Protestant Revolution” may not conflict with the private beliefs of parents or students, being taught that Islam is the “true faith” or normalizing prayer in other faith traditions might—and did in this case. Contrary to the majority’s suggestion, class materials that “advance religious views” that conflict with parents’ religious beliefs—even views that a school district may agree with or think should be encouraged (such as the LGBTQ+-inclusive books in *Mahmoud*) can cross the line between permissible class instruction and impermissible infringement on parental rights under the Establishment Clause.

Whereas *Kennedy* completed the shift away from *Lemon*, *Mahmoud* reinvigorated *Yoder*, explaining that it “is an important precedent of this Court, and it cannot be breezily dismissed as a special exception granted to one particular religious minority.” 145 S.Ct. at 2357. As a result, lower courts can no longer ignore that *Yoder* “embodies a principle of general applicability” and that its underlying “principle provides more robust protection for religious liberty than the alarmingly narrow rule that” the Fourth and Third Circuits applied in *Mahmoud* and *Hilsenrath*, respectively. *Id.* In sum, *Mahmoud* confirms that the decisions in *Edwards* and *Lee*, not the decision in *Kennedy*, identify the coercion that counts under the

Establishment Clause when parents or students object to religious content.

As *Hilsenrath* demonstrates, the lower courts did not know to—and therefore did not—heed the lessons of *Mahmoud* and *Yoder*. As a result, they adopted a narrow view of coercion that afforded no protection for a parent’s right to direct the religious upbringing of her child. *Mahmoud* rejected “this chilling vision of the power of the state to strip away the critical right of parents to guide the religious development of their children.” 145 S.Ct. at 2358. In its place, this Court reaffirmed *Yoder* and *Barnette*, which “embody a very different view of religious liberty, one that comports with the fundamental values of the American people.” *Id.*

This Court, therefore, should grant this petition, vacate the Third Circuit opinion, and remand the case to the Third Circuit, giving the panel the opportunity to determine in the first instance how this Court’s reasoning in *Mahmoud* affects Establishment Clause claims in the public school context.

CONCLUSION

For the reasons given above, this Court should grant the petition for certiorari or, in the alternative, remand the case for reconsideration in light of *Mahmoud*.

Respectfully submitted,

Richard Thompson
Counsel of Record
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
Tel: (734) 827-2001
rthompson@thomasmore.org

Michael P. Hrycak
129 Beech Street
Cranford, NJ 07016
Tel: (908) 789-1870
michaelhrycak@yahoo.com

September 2, 2025

APPENDIX

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED MAY 5, 2025.....	1a
APPENDIX B — SUPPLEMENTAL OPINION ON REMAND OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED OCTOBER 16, 2023	27a
APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED OCTOBER 16, 2023	56a
APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JUNE 3, 2025.....	58a
APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JULY 20, 2022	60a
APPENDIX F — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED NOVEMBER 12, 2020	62a

Table of Appendices

	<i>Page</i>
APPENDIX G — COMPLAINT AND DEMAND FOR JURY TRIAL OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED JANUARY 23, 2018	103a

1a

**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT,
FILED MAY 5, 2025**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3030

LIBBY HILSEN RATH, 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 CHATHAMS;
KAREN CHASE, IN HER OFFICIAL CAPACITY
AS THE ASSISTANT SUPERINTENDENT OF
CURRICULUM AND 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

2a

Appendix A

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:18-cv-00966)

District Judge: Honorable Kevin McNulty

Argued on October 29, 2024

Before: HARDIMAN, PHIPPS, and FREEMAN,
Circuit Judges.

(Filed: May 5, 2025)

OPINION OF THE COURT

HARDIMAN, *Circuit Judge.*

This appeal concerns the constitutionality of a middle school social studies curriculum. Libby Hilsenrath sued the Board of Education of the School District of the Chathams over instructional videos about Islam in her son's seventh-grade World Cultures and Geography class. She claimed the Board violated the Establishment Clause of the First Amendment by assigning the videos. Applying recent pathmarking decisions of the Supreme Court, the District Court disagreed and granted summary judgment to the Board. Hilsenrath filed this appeal. Because the school's curriculum does not resemble a traditional hallmark of religious establishment, we will affirm.

*Appendix A***I****A**

During the 2016-2017 school year, C.H. was a seventh-grade student at Chatham Middle School. He was enrolled in a mandatory World Cultures and Geography class taught in part by long-term substitute Christine Jakowski. The class canvassed world regions to help students “gain a greater sense of the world around them” and “become active and informed global citizens.”¹ Many resources for the class, such as “calendars, handouts, assignment and project directions, and grading guidelines,” were located on Google Classroom.²

The class was organized into seven units, six of which focused on a different region of the world. Within each of these units, students explored the history and culture of the highlighted region, which sometimes included studying its predominant religion. During the Latin America unit, students learned about Christianity. And in the East Asia unit, students viewed PowerPoint slides and videos about Buddhism and Hinduism. The curriculum implemented state standards, including that students will be able to “[c]ompare and contrast the tenets of various world religions.”³

1. App. 439.

2. App. 441.

3. App. 127.

Appendix A

Students encountered Islam during two class periods within the “Middle East and North Africa” (MENA) unit, both taught by Ms. Jakowski. The first lesson was presented through a set of PowerPoint slides entitled “Teaching Critical Thinking[:] Making Generalizations with Content.”⁴ That presentation instructed students that “[a] generalization is a broad, universal statement of understanding based on specific facts and data” and cautioned that “[s]ome are valid” and “others are invalid or faulty.”⁵ To test students’ understanding, the final slide directed them to identify generalizations in a hyperlinked YouTube video and to label them either “valid or faulty.”⁶

That five-minute video, entitled “Intro to Islam,” contains images and written text. Instead of a voiceover, the video features background music and Arabic chants.⁷ The first half of the video alternates between quotations from the Quran and a series of questions and answers about Islam, including:

- “What is Islam?” “Faith of divine guidance for Humanity, based on peace, spirituality

4. App. 407.

5. App. 409, 413.

6. App. 416.

7. Since filing this lawsuit, Hilsenrath has produced what she believes to be the English translation of the Arabic chants sung in the Intro to Islam video. But neither she nor C.H. speaks Arabic, so they did not understand the meaning of the chants when they first watched the video.

Appendix A

and the oneness of God.”⁸

- “Who is Allah?” “Allah is the one God who created the heavens and the earth, who has no equal and is all powerful.”⁹
- “Who is Muhammad (S)?” “Muhammad (Peace be upon him) is the last & final Messenger of God. God gave him the Noble Quran.”¹⁰
- “What is the Noble Quran?” “Divine revelation sent to Muhammad (S) last Prophet of Allah. A Perfect guide for Humanity.”¹¹
- “What does history say about Islam?” “Muslims created a tradition of unsurpassable splendor, scientific thought and timeless art.”¹²

After about two minutes, the video turns to a discussion of “Islamic Art and Architecture,” as well as other

8. Intro to Islam at 0:17.

9. *Id.* at 0:29.

10. *Id.* at 1:01.

11. *Id.* at 1:38.

12. *Id.* at 2:10.

Appendix A

Muslim contributions to society.¹³ Finally, text on the last substantive slide reads “May God help us all find the true faith, Islam . . . Ameen.”¹⁴

The second class in the MENA unit introduced students to “the 5 Pillars of Faith” and the “impact/significance of them in the Muslim culture.”¹⁵ This lesson included a different PowerPoint presentation, entitled “Introduction to Islam.”¹⁶ The slides gave students a broad overview of Islam, including: the symbol of Islam; key figures in Islam; the Quran; demographic statistics about Muslims; and a summary of the Five Pillars of Islam. The slides also included a hyperlink to a YouTube video entitled “The 5 Pillars of Islam.”¹⁷

“The 5 Pillars of Islam” is an animated cartoon. The video features a conversation between two children, a non-Muslim named Alex and a Muslim named Yusuf. Curious, Alex asks Yusuf a series of questions about Islam. Yusuf responds by explaining that “Muslims believe that there is only one God,” whose name is “Allah” and who “is the creator of everything.”¹⁸ After describing the Five Pillars, Yusuf invites Alex to join him in prayer. The video closes

13. *Id.* at 2:13.

14. *Id.* at 4:40.

15. App. 461.

16. App. 224, 386.

17. App. 395.

18. 5 Pillars of Islam at 1:20-1:29.

Appendix A

by providing an email address and a website through which viewers can “organise a mosque tour, or order an information pack.”¹⁹

At the end of the second lesson, students completed a “Scavenger Notes Activity,” a worksheet instructing them to “[t]ake notes using the slides” and to “[f]ill in the blanks AND correct the false information” scattered throughout.²⁰ One section of the worksheet read as follows:

Pillar 1: Belief/Faith (Shahadah)

The basic statement of the Islamic faith:

“There is no god but __ and __ is his messenger.”

This statement is the centrifugal force to their religion.²¹

Although Ms. Jakowski presented both sets of PowerPoint slides to the students, she did not show either video in class or explicitly instruct the students to view them. C.H. nonetheless watched the “Intro to Islam” and “5 Pillars” videos at home with his mother, Libby Hilsenrath. Concerned about the MENA curriculum, Hilsenrath emailed administrators and aired her

19. *Id.* at 5:18.

20. App. 418-22, 461.

21. App. 420.

Appendix A

complaints at a school board meeting in February 2017. At a later meeting, the Board defended its curriculum as a proper application of the school's policy on religion in the classroom. But citing "disruption," the school ultimately removed the video links from the MENA unit PowerPoint slides.²²

B

Hilsenrath sued the District, the Board, and several teachers and administrators on behalf of her minor son, C.H., claiming that the school's MENA curriculum violated the Establishment Clause of the First Amendment. She sought an injunction, a declaratory judgment, nominal damages, and attorney's fees.

After denying the Defendants' motion to dismiss, the District Court considered the parties' cross-motions for summary judgment. The Court first determined that Hilsenrath lacked standing to seek injunctive and declaratory relief because her son was no longer enrolled in the World Cultures and Geography class. It then dismissed the claims against all defendants except the Board, finding that the Board alone is "the legal entity responsible for the decisions that are challenged here."²³ On the merits, the District Court applied *Lemon v.*

22. App. 358.

23. *Hilsenrath v. Sch. Dist. of Chathams*, 500 F. Supp. 3d 272, 287-89 (D.N.J. 2020), *vacated and remanded*, 2022 U.S. App. LEXIS 20588, 2022 WL 2913754 (3d Cir. July 20, 2022).

Appendix A

Kurtzman,²⁴ found no Establishment Clause violation, and granted the Board’s motion for summary judgment. Hilsenrath timely appealed. After hearing oral argument, this Court vacated the District Court’s judgment and remanded in view of the Supreme Court’s decision in *Kennedy v. Bremerton School District*.²⁵

On remand, the District Court again considered the parties’ cross-motions for summary judgment. The Court first noted that its holdings concerning standing and proper parties were “not implicated by *Kennedy* and therefore remain[ed] intact,” leaving it to decide only “Ms. Hilsenrath’s Establishment Clause claim for nominal damages.”²⁶ Turning to the merits, the District Court observed that *Kennedy* “clearly reject[ed] the *Lemon* test” in favor of a “historical analysis.”²⁷ Under that new standard, the Court concluded that none of the materials in the MENA unit resembled the “hallmarks associated with establishment of religion.”²⁸ In particular, the Court found “no evidence of significant coercion,” which the *Kennedy* Court had called one of the “foremost hallmarks

24. 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

25. 597 U.S. 507, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022).

26. *Hilsenrath v. Sch. Dist. of the Chathams*, 698 F. Supp. 3d 752, 760 & n.11 (D.N.J. 2023). Because Hilsenrath waived the standing and proper parties issues in her brief and at oral argument, we likewise consider only her nominal damages claim against the Board.

27. *Id.* at 761 (cleaned up).

28. *Id.* at 765 (cleaned up).

Appendix A

of religious establishments.”²⁹ So the District Court granted summary judgment for the Board on Hilsenrath’s nominal damages claim. Hilsenrath timely appealed.

II

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). We have jurisdiction under 28 U.S.C. § 1291. Summary judgment may be granted only when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”³⁰ “We review de novo the District Court’s resolution of cross-motions for summary judgment.”³¹

III**A**

The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.”³² Since the ratification of the First Amendment in 1791, Congress has obeyed that straightforward prohibition. But things started to get complicated in 1947 when, in *Everson v. Board of Education*, the Supreme

29. *Id.* at 763 (cleaned up).

30. Fed. R. Civ. P. 56(a).

31. *Spivack v. City of Phila.*, 109 F.4th 158, 165 (3d Cir. 2024) (cleaned up).

32. U.S. Const. amend. I.

Appendix A

Court applied the Establishment Clause to the States through the Fourteenth Amendment.³³ Once the Court applied the Clause—which seemed to honor a rudimentary federalism principle³⁴—to interactions between local governments and religion, the federal courts were beset with complaints of unconstitutional conduct.³⁵

Those cases led to the Supreme Court’s decision in *Lemon v. Kurtzman*,³⁶ which tried “to distill from the Court’s existing case law a test that would bring order and predictability to Establishment Clause decisionmaking.”³⁷ *Lemon* created a three-part test to assess the constitutionality of a practice by asking whether: (1) “the government practice had a secular purpose”; (2) “its principal or primary effect advanced

33. 330 U.S. 1, 15, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

34. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49-51, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004) (Thomas, J., concurring in the judgment) (citing Akhil Reed Amar, *The Bill of Rights* 36-39 (1998)).

35. See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952) (released time religious instruction); *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962) (school prayer); *Bd. of Ed. v. Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968) (publicly funded textbooks in parochial schools); *Walz v. Tax Comm’n*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) (tax exemptions for religious organizations).

36. 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

37. *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 19, 48, 139 S. Ct. 2067, 204 L. Ed. 2d 452 (2019) (plurality opinion).

Appendix A

or inhibited religion”; and (3) “it created an excessive entanglement of the government with religion.”³⁸

The *Lemon* test had a short shelf life. In a concurring opinion in *Lynch v. Donnelly*, Justice O’Connor opined that the constitutionality of a religious practice depended on whether a reasonable observer would conclude that the government was “endorses[ing]” religion.³⁹ This “endorsement test” became the law in *County of Allegheny v. American Civil Liberties Union*.⁴⁰ But even after the endorsement test gained currency, the *Lemon* test sometimes reared its head like “some ghoul in a late-night horror movie.”⁴¹ “[I]nstead of bringing clarity to” the Supreme Court’s Establishment Clause jurisprudence, “*Lemon* produced only chaos.”⁴² Over time,

38. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 271 (3d Cir. 2011) (citing *Lemon*, 403 U.S. at 612-13).

39. 465 U.S. 668, 687-89, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O’Connor, J., concurring).

40. 492 U.S. 573, 592-94, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989).

41. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993) (Scalia, J., concurring in the judgment).

42. *Shurtleff v. City of Bos.*, 596 U.S. 243, 277, 142 S. Ct. 1583, 212 L. Ed. 2d 621 (2022) (Gorsuch, J., concurring in the judgment).

Appendix A

Lemon has been criticized,⁴³ amended,⁴⁴ and altogether ignored.⁴⁵

Out of this chaos came *Kennedy*, where the Supreme Court clarified that it “long ago abandoned *Lemon* and its endorsement test offshoot.”⁴⁶ Building on decisions such as *Town of Greece v. Galloway*⁴⁷ and *American Legion v. American Humanist Ass’n*,⁴⁸ the Court “instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings.”⁴⁹

This kind of historical inquiry “requires serious work.”⁵⁰ And that work is especially challenging here because “free public education was virtually nonexistent at the time the Constitution was adopted.”⁵¹ But “[h]istorical

43. See, e.g., *Lamb’s Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment).

44. See, e.g., *Cnty. of Allegheny*, 492 U.S. at 593.

45. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 793-94, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983).

46. 597 U.S. at 534.

47. 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014).

48. 588 U.S. 19, 139 S. Ct. 2067, 204 L. Ed. 2d 452 (2019).

49. *Kennedy*, 597 U.S. at 535 (cleaned up).

50. *Shurtleff*, 596 U.S. at 285 (Gorsuch, J., concurring in the judgment).

51. *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987).

Appendix A

tradition can be established by analogical reasoning,”⁵² and history teaches that established churches often bore certain “telling traits”:

First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.⁵³

So to prevail on her Establishment Clause claim, Hilsenrath must show that the Board’s MENA curriculum resembles one of these hallmarks of religious establishment.⁵⁴

52. *Range v. Att’y Gen. United States*, 124 F.4th 218, 228 (3d Cir. 2024) (en banc).

53. *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in the judgment) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2110-12, 2131-81 (2003)).

54. Hilsenrath and Amicus Americans United insist that

*Appendix A***B**

Hilsenrath proffers two constitutional flaws in the MENA curriculum, likening each to a hallmark of religious establishment. The first is coercion: she claims that the Board did something like “mandat[ing] attendance in the established church” by requiring C.H. to view “religious indoctrination videos.”⁵⁵ The second is non-neutrality: by emphasizing Islam in its curriculum, she reasons, the Board effectively “provided financial support for the established church . . . in a way that preferred the established denomination over other churches.”⁵⁶ Neither argument is persuasive.

1

Hilsenrath first argues that the Board coerced her son into religious practice when it subjected him to “direct proselytizing.”⁵⁷ To be sure, coercion was one of the “foremost hallmarks of religious establishments” at

Shurtleff did not enumerate an exhaustive list of practices that violate the Establishment Clause under a historical approach. True enough. But we agree with our sister circuit that under *Kennedy*, “the plaintiff has the burden of proving a set of facts that would have historically been understood as an establishment of religion.” *Firewalker-Fields v. Lee*, 58 F.4th 104, 122 n.7 (4th Cir. 2023). So even if *Shurtleff* does not cabin the Establishment Clause inquiry, it was Hilsenrath’s burden to expand its reach.

55. Reply Br. 11 (citation omitted).

56. Reply Br. 17 (citation omitted).

57. Hilsenrath Br. 23.

Appendix A

the founding,⁵⁸ and it has played a prominent role in many of the Court’s school prayer cases. For instance, in *Lee v. Weisman*, the Court invalidated a public school district’s practice of inviting a member of the clergy to recite a nonsectarian benediction at its graduation ceremonies, explaining that the benediction imposed a “subtle and indirect” coercive effect on the students.⁵⁹ And in *Santa Fe Independent School District v. Doe*, the Court held that a public high school violated the Establishment Clause when it permitted a student to recite a prayer over a public address system before each varsity football game, again concluding that the prayer coerced spectators into a religious practice.⁶⁰ History and precedent therefore make clear that schools may not “force [students] to engage in a formal religious exercise.”⁶¹

But not all school activities touching on religion amount to “formal religious exercise.”⁶² While there may be circumstances in which public schools violate the Establishment Clause by subjecting students to proselytizing materials, the Supreme Court has cautioned against “[f]ocus[ing] exclusively on the religious

58. *Kennedy*, 597 U.S. at 537 (citations omitted).

59. 505 U.S. 577, 586-87, 593, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992).

60. 530 U.S. 290, 311-12, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000).

61. *Kennedy*, 597 U.S. at 537 (cleaned up).

62. *Id.*

Appendix A

component of any activity.”⁶³ Instead, we must look at the whole record to discern the “proper context” in which an ostensibly religious activity took place.⁶⁴ For example, while a teacher might recite the Ten Commandments as an act of worship, she could also use them to introduce students to the fundamental tenets of a major world religion.⁶⁵ Context is key.

The record here shows that the Board did not proselytize. Even assuming students were compelled to watch the “Intro to Islam” and “5 Pillars” videos—a point which the parties dispute—they did so “as part of a secular program of education.”⁶⁶ The videos were embedded in PowerPoint slides entitled “Introduction to Islam” and “Making Generalizations with Content,” which were presented during two sessions of a year-long class that also covered Christianity, Judaism, Buddhism, and Hinduism.⁶⁷ In short, the MENA lesson was “integrated into the school curriculum” as part of “an appropriate study of history, civilization,” and “comparative religion.”⁶⁸

63. *Lynch*, 465 U.S. at 680.

64. *Id.*

65. See *Stone v. Graham*, 449 U.S. 39, 42, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980) (“This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”).

66. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

67. App. 386, 407.

68. *Stone*, 449 U.S. at 42.

Appendix A

That context distinguishes this case from the Supreme Court’s decisions addressing proselytization in public schools. For instance, the “released time” program invalidated in *Illinois ex rel. McCollum v. Board of Education* was established to instruct public school students in religious truth.⁶⁹ The Bible readings invalidated in *Schempp* were designed for “the promotion of moral values”⁷⁰ In *Lee*, the unconstitutional benediction sought to “give thanks to [the] Lord[] for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.”⁷¹ And in *Santa Fe*, the school offered pre-game prayer “to solemnize the event”⁷²

Here, by contrast, the Board assigned videos to help students “understand what a generalization is and the benefits and consequences of using them” and to “explore the 5 Pillars of Faith and be able to explain the impact/significance of them in the Muslim culture.”⁷³ Because the “Intro to Islam” and “5 Pillars” videos were presented in an academic rather than devotional context, they do “not come close to crossing any line” separating permissible curricular materials from impermissible proselytization.⁷⁴

69. 333 U.S. 203, 231, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

70. 374 U.S. at 223.

71. 505 U.S. at 582 (citation omitted).

72. 530 U.S. at 306 (citation omitted).

73. App. 460–61.

74. *Kennedy*, 597 U.S. at 537.

Appendix A

2

Hilsenrath next argues that, even if the Board did not coerce students or otherwise proselytize, its curriculum still matches a hallmark of religious establishment because it favors Islam over other faiths. But even assuming the Establishment Clause requires equal treatment in primary and secondary school curricula,⁷⁵ the record does not show favoritism here. Besides Islam, C.H. and his classmates were introduced to Christianity, Judaism, Buddhism, and Hinduism. And the World Cultures and Geography course represented only a sampling of the expansive world religions curriculum offered at the School District of the Chathams. As early as kindergarten, students learn about religious holidays such as Hanukkah and Christmas. That instruction continues through high school, when students analyze, among other things, “the doctrinal disputes . . . that fueled the Protestant Reformation.”⁷⁶

75. The parties and amici disagree over whether preferential treatment itself constitutes an Establishment Clause violation after *Kennedy*. Hilsenrath argues that “*Kennedy* did not alter the fundamental demand of the Establishment Clause that the government not prefer one religion over another.” Hilsenrath Br. 49. Amicus Jewish Coalition counters that a free-floating neutrality “standard” would cause “phantom constitutional violations”; it urges tighter alignment with traditional hallmarks of religious establishment, such as preferential government funding. Jewish Coalition Br. 21 (cleaned up). Because world religions were treated equally in C.H.’s World Cultures and Geography class, we leave for another day whether curricular non-neutrality violates the Establishment Clause.

76. App 189.

Appendix A

Hilsenrath counters that, unlike the instruction on other religions, the MENA lesson “extol[led] Islam over all other faiths and encourage[d] conversion to the religion.”⁷⁷ This argument once again ignores context. It is true that the creator of the Intro to Islam video described Allah as “the one God” and Islam as “the true faith.”⁷⁸ But the videos were embedded within PowerPoint slides that refer to Muslims exclusively in the third person, repeatedly describing what “Muslims believe.”⁷⁹ The “Introduction to Islam” worksheet did the same, detailing Muslim beliefs and practices only from the perspective of a nonbeliever. Even apart from instructional materials, the record contains no evidence that Ms. Jakowski is a Muslim or that she ever tried to convert her students to Islam. So assuming the Establishment Clause required the Board to treat religions equally, the record shows that it satisfied that requirement here.

* * *

The United States of America is not Sparta, where children were considered wards of the state. Parents are the first and most important teachers of their children. But once children enter public school, the curriculum is dictated by local government policy, typically by an elected school board. That local arena is the proper place for

77. Reply Br. 19.

78. Intro to Islam at 0:29, 4:40.

79. App. 389-91.

Appendix A

debate and discussion about curricular matters. Our role as a federal court is limited to upholding constitutional rights. So we express no opinion about the propriety of the curriculum at issue, except to hold that it does not bear any of the hallmarks of religious establishment. For that reason, we will affirm the District Court's judgment.

Appendix A

PHIPPS, *Circuit Judge*, concurring in the judgment.

This Establishment Clause challenge comes at a time when the “one-size-fits-all test” from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), has been emphatically rejected,¹ and there is no longer any lurking constitutional mandate of secularism in governmental affairs.² To fill the jurisprudential void occasioned by *Lemon*’s demise, the Majority Opinion uses a ‘hallmarks’ test: whether the challenged action bears any characteristics historically associated with an established church. That approach has the salutary feature of being grounded in this nation’s history and tradition, but I posit that history and tradition are more effective as exegetical tools for construing the text and structure of the Constitution than as freestanding constitutional norms. In addition, the use of the hallmarks test by the Majority Opinion leaves at least two critical questions unanswered: (i) whether governmental action that offends only one of the hallmarks is sufficient for an Establishment Clause violation, or whether the hallmarks should be

1. *Shurtleff v. City of Boston*, 596 U.S. 243, 277, 142 S. Ct. 1583, 212 L. Ed. 2d 621 (2022) (Gorsuch, J., concurring in the judgment); *see also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534-36, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022).

2. *See Shurtleff*, 596 U.S. at 261 (Kavanaugh, J., concurring) (“[A] government *violates* the Constitution when . . . it *excludes* religious persons, organizations, or speech because of religion from public programs, benefits, facilities, and the like.”); *accord Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 488-89, 140 S. Ct. 2246, 207 L. Ed. 2d 679 (2020); *Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 779, 789, 142 S. Ct. 1987, 213 L. Ed. 2d 286 (2022).

Appendix A

considered in the aggregate; and (ii) if one or more of the hallmarks of an established church are present, whether that is dispositive of an Establishment Clause violation, or whether the government can justify its offending practice as comporting with history and tradition.³

In my view, a hallmarks test applied to states through incorporation⁴ is not needed to conclude

3. If the hallmarks test becomes this Court’s “grand unified theory” of the Establishment Clause, *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 19, 60, 139 S. Ct. 2067, 204 L. Ed. 2d 452 (2019) (plurality opinion), then I submit that the hallmarks should be considered in the aggregate, see Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2111 (2003) (“No single law created the established church. Rather, it was constituted by a *web of legislation*, common law, and longstanding practice.” (emphasis added)), and that a unit of government may use history and tradition to justify conduct that offends one or more hallmarks, see *Town of Greece v. Galloway*, 572 U.S. 565, 577, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014) (“[I]t is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.”).

4. There remain grounds for questioning the incorporation of the Establishment Clause. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004) (Thomas, J., concurring in the judgment) (“The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause.”); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 310, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Stewart, J., dissenting) (“I accept too the proposition that the Fourteenth Amendment has somehow absorbed the Establishment Clause,

Appendix A

that the materials about Islam assigned to seventh-grade students at Chatham Middle School do not establish a religion. Instead, all that is needed is a recognition that teaching on matters of religion or even encouraging religious belief or practice in public school does not constitute a “law respecting an establishment of religion.” U.S. Const. amend. I. Indeed, one of the other organic documents of the United States, the Northwest Ordinance of 1787, encouraged the teaching of religion in schools: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” *An Ordinance for the Government of the Territory of the United States North-west of the River Ohio*, Act of July 13, 1787, art. III.⁵ Thus, with

although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy.”).

5. Similarly, in his *Commentaries on the Constitution*, Justice Story emphasized that governmental promotion of religion was not, as a general matter, inconsistent with the Constitution. See, e.g., 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1867 (1833) (“[E]very American colony, from its foundation down to the revolution, with the exception of Rhode Island, (if, indeed, that state be an exception,) did openly, by the whole course of its laws and institutions, support and sustain, in some form, the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the states down to the present period, without the slightest suspicion, that it was against the principles of public law, or republican liberty.” (footnote omitted)); *id.* § 1868 (“Probably at the time of the adoption of the

Appendix A

the lifting of the constitutional mandate of secularism, teaching about religious matters in a public school does not violate the Establishment Clause. For that reason, the instructional materials about Islamic beliefs, practices, and modes of worship do not offend that constitutional provision,⁶ and I respectfully concur in the judgment.

constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship.”).

6. Libby Hilsenrath alleges only a violation of the Establishment Clause; she does not claim, for instance, that she had insufficient notice of the instructional materials such that the school’s opt-out provision, *see* School District of the Chathams, Policy 5250 Excusal from Class or Program (Nov. 5, 2007), did not meaningfully protect her parental rights to educate her son on matters of faith and morals. *See generally* N.J. Stat. Ann. § 18A:35-4.7 (“Any child whose parent or guardian presents to the school principal a signed statement that any part of the instructions in health, family life education or sex education is in conflict with his conscience, or sincerely held moral or religious beliefs shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom.”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (recognizing “the liberty of parents and guardians to direct the upbringing and education of children under their control” as “rights guaranteed by the Constitution”); *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (describing “the power of parents to control the education of their own”); *Wisconsin v. Yoder*, 406 U.S. 205, 233-34, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (requiring Wisconsin to “accommodat[e] the religious objections of the Amish” to compulsory education in light of “the rights of parents

Appendix A

to direct the religious upbringing of their children”); *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion) (recognizing that “the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children”); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 n.26 (3d Cir. 2005) (“[W]e do not hold . . . that the right of parents under the *Meyer-Pierce* rubric ‘does not extend beyond the threshold of the school door.’” (quoting *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005))); *Gruenke v. Seip*, 225 F.3d 290, 305 (3d Cir. 2000) (“It is not unforeseeable, therefore, that a school’s policies might come into conflict with the fundamental right of parents to raise and nurture their child. But when such collisions occur, the *primacy of the parents’ authority* must be recognized and should yield *only* where the school’s action is tied to a *compelling interest*.” (emphasis added)). *But cf. Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024), *cert. granted sub nom., Mahmoud v. Taylor*, 145 S. Ct. 1123, 220 L. Ed. 2d 420 (2025) (mem.).

**APPENDIX B — SUPPLEMENTAL OPINION ON
REMAND OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY,
FILED OCTOBER 16, 2023**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 18-00966 (KM) (MAH)

LIBBY HILSENATH, ON BEHALF OF HER
MINOR CHILD, C.H.,

Plaintiff,

v.

SCHOOL DISTRICT OF THE CHATHAMS, BOARD
OF EDUCATION OF THE SCHOOL DISTRICT OF
THE CHATHAMS, MICHAEL LASUSA, KAREN
CHASE, JILL GIHORSKI, STEVEN MAHER,
MEGAN KEOWN, AND CHRISTINE JAKOWSKI,

Defendants.

SUPPLEMENTAL OPINION ON REMAND

KEVIN MCNULTY, U.S.D.J.:

This case is an Establishment Clause challenge brought by Libby Hilsenrath on behalf of her son, C.H.,¹ to instruction about Islam in C.H.'s seventh-grade World Cultures and Geography course in the Chatham public schools. On November 12, 2020, this Court granted Defendants' motion for summary judgment and denied

1. The identity of C.H., the minor child on whose behalf Ms. Hilsenrath sues, is properly anonymized.

Appendix B

Hilsenrath's cross-motion for summary judgment, holding as follows:

(1) Hilsenrath has standing to pursue a claim for nominal damages, but not for prospective injunctive or declaratory relief;

(2) the School Board for the School District of the District of the Chathams (the "Board") is a proper defendant, and Superintendent LaSusa's involvement in the curricular decisions is sufficient to trigger potential liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978);

(3) the claims against the individual defendants and the School District of the Chathams (the "District") must be dismissed; and

(4) the seventh-grade World Cultures and Geography curriculum and materials did not violate the Establishment Clause.

On July 20, 2022, following an appeal by Hilsenrath, the Third Circuit vacated this Court's judgment and remanded the case "for further consideration in light of the Supreme Court's opinion in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (June 27, 2022)." (DE 87.) That case, decided after I rendered my decision, bears on the proper test that should be applied in analyzing Hilsenrath's Establishment Clause claims.

Again before the Court on remand are Defendants' motion for summary judgment (DE 62) and Hilsenrath's

Appendix B

cross-motion for summary judgment (DE 63). At the Court's invitation, each side filed a supplemental brief on remand. (DE 99, 100 (as corrected).) What follows amounts to an amendment of my prior decision, revised in accordance with *Kennedy v. Bremerton* and the parties' supplemental briefing. It should be read, *mutatis mutandis*, against the backdrop of the fuller discussion in my earlier decision. For the following reasons, Defendants' motion for summary judgment is again **GRANTED**, and Hilsenrath's motion for summary judgment is **DENIED**.²

2. My previous Opinion's prefatory note regarding the delicate nature of the issues raised by this case bears repeating here:

This well-framed case presented sensitive issues requiring factual inquiry and . . . [n]o one's educational, ideological, or religious priors were sufficient to decide it. I understand well the strong feelings that accompany such issues and claims. I do not dismiss the plaintiff's concerns, and I am by no means unsympathetic with parents' desire to control their children's exposure to religious indoctrination. I am also acutely aware that this is public, not parochial, education. Religion, however, is a fact about the world, and no study of geography and cultures is complete without it. There is, to be sure, a line to be drawn between teaching about religion and teaching religion. On this record, I must conclude that the school did not cross that line.

(500 F. Supp. 3d at 277-78, SJ Op. at 2.)

Appendix B

I. BACKGROUND³

3. Certain citations to the record are abbreviated as follows:

DE = Docket entry number in this case

Compl. = Complaint (DE 1)

Def. SMF = Defendants' Statement of Material Facts
(DE 62-2)

C.H. Dep. = C.H. Deposition Transcript, Exhibit F to
Defendants' Motion for Summary Judgment (DE 62-10)

Jakowski Dep. = Christine Jakowski Deposition
Transcript, Exhibit Y to Defendants' Motion for
Summary Judgment (DE 62-29)

LaSusa Dep. = Michael LaSusa Deposition Transcript,
Exhibit K to Defendants' Motion for Summary Judgment
(62-15)

Weber Dep. = Jill Weber Deposition Transcript, Exhibit
I to Defendants' Motion for Summary Judgment (DE
62-13)

Video 1 = Introduction to Islam Video, Exhibit 17 to
Plaintiff's Motion for Summary Judgment, <https://www.youtube.com/watch?v=ZHujiWd49l4> (DE 63-18)

Video 2 = 5 Pillars of Islam Video, Exhibit 18 to
Plaintiff's Motion for Summary Judgment, <https://www.youtube.com/watch?v=ikVGwzVg48c> (DE 63-19)

Worksheet = Introduction to Islam Worksheet, Exhibit
¶¶ to Defendants' Motion for Summary Judgment (DE
62-46)

SJ Op. = November 20, 2020 Opinion granting
Defendants' motion for summary judgment and denying
Plaintiff's cross-motion for summary judgment (DE 82).
The published version of this Opinion can be found at

*Appendix B***A. Facts****1. The World Cultures and Geography Course**

During the 2016-2017 school year, C.H. was a seventh-grade student at Chatham Middle School, in the School District of the Chathams. He was enrolled in a mandatory course called World Cultures and Geography, taught by defendants Megan Keown and Christine Jakowski. (Def. SMF ¶¶ 96-98, 125.)⁴ The aim of the course was to “develop[] a broad understanding of the world and its people” so that “students will become active and informed global citizens.” (DE 62-36 at 1.) To that end, the course devoted a unit of study to each of the world’s major geographic regions. (*Id.*) As part of the study of each region, students learned about the religions commonly practiced in each. (*See, e.g., id.*; DE 62-39.)

One unit was devoted to the Middle East and North Africa (“MENA”). As part of that unit, students learned about Islam, the religion that is prevalent in that region

Hilsenrath on behalf of C.H. v. Sch. Dist. of Chathams,
500 F. Supp. 3d 272 (D.N.J. 2020).

Pl. Br. = Plaintiff’s Supplemental Brief in Support of
Summary Judgment after the Third Circuit’s Order to
Vacate and Remand (DE 99)

Def. Br. = Supplemental Brief in Further Support of
Defendants’ Motion for Summary Judgment on Remand
from the Third Circuit (DE 100)

4. Ms. Keown prepared the syllabus for the class and taught until November 2016, when she went on maternity leave. Ms. Jakowski replaced her and taught the unit at issue. (Def. SMF ¶¶ 96-98.)

Appendix B

and is a central component of many of those countries' governments, laws, and cultures.⁵ (DE 62-41.) This particular unit comprised nine lessons. Most covered geography and current events, but two of the nine focused on Islam. (*Id.*)

(a) Introduction to Islam Video

The first lesson was aimed at teaching students about the general attributes of the Islamic faith. (*Id.* at 2.) Ms. Jakowski presented a PowerPoint, a copy of which was posted on Google Classroom, an online platform for teachers to post course materials for their students. (Jakowski Dep. at 29:8-18.) The last of the PowerPoint slides asked students to write down words they associated with Islam, to watch a linked video introducing students to Islam ("Video 1"), and then to discuss what generalizations they could make after watching the video and consider whether those generalizations were valid. (DE 62-42 at 11.) However, Ms. Jakowski did not play Video 1 in class and students were not required to watch it as homework. (Jakowski Dep. at 30:21-31:1, 36:4-6, 45:11-19.) Nonetheless, C.H., with his mother, did access the presentation and Video 1 from Google Classroom and watched it at home. (C.H. Dep. at 35:23-36:9.)⁶

5. To put it another way, these students are citizens of a country which prohibits establishment of an official religion, but in this unit they were studying countries which emphatically do not. It is impossible to study the government and culture of, for example, the Islamic Republic of Iran while avoiding exposure to the tenets of Islam.

6. A study guide for the MENA unit advised students that the test would be open note, that their notes should include "general

Appendix B

Video 1 is a five-minute introduction to Islam. The video scrolls through pictures of Middle Eastern and North African peoples, Islamic art, and Muslim sites, with singing in the background.⁷ Interspersed with these images for the first half of the video are slides of text asking and answering questions about Islam:

- “What is Islam? . . . Faith of divine guidance for Humanity, based on peace, spirituality and the oneness of God[.]” (Video 1 at 0:17.)
- “Who is Allah? Allah is the one God who created the heavens and the earth, who has no equal and is all powerful[.]” (*Id.* at 0:29.)
- “Who is Muhammed (S)? Muhammed (Peace be upon him) is the last & final Messenger of God. God gave him the Noble Quran[.]” (*Id.* at 1:01.)
- “What is the Noble Quran? Divine revelation sent to Muhammed (S) last Prophet of Allah. A Perfect guide for Humanity[.]” (*Id.* at 1:38.)

knowledge about [Islam] and 5 Pillars,” and that they should “[u]se slides on Google Classroom to ensure that you have all important information in your notes or on the handouts.” (DE 63-14 at 2.)

7. On the YouTube page, the description from the video-creator states that the music playing in the background is “Qasida Burdah” and provides two links for download, but neither link seems to be currently active. Hilsenrath has provided what she attests is a translation of the text of the song, which is religious in nature. (DE 63-17.) There is no testimony from C.H. that he clicked the links at the time of viewing the video or understood what the song, which was in Arabic, signified.

Appendix B

- “What does history say about Islam? Muslims created a tradition of unsurpassable splendor, scientific thought and timeless art[.]” (*Id.* at 2:10.)

Around the two-minute mark, the video begins to focus less on Islam as a religion *per se*, and more on the achievements of Islamic civilization. (*Id.* at 2:39, 3:02-25.) Also interspersed throughout the video are quotations (with attributions) from Muslim prayers, the Quran, and Muhammed. (*Id.* at 0:38, 1:14, 1:24, 1:48, 4:30, 4:19.) The video closes with a text slide stating, “May God help us all find the true faith, Islam. Ameen” (*id.* at 4:42), and another slide, seemingly from the video-creator, thanking family members and Allah (*id.* at 4:50).

In his deposition, C.H. testified that he did not remember much about this video, and did not recall feeling coerced. (C.H. Dep. at 24:24-25:1, 37:3-11.) That, of course, is relevant but not dispositive.

(b) Worksheet

The second lesson further explored the tenets of Islam. (DE 62-45 at 2.) Ms. Jakowski presented a second PowerPoint to the class that provided an overview of Islam’s major characteristics and its five pillars, “the five obligations that every Muslim must satisfy in order to live a good and responsible life according to Islam.” (*Id.* at 11.) As students listened to that lesson, they were given a worksheet that corresponded to the presentation. The worksheet had blanks which students would fill in, or incorrect statements which they would correct, based

Appendix B

on information they had learned. (Jakowski Dep. at 40:1-10.) The PowerPoint and worksheet covered a range of topics at a general level: for example, how often Muslims pray, the practice of alms giving, and why Muslims fast. (Worksheet at 3-5; DE 62-45 at 11-20.)

One slide and corresponding page of the worksheet concerned the pillar called *shahadah*, or “Testimony of Faith.” (DE 62-45 at 14.) The *shahadah* is described as “[t]he basic statement of the Islamic faith,” and the text of the *shahadah* was included in the PowerPoint. (*Id.* at 14.)⁸ The worksheet contained an incomplete version of the *shahadah*, and students filled in the underlined blanks

8. Hilsenrath contends that the PowerPoint and worksheet also contained a link to a webpage that teaches visitors how to convert to Islam, and claims that students viewed it. (*See* 500 F. Supp. 3d at 280 n.5, SJ Op. at 5 n.5 (referring to Hilsenrath’s original brief in support of her motion).) There is indeed a link in both documents to an informational webpage from the BBC describing the *shahadah*. (DE 68-9 at 31, 42.) The webpage states, among other things, that “anyone who cannot recite [the *shahadah*] wholeheartedly is not a Muslim” and “[r]eciting this statement three times in front of witnesses is all that anyone need do to become a Muslim.” *Shahadah: the statement of faith*, BBC, <http://www.bbc.co.uk/religion/religions/islam/practices/shahadah.shtml> (last updated Aug. 23, 2009). Other than Hilsenrath’s own testimony (DE 63-2 at 129-30), which does not seem to reflect firsthand observations, there is no indication that Ms. Jakowski instructed students to follow links in the PowerPoints at home or that C.H. himself followed any such link. (*E.g.*, Jakowski Dep. at 45:11-19.) As to the worksheet, Ms. Jakowski testified that it was provided in class, presumably in hard copy (*id.* at 40:1-3), and C.H. completed the worksheet by hand, so there is no indication that he would or could have clicked on such a link (C.H. Dep. at 44:23-45:5; *see also* DE 62-47).

Appendix B

of the statement: “There is no god but ___ and ___ is his messenger.” (Worksheet at 4, the correct answers being “Allah” and “Muhammed.”) C.H. completed part of the worksheet, including the *shahadah* page. (C.H. Dep. at 36:1-9; DE 62-47.)⁹

(c) Five Pillars Video

Like the first presentation, the five-pillars presentation contained a link to a video (“Video 2”) (DE 62-45 at 10), but Video 2 was not played in class or assigned as homework. (Jakowski Dep. at 36:4-6). C.H., evidently a diligent student, nevertheless watched it at home with his mother. (C.H. Dep. at 35:23-36:9). Video 2, five minutes long, opens with text stating that “the following is an Islamic educational presentation for primary and secondary schools.” (Video 2 at 0:02 (capitalization altered).) Video 2 features two cartoon-animation boys, Alex and Yusuf, discussing Islam. Alex asks Yusuf, who is Muslim, questions about his religion. For example, Alex asks Yusuf when he prays and what Muslims believe. (*Id.* at 0:50-2:00.) Yusuf states that “Allah is the creator of everything.” (*Id.* at 1:30-34.) Yusuf then describes the five pillars to Alex and recites the *shahadah*. (*Id.* at 2:00-2:30.) Video 2 concludes with text instructing that the viewer can order more information from the video creator, an organization called Discover Islam, and can organize a mosque tour.

9. Ms. Jakowski described the worksheet as an in-class assignment. C.H. could not recall whether he completed it at home or in class. (*Compare* Jakowski Dep. at 40:1-10, *with* C.H. Dep. at 45:9-10.) At any rate, it is undisputed that C.H. reviewed the PowerPoint and completed the worksheet as part of the course. (*See id.*)

Appendix B

(*Id.* at 5:20.) It is clear that Discover Islam is a United Kingdom organization because its website ends in “co. uk,” the text of the video uses British spelling, and Yusuf and Alex speak with British accents.

2. Hilsenrath’s Complaints and Defendants’ Response

After watching the videos with C.H. and reviewing the worksheet, Hilsenrath felt that the curriculum favored Islam at the expense of Christianity and Judaism. She sent emails expressing her concerns to (1) Steven Maher, Social Studies Content Supervisor for the School District; (2) Superintendent of Curriculum Karen Chase; (3) Superintendent Michael LaSusa; and (4) the Board of Education of the School District.¹⁰ (DE 62-48; DE 62-50.)

10. For context, I note the roles and responsibilities of each of these parties:

- Supervisor Maher develops the social studies curriculum and supervises the social studies teachers. (Def. SMF ¶¶ 85-88.)
- Assistant Superintendent Chase is responsible for oversight of the curriculum and Supervisor Maher. (*Id.* ¶ 78.)
- Superintendent LaSusa, under New Jersey law, is the “chief executive” of the District and has the power of “general supervision over all aspects, including . . . instructional programs, of the schools of the district.” N.J. Stat. Ann. § 18A:17-20(b); *see also* Def. SMF ¶ 72. He oversees District policy regarding curriculum and course materials, and Assistant Superintendent Chase reports to him. (Weber Dep.

Appendix B

After sending those emails, Hilsenrath attended a Board meeting in February 2017 and voiced her concerns. (Def. SMF ¶ 186.) In response, the Board’s Curriculum Committee convened to discuss those concerns. (*Id.* ¶ 191.) When such complaints are raised, the Committee reviews and researches them and then publicly presents findings and any recommendations to the Board. (Weber Dep. at 19:7-25.) The Board usually does not take formal action regarding Committee recommendations but leaves that to the superintendent. (*Id.* at 20:1-21:8.) Here, the Committee meeting included Superintendent LaSusa, Assistant Superintendent Chase, Supervisor Maher, social

at 20:1-21:1, 35:10-15, 54:13-16; La Susa Dep. at 9:22-25.) He also has the responsibility to “ensure that teachers follow” District policy that religion is treated neutrally. (DE 63-15.) Although the Board has the power to hire and fire the superintendent, the Board does not have the power to overrule him on decisions regarding instructional materials and curriculum. (Weber Dep. at 20:1-21:8.) Ultimately, it is his decision to remove materials from courses, a decision that does not require approval from the Board, and his determination is deemed to represent that of the Board and District. (*Id.* at 51:7-14, 57:7-11; LaSusa Dep. at 101:2-102:2.)

- The Board, under New Jersey law, is the “body corporate” that supervises the District. N.J. Stat. Ann. §§ 18A:10-1, 18A:11-1(c)–(d). It consists of nine members and requires five votes to take any action. (Weber Dep. at 34:9-10; *see also* N.J. Stat. Ann. § 18A:10-6.) Nonetheless, the superintendent retains final authority on most day-to-day matters involving the schools, including the curriculum, an area which the Board avoids. (Weber Dep. at 21:4-8.)

Appendix B

studies teacher Stephanie Lukasiewicz, Board Member Michelle Clark, and Board President Jill Weber. (Def. SMF ¶ 195; LaSusa Dep. at 93:25-94:1.)

After reviewing the curriculum and materials, Superintendent LaSusa and the Committee determined that no changes were necessary. They presented their findings at the next Board meeting, emphasizing that the curriculum as a whole aligned with the District policy of religious neutrality. (DE 62-53, at 2-4; DE 62-54, link to video, *passim*; DE 63-5 at 24:1-14.) Prior to the meeting, however, Hilsenrath (and others) appeared on a national television show to voice her concerns. Seemingly in reaction to what they regarded as misstatements on the show and the ensuing disruption, Superintendent LaSusa and Supervisor Maher had the links to the videos removed from the PowerPoints. (*E.g.*, LaSusa Dep. at 87:6-18; DE 63-23 at 3-4 (referring to reports of violent and vulgar communications).)

B. Procedural History

Months later, when C.H. was in eighth grade and no longer in the World Cultures and Geography course, Ms. Hilsenrath sued the District, the Board, Superintendent LaSusa, Assistant Superintendent Chase, Principal Jill Gihorski, Supervisor Maher, and the two teachers, Ms. Keown and Ms. Jakowski. (Compl. ¶¶ 12-39.) Her claims against the individual defendants name them in their official capacities only. (*Id.* at 2.) She alleges a single claim under 42 U.S.C. § 1983: that the curriculum, with particular focus on the videos and worksheet, violates

Appendix B

the Establishment Clause of the First Amendment to the United States Constitution. (*Id.* ¶¶ 99-116.) She seeks (1) an injunction prohibiting Defendants “from funding and implementing religious instruction that endorses Islam or that favors Islam,” (2) a declaration that Defendants violated the rights of herself and C.H. under the Establishment Clause, (3) a declaration that Defendants’ “training, supervision, policies, practices, customs, and procedures that promote Islam violate the Establishment Clause,” (4) nominal damages, and (5) attorney’s fees. (*Id.*, Prayer for Relief.)

Defendants moved to dismiss the complaint. I denied that motion, holding that the Complaint on its face sufficiently alleged an Establishment Clause claim. *Hilsenrath on behalf of C.H. v. Sch. Dist. of Chatham*, Civ. No. 18-966, 2018 U.S. Dist. LEXIS 100100, 2018 WL 2980392, at *3-4 (D.N.J. June 13, 2018). Following discovery, the parties cross-moved for summary judgment. (DE 62, 63.) On November 12, 2020, I granted Defendants’ motion for summary judgment, denied Hilsenrath’s motion for summary judgment, and dismissed Hilsenrath’s Complaint. *See* SJ Op., 500 F. Supp. 3d 272 (D.N.J. 2020). Hilsenrath appealed. On July 20, 2022, the Third Circuit vacated the judgment without reaching the merits as such; rather it remanded the case to this Court “for further consideration in light of the Supreme Court’s opinion in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (June 27, 2022),” which had been decided in the interim, while the appeal was pending. *See Hilsenrath on behalf of C.H. v. Sch. Dist. of Chatham*, No. 20-3474, 2022 U.S. App. LEXIS 20588, 2022 WL 2913754, at *1 (3d Cir. July 20, 2022). I then ordered supplemental briefing on

Appendix B

the issues raised by the Third Circuit's remand (DE 90), and the parties submitted briefs accordingly (DE 99, 100).

Having considered the parties' supplemental submissions, I am now prepared to rule again on the parties' motions as directed by the Third Circuit.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) provides that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I incorporate from my prior opinion the remaining discussion of the legal standards governing motions and cross-motions for summary judgment. SJ Op. 10-11, 500 F. Supp. 3d at 282-83.

III. DISCUSSION

The sole issue before the Court concerns Ms. Hilsenrath's Establishment Clause claim for nominal damages.¹¹ In accordance with the Third Circuit's directive remanding this case “for further consideration

11. The first three of my four original holdings are not implicated by *Kennedy* and therefore remain intact. *See* pp. 1-2, *supra*.

This case having been narrowed to a pure Establishment Clause claim, I also do not analyze any other constitutional claim, *e.g.*, violation of Fourteenth Amendment guarantees of substantive due process. *See generally Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 (3d Cir. 2005); *Gruenke v. Seip*, 225 F.3d 290, 303-04 (3d Cir. 2000).

Appendix B

in light of the Supreme Court’s opinion in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (June 27, 2022)” (DE 87), I now revisit the parties’ cross-motions for summary judgment. I begin my discussion with a brief summary of the *Kennedy* case and its bearing on the Establishment Clause challenge here. (Section III.A.) I then proceed to reanalyze the parties’ motions consistent with that decision. (Section III.B.)

A. The *Kennedy* Opinion

In *Kennedy*, the Supreme Court considered an appeal by a part time football coach, Joseph Kennedy, who claimed that he lost his job with the Bremerton School District for “kneel[ing] at midfield after games to offer a quiet prayer of thanks,” or for leading “pregame or postgame prayers in the locker room.” *Kennedy*, 142 S. Ct. at 2415-16. Kennedy sued in federal court, alleging that the school district had violated the First Amendment’s Free Speech and Free Exercise Clauses. *Id.* at 2416. The Supreme Court found that Kennedy had discharged his initial burden to go forward with his free speech and free exercise claims. *Id.* at 2422-23. The burden thus shifted to the school district to demonstrate that its actions were justified. *Id.* at 2426.¹² Relevant here are the majority’s holdings with respect to the justification proffered by the school district that “its suspension of Mr. Kennedy was

12. I do not dwell on distinctions between the particular burdens associated with proving Free Exercise and Free Speech claims. The Court ruled that “[w]hether one views [Kennedy’s] case through the lens of the Free Exercise or Free Speech Clause,” Kennedy successfully discharged that initial burden, and that therefore “the burden shift[ed] to the District.” *Kennedy*, 142 S. Ct. at 2426.

Appendix B

essential to avoid a violation of the Establishment Clause.” *Id.* The majority in *Kennedy* rejected this justification and, in so doing, rejected the so-called “*Lemon* test.”¹³ In fact, the majority suggested that the Supreme Court had *already* impliedly abandoned *Lemon* and “instructed that the Establishment Clause must [instead] be interpreted by ‘reference to historical practices and understandings.’” *Id.* at 2428 (citing *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087, 204 L. Ed. 2d 452 (2019) (plurality opinion)). The majority continued:

“‘[T]he line’” that courts and governments “must draw between the permissible and the impermissible” has to “‘accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.’” *Town of Greece*, 572 U.S. at 577, 134 S.Ct. 1811 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294, 83 S.Ct. 1560, 10 L.Ed.2d 844

13. The reference is to *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). *Lemon* imposed a three-part inquiry for analyzing Establishment Clause claims, asking (1) whether the government practice had a secular purpose; (2) whether its “principal or primary effect” advanced or inhibited religion; and (3) whether it created “an excessive government entanglement with religion.” *Id.* at 612-13.

In my prior decision, I applied the now-abandoned *Lemon* test to analyze Hilsenrath’s Establishment Clause claim. In doing so, I cited then-current Third Circuit law noting that *Lemon* had been eroded in many respects, but maintained its vitality in the area of public education. SJ Op. at 21, 500 F. Supp. 3d at 289-90.

Appendix B

(1963) (Brennan, J., concurring)). An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some “exception” within the “Court’s Establishment Clause jurisprudence.” 572 U.S. at 575.

Id. at 2428 (additional citations omitted).

While clearly rejecting the Lemon test, the majority in Kennedy was less clear about what would replace it—*i.e.*, what would constitute a proper “historical analysis” of a party’s Establishment Clause claim in all cases. Nevertheless, the majority did lay down certain markers which I take as a guide for this Court’s analysis of these motions.

The most prominent of those markers is the majority’s emphasis on the presence, or not, of coercion: “[T]his Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, ‘make a religious observance compulsory.’” *Id.* at 2429 (quoting *Zorach v. Claiborn*, 343 U.S. 306, 314, 72 S. Ct. 679, 96 L. Ed. 954 (1952)). The majority emphasized that “coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.” *Id.*

Further guidance as to what other facts might constitute “hallmarks” of an Establishment Clause violation may be found at the Kennedy majority decision footnote 5. That footnote has been described, plausibly

Appendix B

in my view, as a “cipher for interpreting how the Court interprets the Establishment Clause by reference to history and tradition.” Daniel L. Chen, *Kennedy v. Bremerton School District: The Final Demise of Lemon and the Future of the Establishment Clause*, 21 Harvard J. L. & Pub. Policy Per Curiam, 9 (Summer 2022). Most helpful is that footnote’s reference to a portion of Justice Gorsuch’s concurrence in *Shurtleff v. City of Boston, Massachusetts*, in which he reviews “our constitutional history [for] some helpful hallmarks that localities and lower courts can rely on.” 596 U.S. 243, 285, 142 S. Ct. 1583, 212 L. Ed. 2d 621 (2022) (Gorsuch, J., concurring). There, Justice Gorsuch wrote that “[b]eyond a formal declaration that a religious denomination was in fact the established church, . . . founding-era religious establishments often bore certain other telling traits,” including (1) “the government exerted control over the doctrine and personnel of the established church;” (2) “the government mandated attendance in the established church and punished people for failing to participate;” (3) “the government punished dissenting churches and individuals for their religious exercise;” (4) “the government restricted political participation by dissenters;” (5) “the government provided financial support for the established church, often in a way that preferred the established denomination over other churches;” and (6) “the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.” *Id.*¹⁴ At least four of these contain a strong

14. In his concurring opinion in *Shurtleff*, Justice Gorsuch cited to and adopted the position of Professor Michael McConnell when he enumerated these six hallmarks of founding-era religious

Appendix B

element of compulsion, corroborating the primacy of coercion in the Court’s analysis.

To evaluate an Establishment Clause claim in a manner that is “consistent with a historically sensitive understanding of the Establishment Clause,” then, I must determine whether Hilsenrath’s case bears the “hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.” *Kennedy*, 142 S. Ct. at 2429. I now proceed to apply those principles to the summary judgment motions currently before the Court.

establishments. *See Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 285-86, 142 S. Ct. 1583, 212 L. Ed. 2d 621 (2022) (citing Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 William & Mary L. Rev. 2105 (2003)). Underscoring the Court’s adoption of these hallmarks as the guiding principles for Establishment Clause jurisprudence, footnote 5 of the majority opinion in *Kennedy* also cites directly to Professor McConnell’s scholarship. *See Kennedy*, 142 S. Ct. at 2429 n.5 (citing same).

Footnote 5 of the majority opinion in *Kennedy* includes two additional citations, both of which refer to sources that elaborate further on the element of coercion. One citation is to a section of Justice Scalia’s dissent in *Lee v. Weisman* in which he explains that one of the “hallmark[s] of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*,” 505 U.S. 577, 640-642, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) (Scalia, J., dissenting) (emphasis in original), and the other citation refers to a record of statement by James Madison in the Annals of Congress explaining that the First Amendment is aimed to prevent one or multiple sects from “establish[ing] a religion to which they would compel others to conform,” 1 Annals of Cong. 730-731 (1789).

*Appendix B***B. The Summary Judgment Motions on Remand**

As directed by the Third Circuit, I reanalyze Hilsenrath's Establishment Clause claim for nominal damages, not under the *Lemon* test, but under the approach announced recently in *Kennedy*.

I begin with some general observations. Lurking behind the Supreme Court's analysis is the well-recognized tradeoff between the First Amendment Establishment Clause and Free Exercise Clause in particular cases. *See generally Cutter v. Wilkinson*, 544 U.S. 709, 719, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) (these two Clauses, while "express[ing] complementary values," will "often exert conflicting pressures"); *Locke v. Davey*, 540 U.S. 712, 718, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004) (describing the Clauses as "frequently in tension"). Any attempt to expand the scope of religious free exercise in the context of public institutions tends to be met by a corresponding objection that the state is threatening to establish a particular religion. Thus, in *Kennedy*, the coach argued that a school district's restrictions on his prayers would interfere with his religious observances under the Free Exercise Clause; the school district replied that its hands were tied by the Establishment Clause, under which it could not permissibly endorse the coach's religious observances or force others to participate in them. The *Kennedy* Court, however, found this to be a "false choice," because at least on the facts of that case, these two constitutional commands were not "at odds." 142 S. Ct. at 2432. Because students and other observers were (to varying degrees) exposed to the coach's prayers, but not coerced to participate in them, there arose "no conflict between the constitutional commands" of the

Appendix B

Establishment Clause and the Free Exercise Clause. *Id.* In short, the facts “did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.” *Id.* at 2429.

In a very general sense, *Kennedy* may be seen as restricting the scope of the Establishment Clause and, in the name of Free Exercise, granting a bit more leeway for the presence of religion in the setting of public education. Under the prior *Lemon* test, a practice might have been found impermissible if it lacked a “secular purpose,” “advance[d]” religion, or resulted in excessive “entanglement” of government and religion. *Kennedy* emphasizes official coercion and tradition, a test which will often set a higher threshold for an Establishment Clause challenge.¹⁵

Kennedy is not, however, legally or factually on point with our case. To begin with, there is no countervailing Free Exercise issue in our case that resembles the one in *Kennedy*; no coaches, faculty members, or even students are claiming that the authorities punished them for practicing their religion on school property. So in remanding, the Third Circuit surely was not saying that *Kennedy* is directly on point, but rather was responding to this Court’s application of the *Lemon* test, which *Kennedy* has now declared to have been superseded.

Ms. Hilsenrath’s is a pure Establishment Clause claim. Therefore, I eschew the now-superseded *Lemon*

15. That is not to say that the considerations underlying the *Lemon* test have become irrelevant; far from it. *Kennedy* makes it clear, however, that the legal test has changed.

Appendix B

test and, gleaning what guidance I can find from *Kennedy*, I will analyze whether the challenged materials from C.H.’s World Cultures and Geography course bear any of the historical “hallmarks of religious establishments.” *Id.* at 2407 n.5. As before, I analyze the challenged materials as a whole and in the context of the curriculum. *See, e.g., Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 597, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989), *abrogated on other grounds by Town of Greece*, 572 U.S. 565. Nothing about *Kennedy* undermines the principle that context remains critical, or vitiates the warning that to “[f]ocus *exclusively* on the religious component of any activity would inevitably lead to [the activity’s] invalidation.” *Lynch v. Donnelly*, 465 U.S. 668, 679-80, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (emphasis added); *see also Wood v. Arnold*, 915 F.3d 308, 314 (4th Cir. 2019) (“[C]ourts . . . consistently have examined the entire context surrounding the challenged practice, rather than only reviewing the contested portion.” (collecting cases from the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits)), *cert. denied*, 140 S. Ct. 399, 205 L. Ed. 2d 214 (2019).

I first consider whether the challenged World Cultures and Geography curriculum and materials were coercive. The *Kennedy* Court recognized coercion to be “among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.” 142 S. Ct. at 2429. After reviewing the parties’ submissions, I find that the record contains no evidence of significant coercion.¹⁶

16. The analysis here is hampered somewhat by the *Kennedy* Court’s having found it unnecessary to define “what exactly qualifies

Appendix B

To begin with, C.H. expressly testified that he never felt coerced. In fact, C.H. (correctly, in the District’s view) perceived the purpose and effect of the lessons as being to educate students about world religions and the importance of avoiding group generalizations. (C.H. Dep. at 24:18-25:1, 40:8-24, 41:22-25.) Nor did any other student testify that he or she experienced the course materials as coercive. In short, direct, subjective evidence of coercion is lacking.

Even through an objective lens, however, the materials cannot be viewed as tending to compel a student “by force of law and threat of penalty,” to adhere to a particular religious belief or participate in a particular religious practice. *Lee v. Weisman*, 505 U.S. at 640-42 (Scalia, J., dissenting). For the reasons expressed in my prior Opinion, I adhere to my conclusion that “Video 1 was used to introduce students to the tenets of Islam . . .

as impermissible coercion in light of the original meaning of the Establishment Clause.” *Kennedy*, 142 S. Ct. at 2429. Precision may not be required, however; here, as in *Kennedy*, the challenged curriculum and materials, however repugnant to any individual’s sectarian religious beliefs, “did not come close to crossing any line one might imagine separating [secular public education] from impermissible government coercion.” *Id.* Unless and until the Third Circuit holds to the contrary, I continue to be guided by its mandate, which I take to be consistent with *Kennedy*, that the reviewing court “look[] at whether the government is coerc[ing] anyone to support or participate in religion or its exercise.” *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 175 n.18. (3d Cir. 2008) (citation omitted); see also *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d at 187. While the students here were exposed to religious materials, there is no testimony from any individual that he or she experienced pressure to support or participate in the practice of any religion.

Appendix B

[and] Video 2 likewise explored Islam through a neutral question-and-answer format that could not be regarded as proselytizing.” SJ. Op. at 23, 500 F. Supp. 3d at 291. And while “the worksheet contained fill-in-the-blanks questions, as is typical at the middle-school level[,] . . . [t]he format fell well short of compelled recitation of a prayer,” as the worksheet was “clearly designed to assess the students’ understanding of the lesson on Islam,” not to inveigle them into praying. *Id.* (citation and quotation omitted). Now of course there is a baseline level of coercion in all public education, irrespective of the subject matter.¹⁷ The coercion relevant here, however, would be coerced participation in or adherence to a religious belief or practice. The educational units at issue, while exposing students to the tenets of religious faiths in various regions of the world, did not require or coerce students “to *support* or *participate* in” the religious faith covered by that unit. *Borden*, 523 F.3d at 175 n.18. (3d Cir. 2008) (emphasis added). Reasonable students, teachers, and parents would understand that the school’s mission here was pedagogical, even if these course units exposed students to world religions whose adherents engage in proselytization. My prior observation on that point, although phrased in terms of the *Lemon* test, remains valid. *See* SJ Op. at 23, 500 F.

17. For example, students are required to attend school from the ages of 6 to 16, <https://nj.gov/education/safety/sandp/attendance> (citing N.J. Stat. Ann. §§ 18A:38-28 through 31) (last visited Sept. 25, 2023), and their completion of assignments is enforced by the grading system. I note in passing that the Board apparently had a policy permitting students to be excused from any part of instruction which the student or parent finds morally, conscientiously, or religiously offensive. (Def. SMF ¶ 38.)

Appendix B

Supp. 3d at 291 (“Of course, the statements of a religion’s adherents have a religious purpose, *in the mouths of those adherents*. But for secular educators to teach and study about such statements is not to espouse them, or to proselytize.”).¹⁸

The all-important context here is that this unit was part of a comprehensive curriculum on world cultures, which necessarily included units about the predominant religions in the particular area of the world being studied. Religion was not taught as revealed truth, but rather as an important fact about the world. *Kennedy* itself only reinforces the view, expressed at more length in my prior opinion, that exposure to a variety of viewpoints, including religious ones, is a proper goal. That goal is not

18. The following observations from my prior Opinion, although presented in the context of the *Lemon* “endorsement” test, remain valid to my point here that the curriculum was educational, not coercive:

Although the video-creator can be perceived as believing those tenets, neither the lesson, Ms. Jakowski, nor even the video-creator invites or encourages the students to adopt those views. This is par for the course; to take the Ninth Circuit’s cogent example, “Luther’s ‘Ninety-Nine Theses’ are hardly balanced or objective, yet their pronounced and even vehement bias does not prevent their study in a history class’s exploration of the Protestant Reformation, nor is Protestantism itself ‘advanced’ thereby.” [*Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1380 (9th Cir. 1994)]. When, as here, religious beliefs are presented to educate, not convert, students, there is no endorsement of religion.

SJ. Op. at 25-26, 500 F. Supp. 3d at 292.

Appendix B

undermined, and indeed may be enhanced, by non-coercive exposure to opposing beliefs. *See Kennedy*, 142 S. Ct. at 2431 (any rule suppressing coach’s religious expression “would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been ‘part of learning how to live in a pluralistic society.’”).¹⁹

In her brief, Hilsenrath does not meaningfully address the Third Circuit’s mandate on remand, but for the most part hews to her prior general argument that it is a violation of the Establishment Clause for a public school “to proselytize or to favor any one religion over others.” (Pl. Br. at 7.) Whatever its legal merits, that argument fails on the facts, and has only grown weaker in light of *Kennedy*’s newfound emphasis on coercion. *Kennedy*, in my view, does not undermine the case law cited in my prior Opinion, at least insofar as it applies to this fact pattern. *See* SJ Op. at 21-29, 500 F. Supp. 3d at 289-95.

The findings of undisputed fact in my prior Opinion dispel any notion that the World Cultures and Geography course promoted Islam at the expense of other religions. The evidence, I found, demonstrates that “the curriculum treats Islam equally with other religions. It is not a standalone course of study, but is part of a larger survey of world regions and religions.” SJ Op. at 24, 500 F. Supp. 3d

19. The prior Opinion’s discussion of the curriculum’s secular purpose, primary effect, and entanglement, although keyed to the *Lemon* test, is highly pertinent and more comprehensive than the discussion here. SJ Op. at 21-29, 500 F. Supp. 3d at 290-95. It should be read in conjunction with this Opinion.

Appendix B

at 291. Thus “the World Cultures course includes similar units on, for example, Hinduism and Buddhism, in which students watch videos on those religions to understand their tenets and practices.” *Id.* (citing DE 62-39 at 4, 8-11; DE 68-8). I also rejected Hilsenrath’s argument that “because the videos on Hinduism and Buddhism are from the perspective of a more neutral narrator, the World Cultures course does not treat all religions equally and proselytizes when it comes to Islam.” *Id.* at 25 n.14. The reader is referred to the Court’s discussion of these arguments in the prior summary judgment Opinion.

By focusing on these prior arguments, Hilsenrath fails to grapple with the task placed before the Court by the mandate of the Third Circuit, *i.e.*, to set aside the old *Lemon* test and revisit the case in light of the largely coercion-based standard adopted by the majority in *Kennedy*.

The World Cultures and Geography curriculum and materials do not present any of the “hallmarks” associated with establishment of religion to which *Kennedy* alluded. There is no evidence that by assigning middle school students activities and homework regarding various religions and cultures, the Board “exerted control over the doctrine and personnel of [an] established church,” “mandated attendance in [an] established church and punished people for failing to participate,” “punished dissenting churches and individuals for their religious exercise,” “restricted political participation by dissenters,” “provided financial support for [an] established church,” or “used the established church to carry out . . . civil

Appendix B

functions.” *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring). These, the sole guides that *Kennedy* has furnished the lower courts for the assessment of “coercion” for purposes of an Establishment Clause challenge in the context of public education, do not fit the facts of our case.

* * *

In sum, the curriculum and materials here were not coercive and do not otherwise bear or resemble the “hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.” Accordingly, the Board did not violate the Establishment Clause. I will enter summary judgment in the Board’s favor on Hilsenrath’s remaining nominal-damages claim.

IV. CONCLUSION

For the reasons set forth above, Defendants’ motion for summary judgment, reconsidered on remand with the benefit of additional briefing, is **GRANTED**, and Hilsenrath’s motion for summary judgment is **DENIED**.

An appropriate order follows.

Dated: October 16, 2023

/s/ Kevin McNulty
Hon. Kevin McNulty
United States District Judge

**APPENDIX C — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
NEW JERSEY, FILED OCTOBER 16, 2023**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 18-00966 (KM) (MAH)

LIBBY HILSENATH, ON BEHALF OF HER
MINOR CHILD, C.H.,

Plaintiff,

v.

SCHOOL DISTRICT OF THE CHATHAMS, BOARD
OF EDUCATION OF THE SCHOOL DISTRICT OF
THE CHATHAMS, MICHAEL LASUSA, KAREN
CHASE, JILL GIHORSKI, STEVEN MAHER,
MEGAN KEOWN, AND CHRISTINE JAKOWSKI,

Defendants.

ORDER

THIS MATTER having come before the Court via remand from the Court of Appeals for reconsideration of the motion for summary judgment filed by Defendants (DE 62), and the cross-motion for summary judgment filed by Plaintiff (DE 63); and the Court having considered the submissions and supplemental submissions on remand (DE 62, 63, 68-71, 99, 100) without oral argument pursuant to Fed. R. Civ. P. 78(b); for the reasons stated in the Court's original Opinion (DE 82), as revised and extended

57a

Appendix C

in the accompanying Supplemental Opinion on Remand;
and good cause appearing therefor;

IT IS this 16th day of October, 2023,

ORDERED that Defendants' motion for summary judgment (DE 62) is **GRANTED**; and

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment (DE 63) is **DENIED**.

The clerk is directed to close the file.

/s/ Kevin McNulty
Hon. Kevin McNulty
United States District Judge

58a

**APPENDIX D — DENIAL OF REHEARING OF
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT, FILED JUNE 3, 2025**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3030

LIBBY HILSEN RATH, ON BEHALF OF HER
MINOR CHILD, C.H.,

Appellant,

v.

SCHOOL DISTRICT OF THE CHATHAMS, *et al.*

(D.N.J. No. 2:18-cv-00966)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, HARDIMAN,
SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER,
MATEY, PHIPPS, FREEMAN, MONTGOMERY-
REEVES, and CHUNG, *Circuit Judges*.

The petition for rehearing filed by the Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

59a

Appendix D

BY THE COURT,

s/ *Thomas M. Hardiman*
Circuit Judge

Dated: June 3, 2025

**APPENDIX E — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT,
FILED JULY 20, 2022**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3474

LIBBY HILSEN RATH, 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 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

(D.N.J. No. 2-18-cv-00966)

61a

Appendix E

Present: CHAGARES, *Chief Judge*, HARDIMAN and
MATEY, *Circuit Judges*

ORDER

On June 28, 2022, we notified the parties that we were considering taking summary action in this case. We provided them with an opportunity to respond, only Appellant responded, and we have considered Appellant's submission. We conclude that summary action is appropriate. Accordingly, we hereby vacate the District Court's judgment entered on November 12, 2020 and remand this case to the District Court for further consideration in light of the Supreme Court's opinion in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (June 27, 2022).

By the Court,

s/Michael A. Chagares
Chief Circuit Judge

Dated: July 20, 2022

**APPENDIX F — OPINION OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
NEW JERSEY, FILED NOVEMBER 12, 2020**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 18-00966 (KM) (MAH)

LIBBY HILSEN RATH, ON BEHALF OF HER
MINOR CHILD, C.H.,

Plaintiff,

v.

SCHOOL DISTRICT OF THE CHATHAMS, BOARD
OF EDUCATION OF THE SCHOOL DISTRICT OF
THE CHATHAMS, MICHAEL LASUSA, KAREN
CHASE, JILL GIHORSKI, STEVEN MAHER,
MEGAN KEOWN, AND CHRISTINE JAKOWSKI,

Defendants.

OPINION

KEVIN MCNULTY, U.S.D.J.:

This case is an Establishment Clause challenge by Libby Hilsenrath, on behalf of her son C.H., to instruction about Islam in C.H.'s seventh-grade world cultures course. Before the Court are cross-motions for summary judgment. The motions raise certain threshold or technical issues of standing, arising from the passage of time and the school's voluntary withdrawal of certain

Appendix F

of the curriculum materials, and also join issue on the merits. For the following reasons, Defendants' motion for summary judgment (DE 62) is **GRANTED**, and Hilsenrath's motion for summary judgment (DE 63) is **DENIED**.¹

1. Certain citations to the record are abbreviated as follows:

DE = docket entry

Def. Brf. = Brief in Support of Defendants' Motion for Summary Judgment (DE 62-3)

Def. SMF = Defendants' Statement of Material Facts (DE 62-2)

Pl. Brf. = Brief in Support of Plaintiff's Motion for Summary Judgment (DE 63)

Def. Opp. = Defendants' Opposition to Plaintiff's Motion for Summary Judgment (DE 68-3)

Pl. Opp. = Plaintiff's Opposition to Defendants' Motion for Summary Judgment (DE 69)

Def. Reply = Reply Brief in Support of Defendants' Motion for Summary Judgment (DE 70)

Pl. Reply = Reply Brief in Support of Plaintiff's Motion for Summary Judgment (DE 71)

C.H. Dep. = C.H. Deposition Transcript, Exhibit F to Defendants' Motion for Summary Judgment (DE 62-10)

Jakowski Dep. = Christine Jakowski Deposition Transcript, Exhibit Y to Defendants' Motion for Summary Judgment (DE 62-29)

LaSusa Dep. = Michael LaSusa Deposition Transcript, Exhibit K to Defendants' Motion for Summary Judgment (62-15)

Weber Dep. = Jill Weber Deposition Transcript, Exhibit I to Defendants' Motion for Summary Judgment (DE 62-13)

Appendix F

This well-framed case presented sensitive issues requiring factual inquiry and the balancing of multiple factors. No one's educational, ideological, or religious priors were sufficient to decide it. I understand well the strong feelings that accompany such issues and claims. I do not dismiss the plaintiff's concerns, and I am by no means unsympathetic with parents' desire to control their children's exposure to religious indoctrination. I am also acutely aware that this is public, not parochial, education. Religion, however, is a fact about the world, and no study of geography and cultures is complete without it. There is, to be sure, a line to be drawn between teaching about religion and teaching religion. On this record, I must conclude that the school did not cross that line.

I. BACKGROUND**A. Facts****1. The World Cultures and Geography Course**

During the 2016-2017 school year, C.H. was a seventh-grade student at Chatham Middle School, in the School District of the Chathams. He was enrolled in a mandatory

Video 1 = Introduction to Islam Video, Exhibit 17 to Plaintiff's Motion for Summary Judgment, <https://www.youtube.com/watch?v=ZHujiWd49l4> (DE 63-18)

Video 2 = 5 Pillars of Islam Video, Exhibit 18 to Plaintiff's Motion for Summary Judgment, <https://www.youtube.com/watch?v=ikVGwzVg48c> (DE 63-19)

Worksheet = Introduction to Islam Worksheet, Exhibit PP to Defendants' Motion for Summary Judgment (DE 62-46)

Appendix F

course called World Cultures and Geography, taught by defendants Megan Keown and Christine Jakowski. (Def. SMF ¶¶ 96-98, 125.)² The aim of the course was to “develop[] a broad understanding of the world and its people” so that “students will become active and informed global citizens.” (DE 62-36, at 1.) To that end, the course devoted a unit of study to each of the world’s major regions. (*Id.*) In learning about those regions, students learned about the religions commonly practiced in each and compared the religions. (*See, e.g., id.*; DE 62-39.)

One unit was devoted to the Middle East and North Africa (“MENA”); and students learned about Islam, the prevalent religion in that region. (DE 62-41.) There were nine lessons as part of this unit (mostly on geography and current events), but Islam was only the focus of two. (*Id.*)

i. Introduction to Islam Video

The first lesson was aimed at teaching students about generalizations through the lens of generalizations about Islam. (*Id.* at 2.) Ms. Jakowski presented a PowerPoint, and a copy was posted on Google Classroom, an online platform for teachers to provide students with access to course materials. (Jakowski Dep. at 29:8-18.) The last slide asked students to write down words they associated with Islam, watch a linked video introducing students to Islam (“Video 1”), and then discuss what generalizations they

2. Ms. Keown prepared the syllabus for the class and taught until November 2016, when she went on maternity leave. Ms. Jakowski replaced her and taught the unit at issue. (Def. SMF ¶¶ 96-98.)

Appendix F

could make after watching the video and whether those generalizations were valid. (DE 62-42, at 10.) However, Ms. Jakowski did not play Video 1 in class and students were not required to watch it as homework. (Jakowski Dep. at 30:21-31:1, 36:4-6, 45:11-19.) Nonetheless, C.H., with his mother, did access the presentation and Video 1 from Google Classroom and watched at home. (C.H. Dep. at 35:23-36:9.)³

Video 1 is a five-minute introduction to Islam. The video scrolls through pictures of Middle Eastern and North African peoples, Islamic art, and Muslim sites, with singing in the background.⁴ Interspersed with these images for the first half of the video are slides of text asking and answering questions about Islam:

- “What is Islam? . . . Faith of divine guidance for Humanity, based on peace, spirituality and the oneness of God[.]” (Video 1 at 0:17.)

3. A study guide for the MENA unit advised students that the test would be open note, that their notes should include “general knowledge about [Islam] and 5 pillars,” and that they should “[u]se slides on Google Classroom to ensure that you have all important information in your notes or on the handouts.” (DE 63-14, at 1.)

4. On the YouTube page, the description from the video-creator states that the song playing in the background is “Qasida Burdah” and provides two links for download, but neither link seems to be currently active. Hilsenrath has provided what she attests is a translation of the song, which is religious in nature. (DE 63-17.) There is no testimony from C.H. that he clicked the links at the time of viewing the video or understood what the song, which was in Arabic, signified.

Appendix F

- “Who is Allah? Allah is the one God who created the heavens and the earth, who has no equal and is all powerful[.]” (*Id.* at 0:29.)
- “Who is Muhammed (S)? Muhammed (Peace be upon him) is the last & final Messenger of God, God gave him the Noble Quran[.]” (*Id.* at 1:01.)
- “What is the Noble Quran? Divine revelation sent to Muhammed (S) last Prophet of Allah. A Perfect guide for Humanity[.]” (*Id.* at 1:38.)
- “What does history say about Islam? Muslims created a tradition of unsurpassable splendor, scientific thought and timeless art[.]” (*Id.* at 2:10.)

Around the two-minute mark, the video begins to focus less on Islam as a religion *per se*, and more on the achievements of Islamic civilization. (*Id.* at 2:39, 3:02-25.) Also interspersed throughout the video are quotations (with attributions) from Muslim prayers, the Quran, and Muhammed. (*Id.* at 0:38, 1:14, 1:24, 1:48, 4:30, 4:19.) The video closes with a text slide stating, “May God help us all find the true faith, Islam. Ameen” (*id.* at 4:42), and another slide, seemingly from the video-creator, thanking his or her family and Allah (*id.* at 4:50).

C.H. later testified that he does not remember much about this video, and does not recall feeling coerced. (C.H. Dep. at 26:24-25:1, 37:3-11.)

*Appendix F***ii. Worksheet**

The second lesson further introduced students to the tenets of Islam. (DE 42, at 2.) Ms. Jakowski presented a second PowerPoint to the class that provided an overview of Islam's major characteristics and its five pillars, "the five obligations that every Muslim must satisfy in order to live a good and responsible life according to Islam." (DE 45, at 10.) As students listened to Ms. Jakowski's lesson, they were given a worksheet to complete that corresponded with the presentation. The worksheet had blanks which students would fill in, or incorrect statements which they would correct, based on information they learned. (Jakowski Dep. at 40:1-10.) The PowerPoint and worksheet covered a range of topics at a general level: for example, how often Muslims pray, the extent of alms giving, and why Muslims fast. (Worksheet at 3-5; DE 45, at 11-20.)

One slide and corresponding page of the worksheet concerned the pillar called *shahadah*, or "Testimony of Faith." (DE 45, at 10.) The *shahadah* is described as "[t]he basic statement of the Islamic faith," and the text of the *shahadah* was included in the PowerPoint. (*Id.* at 13.)⁵ The worksheet contained an incomplete version of

5. Hilsenrath contends that the PowerPoint and worksheet also contained a link to a webpage that teaches visitors how to convert to Islam and that students viewed it. (Pl. Brf. at 14.) There is indeed a link in both documents to an informational webpage from the BBC describing the *shahadah*. (DE 68-9, at 30, 42.) The webpage states, among other things, that "anyone who cannot recite [the *shahadah*] wholeheartedly is not a Muslim" and "[r]eciting this statement three

Appendix F

the *shahadah*, and students filled in the blanks of the statement: “There is no god but *Allah* and *Muhammad* is his messenger” (the underlined words reflect the parts of the statement which the students completed). (Worksheet at 3.) C.H. completed part of the worksheet, including the *shahadah* page. (C.H. Dep. at 36:1-9; DE 62-47.)⁶

iii. Five Pillars Video

Like the first presentation, the five-pillars presentation contained a link to a video (“Video 2”) (DE 45, at 10), but Video 2 was not played in class or assigned as homework. (Jakowski Dep. at 36:4-6). C.H. watched it at home with his mother. (C.H. Dep. at 35:23-36:9). Video 2 is five minutes long and opens with text stating that “the following is an Islamic educational presentation for primary and

times in front of witnesses is all that anyone need do to become a Muslim.” *Shahadah: the statement of faith*, BBC, <http://www.bbc.co.uk/religion/religions/islam/practices/shahadah.shtml> (last updated Aug. 23, 2009). Besides Hilsenrath’s own testimony (DE 63-2, at 129-30), however, there is no indication that Ms. Jakowski instructed students to follow links in the PowerPoints at home or that C.H. himself followed any such link. (*E.g.*, (Jakowski Dep. at 45:11-19.) As to the worksheet, Ms. Jakowski testified that the worksheet was provided in class, presumably in hard copy (*id.* at 40:1-3), and C.H. completed the worksheet by hand, so there is no indication that he followed any link (C.H. Dep. at 44:23-45:5; *see also* DE 62-47).

6. Ms. Jakowski described the worksheet as an in-class assignment, while C.H. stated that he could not recall whether he completed it at home or in class. (*Compare* Jakowski Dep. at 40:1-10, *with* C.H. Dep. at 45:8-9.) Fundamentally, however, it is undisputed that C.H. reviewed the PowerPoint and completed the worksheet as part of the course. (*See id.*)

Appendix F

secondary schools.” (Video 2 at 0:02 (capitalization altered).) Video 2 features two cartoon-animation boys, Alex and Yusuf, discussing Islam. Yusuf is Muslim, and Alex asks him questions about his religion. For example, Alex asks Yusuf when he prays and what Muslims believe (*Id.* at 0:50-2:00.) Yusuf states that “Allah is the creator of everything.” (*Id.* at 1:30-34.) Yusuf then describes the five pillars to Alex and recites the *shahadah*. (*Id.* at 2:00-2:30.) Video 2 concludes with text instructing that the viewer can order more information from the video-creator, an organization called Discover Islam, and organize a mosque tour. (*Id.* at 5:20.) It is clear that Discover Islam is a United Kingdom organization because its website ends in “co.uk,” the text of the video uses British spelling, and Yusuf and Alex speak with British accents.

2. Hilsenrath’s Complaints and Defendants’ Response

After watching the videos with C.H. and reviewing the worksheet, Hilsenrath felt that the curriculum favored Islam at the expense of Christianity and Judaism. So she sent emails expressing her concerns to (1) Steven Maher, Social Studies Content Supervisor for the School District; (2) Superintendent of Curriculum Karen Chase; (3) Superintendent Michael LaSusa; and (4) the Board of Education of the School District. (DE 62-48, 62-50.) It is important to understand the roles and responsibilities of each:

- Supervisor Maher develops the social studies curriculum and supervises the social studies teachers. (Def. SMF ¶¶ 85-88.)

Appendix F

- Assistant Superintendent Chase is responsible for oversight of the curriculum and Supervisor Maher. (*Id.* ¶ 78.)
- Superintendent LaSusa, under New Jersey law, is the “chief executive” of the District and has the power of “general supervision over all aspects, including . . . instructional programs, of the schools of the district.” N.J. Stat. Ann. § 18A:17-20(b); *see also* Def. SMF ¶ 72. He oversees District policy regarding curriculum and course materials, and Assistant Superintendent Chase reports to him. (Weber Dep. at 20:1-21:1, 35:10-15, 54:13-16; LaSusa Dep. at 9:22-25.) He also has the responsibility to “ensure that teachers follow” District policy that religion is treated neutrally. (DE 63-15.) Although the Board has the power to hire and fire the superintendent, the Board does not have the power to overrule him on decisions regarding instructional materials and curriculum. (Weber Dep. at 20:1-21:8.) Ultimately, it is his decision to remove materials from courses, a decision that does not require approval from the Board, and his determination is deemed to represent that of the Board and District. (*Id.* at 51:7-14, 57:7-11; LaSusa Dep. at 101:2-102:2.)
- The Board, under New Jersey law, is the “body corporate” that supervises the District. N.J. Stat. Ann. §§ 18A:10-1, 18A:11-1(c)—(d). It consists of nine members and requires five votes to take any action. (Weber Dep. at 34:9-10; *see also* N.J. Stat. Ann. § 18A:10-6.) Nonetheless, the superintendent

Appendix F

retains final authority on most day-to-day matters involving the schools, including the curriculum, an area which the Board avoids. (Weber Dep. at 21:4-8.)

After sending emails, Hilsenrath attended a Board meeting in February 2017 and voiced her concerns. (Def. SMF ¶ 186.) In response, the Board's Curriculum Committee convened to discuss her complaints. (*Id.* ¶ 191.) When such complaints are raised, the Committee reviews and researches them and then presents findings and any recommendations to the Board publicly. (Weber Dep. at 19:7-25.) The Board usually does not take formal action regarding Committee recommendations but leaves that to the superintendent. (*Id.* at 20:1-21:8.) The Committee meeting included Superintendent LaSusa, Assistant Superintendent Chase, Supervisor Maher, social studies teacher Stephanie Lukasiewicz, Board Member Michelle Clark, and Board President Jill Weber. (Def. SMF ¶ 195; LaSusa Dep. at 93:25-94:1.)

After reviewing the curriculum and materials, Superintendent LaSusa and the Committee determined that no changes were necessary and presented their findings at the next Board meeting, emphasizing that the curriculum aligned with the District policy of religious neutrality. (DE 62-54, at 2-5; DE 62-5, at 24:1-14.) Prior to the meeting, however, Hilsenrath appeared on a national television show to voice her concerns, leading to threats from viewers directed at Board members, administrators, and teachers. (DE 62-54, at 2-3; DE 62-55.) Because of this disruption, Superintendent LaSusa and Supervisor Maher had the links to the videos removed from the PowerPoints. (*E.g.*, LaSusa Dep. at 87:6-18.)

*Appendix F***B. Procedural History**

Months later, when C.H. was in eighth grade and no longer in the World Cultures course, Hilsenrath sued the District, the Board, Superintendent LaSusa, Assistant Superintendent Chase, Principal Jill Gihorski, Supervisor Maher, and the two teachers, Ms. Keown and Ms. Jakowski. (Compl. ¶¶ 12-39.) Her claims against the individual defendants name them in their official capacities only. (*Id.* at 2.) She alleges one claim under 42 U.S.C. § 1983: that the curriculum, especially the videos and worksheet, violates the Establishment Clause of the First Amendment to the United States Constitution. (*Id.* ¶¶ 99-116.) She seeks (1) an injunction prohibiting Defendants “from funding and implementing religious instruction that endorses Islam or that favors Islam,” (2) a declaration that Defendants violated her and C.H.’s rights under the Establishment Clause, (3) a declaration that Defendants’ “training, supervision, policies, practices, customs, and procedures that promote Islam violate the Establishment Clause,” (4) nominal damages, and (5) attorney’s fees. (*Id.*, Prayer for Relief.)

Defendants moved to dismiss, but I denied the motion, holding that the Complaint on its face alleged an Establishment Clause claim. *Hilsenrath on behalf of C.H. v. Sch. Dist. of Chatham*, Civ. No. 18-966, 2018 U.S. Dist. LEXIS 100100, 2018 WL 2980392, at *3-4 (D.N.J. June 13, 2018). Now, following discovery, the parties have cross-moved for summary judgment. C.H. is now in high school.

*Appendix F***II. DISCUSSION AND ANALYSIS**

To summarize, I hold as follows:

(1) Hilsenrath has standing to pursue a claim for nominal damages, but not for prospective injunctive or declaratory relief;

(2) The Board is a proper defendant, and Superintendent LaSusa's involvement in the curricular decisions is a policy sufficient to confer potential liability under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978);

(3) the claims against the individual defendants and the District will be dismissed; and

(4) the seventh grade World Cultures curriculum and materials did not violate the Establishment Clause.

A. Standard of Review

Federal Rule of Civil Procedure 56(a) provides that summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See *Kreschollek v. S. Stevedoring Co.*, 223 F.3d 202, 204 (3d Cir. 2000). In deciding a motion for summary judgment, a court must construe all facts and inferences in the light most favorable to the nonmoving party. See *Boyle v. County of Allegheny*, 139 F.3d 386, 393 (3d Cir. 1998). The moving party bears the burden of establishing

Appendix F

that no genuine issue of material fact remains. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). “[W]ith respect to an issue on which the nonmoving party bears the burden of proof . . . the burden on the moving party may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325.

Once the moving party has met that threshold burden, the non-moving party “must do more than simply show that there is some metaphysical doubt as to material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The opposing party must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *see also* Fed. R. Civ. P. 56(c) (setting forth types of evidence on which nonmoving party must rely to support its assertion that genuine issues of material fact exist).

When the parties file cross-motions for summary judgment, the governing standard “does not change.” *Clevenger v. First Option Health Plan of N.J.*, 208 F. Supp. 2d 463, 468-69 (D.N.J. 2002) (citation omitted). The court must consider the motions independently. *Goldwell of N.J., Inc. v. KPSS, Inc.*, 622 F. Supp. 2d 168, 184 (D.N.J. 2009). That one of the cross-motions is denied does not imply that the other must be granted. For each, “the court construes facts and draws inferences in favor of the party against whom the motion under consideration is made”

Appendix F

but does not “weigh the evidence or make credibility determinations.” *Pichler v. UNITE*, 542 F.3d 380, 386 (3d Cir. 2008) (internal quotation and citations omitted).

B. Standing

I first must assess standing. *See Free Speech Coal., Inc. v. Att’y Gen. U.S.*, 974 F.3d 408, 421 (3d Cir. 2020). “To establish standing, a party must have ‘(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.’” *N.J. Dep’t of Env’t Prot. v. Am. Thermoplastics Corp.*, 974 F.3d 486, 493 (3d Cir. 2020) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)). Hilsenrath “has the burden of demonstrating that these requirements are met at the ‘commencement of the litigation,’ and must do so ‘separately for each form of relief sought.’” *Freedom From Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)).

Of the standing trio, only the injury prong is at issue here. (*See* Def. Opp. at 7-13.) “Injury in fact requires ‘the invasion of a concrete and particularized legally protected interest resulting in harm that is actual or imminent, not conjectural or hypothetical.’” *Sherwin-Williams Co. v. County of Delaware*, 968 F.3d 264, 268 (3d Cir. 2020) (quoting *Finkelman v. Nat’l Football League*, 810 F.3d 187, 193 (3d Cir. 2016)). Parents have a cognizable interest in “the conditions in their children’s schools.” *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d

Appendix F

211, 217 n.2 (3d Cir. 2003). Accordingly, parents suffer an injury when a school's actions disfavor or favor religion. *E.g.*, *New Kensington*, 832 F.3d at 479 n.11. There is no dispute that Hilsenrath's allegations, if sustained, would entail some such injury. (Def. Opp. at 9.) Whether that injury confers standing, however, must be assessed in the context of the relief sought. *See New Kensington*, 832 F.3d at 476.

1. Injunctive and Declaratory Relief Claims

To seek injunctive or declaratory relief, Hilsenrath (personally and on behalf of C.H.) must show that she is either currently suffering the injury or will likely suffer the injury in the future. *Pa. Prison Soc'y v. Cortes*, 508 F.3d 156, 166 (3d Cir. 2007) (injunctive relief); *see Sherwin-Williams*, 968 F.3d at 269, 272 (declaratory relief); *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S.V.I.*, 218 F.3d 232, 240 (3d Cir. 2000) (same). "[P]ast exposure to illegal conduct" is not enough. *McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 223 (3d Cir. 2012) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)). For example, in *City of Los Angeles v. Lyons*, the victim of a police chokehold sought to enjoin the department's chokehold policy. The Supreme Court held that he lacked standing to seek prospective relief because he could not show any likelihood that he would be choked again. 461 U.S. 95, 111, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983).

Hilsenrath cannot show a current or future injury. C.H. is no longer in the course or even at the Middle School. He thus will not be "subjected" to the seventh-grade

Appendix F

World Cultures curriculum again. Indeed, in the related context of mootness, courts have held that challenges to school policies or curriculum no longer present a live controversy when the student de-matriculates from the school. *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 432-33, 72 S. Ct. 394, 96 L. Ed. 475 (1952) (Bible reading in class); *Donovan*, 336 F.3d at 216 (policy prohibiting Bible club); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 73-74 (2d Cir. 2001) (various classroom activities and lesson plans); *Wood v. Bd. of Educ. of Charles Cnty.*, No. GJH-16-00239, 2016 U.S. Dist. LEXIS 136512, 2016 WL 8669913, at *4 (D. Md. Sept. 30, 2016) (materials similar to those challenged here). Thus, Hilsenrath lacks standing to seek an injunction prohibiting Defendants from continuing the curriculum or a declaration that Defendants are violating the Establishment Clause. (*See* Compl., Prayer for Relief (b), (c).)⁷

7. Hilsenrath's requested relief includes enjoining Defendants from "funding" the curriculum at issue. (Compl., Prayer for Relief at (c).) In limited circumstances, the Supreme Court has recognized taxpayer standing to challenge Establishment Clause violations. *ACLU of N.J. v. Schundler*, 104 F.3d 1435, 1445 & n.9 (3d Cir. 1997). Hilsenrath's briefs do not press such a theory. Regardless, such a theory fails here because "a municipal taxpayer plaintiff must show (1) that he pays taxes to the municipal entity, and (2) that more than a de minimis amount of tax revenue has been expended on the challenged practice itself." *Nichols v. City of Rehoboth Beach*, 836 F.3d 275, 281 (3d Cir. 2016) (citing *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 262 (3d Cir. 2001) (Alito, J.)). Hilsenrath has made neither showing. Moreover, any expenditure on the instructional materials here would be de minimis. *See Township of Wall*, 246 F.3d at 262-63 (surveying cases challenging Bible reading in schools).

Appendix F

To be sure, Hilsenrath also seeks a declaration that Defendants “violated” the Establishment Clause in the past. (*See id.* at (a).) Such a retrospective declaration, however, is not the endgame, but a “means” by which the plaintiff can obtain “some action (or cessation of action) by the defendant.” *Hewitt v. Helms*, 482 U.S. 755, 761, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987). Accordingly, plaintiffs lack standing to seek a declaration that past conduct was illegal when there is no prospect that such a declaration can be used to redress a current or future injury. *E.g.*, *Policastro v. Kontogiannis*, 262 F. App’x 429, 434 (3d Cir. 2008); *A.S. v. Harrison Twp. Bd. of Educ.*, 66 F. Supp. 3d 539, 548 (D.N.J. 2014); *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 925 F.3d 1205, 1210-11 (11th Cir. 2019). Hilsenrath can show only a past injury: the instruction C.H., an eighth grader when the action was filed, received in seventh grade. She therefore lacks standing to seek declaratory relief.

Hilsenrath’s arguments to the contrary are unpersuasive. First, she argues that C.H. “will again encounter the religion of Islam as a topic” in other courses he takes in high school. (Pl. Reply at 5.) There are several problems with this theory of standing. For starters, generally “encounter[ing]” Islam in a curriculum is not an injury. *Cf. Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 255, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (explaining that schools can constitutionally teach children about religions); *New Kensington*, 832 F.3d at 480 (plaintiff was not injured by religious display when she did not understand, at first observance, that it endorsed a religion). Assuming Hilsenrath means that C.H. will be

Appendix F

exposed to favoritism of Islam in later courses, that injury is too speculative. Future injuries must be “certainly impending” or there must be “a substantial risk that the harm will occur.” *New York v. Dep’t of Commerce*, 139 S. Ct. 2551, 2565, 204 L. Ed. 2d 978 (2019) (citation omitted). Evidence of past harms is insufficient—a plaintiff on summary judgment must produce affidavits or the like to show that she will face the harm. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

The course in which C.H. may again encounter Islam is eleventh-grade Advanced Placement World History. (DE 62-26, at 12.) There is no indication that C.H. will opt to enroll to that particular course, so any exposure is speculative. *See Roberts v. Madigan*, 921 F.2d 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)). Even if C.H. planned to enroll, teachers enjoy discretion in crafting their lessons (*e.g.*, DE 62-26, at 1), so there is no basis to predict whether Islam will be presented at all, and if so, whether such presentation will take a form that offends the Establishment Clause. *See COPE v. Kansas State Bd. of Educ.*, 821 F.3d 1215, 1222-23 (10th Cir. 2016) (no standing to challenge state educational standards when it was unclear how those standards would be implemented in the classroom). Thus, Hilsenrath’s theory that C.H. will again be exposed to Islam in a constitutionally offensive context is too speculative.

Appendix F

All that aside, Hilsenrath cannot show that “the injury will be redressed by a favorable decision.” *Laidlaw*, 528 U.S. at 181. The arguments and evidence in this case are focused on the seventh-grade course. Any injunction would need to be based on the facts and arguments she presented. See *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087, 198 L. Ed. 2d 643 (2017) (per curiam) (“Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.”); see also, e.g., *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 206 (3d Cir. 2014). I would have no solid ground to enjoin the instruction of Islam in an eleventh-grade course when the case before me has been focused on a different, seventh-grade course. Accordingly, a favorable decision could not redress any future injury that is posited.

Second, Hilsenrath argues that although Defendants removed the videos from the World Cultures course, it is uncertain whether Defendants will later reincorporate the videos into the course. (Pl. Reply at 7-10.) In so arguing, she relies on the voluntary cessation doctrine, which says that a claim is not moot when a defendant stops his illegal conduct *during litigation* unless it is clear that the behavior is not likely to recur. (*Id.* at 7 (citing *New Kensington*, 832 F.3d at 476).) The cessation in this case occurred before, not during, litigation. But in any event, the doctrine has no force here because it cannot serve “as a substitute for the allegation of present or threatened injury upon which initial standing must be based.” *Steel*

Appendix F

Co. v. Citizens for a Better Env't, 523 U.S. 83, 109, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Put differently, that Defendants may use the videos in the future has no relevance because Hilsenrath cannot show that C.H. will ever again be in a course where the videos could be watched.⁸

Thus, Hilsenrath lacks standing to seek injunctive and declaratory relief, and to the extent her claims seek such relief, they will be dismissed.

2. Nominal Damages Claim

Hilsenrath also seeks nominal damages. (Compl., Prayer at (d).) Here, the standing analysis is different.

A plaintiff has standing to seek nominal damages for past Establishment Clause injuries. *New Kensington*, 832 F.3d at 480. That Hilsenrath cannot show future injury is immaterial because damages offer retrospective relief.

8. Both parties confuse mootness and standing, with Defendants arguing that the removal of the videos mooted Hilsenrath's claims before the Complaint was filed, and Hilsenrath responding with the voluntary cessation doctrine. (Def. Opp. at 15; Pl. Reply at 7.) Standing requires showing that a live controversy exists at the outset of litigation, while mootness requires showing that a live controversy persists throughout litigation. *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 305-06 (3d Cir. 2020). Because the removal of the videos occurred before litigation started, it could be analyzed in relation to the issue of standing. But it is not relevant because, regardless of whether the videos will be used in a seventh-grade world cultures course again, it is certain that C.H. will never again be in such a seventh-grade course.

Appendix F

Id. at 478 n.7 (citing *Lyons*, 461 U.S. at 105). It stands to reason, then, that Hilsenrath would have standing to pursue a nominal-damages claim in relation to C.H.'s past exposure to the curriculum.

Neither the Third Circuit nor the Supreme Court has addressed whether a nominal-damages claim *alone* confers standing. In a concurring opinion in *New Kensington*, Chief Judge Smith expressed his view that the answer to that question should be no, because nominal damages do not truly provide redress for an injury. *Id.* at 483-84 (Smith, C.J., concurring).⁹ A closely related issue is currently before the Supreme Court of the United States. In *Uzuegbunam v. Preczewski*, the Court will consider whether a government's post-filing cessation of an allegedly unconstitutional policy moots the case when only a nominal-damages claim is left. No. 19-968 (Brief for the Petitioners at 1).¹⁰ The United States as *amicus* urges the Court to hold that a nominal-damages claim is sufficient to confer standing. *Id.* (Brief for the United States as Amicus Curiae Supporting Petitioners at 1, 9).

Although the issue is presently unsettled, I conclude that Hilsenrath's nominal-damages claim is sufficient

9. The *New Kensington* panel did not need to address the question because at least one plaintiff had standing to seek injunctive relief. 832 F.3d at 481.

10. Three Justices have already indicated their view that a nominal-damages claim preserves a live controversy. *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1535, 206 L. Ed. 2d 798 (2020) (Alito, J., joined by Gorsuch & Thomas, JJ.).

Appendix F

to present a live controversy. No precedent bars such a holding. Nominal damages are available with respect to past Establishment Clause violations, *New Kensington*, 832 F.3d at 480 (majority op.), and damages claims ordinarily suffice to preserve a controversy even if prospective relief claims fail, *see Mission Prods. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660, 203 L. Ed. 2d 876 (2019). I therefore hold that the nominal-damages claim is sufficient to confer jurisdiction here.

The *New Kensington* concurrence takes the view that nominal damages do not redress any injury because they provide no tangible benefit. *New Kensington*, 832 F.3d at 485 (Smith, C.J., concurring); *see also Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 610-11 (6th Cir. 2008) (dicta); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1267-68 (10th Cir. 2004) (McConnell, J., concurring). The weight of authority, however, is against that view. Nominal damages reflect that the harm is non-quantifiable, not non-existent. 25 C.J.S. Damages § 24 (2020). Nominal damages still vindicate a plaintiff's rights, and their "value can be of great significance to the litigant and to society." *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999); *see also, e.g., Carey v. Piphus*, 435 U.S. 247, 253, 266, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) (explaining that nominal damages "vindicat[e]" certain rights that cannot otherwise be quantified). Although a nominal-damages award is "not exactly a bonanza, [] it constitutes relief on the merits." *Farrar v. Hobby*, 506 U.S. 103, 116, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (O'Connor, J., concurring). Given the well-supported view that nominal damages provide redress

Appendix F

for a past injury, like Hilsenrath's here, I conclude that she has standing to pursue her nominal-damages claim, and that, to that extent, I have jurisdiction over the case.

C. Theories of Liability

The next set of threshold issues requires the Court to identify the defendants against whom Hilsenrath can pursue an Establishment Clause violation and the theories of liability that are cognizable.

1. The Board and the District

In New Jersey, the terms “school board” and “school district” are often used interchangeably, but those entities do not have the same legal status. I rule that the Board, and not the District, is the proper defendant here.

School boards are the governmental entities which exercise the kind of powers at issue here. *See* N.J. Stat. Ann. § 18A:10-1 (“The schools of each school district shall be conducted, by and under the supervision of a board of education, which shall be a body corporate . . .”). As such, school boards are created as legal entities with the capacity to sue and be sued. *Id.* § 18A:11-2(a); *see also* *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 230 (3d Cir. 2006).

A school board may be subject to *Monell*-style municipal liability if its policy or custom caused the constitutional violation. *Mann v. Palmerton Area Sch. Dist.*, 872 F.3d 165, 174-75 (3d Cir. 2017). Policy can be

Appendix F

shown if an official with final policymaking authority for the Board approved or ratified the curriculum and materials. *See McGreevy v. Stroup*, 413 F.3d 359, 367 (3d Cir. 2005). Such a showing requires me to “determine (1) whether, as a matter of state law, the official is responsible for making policy in the particular area of municipal business in question, and (2) whether the official’s authority to make policy in that area is final and unreviewable.” *Hill v. Borough of Kutztown*, 455 F.3d 225, 245 (3d Cir. 2006) (internal citations and emphases omitted). That inquiry involves “[r]eviewing the relevant legal materials, including state and local positive law, as well as ‘custom or usage having the force of law.’” *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 n.1, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988) (plurality)).

Superintendent LaSusa qualifies as an official with final policymaking authority. As to whether he is “responsible for making policy in the particular area of municipal business in question,” *Hill*, 455 F.3d at 245, New Jersey law provides a positive answer. New Jersey grants superintendents “chief executive” status and power of “general supervision over all aspects, including . . . instructional programs, of the schools of the district.” N.J. Stat. Ann. § 18A:17-20(b). The record, too, confirms that Superintendent LaSusa acts as the chief executive and is responsible for curriculum and academic programming decisions. (Weber Dep. at 20:1-21:1, 35:10-15, 54:13-16; LaSusa Dep. at 20:16-18.) What is more, the Board has specifically instructed him to ensure that teachers

Appendix F

maintain religious neutrality (DE 63-15; LaSusa Dep. at 71:18-72:5, 73:1-4), “the particular area of municipal business in question” in this case, *Hill*, 455 F.3d at 245. His authority in these areas is “final and unreviewable,” *id.*, because the Board cannot overrule him and, at most, can require him to report to the Board regarding such issues. (Weber Dep. at 29:12-13, 35:10-15, 40:1-10, 54:13-16.)

Superintendent LaSusa also ratified the conduct at issue. “[W]hen a subordinate’s decision is subject to review by the municipality’s authorized policymakers, they have retained the authority to measure the official’s conduct for conformance with their policies. If the authorized policymakers approve a subordinate’s decision and the basis for it, their ratification would be chargeable to the municipality . . .” *Praprotnik*, 485 U.S. at 127; *see also Kelly v. Borough of Carlisle*, 622 F.3d 248, 264 (3d Cir. 2010). Ms. Jakowski is a subordinate of Superintendent LaSusa, as he is at the top of her chain of command. (LaSusa Dep. at 9:17-25, 15:22-16:4.) As the final supervisor, he is “responsible for ensuring that [her] instruction meets appropriate standards” (*id.* at 23:1-5), including religious neutrality (*id.* at 73:1-4). Following Hilsenrath’s complaints, he, along with others, reviewed the materials and determined that they comported with the religious neutrality policy and did not require removal; that determination represents the policy of the Board. (*Id.* at 94:20-95:4, 101:2-102:2; Weber Dep. at 51:7-14, 57:7-11.) Thus, Ms. Jakowski’s lessons were subject to review by Superintendent LaSusa for compliance with policies (including the religious neutrality policy), and he approved those lessons going forward, so his “ratification”

Appendix F

is “chargeable” to the Board under *Monell*. *Praprotnik*, 485 U.S. at 127; *see also McGreevy*, 413 F.3d at 368 (“[E]ven one decision by a school superintendent, if s/he were a final policymaker, would render his or her decision district policy.”).¹¹

Both as a matter of state law and the *Monell* doctrine, the Board is the legal entity responsible for the decisions that are challenged here. It is a proper defendant.

School districts stand on a different footing. Unlike a school board, a school district is not created as a legal entity subject to suit. *Mesar v. Bound Brook Bd. of Educ.*, No. A-2953-16T2, 2018 N.J. Super. Unpub. LEXIS 1027, 2018 WL 2027262 (N.J. Super. Ct. App. Div. May 2, 2018). In addition, the plaintiff here does not identify any basis for holding the District separately liable. I will therefore dismiss the remaining nominal-damages claims as against the District.

2. The individual defendants

I will also dismiss the remaining, nominal-damages claims against the individual defendants in their official capacities.

11. Hilsenrath also argues that the Board is liable under *Monell* based on a failure-to-train theory. (Pl. Opp. at 10-13 (citing *Forrest v. Parry*, 930 F.3d 93, 118 (3d Cir. 2019).) Such a theory, however, will fail if she cannot establish a constitutional violation. *Vargas v. City of Philadelphia*, 783 F.3d 962, 974-75 (3d Cir. 2015). Because I conclude that she has one clearly viable *Monell* theory, I do not reach this alternative failure-to-train theory.

Appendix F

The Complaint seeks damages against “all the Defendants.” (Compl., Prayer at (d).) Hilsenrath clarifies in her brief, however, that she is seeking nominal damages only against the Board and the District, not the individual defendants. (Pl. Reply Br. at 15.)¹² Accepting that concession, I find that the dismissal of the claims for injunctive and declaratory relief on standing grounds, *see supra*, leaves no claims outstanding against the individual defendants.

12. In the motion-to-dismiss decision, I recognized that the individuals were probably included only as “relief defendants,” *i.e.*, persons who might be required for the fashioning of effective injunctive relief. Even at the pleading stage, however, these defendants appeared to be superfluous. *See Hilsenrath*, 2018 U.S. Dist. LEXIS 100100, 2018 WL 2980392, at *1 (citing *Kentucky v. Graham*, 473 U.S. 159, 166-67, 105 S. Ct. 3099, 87 L. Ed. 2d 114 & n.14 (1985) (“There is no longer a need to bring official-capacity actions against local government officials, for . . . local government units can be sued directly for damages and injunctive or declaratory relief.”)).

Technically, the plaintiff’s concession might be seen as an amendment of the complaint, which cannot generally be accomplished by means of statements in a brief. *See Jones v. Treece*, 774 F. App’x 65, 67 (3d Cir. 2019); *see also Commw. of Pa. ex. rel Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988). There is some authority for the proposition that I may treat Hilsenrath’s brief as a motion to amend, if Defendants consent or there would be no prejudice. *Ragland v. Comm’r N.J. Dep’t of Corrs.*, 717 Fed. Appx. 175, 178 n.6 (3d Cir. 2017) (per curiam); *Onal v. BP Amoco Corp.*, 275 F. Supp. 2d 650, 658 n.2 (E.D. Pa. 2003), *aff’d*, 134 F. App’x 515 (3d Cir. 2005). Here, the amendment is simply a concession that plaintiffs are relinquishing part of a claim, which they are generally entitled to do, and which does not prejudice any defendant. I therefore accept the concession.

Appendix F

In sum, I rule that the remaining claims for nominal damages are properly asserted against the Board, but not the District or the individual defendants.

D. Merits of the Establishment Clause Claim

Finally, I turn to the underlying merits: whether the challenged materials and curriculum violate the Establishment Clause. I rule that they do not.

In some respects, the Establishment Clause test is in flux. The default test has long been that of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), although the Supreme Court and Third Circuit have withheld its application in certain contexts, *Freedom From Religion Found., Inc. v. County of Lehigh*, 933 F.3d 275, 280-81 (3d Cir. 2019). Not so here, however: “In the public school context, the Supreme Court has been inclined to apply the *Lemon* test.” *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 282 (3d Cir. 2011). *Lemon* imposes a three-part inquiry, asking “(1) whether the government practice had a secular purpose; (2) whether its principal or primary effect advanced or inhibited religion; and (3) whether it created an excessive entanglement of the government with religion.” *Id.* (quoting *Lemon*, 403 U.S. at 612-13). In undertaking this inquiry, I analyze the challenged materials together and in the context of the curriculum. Context is critical; I therefore do not analyze whether any one page, slide, or statement is an Establishment Clause violation in and of itself. *See, e.g., County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 597, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989), *abrogated on other*

Appendix F

grounds by Town of Greece v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014). Indeed, to “[f]ocus exclusively on the religious component of any activity would inevitably lead to [the activity’s] invalidation.” *Lynch v. Donnelly*, 465 U.S. 668, 679-80, 104 S. Ct. 1355, 79 L. Ed. 2d 604, (1984). *See also Wood v. Arnold*, 915 F.3d 308, 314 (4th Cir.) (“[C]ourts . . . consistently have examined the entire context surrounding the challenged practice, rather than only reviewing the contested portion.” (collecting cases from the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits)), *cert. denied*, 140 S. Ct. 399, 205 L. Ed. 2d 214 (2019).

1. Secular Purpose

Under the first *Lemon* prong, I ask whether there is “some secular purpose,” even if it is not the exclusive purpose, for the government action, or whether, to the contrary, its “actual purpose is to endorse or disapprove of religion.” *Doe*, 653 F.3d at 283 (citation omitted). In discerning the purpose of a government action, I view it from the perspective of an “objective observer” with knowledge of the context. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (citation omitted).

The Board proffers that the purpose behind the materials and curriculum is to “assur[e] that our children are intellectually and socially prepared to become self-reliant members of 21st century society.” (Def. Brf. at 45.) More specifically, the curriculum aims to educate students about the world’s major religions, a mission which

Appendix F

requires some exposure to their tenets and texts. (*Id.* at 45-46.) Educating students about religions, which requires exposure to religious texts, is a valid, secular purpose. *Stone v. Graham*, 449 U.S. 39, 42, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980) (“[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”); *Schempp*, 374 U.S. at 255 (explaining that “one’s education is not complete without a study of comparative religion or the history of religion” and the Bible and religion can be studied “consistently with the First Amendment”). The Board’s evidence consistently shows that the purpose in the lessons and instructional materials was merely educational, not to favor or disfavor a religion. (*E.g.*, DE 62-41, at 2-3 (lesson plan).) The Board’s proffered purpose bears the hallmarks of being “genuine” and is therefore entitled to “deference.” *McCreary*, 545 U.S. at 864.¹³

In response, Hilsenrath argues that there can be no secular purpose for exposing students to proselytizing content such as the *shahadah* or statements like “Allah is one the God.” (Pl. Opp. at 16-17.) She gets off on the wrong foot, however, by asking the Court to analyze the purpose behind each statement she objects to. *See Lynch*, 465 U.S. at 679-80 (holding that, in a challenge to a Christmas display that included a crèche, the district court erred in “infer[ring] from the religious nature of the crèche that

13. The genuineness of the government’s purpose, of course, might present a triable issue of fact in a particular case. Here, however, discovery has failed to uncover evidence of an underlying religious purpose. And the case law long ago established the principle that comparative religion is a legitimate subject of study.

Appendix F

the City has no secular purpose for the display”); *see also Wood*, 915 F.3d at 314 (citing authorities). Of course, the statements of a religion’s adherents have a religious purpose, *in the mouths of those adherents*. But for secular educators to teach and study *about* such statements is not to espouse them, or to proselytize.

The content to which Hilsenrath objects is closely tied to secular educational purposes. Video 1 was used to introduce students to the tenets of Islam. It employed quotations from the Quran and Muslim prayers, but there is no constitutional problem in using religious materials to study “history, civilization, . . . comparative religion, or the like.” *Stone*, 449 U.S. at 42. Video 2 likewise explored Islam through a neutral question-and-answer format that could not be regarded as proselytizing. True, the worksheet contained fill-in-the-blanks questions, as is typical at the middle-school level. The format fell well short of compelled recitation of a prayer, however, and was clearly “designed to assess the students’ understanding of the lesson on Islam,” as the Fourth Circuit explained when upholding a similar worksheet against a First Amendment challenge. *Wood*, 915 F.3d at 315.

Thus, the Board had a valid, secular purpose in using its curriculum and instructional materials to educate students. Nothing in the discovery materials brought to the Court’s attention bespeaks a proselytizing mission on behalf of the Islamic faith, and there is nothing in the record to indicate that the Board’s purpose exceeded its educational mandate.

*Appendix F***2. Primary Effect**

Under the second *Lemon* prong, I ask whether the primary *effect* of the government's practice is to advance or inhibit religion, regardless of any secular purpose. *Doe*, 653 F.3d at 284 (citation omitted). In doing so, I also consider the related endorsement test, which asks "whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion," from "the viewpoint of the reasonable observer," considering "the history and ubiquity of the practice." *Id.* (citation omitted). The curriculum and materials do not have the primary effect of advancing Islam, and an observer would not perceive any endorsement. For that conclusion, I offer four reasons.

First, the curriculum treats Islam equally with other religions. It is not a standalone course of study, but is part of a larger survey of world regions and religions, so there is no impermissible favoritism. Generally, in curriculum cases, a school's presentation of multiple religious materials or presentation of religious material in conjunction with nonreligious material tends to demonstrate that the primary effect of the curriculum is not to advance any one religion. See *Cal. Parents for Equalization of Educ. Materials v. Torlakson*, 370 F. Supp. 3d 1057, 1081-82 (N.D. Cal. 2019) (surveying cases), *aff'd*, 973 F.3d 1010 (9th Cir. 2020). Here, the World Cultures course includes similar units on, for example, Hinduism and Buddhism, in which students watch videos on those religions to understand their tenets and practices. (DE 62-39, at 4, 8-11; DE 68-8.) A reasonable observer would not perceive

Appendix F

an endorsement of Islam when the course also presented other religions in a similar manner. Further, Islam is introduced as part of a unit on the Middle East and North Africa in a course covering geography and world cultures, so it is presented in conjunction with nonreligious material about a region of the world.

Second, a reasonable observer would see that the curriculum and materials are presented as part of an academic exercise. When schools require students to “read, discuss, and think” about a religion, such lessons do not have the primary effect of advancing that religion. *Wood*, 915 F.3d at 317; *see also Torlakson*, 973 F.3d at 1021; *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1380 (9th Cir. 1994). Reasonable observers understand that students are simply learning to “identify the views of a particular religion,” not to follow the religion. *Wood*, 915 F.3d at 317; *see also Torlakson*, 973 F.3d at 1021 (curriculum did not have primary effect when it did not “call for the teaching of biblical events or figures as historical fact”).

Here, the videos, lessons, and worksheet presented students with the tenets of Islam. This case falls into the category of those in which schools permissibly asked students to “read, discuss, and think” about a religion. *Wood*, 915 F.3d at 317. True, Video 1 is from the perspective of a believer, but a reasonable observer would understand that the video is not presented as representing the views of the teacher or the school; nor is there any indication that it was presented in a manner to suggest that students should accept the video-creator’s views as

Appendix F

revealed religious truth.¹⁴ Rather, Video 1 was assigned to introduce students to the tenets of Islam. Although the video-creator can be perceived as believing those tenets, neither the lesson, Ms. Jakowski, nor even the video-creator invites or encourages the students to adopt those views. This is par for the course; to take the Ninth Circuit's cogent example, "Luther's 'Ninety-Nine Theses' are hardly balanced or objective, yet their pronounced and even vehement bias does not prevent their study in a history class' exploration of the Protestant Reformation, nor is Protestantism itself 'advanced' thereby." *Brown*, 27 F.3d at 1380 (citation omitted). When, as here, religious beliefs are presented to educate, not convert, students, there is no endorsement of religion.¹⁵

14. Relatedly, Hilsenrath argues that because the videos on Hinduism and Buddhism are from the perspective of a more neutral narrator, the World Cultures course does not treat all religions equally and proselytizes when it comes to Islam. (Pl. Reply at 3.) As discussed above, there is no problem with Video 1's presentation. Moreover, "Plaintiffs' efforts to wring an Establishment Clause violation from subtle differences that they perceive in the curricular treatment of various religions does not withstand scrutiny, and, if accepted, would paralyze educators in their lawful objective of treating religion as a topic relevant to world history." *Torlakson*, 973 F.3d at 1022 (Bress, J., concurring).

15. Hilsenrath makes much of the facts that (1) Video 2 ended with information about scheduling a tour of a mosque and (2) one of the PowerPoints and a worksheet contained a link to a BBC webpage that allegedly teaches visitors how to convert to Islam. (Pl. Brf. at 19; Pl. Opp. at 4; Pl. Reply at 14-15.)

First, as a general matter, information about how students—independently and on their own time—can visit a house of worship to learn more about a religion is not *per se* objectionable. I add that

Appendix F

Third, the curriculum and materials did not require or even propose that the students engage in religious activity. Courts weigh whether the school requires or invites students to partake in a religious activity. *E.g.*, *Wood*, 915 F.3d at 317; *Brown*, 27 F.3d at 1380; *Doe*, 653 F.3d at 284. For example, in *Malnak v. Yogi*, the Third Circuit held that a class about a religion crossed the line when students were required to participate in a religious ceremony. 592 F.2d 197, 199 (3d Cir. 1979) (per curiam). In contrast, here, C.H. passively watched two informational videos. As to the worksheet, “students were not required to memorize the *shahada*, to recite it, or even to write the complete statement of faith. Instead, the worksheet included a variety of factual information related to Islam and merely asked the students to demonstrate their understanding of the material by completing the partial sentences. This is precisely the sort of academic exercise

Video 2, made by a United Kingdom company, suggested a mosque tour under the heading “Discover Islam UK,” so there is little realistic possibility that a New Jersey seventh-grader would take up the offer, if that is what it was.

Second, there is no indication that C.H. or any student actually followed the link to the BBC webpage, *supra* note 5, so that link is not central to my inquiry. Regardless, the webpage is informational, and a reasonable observer would not view the BBC, a public service broadcaster, as evangelizing for a particular faith. The objection appears to be to a statement on this third-party website that “[r]eciting [the *shahadah*] three times in front of witnesses is all that anyone need do to become a Muslim.” That statement, however, is factual, and would not reasonably be taken as the school’s invitation to convert. No more would a factual statement, in a unit on Christianity, that Christian sects regard infant or adult baptism as the faith’s rite of admission or adoption.

Appendix F

that the Supreme Court has indicated would not run afoul of the Establishment Clause.” *Wood*, 915 F.3d at 316 (citing *Schempp*, 374 U.S. at 225, and analyzing the same worksheet challenged here). The curriculum never progressed from the academic to the liturgical, and it did not have the primary effect of advancing religion.

Fourth, a few miscellaneous facts about the larger context also cut against any holding that the primary effect here was to advance Islam: (1) The course was given to seventh-grade students, who are considered less impressionable than elementary school students, as to whom First Amendment concerns are perhaps more acute. Adolescents are equipped to, and proverbially do, exercise some independent judgment with respect to what they are told by adults. *See Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 686 (7th Cir. 1994); *cf. Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 95-96 (3d Cir. 2008). (2) Islam occupied only two lessons within a yearlong course, so objective observers would be less likely to perceive an endorsement of Islam. *Wood*, 915 F.3d at 317-18; *Brown*, 27 F.3d at 1380. (3) The curriculum was designed not just to educate to students about Islam but also to teach them valuable lessons about uncritical acceptance of cultural generalizations. *See Fleischfresser*, 15 F.3d at 689 (reading program that used witchcraft as the subject of stories did not have the primary effect of advancing witchcraft because the primary effect of the lesson was to “improv[e] [] reading skills and to develop imagination and creativity”). And (4) many American students learn about world religions, including but hardly limited to

Appendix F

Islam, as shown in cases like *Wood*. A reasonable observer considering the “history and ubiquity of the practice” would understand that such lessons here are part of a common academic program. *See Doe*, 653 F.3d at 284. These facts further weigh in favor of my conclusion that these lessons did not run afoul of the second, “effects” prong of *Lemon*.¹⁶

3. Excessive Entanglement

Under the third *Lemon* prong, I ask whether the challenged practices “foster an excessive government entanglement with religion.” *Doe*, 653 F.3d at 288 (quoting *Lemon*, 403 U.S. at 613). I analyze how the challenged practices create a “relationship between the government and religious authority,” but “excessive entanglement requires more than mere interaction between church and state, for some level of interaction has always been tolerated.” *Id.* (internal quotation marks, citations, and alterations omitted). In cases involving curriculum or programs at schools, courts have looked to whether the school works with religious entities to create the curriculum and whether the school must constantly monitor the activities to ensure no endorsement of religion. *See Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch.*

16. It is worth pointing out that C.H. never felt coerced, and, in fact perceived the purpose and effect of the lessons as to educate students about world religions and the importance of avoiding group generalizations. (C.H. Dep. at 24:18-25:1, 40:8-24, 41:22-25.) Still, it is not necessarily significant that one student or another is mature and independent-minded; *Lemon*’s second prong is an objective inquiry, not an evaluation of each student’s response.

Appendix F

Dist., 587 F.3d 597, 608 (3d Cir. 2009); *Wood*, 915 F.3d at 318; *Brown*, 27 F.3d at 1384; *Fleischfresser*, 15 F.3d at 688.

Here, there is not even evidence of “mere interaction between church and state.” *Doe*, 653 F.3d at 288 (citation omitted). Teachers and Supervisor Maher created the lesson plans, and there is no indication that they worked with any religious organization in doing so. (Def. SMF ¶¶ 154-55.)¹⁷ Absent the rare parent complaint, the teachers are left alone to implement the lessons themselves, so there is no need to entangle the Board in continual surveillance of the classroom. *See Brown*, 27 F.3d at 1384.

Hilsenrath cites *Doe*, in which school board members composed and recited prayers at meetings. 653 F.3d at 288. Both *Doe* and this case, she urges, involve excessive entanglement because the incorporate religion as part of a “formal activity” (there, board meetings; here, the required classroom curriculum). (Pl. Opp. at 22-23.) The “effects” analysis, *see* Section II.D.2, *supra*, largely disposes of that argument. *See Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386

17. This is not to say that working with a religious organization to develop an accurate and respectful curriculum should qualify as excessive entanglement. *See Doe*, 653 F.3d at 288 (government interaction with religious organizations is not *per se* excessive entanglement). And even if it did, “entanglement, standing alone, will not render an action unconstitutional if the action does not have the overall effect of advancing, endorsing, or disapproving of religion.” *ACLU of N.J. ex rel Lander v. Schundler*, 168 F.3d 92, 97 (3d Cir. 1999). Be that as it may, this case does present *any* “level of interaction” between a school and a religious organization. *Doe*, 653 F.3d at 288 (citation omitted).

Appendix F

F.3d 514, 534 (3d Cir. 2004) (Alito, J.) (“[T]he factors employed to assess whether an entanglement is excessive are similar to the factors used to examine effect.” (internal quotation marks, citation, and alterations omitted)); *ACLU of N.J. ex rel Lander v. Schundler*, 168 F.3d 92, 97 (3d Cir. 1999) (explaining that the Supreme Court has sometimes collapsed the effects and entanglement prongs). Moreover, there is little similarity between *Doe* and this case. In *Doe*, the Third Circuit found entanglement because the board formally participated in a religious activity by composing and reciting prayers at meetings, “hallmarks of state involvement.” 653 F.3d at 288. But, as explained above, there is no religious activity here, only factual presentation of the tenets of a religion for academic study. Absent evidence of more direct involvement with a religious entity, a school does not entangle itself religion simply by teaching it as part of a broader, balanced curriculum, even if curriculum development or teaching could be considered a “formal” state activity.

* * *

In sum, the curriculum and materials here survive scrutiny under each of the three *Lemon* prongs. Accordingly, the Board did not violate the Establishment Clause. I will enter summary judgment in the Board’s favor on Hilsenrath’s remaining nominal-damages claim.

III. CONCLUSION

For the reasons set forth above, Defendants’ motion for summary judgment is granted and Hilsenrath’s motion for summary judgment is denied. To recap, Hilsenrath’s

Appendix F

claims for injunctive and declaratory relief against all Defendants fail for lack of standing, but her nominal-damages claims may proceed. The nominal damages claims are properly asserted against the Board, which is an entity with the capacity to be sued, and which is potentially liable under a *Monell* theory. The claims are dismissed, however, as against the District and the individual defendants. As to the remaining, nominal-damages claim against the Board, summary judgment is granted, and the claim is dismissed, because the curriculum and materials satisfy the *Lemon* test and do not violate the Establishment Clause.

A separate order will issue.

Dated: November 12, 2020

/s/ Kevin McNulty
Hon. Kevin McNulty
United States District Judge

**APPENDIX G — COMPLAINT AND DEMAND
FOR JURY TRIAL OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW
JERSEY, FILED JANUARY 23, 2018**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COMPLAINT AND DEMAND FOR JURY TRIAL
[Civil Rights Action under 42 U.S.C § 1983]

LIBBY HILSENATH, ON BEHALF OF HER
MINOR CHILD, C.H.,

Plaintiff,

-v.-

SCHOOL DISTRICT OF THE CHATHAMS;
BOARD OF EDUCATION OF 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
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

Appendix G

SOCIAL STUDIES TEACHER FOR CHATHAM
MIDDLE SCHOOL; CHRISTINE JAKOWSKI,
IN HER OFFICIAL CAPACITY AS A SOCIAL
STUDIES TEACHER FOR CHATHAM
MIDDLE SCHOOL,

Defendants.

***“May God help us all find the true faith,
Islam. Ameen.”***

*- Defendants’ call for the conversion
of 7th grade students*

**LOCAL CIVIL RULE 10.1 STATEMENT
OF PARTY ADDRESSES**

Plaintiff Libby Hilsenrath (on behalf of her minor child) and C.H. reside at 37 Weston Avenue, Chatham, NJ 07928. The Defendants School District of the Chathams, Board of Education of the School District of the Chathams, and the individual defendants in their official capacities (collectively, “the Defendants”) have a common business address of 58 Meyersville Road, Chatham, NJ 07928.

COMPLAINT

Plaintiff Libby Hilsenrath, on behalf of her minor child, C.H., by and through her undersigned counsel, brings this civil rights action against the above-named Defendants, their employees, agents, and successors in office, and in support thereof allege the following upon information and belief:

Appendix G

INTRODUCTION

1. This action seeks to enforce the protections afforded by the Establishment Clause of the First Amendment to the United States Constitution.

2. Defendants assailed the First Amendment, despite the opposition of Plaintiff, by forcing children to endure the promotion of Islam in their public schools, including an explicit and direct call to the children for conversion to the religion of Islam.

3. Plaintiff brings this civil rights action under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

4. Plaintiff seeks a declaration that the Defendants violated clearly established constitutional and statutory rights; a permanent injunction barring the Defendants from continuing the acts, policies, practices, customs, and procedures that violate the rights of Plaintiff, her son, and other school children as set forth in this Complaint; and a judgment awarding nominal damages for the loss of these constitutional and statutory rights. Plaintiff also seeks an award of the reasonable costs of litigation, including attorneys' fees and costs, pursuant to 42 U.S.C. § 1988 and other applicable law.

JURISDICTION AND VENUE

5. This action arises under the First and Fourteenth Amendments to the United States Constitution and 42

Appendix G

U.S.C. § 1983. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) & (4).

6. This Court is authorized to award Plaintiff declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, Rules 57 and 65 of the Federal Rules of Civil Procedure, and the general legal and equitable powers of this Court.

7. Plaintiff's claims for nominal damages are authorized under 42 U.S.C. § 1983 and by the general legal and equitable powers of this Court.

8. This Court is authorized to award Plaintiff reasonable costs of litigation, including attorneys' fees and expenses, pursuant to 42 U.S.C. § 1988.

9. Venue is proper under 28 U.S.C. § 1391(a)(1) and (b)(2) because Defendants reside in this District and a substantial part of the events or omissions giving rise to the claims in the Complaint occurred in this District.

PLAINTIFF

10. Plaintiff Libby Hilsenrath is an adult resident of the State of New Jersey. She is the mother and a legal guardian of C.H., her minor child. She brings this action on behalf of C.H. as his next friend.

11. C.H. is a minor child. At all relevant times, C.H. is and has been a middle school student at Chatham Middle School in School District of the Chathams, New Jersey.

Appendix G

DEFENDANTS

12. Defendant School District of the Chathams and Defendant Board of Education of the School District of the Chathams (hereinafter collectively referred to as “School District of the Chathams”) are public entities established and organized under and pursuant to the laws of the State of New Jersey with the authority to sue and be sued in their own name.

13. Chatham Middle School is a middle school managed, governed, operated by, and located within School District of the Chathams in Chatham, New Jersey.

14. Defendant School District of the Chathams and its officials are responsible for creating, adopting, approving, ratifying, and enforcing the policies, practices, customs, and procedures of the public schools within School District of the Chathams, including Chatham Middle School.

15. Defendant School District of the Chathams and its officials are responsible for selecting, managing, approving, and implementing the materials used in the curriculum taught at Chatham Middle School.

16. Defendant School District of the Chathams and its officials are responsible for how the schools within the district meet the educational standards set by the State of New Jersey.

17. Defendant School District of the Chathams and its officials are responsible for the training and supervision of

Appendix G

their teachers and administrators, including the training and supervision of Defendants Michael LaSusa, Karen Chase, Jill Gihorski, Steven Maher, Megan Keown, and Christine Jakowski.

18. Defendant Michael LaSusa is an adult resident of the State of New Jersey. Defendant Michael LaSusa was at all relevant times the Superintendent of School District of the Chathams.

19. As Superintendent, Defendant LaSusa was responsible for establishing and supervising the curriculum as well as enforcing the policies, practices, customs, and/or procedures of School District of the Chathams.

20. At all times relevant to the Complaint, Defendant LaSusa was responsible for all aspects of education, including supervision and direction of the curriculum at Chatham Middle School.

21. At all times relevant to the Complaint, Defendant LaSusa acted under color of state law and within the scope of his employment with School District of the Chathams.

22. Defendant Karen Chase is an adult resident of the State of New Jersey. Defendant Karen Chase was at all relevant times the Assistant Superintendent of Curriculum and Instruction for School District of the Chathams.

23. As the Assistant Superintendent, Defendant Chase was responsible for establishing and supervising

Appendix G

the curriculum as well as enforcing the policies, practices, customs, and/or procedures of School District of the Chathams. She was responsible for developing and implementing the curriculum, including the curriculum presented to C.H.

24. At all times relevant to the Complaint, Defendant Chase acted under color of state law and within the scope of her employment with School District of the Chathams.

25. Defendant Jill Gihorski is an adult resident of the State of New Jersey. Defendant Jill Gihorski was at all relevant times Principal of Chatham Middle School.

26. As the Principal of Chatham Middle School, Defendant Gihorski was responsible for Chatham Middle School, including establishing and supervising the curriculum as well as enforcing the policies, practices, customs, and/or procedures of School District of the Chathams and Chatham Middle School.

27. Defendant Gihorski was responsible for supervising the instruction and the curriculum presented to C.H.

28. At all times relevant to the Complaint, Defendant Gihorski acted under color of state law and within the scope of her employment with School District of the Chathams.

29. Defendant Steven Maher is an adult resident of the State of New Jersey. Defendant Steven Maher was at all relevant times the Supervisor of the Social Studies Department for School District of the Chathams.

Appendix G

30. Defendant Maher was responsible for the social studies instruction in C.H.'s World Cultures and Geography class.

31. As the Supervisor of the Social Studies Department, Defendant Maher was responsible for establishing and supervising the curriculum within the Social Studies Department as well as enforcing the policies, practices, customs, and/or procedures of School District of the Chathams.

32. At all times relevant to the Complaint, Defendant Maher acted under color of state law and within the scope of his employment with School District of the Chathams.

33. Defendant Megan Keown is an adult resident of the State of New Jersey. Defendant Megan Keown was at all relevant times a teacher in the Social Studies Department at Chatham Middle School.

34. As a Chatham Middle School Social Studies teacher, Defendant Keown was responsible for establishing and teaching the curriculum as well as enforcing the policies, practices, customs, and/or procedures of School District of the Chathams.

35. At all times relevant to the Complaint, Defendant Keown acted under color of state law and within the scope of her employment with School District of the Chathams.

36. Defendant Christine Jakowski is an adult resident of the State of New Jersey. Defendant Christine Jakowski

Appendix G

was at all relevant times a teacher in the Social Studies Department at Chatham Middle School.

37. As a Chatham Middle School Social Studies teacher and substitute teacher for Defendant Keown, Defendant Jakowski was responsible for teaching the curriculum as well as enforcing the policies, practices, customs, and/or procedures of School District of the Chathams.

38. At all times relevant to this Complaint, Defendant Jakowski acted under color of state law and within the scope of her employment with School District of the Chathams.

39. At all times relevant to this Complaint, Defendants LaSusa, Chase, Gihorski, Maher, Keown, and Jakowski acted under color of state law, within the scope of their employment, and deprived Plaintiff and her child of clearly-established constitutional and statutory rights.

40. One or more official rules, regulations, policies, decisions, or customs of School District of the Chathams were the cause of and the moving force behind the violations of Plaintiff and her child's clearly-established constitutional and statutory rights.

41. At all times relevant to this Complaint, violation of the clearly-established constitutional and statutory rights occurred through: (1) rules or regulations promulgated, adopted, or ratified by School District of the Chathams; (2) policy statements or decisions officially made by School

Appendix G

District of the Chathams; (3) one or more customs that are widespread, well-settled practices that constitute standard operating procedures of School District of the Chathams; and/or (4) inadequate training, inadequate supervision, inadequate screening during the hiring process, and/or a failure to adopt a needed policy.

42. At all times relevant to this Complaint, School District of the Chathams: (1) directed that the violation of Plaintiff and her child's rights occur; (2) authorized those violations; (3) agreed with and ratified the decisions of one or more subordinates to engage in violation of Plaintiff and her child's rights; and/or (4) was guilty of inadequate training, inadequate supervision, inadequate screening during the hiring process, and/or a failure to adopt a needed policy when violation of these rights was a highly predictable consequence of the inadequate training, inadequate supervision, inadequate screening during the hiring process, and/or failure to adopt a needed policy.

STATEMENT OF THE FACTS

43. During the 2016-2017 school year, C.H., only twelve-years-old, was a 7th grade student at Chatham Middle School in the School District of the Chathams.

44. In January 2017, C.H. and other children were enrolled in the 7th grade World Cultures and Geography class ("Geography class") at Chatham Middle School.

45. This class is a mandatory requirement for a student to be promoted from the 7th grade at Chatham Middle School.

*Appendix G***I. Defendants' Curriculum Promotes Islam**

46. On or about January 11, 2017, each of the Defendants collectively, through their responsibilities of supervision, creation, implementation, and approval of the curriculum, began the Middle East and North Africa ("MENA") unit of the Geography class.

47. Defendants, all of whom are responsible for the curriculum, utilize the online resource known as "Google Classroom" in the Geography class, including the MENA unit.

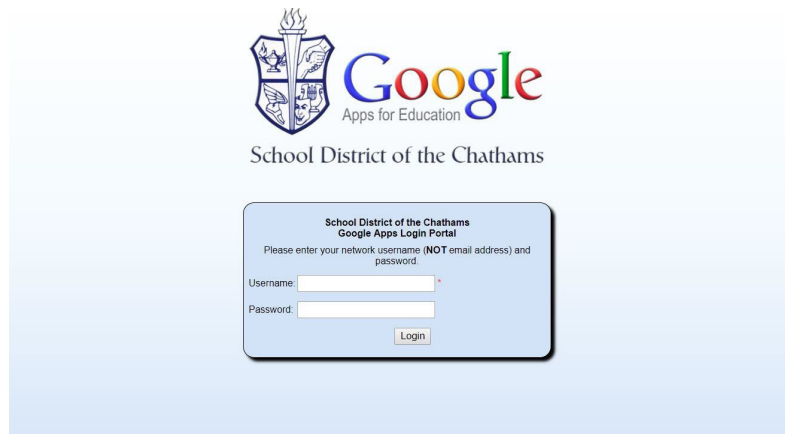
48. Google Classroom operates as an internet forum for schools and teachers to share information, including power points, videos, assignments, links to other websites, and other documents, with the students to access anywhere on any internet compatible device.

49. For students at Chatham Middle School to access Google Classroom, the students must use their official school email address with the domain "@chatham-nj.org." This brings the students to Defendant School District of the Chatham's official Google Classroom login page.

50. The login page bears the imprint "School District of the Chathams" and the district's crest. This is a capture of the login page:

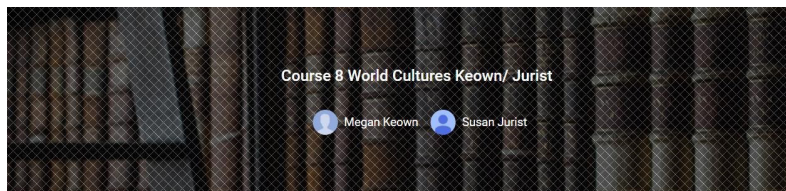
114a

Appendix G



51. After completing the login process, the students can then access specific online “classrooms” for the classes in which they are enrolled at Chatham Middle School.

52. The Geography class online classroom bears the teachers’ names as pictured below:



53. The online classroom also bears the imprint of the teachers’ official school district email addresses.

54. School District of the Chathams’ Google Classroom allowed Defendants to upload materials, including videos, assignments, slide show presentations, and other

Appendix G

documents, for children in the Geography class to access at home, alone, with no supervision from a teacher or any school employee. The school children were required to view the uploaded materials and had access to the uploads, videos, and other materials on any device with an internet connection.

55. Defendants required the students of the Geography course, under the coercive threat of lower grades and failed assignments, to view all materials posted on the Google Classroom.

56. On or about January 23, 2017, Plaintiff Libby Hilsenrath was reviewing her child's assignments for the MENA unit of C.H.'s Geography class on the Google Classroom website.

57. While reviewing the website, Mrs. Hilsenrath discovered, for the first time, that the online content from the school directed students, as an assignment alone and unsupervised at home, to watch an "Intro to Islam Video" ("conversion video") (available at <https://www.youtube.com/watch?v=ZHujiWd49l4> (last viewed Jan. 4, 2018)).

58. This nearly five-minute long video seeks to convert viewers to Islam and is filled with the religious teachings of Islam presented, not as beliefs, but as facts.

59. These unqualified, religious "facts" included such proselytizing statements as:

Appendix G

- a. "Allah is the one God"
- b. "[Allah] has no equal and is all powerful[.]"
- c. "Muhammad (Peace be upon him) is the last & final Messenger of God."
- d. "God gave [Muhammad] the Noble Quran[.]"
- e. "[The Quran is] [d]ivine revelation . . ."
- f. "[The Quran is a] Perfect guide for Humanity[.]"
- g. "The Noble Quran [is] Guidance, Mercy and Blessing for all mankind[.]"
- h. "The Noble Quran[:] [w]ithout any doubt and an eloquent guide from Allah[.]"
- i. "The Beautiful Quran[:] Guidance for the wise & sensible[.]"
- j. "Muslims created a tradition of unsurpassable splendor"
- k. "Islam [is] [a] shining beacon against the darkness of repression, segregation, intolerance and racism . . ."

60. The conversion video also contains excerpts from the Quran stating that Islam is "perfected" religion and the only religion for mankind.

Appendix G

61. This conversion video, replete with biased, chastising statements encouraging the students at Chatham Middle School, including C.H., to follow the Quran and become Muslim, ***concluded with a direct and explicit call for the children to convert to Islam, “May God help us all find the true faith, Islam. Ameen.”*** This is a picture captured from the video:



62. Additionally, the conversion video is set to a musical version of the poem “Qaseedah Burdah” and includes a link for students to download the song for their own use. The “Qaseedah Burdah” contains the following verses describing Christians and Jews as “infidels” and praising Muhammad in gruesome detail for slaughtering them:

Appendix G

a. “He [Muhammad] kept on encountering with them (infidels) in every battle until they looked like meat put on butcher’s bench (they were the lesson for those who were willing to encounter with the Muslims)” (parenthetical in original).

b. “It is as though the religion of Islam was a guest that visited every house of those (infidels and was) extremely desirous for the flesh of enemy” (parenthetical in original).

c. “(Of course!) Everyone of volunteer has hope of reward from Allah (Almighty; and) fights to exterminate the roots of (infidels) and to demolish it (infidelity).” (parentheticals in original).

d. “(The Muslims made their) white shining swords red (with the blood of infidels) after they were plunged; (and the majority of) enemies were having black hair (i.e., most of them were young).” (parenthetical in original).

63. Defendants, collectively through their supervision, implementation, and creation of the curriculum, also put a video on the pillars of Islam (“pillars video”) on the Google Classroom website as an assignment for the children at Chatham Middle School, including C.H., to view at home without the supervision of a teacher. (available at <https://www.youtube.com/watch?v=ikVGwzVg48c> (last viewed Jan. 4, 2018)).

Appendix G

64. This video utilizes cartoon animation that is similar to popular television programs regularly viewed by many children and teenagers. Thus, the manner in which the information on Islam is presented is designed to appeal to those of an impressionable age, including C.H. and the other students at Chatham Middle School.

65. The cartoon video begins with two children, like the students, playing with a soccer ball, Alex (a non-Muslim) and Yusuf (a Muslim).

66. As Alex and Yusuf play, the Islamic call for prayer sounds in the background, sparking a conversation between the two. During that conversation between the two students, Yusuf proselytizes Alex.

67. Yusef first explains that Allah created everything.

68. Yusef then instructs Alex in the *Shahada*, the Islamic conversion creed and prayer, stating as the words appear in bright, colorful letters, “There is no God except Allah and Prophet Muhammad is his messenger.”

69. As the video proceeds, Yusuf explains the 5 pillars of Islam to Alex, including the second pillar which requires Muslims to pray five times a day.

70. Alex then asks if it is hard to pray that often. Yusef responds, with a chuckle, “No. Not at all! We are praying to god. And when I remember that it is god that keeps me healthy and keeps my heart beating it makes me want to pray.” As Yusuf says this, the video zooms in

Appendix G

and shows his heart beating in his chest. Alex then looks down, sees his own heart beating, and smiles, signaling his understanding of why one should adhere to the second pillar of Islam.

71. Toward the end of the video, Yusuf tells Alex that he must depart for midday prayer. Alex looks after Yusuf and then puts his head down in sadness. Yusuf then returns and invites Alex to come with him to the prayer. Alex then, smiling and happy, goes off to pray with Yusuf.

72. The pillars video, that the children of Chatham Middle School are instructed to watch outside the supervision of the teacher in the classroom concludes with text containing contact information and a website for the students of Chatham Middle School to set up their own mosque tour.

73. Due to the fact that these doctrinal messages calling for conversion to Islam were included in video format with vivid images and text, they possess greater communicative impact and are more likely to be accepted by the students viewing them than information that is spoken in a classroom or even written in a book.

74. The videos also do not contain any form of disclaimer from Defendants indicating that they do not represent their views or opinions.

75. Defendants' curriculum also contained a work sheet requiring the children to engage in a fill-in-the-blank written profession of the *shahada*, the Islamic conversion

Appendix G

creed and prayer: “There is no god but [Allah] and [Muhammad] is his messenger.” (bracketed statements were required to be filled in by the students).

76. Further, this worksheet contains a hyperlink directing students to another webpage that explains to the students the ease with which they could convert to become a Muslim.

77. The webpage begins with the *shahada*, the Islamic conversion creed and prayer: “There is no God but Allah, and Muhammad is his messenger.” The document then, in a cavalier statement demonstrating the ease of conversion, states: “**Becoming Muslim**[:] Reciting this statement three times in front of witnesses is all that anyone need do to become a Muslim.”

78. Defendants coerced the children in the Geography class to watch the conversion video and pillars video, and complete other assignments on Google Classroom because the material and information contained in the videos could be tested on homework, assignments, quizzes, tests, and other graded assignments.

II. Defendants’ Curriculum Ignores Christianity and Judaism

79. The Jewish and Christian religions both developed in the Middle East and North Africa predating Islam.

80. Currently, there are approximately 16 million Christians in the Middle East and approximately 6.4 million Jews living in the Middle East.

Appendix G

81. Despite the historical and current presence of Jews and Christians in the Middle East and North Africa, the MENA portion of the World Cultures and Geography class did not cover the historical origins of these religions, require students to learn the central tenets of these religions, or require students to watch any videos related to these religions.

82. The Geography class has a unit on Latin America, which is approximately 88% Christian. Despite this, Defendants did not instruct the students in the religious beliefs of Christianity or include and readings from the Bible.

83. Christianity is the world's largest religion. Despite this fact, Defendants' so-called *World Cultures* and Geography class, did not teach the students any of the tenets of Christianity or have the students read any portions of the Bible in any unit.

84. The Geography class also has a unit on East and Southeast Asia. Despite this, Defendants did not include detailed instruction on any of the Eastern religions, and certainly contained no instructions on prayer in the Eastern religions.

**III. Defendants School District of the Chathams,
Board of Education of the School District of
the Chathams, LaSusa, and Maher Authorized,
Approved, and Ratified the MENA Unit**

85. On February 5, 2017, Plaintiff sent an email to Defendant Board of Education member Jill Weber, and

Appendix G

Defendants Assistant Superintendent Karen Chase, and Superintendent Michael LaSusa. The email included a request that the concerns be forwarded to the rest of the Board.

86. Plaintiff included in her email hyperlinks to the conversion and the pillars videos. Plaintiff explicitly directed Defendants to these videos in her email stating, “[i]ncluded are two videos from the class.”

87. On February 6, 2017, Plaintiff attended a School District of the Chathams Board of Education meeting, again articulating that the conversion video and the pillars video promote the religion of Islam. In addition, she expressed concern that other religions, including Christianity and Judaism, were not covered in the class. Defendant LaSusa indicated that he reviewed the entire curriculum and vigorously defended and approved of the curriculum.

88. On February 8, 2017, Defendant LaSusa sent an email to Defendants Chase, Gihorski, Maher, and Keown stating that he was aware of parent complaints and that the documents and curricular material at issue were posted online. His email further indicated approval of the curricular materials.

89. On March 6, 2017, Defendant Board of Education held a prescheduled public meeting attended by over one hundred people. At this meeting, Defendant Maher defended the curriculum and indicated that he approved of the entire MENA unit. He also stressed that the entire

Appendix G

curriculum, including the MENA unit, had been approved by Defendant Board of Education.

90. At the same meeting, Defendant Maher and three Board of Education members communicated their approval and ratification of the MENA unit and Defendant Maher purported to explain to the public, parents, and students present at the board meeting the true nature of the curriculum.

91. However, Defendant Maher did not show the conversion video or the pillars video, did not explain the two videos, and did not even mention these two controversial videos.

92. In fact, Defendant Maher purposely excluded from his presentation any mention whatsoever of the videos that were the true source of Plaintiff's concerns with the curriculum, thereby concealing important information from the public.

93. Also at the March 6, 2017 meeting, the chair of the Policy Committee for Defendant Board of Education, Richard Connors, speaking on behalf of the committee, said that his committee "carefully reviewed" the policies and regulations of the school as well as the Islam classes and curriculum. Mr. Connors stated that "[t]he year-long curriculum, as well as the classes in particular, fall well within the spirit and the wording of the policies and the regulations."

Appendix G

94. Any reasonable individual, especially someone with experience or training in how public students are to be educated, would be troubled by a video that includes direct calls for conversion to Islam, doctrinal religious instruction, or references to Christians and Jews as “infidels” who should be killed.

95. Nevertheless, despite stating that he and his committee had undertaken a careful review of the curriculum, Mr. Connors likewise never informed those assembled at the meeting that the curriculum about the two controversial videos or explained their content.

IV. Defendants Display Animus toward Christianity and Those Who Oppose Islamic Prayer in Public Schools.

96. On January 24, 2017, Defendant Maher, in response to criticism of the curriculum, sent an email purportedly justifying Defendants’ promotion of Islam. In this email, Defendant Maher included a link to a video he described as “priceless.” (available at <https://www.youtube.com/watch?v=fX3gMDJCZ-4> (last viewed Jan. 4, 2018)).

97. This “priceless” video shows a powerful man mocking, bullying, and belittling a woman because of her Christian beliefs.

98. Defendant Maher sent no such video belittling or mocking Islam or any other religion.

Appendix G

**CLAIM FOR RELIEF
(Establishment Clause – First Amendment Violation)**

99. Plaintiff hereby incorporates by reference all stated paragraphs.

100. Defendants deprived Plaintiff and her son of their rights guaranteed under the Establishment Clause of the United States Constitution.

101. By Defendants' collective conduct of creating, implementing, authorizing, and ratifying the curriculum, their conduct has the primary purpose and effect of promoting and advancing religion. Thereby Defendants violated, and are continuing to violate, Plaintiff and her son's rights under the Establishment Clause, contrary to the First and Fourteenth Amendments. The policies, practices, and customs established by Defendants School District of the Chathams, Board of Education of the School District of the Chathams, LaSusa, Chase, Gihorski, Maher, Keown, Jakowski and/or other school officials are the cause in fact of the constitutional violations.

102. By including the conversion and pillars videos in the Chatham Middle School curriculum and on the school's official online classroom, the videos bear the imprint of Defendants and Chatham Middle School, thus putting the school age children in the untenable position of enduring and actively participating in the videos.

103. Defendants, through their creation, implementation, approval, and ratification of the

Appendix G

curriculum and videos, affirmatively sponsor the Islamic prayer directed at the school children.

104. Defendants, by initiating and requiring Islamic prayer, have forced a coercive decision on the Plaintiff and her son: either endure Islamic prayer and other promotion of Islam or forgo completing assignments, thereby risking a lower grade and other negative consequences.

105. A reasonable, objective student, parent, or other observer aware of Defendants' conduct would conclude that the Defendants have endorsed and continue to endorse Islam in Chatham Middle School.

106. A reasonable, objective student, parent, or other observer aware of Defendants conduct with regard to presenting students with conversion prayers and encouraging students to attend Muslim prayer services and mosques would view the conduct as government endorsement of Islam.

107. Defendants' sponsorship of the religious messages contained in their curriculum sends the message to non-Muslims, like C.H., that he is an outsider and the accompanying messages to Muslims that they are insiders.

108. As Defendants' approval and ratification make abundantly clear, unless restrained by this Court, Defendants will continue to subject C.H. to coercive instruction in Islam. Plaintiff and C.H. have been and will continue to be irreparably harmed by the Defendants' denial of Plaintiff and her son's fundamental constitutional

Appendix G

right to be free from government endorsement of particular religious beliefs.

109. Defendants conduct of presenting students, including C.H., with a prayer encouraging them to “find the true faith, Islam,” attend Muslim prayer, schedule a mosque visit, and other matters alleged *supra* have no secular purpose.

110. Defendants conduct of presenting students, including C.H., with a prayer encouraging them to “find the true faith, Islam,” attend Muslim prayer, schedule a mosque visit, and other matters alleged *supra* have the primary effect of advancing Islam and inhibiting all other religions and non-religion.

111. Defendants conduct of presenting students, including C.H., with a prayer encouraging them to “find the true faith, Islam,” attend Muslim prayer, schedule a mosque visit, and other matters alleged *supra* foster an excessive entanglement with the religion of Islam.

112. Defendants did not treat religions neutrally and, in fact, endorsed Islam in their curriculum, conveying the message that Islam is favored or preferred over any other religious belief or non-religion.

113. Defendants’ promotion of Islam, favoritism toward Islam, and the disparate and disparaging treatment of all other religions create a situation that is likely to create religiously based divisiveness.

Appendix G

114. The School District of the Chathams' training, supervision, policies, practices, customs, and/or procedures were the moving force behind the Defendants' violation of the right to freedom of religion protected by the First Amendment

115. Plaintiff has no adequate remedy at law for the denial of her son's fundamental constitutional rights.

116. As a direct and proximate result of the Defendants' violation of the Establishment Clause of the First Amendment, C.H. has suffered irreparable harm, including the loss of fundamental constitutional rights, which warrants declaratory and injunctive relief as well as nominal damages for the past loss of constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully asks this Court to:

a) Declare that the Defendants violated Plaintiff and C.H.'s fundamental and clearly established constitutional rights as set forth in this Complaint;

b) Declare that Defendants' training, supervision, policies, practices, customs, and procedures that promote Islam violate the Establishment Clause of the First Amendment;

c) Permanently enjoin the Defendants, their supervisors, employees, agents, and successors in office

Appendix G

from funding and implementing religious instruction that endorses Islam or that favors Islam over other religions or non-religion, including the conversion and pillars videos, as set forth in this Complaint;

d) Award Plaintiff Libby Hilsenrath, on behalf of C.H., damages against all the Defendants for the violations of their constitutional rights, including nominal damages that will appropriately recognize the Defendants' violation of constitutional rights;

e) Award Plaintiff reasonable attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988 and other applicable law;

f) Award Plaintiff prejudgment and post-judgment interest; and

g) Grant such other and further relief as this Court should find just and proper.

131a

Appendix G

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff hereby demands a trial by jury of all issues triable of right by a jury.

Date: January 23, 2018

Respectfully submitted,

MICHAEL P. HRYCAK
Attorney for Plaintiff

/s/ Michael P. Hrycak
MICHAEL P. HRYCAK
NJ Attorney ID # 2011990
316 Lenox Avenue
Westfield, NJ 07090
(908)789-1870
michaelhrycak@yahoo.com

THOMAS MORE LAW CENTER

Kate Oliveri,
MI Bar No. P79932*
B. Tyler Brooks,
N.C. Bar No. 37604*†
24 Frank Lloyd Wright
Drive, Suite J 3200
Ann Arbor, MI 48106
koliveri@thomasmore.org
tbrooks@thomasmore.org
**Pro Hac Vice to be filed*

132a

Appendix G

†Admitted to practice law
in North Carolina, South
Carolina, and Tennessee.
Not admitted to practice
law in Michigan.