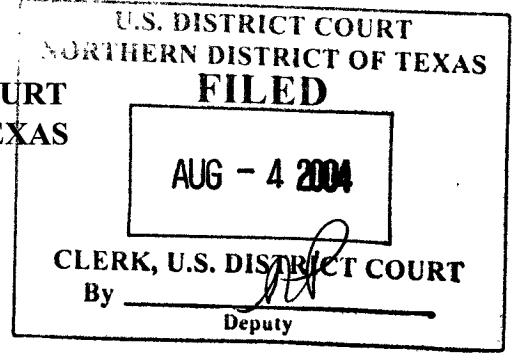


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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



DANIEL CHIRAS, individually; and CONSUELO §
RODRIGUEZ, as next friend of ROCIO §
RODRIGUEZ, individually and on behalf of others §
similarly situated, §

Plaintiffs, §

v. §

GERALDINE MILLER, in her official capacity as §
chair of the State Board of Education; DAVID §
BRADLEY, in his official capacity as member of §
the State Board of Education and in his individual §
capacity; DON MCLEROY, in his official capacity §
as member of the State Board of Education and in §
his individual capacity; DAN MONTGOMERY, §
in his official capacity as member of the State Board §
of Education; CYNTHIA THORNTON, in her §
official capacity as member of the State Board of §
Education and in her individual capacity; and §
GRACE SHORE, in her individual capacity, §

Defendants. §

§ SECOND AMENDED
§ COMPLAINT

§ Civil Action No. 3-03 CV 2651 M

SECOND AMENDED COMPLAINT- CLASS ACTION

INTRODUCTION

This lawsuit seeks to vindicate the First Amendment rights of an author of an environmental science textbook, as well as the public high school students who have been denied access to that textbook as a result of illegal viewpoint discrimination by members of the Texas State Board of Education ("SBOE").

In November 2001, the SBOE, including individual Defendants Geraldine Miller, David Bradley, Don McLeroy, Dan Montgomery, Grace Shore, and Cynthia Thornton, who were all then members of the SBOE, rejected Plaintiff Daniel Chiras' textbook for use in Texas high school environmental science courses. The SBOE rejected the textbook despite a recommendation from the Texas Commissioner of Education to adopt the book, and despite the conclusion of the state's official textbook review panel that Chiras' book was free from any factual errors. In making its decision, the SBOE failed to point to any specific factual errors in the book and failed to identify any other grounds for the rejection. This glaring omission, when coupled with the record surrounding the SBOE's two days of textbook hearings in November 2001, highlights the obvious, but unstated truth regarding the SBOE's decision to reject Chiras' book: the decision was guided by constitutionally invalid concerns regarding viewpoints expressed in the text, rather than by any legitimate concerns for factual accuracy or curriculum fulfillment. Such viewpoint discrimination is presumptively unconstitutional and subject to strict judicial scrutiny.

Plaintiff Rocio Rodriguez is a student currently enrolled in the Advanced Placement ("AP") Environmental Science course at the Dallas Independent School District's Talented and Gifted Magnet High School in Dallas, Texas. She, by her next friend Consuelo Rodriguez (Rocio's mother), has brought this lawsuit on her own behalf, and on behalf of a putative class of current and future Texas public high school students who are enrolled in or will enroll in environmental science classes. She seeks a declaratory judgment against Defendants for rejecting Chiras' textbook on unconstitutional grounds and an injunction ordering Defendant SBOE officials to add Chiras' book to the list of state-approved textbooks. Plaintiff Daniel Chiras, on his own behalf, seeks the identical injunctive and declaratory relief from Defendant SBOE officials. In addition, Chiras seeks compensatory damages from Defendants Bradley, McLeroy, Shore,

and Thornton in their individual capacities. Those damages stem from the lost sales caused by those defendants' viewpoint discrimination, which led to the SBOE's decision to reject the book.

As a result of the SBOE's decision to reject Chiras' textbook, Texas public schools were prohibited from using state funds to purchase the book. This effectively ensured that Texas high school students enrolled in environmental science classes would be deprived of access to the book. In addition, because Texas is the second-largest purchaser of textbooks in the country, public school districts in many other states follow Texas' lead in deciding whether to purchase a textbook. The SBOE's decision to reject Chiras' textbook therefore had a nationwide "ripple effect," causing schools in other states to decide against purchasing Chiras' book.

JURISDICTION AND VENUE

1. Plaintiffs bring this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and 28 U.S.C. § 2201-02, and under the First and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1343.

2. Plaintiff Rocio Rodriguez (who appears as plaintiff through her next friend and parent Consuelo Rodriguez) attends high school in Dallas County, Texas. Because she has been denied her First Amendment rights to access Plaintiff Chiras' textbook in Dallas, a substantial part of the events or omissions giving rise to their claim occurred in this judicial district. Moreover, Defendant Geraldine Miller is a resident of Dallas, Texas. Venue for this action is proper in this court under 28 U.S.C. § 1391(b).

PARTIES

3. Plaintiff Rocio Rodriguez, by her next friend Consuelo Rodriguez, is a 17-year-old incoming senior at the Talented and Gifted Magnet High School in Dallas, Texas. She is enrolled in the AP

Environmental Science course offered at her school for the upcoming school year, 2004-05.

4. Plaintiff Daniel D. Chiras, Ph.D. is a resident of Evergreen, Colorado and the author of ENVIRONMENTAL SCIENCE: CREATING A SUSTAINABLE FUTURE (6th ed.). Chiras teaches environmental science courses at Colorado College, the University of Colorado at Denver, and the University of Denver, and has published 18 books, several of which are used as college and high school textbooks. He has also written over 200 articles on environmental issues published in magazines, journals, newspapers, and encyclopedias.

5. Defendant Geraldine Miller is the current chair of the SBOE. She is sued in her official capacity only. Miller was acting under color of state law at all times relevant to this complaint. Miller is a resident of Dallas, Texas.

6. Defendant David Bradley is a member of the SBOE. He is sued in both his official capacity and his individual capacity. Bradley was acting under color of state law at all times relevant to this complaint.

7. Defendant Don McLeroy is a member of the SBOE. He is sued in both his official capacity and his individual capacity. McLeroy was acting under color of state law at all times relevant to this complaint.

8. Defendant Dan Montgomery is a member of the SBOE. He is sued in his official capacity only. Montgomery was acting under color of state law at all times relevant to this complaint.

9. Defendant Cynthia Thornton is a member of the SBOE. She is sued in both her official capacity and her individual capacity. Thornton was acting under color of state law at all times relevant to this complaint.

10. Defendant Grace Shore is a former member of the SBOE and served as its chair when Chiras' textbook was being considered for adoption, including when the SBOE voted to reject the book. She is sued in her individual capacity. Shore was acting under color of state law at all times relevant to this complaint.

CLASS ACTION ALLEGATIONS

11. Plaintiff Rocio Rodriguez brings this action pursuant to FED. R. CIV. P. 23(b)(2) on her own behalf and on behalf of a putative class consisting of all current and future Texas public high school students who are enrolled in or will enroll in environmental science classes.

12. This matter is properly maintainable as a class action pursuant to FED. R. CIV. P. 23(b)(2) in that:

(a) The class members are so numerous as to make joinder of all of them impracticable. While the exact size of the proposed plaintiff class is unknown, during the hearing in November 2001, SBOE members estimated that 20,000 public high school students in Texas were currently enrolled in environmental science courses. Given that the proposed class includes current *and* future students, the class is clearly "so numerous that joinder of all members is impracticable," as required by FED. R. CIV. P. 23(a)(1).

(b) There are questions of law and fact common to the class members. These common questions of law and fact predominate over questions affecting individual class members. Among the questions of law and fact common to the class is whether the Defendants' conduct, as described below, violates the class members' First Amendment right of access to information.

(c) The claims of Ms. Rodriguez are typical of the claims of proposed class members.

They, as the other class members, are public high school students who are enrolled in or will enroll in environmental science classes. They, like the class as a whole, are victims of Defendants' illegal viewpoint discrimination described below, and are *not* asserting claims for damages, but seek only injunctive and declaratory relief.

(d) Ms. Rodriguez will fairly and adequately protect the interests of the class members.

She is represented by counsel experienced in class action and civil rights litigation.

(e) Defendants have rejected Chiras' book for unconstitutional reasons, which affects all of the putative class members in the same way. This makes injunctive and declaratory relief with respect to the class as a whole appropriate.

FACTUAL ALLEGATIONS

13. The SBOE is the state agency granted statutory authority to adopt and distribute instructional materials, including textbooks, for use in all Texas public schools. *See* TEXAS EDUCATION CODE, Chapter 31; TEXAS ADMINISTRATIVE CODE, Chapter 66. Pursuant to this authority, the SBOE adopts textbooks for statewide use through a formal process. This process includes: 1) soliciting bids for new instructional materials for particular courses; 2) review of submitted textbooks by panels appointed by the Texas Commissioner of Education; 3) preliminary and final reports from the Commissioner of Education to the SBOE recommending whether to adopt or reject a particular textbook; 4) solicitation of written comments from Texas residents to the SBOE; 4) public hearings in which residents, experts, and publishers submitting materials may all comment; and, finally, 5) the SBOE's vote on whether to include particular textbooks on a list of those that will be available for purchase by local schools. Local school districts may use state funds only to purchase state-approved textbooks. TEXAS EDUC. CODE, § 31.101.

14. The SBOE textbook adoption cycle provides for consideration of textbooks in “foundation” courses, including environmental science, once every six years.

15. In May 1999, the SBOE solicited bids from publishers for textbooks to be used in both “regular” and AP environmental science courses in Texas public high schools beginning in the fall of 2002, and to be considered for adoption in the fall of 2001. In response to this invitation for bids, Jones and Bartlett Publishers (“Jones & Bartlett”) submitted the 6th edition of ENVIRONMENTAL SCIENCE: CREATING A SUSTAINABLE FUTURE, by Plaintiff Daniel Chiras. Jones & Bartlett requested that Chiras’ book be considered for adoption with respect to both “regular” and AP Environmental Science courses.

16. Following Jones & Bartlett’s bid, the Texas Commissioner of Education submitted Chiras’ book for review by a panel of educators at Texas A&M University. The review panel was charged with determining the extent to which Chiras’ book covered the curriculum content requirements for the applicable courses, which are known as the “Texas Essential Knowledge and Skills,” or “TEKS.” The panel was also asked to identify any factual errors in the textbook.

17. The review panel initially identified some alleged factual errors in Chiras’ book, and the Commissioner submitted the panel’s initial report to Jones & Bartlett to allow the publisher to respond. In Jones & Bartlett’s response, the publisher agreed to make certain corrections, and also argued that certain areas required no “correction” because the statements at issue were matters of interpretation and/or opinion, rather than fact. After receiving Jones & Bartlett’s response, on October 26, 2001, the panel accepted Jones & Bartlett’s position and reported that no additional factual corrections were necessary. Accordingly, the Commissioner of Education recommended that the SBOE place the book on the list of approved textbooks for use in both the regular and AP environmental science courses.

18. Specifically, the Commissioner of Education recommended that Chiras' book be placed on the "nonconforming" list of approved textbooks. The SBOE generates two lists of approved textbooks: the "conforming" list and the "nonconforming" list. The "conforming" list includes approved textbooks that cover 100% of the TEKS curriculum elements. The "nonconforming" list includes approved textbooks that cover at least 50%, but not all, of the TEKS elements. Inclusion on either list permits local school districts to use state funds for purchase of the books.

19. In the SBOE's original 1999 proclamation that solicited bids for textbooks to be adopted in 2001, it scheduled one public hearing on the subject for September 2001. In accord with that proclamation, the SBOE conducted a public hearing on September 6, 2001, during which it heard comments regarding Chiras' book, as well as two other environmental science textbooks that had been submitted for approval. The SBOE also received written comments from the public regarding Chiras' book, submitted in connection with the September 2001 hearing.

20. In late September 2001, the Texas Education Agency forwarded to Jones & Bartlett some of the oral and written comments on Chiras' book. In October, Jones & Bartlett provided the Texas Education Agency with written responses to both the oral and written comments made in connection with the September 2001 hearing.

21. After reviewing the public comments, as well as Jones & Bartlett's response, the Commissioner recommended adoption of Chiras' book. Indeed, Chiras' book was one of only three books that the Commissioner recommended for approval in 2001 for use in regular environmental science courses, and the *only* book the Commissioner recommended that year for approval in AP environmental science courses.

22. On information and belief, following the Commissioner's final report on October 26, 2001, two conservative "think-tank" organizations – the Texas Public Policy Foundation ("TPPF") and Citizens for a Sound Economy ("CSE") – requested that the SBOE permit additional public comment on the textbooks proposed for approval, before the scheduled final vote in November. Despite the SBOE's express limitation in the 1999 proclamation that it would accept neither written nor oral comments from the public after October 14, 2001, the SBOE agreed to reopen public hearings on the proposed textbooks on November 8, 2001, just one day prior to the final vote on the books scheduled for November 9.

23. On information and belief, before the newly-scheduled hearing on November 8, members of both TPPF and CSE worked directly with Defendants McLeroy, Shore, and Thornton to develop a strategy for rejecting Chiras' book. That work included having members of those organizations feed information and arguments to these Defendants in an effort to help them persuade other SBOE members to vote against the book.

24. The motivation of both TPPF and CSE in opposing adoption of Chiras' book was based entirely on their strong disagreement with the author's expression of viewpoint regarding environmental and economic issues. For example, both groups strenuously objected to the book on the grounds it allegedly reflected "anti-Christian" and "anti-free enterprise" sentiment. According to CSE representative Peggy

Venable, Chiras' book "presented a radical, controversial, political agenda as 'science.'" Venable also claimed that Chiras' book was "outrageous" for allegedly "blam[ing] Christianity, democracy and industrialization as causing the so-called environmental 'crisis.'" Similarly, TPPF Senior Fellow Duggan Flanakin commented with regard to the book that "[t]he vitriol against Western civilization and its primary belief systems is shocking." On November 8, 2001, the day Flanakin presented his comments on behalf of TPPF at the hearing, Flanakin also submitted a single-spaced, 24-page "Report to Publisher" regarding Chiras' book. Jones & Bartlett had never seen or known of the "report" until November 8, just one day before the scheduled SBOE vote.

25. On information and belief, Defendant Thornton, a member of the SBOE, requested that members of TPPF and/or CSE provide her with specific instances in which Chiras' book contained "anti-free enterprise" statements, and one or both of those organizations complied.

26. At the November 8, 2001 hearing, the SBOE heard comments from several representatives and/or members of CSE and TPPF, all of whom spoke vigorously and passionately against adoption of Chiras' book. Notably, neither any of the public comments against the book, nor any of the questions or discussion among SBOE members even mentioned or described *any* of the TEKS curriculum content requirements for environmental science, nor did they argue that Chiras' book failed to meet those requirements in any way.

27. Carol Fletcher, who served on the state Textbook Adoption Committee for environmental science, told the SBOE that the "review these books received was vigorous and detailed." She concluded that "it's my opinion that the textbooks found in compliance with the TEKS and therefore eligible for adoption will be an effective tool for assisting teachers in this endeavor."

28. University of Texas emeritus professor Bassett Maguire, who has been a member of the UT faculty in ecology since 1957, spoke in support of adopting all three proposed environmental science books. Nonetheless, Maguire noted that he would choose Chiras' book among the three because it "has the best and most coherent discussion of the basic ecology of the Earth."

29. Following completion of public comments on November 8, 2001, Thornton moved to reject Chiras' book, and the motion passed on a preliminary vote of 10-5. Each of the Defendants voted in favor of the motion to reject Chiras' book. At the same time, and by the same vote, the SBOE also preliminarily rejected another environmental science text, published by J.M. LeBel Enterprises ("LeBel").

30. Just prior to the SBOE's final vote on November 9, 2001, the SBOE permitted Jones & Bartlett editor Dean DeChambeau to respond to the oral comments and TPPF "report" issued just one day earlier. During DeChambeau's presentation, Defendant Grace Shore asked him whether the author of the book "has a definite philosophy toward environmentalism," and also inquired as to the extent to which the author would need to give approval to any changes that Jones & Bartlett might have been willing to make to the book in order to gain its approval by the SBOE. The SBOE members then voted, again 10-5, to reject Chiras' book for use in either regular or AP environmental science courses. Each of the Defendants voted to reject Chiras' book.

31. By contrast with the final vote on Chiras' book, on November 9, 2001, the SBOE voted to *approve* the LeBel textbook that it had preliminarily rejected one day earlier. The decision regarding the LeBel book changed because, into the late night hours of November 8, 2001, the publisher's president

worked with the Texas Education Agency to correct “problems” that were identified at the November 8 hearing. The *New York Times* later reported that president Rene LeBel described this so-called “correction” process as a “book-burning,” that “was 100 percent political.”

32. Ultimately, Defendants’ own words prove that their motive for rejecting Chiras’ book was suppression of a particular viewpoint. On November 19, 2001, just 10 days after the SBOE rejected Chiras’ book, CSE published on its website an article written by Defendant McLeroy, an SBOE member, entitled “The Rejected Textbook.” According to McLeroy’s article, the SBOE rejected Chiras’ book because it was based on a “false premise. ... The claim that the root cause of environmental problems is economic growth is simply wrong.”

33. Moreover, the *Austin American-Statesman* reported that Defendant Grace Shore, then chair of the SBOE, told the newspaper that “[t]he oil and gas industry should be consulted” regarding passage of proposed environmental science textbooks, because “[w]e [the oil and gas industry] always get a raw deal.”

34. Most notably, Defendant and SBOE member David Bradley reportedly told the *Dallas Morning News* that, in response to SBOE members’ review of textbooks, the SBOE members “are seeing a change in the attitude of publishers. They are starting to work with conservative groups and textbook critics ... who more accurately reflect the viewpoint of most Texans. I really think the pendulum is swinging back to a more traditional, conservative value system in our schools.”

35. As a result of the SBOE’s decision to reject Chiras’ book, no Texas school district has purchased the book for use in environmental science courses. As a direct result, Plaintiff Chiras has been deprived of his constitutional right to express himself without viewpoint-based censorship, and he has also

suffered monetary damages. Plaintiff Rocio Rodriguez, and all other current and future Texas environmental science students have also been deprived of their constitutional right of access to Chiras' book as an educational resource.

FIRST CLAIM FOR RELIEF

(Claims by all Plaintiffs against all Defendants, except Grace Shore,
for injunctive and declaratory relief, pursuant to 42 U.S.C. § 1983)

36. Plaintiffs reallege and incorporate by reference the allegations contained in all preceding paragraphs as if set forth fully herein.

37. Defendants' actions under color of state law abridge Plaintiffs' freedom of speech by limiting the author's expression and by denying access to that expression on the basis of the content and viewpoint of the author's speech.

38. Defendants' actions are subject to strict judicial scrutiny and violate Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution, and the federal Civil Rights Act of 1871, 42 U.S.C. § 1983.

39. As a result of Defendants' ongoing violations of the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of 1871, the Plaintiffs have suffered and will continue to suffer injury.

40. Pursuant to 42 U.S.C. § 1983, the Plaintiffs are entitled to a declaration that their rejection of Chiras' book on the basis of viewpoint violated that First and Fourteenth Amendments. Plaintiffs are also entitled to injunctive relief requiring Defendants, in their official capacity, to add Chiras' book to the "nonconforming list" of environmental science textbooks approved for use by Texas public high schools.

SECOND CLAIM FOR RELIEF

(Claim for damages by Plaintiff Chiras pursuant to 42 U.S.C. § 1983 against Defendants David Bradley, Don McLeroy, Grace Shore, and Cynthia Thornton, in their individual capacities)

41. Plaintiffs reallege and incorporate by reference the allegations contained in all preceding paragraphs as if set forth fully herein.

42. Defendants' actions under color of state law have abridged Plaintiff Daniel Chiras' freedom of speech by limiting his expression on the basis of the content and viewpoint of his speech.

43. Defendants' actions violate Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution, and the federal Civil Rights Act of 1871, 42 U.S.C. § 1983. Defendants are not subject to qualified immunity because their conduct violated clearly-established constitutional and statutory rights of which a reasonable person would have been aware.

44. As a result of Defendants' ongoing violations of the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of 1871, Plaintiff Daniel Chiras has suffered and will continue to suffer damages, including but not limited to his share of lost sales resulting from Defendants' rejection of his book.

PRAYER

AS TO THE PLAINTIFFS' FIRST CLAIM FOR RELIEF, Plaintiffs respectfully pray this Court enter judgment in favor of the Plaintiffs against all Defendants (except Grace Shore), including:

- (a) issue a declaratory judgment declaring that Defendants have unlawfully rejected Chiras' book on the basis of disagreement with the viewpoints expressed in that book;

- (b) grant the Plaintiffs permanent injunctive relief requiring the Defendant SBOE officials to add the 6th edition of ENVIRONMENTAL SCIENCE: CREATING A SUSTAINABLE FUTURE, by Plaintiff Daniel Chiras, to the “nonconforming” list of approved environmental science textbooks for use in Texas public high schools;
- (c) award the Plaintiffs their reasonable attorneys’ fees and costs pursuant to 42 U.S.C. § 1988 and/or other applicable provisions; and
- (d) award further relief this Court finds just and appropriate.

AS TO PLAINTIFF DANIEL CHIRAS’ SECOND CLAIM FOR RELIEF, Plaintiff respectfully requests this Court enter judgment against Defendants Bradley, McLeroy, Shore, and Thornton, in his favor, including:

- (a) damages as determined by the finder of fact;
- (b) reasonable attorneys’ fees and costs pursuant to 42 U.S.C. § 1988 and/or other applicable provisions; and
- (c) any further relief this Court finds just and appropriate.

///

Respectfully submitted,

TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.

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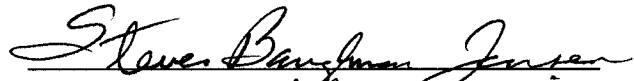
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July 30, 2004

CERTIFICATE OF SERVICE

Thereby certify that on August 2, 2004, a true and correct copy of Plaintiffs' Second Amended Complaint - Class Action was forwarded via United States Mail to counsel for all Defendants, addressed as follows:

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Steve B. Jensen (by permission
Cynthia Metcalf)