UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15-3083

FREEDOM FROM RELIGION FOUNDATION, INC; DOE 1, by Doe 1's next friend and parent, Marie Schaub; MARIE SCHAUB, who also sues on her own behalf,

Appellants,

v.

NEW KENSINGTON-ARNOLD SCHOOL DISTRICT,

Appellee.

Appeal of the United States District Court for the Western District of Pennsylvania Memorandum Opinion and Order of Court Dated July 27, 2015 at Docket No.: 2:12-cv-01319

BREIF FOR THE APPELLANTS

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 15-3083

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v.

NEW KENSINGTON-ARNOLD SCHOOL DISTRICT

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Freedom From Religion Foundation makes the following disclosure:

(Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

s/ Patrick C. Elliott

(Signature of Counsel or Party)

Dated: 12/10/15

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JURISDICTIONAL STATEMENTS

A. Basis for Subject Matter and Appellate Jurisdiction

The district court had subject matter jurisdiction over the original controversy pursuant to 28 U.S.C. §§ 1331.

This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the appeals before it are from final orders from the district court.

B. Filing Dates Establishing Timeliness of the Appeal

The final order of the district court granting summary judgment was dated July 27, 2015. Appellants filed a timely Notice of Appeal on August 25, 2015.

STATEMENT OF ISSUES PRESENTED

(1) A case becomes moot only when it is impossible for a court to grant any effectual relief whatsoever. Appellant Marie Schaub and her high school-aged child, Appellant Doe 1, are assuming special burdens, on an ongoing basis, to avoid direct daily contact with Ten Commandments Monument displayed by the New Kensington-Arnold School District. Would injunctive relief provide effectual relief to Appellants?

The parties did not address mootness in their summary judgment pleadings. The district court raised this issue *sua sponte* in its Memorandum Opinion and dismissed Appellants' claim for injunctive relief on this basis. Opinion, 17-18 (J.A. 18-19).

(2) As long as a plaintiff retains a concrete interest, however small, in a case, the case does not become moot. Appellants still face future contact with the Ten Commandments Monument because they remain residents of the community and because Doe 1 may attend classes at a vocational school located on the Valley High School campus, where the Ten Commandments Monument is displayed. Does Appellants' continuing interest in obtaining injunctive relief prevent this case from becoming moot?

The parties did not address mootness in their summary judgment pleadings. The district court raised this issue *sua sponte* in its Memorandum Opinion and dismissed Appellants' claim for injunctive relief on this basis. Opinion, 17-18 (J.A. 18-19).

(3) A case is not moot where a court can grant different relief than was originally sought to fairly compensate a plaintiff. Appellants suffered injury by acting to avoid unwelcome daily contact with the Ten Commandments Monument, which they sought to prevent through an injunction. Should the availability of nominal damages to compensate Appellants for their altered conduct prevent the case from becoming moot?

The parties did not address mootness in their summary judgment pleadings. The district court raised this issue *sua sponte* in its Memorandum Opinion and

dismissed Appellants' claim for injunctive relief on this basis. Opinion, 17-18 (J.A. 18-19).

(4) A plaintiff has standing to seek nominal damages in an Establishment Clause case where she has experienced "direct, unwelcome contact" with a religious display. Appellants are long-standing residents of the New Kensington-Arnold School District and had experienced "directed, unwelcome contact" with the Ten Commandments Monument at the time this case was filed. Did Appellants have standing to seek nominal damages based upon their "direct, unwelcome contact" with the Ten Commandments Monument?

Appellants raised and addressed the issue of Appellants' standing in its summary judgment pleadings. (ECF No. 64, 21-26) (Pls.' Br. Supp.); (ECF No. 77, 9-13) (Pls.' Br. Opp.). Appellee raised and addressed the issue of Appellants' standing in its summary judgment pleadings. (ECF No. 59, 16-23) (Def.'s Br. Supp.); (ECF No. 72, 1-4) (Def.'s Br. Opp.).

STATEMENT OF RELATED CASES AND PROCEEDINGS

A companion cases to this case was also filed in the United States District Court for the Western District of Pennsylvania in 2012. That case was decided earlier this year. *Freedom From Religion Foundation, Inc. v. Connellsville Area Sch. Dist.*, No. 2-12-cv-1406, 2015 WL 5093314 (W.D. Pa. Aug. 28, 2015).

STATEMENT OF THE CASE

Appellants Freedom From Religion Foundation, Inc., Marie Schaub, and Doe 1 filed a single-count Complaint on September 14, 2012 seeking declaratory and injunctive relief, nominal damages, and attorneys' fees based upon Appellee's deprivation of their constitutional rights secured by the First and Fourteenth Amendments. (ECF No. 1). Initially, Appellee New Kensington-Arnold School District (NKASD) responded to the Complaint by filing a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and a Motion to Strike pursuant to Rule 12(f). (ECF Nos. 8, 13). Appellants opposed the motions (ECF Nos. 16, 18). On January 22, 2013, the district court issued a Memorandum Opinion denying the motion to dismiss. (ECF Nos. 19, 20).

Prior to getting underway with discovery, Appellants filed a Motion to Proceed Pseudonymously based upon the community reaction in the NKASD community to Appellants' suit. (ECF No. 11). Defendants opposed the motion. (ECF No. 13). The district court granted Appellants' Motion in its December 19, 2012 Memorandum Opinion (ECF No. 19).

At the conclusion of discovery, the parties cross-filed for summary judgment. (ECF Nos. 58, 62). The district court permitted each party to file Briefs in Opposition before closing the briefing on the summary judgment motions. On July 27, 2015, the district court issued a Memorandum Opinion (ECF No. 83, J.A.

2) dismissing Appellants' case based upon alleged mootness of Appellants' injunctive relief claim and for lack of standing as to Appellants' nominal damages claim ("Opinion"). The Opinion is the subject of this appeal.

STATEMENT OF THE FACTS

A. Origins of the Ten Commandments Monument

In 1956, the New Kensington School District Authority accepted a stone monument inscribed with the Ten Commandments from the New Kensington Fraternal Order of the Eagles, Aerie 533 (the "Ten Commandments Monument" or the "Monument"). Joint Appendix 22-23 (Defendant's Response to Plaintiff's First Set of Interrogs.); J.A. 27-28 (Dec. 3 & Dec. 17, 1956 Minutes of Meeting of New Kensington School District Authority). The Ten Commandments Monument was placed on the grounds of the New Kensington High School. *Id;* J.A. 31-32 (*Daily Dispatch* Sept. 19, 1957 News Article). The Monument, which still stands today in its original location, is 6 feet tall and weighs approximately 2,000 pounds. J.A. 22-23; J.A. 31-32. The tablet was designed to represent "the kind of stone the first commandment was written on and given to Moses." *Id.*

The text of the Ten Commandments Monument reads:

The Ten Commandments
I AM the LORD thy God.

I. Thou shalt have no other gods before me.
II. Thou shalt not take the Name of the Lord thy God in vain.

III. Remember the Sabbath day, to keep it holy.
IV. Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
V. Thou shalt not kill.
VI. Thou shalt not commit adultery.
VII. Thou shalt not steal.
VIII. Thou shalt not bear false witness against thy neighbor.
IX. Thou shalt not covet thy neighbor's house.
X. Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's

J.A. 33-35, 39 (Photographs of Ten Commandments Monument).

B. Location of the Ten Commandments Monument

The school property on which the Ten Commandments Monument stands serves as the New Kensington Arnold School District (NKASD) high school, which is referred to as Valley High School (VHS). J.A. 36-39 (Photographs of Ten Commandments Monument); J.A. 77-78 (Deposition of Dr. George Batterson); J.A. 98-99 (Deposition of John Pallone); J.A. 114-15 (Deposition of Robert Pallone). The Ten Commandments Monument sits in a grassy area between two parallel concrete footpaths that extend from the parking lot area to the entrance of the VHS gymnasium (the "footpaths"). J.A. 44-53 (Photos); J.A. 114-19 (Dep. of R. Pallone). The front of the Ten Commandments Monument is visible from the footpaths. JA49-51 (Photos). The side and rear of the Ten Commandments Monument is visible from the sidewalk that runs perpendicular to the footpaths along the front of Valley High School. J.A. 40-42, J.A. 56 (Photos). The rear of the

Ten Commandments Monument is visible from the gymnasium entrance. J.A. 53 (Photos).

Students enter VHS in the morning via the footpaths. J.A. 118 (Dep. of R. Pallone). The parking lot area adjacent to where the footpaths begin (*see* J.A. 53 (Photos)) is used for student parking. J.A. 116, 119 (Dep. of R. Pallone). The footpaths provide the primary means of access to VHS when individuals attend athletic events. J.A. 117-118 (Dep. of R. Pallone); J.A. 76, 85 (Dep. of Batterson).

C. Request to Remove the Monument and NKASD Response

The Freedom From Religion Foundation (FFRF) is a national 501(c)(3) educational charity and membership organization that is dedicated to promoting the constitutional principle of separation of state and church and educating the public on matters relating to nontheism. J.A. 120 (FFRF Website). On February 19, 2012, FFRF received a complaint about the Ten Commandments Monument from a non-NKASD student who had visited VHS. J.A. 121 (Rebecca Markert Declaration). On March 20, 2012, FFRF submitted a letter to then Superintendent George Batterson requesting that the Ten Commandments Monument be removed. J.A. 124-26 (FFRF letter); J.A. 79 (Dep. of Batterson).

On March 22, 2012, Superintendent Batterson read the letter to his Board of School Directors and a District solicitor in executive session before a regularly scheduled NKASD Board meeting. J.A. 79-80, J.A. 83-84 (Dep. of Batterson); J.A.

128-29 (March 23, 2012 Tribune-Review News article). Upon hearing the letter, the Board stated that it wanted to keep the Monument and informed Batterson that he should consult with legal counsel for that purpose. J.A. 79-80 (Dep. of Batterson). All NKASD administrators and board members present for this discussion supported keeping the Monument, as did all other administrators with whom Board President Robert Pallone spike later. J.A. 81-82 (Dep. of Batterson); J.A. 106-07 (Dep. of R. Pallone).

By March 23, 2012, the local news media had picked up the story of the FFRF Letter and NKASD's decision to keep the Ten Commandments Monument. *See e.g.,* J.A. 128-29. Superintendent Batterson and NKASD received more than 1,000 calls and emails supporting the District's decision. J.A. 86 (Dep. of Batterson); s*ee* J.A. 639-40 (March 29, 2012 WPXI news article); J.A. 643 (April 8, 2012 Batterson email).

NKASD officials subsequently took a firm stand against removal of the Monument. Batterson stated to the Tribune-Review, "We're not happy with them asking us to take down the Ten Commandments." J.A. 128-29. Around this time, a Facebook group called "KEEP THE TEN COMMANDMENTS AT VALLEY HIGH SCHOOL" was created; Board President Robert Pallone posted the following to the group:

> Clearly, we are under attack from an outside group from the state of Wisconsin - Our community, the administration, the board and our staff are outraged by the request to remove a monument that has been part of our district and community for decades. We WILL NOT remove this monument without a fight !!!!! We will litigate this issue at the highest level (US Supreme Court) if necessary. All of us in the district appreciate the overwhelming support from the community and as the current President of the board I want to assure all of you that we won't remove this monument without a battle…

J.A. 123; J.A. 128 (Dep. of R. Pallone); J.A. 121-22 (Decl. of Markert).

On March 23, 2012, Superintendent Batterson sent an email stating, "If we pray about [the Ten Commandments issue] God will help our children to win out over the atheist organization that wants to impose their will on us." J.A. 131 (March 23, 2012 Batterson email). On March 30, 2012, Batterson responded to an email and thanked a former NKASD graduate for his support, writing "[w]e are going to not cave in. I am determined to keep the Ten Commandments on our high school lawn. We are doing the right thing for our children, community and graduates." J.A. 641 (March 30, 2012 Batterson email). Batterson responded to another email and indicated that "We have the support of our entire student body, community and many Christians like you from all over the country. We are doing the right thing and will prevail over a small group of atheists who should mind their own affairs in Wisconsin. We can not let people like this continue to

undermine or [sic] values and impose their will on the vast majority of Americans." J.A. 642 (March 30, 2012 Batterson email). On March 31, 2012, Batterson wrote in an email to his fiancé, "I have influenced my board and community to stand up to the atheists." J.A. 636.

D. Appellants' Encounters with the Ten Commandments Monument

Marie Schaub resides within the city of Arnold and the New Kensington-Arnold School District. J.A. 677 (Schaub Decl.). Schaub is the mother of Doe 1. J.A. 669 (Schaub Deposition). Doe 1 attended Valley Middle School in the NKASD. J.A. 678.

Schaub and Doe 1 planned for Doe 1 to attend Valley High School in August 2014 upon her completion of eighth grade. *Id.* Because of the Ten Commandments monument, Schaub and Doe 1 have taken actions to avoid Valley High School. *Id.*

Doe 1 does not believe in a god. J.A. 684-85 (Doe 1 Deposition). Doe 1 feels that the NKASD wants her to believe in God because of the presence of the Ten Commandments Monument in front of the school. J.A. 864.

Schaub identifies as an atheist and is a member of FFRF.[1] J.A. 678. Schaub views the Ten Commandments Monument as "commanding" that school visitors

[1] FFRF asserts associational standing on the basis that Schaub is a member.

worship "thy God." J.A. 679. Schaub believes that the Ten Commandments Monument's presence in front of the VHS signals that she is an outsider because she does not follow the particular religion or god that the Monument endorses. *Id.* Schaub does not want Doe 1 to attend a school that endorses religion, including one that does so through the placement of a religious monument in view of Doe 1. *Id.*

Given the prominent placement of the Monument in front of the school, Schaub's family decided it was best to avoid bringing Doe 1 into daily contact with the Monument and withdrew Doe 1 from NKASD. J.A. 679-80. If the District removed the Monument, Schaub would allow Doe 1 to attend the VHS. J.A. 680. As it stands, however, Schaub does not want Doe 1 to be influenced by the Ten Commandments monument in front of Valley High School. *Id.*

According to Schaub, VHS is the most convenient high school for Doe 1 to attend. J.A. 679. VHS is approximately 2.5 miles from Schaub's residence. *Id.* Busing is available from Schaub's residence to VHS. *Id.* Further, if Doe 1 attended the VHS, she would have been able to continue instruction with her classmates from the Valley Middle School. *Id.*

Doe 1 now attends school in a different district approximately 5 miles from Schaub's residence. J.A. 680. Doe 1 cannot take a school bus to her new school from Schaub's residence. *Id.* Doe 1 has different classmates than Doe 1 had while

attending Valley Middle School. *Id.*

Doe 1 has encountered the monument on numerous occasions. Doe 1 used the swimming pool at VHS from third to fifth grade in her daycare program. J.A. 683 (Doe 1 Dep.). Doe 1 also participated in a karate event at the school, *id.*, and attended an eighth grade dinner dance there in May 2014. J.A. 678 (Schaub Decl.). In these instances, Doe 1 walked past the Ten Commandments Monument when she entered the school via the footpaths. J.A. 684, 686. In addition, the Monument is visible from the adjacent road. *See* J.A. 53 (Photos); J.A. 687. Doe 1 sees the Monument every time she is driven to the home of a nearby friend. J.A. 687.

Schaub has encountered the Monument on several occasions. Schaub viewed the Monument on one or two occasions when she dropped her sister off at VHS for school-related business. J.A. 670-72 (Schaub Dep.). Schaub also utilized the footpaths by the Monument when she attended the karate event in which Doe 1 participated. J.A. 678 (Schaub Decl.). Schaub saw the words "Ten Commandments" at the top of the monument and "I am the Lord thy God" and her stomach turned. J.A. 823-824.

Schaub and Doe 1 were invited to attend an orientation for the Northern Westmoreland Career & Technology Center (Career Center) on November 13, 2014. J.A. 680 (Schaub Decl.). The Career Center is located on the same campus as VHS, in an adjacent building. *Id.* Doe 1's current school district allows students

to take vocational and technical classes at the center. *Id.* Doe 1 expressed an interest in attending classes at the Career Center in the future. *Id.* Schaub is concerned Doe 1 will come into contact with the Monument if Doe 1 attends classes at the Career Center. *Id.*

STATEMENT OF THE STANDARDS AND SCOPE OF REVIEW

Circuit courts of appeals exercise plenary review of justiciability issues. *See Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1462 (3d Cir. 1994). Additionally, circuit courts exercise plenary review of an order granting summary judgment and apply the same standard applied by the district court. *Jakimas v. Hoffmann–La Roche, Inc.*, 485 F.3d 770, 777 (3d Cir. 2007). Summary judgment is appropriate only if there "is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it might "affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The facts are viewed in the light most favorable to the non-moving party. *Moore v. City of Phila.*, 461 F.3d 331, 340 (3d Cir. 2006). The party seeking summary judgment bears the burden to identify evidence that demonstrates an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this burden, then the non-moving party must present evidence on which a jury could reasonably find for it. *Anderson*, 477 U.S. at 252.

SUMMARY OF THE ARGUMENT

Appellants' injunctive relief claim is not moot because effectual relief can still be awarded by the Court. When Appellants filed their complaint, Doe 1 was destined to confront the same dilemma facing the plaintiffs in *Schempp* more than 50 years ago—contact with an unwelcome religious exercise or the assumption of burdens to avoid such contact. Both contact and the assumption of burdens to avoid it constitute injuries-in-fact sufficient to confer standing under Article III. Where those injuries are ongoing at the time an Establishment Clause claim is adjudicated, the case cannot be moot. Because Appellants are assuming burdens to avoid the Monument on an ongoing basis, injunctive relief is necessary, and the case is not moot.

Injunctive relief will also remedy the Appellants' continuing risk of future contact with the Monument. The testimony in the record reflects that Appellants will continue to face this risk. While that contact may not be as significant as the daily contact with the Monument Doe 1 would have faced as a student at VHS, any identifiable trifle is sufficient to prevent the case from becoming moot. The risks of future contact facing Appellants exceed that standard and require injunctive relief to be adequately foreclosed.

Even if the court feels that the ongoing harm facing Appellants is insufficient to warrant injunctive relief, there is yet another reason that the case is

not moot. The fact that Appellants altered their conduct to avoid the Monument must support at least an award of nominal damages. The mootness doctrine, in conjunction with Rule 54(c) of the Federal Rules of Civil Procedure, encourages a court to grant any effective relief—even relief that is something less than what was originally sought. In this case, Supreme Court case law supports an award of nominal damages to compensate Appellants for their constitutional harm even if the court cannot turn back the clock to prevent Doe 1 from being forced to switch school districts. This relief, slight is it may seem, is necessary to protect Appellants' constitutional interests and forecloses a finding of mootness.

Appellants' claim for nominal damages must also be remanded to the district court for a decision on the merits. When Appellant's prior conduct with the Monument is considered under the appropriate "direct, unwelcome contact" standard, it is clearly sufficient to confer standing on Appellants to pursue their nominal damages claim. Appellants are members of the NKASD community and have had direct and unwelcome contact with the Monument. No existing case law supports denial of standing in such a situation. Furthermore, the recognition of Appellants' standing to pursue their damages claim will not implicate any of the concerns associated with an over-expansive interpretation of Article III standing.

ARGUMENT

I. Introduction

Every morning, high school students in the NKASD walk past the six-foot-tall, granite Ten Commandments Monument. Its stone-carved letters proclaim to all: *I AM the LORD thy God*. To prevent Doe 1 from walking in the shadow of this imposing monolith, Marie Schaub initiated this case when Doe 1 was two years away from attending VHS. When August 2014 arrived and the case remained unresolved, Schaub and her family made the difficult decision to remove Doe 1 from her home school district to avoid the coercive effect that Appellants believe the Monument conveys. Schaub and Doe 1 continue to deal with the burdens associated with this decision at the time of this appeal.

Although Schaub and Doe 1 are continuing to suffer one of the very injuries they sought to avoid when this case was filed, the district court ruled that their claim for injunctive relief has become moot. Injunctive relief, however, would still meaningfully unburden Appellants and allow Doe 1 to return to the NKASD. It would also allow Doe 1 to attend classes at an adjacent vocational school without coming into contact with the Monument and prevent Appellants from future contact with the Monument as members of the community. But even if the Court believes such injunctive relief is ineffective, Appellants' altered conduct to avoid the Monument warrants at least an award of nominal damages.

Appellants' injury when the case was filed was not strictly prospective. As members of the NKASD community, both individual Appellants have had direct, unwelcome contact with the Monument. Even the adjacent road traveled by Doe 1 falls within the umbra of the Monument. When Schaub observed the Monument on school district property, it caused her stomach to turn. This sort of unwanted personal contact with the Monument is precisely the type of contact necessary for standing. Yet, the district court held that this contact was insufficient to support Appellants' claim for nominal damages. Like the court's dismissal for mootness, the dismissal for want of standing must also be overturned.

II. Legal Landscape

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). "Courts enforce the case-or-controversy requirement through . . . several justiciability doctrines," including standing and mootness. *Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 137 (3d Cir. 2009) (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)). Both standing and mootness are at issue in this appeal.

A. Standing

When reviewing these two doctrines, the standing doctrine stands first in line because it focuses on the facts as they existed at the commencement of a case. *Davis v. Federal Election Com'n*, 554 U.S. 724, 734 (2008) (citations omitted). To demonstrate standing, "[a]t an irreducible minimum," a party must show that he has suffered an "actual injury redressable by the court." *Id.* at 472. A plaintiff must therefore demonstrate that she "(1) has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Among a number of constitutional and prudential considerations, these requirements help to ensure that the litigants before the court are "directly affected by the . . . practices against which their complaints are directed." *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 224 n.9 (1963). Furthermore, by limiting access to the courts to those who demonstrate that they have a "personal stake in the outcome of the controversy," the standing doctrine helps to assure "that concrete adverseness which sharpens the presentation of issues upon which

the court so largely depends for illumination of difficult constitutional questions," *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Standing must be established as to each claim and each request for relief. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Therefore, where a plaintiff seeks relief in the form of both damages and prospective or injunctive relief, standing for each claim for relief must be demonstrated.

1. Standing for Damages

In *Valley Forge*, the Supreme Court provided a useful example of the type of alleged injury-in-fact that does *not* satisfy the requirements of the standing doctrine. The group of plaintiffs in *Valley Forge* challenged the transfer of surplus federal property to a religious educational institution. *Valley Forge*, 454 U.S. at 468-69. Noting that it was "not retreat[ing] from [its] earlier holdings that standing may be predicated on noneconomic injury," the Supreme Court found that the particular group of plaintiffs in *Valley Forge* had not identified a "personal injury" resulting from the challenged transfer and noted that plaintiffs must "identify a[] personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485-86 (emphasis in original).

Circuit courts have focused on two key attributes of *Valley Forge* when attempting to interpret and utilize this holding. First, the circuit courts have focused closely on the distance of the plaintiffs from the community in which the challenged transfer took place—although the *Valley Forge* plaintiffs were dedicated to the separation of church and state, they did not reside in the state where the conveyance was made (Pennsylvania) and only learned about the challenged conveyance through a news release. *Id.* at 487. *See, e.g.*, *Saladin v. City of Milledgeville*, 812 F.2d 687, 692-93 (11th Cir. 1987) (referencing *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.3d 1098 (11th Cir. 1983), which distinguished the facts in that case from *Valley Forge*); *Vasquez v. Los Angeles ("LA") County*, 487 F.3d 1246, 1252 (9th Cir. 2007) (distinguishing *Valley Forge* because the plaintiffs in *Valley Forge* "were physically removed from the defendant's conduct"); *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997) (describing the complaint of the plaintiffs in *Valley Forge* as "a mere abstract objection" and noting that *Valley Forge* recognized standing where there is "direct contact with an unwelcome religious exercise"). Second, the courts have highlighted *Valley Forge's* confirmation that non-economic injury can provide a sufficient injury-in-fact to confer Article III standing. *Rabun*, 698 F.2d at 1105-06 (addressing whether noneconomic injury can provide a basis for standing in Establishment Clause cases

after *Valley Forge* and finding that *Valley Forge* "reaffirmed [the Supreme Court's] prior holdings that noneconomic injury could serve as a basis for standing").

These two key aspects of the *Valley Forge* decision have led the circuit courts to hold nearly uniformly that an Establishment Clause plaintiff need only demonstrate "direct, unwelcome contact" with a challenged display in order to have standing. *See Vasquez*, 487 F.3d at 1253 (surveying such cases in the Second, Fifth, Tenth, and Eleventh Circuits); *Suhre*, 131 F.3d at 1086-90; *American Civil Liberties Union of Ohio Foundation, Inc. v. DeWeese*, 633 F.3d 424, 429-30 (6th Cir. 2011) (holding that direct and unwelcome contact is sufficient to confer standing and finding standing where individual plaintiff submitted an affidavit stating that he came into contact with the challenged display and that it offended him); *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1023-24 (8th Cir. 2012) (finding direct, personal contact with challenged display sufficient for standing).

At one time, the Seventh Circuit interpreted *Valley Forge* as requiring more than "direct, unwelcome contact." *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir. 1988). In *Zielke*, the Seventh Circuit read *Valley Forge* to require that an Establishment Clause plaintiff demonstrate that he altered his conduct as a result of a challenged display or exercise. *Id.* at 1467-68.

This singular decision has been criticized by the other courts of appeals, and the Seventh Circuit has subsequently retreated from the *Zielke* decision. *See, e.g., Doe v. Cnty. of Montgomery, Ill.*, 41 F.3d 1156, 1159-61 (7th Cir. 1994) (finding direct and unwelcome contact with the challenged display sufficient to confer standing on individual plaintiffs and rejecting an altered conduct requirement).[2]

Cases in other circuits decided after *Zielke* have persuasively explained why the "altered conduct" standard demands too much of plaintiffs. *See, e.g., Suhre*, 131 F.3d at 1088. In *Suhre*, the Fourth Circuit Court of Appeals addressed the Defendant's argument, which relied upon *Zielke*, that Establishment Clause plaintiffs must alter their conduct in order to demonstrate an injury-in-fact sufficient for standing. *Id.* The *Suhre* court ultimately concluded that altered conduct, while sufficient to demonstrate an injury-in-fact, is not required to establish standing. In so deciding, the court specifically rejected the reasoning in *Zielke*, holding that "the Supreme Court has never required that Establishment Clause plaintiffs take affirmative steps to avoid contact with the challenged displays" and that "[c]ompelling plaintiffs to avoid [challenged displays would]

[2] As the district court noted in its Opinion, the current state of the law in the Seventh Circuit is somewhat unclear. Opinion, 11 n.3. Given the wealth of support for the "direct, unwelcome contact" standard and the Seventh Circuit's retreat from "altered conduct," a further analysis of the current state of this law in the Seventh Circuit is beyond the pale of this brief.

impose on them a burden that no citizen should have to shoulder." *Id.* Such a requirement would "effectively add insult to the existing injury requirement." *Id.* (internal citations omitted).

The Supreme Court provided additional support for the "direct, unwelcome contact" standard after *Valley Forge*. *Allegheny County v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984). In *Allegheny County* and *Lynch*, the Supreme Court faced challenges to religious displays by plaintiffs who had alleged only direct, unwelcome contact with the displays. In both cases, the Court ruled on the merits without any discussion of the standing of the plaintiffs. The same standing principle is implicit in the more recent cases *Van Orden v. Perry*, 545 U.S. 677 (2005) and *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), where plaintiffs' objections to religious displays on noneconomic grounds were heard by the Supreme Court. The Supreme Court's rulings on the merits of these cases without addressing standing is notable because every federal appellate court has an obligation to satisfy itself on jurisdictional issues, including standing. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

This Honorable Court has yet to formally join the majority of the circuit courts in holding that the "direct, unwelcome contact" requirement governs Establishment Clause standing. The Court did, however, acknowledge the trend toward that standard in *ACLU-NJ v. Township of Wall*, where it cited and quoted

without criticism the early cases interpreting *Valley Forge* in that manner. 246 F.3d 258, 265-66 (3d Cir. 2001). In *Freethought Society v. Chester Cnty.*, decided after *Wall*, this Court found standing, without much discussion, where a plaintiff had direct, unwelcome contact with a Ten Commandments display in a county courthouse. 334 F.3d 247, 255 n.3 (3d Cir. 2003). The plaintiff alleged direct contact with the challenged display but did not allege altered conduct. *Id.* This Court determined that it "d[id] not find convincing the defendants' argument that . . . [the plaintiff] . . . [lacks] standing to sue." *Id.* at 255 n.3.

In light of the wealth of case law adopting a consistent approach to the Establishment Clause standing issue, this Court should formally join the other circuits in holding that Establishment Clause plaintiffs need only demonstrate "direct, unwelcome contact" to satisfy the injury-in-fact requirement of Article III standing. In so holding, the Court will give full meaning to *Valley Forge*, while recognizing the reality that Establishment Clause plaintiffs' injuries will often relate to the "spiritual, value-laden beliefs of the plaintiffs." *Suhre,* 131 F.3d at 1086 (citing *Rabun*, 698 F.2d at 1102).

2. Standing for Injunctive Relief

A plaintiff has standing to seek injunctive relief if he shows that he is "'likely to suffer future injury' from the defendant's conduct." *McNair v. Synapse Group Inc.*, 672 F.3d 213, 223 (3d Cir. 2012) (citing *City of Los Angeles v. Lyons*,

461 U.S. 95, 105 (1983)). Specifically, a plaintiff must demonstrate "(1) that he is under threat of suffering injury-in-fact that is concrete and particularized; (2) the threat must be actual and imminent, not conjectural and hypothetical; (3) it must be fairly traceable to the challenged action of the defendant; and (4) it must be likely that a favorable judicial decision will prevent or redress the injury." *Free Speech Coalition, Inc. v. Attorney General U.S.*, 787 F.3d 142, 167 (3d Cir. 2015) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

The threatened injury must be imminent or "certainly impending" such that there is a "substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014) (citing *Clapper v. Amnesty Intern USA*, 133 S.Ct. 1138, 1150 n.5 (2013)). Imminence is "a somewhat elastic concept." *Clapper*, 133 S.Ct. at 1147. The purpose of the requirement is to ensure that an injury is "not too speculative for Article III purposes." *Id.* (citation omitted). An injury is too speculative for Article III purposes where the impending injury is based upon a "speculative chain of possibilities." *Id.* at 1150 (finding plaintiff's claim was not certainly impending where it rested upon five speculative assumptions).

B. Mootness

The mootness doctrine compels dismissal of a case where "the issues presented are no longer live or the parties lack a legally cognizable interest in the

outcome." *Chafin v. Chafin*, 133 S.Ct. 1017, 1023 (2013) (citations and internal quotations omitted). The requirements of standing and mootness are similar—both arise out of the "cases and controversies" language of Article III. Indeed, mootness is often defined as "the doctrine of standing set in a time frame: [t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994) (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). Their requirements, however, are not identical, and suggesting as much falls short of providing a comprehensive definition of mootness. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 170 (2000).

While the requirements of standing prevent pursuit of hypothetical or speculative claims, mootness applies "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Employees Intern. Union, Local 100*, 132 S.Ct. 2277, 2287 (2012) (citations and internal quotations omitted). A "court must be sure the plaintiff would not be entitled to *any* meaningful relief" before it dismisses a case as moot. *Brill v. Velez*, 2014 WL 2926086, at *4 (D.N.J. June 27, 2014) (citing *Church of Scientology of Cal. V. United States*, 506 U.S. 9, 12 (1992)). Put differently, "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the

case is not moot." *In re ICL Holding Co., Inc.*, 802 F.3d 547, 553 (3d Cir. 2015) (citing *Knox*, 132 S.Ct. at 2287). As with the considerations that inform the standing analysis, one of the reasons that courts search for a continuing "concrete interest, however small" is to ensure that there "continues to exist between the parties that concrete adverseness which sharpens the presentation of issues." *Chafin*, 135 S.Ct. at 1024 (citations and internal quotations omitted).

In some respects, these mootness concepts closely follow the precepts of Rule 54(c) of the Federal Rules of Civil Procedure. *See, e.g., Kirby v. U.S. Government, Dept. of Housing & Urban Development*, 745 F.2d 204, 207 (3d Cir. 1984). Rule 54(c) provides that courts "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). "As long as the plaintiffs have stated a claim for relief, it is the court's obligation to grant the relief to which the prevailing party is entitled whether it has been specifically demanded or not." *Kirby*, 745 F.2d at 207.

III. Appellants' claim for injunctive relief is not moot.

Appellants' claim for injunctive relief was not rendered moot when Doe 1 enrolled in a neighboring school district.[3] The Court can still fashion effectual

[3] Although the conclusion of the district court's Opinion seems to suggest that the case was decided on standing, the court's grant of summary judgment as to Appellants' injunctive relief claim was clearly based upon a determination that the claim had become moot. *See* Opinion, 18 (commenting "[I]n essence, [Appellants']

relief for three reasons. First, Doe 1 is suffering an ongoing injury as a displaced student who assumed special burdens to avoid daily contact with the Monument. The originally requested injunctive relief would provide relief for this ongoing injury. Second, the individual Appellants face a continuing risk of future "direct, unwelcome contact" with the Monument, for which the requested injunctive relief would also prove effectual. Third, even if the Court deems injunctive relief inappropriate, the Appellants are entitled to nominal damages on this claim in light of their altered conduct to avoid the injury they sought to prevent at the inception of this case.

Appellants review each of these bases for overturning the district court's decision in turn below. Before addressing the issue of mootness, Appellants must pause to assure the Court that they had standing to bring a claim for injunctive relief. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000) (noting that where appellate court overturns finding of mootness, it has an obligation to confirm that standing existed at the outset of the litigation).[4] The review of Appellants' standing to bring this claim helps to craft

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claim for injunctive relief has become moot because of the decision to remove Doe 1 from the School District"). As will be discussed below, this conclusion too narrowly construes the harm facing Appellants and ignores the risk of future contact.

[4] This is so even though the district court effectively found that Doe 1 had standing to bring her claim for injunctive relief at the time the case was filed. Opinion, 17

the appropriate lens for analyzing the three reasons that effectual relief can still be given.

A. Appellants have standing to seek injunctive relief.

At the time the complaint was filed, Doe 1 faced the following reality: when Doe 1 reached high school in her then-current school district, she would come into certain, daily contact with the Monument unless she assumed special burdens to avoid doing so. The Supreme Court addressed this same dilemma in *Schempp*, where the plaintiff-students were forced to choose between suffering unwelcome religious exercises and undertaking special burdens to avoid them. *Schempp*, 374 U.S. at 223 n.9. The plaintiff-students in *Schempp* had standing to challenge the religious exercise under the Establishment Clause. *Id. See also Valley Forge*, 454 U.S. at 487 n.22 (holding "[t]he plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause . . . but because impressionable school children were subjected to unwelcome religious exercise *or were forced to assume special burdens to avoid them*") (emphasis added).

Despite any uncertainties that can be said to exist in the Establishment Clause arena, it remains clear that a plaintiff-student facing the *Schempp* dilemma

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(opining "it would have been reasonable to infer that Plaintiffs would be forced to come into regular contact with the [M]onument had Doe 1 remained in the [NKASD] and started attending classes at the high school in August 2014").

suffers an injury-in-fact no matter his chosen course. Actual contact with a challenged display confers standing under the "direct, unwelcome contact" standard. *See*, *e.g.*, *Washegesic*, 33 F.3d at 682-83. Altered conduct, while not required for Establishment Clause plaintiffs to have standing, is also a sufficient injury-in-fact to confer standing. *See Suhre*, 131 F.3d at 1088. Because past versions of these injuries provide a basis for standing to seek nominal damages, the threat of such injuries in the future confers standing to seek injunctive relief, provided that the remaining requirements for injunctive relief standing are also met.

Those remaining requirements are satisfied here. Doe 1's potential future injuries were clearly traceable to the conduct of the NKASD, and a timely award of the requested injunctive relief would have undoubtedly prevented the potential future injuries from occurring. Most importantly, based upon compulsory education laws in Pennsylvania,[5] Doe 1's entry into high school at VHS—and consequent First Amendment injury—was sufficiently certain at the time the complaint was filed to support standing. Based upon these laws, it can be said that so long as Plaintiff remained a resident of the New Kensington-Arnold community,

[5] Attendance in public schools in Pennsylvania is compulsory. 24 P.S. § 13-1327. Furthermore, students normally can only attend the district in which they or their parents or guardians reside. 24 P.S. §13-1302.

she would inevitably face the type of "contact or avoidance" injury suffered by the plaintiff-students in *Schempp*. This impending future injury confers standing for Appellants' claim for injunctive relief.

B. Injunctive relief would effectively remedy the Appellants' ongoing injury.

Now high school age, as a displaced student from the New Kensington-Arnold community attending a neighboring school district, Doe 1 is assuming special burdens every day to avoid contact with the Monument. Schaub went out of her way to enroll Doe 1 in a neighboring school district, and she undertook the burdens associated with transporting her there. Doe 1 was forced to enroll in a neighboring district and leave behind her fellow NKASD classmates, with whom she had attended school for years.

The Appellants' ongoing assumption of these special burdens to avoid daily contact with the Monument prevents this case from becoming moot. Appellants are reminded of their ongoing personal stake every morning when Doe 1 is unable to take the school bus from Schaub's house to her new school district. So long as the Monument is displayed, Doe 1 is forced to attend this neighboring school district to avoid daily contact with the Monument. Unquestionably, an award of injunctive relief would still provide an effective remedy to Appellants in that it would allow them to stop undertaking these special burdens, and it would give Doe 1 the

opportunity to return to the NKASD without certain daily contact with the Monument.

The impending harm facing Appellants when the case was filed was daily contact with the Monument *or the assumption of special burdens to avoid that contact with the Monument*.[6] As was recognized in *Schempp* and reaffirmed in *Valley Forge*, both actual contact and the assumption of special burdens to avoid contact provide Article III standing. Consequently, Appellants' continued assumption of special burdens to avoid daily contact with the Monument constitutes an ongoing injury that will be effectively remedied by an injunction and prevents this case from becoming moot.

A series of display cases in the Ninth Circuit have established that the ongoing assumption of special burdens to avoid unwanted contact with a challenged display confers standing for an injunctive relief claim. These cases are instructive to the Court's mootness analysis given that standing and mootness both measure a plaintiff's personal stake in a case's outcome. In *Buono v. Norton*, the

[6] The District Court's finding of mootness as to the injunctive relief claim was based upon its narrow view of the potential future harm sought to be addressed by Appellants' claim for injunctive relief. Opinion, 17 (finding that "removing [Doe 1] from the NKASD eliminated the reasonable expectation of [contact with the Monument] occurring"). The district court's opinion shows that the court defined the potential future harm to Doe 1 as nothing more than daily *contact* with the Monument.

plaintiff sought injunctive relief and alleged injury in part because he would tended to avoid the area of a federally-owned preserve near a challenged display as long as the display remained standing. 371 F.3d 543, 547 (9th Cir. 2004). The Ninth Circuit held that the plaintiff had standing to seek injunctive relief, focusing on his ongoing inability to "freely use" the area around the display. *Id.* at 547-48. *See also Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 619 n.2 (9th Cir. 1996) (standing to seek injunctive relief existed where local citizens who alleged a Latin cross on a butte in a city park prevented them from freely using the area); *Ellis v. City of La Mesa*, 990 F.3d 1518, 1523 (9th Cir. 1993) (plaintiffs who avoided public parks with Latin crosses had standing to seek injunctive relief, as did a plaintiff who declined to invite business clients to his home due to the presence of a cross on city's insignia). If a plaintiff assuming these sorts of burdens has the requisite stake to seek injunctive relief at the outset of a case (standing), a plaintiff assuming these same burdens at the time a case is adjudicated has an ongoing personal stake in the dispute (mootness).

If the Court finds that Appellants' claim for injunctive relief is moot, it would effectively prohibit future plaintiff-students facing the *Schempp* dilemma from choosing the path of avoidance once a case is filed. This would offend Establishment Clause jurisprudence by placing too significant a burden on plaintiff-students. Prohibiting plaintiffs from avoiding contact with a display once

a case has been filed would require plaintiffs to "precisely calibrat[e] their reactions [to the challenged display]" in order to maintain standing or avoid mootness. *Suhre*, 131 F.3d at 1089 (declining to place such a burden on Establishment Clause plaintiffs).

Additionally, many courts of appeals have criticized *Zielke* on the ground that plaintiffs should not be placed in the position of *having to alter their conduct* to obtain standing—doing so would effectively add an "insult" requirement to the existing "injury-in-fact" requirement. *See id.* at 1088. By extension, then, Establishment Clause plaintiffs should not be forced to repeatedly encounter a display throughout a case to maintain a sufficient personal stake to see their claims through. While an avoidance requirement would add "insult to injury-in-fact," an *avoidance prohibition* would add "injury to injury-in-fact" by forcing Establishment Clause plaintiffs to encounter the full brunt of the injury that was threatened at the outset of the litigation. *Accord Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391, 1398-99 (10th Cir. 1985) ("We do not believe principles of standing require . . . plaintiffs to remain in a hostile environment to enforce their constitutional rights."). The recognition of avoidance as its own injury-in-fact by *Schempp* and *Valley Forge* demonstrates that that such a perversion of the standing requirements is unnecessary.

For the foregoing reasons, Doe 1's ongoing avoidance of the Monument is properly characterized as an ongoing injury. This type of ongoing injury provides standing for injunctive relief if it occurs prior to the filing. By extension, it must also be sufficient to prevent a case from becoming moot. Ongoing avoidance is a continuing injury-in-fact that can be meaningfully remedied by enjoining the display of the Monument. Therefore, Appellants' claim for injunctive relief is not moot.

C. Injunctive relief would eliminate the risk of future contact with the Monument.

Appellants' continuing risk of future contact with the Monument further prevents this claim from becoming moot, even if their ongoing avoidance of the Monument does not. Appellants risk close contact with the Monument if Doe 1 decides to attend any of the vocational classes offered by the vocational school, which is located on the same campus as the VHS. Additionally, as members of the community, the individual Appellants face likely contact with the Monument because it is plainly visible from the road that individual Appellants' frequently travel.

In her declaration before the district court, Schaub attested that Doe 1 was invited to orientation regarding the Career Center. J.A. 680. The Career Center is the vocational school that is used by both the NKASD and the new district in

which Doe 1 is enrolled as a student. *Id.* The Career Center is located on the same campus as VHS and is located in an adjacent building. *Id.* Doe 1 has expressed an interest in attending classes at the Career Center, and Schaub is fearful of the contact Doe 1 will have with the Monument if Doe 1 does attend such vocational classes. *Id.*

Additionally, Doe 1 testified that Doe 1 is able to see the Monument from the adjacent road, which is situated in the community in which they reside. J.A. 687. Since they continue to reside in the community, the individual Appellants' will obviously continue to encounter the Monument when they utilize the adjacent road. The Monument was designed to look like the stone that the commandments were "written on and given to Moses," and even from the road, the prominently-placed Monument broadcasts its religious message. J.A. 32-33; 678. *See Saladin*, 812 F.2d at 691-92 (noting that a city's "smudging" of the word 'Christianity' does not prevent injury-in-fact to citizens who can equate the smudge with the actual word); *Rabun*, 698 F.2d 1098, 1108 (noting that plaintiff suffered injury-in-fact where illuminated cross in a state park was visible from the highway and porch of plaintiff's summer cabin).

The potential for future contact with the Monument—whether if Doe 1 attends classes at the Career Center or when Appellants drive by the VHS campus—renders this case similar in many respects to *Washegesic*. The plaintiff in

Washegesic was a student who had graduated by the time his case was heard on appeal. 33 F.3d at 681. The student-plaintiff in that case petitioned for the removal of a painting of Jesus, which was displayed in the high school of the Bloomingdale Public Schools. *Id.* The defendant school district argued that the Establishment Clause claim seeking injunctive relief had been rendered moot by the student-plaintiff's graduation. *Id.* The student-plaintiff responded that he would still visit the school for sporting events, dances, and other social functions, and that he would confront the painting in the hallway just the same, whether he was a student or not. *Id.*

In finding that the student-plaintiff's claim for injunctive relief was not moot, the court noted that the painting "affect[ed] students and non-students alike." *Id.* (stating "[s]tatus as a student is not necessary for standing" where this is the case). "Any parent, employee or former student who uses the school facilities and suffers actual injury would have standing to sue[, so] this case is not moot." *Id.* at 683. In reaching its decision, the court distinguished the case from *Valley Forge* and noted the significance of the fact that the student-plaintiff was a member of the community. *Id.* ("The practices of our own community may create a larger psychological wound than someplace we are just passing through.").

Similarly, the prominent display of the Monument in front of the VHS building affects all members of the community, regardless of student status. All

residents—both students and non-students alike—face continued contact with the Monument form the adjacent road. Doe 1 may yet have to return to the VHS campus to attend classes at the vocational school located on the campus. As in *Washegesic*, this potential for future contact with the Monument supports the conclusion that Appellants' claim for injunctive relief is not moot.

But this case is even clearer than *Washegesic*. Unlike the then-graduated student-plaintiff in *Washegesic*, Doe 1 is still high school-age at the time this case is being adjudicated on appeal. Beyond the potential for attendance at classes in the Career Center, Doe 1 could become a student of VHS by returning to the NKASD if her claim for injunctive relief is granted. Indeed, Schaub indicated in her declaration before the district court that she "would allow Doe 1 to attend [VHS]" in the event that the Appellants' claim for injunctive relief is granted. J.A. 680. The potential return to NKASD further supports the conclusion that the injunctive relief claim is not moot.

These facts demonstrate that Appellants' retain a personal interest in this litigation. Given that Appellants need only show that they maintain "a concrete interest, however small, in the outcome of the litigation," these risks of ongoing and future contact prevent Appellants' claim for injunctive relief from becoming moot. Regardless of Doe 1's enrollment in a neighboring school district, injunctive

relief will effectively address the ongoing risk that Appellants will have contact with the Monument.

D. An award of nominal damages for Appellants' altered conduct provides a meaningful partial remedy and protects Appellants' constitutional interests.

Even if the Court is unpersuaded by the mootness arguments in the above two sections, Appellants' case is not moot because Appellants are entitled to nominal damages arising out of the "altered conduct" they engaged in during the course of this litigation. The Supreme Court has unequivocally held that a claim remains live if a plaintiff can show the existence of "any effectual relief whatever." Here, Appellants had standing to seek an injunction to avoid the very future injury they eventually suffered while the case was pending. In a case like this, the existence of nominal damages as a partial remedy to compensate Appellants for that injury must be sufficient to prevent the case from becoming moot, even if injunctive relief is no longer appropriate.

The relief ultimately issued by a court adhering to the "any effectual relief whatever" standard for mootness may necessarily include different relief than was envisioned at the outset of a case. *See Church of Scientology*, 506 U.S. at 12-13. In *Church of Scientology*, the Church opposed an Internal Revenue Service summons for tapes of conversations between the Church and its attorneys. *Id.* at 11. The California trial court ultimately entered an order enforcing compliance of the IRS

summons. *Id.* The Church appealed and sought a stay of the trial court's order. *Id.* After denial of the appeal, the tapes at issue were produced to the IRS. *Id.* at 12. On appeal, the state appellate court "ordered the Church to show cause why its appeal should not be dismissed as moot." *Id.* at 11-12. Unsatisfied with the Church's response, the appellate court dismissed the appeal and held that the case was moot because the tapes had already been turned over to the IRS. *Id.* at 12.

The Supreme Court granted certiorari and overturned the decision, holding that even though it could not "return the parties to the *status quo ante* . . . [it could] fashion *some* form of meaningful relief in circumstances [like those in *Church of Scientology*.]" *Id.* at 12-13. The Court reasoned that even though (1) the Church had sought to stop the production of the tapes and (2) during the pendency of its appeal the tapes had been produced to the IRS, the "court [did] have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession." *Id.* at 13. The Court also noted that the IRS's unlawful receipt of the tapes was "an affront to the [Church's] privacy . . . and that despite the fact that the original relief requested could not be granted, the "interest in maintaining the privacy of the [Church] is of sufficient importance to merit constitutional protection." *Id.* Ultimately, the Court found that the availability of the alternate remedy it fashioned (a return or destruction of the tapes) prevented the case from becoming moot. *Id.*

The holding and rationale in *Church of Scientology* is easily ported to the Establishment Clause arena. It is not difficult to envision an Establishment Clause plaintiff who suffers, while the case is pending, the actual injury that the plaintiff sought to enjoin because it was impending at the outset of the case. Just as in *Church of Scientology*, the realization of that impending harm should not moot the plaintiff's claim where a court can fashion some sort of surrogate nominal remedy akin to the alternate nominal remedy obtained by the Church. In the Establishment Clause arena, such a remedy is already provided for: plaintiffs may obtain nominal damages to protect the constitutional interests that are violated in such cases.

Here, the facts warrant this same conclusion. The individual Appellants had standing to seek injunctive relief in order to avoid the impending *Schempp* dilemma. While the case was pending, the individual Appellants faced that dilemma and chose to assume special burdens to avoid daily contact with the Monument. Even if the Court is disinclined to characterize Appellants' injury as ongoing in nature (which would warrant the issuance of the requested injunctive relief), the altered conduct they undertook to avoid the Monument is an injury-in-fact compensable by an award of nominal damages. Although an award of nominal damages will not undo the harm that befell Appellants when they were forced to alter their conduct, this partial remedy still protects the Appellants constitutional interests and provides "effectual relief."

IV. Appellants have standing to seek nominal damages.

The individual Appellants' past contact with the Monument at the time the case was filed constituted sufficient injury-in-fact to confer standing to Appellants to seek nominal damages. Unlike the benchmark case of *Valley Forge*, the individual Appellants are members of the community where the Monument is displayed, and they had "direct, unwelcome contact" with the Monument before the case was filed. Appellants' unique injury-in-fact confers standing. As a result, even if the Court finds that Appellants' injunctive relief claim is moot, this claim for nominal damages remains live and supports remand to the district court for a decision on the merits.

Before reviewing the specific facts of Appellants' injury, a more precise review of how the "direct, unwelcome contact" standard has been applied is useful. While the discussion of the law on standing in Section II above establishes that "direct, unwelcome contact" is the appropriate standard, that standard can be better defined through a review of the many cases applying it.

As a number of courts have observed, *Valley Forge* demonstrates what standing is *not* rather than what it actually is. Nonetheless, where the law is somewhat unclear or unsettled, any definition is helpful, even a negative one. With that in mind, it is also useful to review the (incorrect) standard applied by the district court to further underscore what the standard is *not*.

Although the district court canvassed the law of the other circuits and concluded that this Court would apply the "direct, unwelcome contact" standard, it quickly reformulated this standard to "direct, *regular*, and unwelcome contact." Opinion, 13-14. This stricter version of the "direct, unwelcome contact" standard cited by the district is sourced to the District Court of the District of New Mexico. *Felix v. City of Bloomfield*, 36 F.Supp.3d 1233, 1239 (D. N.M. Aug. 7, 2014). Notably, the *Felix* court's insertion of the word "regular" into the standard is done without any citation whatsoever. *Id.*

A review of the district court's legal support for its subscription to *Felix*'s stricter standard reveals that both district courts erred in arriving at their conclusions that a plaintiff's "direct, unwelcome contact" must also be "regular." Before distorting the standard to include a regularity requirement, the district court incorrectly stated that "[a]ll of the cases in which standing has been found involved 'persons who are obliged to view religious displays in order to access public services, or reach their jobs,' or the like." Opinion, 13 (citing *Freedom From Religion Foundation, Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011). The court's statement transforms the narrow observation relied upon by the plaintiff in *Obama* into a wide-sweeping observation about *all* Establishment Clause cases. *See Obama*, 641 F.3d at 807 (the portion of *Obama* cited by the district court actually begins, "*Plaintiffs rely principally on a series of decisions in which* ***this***

***circuit** has held that* persons who are obliged to view religious displays in order to . . .").

Next, the district court suggests that, "[i]n other words, the contact [in all cases where standing has been found] was 'frequent and regular, not sporadic and remote.'" Opinion, 13 (citing *Vasquez*, 487 F.3d at 1252). However, *Vasquez* did not purport to establish such a standard. When the court there characterized the plaintiffs' contact in that case as "frequent and regular," it did so to distinguish *Valley Forge*, where those plaintiffs had *no* direct, unwelcome contact at all. After setting the stage for its heightened regularity requirement, the district court briefly discuss five cases it apparently suggests support its conclusion—but like *Vazquez*, none of these cases actually purport to create a heightened standard. Opinion, 13-14.

The district court then observes that "Schaub and Doe 1, by contrast, have failed to establish that they were forced to come into 'direct, regular, and unwelcome contact with the' Ten Commandments." Opinion, 14. In this statement, which includes "regular," the district court's error is apparent, and its ultimate result—dismissal of Appellants' nominal damages claim—was therefore obtained only by applying the wrong legal standard to the facts of this case.

This error was compounded by the district court's apparent reliance upon *Wall* to establish the outer limit of what is necessary for a plaintiff to establish

standing in an Establishment Clause case in this Circuit. Opinion, 14 (discussing *Wall*, the district court remarked, "[i]f *Wall* was a close question, then this case is far from it"). The problem with this obvious reliance on *Wall* is two-fold.

First, this Court's "close call" comment in *Wall* was made in reference to a 1998 holiday display that, while originally challenged by the plaintiffs, was not challenged in the appeal that came before this Court. *Wall*, 246 F.3d at 266. As a result, any discussion of that display was clearly dicta. *Id.* at 266. Second, *Wall* made clear that it did not settle the question of the appropriate standard for evaluating standing in Establishment Clause cases after *Valley Forge*. *Id.* at 265-266 Therefore, the discussion in *Wall* relied upon by the district court constitutes dicta on an issue for which no concrete standard was used by the Court. With this in mind, any reliance upon *Wall* as the proper point of reference for analyzing the facts of this case was obviously misplaced.

In reality, the proper point of reference for this case is the actual "direct, unwelcome contact" standard. Reference to the holdings in other circuits that have addressed this issue is helpful; *Wall*'s dicta is not. Under the appropriate standard, it is clear that the Appellants in this case have standing to seek nominal damages.

A. Appellants' "direct, unwelcome contact" with the Monument confers standing for a claim seeking nominal damages.

The character of Appellants' contacts with the Monument is dramatically different than that of the plaintiffs in *Valley Forge*. Unlike the plaintiffs in *Valley Forge*, both individual Appellants had *direct* contact with the Monument. Doe 1 passed directly by the Monument on a frequent basis over the course of three years when Doe 1's day care program traveled to VHS to use the swimming pool. J.A. 683. Doe 1 also attended a karate event at the VHS gymnasium. *Id.* Schaub passed directly by the Monument while attending Doe 1's karate event, and on one or two other occasions, Schaub also viewed the Monument from the VHS parking lot while dropping off her sister so that her sister could take of necessary business at the school. J.A. 670-72. The Monument is also visible from the adjacent road.[7] J.A. 687.

In contrast, the plaintiffs in *Valley Forge* never had any sort of direct contact with the alleged violation. 454 U.S. at 487. Naturally, under the "direct, unwelcome contact" standard, a plaintiff's actual direct contact with a challenged

[7] The district court discounted and did not seem to consider the contact Appellants had with the Monument from the adjacent road, suggesting that any passerby could have this sort of contact and every passerby cannot have standing to challenge the Monument. But Appellants were not out-of-town passersby; they were members of the NKASD community. Furthermore, as will be discussed below, there could be no mistaking that the Monument broadcasts its religious message if the observer is acquainted with the text of the Monument as both Appellants were.

display has been integral to findings of standing. *See, e.g.*, *Suhre*, 131 F.3d at 1086 (citing *Saladin*, 812 F.2d at 692; *Murray v. City of Austin, Tex.*, 947 F.2d 147, 151 (5th Cir. 1991); *Foremaster City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989)) (some citations omitted). *Suhre* reasoned that the "[p]laintiffs were denied standing in *Valley Forge* because they had *absolutely no personal contact with the alleged establishment of religion*." *Id.* (emphasis added).

Appellants' contacts with the Monument were precipitated by the fact that they reside in the NKASD community. Their residence in the NKASD strongly distinguishes this case from *Valley Forge*. Indeed, an Establishment Clause plaintiff's residence in the same community as a challenged display has, on a number of occasions, been materially significant in distinguishing cases from *Valley Forge*. *See, e.g.*, *Washegesic*, 33 F.3d at 683 ("The practices of our own community may create a larger psychological wound than someplace we are just passing through.") (citing *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986) (noting "[m]aybe it ought to make a difference if (as here) a plaintiff is complaining about the unlawful establishment of a religion by the city, town, or state in which he lives, rather than about such an establishment elsewhere")); *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) ("A psychological consequence . . . does constitute concrete harm where the psychological

consequence is produced by government condemnation of one's own religion or endorsement of another's *in one's own community*.") (emphasis added) (internal quotations omitted); *Suhre*, 131 F.3d at 1088 ("Plaintiffs who 'are part of the [community where challenged religious symbolism is located] and are directly affronted by the presence of [this symbolism]' certainly 'have more than an abstract interest in seeing [the government] observes the Constitution.'") (citing *Saladin*, 812 F.2d at 693)).[8]

Without looking any further at the quality and quantity of Appellants' contacts with the Monument, it is clear that these Plaintiffs are materially different from those in *Valley Forge*.[9] Appellants cannot be confused with those removed plaintiffs who claim a "generalized grievance" based upon a wholly abstract objection that the District is violating the Establishment Clause. The generalized character of the grievance raised by the plaintiffs in *Valley Forge* was at the heart of the Supreme Court's decision to deny standing to those plaintiffs. *See, e.g.*, *Suhre*, 131 F.3d at 1086 (noting *Valley Forge* clearly refused to extend standing to

[8] In this case, the overwhelming reaction by the community to support retaining the Monument further underscores the nature of the particularized injury that a plaintiff may suffer as a member of the community where a challenged display is located. *See supra*, 10-13.

[9] The district court effectively held that because Schaub did not immediately challenge the display of the Monument she is no different than the plaintiffs in *Valley Forge* ("someone who has never come into contact with the monument). For the reasons discussed above, this is simply not the case.

plaintiffs partaking of a generalized grievance out of fear that doing so "would convert the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders or turn the courts into judicial versions of college debating forums") (citing *Valley Forge*, 454 U.S. at 473). With this in mind, a finding that Appellants have standing to seek nominal damages based upon their past contact with the Monument offends neither the holding nor the reasoning in *Valley Forge*.

Presented facts so materially different from those in *Valley Forge*, this Court would need to find a benchmark other than *Valley Forge* to deny standing in this case. Such a benchmark would have to carve out these individual Appellants from the scores of plaintiffs who have obtained standing based upon their residence in a community where they suffered "direct, unwelcome contact" with a religious display. Presumably, this would be based upon some sort of quantitative or qualitative minimum, well beyond the limits recognized in *Valley Forge*, that Appellants fail to meet. Appellants, however, are unable to locate any cases in which a plaintiff who resided in the same community as a challenged display with which she had direct contact was denied Article III standing to seek nominal damages. Instead, the relevant case law reinforces Appellants' claim for standing.

In *Saladin*, for example, the Eleventh Circuit observed "[t]here is no minimum quantitative limit required to show injury." 812 F.2d at 691 (citing

United States v. SCRAP, 412 U.S. 669, 689 n.14 (1973) ("identifiable trifle" sufficient injury to establish standing)). A number of cases applying the "direct, unwelcome contact" standard confirm the lack of any quantitative limit. In *Rabun*, the Eleventh Circuit found that a plaintiff had standing where he camped three to four times each year in a state park where a challenged display was located. As in *Saladin*, the court pointed to *SCRAP* for support. *Rabun*, 698 F.2d at 1108. The court stated

> [T]he Supreme Court has made it clear that no minimum quantitative limit is required to establish injury under either a constitutional or prudential analysis: Injury in fact . . . serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem.
> . . .
> Thus, we find that [the] plaintiffs . . . have sufficiently demonstrated particular and personalized nonecomoinc injury to distinguish them from the general citizenry who may be as equally offended on a philosophical basis but who are not as specifically or perceptibly harmed, consistent with both the prior precedent defining nonecominc injures in general and the decision in *Valley Forge*, to provide them with a personal stake in the controversy.

Id. (internal quotations and citations omitted). *See also Buono*, 371 F.3d at 546 (finding standing where plaintiff visited the challenged national preserve two to four times a year on average).

Qualitatively, Schaub's contact with the Monument was clearly sufficient to cause her offense. J.A. 823-824.[10] The fact that the Monument sits on public school elevates the nature of the injury suffered by Appellants. This is so for two reasons. First, Establishment Clause jurisprudence has long viewed religious displays and exercises in the public school setting with special care. *See, e.g.*, *Stone v. Graham*, 449 U.S. 39, 42 (1980). Second, based upon the location of the Monument, anyone observing the Monument on public school grounds would realize that students are compelled to come into contact with the Monument. School attendance, even more than fulfilling civic duties or attending one's job, compels contact—school attendance is compulsory in Pennsylvania. Because of this, each time Appellants came into contact with the Monument—and likely every time they thought about it without being placed in front of it—they would know that Doe 1 would be forced to come into contact with it if she remained a student at NKASD.

Appellants' *direct* contact with the Monument here is eactly what the plaintiffs lacked in *Valley Forge*. All of Appellants' contact with the Monument

[10] The district court suggested that Schaub's "delay" in taking formal legal action seeking the removal of the Monument somehow undercut her assertions of offense in the presence of the Monument. In addition to constituting an improper assessment of Schaub's credibility, this Court has expressly rejected the idea that a plaintiff's delay in mounting an Establishment Clause challenge has any effect on the plaintiff's claim to standing. *Freethought Society*, 334 F.3d at 255 n.3 (holding plaintiff did not waive her claim to challenge display where she had first seen the display 40 years before filing suit).

was personal and sufficient to form an injury-in-fact under Article III. Even the sighting of the Monument while driving by VHS on the adjacent road constitutes a much closer connection to the display than was shown in *Valley Forge*. *See Felix*, 36 F.Supp.3d at 1238-1239 (recognizing plaintiff's driving by challenged display as contact tending to prove Article III injury-in-fact); *Saladin*, 812 F.2d at 691-92 (noting that a city's "smudging" of the word 'Christianity' does not prevent injury-in-fact to citizens who can equate the smudge with the actual word); *Rabun*, 698 F.2d 1098, 1108 (noting that plaintiff suffered injury-in-fact where illuminated cross in a state park was visible from the highway and porch of plaintiff's summer cabin).

To date, only *Valley Forge* has drawn a definitive line on the issue of physical proximity to an Establishment Clause violation. There, the Supreme Court found an abstract and general objection made from across state lines insufficient proximate contact for standing purposes. No case since has claimed to define a stricter outer boundaries on this issue.

It is simply not reasonable to extend this line so far as to include the facts of this case, especially when so many Establishment Clause claims have been recognized under the "direct, unwelcome contact" standard in similar situations. Recognizing Appellants' standing under this standard will not erode the time-tested boundaries established by Establishment Clause standing jurisprudence. The

floodgates will not open to future plaintiffs pursuing generalized grievances because Appellants' grievance is not general. Given the personal injury suffered by Plaintiffs, the district court's dismissal of Appellants' nominal damages claim must be overturned, and the case must be remanded to the district court for a decision on the merits.

CONCLUSION

Appellants' injunctive relief claim is not moot because Appellants retain an interest in the case and effectual relief can be awarded. Appellants' direct and unwelcome contact with the Monument constitutes an injury-in-fact sufficient to confer Article III standing to raise a nominal damages claim. In light of the foregoing, this Honorable Court should reverse the district court's grant of summary judgment and remand both claims for consideration on the merits.

Respectfully submitted,

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COMPLIANCE CERTIFICATIONS

I, Marcus B. Schneider, hereby certify that the following statements are true and accurate:

1. **My name appears on the brief for Appellants, and I am a member of the bar of the United States Court of Appeals for the Third Circuit.**
2. **Appellants' brief complies with the type volume limitation and contains 12,572 words as counted by Microsoft Word.**
3. **Appellants' brief was filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system on December 10, 2015. Opposing Counsel in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.**
4. **The text of the electronic version of Appellants' brief is identical to the text of the paper copies of the same.**
5. **The virus detection program Malwarebytes Anti-Malware, version 2.2.0.1024, has been run against the final PDF version of Appellants' brief prior to filing, and no virus was detected.**

The have hereby been served upon counsel of record via the appellate CM/ECF system on December 10, 2015, as follows:

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