No. 18-1487

In The Supreme Court of the United States

MERCER COUNTY BOARD OF EDUCATION; MERCER COUNTY SCHOOLS; DEBORAH S. AKERS, IN HER INDIVIDUAL CAPACITY,

Petitioners,

v.

ELIZABETH DEAL; JESSICA ROE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED

For over 75 years, the Mercer County Schools system operated a "Bible in the Schools" program through which it delivered religious instruction to its elementary and middle school students. When Elizabeth Deal, a parent of one such student and a resident of Mercer County, W.V., withheld permission for her daughter to participate in the program, the child became the target of taunts and harassment by other students. The program and the resulting harassment led Deal to transfer her daughter to a neighboring school district and to join the lawsuit at issue here. She alleged in her Complaint that she was having her daughter avoid the public schools because of the program and exposure to harassment. The Mercer County Schools system now argues that her failure to state that she would re-enroll her child in the Mercer County Schools in the event the program were discontinued deprives her of standing to seek injunctive relief.

Did the Fourth Circuit err by finding that Elizabeth Deal and her daughter have standing to seek an injunction against the Bible in the Schools program, when she alleged that she was avoiding the schools because of the program's existence but did not use the magic word of "re-enrollment"?

RELATED CASES

Freedom From Religion Found., Inc. v. Mercer Cty. Bd. of Educ., No. CV 1:17-00642, U.S. District Court for the Southern District of West Virginia. Judgment entered Nov. 14, 2017.

Deal v. Mercer Cty. Bd. of Educ., No. 17-2429, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Dec. 17, 2018.

Freedom From Religion Found., Inc. v. Mercer Cty. Bd. of Educ., No. CV 1:17-00642, U.S. District Court for the Southern District of West Virginia. Memorandum and Order on Plaintiffs' Motion for Leave to Conduct Limited Discovery entered July 31, 2019.

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STATEMENT OF THE CASE

Elizabeth Deal resides in Mercer County, W.V., and is the mother of "Jessica Roe," a child who attended elementary schools in Mercer County, W.V., from kindergarten through third grade. C.A. App. 29. Throughout Jessica's attendance, the Mercer County Schools system[1] administered weekly "Bible in the Schools" classes as a regular part of the school day. Pet'rs' App. 3a, 4a. The Bible in the Schools program presents religious messages and information in a manner that is designed to encourage students to follow Christian teachings. C.A. App. 31. The lessons could easily have been mistaken for Sunday School, covering topics such as creationism, the biblical crucifixion of Jesus, and the Ten Commandments. Pet'rs' App. 3a; C.A. App. 38–42. This program, and Deal's efforts to shield her daughter from exposure to the program, are the subject of this case.[2]

A. Facts regarding Deal's avoidance of Bible in the Schools

Deal "did not and does not want Jessica Roe to receive religious instruction from Jessica's public school." C.A. App. 33. Deal identifies as agnostic and

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[1] "Mercer County Schools system" refers collectively to the Petitioners, the Mercer County Board of Education, Deborah Akers, and Mercer County Schools.

[2] The facts presented here are taken from Deal's First Amended Complaint (C.A. App. 27), as standing is determined at the outset of the litigation. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000).

wishes to educate Jessica about multiple religions, to equip her daughter to make independent religious choices. *Id.*

Accordingly, when Deal received a slip requesting permission to allow Jessica to participate in Bible in the Schools during first grade, Deal did not sign it, even though she felt pressure to do otherwise because nearly all other students in Jessica's school attended the program. *Id.* Because Deal did not give the requisite permission, Jessica was placed in a coatroom in the back of her classroom while the Bible in the Schools program was underway. *Id.* The location, however, did not prevent the child from hearing the religious programming. *Id.*

When Deal complained to the school principal, Jessica was removed from the classroom during the religious lessons. *Id*. In the first and second grades, Jessica was placed in the library or another classroom and most often read a book to herself. C.A. App. 34. In third grade, she was sent to a computer lab, where she continued to read to herself, as she was not permitted to use the computers. *Id*. During these periods, Jessica was not given any alternative instruction. *Id*.

As a consequence of her non-participation, Jessica was harassed and excluded by other students. *Id.* This harassment included taunts that Jessica and her parents were "going to hell." *Id*. Elizabeth and Jessica felt like second-class citizens in the school community, both because of the presence of the Bible in the Schools

program and the harassment Jessica suffered as a result of her non-participation. C.A. App. 35.

Largely because of the Bible in the Schools program and the mistreatment Jessica experienced as a result of her non-participation, Deal transferred Jessica to a neighboring school district during the child's fourth grade year. *Id.* Deal "incurred, and continues to incur, additional expenses in order to send Jessica to a school outside of Mercer County." *Id.*

Shortly after switching schools, Deal joined this action, seeking injunctive relief, declaratory relief, and nominal damages for her injuries. C.A. App. 46–47.

B. District Court proceedings

The district court granted the Mercer County Schools system's motion to dismiss under Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6). Pet'rs' App. 4a–5a. The court reasoned that Deal did not have standing to seek injunctive relief because she did not definitively avow in her pleadings that Jessica would re-enroll in the Mercer County Schools if injunctive relief were granted and because Deal did not allege that Bible in the Schools was the *only* reason Deal sent Jessica to another school system. Pet'rs' App. 29a, 31a.[3] The district court also found that the Plaintiffs' claims were not ripe for review because the school system had temporarily suspended the program, Pet'rs' App. 42a, even

[3] Petitioners use the term "but for." Cert. Pet. 5. The district court's opinion, however, does not include that term.

though school officials publicly stated that they intended to reinstate the program in the future. Pet'rs' App. 44a.

In its petition for certiorari, the Mercer County Schools system relies on an edited oral argument transcript to claim that Deal's counsel admitted that Deal had not alleged that she would re-enroll Jessica in Mercer County Schools in the event the Bible in the Schools program were discontinued. Cert. Pet. 5–6. A more full recounting of the transcript paints a more accurate picture of Deal's position. As Deal's counsel stated:

> It's not realistic to, to require Elizabeth Deal to consider every possible way in which this case might be resolved to make a decision preemptively on speculative circumstances about whether Jessica would return to the district. *It's enough that she is, as it currently stands, deprived of the ability to do that without consequence in her home district.*
>
> . . . *Whether—depending upon the nature of the relief in this case, Elizabeth would make the decision to send Jessica back, I don't think any person could reasonably speculate about, you know, whether that decision would be made in a particular way given the uncertainty as to the precise nature of the relief.*

C.A. App. 287:1–288:23 (emphasis added). Thus, Deal's position was not that she would not re-enroll her child in the Mercer County Schools if the program were discontinued; it was that her re-enrollment would depend on the extent of the relief achieved.

C. The Fourth Circuit decision and subsequent proceedings

In its December 17, 2018, Opinion, the United States Court of Appeals for the Fourth Circuit found that Deal properly alleged actual, ongoing injuries that would be remedied by the requested injunction. The ongoing injuries identified by the Fourth Circuit included Deal's assumption of special burdens to avoid being subjected to unwelcome religious exercises. Pet'rs' App. 7a. In the context of this injury, the Fourth Circuit reasoned, the "opportunity" to return Jessica to her home district is a "tangible benefit" sufficient to confer standing. Pet'rs' App. 11a. The panel also concluded that the district court erred by treating the suspension of the program as an issue of ripeness rather than mootness, and that the case was not moot because Petitioners had not met their heavy burden of showing that the allegedly wrongful behavior could not reasonably be expected to recur. Pet'rs' App. 13a, 16a.

When the Mercer County Schools system requested rehearing on January 14, 2019, it shifted gears. First, although Deal had cited *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), in her opening brief on appeal (Appellants' Opening Br. 19), the school system did not rely on the case at all in the initial appeal; but in its rehearing brief, it placed the decision at the heart of its argument. Pet. for Panel Reh'g, 1, 4–5. Second, Mercer County Schools asserted that the case had become moot, not because of the system's initial decision to put a hold on the program for review, but because of a resolution that the Board had adopted

about two weeks after the panel decision. Pet. for Panel Reh'g 9–10. The Fourth Circuit denied the rehearing petition on January 28, 2019. Pet'rs' App. 47a.

On remand to the district court, the school system filed a motion to stay proceedings in anticipation of seeking a writ of certiorari from the Fourth Circuit's decision. Resp't App. 1–6. There, too, the school system did not claim that the Fourth Circuit's decision could not be reconciled with *Summers*; instead, it asserted that the Fourth Circuit's decision was inconsistent with various Circuit opinions on the issue of mootness. *Id.* at 3. The district court denied the motion to stay proceedings. Mem. Opinion and Order (May 6, 2019).

Then, on April 10, 2019, the Mercer County Schools system asked the district court to dismiss the case with prejudice. Resp't App. 7–13. It argued that the entire case was mooted by the January 3, 2019 resolution, that Deborah Akers is entitled to qualified immunity, that "Mercer County Schools" is not a final policymaking authority, and that Deal's claims are barred by the statute of limitations. *Id.*

In response, on April 24, 2019, Deal filed a motion for leave to conduct limited discovery regarding the circumstances surrounding Mercer County School's January 3 resolution and its claim that the program could not return. The district court granted the motion for limited discovery on July 31, 2019, and discovery is underway.

REASONS TO DENY THE PETITION

The Petition should be denied for several reasons. First, the case arises in an interlocutory posture. The Court will have an opportunity to address the standing question after the case concludes, so there is no pressing need to address the question now. Second, even if the Court were to conclude that Deal lacks standing to pursue injunctive relief, her claim for nominal damages would remain for resolution. Thus, the Court's review would be an academic exercise, as the case will proceed regardless. Third, the Question Presented is trivial, both because a ruling favorable to the school system would simply invite a say-the-magic-words response from litigants and because the decision would have little relevance beyond this case. Finally, the decision below does not conflict with the decisions of this Court—including *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009)—or with any decision from another Circuit.

I. The decision below is interlocutory and can be reviewed once the case concludes.

This case is currently proceeding in the district court following the reversal of the grant of Mercer County Schools' original motion to dismiss. It would thus be premature for this Court to address the case at this time.

This Court generally limits its discretionary jurisdiction to the review of final judgments. *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993)

(Scalia, J., opinion on denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction") (*citing American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893); *Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*)). Review of interlocutory decisions is disfavored. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257–58 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree.").

The case comes to this Court in a non-final posture, in light of the Fourth Circuit's conclusion that the case can proceed. Had the district court reached that same result, the interlocutory ruling would not have been appealable at all. It would have been non-final, as the case would have simply proceeded as it is proceeding now. It would not have constituted an appealable collateral ruling, *see Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009), and it would not have conclusively resolved an important question separate from the merits that would have been effectively unreviewable on appeal from a final judgment. *Id.*

The fact that it was the Fourth Circuit, rather than the district court, that ruled in favor of the plaintiffs on the standing question should not change the analysis. The Fourth Circuit's standing ruling will become reviewable by this Court after the final disposition of the case by the district court. *See Virginia Military Inst.*, 508 U.S. 946 ("Our action does not, of course, preclude VMI from raising the same issues in a later petition, after final judgment has been

rendered.") (*citing Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257–59 (1916); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365–66, n.1 (1973); R. STERN, E. GRESSMAN, & S. SHAPIRO, SUPREME COURT PRACTICE, § 4.18, pp. 224–26 (6th ed. 1986); 17 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4036, p. 32 (2d ed. 1988)).

The intermediate posture of this case makes it a flawed and tenuous vehicle to resolve the question presented. If necessary, this Court can review the Circuit's ruling when a petition comes before it following a final decision.

II. The case is a poor vehicle to address the Question Presented because it will proceed regardless of the outcome.

Mercer County Schools asks this Court to engage in an academic exercise because even if Deal lacks standing to pursue injunctive relief, she will retain standing to pursue her nominal damages claim. Accordingly, if the Court were to take the case, regardless of how the Court were to rule, the case would proceed to the merits stage.

Mercer County Schools' Question Presented asks whether the Fourth Circuit erred in concluding that Deal has "standing to seek to enjoin a school program." Cert. Pet. i. The Petition does not raise the issue of Deal's pursuit of a separate claim for nominal damages for past violations of her and her daughter's

constitutional rights.[4] That independent nominal damages claim would proceed regardless of whether her injunctive claim goes forward. *See Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003) (Finding that a nominal damages claim continued to present a live controversy despite nonjusticiable claims for injunctive and declaratory relief).

Under Supreme Court Rule 14.1, "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Because Mercer County Schools' petition is limited to the question of Deal's standing to pursue injunctive relief, her standing to pursue nominal damages is not in question here.

Thus, rather than resolving the case once and for all, a decision from this Court would simply take one form of relief off the table, allowing the balance of the case to proceed.[5] The Court's resources should not be wasted on that academic exercise.

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[4] There are also remaining state-law claims that would likewise be unaffected by any ruling from this Court on Deal's standing to pursue injunctive relief under the federal constitution.

[5] The Court's practice is to let the lower courts fashion relief before stepping in. *See Virginia Military Inst.*, 508 U.S. 946; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 436 (1975) ("Because of the particular circumstances here, however, it appears that the more prudent course is to leave to the District Court the precise fashioning of the necessary relief in the first instance."); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., concurring) ("Because no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take, I agree with the Court's decision to deny the petitions for certiorari.").

III. The Question Presented is trivial and has virtually no national implications.

The Question Presented is trivial for two independent reasons. First, it elevates form over substance, as a decision favorable to the school system would simply lead to litigants' inclusion of "magic words" in their complaints. Second, the case presents a unique set of facts that is unlikely to be replicated in other cases.

A section 1983 plaintiff like Deal need only satisfy notice pleading requirements, which means that her short and plain statement of the claim must allow a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Deal has met that standard.

Deal's complaint did precisely that: it outlined the nature of the program and stated facts showing that Deal was avoiding the program by sending her child to an out-of-district school. Conduct that avoids something necessarily conveys that one is staying away *because* of it and that one's choice calculus would be different if that something were to fall away. Thus, in cases involving religious displays, it has been enough for standing purposes when a litigant has taken steps to avoid the display. *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1113 (10th Cir. 2010); *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004); *Gonzales v. North Township*, 4 F.3d 1412, 1416 (7th Cir. 1993); *ACLU of*

Georgia v. Rabun Cty. Chamber of Commerce, Inc., 698 F.2d 1098, 1108 (11th Cir. 1983).

No Circuit has said that, in addition, a litigant must also affirmatively state that they will resume their past practice of passing by the display in the event the display were removed. And the reason is that the word "avoid" does the requisite work. This situation should be no different.

Indeed, in the context of a motion to dismiss, all justifiable inferences are to be drawn in Deal's favor. When considering a motion to dismiss for lack of standing, "reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264 (1991). Here, Deal's avoidance of the program, together with the expenses that the avoidance entails, justifies the inference that she would enroll Jessica again in Mercer County Schools if the program were enjoined.

If the Court thinks its precious time is worth making the point that certain words must be included within the four corners of a Complaint, it would invite nothing more than an editorial adjustment: litigants would simply include the magic words in their complaints. There is little reason for the Court to engage in that trivial exercise.

The Question Presented is also trivial because it arises in the context of a case with highly unique facts.

For over 70 years, the Supreme Court's ruling in *McCollum v. Board of Education*, 333 U.S. 203 (1948), has prohibited public schools from engaging in devotional religious instruction during the school day. In light of that longstanding settled law, few schools continue to engage in that conduct.

This case is even more unusual in that it involves a litigant whose daughter was harassed and who then removed the child from the offending school system to protect her from that harassment. Even narrower still, she then filed suit claiming that she took actions to avoid the school system, but neglected to include a sentence stating that she would re-enroll her child in the school system in the event the program was enjoined.

These highly unique circumstances are unlikely to re-appear in a future case. Indeed, the school system has not pointed to another circumstance like it. The Court's scarce resources should not be expended on a ruling unique to this litigant.

In sum, the Question Presented is trivial, both because it asks the Court to address a question of form rather than substance and because it involves a unique set of facts unlikely to be replicated in any other case.

IV. The decision below is correct.

A. The decision is consistent with this Court's precedents, including *Summers*.

The Fourth Circuit's conclusion—that a mother has standing to challenge a religious program that she is taking ongoing measures to avoid—is consistent with this Court's Establishment Clause jurisprudence and does not conflict with *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

The facts alleged in the First Amended Complaint establish the ongoing injuries to which the Fourth Circuit pointed—"(1) near-daily avoidance of contact with an alleged state-sponsored religious exercise[] and (2) enduring feelings of marginalization and exclusion resulting therefrom." Pet'rs' App. 8a.

These harms are more than sufficient to give Deal a personal stake in the outcome. *See Warth*, 422 U.S. at 498. In *School Dist. of Abington v. Schempp*, 374 U.S. 203, 224 n.9 (1963), for example, students and their parents had standing to challenge a school district's practice of beginning the school day with Bible readings and the Lord's Prayer. As this Court has recognized, standing existed there "because impressionable school children were subjected to unwelcome religious exercises *or* were forced to assume special burdens to avoid them." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.22 (1982) (discussing *Schempp*) (emphasis added).

Here, Deal has done both: her child has been subject to unwelcome religious exercises and she has assumed special burdens to avoid them. As her Complaint indicates, she pulled her daughter out of her local public school after years of unwanted contact with the program. Deal began her course of avoidance by resisting the pressure she felt to sign Jessica's Bible in the Schools permission slip. C.A. App. 33. When she withheld permission for her daughter to participate in the program, the school placed the child in an adjoining coatroom from which she could still hear the instruction. *Id*. Thereafter, the school placed Jessica elsewhere, by herself, to read alone. C.A. App. 33–34.

The child's marginalization worsened over time, leaving Deal and her daughter feeling like second class citizens. C.A. App. 35. Other students harassed and excluded Jessica because of her non-participation. C.A. App. 34. Students taunted Jessica, saying her family was "going to hell." *Id.* As a result, Deal removed her child from the school and has "incurred, and continues to incur" additional expenses to send Jessica to a school outside of Mercer County. C.A. App. 35. Incurring burdens to send a child to another school is the ultimate act of avoidance for a plaintiff seeking to shield her child from government-sponsored religious instruction.

Thus, Deal and her daughter "were subjected to unwelcome religious exercises [*and*] were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 487 n.22. This is a case of actual ongoing injury; it is not a case in which a plaintiff is alleging a risk of

imminent injury and supporting the allegation with vague claims of future contact with the challenged practice. The plaintiffs are suffering *actual*, not imminent, *present-day* harm. As the Fourth Circuit noted, such ongoing injury is different in kind and more easily satisfies injunctive standing than injuries that will allegedly occur in the future. Pet'rs' App. 8a.

Summers, on which the school system now heavily relies (but did not even think worth a single citation in their opening brief to the Fourth Circuit), involved the latter situation, namely, a claim of alleged future injury. There, an environmental organization based its standing on a member's assertion that he planned to visit several unnamed national forests *in the future*. *Id.* at 495. Finding these claims of potential future injury insufficient to confer standing, this Court held that there was only a small likelihood that the member's wanderings would bring him in contact with a parcel of land about to be impacted by a project unlawfully subject to the challenged regulations. *Id.* "This vague desire to return is insufficient to satisfy the requirement of imminent injury: 'Such "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.'" *Id*. at 496 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992), emphasis in original).

Here, in contrast, Deal has already been exposed to the harm and is now taking ongoing steps to avoid it. Pet'rs' App. 7a. Thus, unlike a plaintiff who may

"some day" be affected by a general federal regulation at some undefined place and time, Deal and Jessica have been—and continue to be—specifically impacted by Mercer County Schools' Bible in the Schools program.

The redressability aspect of standing supports the same result. Redressability is satisfied when a plaintiff shows that a favorable decision will relieve a discrete injury to himself. *See Larson v. Valente*, 456 U.S. 228, 242–43, n.15 (1982). "[T]he relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is *likely* to be redressed by a favorable decision." *Id.* (citations and original emphasis omitted) (emphasis added). Thus, in *Larson*, the Court declined to impose a burden on a religious organization to demonstrate that it was "certain" that striking down a portion of a solicitation statute would allow it to avoid state registration. Imposing a certainty requirement, would entail a "draconic interpretation of the redressability requirement that is justified by neither precedent nor principle." *Id.*

Here, a favorable decision would redress the actual and ongoing injury that Deal and her daughter are experiencing, which is that they are incurring special burdens to avoid the harms caused by exposure to religious instruction. As a Mercer County parent wishing to direct her child's religious upbringing, Deal faces the classic *Schempp* dilemma: allow her daughter to receive unwanted religious instruction or take action to avoid it. Deal also has a property right to send her daughter to public school in Mercer County. *Goss v.*

Lopez, 419 U.S. 565, 574 (1975) (holding that students have a constitutionally protected property interest in receiving a public education). Jessica has constructively been denied that right and an injunction would reinstate it. Accordingly, the Fourth Circuit panel rightfully determined that injunctive relief would afford Jessica an opportunity to return to Mercer County Schools, thereby redressing her injury. Pet'rs' App. 11a.

Indeed, under *Larson*, Deal need only show that an injury would *likely* be redressed by an injunction. Deal's local school is unavailable to Jessica because of the Bible in the Schools program. She incurs ongoing and future expenses to send Jessica to a different school. Deal's assumption of burdens to avoid the program constitutes an actual and ongoing injury that would be redressed by an injunction because, if the program were enjoined, Deal would no longer be forced to send Jessica to a different school system.

In sum, the Fourth Circuit's decision is entirely consistent with this Court's precedents.

B. The decision below is consistent with the decisions of the other circuits.

The Mercer County Schools system alleges that the Fourth Circuit's opinion creates a split in the circuits. Cert. Pet. 21–22. But the three out-of-circuit decisions they cite are entirely inapposite, as all of them involve speculative economic injury rather than the kind of noneconomic injury that has long been understood to give rise to standing in Establishment Clause cases. *Id.*

Circuits around the country have followed this Court's lead in holding that Establishment Clause plaintiffs have standing to seek to enjoin religious instruction in a neighborhood public school, either because they are being subjected to religious practices or are avoiding it. *Doe v. Porter*, 370 F.3d 558, 561 (6th Cir. 2004).

Indeed, the on-point cases from other circuits are consistent with, not in tension with, the decision below. The Tenth Circuit, for example, held that a plaintiff had standing to seek injunctive relief even after she transferred her children to a neighboring school district because of harassment generated by their Establishment Clause lawsuit. *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1399 (10th Cir. 1985), *abrogated on other grounds by Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 304 n.5 (1986). More recently, the Third Circuit held that a parent who chose not to enroll her child in the local high school because of a Ten Commandments monument at the school's entrance had standing to pursue the monument's removal. *Freedom from Religion Found. Inc v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 481 (3d Cir. 2016).

In sum, the Fourth Circuit's decision is consistent with the decisions of this Court and of the other circuits.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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