IN THE 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.

BRIEF OF 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

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Dated: January 8, 2016

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 15-3083

Freedom From Religion Foundation, Inc., et al.

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, New Kensington-Arnold School District (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: Not applicable

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

Not applicable

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:

Not applicable

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.

Not applicable

s/Anthony G. Sanchez, Esq. Dated: 9-3-15

(Signature of Counsel or Party)

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STATEMENT OF THE ISSUES FOR REVIEW

I. Whether, in a First Amendment Establishment Clause case attacking a monument located on the grounds of a high school, the lower court correctly ruled that the mother of a child who did not attend the high school did not have standing when the mother had only once, several years before the filing of the lawsuit, passed the monument, only saw the monument out of the corner of her eye, and thought nothing more about it and kept on walking?

II. Whether, in a First Amendment Establishment Clause case attacking a monument located on the grounds of a high school, the lower court correctly ruled that a child lacked standing when the child never attended school at the high school, had ignored and not paid any attention to the monument on the few occasions she had passed it, and never testified that she found contact with the monument unwelcome or that she was in anyway offended by the monument?

III. Whether the lower court correctly ruled that a party must have standing at the time the lawsuit is filed and cannot attempt to manufacture standing later in the lawsuit?

IV. Whether, in a case in which the lower court granted summary judgment based on a finding that the remaining plaintiffs lacked standing, the remaining plaintiffs waived the issue that their conduct after the filing of the lawsuit created standing to pursue injunctive relief when the plaintiffs did not raise or argue that issue in their summary judgment motion or briefs?

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases and proceedings. The lower court in the present case entered summary judgment based on a lack of standing. The case cited by Appellants, Freedom From Religion Foundation, Inc. v. Connellsville Area Sch. Dist., No. 2-12-cv-1406, 2015 WL 5093314 (W.D. Pa. Aug. 28, 2015), did not involve an issue of standing, and, therefore, is not related to this case on appeal.

STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

The present case is an appeal from a lower court order granting summary judgment based on a lack of standing. The appellate court exercises de novo review over the lower court's legal conclusions related to standing and reviews the factual elements underlying that determination for clear error. Perelman v. Perelman, 793 F.3d 368, 373 (3d Cir. 2015).

STATEMENT OF THE CASE

Procedural History

The present action was filed against Appellee, New Kensington Arnold School District ("NKASD") raising a First Amendment Establishment Clause attack against a monument donated by the Fraternal Order of Eagles ("FOE") that has sat on the lawn of Valley High School in the school district for almost 55 years without complaint. Originally, the plaintiffs in the lawsuit were Appellant Freedom From

Religion Foundation ("FFRF"), Appellant Marie Schaub ("Schaub"), Appellant Doe 1, the daughter of Schaub, and two relatives of Schaub, Doe 2, a student at the high school at the time the lawsuit was filed, and Doe 3, the parent of Doe 2. (District Court Docket Sheet, entry 1, JA 877) Doe 2 and Doe 3, however, were subsequently voluntarily dismissed from this lawsuit with prejudice. (District Court Docket Sheet, entry 44, JA 882)

Following the close of discovery, the parties filed cross Motions for Summary Judgment. FFRF, Schaub and Doe 1 argued in their Motion and Brief that the Monument violated the Establishment Clause of the First Amendment. In its Brief in Opposition to Appellants' Motion, and in its own Motion for Summary Judgment and supporting Brief, NKASD argued that the Monument did not violate the Establishment Clause. NKASD further argued that FFRF, Schaub and Doe 1 lacked standing. In their Brief in Opposition to NKASD's Motion for Summary Judgment, FFRF, Schaub and Doe 1 argued that they did have standing. FFRF, Schaub and Doe 1 never argued, in either its Motion for Summary Judgment or supporting Brief, or in its Brief in Opposition to NKASD's Motion for Summary Judgment that the decision by FFRF and Schaub, made after the close of discovery, to withdraw Doe 1 from the school district gave Appellants standing to pursue injunctive relief.

The lower court ruled that FFRF, Schaub and Doe 1 lacked standing and granted summary judgment on that basis. The lower court did not address the issue

of whether the Monument violated the Establishment Clause. FFRF, Schaub and Doe 1 appealed the order granting summary judgment.

Statement of Facts

Since the 1950s, the Fraternal Order of Eagles ("FOE") has donated hundreds of monuments to counties, municipalities and other government entities across the United States. Card v. City of Everett, 520 F.3d 1009, 1013 (9th Cir. 2008). The monuments were paid for and distributed by the FOE through its local chapters, known as Aeries, throughout the country. (Affidavit of E.J. Ruegemer, ¶4, JA 793) The monuments are a rectangular shaped stone slab. Prominent on these monuments (hereinafter the "FOE Monument" or "FOE Ten Commandments Monument") is an inscription of one version of the Ten Commandments. These monuments also feature tablets with Hebrew or Phoenician letters; a floral motif; the Masonic "all seeing eye," familiar from the back of the dollar bill; a bald eagle grasping an American Flag in its talons; the Chi-Rho symbol; and two Stars of David. At the bottom of the FOE monuments is an inscription stating that the monument was donated by the local FOE. (Photograph of FOE Monument, JA 33) These FOE Ten Commandments Monuments, with their plethora of symbols, have been determined by the courts to be "a mélange of civil, political, cultural and religious meanings." State v. Freedom From Religion Found., Inc., 898 P.2d 1013, 1018 (Colo. 1995).

The FOE monument donation program arose out of an idea by E.J. Ruegemer, chairman of the FOE's Youth Guidance Committee and also a judge in Minnesota, who believed, based on his experiences with troubled youths as a juvenile court judge, that these youths could benefit from exposure to a code of conduct such as the Ten Commandments, not as "religious instruction of any kind, but to show these youngsters that there were such recognized codes of behavior to guide and help them." (Ruegemer, ¶2-3, JA 792-793)

As these FOE monuments dot the landscape throughout the United States, they have been the subject of several legal challenges. The United States Supreme Court has twice found that the FOE Monuments pass Constitutional muster. See, Van Orden v. Perry, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005), and Pleasant Grove v. Summum, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009).

In 1957, when NKASD was constructing Valley High School, the local Aerie of the FOE donated one of its Ten Commandment Monuments to NKASD. (Deposition of George Batterson, pages 37-38, JA 806-807) NKASD placed the FOE monument in a somewhat isolated location, not by the main student entrance of the school, but on the lawn in the vicinity of a walkway leading to a side entrance to the gymnasium. (Batterson, 9, JA 798) The area where the FOE monument is located is not well lit. (Deposition of John Pallone, page 44, JA 844; Deposition of

Marie Schaub, page 80, JA 818) The closest someone passing along the walkway could get to the FOE monument is about 15 feet. (Schaub, 80, JA 818)

The FOE monument sat inconspicuously in that location without incident or complaint for approximately 55 years. Based on the evidence of record, many students did not notice the FOE Monument or realize what it was. (J. Pallone, 11-12, JA 841-842; Deposition of Robert Pallone, pages 18, 105-106, JA 852-853; Affidavit of Jennifer Retter, ¶3, JA 866) Students who did notice the FOE Monument either ignored it or, if they did take the time to examine the Monument, were not in any way offended by it and voiced no objection to it. (Affidavit of David Jack, ¶¶3-6, JA 870-871; Affidavit of Johanna Jack, ¶¶3, 4, JA 873; Affidavit of Mark Licata, ¶¶3-5, JA 869; Affidavit of Robert Sauro, ¶¶3-5, JA 874; Affidavit of Jennifer Retter, ¶4, JA 866; Affidavit of Sonny Zampogna, ¶¶3-4, JA 867; Affidavit of Dante Cicconi, ¶¶3-4, JA 868; Affidavit of Mark Lukac, ¶¶3-4, JA 872)

In late March 2012, NKASD received a letter from FFRF, dated March 20, 2012, demanding that the FOE monument be removed. (Batterson, 11-12, JA 800-801) FFRF admits that it was made aware of the FOE Monument by a person who was not a student in the school district and did not live in the school district. (Declaration of Rebecca Market, ¶2, JA 121) There is no dispute that the FFRF letter was the first complaint or objection that NKASD ever received regarding the FOE

monument in the 55 years that the monument sat on the lawn of the high school. (Batterson, 16, JA 802; J. Pallone, 54, JA 845)

When NKASD refused to remove the FOE Monument, FFRF filed the underlying lawsuit, claiming that the FOE Monument violates the Establishment Clause of the First Amendment. FFRF enlisted as a plaintiff in the lawsuit Appellant Schaub, who also included her daughter, Appellant Doe 1, in the lawsuit. Schaub's last encounter with the FOE Monument had been four or five years prior to the filing of the lawsuit. Schaub testified that she hadn't been to the high school in years. (Schaub, 82, JA 819) Schaub had been to the school only a handful of times and chanced upon the FOE Monument on only three occasions, two of which involved dropping her sister off at the school. (Schaub, 32, 52, 77-78, JA 813, 814, 816-817) When she dropped off her sister, Schaub didn't walk past the FOE Monument, she parked her car and let her sister out. (Schaub, 83-85, JA 820-822)

The other occasion occurred in 2007 or 2008 when Schaub went to the school to attend a karate event that Doe 1 was participating in. (Schaub, 53, JA 815) Doe 1 had gone to the event with her grandparents. (Schaub, 53, JA 815) When Schaub walked past the FOE Monument to enter the school, she didn't stop to examine or read any of the Monument. (Schaub, 91, JA 823) She only saw the words "I am the Lord Thy God," which she claims made her feel sick, and kept on walking. (Schaub, 92, JA 824) Schaub admitted that she didn't think about whether the presence of the

FOE Monument on school grounds was an improper endorsement of religion. (Schaub, 95, JA 827) Nor did Schaub ever testify that when she saw the FOE Monument that she felt she was being pressured to believe in religion or that it made her feel excluded or ostracized. Schaub described her encounter as follows: "I kind of looked at it out of the corner of my eye, didn't really think too much about it and I just kept on walking." (Schaub, 95, JA 827)

Schaub was not a member of FFRF when the March 2012 letter was sent, or when the lawsuit was filed. Schaub has never joined FFRF. Rather, sometime in 2014, Dan Barker, the co-president of FFRF, gifted to Schaub a one-year membership that will expire in 2015. (Schaub, 132, 145, JA 834,835)

Doe 1 has never been a member of FFRF. (Deposition of Doe 1, 22-23, JA 863-864) Doe 1 was not a student at the high school when this lawsuit was filed and has never been a student at the high school. (Doe 1, 25, JA 865) She did, however, pass by the FOE monument on occasion to attend events that were not school functions, such as a the above-referenced karate tournament, that were held at the high school. Typical of many people, Doe 1 never paid any attention to the FOE Monument. She testified, "I just didn't really pay attention to it. I was just kind of ignoring it because I really didn't care about it." (Doe 1, 11, JA 860) As she has never read the Monument or paid any attention to it, she would have nothing to say about it. (Doe 1, 11, JA 860) Doe 1 has never looked at the Monument itself, and

only looked at a picture of the Monument because Schaub, her mother, brought it to her attention. (Doe 1, 11-12, 15, JA 860-861, 862) Doe 1's understanding was that her mother wanted the FOE Monument taken down "because it was like religion and state put together or something." (Doe 1, 12, JA 861) Doe 1 never testified that an encounter with the FOE Monument has or would be unwelcome for her. Doe 1 never testified that she was in any way offended by the FOE Monument, and she never testified that the FOE Monument made her feel ostracized for not believing in God or religion. To the contrary, Doe 1 testified that she didn't feel anything in particular at the times when she saw the monument, (Doe 1, 22, JA 863); and that the monument does not make her feel like she has to believe in God. (Doe 1, 23, JA 864)

Concerned that the facts would establish that Schaub and Doe 1 lacked standing, FFRF and Schaub asked Doe 2 and Doe 3, Schaub's relatives, to be plaintiffs in the lawsuit. Doe 2 was a student in the high school at the time, and Doe 3 was Doe 2's parent. Schaub stated in a Facebook post, "My relative's child is in the high school now but mine is in the middle school . . . that's why I asked them to join so they couldn't say the case isn't mature. . . [E]ven if they said that MY child isn't affected by having my relative who has kid in the high school NOW, they can't stop the suit." (Schaub deposition exhibit 15, JA 760) Doe 2 and Doe 3, however, were subsequently voluntarily dismissed from this lawsuit with prejudice. (District Court Docket Sheet, entry 44, JA 882)

Doe 1 was still a student in the middle school at the time of her and Schaub's depositions. Doe 1 was scheduled to begin attending school at Valley High School the following August. Schaub never indicated in her deposition that she would not permit Doe 1 to attend school at the high school because of the presence of the FOE Monument. Rather, Schaub testified that she intended for Doe 1 to attend school at the high school. (Schaub, 119, JA 757) Also, Doe 1 never testified that she did not want to attend school at the high school because of the FOE Monument. Rather, she too testified that she would be a student at the high school the following August. (Doe 1, 25, JA 865)

Similarly, neither Schaub or Doe 1 ever testified at their depositions that they had ever taken any steps to avoid the FOE Monument, or that either of them had ever refused to attend any type of function at the high school because they didn't want to encounter the Monument. Further, Schaub never testified that she prohibited Doe 1 from attending any functions at the high school because she did not want Doe 1 exposed to the FOE Monument. Nor did Doe 1 ever testify that she decided not to attend any function at the high school because she did not want to be exposed to the FOE Monument. Rather, in May 2014, while this lawsuit was pending and approximately a month after the depositions, Doe 1 attended an eighth grade dinner dance held at the high school. (Schaub, 63, JA 754) Schaub allowed Doe 1 to attend

the dinner dance even though she believed that there was no way that Doe 1 could attend the dance without passing the FOE Monument. (Schaub, 65; JA755)

At the conclusion of discovery, the parties filed cross Motions for Summary Judgment. In their Motion and Briefs, Appellants revealed for the first time that Schaub had withdrawn Doe 1 from NKASD and sent her to a private high school. Appellants claimed that the costs and burdens incurred by sending Doe 1 to a private school were sufficient to confer standing on Appellants. The lower court disagreed, finding that Appellants lacked standing and granting summary judgment to NKASD on that basis.[1] Appellants have appealed the Order granting summary judgment, whereby this matter comes before this Honorable Court.

SUMMARY OF ARGUMENT

Standing is a jurisdictional requirement. A plaintiff must have standing both at the time the lawsuit is filed and throughout the life of the lawsuit. To have standing, a plaintiff must have sustained an injury that is both concrete, meaning that the injury is real, distinct and palpable; and particularized, meaning that the injury

[1] In its Motion for Summary Judgment, NKASD also raised the issue that, based on prior case law, including decisions of the United States Supreme Court, the FOE Ten Commandments Monument did not violate the First Amendment, while Appellants claimed in their Motion that the Monument did violate the First Amendment. As the lower court found that Appellants lacked standing and granted summary judgment on that basis, the lower court never addressed the issue of whether the Monument violated the First Amendment, nor have Appellants raised that issue on appeal.

has affected the plaintiff in a personal and individual way. As applied to Establishment Clause challenges, Courts have held that to have an injury sufficient to confer standing, a plaintiff cannot merely be a member of the community who is offended by the challenged display, the plaintiff must also come into contact with the challenged display as part of her regular, normal routine.

None of the Appellants in the present case meet this standard. Schaub encountered the challenged FOE Monument on only three occasions. All three occurred years before the lawsuit was filed. On two of those occasions, she didn't actually pass by the Monument, it was only within her sight from the parking lot where she had dropped off her sister. Schaub testified that on the one occasion that she actually walked past the Monument, she only saw it out of the corner of her eye. Schaub admitted she never thought or considered at that time that the presence of the Monument on school grounds was inappropriate. She never testified that passing the Monument made her feel that NKASD was sending a message about the religious beliefs she should hold, or that it made her feel excluded or ostracized. Rather, Schaub testified that she "kind of looked at it out of the corner of my eye, didn't really think too much about and I just kept on walking." That is not sufficient to confer standing.

Doe 1 was not a student at the high school at the time the lawsuit was filed and has never been a student at the high school. She passed the FOE Monument on

a few infrequent occasions while attending functions held at the high school. She testified, however, that she ignored the Monument and paid no attention to it. She didn't notice the Monument until Schaub, her mother, brought it to her attention. Even then, Doe 1 didn't look at the Monument itself, she only looked at a picture of it. Doe 1 never testified that the Monument offended her in anyway, or that contact with the Monument was or would be unwelcomed. She did clearly state that the Monument did not make her believe that she had to believe in God. Consequently, Doe 1 has not suffered any type of injury and does not have standing.

FFRF bases its standing on that of Schaub, its member. As Schaub does not have standing, FFRF also does not have standing. Additionally, the facts uncovered during discovery establish that Schaub was not a member of FFRF at the time this lawsuit was filed.

Any costs or burdens incurred as a result of the decision by FFRF and Schaub, made sometime after the close of discovery, to withdraw Doe 1 from the school district, did not confer standing on Appellants to pursue injunctive relief. Standing is a prerequisite for jurisdiction. Therefore, a plaintiff must have standing at the time the lawsuit is filed and cannot manufacture standing later. As the facts uncovered during discovery established that Appellants lacked standing at the time the lawsuit was filed, the lower court lacked jurisdiction to provide injunctive or any relief.

Additionally, Appellants claimed that withdrawing Doe 1 from the school district was necessary to protect her from unwelcome contact with the Monument. This argument is contradicted by the facts of record uncovered during discovery. Doe 1 never testified that any of her prior encounters with the Monument were unwelcomed or that any future encounter with the Monument would be unwelcome, or that she did not want to attend school at the high school so as to avoid the Monument. Conversely, both Schaub and Doe 1 testified at their depositions Doe 1 intended to attend school at the high school the following August. Appellants cannot deny that in May 2014, after this lawsuit was filed and after the depositions, Doe 1 attended an eighth grade dinner dance at the high school. Schaub was so unconcerned about contact with the Monument being unwelcome that she permitted Doe 1 to attend the dinner dance even though Schaub believed Doe 1 would have to encounter the Monument when she went to the dance. If contact with the FOE Monument was not so unwelcome as to prevent Doe 1 from attending a dinner dance at the high school, Appellants cannot now claim that contact with the Monument was so unwelcome that Doe 1could not attend classes at the high school. A party cannot manufacture standing by voluntarily incurring unnecessary costs or burdens after the lawsuit was filed.

Appellants have also waived any argument that withdrawing Doe 1 from the school district conferred standing to pursue injunctive relief. Appellants never raised

that argument during the summary judgment stage. The phrase "injunctive relief" does not appear anywhere in either Appellants' Brief in Support of their Motion or Brief in Opposition to NKASD's Motion. As the argument was not made in the lower court, it is waived on appeal.

ARGUMENT

I. THE LOWER COURT CORRECTLY CONCLUDED THAT NONE OF THE APPELLANTS SUSTAINED A CONCRETE PARTICULARIZED INJURY THAT IS NECESSARY TO CONFER STANDING.

A. The Requirements of Standing

The standing requirement is an integral part of the governmental charter for the Federal court system established by Article III of the Constitution. ACLU-NJ v. Township of Wall, 246 F.3d 258, 261 (3d Cir. 2001). "Article III of the Constitution limits the judicial power of the United States to the resolution of 'Cases' and 'Controversies,' and 'Article III standing ... enforces the Constitution's case-or-controversy requirement.' 'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 597-98, 127 S. Ct. 2553, 2562, 168 L. Ed. 2d 424 (2007), (citations omitted). Thus, if a plaintiff lacks standing, the court will lack subject matter jurisdiction. Wall, 246 F.3d at 261. See also, Public Interest Research Grp. of

New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 117 (3d Cir. 1997), ("Standing is a threshold jurisdictional requirement, derived from the 'case or controversy' language of Article III of the Constitution."), (citing, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471–73, 102 S.Ct. 752, 757–59, 70 L.Ed.2d 700 (1982)).

The plaintiff has the burden of proving standing. Wall, 246 F.3d at 261. To do so, the plaintiff must meet certain specific requirements.

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it 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, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000).

> Each of these definitional strands imposes unique constitutional requirements. An injury is 'concrete' if it is 'real,' or 'distinct and palpable, as opposed to merely abstract,' while an injury is sufficiently 'particularized' if it 'affect[s] the plaintiff in a personal and individual way.'

Tri-Realty Co. v. Ursinus Coll., No. CV 11-5885, 2015 WL 5013729, at *11 (E.D. Pa. Aug. 24, 2015), (quoting New Jersey Physicians, Inc. v. President of U.S., 653 F.3d 234, 238 (3d Cir. 2011)).

Thus, in an Establishment Clause case, being offended by the challenged display or conduct is not a concrete and particularized injury that will confer standing

because such an injury is not distinct or palpable and does not affect the plaintiff in a personal or individual way. In Valley Forge, the Supreme Court explained that such a psychological injury is insufficient to confer standing.

> They fail to identify any 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. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Valley Forge, 102 S.Ct. at 765-66, (Court's italics).

The reasoning in Valley Forge was applied in Freedom From Religion Found., Inc. v. Zielke, 845 F.2d 1463 (7th Cir. 1988), a case that involved another FFRF challenge to an FOE monument, this one located in a city park known as Cameron Park, in La Crosse, Wisconsin. In their Brief in the present case, Appellants create the straw man that the court in Zielke held that standing can *only* arise when a plaintiff has somehow altered her conduct as a result of the challenged display, and then attack Zielke as incorrectly applying the holding in Valley Forge. (Appellants' Brief, pages 21-22) A close reading of Zielke undermines Appellants' claim and establishes that Zielke conforms to Supreme Court precedent and the decisions of other Circuits on the type of injury that is needed to confer standing.

In Zielke, Phyllis Grams was an individual plaintiff /appellant and a resident of La Crosse. Grams did not encounter the FOE Monument in the course of her normal routine. Rather, Grams deliberately went to view the monument after a friend brought it to her attention. Zielke, 845 F.2d at 1466. Grams testified that when she viewed the FOE Monument, "she was offended by the display because she viewed it as a message from the city about the religious beliefs that private citizens should hold. Grams was sufficiently offended by the Ten Commandments monument that she complained about it to the Common Council of La Crosse." Zielke, 845 F.2d at 1466.

The Court in Zielke held that the injury claimed by Grams was insufficient to confer standing. Because Grams did not regularly encounter the FOE monument as part of her normal routine, she was only in the position of someone who felt offended by the challenged display, which was the very type of non-economic psychological injury that Valley Forge held was insufficient to confer standing. Therefore, Grams needed to have done something more, she needed to have altered her conduct as a result of the monument, to have the type of injury sufficient to confer standing. Zielke, 845 F.2d at 1467, 1468. Without such a concrete injury, Grams' only claim to standing was that she was offended by the monument and was a member of the community in which the monument was located. Such facts, however, do not result in the particularized injury needed to confer standing.

> Although Grams lives in the City of La Crosse, the appellants did not demonstrate that she lives anywhere near Cameron Park, that the monument is visible in the course of her normal routine, or that her usual driving or walking routes take her past the park. The appellants also failed to establish that Grams suffered any injury simply because of her close proximity to the monument.

Zielke, 845 F.2d at 1469.

The requirement, that the plaintiff suffered a concrete and particularized injury to herself and that standing cannot be obtained by raising a psychic injury generally available to any member of the community, is consistent with numerous Supreme Court decisions.

> By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107, 118 S. Ct. 1003, 1019, 140 L. Ed. 2d 210 (1998), (citing, among other cases, Valley Forge, 102 S.Ct. at 763-65). See also, Hollingsworth v. Perry, 133 S. Ct. 2652, 2662, 186 L. Ed. 2d 768 (2013), ("A litigant 'raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.'"), (citation omitted); Lance v. Coffman, 549 U.S. 437, 440,

127 S. Ct. 1194, 1197, 167 L. Ed. 2d 29 (2007), ("To have standing, we observed, a plaintiff must have more than 'a general interest common to all members of the public.'"), (citation omitted); American Civil Liberties Union of Illinois v. City of St. Charles, 794 F.2d 265, 268 (7th Cir. 1986), (that plaintiffs were deeply offended by a display on public property is not sufficient to confer standing "for it is not by itself a fact that distinguishes them from anyone else in the United States who disapproves of such displays. To be made indignant by knowing that government is doing something of which one violently disapproves is not the kind of injury that can support a federal suit."); and Freedom From Religion Found., Inc. v. Obama, 641 F.3d 803, 807-08 (7th Cir. 2011), (where plaintiffs' only claim to standing was feeling offended at the behavior of the government and plaintiffs "have not altered their conduct one whit or incurred any cost in time or money," plaintiffs lacked standing because "unless all limits on standing are to be abandoned, a feeling of alienation cannot suffice as injury in fact.")

Courts have "emphasized repeatedly" that the injury necessary to confer standing "must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is 'distinct and palpable.'" Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717, 1723, 109 L. Ed. 2d 135 (1990), (citation omitted). See also, Summers v. Earth Island Inst., 555 U.S. 488,

497, 129 S. Ct. 1142, 1151, 173 L. Ed. 2d 1 (2009), ("[T]he party bringing suit must show that the action injures him in a concrete and personal way.")

To have standing then, a plaintiff cannot simply be a member of the community offended by the challenged display; to have sustained a concrete and particularized injury, the plaintiff must have, in the course of her normal routine, come into regular or continuing contact with the challenged display. Whether the plaintiff has standing "depends on the directness of the harm," and a plaintiff who "has continuing direct contact with the object at issue" will have standing as in that situation, the plaintiff's "grievance is not remote, vicarious or generalized as in Valley Forge." Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679, 682-83 (6th Cir. 1994). A plaintiff will also have standing when the plaintiff is not only a member of the community, but also "his contact with the symbol was frequent and regular, not sporadic and remote." Vasquez v. Los Angeles Cty., 487 F.3d 1246, 1252 (9th Cir. 2007). Similarly, children in schools where a Bible reading and prayer started each school day had standing to challenge the state law that mandated such a practice. School District of Abington v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 1572-73, n.9, 10 L.Ed.2d 844 (1963). See also, Foremaster v. City of St. George, 882 F.2d 1485, 1491 (10th Cir. 1989), (where plaintiff was "directly confronted by the [challenged symbol] on a daily basis," plaintiff's contact was pervasive and conferred standing).

Applying these well-established standards to the present case confirms that the district court correctly concluded that none of the Appellants had standing.

B. Schaub does not have standing as she testified she only walked past the FOE monument on one occasion, saw it out of the corner of her eye, thought nothing more of it and kept on walking.

The facts of record uncovered during discovery establish that Schaub has no basis to assert standing. Schaub is not now and has never been a student attending Valley High School. She encountered the FOE Monument on only three occasions, all of which occurred years before this lawsuit was filed. Schaub admitted that she hadn't been to the high school in years. (Schaub, 82, JA 819) Of those three occasions, she passed by the FOE Monument only once; on the other two occasions, the FOE Monument may have been visible to her when she parked her car to drop off her sister at the high school. (Schaub, 32, 52, 77-78, 83-85, JA 813, 814, 816-817) Thus, consistent with the cases cited above, Schaub has not had the frequent, regular contact with the FOE Monument necessary to create the concrete, particularized injury sufficient to confer standing.

Further, Schaub cannot even claim that the FOE Monument caused her any type of injury on the one occasion that she did pass by it. Schaub admitted that she never actually looked at or read the FOE Monument. Rather, she testified that she saw, apparently out of the corner of her eye, the words, "I am the Lord Thy God," and that those words somehow made her stomach upset. (Schaub, 92, JA 824)

Schaub admitted, however, that she just kept on walking. She did not stop to examine the FOE Monument or view the other words or symbols inscribed on it, or the inscription stating it had been donated by the FOE. She did not consider the context of the FOE Monument. Nor did she testify that she thought about, considered or believed that the FOE Monument's presence on school grounds was an attempt by NKASD to pressure students or others into believing in any religion or God. To the contrary, Schaub testified that, "I kind of looked at it out of the corner of my eye, didn't really think too much about it and I just kept on walking." (Schaub, 95) Schaub did not complain to NKASD about the FOE Monument. The only complaint Schaub made about the FOE Monument prior to this lawsuit was an online complaint form she filled out on the FFRF website; that complaint was not made, however, until after FFRF had sent its March 2012 letter to NKASD which initiated this dispute.

Thus, Schaub has an even fainter claim to standing than did Grams in Zielke. Like Grams in Zielke, Schaub in the present case did not encounter the FOE Monument on a regular basis. After Grams saw the FOE monument in Zielke, however, she at least went to the city and complained. Unlike Grams in Zielke, after passing by the FOE Monument, Schaub never complained to NKASD that she was offended by the presence of the Monument, that she felt that the Monument's presence on government grounds was improper, or that she viewed the Monument

as a message from NKASD about the religious beliefs that students or other private citizens should hold. She never considered or thought about any of those things. Rather, based on her own testimony, after Schaub saw the monument, she "didn't think too much about it" and "just kept on walking." A person who sees a challenged display out of the corner of her eye, and then just keeps on walking and thinks nothing more of it has not sustained the concrete and particularized injury necessary to confer standing. See also, Wall, 246 F.3d at 266 (while court could assume that plaintiffs disagreed with holiday display for some reason, court could not assume that they suffered the type of injury that would confer standing).

Appellants attempt to argue that Schaub has standing because she is not only a member of the community, but she can also see the FOE Monument when she drives by the high school. (Appellants' Brief, 32-33) To support this argument, Appellants refer to cases such as Buono v. Norton, 371 F.3d 543 (9th Cir. 2004); Separation of Church & State Comm. v. City of Eugene, 93 F.3d 617 (9th Cir. 1996); and Ellis v. City of La Mesa, 990 F.2d 1518 (9th Cir. 1993). Unlike in the present case, however, in those cases the challenged displays were in public parks and in the shape of a crucifix or Latin cross. Buono, 371 F.3d at 546; City of Eugene, 93 F.3d at 619; Ellis, 990 F.2d at 1520. Thus, what led to the challenge to the displays in those cases was the religious symbolism inherent in their shape. In the present case, the FOE Monument is a rectangular stone slab. (JA 33) There is no religious

symbolism inherent in the shape of the FOE Monument, nor do Appellants base their attack on the FOE Monument on its shape. Rather, the basis of Appellants attack is a portion of the written words that are inscribed on the FOE Monument. Though Schaub claims to have extraordinary eyesight, even she does not claim that she can read the inscriptions on the FOE Monument while driving past the high school.

The cases cited by Appellants are also distinguishable because in those cases the challenged displays prevented plaintiffs from freely using the park areas around the displays since they avoided those areas due to the offense they felt at the religious symbolism inherent in the displays. Buono, 371 F.3d at 547-48; City of Eugene, 93 F.3d at 619; Ellis, 990 F.2d at 1523. In the present case, Schaub never, in either her deposition testimony or in any of her discovery responses, stated that she refused to make use of or attend any functions at the high school because of the FOE Monument, or that she ever took any steps to avoid the high school in general or the FOE Monument in particular. She was so unconcerned about the display that, even after this lawsuit was filed and even after her deposition, she allowed her daughter to attend a dinner dance at the high school even though she believed her daughter would have to encounter the FOE Monument to do so. (Schaub, 63, 65, JA 754, 755)

Prior to the start of this controversy, Schaub had passed by the FOE Monument only once, and had thought nothing more of it. That is not sufficient to confer standing.[2]

C. Doe 1 lacks standing as she passed by the FOE Monument on only a few occasions, and never testified that any of those occasions were unwelcome, or that she in any way found the FOE Monument to be offensive.

Doe 1 was not a student at the high school at the time this lawsuit was filed, nor has she ever been a student at the high school. While she did attend some events at the high school before this lawsuit was filed, based on the record, those occasions were irregular and infrequent. Most importantly, Doe 1 never testified that she suffered any actual physical or even psychological injury caused by the FOE Monument. Doe 1 never testified that her contact with the FOE Monument, on any of those occasions when she did pass by it, was unwelcome. She never testified that she was offended in any way by the FOE Monument or that the Monument made her feel excluded or isolated.

To the contrary, Doe 1's deposition testimony establishes that she was not at all offended by the FOE Monument. On the infrequent occasions when Doe 1 passed by the FOE Monument, her reaction was typical of many others who encountered

[2] During the summary judgment proceedings, Appellants made no attempt to argue that Schaub had standing based on her status as a taxpayer in the school district, nor have they raised that issue on appeal.

the Monument: she ignored it and paid no attention to it. Doe 1 testified that, "I just didn't really pay attention to it. I was just kind of ignoring it because I really didn't care about it." (Doe 1, 11, JA 860) Because she has never read the monument or paid any attention to it, she would have nothing to say about it. (Doe 1, 11, JA 860)

Doe testified that she only took note of the FOE Monument because her mother, Schaub, brought it to her attention when she became embroiled along with FFRF in this dispute; even then, Doe 1 never took the time to examine the FOE Monument itself, she merely looked at a picture of it. (Doe 1, 11-12, 15, JA 860-861, 862) Doe 1 did not testify, however, that looking at a picture of the FOE Monument caused her to feel offended in anyway by the presence of the Monument at the high school.[3] Rather, Doe 1's testimony was that she didn't feel anything in particular at the times when she saw the monument (Doe 1, 22, JA 863). The closest Doe 1 came to claiming any offense was her equivocal statement that because of the Monument's presence at the high school, "they kind of want you to be that way"; however, she clearly and directly stated that the Monument did not make her "feel like I have to believe in God." (Doe 1, 23, JA 864)

[3] Even if looking at a picture of the FOE Monument had somehow offended Doe 1 that would not have been sufficient to confer standing. See, Wall, 246 F.3d at 266, (where plaintiff testified that he went to municipal building and observed township's 1999 holiday display, but the record was unclear as to whether he did so in order to describe the display for this litigation or whether, for example, he observed the display in the course of satisfying a civic obligation at the municipal building, plaintiff's evidence failed to establish standing).

These factors undermine Appellants attempt to rely on Washegesic. Appellants claim that Washegesic stands for the proposition that a person can have standing to challenge a display at a school even if the person doesn't attend that school. (Appellants' Brief, pages 36-37) Washegesic involved a challenge to a "famous" portrait, entitled "Head of Christ" that was prominently displayed inside the school in a hallway next to the gym and principal's office. Washegesic, 33 F.3d at 681. Unlike Doe 1 in the present case, however, the plaintiff in Washegesic had been a student in the school at the time the lawsuit was filed. Washegesic, 33 F.3d at 681. Additionally, the Court stated that a person who was not a student could have standing to sue "if she attended events in the gymnasium and took the portrait as a serious insult to her religious sensibilities." Washegesic, 33 F.3d at 682. In the present case, Doe 1 came nowhere near to stating that she took the FOE Monument as a serious insult to her religious sensibilities.

Additionally, as with Schaub, Doe 1 cannot claim that she ever avoided the high school because of the presence of the FOE Monument. Doe 1 never testified that she declined or refused to attend functions at the high school because she did not want to encounter the FOE Monument, nor did she ever testify that she did not want to be a student at the high school because she did not want to encounter the FOE Monument. To the contrary, after this lawsuit was filed, and after her deposition, Doe 1 attended an eight grade dinner dance held at the high school.

(Schaub, 63, JA 754) Further, the deposition testimony of both Schaub and Doe 1 establishes that they both expected and intended Doe 1 to be a student at the high school the following August. (Doe 1, 25, JA 865; Schaub, 119, JA 757)

Thus, the facts of record establish that Doe 1 has not suffered, or even claimed to have suffered any injury of any nature as a result of any encounter with the FOE Monument or that she ever avoided the high school because of the presence of the Monument. Consequently, Doe 1 has not sustained a concrete, particularized injury necessary to confer standing.

D. As no member of FFRF has standing, FFRF also does not have standing.

An association like FFRF can have standing if a member has standing. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of the Earth, 120 S.Ct. at 704. Therefore, in the present case, any standing FFRF has must be based on the standing that its members have. Wall, 246 F.3d at 261-62; and Zielke, 845 F.2d at 1469. In the present case, the only FFRF member who has been identified is Schaub. As set forth above, Schaub does not have standing in the present case. Therefore, FFRF also lacks standing. Zielke, 845 F.2d at 1469.

Further, based on Schaub's deposition testimony, Schaub was not a member of FFRF at the time this lawsuit was filed. (Schaub, 132) This fact is significant because, as will be more fully discussed below in §II, *infra*, a party must have standing at the time the lawsuit is filed. As Schaub not only didn't have standing herself at the time the lawsuit was filed, but wasn't even a member of FFRF at that time, FFRF cannot base a claim to standing on Schaub.

II. THE DECISION BY FFRF AND SCHAUB, MADE AFTER THE CLOSE OF DISCOVERY, TO WITHDRAW DOE 1 FROM THE SCHOOL DISTRICT DOES NOT CONFER STANDING AS STANDING MUST BE PRESENT AT THE TIME THE LAWSUIT IS FILED AND THROUGHOUT THE LIFE OF THE LAWSUIT.

Not surprisingly, given the facts of record in the present case, Appellants do not spend too much time trying to argue that they had standing when this lawsuit was filed. Rather, Appellants spend the bulk of their Brief arguing that, because of the decision by FFRF and Schaub, made sometime after the close of discovery, to withdraw Doe 1 from the school district, Appellants' claim for injunctive relief is no longer moot. Ultimately, reduced to its essence, Appellants argument is that even if a person has not sustained a concrete, particularized injury as a result of contact with a challenged display, the person still has standing to seek injunctive relief if, after the lawsuit was filed, the person voluntarily incurred some type of burden to avoid contact with the challenged display. Thus, under Appellants' argument, even if a person never came into contact with a challenged display, or was not offended by

coming into contact with a challenged display, the person would still have standing to seek an injunction to have the display removed if the person may incur some burden in the future to avoid contact with the display. None of the myriad cases cited by Appellants support such an expansive view of standing.

Appellants' argument also suffers from other fatal flaws. "Standing is a threshold jurisdictional requirement, derived from the 'case or controversy' language of Article III of the Constitution." Public Interest Research Grp. of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 117 (3d Cir. 1997). Consequently, a party must have standing from the time the lawsuit is filed. "[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome **when the suit was filed**." Davis v. Federal Election Comm'n, 554 U.S. 724, 734, 128 S. Ct. 2759, 2769, 171 L. Ed. 2d 737 (2008), (emphasis added). See also, Perry v. Village of Arlington Heights, 186 F.3d 826, 830 (7th Cir. 1999), ("Because standing goes to the jurisdiction of a federal court to hear a particular case, it must exist at the commencement of the suit.")

Standing must not only be present at the beginning of the lawsuit, but must continue throughout the life of the lawsuit. "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Friends of the Earth, 120 S. Ct. at 709. See also, Leuthner v. Blue Cross & Blue Shield of Ne. Pennsylvania, 454 F.3d 120, 127 (3d Cir. 2006),

("For constitutional and prudential standing it is well established that standing must exist at the time the suit is commenced and throughout the suit.") Additionally, "the proof required to establish standing increases as the suit proceeds." Davis, 128 S.Ct. at 2769.

As set forth above, neither Schaub nor Doe 1 sustained the concrete, particularized injury necessary to confer standing. Additionally, not only does FFRF lack standing because its member, Schaub, lacks standing, FFRF also lack standing because Schaub admittedly was not a member of FFRF at the time this lawsuit was filed. (Schaub, 132, 145, JA 834, 835)

The facts of record establish that FFRF and Schaub were aware of their lack of standing at the time this lawsuit was filed. For that reason, Schaub asked her relatives, Doe 2 and Doe 3, to join the lawsuit. As Doe 2 was at that time a student at the high school, Appellants apparently believed that would confer standing. (JA 760) That one plaintiff has standing, however, does not confer standing on all plaintiffs. Further, there is no dispute that Doe 2 and Doe 3 were voluntarily dismissed from this lawsuit. (District Court Docket Sheet, entry 44, JA 882)

Also, in arguing that the post-discovery withdrawal of Doe 1 gave them standing to seek injunctive relief, Appellants tacitly admit that they had suffered no injury prior to this lawsuit, stating, "Appellants had standing to seek an injunction

to avoid **the very future injury they eventually suffered** while this case was pending." (Appellants' Brief, page 39, emphasis added)

If a plaintiff lacks standing when the lawsuit was filed, the plaintiff cannot manufacture standing by her conduct after the lawsuit was filed. See, Pollack v. United States Dep't Of Justice, 577 F.3d 736, 743, n.2 (7th Cir. 2009), (as "a plaintiff must establish standing at the time suit is filed and cannot manufacture standing afterwards," a plaintiff cannot manufacture standing by visiting the challenged display after he commenced the lawsuit), (citing Laidlaw, 120 S.Ct. 693). Consequently, Appellants cannot attempt to manufacture standing by deciding, sometime after the close of discovery, to withdraw Doe 1 from the school district.

Additionally, the reasons given for the decision to withdraw Doe 1 from the school district have no support in the facts of record uncovered by discovery. Appellants contend that Schaub and FFRF withdrew of Doe 1 from the school district because Doe 1 was offended by the FOE Monument, wanted to avoid it, and withdrawal was necessary so Doe 1 could avoid "unwelcome contact" with the Monument. To support this contention, Appellants rely on the assertions made by Schaub in her post-discovery declaration filed as part of Appellants' Motion for Summary Judgment. (See, Appellants' Brief, pages 10-11, referring to Schaub's declaration, JA 677-680) The assertions made by Schaub in her declaration, like the

assertions made by the Appellants in their Brief, are contradicted by the facts of record uncovered in discovery.

As set forth above when discussing Doe 1's lack of standing, Doe 1 never testified that the FOE Monument offended her in anyway, nor did she ever testify that contact with the Monument was or would be unwelcome to her, that she had ever attempted to avoid the Monument so as to avoid unwelcome contact, or that she did not want to attend school at the high school so as to avoid contact with the Monument. To the contrary, Doe 1 testified at her deposition that she would be a student at the high school the following August. (Doe 1, 25, JA 865)[4] Similarly, Schaub testified that she intended Doe 1 to attend school at the high school. (Schaub, 119, JA 757)

Further, rather than trying to avoid the FOE Monument, Appellants admitted that in May 2014, while this lawsuit was pending and a month after her deposition, Doe 1 attended an eighth grade dinner dance held at the high school. (Schaub, 63, JA 754) Schaub expressed no concern that attending the dinner dance would result in Doe 1 coming into contact with the Monument. To the contrary, Schaub allowed Doe 1 to attend the dinner dance even though she believed that Doe 1 would have to

[4] While Schaub's post-discovery declaration contained several assertions as to what Doe 1 felt or believed, any such assertions were not only contradicted by the record, they were also obviously hearsay. Notably, no such assertions have ever been made by Doe 1, in either her deposition testimony, or even in a post-discovery declaration.

encounter the Monument to attend the dance. (Schaub, 65, JA 755) Consequently, the assertions made by Appellants to support their post-discovery decision to withdraw Doe 1 from the school district are contradicted by the facts of record.[5] If Schaub and Doe 1 did not find contact with the FOE Monument unwelcome enough to prevent Doe 1 from attending a dinner dance at the high school, Appellants cannot now claim that contact with the Monument was so unwelcome that Doe 1 could not attend classes at the high school.[6]

The last ditch attempt by Appellants to manufacture standing is also contradicted by their Complaint. Paragraph 31 of Appellants' Complaint states, "Doe 1 will attend Valley High School starting in the year 2014." Nowhere does the Complaint state, infer, imply or claim that, if the FOE Monument was not removed, Doe 1 would be withdrawn from the school district so as to avoid contact with the Monument.

The facts of record establish that Doe 1 did not consider that contact with the FOE Monument was or would be unwelcome. Therefore, withdrawing Doe from the

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[5] Of note, a party cannot evade summary judgment by attempting to create a factual dispute through a post-discovery declaration or affidavit that contradicts the party's deposition testimony. See, e.g., Martin v. Merrell Dow Pharm., Inc., 851 F.2d 703, 706 (3d Cir. 1988); and Smith v. Johnson & Johnson, 593 F.3d 280, 285 n.3 (3d Cir. 2010).

[6] Such a position would be akin to the childish argument often made by students that they are too sick to attend class at school during the day, but not too sick to attend some event at the school that same evening.

school district was not necessary to prevent any unwelcome contact. Thus, any costs or burdens incurred by Appellants as a result of the decision to withdraw Doe 1 from the school district were unnecessary, self-inflicted harm that does not provide Appellants with standing to seek injunctive or any relief. See, Clapper v. Amnesty Int'l USA, __U.S.__, 133 S. Ct. 1138, 1151, 185 L. Ed. 2d 264 (2013), ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.")

III. APPELLANTS HAVE WAIVED THE ARGUMENT THAT THE DECISION TO REMOVE DOE 1 FROM THE SCHOOL DISTRICT PROVIDED THEM WITH STANDING TO SEEK INJUNCTIVE RELIEF AS THEY NEVER RAISED SUCH AN ARGUMENT IN THE LOWER COURT.

Appellants claim that the reason why their claim for injunctive relief was dismissed was that the lower court *sua sponte* raised the issue that the withdrawal of Doe 1 from the school district deprived Appellants of standing to seek injunctive relief. They then go on to argue that, instead of depriving them of standing, removing Doe 1 from the school district conferred standing to seek injunctive relief.

Appellants' argument misapprehends both the law and the lower court's opinion. As more fully set forth above, standing is a jurisdictional requirement, and, therefore, a plaintiff must have standing at the time the lawsuit is filed and throughout the life of the lawsuit. Consequently, when, as in the present case, a

plaintiff lacks standing at the time the lawsuit is filed, the court lacks jurisdiction to grant any relief, whether it be in the form of actual damages, nominal damages or injunctive relief.[7]

In its opinion, the lower court referred to this rule of law. (See, lower court opinion at page 7, JA 8 (citing Davis) and page 16, JA 18 (citing Pollack)). After reviewing the evidence of record the lower court concluded that "the Court cannot agree that Plaintiffs Schaub and Doe 1 have adduced sufficient evidence that they have been injured by the presence of the monument on the high school's lawn" (lower court opinion at page 13, JA 14), finding that "Schaub's contacts with the monument were superficial at best" (lower court opinion at page 14, JA 15) and that "Doe 1's alleged injury is even more tenuous" (lower court opinion at page 15, JA 16). Regarding the post-discovery withdrawal of Doe 1 from the school district, the lower court stated that the decision to withdraw Doe 1 "is therefore irrelevant to the determination of whether standing existed at the time of the filing of this lawsuit." (Lower court opinion at page 17, JA 18) The lower court then went on to reason that, in addition to not having standing to file the lawsuit, the withdrawal of Doe 1 also rendered the claim for injunctive relief moot (lower court opinion at pages 17-18,

[7] Stated another way, if plaintiff does not have the required standing when the lawsuit is filed, there is nothing to become moot later in the lawsuit; the issue of whether plaintiff's claim subsequently became moot is itself moot because plaintiff lacked standing to bring the claim at the outset.

JA 18-19), concluding that, even if the Appellants had had standing at the time the lawsuit was filed, which they didn't, withdrawing Doe 1 from the school district rendered the request for injunctive relief moot (lower court opinion at page 18, JA 19).

What is important for this discussion, however, is Appellants' use of the phrase "*sua sponte*." Through the deft use of that phrase, Appellants are attempting to evade the fact that they never raised such an argument in the lower court. Appellants never claimed or argued that the withdrawal of Doe 1 from the school district conferred upon them standing to seek injunctive relief. In fact, Appellants made no reference to their request for injunctive relief. The phrase "injunctive relief" appears nowhere in Appellants' Brief in Support of their own Motion for Summary Judgment and nowhere in their Brief in Opposition to NKASD's Motion for Summary Judgment.

The law is clear that arguments raised for the first time on appeal are deemed to be waived and will not be addressed by the Court. In re Mystic Tank Lines Corp., 544 F.3d 524, 528 (3d Cir. 2008); and Metropolitan Edison Co. v. Pennsylvania Pub. Util. Comm'n, 767 F.3d 335, 352 (3d Cir. 2014) cert. denied, 135 S. Ct. 2372, 192 L. Ed. 2d 144 (2015). To preserve an issue for appeal, the party "must unequivocally put its position before the trial court" and a "fleeting reference or vague allusion to

an issue will not suffice to preserve it for appeal." In re Insurance Brokerage Antitrust Litig., 579 F.3d 241, 262 (3d Cir. 2009).

In the present case, Appellants did not even make a fleeting reference or vague illusion to the issue that withdraw Doe 1 from the school district conferred standing to seek injunctive relief. Although Appellants filed two separate briefs at the motion for summary judgment stage, Appellants never argued that withdrawing Doe 1 from the school district conferred standing to seek injunctive relief, and never once even referred to injunctive relief. As Appellants never raised such an issue in the lower court, Appellants have waived that issue on appeal.

CONCLUSION

Standing is a jurisdictional requirement and, therefore, a plaintiff must have standing at the time the lawsuit is filed and throughout the life of the lawsuit. The facts of record uncovered during discovery establish that none of the Appellants sustained a concrete and particularized injury necessary to confer standing. Further, any costs or burdens incurred as a result of the post-discovery decision to withdraw Doe 1 from the school district did not confer standing. A party must have standing when the lawsuit is filed. Additionally, the facts of record establish that withdrawing Doe 1 from the school district was unnecessary as Doe 1 never testified that she found contact with the Monument to be unwelcome. A party cannot manufacture standing by voluntarily incurring unnecessary costs or burdens after the lawsuit has

been filed. Also, as Appellants never argued in the lower court that the withdrawal of Doe 1 gave them standing to pursue injunctive relief, that claim has been waived. For these reasons, the lower court correctly concluded that Appellants lacked standing and properly entered judgment in favor of NKASD. Therefore, the lower court should be affirmed.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I, Anthony G. Sanchez, hereby make the following certifications with regard to the filing of the within Appellee Brief:

1. That I am a member of the Bar of the United States Court of Appeals for the Third Circuit;

2. That this Brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) and contains **10,345** words as counted by Microsoft Word;

3. I hereby certify that this 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 January 8, 2016. Opposing Counsel are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

4. That the text of the PDF-A electronic version and Hard Copies of this Brief are identical;

5. This Brief also complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007 in 14 pt. font, Times New Roman; and

6. That a virus check was performed on the PDF-A and Hard Copies of this Brief, using Symantec Anti-Virus software and that no virus was indicated.

/s/ Anthony G. Sanchez, Esquire

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that counsel listed below were served via the appellant CM/ECF system.

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