UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 17-2429

ELIZABETH DEAL; JESSICA ROE,

Plaintiffs-Appellants,

FREEDOM FROM RELIGION FOUNDATION, INC.; JANE DOE; JAMIE DOE,

Plaintiffs,

v.

MERCER COUNTY BOARD OF EDUCATION; MERCER COUNTY SCHOOLS; DEBORAH S. AKERS, in her individual capacity; and REBECCA PEERY, in her individual capacity,

Defendants-Appellees.

Appeal of the United States District Court for the Southern District of West Virginia Memorandum Opinion and Order of Court Dated November 14, 2017 at Docket No.: 1:17-cv-0642

APPELLANTS' OPENING BRIEF

MARCUS B. SCHNEIDER, ESQUIRE
W.V. ID NO. 12814
STEELE SCHNEIDER
428 FORBES AVENUE, SUITE 700
PITTSBURGH, PENNSYLVANIA 15219
(412) 235-7682
Attorney for Appellants

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-2429 Caption: Deal, et al. v. Mercer County Board of Education, et. al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Elizabeth Deal; Jessica Roe
(name of party/amicus)

who is appellants, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Marc Schneider Date: 3/5/18

Counsel for: Appellants

CERTIFICATE OF SERVICE

****

I certify that on 3/5/18 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Marc Schneider (signature) 3/5/18 (date)

Print Save Reset Form

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Treatises

Jurisdictional Statements

I. Basis for Subject Matter and Appellate Jurisdiction

The district court had subject matter jurisdiction over the original controversy pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the appeal before it is from a final order from the district court.

II. Filing Dates Establishing Timeliness of the Appeal

The final order of the district court granting summary judgment was dated November 14, 2017. Appellants filed a timely Notice of Appeal on December 14, 2017.

Statement of the Issues

This Honorable Court should reverse the district court and find Elizabeth Deal and Jessica Roe have standing to challenge the Bible in the Schools ("BITS") program taught in Mercer County Schools for three different reasons:

- **Issue One: Injunctive Relief Standing Based upon Avoidance of Contact**

  In the Fourth Circuit, avoidance of contact with a challenged religious exercise is an injury-in-fact redressable by an injunction. Elizabeth Deal is sending Jessica Roe to a school outside of Mercer County to avoid BITS and the harassment she endured as a non-participant of the program. As an ongoing resident of Mercer County, does Elizabeth's assumption of burdens

to shield her daughter from the harmful effects of BITS give her standing to seek an injunction of the program?

- **Issue Two: Injunctive Relief Standing Based upon Feelings of Exclusion**

  Establishment Clause plaintiffs also have standing where they feel excluded from their home communities as a result of state action that favors one religion over others. Elizabeth Deal and Jessica Roe feel like second-class citizens in their community, which has forced them to seek public education elsewhere by administering the sectarian BITS program. Do they have standing to seek an injunction to end the promotion of Christianity by their local public schools?

- **Issue Three: Nominal Damage Standing Based on Past Constitutional Injuries**

  The Supreme Court has held that claims for nominal damages are the appropriate means of vindicating past deprivations of important constitutional rights and that these claims should be "actionable." Jessica Roe was harassed for not participating in BITS, and she and her mother were made to feel like outsiders in their own community. Do they have standing to pursue their claim for nominal damages to redress these past injuries?

The Court should also reverse the district court's erroneous finding of unripeness and hold that Deal's claims to enjoin the long-standing BITS program are not moot.

- **Issue Four: Mootness under the Voluntary Cessation Doctrine**

  Defendants seeking to moot a case by voluntarily altering their conduct must bear the burden of demonstrating with absolutely clarity that the challenged practice will not occur again. Amid public commitments to fight this challenge to BITS, Mercer County Schools "suspended" the program for one year so that it can be reviewed by community members, teachers, and religious leaders. On these facts alone, have Mercer County Parties satisfied their heavy burden to show the case is moot?

Statement of the Case

I. Relevant Facts

A. The Bible in the Schools Program

For over 75 years, public schools in Mercer County have provided bible instruction to their students. Joint Appendix ("JA") 30 (First Amended Complaint (FAC) ¶18). Since 1986, Appellee Mercer County Board of Education (the "Board") has administered the "Bible in the Schools" ("BITS") program. JA31 (FAC ¶22). BITS instills religious teachings in elementary and middle school students. JA31 (FAC ¶26). The classes teach the central tenets of Christianity and

encourage students to follow Christian teachings. JA31 (FAC ¶27). Today, these classes are taught in 15 elementary schools, one intermediate school, and three middle schools in Mercer County. JA31 (FAC ¶25).

The Board is responsible for adopting policies that govern Appellee Mercer County Schools ("Mercer Schools") and BITS. JA42 (FAC ¶90). By policy and practice, the Board approved the BITS program for students in first through eighth grade. JA42 (FAC ¶93). The Board and Mercer County Schools employ BITS teachers. JA42 (FAC ¶94). Mercer County Schools provides prepared lessons to these teachers. JA31 (FAC ¶25). Appellee Deborah Akers, the Superintendent of Mercer Schools, has created policies supporting and implementing BITS for approximately 25 years. JA30, JA43 (FAC ¶14, 97).

The BITS classes are taught by itinerant bible teachers who must possess "a degree in Bible." JA35-36 (FAC ¶¶53, 54). The weekly classes, which are a part of the regular school day, last for 30 minutes in elementary schools and 45 minutes in middle schools. JA37 (FAC ¶61). The overwhelming majority of students participate in bible classes. JA37 (FAC ¶62). Although the bible classes are said to be "voluntary," Defendants have failed to provide alternative instruction to many students who opt not to attend. JA37-38 (FAC ¶¶62, 64).

B. Elizabeth Deal's and Jessica Roe's Interaction with BITS

Appellant Jessica Roe is the pseudonym of a minor student who attended elementary schools in Mercer County from 2012 through 2016. JA 29 (FAC ¶13). While Jessica was enrolled, the Defendants administered BITS classes at schools she attended. JA32, JA34 (FAC ¶¶34, 43).

When Jessica began elementary school, her mother, Appellant Elizabeth Deal, received a permission slip to allow Jessica to participate in BITS program. JA33 (FAC ¶35). Elizabeth, who identifies as agnostic, felt pressure to enroll Jessica in BITS because nearly all other students in Jessica's school participated in the program. JA33 (FAC ¶¶36-38). Elizabeth ultimately declined to permit Jessica to attend because she wishes to have control over Jessica's religious education, and she did not—and does not—want Jessica to receive religious instruction from Jessica's public school. *Id.*

Because Elizabeth did not sign the BITS permission slip, Jessica was placed in a coatroom in the back of her elementary classroom during BITS classes. JA33 (FAC ¶¶38-39). From there, she could still hear the instruction from BITS class. JA33 (FAC ¶39). Elizabeth complained to the school principal. JA33 (FAC ¶40). In response, instead of placing Jessica in the coatroom, Mercer Schools removed her from the classroom, but it never provided alternative instruction. JA33-34 (FAC ¶¶40-44). In first and second grade, Jessica was sent to a library or another

classroom, where she most often read a book to herself; in third grade she was sent to a computer lab, where she continued to read to herself. *Id.*

Because she did not participate in BITS, Jessica was harassed and excluded by other students. JA34 (FAC ¶¶45-46). This harassment included taunts that Jessica and her parents were going to hell. JA34 (FAC ¶45). Elizabeth and Jessica felt like second-class citizens in Mercer Schools because of the presence of BITS and the treatment Jessica suffered as a result of her non-participation in the program. JA35 (FAC ¶47). After Jessica's third grade year, based in large part on BITS and the mistreatment of Jessica, Elizabeth made the decision to incur additional expenses to send Jessica to a school outside of Mercer County. JA35 (FAC ¶¶48-50). Elizabeth continues to reside in Mercer County. *Id.*

II. Procedural History

Originally, this case was filed by Freedom From Religion Foundation, Inc. ("FFRF") and a different set of parent and student plaintiffs, Jane Doe and Jamie Doe (collectively the "Doe Plaintiffs"),[1] against Mercer County Board of Education (the "Board"), Mercer County Schools ("Mercer Schools"), and Deborah Akers. JA11 (ECF No. 1). After these original Defendants filed a Rule 12 motion to dismiss, an Amended Complaint was filed. JA27 (ECF No. 21) (the "FAC"). The FAC retained the original plaintiffs and defendants and added as

[1] The Doe Plaintiffs are not parties to this appeal.

plaintiffs Elizabeth Deal, on her own behalf and on behalf of her child, Jessica Roe (collectively "Deal"), and as a defendant Rebecca Peery, a Mercer Schools principal. Elizabeth and Jessica are the Plaintiffs-Appellants in this appeal, and the Board, Mercer Schools, Akers, and Peery (collectively "Mercer County Parties") are the Defendants-Appellees. *Id.*

In the FAC, Deal asserted claims against the Mercer County Parties challenging the constitutionality of BITS under the Establishment Clause of the First Amendment and Article II, Section 15 of the West Virginia Constitution. J.A. JA44-46 (FAC ¶¶107-112, 114-116). Deal sought declaratory relief, a permanent injunction of BITS, nominal damages, attorney's fees, and all other appropriate relief. JA46-47 (FAC ¶¶A-F)

On April 19, 2017, the Board, Mercer Schools, and Akers filed a Rule 12 motion to dismiss and accompanying memorandum alleging that (1) all Plaintiffs lacked standing and (2) the FAC failed to set forth cognizable claims. JA120 (ECF Nos. 25-26) (collectively "Motion to Dismiss"). Plaintiffs filed a Memorandum in Opposition to the Motion to Dismiss on May 10, 2017. JA 173 (ECF No. 28) (the Response").

On May 24, 2017, the Board, Mercer Schools, and Akers filed a Reply to the Response. JA195 (ECF No. 30) (the "Reply"). The Reply notified the district court of the purported "suspension" of BITS. JA203-07 (ECF No. 30, 4-8). According to

newspaper articles and a memo from Akers to the Board, Mercer County Parties "suspended" BITS for "at least" a year so that the program could be reviewed by community members, religious leaders, and teachers. J.A. 214-49 (ECF Nos. 30-1-30-7). Plaintiffs filed a Sur-Reply in response to the Reply on June 9, 2017. JA250 (ECF No. 33) (the "Sur-Reply").

After the close of briefing, the district court held argument and requested additional briefing. Argument was held on the Motion to Dismiss on June 19, 2017. JA262 (Transcript of Oral Argument). On July 6, 2017, the district court requested additional briefing regarding whether (1) the case was ripe for decision and (2) the court would have to decide the issue of standing prior to considering ripeness. JA305 (ECF No. 36). Both parties filed briefs in compliance with this request on August 4, 2017. JA307, JA319 (ECF Nos. 43-44).

On November 14, 2017, the district court issued a Memorandum Opinion and Order and Amended Memorandum and Order[2] dismissing all Plaintiffs' claims based upon a finding that the claims were not justiciable. JA330, JA361 (ECF Nos. 46-47) (the "Opinion"). The Opinion is the subject of this appeal.

[2] There are no substantive differences between the Memorandum Opinion and Order and the Amended Memorandum Opinion and Order.

Summary of the Argument

This Honorable Court has a rich history of recognizing important rights of Establishment Clause plaintiffs. The Court has developed standing requirements that ensure fair access to the courts for those who experience the uniquely non-economic injuries typically felt by Establishment Clause plaintiffs. In addition, the Court has acknowledged the importance of nominal damages for the vindication of the important constitutional rights protected by the Establishment Clause. This case presents the Court with an opportunity to uphold its prior decisions on these important issues.

Mercer County Parties' administration of the long-standing BITS program in their elementary schools has caused—and is causing—Elizabeth Deal and Jessica Roe to experience all three of the injuries-in-fact that will support a claim to Establishment Clause standing: direct, unwelcome contact; avoidance of contact; and feelings of exclusion. Despite Elizabeth's efforts to shield Jessica from the Christian teachings of BITS, Jessica had direct, unwelcome contact with the classes. Once Jessica was able to avoid the classes themselves, her peers began harassing her—going so far as to condemn her family to hell. To get away from BITS, Elizabeth removed Jessica from Mercer Schools and enrolled her in a different district. Through all of this, Elizabeth and Jessica have felt like outsiders in the community where they continue to reside.

Elizabeth and Jessica seek an injunction ending Mercer County Parties' open endorsement of Christianity through BITS and nominal damages to vindicate the constitutional violations already visited upon them. While the Court cannot address all of the impediments Jessica might face in returning to Mercer Schools, an injunction of BITS will remove the unconstitutional obstacle denying Jessica free access to Mercer Schools. And an award of nominal damages will recognize and vindicate the past harms Elizabeth and Jessica have experienced.

Both of these requests for relief require consideration of the constitutionality of the long-standing BITS program. The Court's ability to review the decades-old program as it existed when the FAC was filed is not compromised by the one-year "suspension" of the program. The evidence surrounding this "suspension" fails to demonstrate with absolute clarity that BITS will not return. Far from it, the candid comments of Akers before the "suspension" occurred unmasks this contrived action as a mere litigation tactic. Given the real possibility that BITS returns, the review of its curriculum is not moot.

Argument

I. Standard of Review

Circuit courts of appeal review justiciability determinations of district courts de novo. *Int'l Refugee Assistance Project v. Trump*, No. 17-2231, 2018 WL

894413, at *7 (4th Cir. Feb. 15, 2018) (*IRAP II*).

For challenges to jurisdiction on the face of the complaint, "the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). Courts must assume that plaintiffs would be successful on the merits of their underlying claims. *IRAP II*, 2018 WL 894413, at *7 (citations omitted) (presuming an Establishment Clause violation). Similarly, "general factual allegations of injury resulting from the defendant's conduct may suffice . . . for on a motion to dismiss [the Court] presume[s] that general allegations embrace those specific facts that are necessary to support a claim." *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 329 (4th Cir. 2008).

Where a "factual challenge" is made, the pleadings' allegations are regarded as "mere evidence on the issue," and evidence outside of the pleadings may be considered. *Richmond, Fredericksburg & Potomac R. Co. v. U.S.*, 945 F.2d 765, 768 (4th Cir. 1991). The standard for a factual challenge aligns with the standard for considering a summary judgment decision: facts beyond the pleadings are needed to set forth the existence of a genuine issue of material fact. *Id.* (citation omitted). Under this standard, "the moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* (citations omitted).

The Motion to Dismiss set forth a facial challenge to the standing of Deal under Rule 12(b)(1). In their Reply, Mercer County Parties submitted evidence regarding the "suspension" of BITS. Because standing is evaluated based upon facts as they exist at the time a complaint is filed, this evidence does not affect Deal's standing. While the additional evidence can be considered under the factual challenge standard of review for the mootness issue, this evidence is insufficient to moot Deal's claims.

II. Discussion of the Issues

This appeal concerns the power of federal courts to assert jurisdiction over Appellants' claims. Article III of the Constitution limits the "'judicial power' of [federal courts] to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Courts enforce the case-or-controversy requirement through several justiciability doctrines, including standing, mootness, and ripeness. *U.S. v. McClure*, 241 Fed.Appx. 105, 107-08 (4th Cir. 2007). All three of these justiciability doctrines are at issue in this appeal.

A. Deal has standing to pursue claims for injunctive relief and nominal damages.

The requirements for Article III standing are well known. A plaintiff must demonstrate:

> (1) . . . an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The analysis of these requirements focuses on the facts as they existed at the commencement of the case. *Davis v. Federal Election Com'n*, 554 U.S. 724, 734 (2008) (citations omitted).

1. Consistent application of standing in Establishment Clause cases has turned a once elusive standard into a simple rule.

The injury-in-fact inquiry in Establishment Clause cases is tailored to reflect the unique injuries Establishment Clause plaintiffs tend to suffer. *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997). Federal courts have long recognized that these injuries often involve "the spiritual, value-laden beliefs of [Establishment Clause] plaintiffs." *Id.* (citing *Rabun County*, 698 F.2d at 1102). Thus, courts have found these injuries sufficient to meet the Article III standing requirements in Establishment Clause cases. *Suhre*, 131 F.3d at 1086 (citing *Valley Forge*, 454 U.S. at 486) (additional citations omitted); *Moss v. Spartanburg Cty. School Dist. No. 7*, 683 F.3d 599, 607 (4th Cir. 2012).

These non-economic and spiritual injuries confer standing if they are sufficiently personal and particularized. *IRAP II*, 2018 WL 894413 at *8.

Addressing the injury requirement in Establishment Clause cases, the Supreme Court stated that mere psychological disagreement with conduct observed from afar is insufficient to confer standing. *Valley Forge*, 454 U.S. at 485. But the facts of *Valley Forge* were extreme: *out-of-state* plaintiffs challenged a government action despite having *no direct contact* with the challenged action or the community in which it occurred. 454 U.S. 485-87. Although the Supreme Court found the *Valley Forge* plaintiffs had not alleged an injury-in-fact, the Court did not retreat from the principle that standing may be predicated upon non-economic injury directly felt by the plaintiffs. *Valley Forge*, 454 U.S. at 486-87.

a. Establishment Clause plaintiffs demonstrate standing where they face direct, unwelcome contact with an unwanted religious exercise or assume burdens to avoid such contact.

Balancing the requirement for a particularized injury with the acknowledgement that Establishment Clause plaintiffs suffer uniquely intangible injuries, this Court—like nearly every other Circuit—adopted the direct, unwelcome contact standard to assess standing in Establishment Clause cases involving religious displays. *Suhre*, 131 F.3d at 1088-90. *Suhre* dealt with a community member's Establishment Clause challenge of a Ten Commandments display in his county's courthouse. *Id.* at 1084-85. The plaintiff's standing to bring his claims was the sole issue before this Court on appeal. *Id.* at 1085. The defendant urged the Court to require altered conduct from Establishment Clause

plaintiffs to find standing. *Id.* at 1087-88. The Court, however, rejected the defendant's invitation, instead announcing its decision to join other circuits finding standing where plaintiffs demonstrate direct, unwelcome contact with the challenged religious display. *Id.* The Court reasoned that direct, unwelcome contact demonstrates the sort of direct injury required by Article III. *Id.* at 1089 (direct, unwelcome contact "sets a plaintiff apart from the general public and shows that his grievance is not shared in substantially equal measure by all or a large class of citizens") (internal quotations and citations omitted).

The standard embraced by this Court comports with earlier Supreme Court decisions allowing students and parents affected by school policies to bring Establishment Clause challenges. *See, e.g., Sch. Dist of Abington v. Schempp*, 374 U.S. 203, 224 n.9 (1963). In *Schempp*, students and their parents challenged a school district's practice of beginning each school day with Bible readings and recitation of the Lord's Prayer. *Id.* at 204-06. The plaintiffs "had standing, not because their complaint rested on the Establishment Clause . . . but because impressionable school children were subjected to unwelcome religious exercises *or were forced to assume special burdens to avoid them*." *Valley Forge*, 454 U.S. at 487 n.22 (discussing *Schempp*) (emphasis added).

Relying upon the findings in *Schempp*, *Suhre* also held that altering conduct to avoid a challenged religious exercise provides a basis for standing. 131 F.3d at

1088. While demonstrating altered conduct—a more extraordinary showing than direct contact—is not necessary to support standing, altered conduct certainly suffices. *Id.* In particular, avoidance of public institutions is a significant constitutional injury:

> Compelling plaintiffs to avoid public schools or buildings is to impose on them a burden that no citizen should have to shoulder. A public or county courthouse exists to serve *all* citizens of a community, whatever their faith may be. Rules of standing that require plaintiffs to avoid the display of which he complains in order to gain standing to challenge it only imposes an extra penalty on individuals already alleged to be suffering violation of their constitutional rights.

Id.

Suhre makes clear what *Schempp* held 55 years ago: Establishment Clause plaintiffs have standing whether they choose to suffer direct, unwelcome contact with a challenged practice *or* assume burdens to avoid such contact. *Accord IRAP II*, 2018 WL 894413 at *8 (recognizing both forms of injury-in-fact).

b. Establishment Clause plaintiffs also demonstrate standing where they suffer feelings of marginalization and exclusion caused by the challenged religious exercise.

This Circuit and others have recognized another injury-in-fact sufficient to confer standing to Establishment Clause plaintiffs: the feeling of marginalization and exclusion caused by a plaintiff's interaction with challenged government conduct. *Moss*, 683 F.3d at 607; *IRAP II*, 2018 WL 894413 at *9; *see e.g., Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d

1043, 1052 (9th Cir. 2010) (recognizing as injury-in-fact the psychological consequence produced by government "endorsement of another's [religion] in one's own community"). This injury-in-fact acknowledges that "one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they are *outsiders*, not full members of the political community.'" *Moss*, 775 F.3d at 607; *IRAP II*, 2018 WL 894413 at *8 (both quoting *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005)). When government action marginalizes citizens for choosing not to follow a state-endorsed religion, those citizens suffer an injury-in-fact, and they have standing to seek relief under the Establishment Clause.

The Establishment Clause plaintiffs in *Moss* suffered this injury-in-fact. *Moss*, 683 F.3d at 601. The parent and student plaintiffs challenged their school district's policy of allowing students to receive credit for off-campus private religious instruction. *Id.* The plaintiffs' interactions with the district policy began when they received a promotional letter from one of the private religious educators offering instruction for credit under the policy. *Id.* at 607. Because the plaintiffs perceived Christian favoritism from this letter, they felt like "outsiders" in their community, and they lessened their involvement with the school. The Court held that these feelings of exclusion (and the plaintiffs' direct, unwelcome contact with the policy) constituted cognizable injury-in-fact. *Id.*

More recently, in *IRAP II*, this Court reiterated that plaintiffs who suffer feelings of exclusion caused by government action have suffered constitutionally significant injuries-in-fact. *IRAP II*, 2018 WL 894413 at *9 (citing *Moss*, 683 F.3d at 607). The plaintiffs in *IRAP II* challenged a Presidential Proclamation that indefinitely barred nationals from a number of predominantly-Muslim countries (the "Proclamation"). *Id.* at *2-3. Most of the plaintiffs were members of the Muslim faith, who alleged two injuries: (1) feelings of exclusion caused by the Proclamation's hostility towards their religion and (2) separation from family members whose ability to enter the country was negatively affected by the Proclamation. *Id.* at *9. Assuming the Proclamation disfavored Islam for purposes of its standing analysis, *IRAP II* found plaintiffs had alleged an injury-in-fact because the plaintiffs were "'victims of this alleged intolerance' who [were] suffering '[f]eelings of marginalization and exclusion.'" *Id.* (quoting *Moss*, 683 F.3d at 606-07). This injury, the Court concluded, was an actual, concrete injury that personally and individually affected the plaintiffs. *Id.*

2. Deal is suffering ongoing injuries-in-fact that provide her with standing to seek injunctive relief.

A plaintiff has standing to seek injunctive relief if she shows she is likely to suffer future injury-in-fact. *Suhre*, 131 F.3d at 1090 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-06 (1983)). A plaintiff must demonstrate "(1) that she is under threat of suffering injury-in-fact that is concrete and particularized; (2) the

threat must be actual and imminent, not conjectural and hypothetical; (3) it must be fairly traceable to the challenged action of the defendant; and (4) it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

The redressability requirement is satisfied when a plaintiff shows "that a favorable decision will relieve a discrete injury to himself." *IRAP II*, 2018 WL 894413 at *10 (citing *Larson v. Valente*, 456 U.S. 228, 242-43, n.15 (1982)). But a plaintiff need "not show that a favorable decision will relieve his *every* injury." *Larson*, 456 U.S. at 243 n.15. It must be "*likely*, as opposed to merely speculative," that the injury to be relieved will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. at 561.

a. Deal is assuming burdens to avoid BITS.

The allegations of the FAC establish that Elizabeth and Jessica are altering their conduct to avoid the BITS program on an ongoing basis. As a Mercer Schools parent wishing to direct her child's religious upbringing, Elizabeth faced the classic *Schempp* dilemma when Jessica began elementary school: allow her daughter to receive unwanted religious instruction or take steps to ensure Jessica would avoid it.

By the time the Complaint was filed, Elizabeth's actions to shield Jessica from BITS culminated in enrolling Jessica in a different school district. But

Elizabeth's handling of the dilemma did not begin with this drastic step. She began her course of avoidance by declining to sign Jessica's BITS permission slip—despite feeling pressured to sign it—to retain control over Jessica's religious education. JA33 (FAC ¶¶35-38). Mercer Schools put Jessica in an adjoining coatroom, where she could still hear the BITS instruction. JA33 (FAC ¶39). When Elizabeth complained, Mercer Schools simply removed Jessica altogether; Jessica was sent to other rooms—without any alternative educational instruction—to read alone. JA33-JA34 (FAC ¶¶40-44). Mercer School's unceremonious placement of Jessica is a quintessential example of a government action that marginalizes a citizen for failing to follow its prescribed religion.

Elizabeth felt that she and Jessica were second class citizens in the school. JA 35 (FAC ¶47). Other students harassed and excluded Jessica because she did not participate in BITS. JA34 (FAC ¶¶45-46). Students taunted Jessica, saying her family was going to hell. JA34 (FAC ¶¶45). As a result, Elizabeth decided to incur additional expenses to send Jessica to a school outside of Mercer County. JA35 (FAC ¶48). Incurring personal expenses to send a child to another school is the ultimate act of avoidance for a plaintiff seeking to shield her child from state-sponsored religious instruction.

b. Deal had standing to seek injunctive relief while Jessica was being removed from her classmates to avoid BITS.

It is worth pausing here to consider Deal's claim to standing as if Jessica still attended Mercer Schools. While attending Mercer and being removed from the classroom during BITS, Deal was suffering ongoing injury-in-fact. In trying to avoid BITS, Jessica was regularly excluded from her classmates and harassed by them. Based upon *Suhre*'s reading of *Schempp* and *Valley Forge*, Deal's decision to avoid BITS—rather than endure it—had no effect on Deal's standing to challenge BITS under the Establishment Clause. The injury caused by Deal's avoidance of BITS was no less constitutionally significant than the injury Deal would have suffered had Jessica participated in BITS against Elizabeth's personal wishes and beliefs.

There is nominal difference between Deal's earlier avoidance injury and Elizabeth's decision to enroll Jessica in a different school. In both cases, to avoid BITS, Jessica was displaced from her classmates, and Elizabeth and Jessica were made to feel like second-class citizens in their community. Their in-school avoidance merely traded one injury for another: though Jessica was not forced to attend BITS, Mercer Schools excluded Jessica and her classmates harassed her. As such, Elizabeth had good reason to take their avoidance one step further. By removing Jessica from Mercer Schools, Deal avoided BITS *and* the harassment.

Deal did not, however, avoid the exclusion and marginalization caused by BITS—they are now more marginalized than ever.

c. Deal's decision to change schools does not eradicate their standing.

As stated above, Deal has standing under the Establishment Clause whether she endures a challenged practice or acts to avoid it. This Circuit recognizes standing for both scenarios. The FAC alleges the additional burdens assumed by Deal. Elizabeth is incurring expenses to send Jessica to a different school. Jessica is displaced from her classmates and her local school is unavailable to her because of the presence of BITS and her inability to fully avoid its adverse effects. The assumption of these burdens to avoid BITS and harassment related to Jessica's non-participation in it constitutes an injury-in-fact sufficient to confer standing on Deal to seek injunctive relief.

(i) Deal need not choose to face direct, unwelcome contact over avoidance.

A finding that Deal lost standing when Jessica changed schools would place standing burdens on Deal this Court previously found untenable. If removing Jessica from Mercer Schools when she continued to experience direct injuries deprived Deal of standing, Establishment Clause plaintiffs will be forced to (1) endure avoidable injury or (2) precisely calibrate their reaction to the state action they challenge to maintain standing. *Suhre* expressed this Court's unwillingness to

hold Establishment Clause plaintiffs to these burdens. *Suhre*, 131 F.3d at 1090. If that is no longer the case, Establishment Clause plaintiffs will face the impossible task of discerning how to react to ensure standing is preserved.

Suhre suggests Establishment Clause plaintiffs need not choose one injury-in-fact over another. When *Suhre* rejected an altered conduct requirement for Establishment Clause standing, the Court identified the altered conduct injury as potentially more severe than unwelcome contact. *Suhre*, 131 F.3d at 1088. In doing so, *Suhre* observed that *compelling avoidance*, when plaintiffs were already experiencing injury through contact, would effectively require such plaintiffs to add "insult" to their existing injury. *Id.* at 1088 ("[f]orcing an Establishment Clause plaintiff to avoid [the challenged action] in order to gain standing . . . only imposes an extra penalty"). While an avoidance requirement would add "insult to injury," an avoidance *prohibition* would add "injury to injury" by forcing Establishment Clause plaintiffs to encounter the full brunt of other injuries that they might prefer to avoid by altering their conduct.

Here, Deal chose the path of avoidance over subjecting Jessica to continued harassment at the hands of her peers. Considering *Suhre*'s assessment of this injury as more severe than direct contact, Deal must have standing. If she does not, *Suhre*'s recognition of the altered conduct injury-in-fact will be gutted. Deal will have had standing when she acted to avoid one injury (initial contact with BITS)

but not when she acted to avoid a continuing one (harassment and failure to adequately accommodate Deal's requested avoidance).

Suhre was unwilling to create such a difficult standing matrix for Establishment Clause plaintiffs to navigate. *Id.* With *Bell v. Little Axe Independent School District* as an example, *Suhre* examined the justiciability problems that could arise from forcing a specific course of action on Establishment Clause plaintiffs to maintain standing. *Id.* at 1099 (citing 766 F.2d 1391 (10th Cir. 1985)). The Court declined to take a one-size-fits-all approach:

> We are unwilling to put potential Establishment Clause plaintiffs to the task of precisely calibrating their reactions to offensive state-sponsored religious symbolism at the peril of either reacting too little to have standing or reacting so much that their constitutional claims are deemed moot.

Suhre, 131 F.3d at 1089.

Bell sheds light on how Appellants' standing ought to be addressed under *Suhre*. In *Bell*, parent plaintiffs moved outside the defendant school district and placed their children in a neighboring school. *Bell*, 766 F.2d at 1398. This act of avoidance occurred after the plaintiffs had been the victims of harassment and exclusion in the community, including destruction of plaintiffs' house by a fire of suspicious origin. *Id.* at 1397-98. The school challenged plaintiffs' standing following their relocation. *Id.* at 1398. Holding that principles of standing did not require plaintiffs "to remain in a hostile environment to enforce their constitutional

rights," the Tenth Circuit found plaintiffs had standing to pursue injunctive relief. *Id.* at 1399, 1407.

This case aligns with the reasoning in *Bell*, and the facts here provide better grounds for standing. In both cases, the student-plaintiffs had past contact with the challenged religious exercise but did not attend the defendant school systems when the case was filed. But here, Elizabeth continues to reside within Mercer County; the parents in *Bell* had moved outside the school district. Thus, unlike the *Bell* plaintiffs, Elizabeth remains a resident of the district she challenges, allowing her to return Jessica to the Mercer Schools if BITS is enjoined.

(ii) Deal's continued residence in Mercer County, where local schools are endorsing Christianity, is significant to their claim to standing.

Deal's ongoing presence in the Mercer Schools community is constitutionally significant. *Suhre*, 131 F.3d at 1087. As *Suhre* observed, the proximity of plaintiffs to challenged conduct plays an important role in finding an injury-in-fact sufficient to confer standing. The court cited approvingly to *Washegesic v. Bloomingdale*, which held similarly: "[t]he practices of our own community may create a larger psychological wound than someplace we are just passing through." *Id.* (citing 33 F.3d 679, 683 (6th Cir. 1994) (extending standing to former student challenging a Jesus painting in the public school because the student planned to return to the school for events and because the display "affected

students and non-students alike"). Ultimately, *Suhre* concluded "where there is a personal connection between the plaintiff and the challenged [action] *in his or her home community*, standing is more likely to lie." *Id.* (emphasis added). Here, Deal retains this personal connection to the challenged action.

That this case involves an overtly sectarian bible class in Mercer County's public schools is constitutionally significant as well. The likelihood that standing will lie in a given Establishment Clause case is enhanced where the challenged exercise involves a public facility such as a school. *Id.* As *Suhre* discussed, religious displays in public buildings are more likely to engender a feeling of true religious endorsement that impairs the use of the public building by those who object to the religious message. *Id.*

And unlike the inferential link between the religious *display* and endorsement of a religious message addressed in *Suhre*, this case involves the overt endorsement of a religious message presented during classroom instruction. Far from the mere potential of being compromised, Elizabeth's and Jessica's use of the local public school system has been thwarted completely by the pervasive incorporation of BITS throughout the district and the backlash to Jessica's non-participation in that program.

(iii) Requiring Deal to keep Jessica in Mercer Schools to maintain standing would preclude her from seeking to mitigate her injuries.

In light of these important features of this case, *Suhre* compels a finding that Appellants' ongoing avoidance of BITS and Mercer Schools constitutes an injury-in-fact. If Elizabeth's decision to enroll Jessica in a different school district because of BITS and the harassment Jessica endured eliminates all injuries-in-fact, parent-plaintiffs will be forced to keep their children in an openly hostile environment while seeking court intervention—a process often taking place over several years. Such a result would be inimical to this Court's prior well-reasoned refusal to hold Establishment Clause plaintiffs to this task.

d. Deal's feelings of marginalization and exclusion caused by their interactions with BITS constitutes a cognizable injury-in-fact sufficient to confer standing to seek injunctive relief.

As with Deal's ongoing avoidance injury, Appellants' stigmatic injury confers standing. As a direct result of Mercer County Parties' BITS program, Elizabeth and Jessica were coerced and excluded in several ways. When Elizabeth received the BITS permission slip, she was conflicted. Elizabeth did not want Jessica to attend BITS classes; rather, she wished to educate Jessica about multiple religions. At the same time, Elizabeth felt pressure to enroll Jessica in BITS because of its nearly unanimous attendance. When Elizabeth ultimately made the decision to have Jessica removed from the BITS classes, Jessica was excluded from and harassed by her classmates. This experience caused Elizabeth and Jessica

to feel like second-class citizens in Mercer Schools.

These facts present a stronger case for standing than those in *Moss*, where this Court first recognized the injury-in-fact arising from feelings of marginalization and exclusion. Like Elizabeth, the parents in *Moss* received paperwork regarding the religious practice that they ultimately challenged. Both Elizabeth and the Mosses objected to the religious endorsement they perceived from the paperwork and the program it represented. But the Mosses never had any greater interaction with the challenged program. Their feelings of exclusion derived from the existence of the program and their belief that it was part of a broader pattern of Christian favoritism. Elizabeth and Jessica confronted BITS directly. Their confrontation led to tangible harm: exposure to BITS, feelings of exclusion, and harassment of Jessica.

It is important that Deal's feelings of exclusion result from their direct contact with BITS. *IRAP II* made this point clear in comparing the nature of this "stigmatic injury" with the type of injury that supports standing in the Equal Protection arena. *IRAP II*, 2018 WL 894413 at *8 n.6. In Equal Protection cases, "the stigmatizing injury . . . caused by . . . discrimination accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." *Id.* And in an Establishment Clause case, stigmatic injury provides a basis for standing where the injury is suffered from

having "personal contact with unconstitutional religious animus." *Id.* (internal quotations and citations omitted). Given the direct link between Appellants' feelings of exclusion and BITS, this requirement is met in this case.

Thus, even if Appellants do not have standing to seek injunctive relief for their avoidance injury, they have standing to do so on the basis of this stigmatic injury. Clearly, the harm to Appellants caused by BITS has not been remedied so long as they continue to act to avoid the BITS program. While the program itself is avoided through these steps, this *actual exclusion* from Mercer Schools—while Elizabeth continues to reside in the same community—would do nothing to remedy the feelings of exclusion resulting from the unconstitutional religious exercise. The recognition of this ongoing stigmatic injury provides Appellants with a basis for standing without any need to address the issue of whether Jessica will ultimately return to Mercer Schools.

e. Deal need not put forward a contrived avowal that Jessica will return to Mercer Schools for an injunction to remedy their ongoing avoidance.

Having established that Deal's ongoing avoidance and feelings of exclusion are constitutionally-significant injuries-in-fact, Deal possesses standing to pursue injunctive relief if the other three requirements for such standing are met. First, the conduct giving rise to this injury—Mercer County Parties' administration of the BITS program—is clearly traceable to Appellees. Second, this injury clearly

satisfies the imminence requirement because it is ongoing. The district court's opinion turned upon the remaining requirement: redressability.

If BITS is enjoined, Deal's ongoing avoidance of the program and feelings of exclusion would be meaningfully redressed. BITS would no longer hinder Deal's free access to the public school in Elizabeth's home school district. The removal of this obstacle—the only impediment to attendance this case is suited to address—would provide enough relief to satisfy the redressability element. While such relief may not remove every barrier to Appellants' return to Mercer Schools, other barriers (e.g., student harassment) are beyond the scope of this litigation. As discussed below, the redressability of this injury does not hinge upon whether Jessica ultimately returns to Mercer Schools or avows she will do so.

IRAP II illustrates that injunctive relief need not address every injury to satisfy the redressability requirement. 2018 WL 894413 at *10. The defendants in *IRAP II* argued that the claimed injury of separation from family members whose entry into the country was affected by the Proclamation would not be redressed by lifting the travel ban because other obstacles could continue to prevent the issuance of visas to these individuals even if the Proclamation was struck down. *Id.* In response, the Court held that the issue of whether the plaintiffs' relatives would ultimately be issued visas was "beyond the scope of [the] litigation" and "ultimately not subject to judicial review." *Id.* The Court's holding that enjoining

the Proclamation would at least remove *that obstacle* from these relatives' quest for visas rendered the associated injury sufficiently redressable for plaintiffs to have standing on the basis of that injury.

Applying these principles to this case, the meaningfulness of an injunction stopping BITS becomes clear. The only matter before the Court is the constitutionality of the BITS program. An injunction against BITS on constitutional grounds removes Appellants' constitutional objection to attending their local school. Whether an injunction of the program ultimately leads to Jessica's return to Mercer Schools is "beyond the scope of this litigation." *See id.* Other issues that might prevent Jessica from returning, such as the potential for further harassment, are not before the Court. BITS is the matter at hand. The Court can remedy the effect of this religious instruction on Elizabeth's ability to freely send Jessica to her local school without fear of constitutional injury.

As this analysis demonstrates, the redressability of Appellants' avoidance injury should not and does not hinge on whether Jessica will ultimately return to Mercer Schools. In Establishment Clause cases involving challenges to school policy, it is patently unrealistic for a parent to truthfully *avow*, at the start of a case, that her child will return to the school if the requested relief is granted. Numerous variables will affect a plaintiff parent's decision, from community reaction to the

specific relief granted by the court. The avowal required by the district court is too speculative to have any substantive or legal effect.

Premising Establishment Clause standing on the existence of such a guarantee undermines the significance of the injury-in-fact requirement. Establishment Clause plaintiffs would be encouraged to simply "say the magic words" to get into Court. And the courthouse doors would be closed to plaintiffs with real injuries of constitutional consequence—like Deal—who instead allege only what they truthfully can in the difficult circumstances that oftentimes surround Establishment Clause cases.

In addition, these "magic words" are ultimately unverifiable and unenforceable. It is difficult to imagine how plaintiff parents would *prove* these statements considering all of the variables that could affect their decision. Moreover, given the fact that the Court would ultimately have no recourse to force a student to return to the scene of a prior Establishment Clause violation, the pleading process would become unnecessarily contrived. As these problems demonstrate, basing the redressability of cases like this on a student's avowed return to the school is a fool's errand.

Instead, as *IRAP II* suggests, the Court should aim to remedy the single issue brought before it in these cases: removing the obstacle to attendance that is subject to judicial review. So long as a plaintiff remains in the community and of school

age at the time of adjudication, the Court should find no redressability problem with claims seeking injunctive relief. Because Elizabeth continues to reside in Mercer County and Jessica is of an age where she would encounter BITS if she was a student in Mercer Schools, Deal's ongoing avoidance injury is redressable by the requested injunction.

3. Deal's past injuries-in-fact provide standing to seek nominal damages.

Deal has standing to pursue a claim for nominal damages based upon the direct, unwelcome contact Elizabeth and Jessica have had with BITS and the resulting feelings of exclusion stemming from the program and their attempts to avoid it. Whereas these injuries-in-fact in their ongoing form provide standing for Deal to seek injunctive relief, the past injuries provide standing for nominal damages.

As with Deal's claim for injunctive relief, she must demonstrate that these injuries-in-fact are traceable to Mercer County Parties' conduct and redressable by the relief they request. There is no doubt that the administration of BITS and Deal's prior interaction with the program is traceable to Mercer County Parties. Therefore, Deal's claim for nominal damages turns on whether nominal damages will redress Deal's past injuries.

a. If Deal has standing to seek injunctive relief, she has standing to pursue nominal damages.

This issue is straightforward if Deal has standing to pursue injunctive relief. Where Establishment Clause plaintiffs have standing to seek injunctive relief and those claims remain live at the time of adjudication, no courts have questioned a plaintiff's ability to also recover nominal damages. *See, e.g.*, *American Humanist Ass'n v. Maryland-National Capital Park and Planning Comm'n*, 874 F.3d 195, 202-204 (4th Cir. 2017) (finding standing for injunctive relief in Establishment Clause case and not separately addressing standing for nominal damages); *Catholic League*, 624 F.3d at 1053 (same); *American Atheists v. Davenport*, 637 F.3d 1095, 1113 (10th Cir. 2010) (same); *Freedom From Religion Foundation v. New Kensington*, 832 F.3d 469, 482-86 (Smith, J. concurring dubitante) (questioning justiciability of standalone nominal damages claim but concurring in decision permitting nominal damages claim to go forward where live claim for injunctive relief existed). Thus, if the Court concludes Deal has standing to seek injunctive relief, she also has standing to pursue a claim for nominal damages based upon the past versions of the very same injuries-in-fact that entitle her to injunctive relief.

b. Deal has standing to pursue a standalone claim to recover nominal damages for past constitutional injury.

Even if the Court finds Deal does not have standing to pursue injunctive relief, Deal has standing to pursue a claim for nominal damages based upon her

past constitutional injuries. The Supreme Court has recognized the right of a plaintiff to recover nominal damages based upon past constitutional injury. *Carey v. Piphus*, 435 U.S. 247 (1978); *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299 (1986). First, in *Carey*, the Supreme Court held that a plaintiff asserting a denial of due process can obtain an award of nominal damages without proof of actual injury. *Carey*, 435 U.S. at 266-67. Then, in *Stachura*, the Supreme Court made clear that its holding in *Carey* was not limited to only certain constitutional rights. 477 U.S. at 308 n.11, 309. More than just a possible form of relief, "[n]ominal damages, and not damages based on some undefinable 'value' of infringed rights, *are the appropriate means* of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Id.* (emphasis added). [3]

Nominal damages play a vital role in the vindication of constitutional rights. "[S]uccessful civil rights plaintiff[s] often secure[] important social benefits that

---

[3] Nominal damages are clearly a form of retrospective relief. *See* Charles T. McCormick, *Handbook on the Law of Damages* § 20, 1t 85 (1935) ("Nominal damages are awarded *for the infraction of a legal right*, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage . . ." (emphasis added); *Nominal Damages*, *Black's Law Dictionary* (10th ed. 2014) (defining nominal damages as "[a] trifling sum awarded *when a legal injury is suffered* but where there is no substantial loss or injury to be compensated" (emphasis added)). This applies to Establishment Clause cases as well. *See, e.g., American Humanist Ass'n v. Greenville School Dist.*, 652 Fed.Appx. 224, 231-32 (4th Cir. 2016) (characterizing nominal damages claim as based upon "prior constitutional violation"); *New Kensington-Arnold School Dist.*, 832 F.3d at 480 (3d Cir. 2016) (analyzing standing for nominal damages as injury from past contact).

are not reflected in nominal or relatively small damages awards." *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986). *Carey* explained the importance of permitting claims for nominal damages to go forward:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of injury, the law recognizes the importance to organized society that those rights be scrupulously observed.

435 U.S. at 266.

There is ample support for finding Deal has standing to pursue the important Establishment Clause rights she seeks to vindicate through their standalone nominal damages claim. This Court has held standing exists where a plaintiff alleges a personal injury "that is redressable by nominal damages." *Covenant Media of SC, LLC v. City of North Charleston*, 493 F.3d 421, 429 (4th Cir. 2007). The Eighth, Ninth, and Tenth Circuits are in accord. *Advantage Medial, L.L.C. v. City of Eden Prarie*, 456 F.3d 793, 802 (8th Cir. 2006) (finding claim redressable where nominal damages could be awarded for violation of constitutional rights) (citing *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309 (1986)); *Jacobs v. Clark School Dist.*, 526 F.3d 419, 426 (9th Cir. 2008) (finding standing based solely on claims for nominal damages to compensate for constitutional injury); *American Humanist Assoc'n v. Douglas County Sch. Dist. RE-1*, 859 F.3d 1243, 1253 n.3 (10th Cir. 2017) (finding standing for Establishment Clause plaintiff's

retrospective relief based upon past direct, unwelcome contact with challenged religious exercise). More importantly, existing Supreme Court caselaw amply supports this approach.

(i) Supreme Court precedent requires this Court to recognize standing for Deal to pursue a standalone nominal damages claim.

The Supreme Court and this Circuit have all but directly addressed the justiciability of a standalone claim for nominal damages. In *Carey*, two student plaintiffs alleged their school had suspended them without providing them with due process. *Carey*, 435 U.S. 248-51. The Court found that plaintiffs would be entitled to nominal damages for the alleged denial of due process, even if they had no compensable injury. *Id.* at 266-67. The Court holding sheds light on the potential justiciability of nominal damages claims: "we believe that the denial of procedural due process should be *actionable for nominal damages* without proof of actual injury." *Id.* at 266 (emphasis added).

What could this statement mean other than a plaintiff alleging a denial of due process has *standing* to pursue a claim for nominal damages? Actionable is defined as "furnishing the legal ground for a lawsuit or other legal action." *Actionable*, Black's Law Dictionary (10th ed. 2014). A nominal damages claim would not be "actionable" if a plaintiff lacks standing to assert it. Considering as much in conjunction with *Stachura's* holding that there is no hierarchy of constitutional rights, plaintiffs in Establishment Clause cases must have standing to

pursue nominal damages. *See Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Ga.*, 868 F.3d 1248, 1273 (11th Cir. 2017) (Wilson, J. concurring). Holding otherwise places those rights in a hierarchy, with some rights redressable by nominal damages and others not. Thus, if due process plaintiffs have standing to seek nominal damages alone, Deal must also enjoy standing to seek nominal damages in this case.

Similarly, it is difficult to read *Covenant Media* in a way that does not resolve this issue. Plaintiff Covenant Media, a media company interested in constructing billboards, challenged the constitutionality of a zoning regulation of defendant North Charleston. *Covenant Media*, 493 F.3d at 424-25. Covenant filed suit after it received no response to an application it had made to construct a billboard. *Id.* After the filing of the claim, North Charleston enacted new zoning regulations regarding billboards, which set forth new standards and restrictions pertaining to billboards like the one Covenant sought to construct. *Id.* at 425-26. Covenant ultimately sought injunctive relief (in the form of a court order allowing it to construct the billboard it applied for), compensatory damages (for damages suffered as a result of the lack of approval of its application); and nominal damages (for alleged violation of Covenant's constitutional rights based upon the lack of consideration of the application). *Id.* at 427-429. North Charleston defended by arguing that the entire case was moot based upon the enaction of replacement

regulations and that Covenant could not recover damages for its failure to process the billboard application because an independent basis existed to deny the original application. *Id.*

After considering cross-motions for summary judgment, the district court made the following justiciability decisions: Covenant's claim for injunctive relief was moot because of the replacement regulations, and its claim for damages (the district court did not specify between compensatory damages and nominal damages), while not moot, lacked standing because its application was deficient and subject to denial for constitutional content-neutral requirements. *Id.* at 427.

This Court reversed the district court decision on the lack of standing. The court found that the constitutional injury Covenant suffered if the original regulations were unconstitutional was redressable "*at least by nominal damages*." *Id.* at 428 (citing *Carey*, 435 U.S. at 266). Even though Covenant's ability to prove monetary damages was likely compromised by the independent basis North Charleston would have had to deny the billboard application, the Court held the constitutional claim for nominal damages supplied Covenant with standing:

> Because Covenant alleges a personal injury—untimely consideration of its December 2004 Application—that was caused by North Charleston's application of the allegedly unconstitutional Sign Regulation and that is redressable by nominal damages, we conclude that the district court erred in determining that Covenant lacked standing.

Id. at 429.

The district court found that *Covenant Media* was not controlling on the question of whether Deal can proceed in this case on a claim for nominal damages alone. This interpretation was based on its conclusion that *Covenant Media* did not "squarely address" the standalone nominal damages question because Covenant also had a claim for compensatory damages. JA379 (Opinion, 19). But the opinion clearly premised the existence of standing on the presence of nominal damages for the alleged constitutional violation alone[4]; support for actual damages was at best questionable in light of North Charleston's content-neutral basis for denying the application. And given the Court's express reference to *Carey*'s discussion of the *actionability* of nominal damages claims, there is little to suggest Covenant's initial claim for compensatory damages played a part in the Court's standing decision.

Given the holdings in these cases, the Court should have no difficulty leaning heavily on *Carey*, *Stachura*, and *Covenant Media* in allowing Deal's claim for nominal damages to go forward, even if it goes forward alone. Nonetheless, to the extent the Court finds neither *Carey* and *Stachura*, at the Supreme Court level, nor *Covenant Media*, in this Circuit, to be controlling, a review of the circuit split

[4] Although *Covenant Media* did discuss the presence of a compensatory damages claim, this discussion occurred in a footnote discussing *mootness* and the compensatory damages claim was only mentioned in passing.

regarding a related issue—whether nominal damages alone can save an otherwise moot case from dismissal—provides additional support for concluding that Deal has standing to pursue a standalone nominal damages claim.

(ii) The majority view that a nominal damages claim alone rescues a case from mootness supports Deal's standing to pursue a standalone nominal damages claim.

This Circuit has adopted the majority view[5] that a standalone claim for nominal damages prevents a case from becoming moot. *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003); *American Humanist Assoc'n v. Greenville Sch. Dist.*, 652 Fed.Appx. at 232; *Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009) (holding that if a plaintiff's claim for injunctive relief becomes moot, the action is not moot if she may still be entitled to nominal damages). *Greenville* and *Mellen*, both Establishment Clause cases, held that the plaintiffs' claims for nominal damages based upon past contact with challenged religious practices were sufficient to prevent the cases from being moot, even where all other claims had

[5] Nearly every other circuit has held that a nominal damages claim is sufficient to save a case from mootness. *See, e.g.*, *Kuperman v. Wrenn*, 645 F.3d 69, 73 n.5 (1st Cir. 2011); *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001); *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009); *Murray v. Bd. Of Trs., Univ. of Louisville*, 659 F.3d 77, 79 (6th Cir. 1981); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 802-03 (8th Cir. 2006); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257-58 (10th Cir. 2004).

been mooted by intervening events.

In both cases, the defendants appealed district court findings of Establishment Clause violations and asserted mootness arguments on appeal based upon the intervening events that had occurred. *Greenville*, 652 Fed.Appx. at 231; *Mellen*, 327 F.3d 363-64. In *Greenville*, the parent and student plaintiffs, who sought an injunction of ongoing religious practices and nominal damages to compensate for past contact, had moved to a different state while the case was on appeal. *Greenville*, 652 Fed.Appx. at 228. In *Mellen*, the cadets who challenged the supper prayer at their state-operated military college had graduated. *Mellen*, 327 F.3d at 363.

This Court determined that neither case was moot because of live nominal damages claims. In *Greenville*, the Court determined that the case was not moot because plaintiffs' past constitutional injury was "complete at the time the violation occurred" and the nominal damages claim in connection with this injury provided them with a continued interest in the case's outcome. *Greenville* 652 Fed.Appx. at 232. In *Mellen*, this Court held that while the student's declaratory and injunctive relief claims were mooted by the students' graduation, "their [nominal] damage claim continues to present a live controversy." *Mellen*, 327 F.3d at 365.

This Circuit's subscription to the majority view is unsurprising in light of its

decision in *Covenant Media*. The same principles that underlie *Covenant Media*'s conclusion that a claim for nominal damages alone provides a plaintiff with standing to challenge a constitutional injury are at work in the Court's mootness analysis in *Greenville* and *Mellen*. Given the similarity between the standing and mootness analyses,[6] it is fair to conclude that the other circuits subscribing to this majority view would find that constitutional plaintiffs have standing to pursue standalone nominal damages claims.

(iii) The minority view on the justiciability of standalone nominal damages claims cannot withstand scrutiny because it is inconsistent with Supreme Court caselaw.

The minority view on this issue was most recently set forth by a sharply divided en banc panel in the Eleventh Circuit. *Flanigan's*, 868 F.3d 1248, 1270 (11th Cir. 2017). *Flanigan's* held that a standalone nominal damages claim for past injuries will not save an otherwise moot case from dismissal. *Id.* This conclusion has previously seen little support across the circuits. *See Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602, 610-11 (6th Cir. 2008); *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1262 (10th Cir. 2004) (McConnell, J. concurring) (questioning redressability of nominal damages); *New*

[6] Mootness is often defined as the doctrine of standing set in a time frame: [t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)).

Kensington, 832 F.3d 469, 482 (Smith, J., concurring dubitante) (same). In reliance upon this minority view—and in spite of *Covenant Media* and this Circuit's adherence to the majority view—the district court found that stand alone nominal damages claims are not justiciable. JA380 (Opinion, 20).

The minority rationale cannot be squared with *Carey* and *Stachura*, and it provides no reason for this Circuit to reverse course and move towards a view that nominal damages are not justiciable. One of the common refrains from the minority view is that nominal damages are insufficient to satisfy the redressability requirement because they do not change the relationship of the parties. *Flanigan's*, 868 F.3d at 1268 (the only redress we can offer Appellants is judicial validation . . . [and] absent an accompanying practical effect on the legal rights or responsibilities of the parties before us, we are without jurisdiction to give them that satisfaction"); *New Kensington*, 832 F.3d 484 (quoting *Morrison*, 521 F.3d at 611 ("[t]o confer nominal damages here would have *no* effect on the parties' legal rights."). But the Supreme Court has held that nominal damages do just that: "A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Farrar v. Hobby*, 506 U.S. 103, 113 (1992) (holding that plaintiffs obtaining nominal damages for constitutional violations have "prevailing party" status for purposes of § 1988).

Farrar's view of nominal damages as meaningful relief is much more compatible with prior Supreme Court caselaw on nominal damages than that of the minority view. *Farrar* squares completely with the Supreme Court's recognition in *Carey* and *Stachura* that nominal damages are a meaningful form of relief for constitutional injury. Its reasoning also allows nominal damages to be distinguished from the sort of nonjusticiable "psychic satisfaction" that worried the Supreme Court in *Steel Co v. Citizens for a Better Environment*. 523 U.S. 83, 107 (1998) (plaintiffs pursuing civil penalties payable to the government would be provided with only nonjusticiable "psychic satisfaction," which does not remedy individual plaintiff's injury). As *Farrar* suggests, there is a notable difference between the effect of an award of nominal damages on the relationship of the parties (where the defendant owes a judgment to the plaintiff) and the lack of any effect on the parties in situations where civil penalties are pursued (where the defendant owes the plaintiff nothing).

Farrar's view of nominal damages also has the advantage of treating nominal damages and compensatory damages—both forms of retrospective relief—in the same way. According to the analysis in *Farrar*, the only difference between the two types of damages is the amount the defendant is forced to pay. But the minority view draws a hard line between these two types of retrospective relief. *See New Kensington*, 832 F.3d at 491 (acknowledging that if plaintiff had

"sought compensatory damages [ ] for any past harm" the court would have to undertake a backwards-looking standing inquiry). Yet the underlying injury is the same for both types of damages.

Both types of damages connect with past constitutional injuries. *Stachura* makes this clear. 477 U.S. at 307-10. The only difference between the two types of damages is that compensatory damages are designed to compensate plaintiffs for actual damages arising from those violations and nominal damages are damages awarded in recognition of the constitutional violations themselves. *Id.* at 308, n.11. Considering that the same underlying conduct is at issue, the majority view is correct: in constitutional cases, claims for compensatory damages and nominal damages are equally—and separately—justiciable.

If the Court determines that it must confront this issue, reversal of the district court and reaffirmation of this majority view will align with these Supreme Court cases and advance this Circuit's long-standing recognition of the uniquely non-economic nature of Establishment Clause injuries. Deal has set forth past injuries consisting of contact with the BITS program, assumptions of burdens to avoid the program, and pervasive feelings of exclusion—precisely the sort of non-economic injuries-in-fact this Court has confronted in the past. The Court should recognize that here, in the Establishment Clause context, Deal has standing to pursue nominal damages for these past injuries and that an award of nominal

damages will serve the important function of vindicating and upholding Deal's First Amendment rights.

B. Mercer County Parties' temporary "suspension" of BITS does not affect the justiciability of Deal's challenge to the constitutionality of the program.

The FAC presents a concrete controversy that is ripe for judicial review: whether the long-standing BITS program, as it existed when the FAC was filed, is unconstitutional. This remains the controversy before the Court, and its resolution will determine Deal's claims for retrospective and prospective relief. Because the Mercer County Parties' "suspension" of BITS does not make it "absolutely clear" the program will not return, the "suspension" has no effect on the justiciability of this controversy.

First, the "suspension" cannot affect standing because standing is evaluated at the time a case is filed. *Davis*, 554 U.S. at 734. When the case was filed, BITS was being administered just as it had been for decades. And Deal challenged that version of the program. For purposes of standing, the characteristics of BITS as they existed when the FAC was filed are frozen in time.

Second, while mootness and ripeness can account for new facts, the "suspension" of BITS—the only such new facts in this case—do not affect justiciability under either of these doctrines. The developments would only affect the ripeness of Deal's claims if, after the "suspension," she sought to preemptively

challenge a substantially-different, future version of BITS. Because she does not, in order for the "suspension" to render the case moot, Mercer County Parties must bear a heavy burden to show BITS will never return, which they have not done.

1. Deal continues to challenge the long-standing BITS program, and her claim has not become unripe.

Ripeness ensures that courts are engaged to consider issues only after the controversy has become "clean-cut and concrete." *Miller v. Brown*, 462 F.3d 312, 318-19 (4th Cir. 2006) (quoting *Rescue Army v. Mun. Court of City of Los Angeles*, 331 U.S. 549, 584 (1947). Often times, this requires courts to consider whether the timing of the lawsuit is appropriate. *Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013) (citing *Renne v. Geary*, 501 U.S. 312, 320 (1991)). Given the emphasis on whether the particular *controversy* raised in a case is fit for review, numerous courts have found the analysis for ripeness similar, if not identical, to the analysis for standing. *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) (citing Erwin Chemerinsky, *Federal Jurisdiction* § 2.4 (4th ed. 2003)) (". . . there is an obvious overlap between the doctrine of standing and ripeness"); *Cooksey*, 721 F.3d at 240 ("Our ripeness inquiry, however, is inextricably linked to our standing inquiry.").

The overlap between standing and ripeness is apparent in this case. As the earlier discussion of Deal's standing demonstrates, her challenge to the constitutionality of BITS—the controversy alleged in the FAC—is clear-cut and concrete. The FAC includes details of the BITS program and clearly sets out the

aspects of the program being challenged under the Establishment Clause. Because the review of Deal's standing to challenge the long-standing BITS program demonstrates the existence of a concrete controversy, a separate ripeness analysis of this controversy is unnecessary.

Thus, the question of whether ripeness needs to be considered *at all* turns entirely on whether the Mercer County Parties' "suspension" changes the controversy at issue into one that is not concrete. For her part, Deal has maintained throughout the case that the controversy she raised is unchanged. JA250, 270, 307 (reflecting Deal's argument in the Sur-Reply, oral argument, and additional briefing). Therefore, unless the "suspension" is capable of involuntarily changing the controversy being placed at issue by Deal, there is no reason to undertake a ripeness analysis.

Without identifying any reason why such an involuntary change should occur, the district court recharacterized the controversy at issue as a challenge to an unknown future BITS program. As a consequence, the district court never addressed the justiciability of the actual controversy: the original challenge to BITS as it existed when the FAC was filed. Instead, the court effectively replaced that controversy—which Deal has consistently maintained is the controversy raised by her FAC—with its recharacterization, upon which it conducted its analysis.

Staley v. Harris County, upon which the district court heavily relied,

demonstrates that this was in error. 485 F.3d 305, 309 (5th Cir. 2007). *Staley* involved an Establishment Clause challenge of a monument outside a community courthouse that contained a bible. *Id.* at 307. After the district court issued a permanent injunction, and two months before the Fifth Circuit was set to hear argument on appeal, the challenged display was placed in storage while the courthouse closed for an extended period for renovations. *Id.* The removal of the display thrust justiciability issues to the fore in the appeal, and the court of appeals ultimately dismissed the appeal as moot. *Id.* at 314.

Of critical importance, the Fifth Circuit separately considered two different justiciability issues regarding the display's removal. *Id.* at 308-09. As to the plaintiff's original claim challenging the prior version of the display (which existed from the case's filing until the display's removal two months before argument of the appeal), the court considered whether the change in circumstance *rendered that original controversy moot*. *Id.* at 309. Ripeness was not considered as to this original claim because the controversy over the constitutionality of a certain display was (and remained) concrete.

Separately, the court considered whether plaintiff could recharacterize his original claim to challenge the "probable redisplay" of the monument. *Id. Here*, ripeness was an issue. *Id.* Any such recharacterized claim, the court reasoned, would necessarily be speculative and lack concreteness because the precise nature

of a future redisplay of the monument was unknown. *Id.* Ultimately, the court concluded that these ripeness concerns would be fatal to any effort by plaintiff to recharacterize his claim as a challenge to the potential future redisplay of the monument. *Id.*

In the case below, the district court only considered the ripeness of a challenge to an undefined future version of BITS. But there was no need to do this because Deal continues to challenge the long-standing BITS program, not a substantially-different, future version of BITS. Because the district court failed to address the justiciability of the *actual controversy*, the district court failed to analyze the only justiciability question before it. As demonstrated by *Staley*, the relevant question here is whether the challenge to the long-standing BITS program is *moot*.

2. Deal's challenge to the long-standing BITS program is not moot as a result of its "suspension."

The mootness doctrine is designed to ensure that a controversy that was once fit for review remains "live" and that the parties maintain a "legally cognizable interest in the outcome" throughout the duration of the case. *Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Mootness bears resemblance to the standing doctrine and is often defined as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue

throughout its existence (mootness)." *Porter*, 852 F.3d at 363 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (citations omitted)).

a. Mercer County Parties must bear a heavy burden to demonstrate that the "suspension" of the long-standing BITS program moots this case.

The voluntary cessation doctrine controls the issue of whether Mercer County Parties' "suspension" of BITS renders this case moot. Under the doctrine, "[a] defendant's 'voluntary cessation of a challenged practice' moots an action only if 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc. (TOC)*, 528 U.S. 167, 189 (2000)). Defendants bear a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* (internal quotations omitted) (quoting *Laidlaw*, 528 U.S. at 189). Courts have been "particularly unwilling to find" this formidable burden is met where a "defendant expressly states that, notwithstanding its abandonment of a challenged policy, it could return to the contested policy in the future." *Porter v. Clarke*, 852 F.3d 358, 365 (4th Cir. 2017).

Mercer County Parties cannot meet their heavy burden to demonstrate that Deal's challenge to the long-standing BITS program is moot. In *Porter*, the Fourth Circuit held that inmates' Eighth Amendment challenge to prison policies was not

mooted by the prison's voluntary adoption of changes in the challenged policies because the prison would not rule out the possibility of a return to the old policies. *Porter*, 852 F.3d at 366 (citations omitted) (holding the prison had not met its "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur").

b. The evidence put forward by Mercer County Parties is insufficient to satisfy their heavy burden.

Here, Mercer County Parties have done even less than the prison in *Porter*. Based upon the information provided by Mercer County Parties, all that is clear is that BITS has merely been "suspended" for one year so that it can be "reviewed" with community members, religious leaders, and teachers. JA217, JA233 (ECF Nos. 30-2, 30-4). This "suspension" occurred while Akers publicly emphasized that Mercer County Parties were fighting to keep BITS. JA222 (ECF No. 30-3). Mercer County Parties have pointed to no evidence definitively establishing that BITS will not return just as it was before this "suspension."[7]

The Mercer County Parties' failure to provide reliable support—both from

[7] The District concluded that the original BITS program challenged by the FAC "no longer exists." JA390 (Opinion, 30). The Court's basis for reaching this conclusion is unclear. It cites to Mercer County Parties' Reply Brief, but the cited page (JA205 (ECF No. 30, 6)) reveals no definitive contention that BITS "no longer exists." The Court also cites to Appellees' counsel's statements during oral argument (presumably those referenced above), but these statements by counsel are wholly unsupported by the scant record put forward by Mercer County Parties to provide information about the purported "suspension."

an evidentiary standpoint and a legal standpoint—surrounding the "suspension" is also problematic. To support their contentions on the subject, Mercer County Parties cite to newspaper articles discussing: (1) notice given to BITS teachers of their possible termination, (2) the actual Board vote to suspend BITS, and (3) a high school bible course Mercer Schools was considering implementing. JA217, JA222, JA227 (ECF Nos. 30-2, 30-3, 30-5). The only other evidentiary support offered by Mercer County Parties was a memo to the Board from Akers recommending the one-year "suspension" of BITS to allow for its "review." JA224 (ECF No. 30-4). In addition, and with nothing more than this inadequate record as support, counsel for Mercer County Parties represented in oral argument on their motion to dismiss that "it is clear from media accounts that the curriculum that is complained about in the complaint is over and is not coming back." JA274-275 (Transcript, 13:24-14:3). As Deal argued before the district court, this record does not contain evidence upon which the district court could reliably base a justiciability decision, and the district court should have provided an opportunity for discovery to further develop the details surrounding the "suspension" to allow for the credibility of this evidence to be assessed.

Given this thin support for the contentions surrounding the "suspension" of BITS, as well as the decades-long history of BITS and Akers statements' about fighting to keep the program, this action by Mercer County Parties should be

viewed as little more than a litigation tactic. And the underpinnings of the well-defined voluntary cessation doctrine demonstrates that this is precisely the sort of manipulation of justiciability courts should not allow.

The voluntary cessation doctrine rests on the idea that defendants "should not be able to evade judicial review . . . by temporarily altering questionable behavior" and prevents "manipulative litigant[s]" from altering their behavior while a suit is pending only to reinstate it immediately after dismissal of a case. *Porter*, 852 F.3d at 364. If a defendant could avoid the application of the voluntary cessation doctrine by undertaking a "review" of its policies and presenting a ripeness argument, the aims of this doctrine will be defeated. The Court must guard against such a wholesale destruction of this well-established doctrine by looking askance at the conduct of Mercer County Parties and rejecting any invitation to consider this issue through the lens of ripeness. Instead, the Court should find Deal's challenge to the long-standing BITS program to be a live controversy because the "suspension" fails to demonstrate with clarity that the BITS program will not return.

3. Deal's claim for nominal damages is not moot as a result of the "suspension" of the BITS program.

As discussed in Section A.3. above, Deal's claim for nominal damages seeks retrospective relief for injuries that had already occurred as of the time the case was filed. The "suspension" of BITS has no impact on this claim for damages

resulting from past injuries. Therefore, even if the Court determines the program's "suspension" moots Deal's claims for injunctive relief, her nominal damages claim is not moot.

Conclusion

BITS cannot escape review. When properly characterized, Deal's claims for injunctive relief and nominal damages present a concrete controversy that satisfies all justiciability requirements.

Elizabeth and Jessica have suffered and continue to suffer injuries that will be redressed by the relief they have requested: an injunction of BITS and an award of nominal damages. These remedies will remove an unconstitutional impediment to public school attendance and the figurative "Not Welcome" sign that has been on display to Elizabeth and Jessica for years. Thus, they have standing to pursue these claims.

The one year suspension of BITS does not eliminate this stigmatic injury Elizabeth and Jessica are suffering. Nor does it preclude review of the long-standing BITS program that was entrenched in the elementary school curriculum of Mercer Schools when the case was filed. Because the evidence fails to clearly show BITS is gone for good, the case is not moot, and it should be remanded to the district court where it can proceed.

Request for Oral Argument

Pursuant to Local Rule 34(a), Plaintiffs-Appellants respectfully request that this Court grant them oral argument on the issues presented by this appeal.

Respectfully Submitted,

/s/ Marcus B. Schneider, Esq.
Marcus B. Schneider, Esquire
Steele Schneider
428 Forbes Avenue, Suite 700
Pittsburgh, Pennsylvania 15219
(412) 235-7682

Patrick Elliot, Esquire
Freedom From Religion Foundation
10 N. Henry St.
Madison, WI 53703
(608) 256-8900

Counsel for Plaintiffs-Appellants

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-2429 **Caption:** Elizabeth Deal, et al v. Mercer Cty. Bd. of Ed., et al

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Type-Volume Limit for Briefs: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

Type-Volume Limit for Other Documents if Produced Using a Computer: Petition for permission to appeal and a motion or response thereto may not exceed 5,200 words. Reply to a motion may not exceed 2,600 words. Petition for writ of mandamus or prohibition or other extraordinary writ may not exceed 7,800 words. Petition for rehearing or rehearing en banc may not exceed 3,900 words. Fed. R. App. P. 5(c)(1), 21(d), 27(d)(2), 35(b)(2) & 40(b)(1).

Typeface and Type Style Requirements: A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch). Fed. R. App. P. 32(a)(5), 32(a)(6).

This brief or other document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

☑ this brief or other document contains 12,973 [*state number of*] words

☐ this brief uses monospaced type and contains _____ [*state number of*] lines

This brief or other document complies with the typeface and type style requirements because:

☑ this brief or other document has been prepared in a proportionally spaced typeface using
Microsoft Word [*identify word processing program*] in
14 Times New Roman [*identify font size and type style*]; **or**

☐ this brief or other document has been prepared in a monospaced typeface using
_____ [*identify word processing program*] in
_____ [*identify font size and type style*].

(s) /s/ Marcus B. Schneider

Party Name Elizabeth Deal, Jessica Roe

Dated: March 5, 2018

Certificate of Service

I certify that on March 5, 2018, the foregoing Appellants' Opening Brief was served on all parties or their counsel of record through the CM/ECF system.

March 5, 2018

/s/ Marcus B. Schneider, Esq.
Marcus B. Schneider, Esquire
Steele Schneider
428 Forbes Avenue, Suite 700
Pittsburgh, Pennsylvania 15219
(412) 235-7682

Patrick Elliot, Esquire
Freedom From Religion Foundation
10 N. Henry St.
Madison, WI 53703
(608) 256-8900

Counsel for Plaintiffs-Appellants