UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15-3083

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

Appellants,

v.

NEW KENSINGTON-ARNOLD SCHOOL DISTRICT,

Appellee.

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

REPLY BRIEF FOR THE APPELLANTS

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INTRODUCTION

This appeal calls upon the Court to address the justiciability of Appellants' claims for injunctive relief and nominal damages. Appellants bring an Establishment Clause challenge to the New Kensington-Arnold School District's display of a Ten Commandments Monument on the grounds its high school. Because the standing requirements for injunctive relief and nominal damages are different, the Court must conduct separate standing analyses for each claim. Appellants have standing to pursue injunctive relief if a future injury-in-fact is sufficiently likely to occur. To pursue a claim for nominal damages, Appellants must demonstrate that they already suffered an injury-in-fact prior to the filing of this case.

In their Opening Brief, Appellants argued that they had standing to seek injunctive relief at the outset of this case because Doe 1, as a student in the District, was certain to face a dilemma when she reached high-school age: suffering unwanted daily contact with the Monument, or taking some action to avoid it. The District has not responded to Appellants' argument that this future injury-in-fact gave them standing to pursue injunctive relief.

Appellants also argued that their claim for injunctive relief remains live in spite of Appellant Schaub's decision to remove Doe 1 from the District to avoid daily contact with the Monument. Even after Schaub's decision, injunctive relief

will still provide meaningful relief to Appellants because it will unburden them of their ongoing avoidance of the Monument. The District has not responded to Appellants' argument that their claim for injunctive relief is not moot.

The District did respond to Appellants' argument that they have standing to pursue nominal damages because their past contact with the Monument satisfies the appropriate direct, unwelcome contact standard. The District, however, argues for the adoption of a far stricter standard—one that would require Establishment Clause plaintiffs to have "regular" contact with a challenged display. Appellee tries to minimize Appellants' contacts with the Monument to show that their claims do not meet its conjured standard, as well as to portray Appellants' case as the kind of general grievance over which federal courts never have jurisdiction. Applying the proper standard to the undisputed facts of record, the Court will find that Appellants have suffered the sort of particularized injury necessary to provide them with standing to pursue nominal damages.

ARGUMENT

I. The Court has jurisdiction to adjudicate Appellants' claim for injunctive relief.

Federal courts must separately evaluate standing for each claim of relief. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2000) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)).

Consistent with this requirement, in their Opening Brief, Appellants separately addressed standing for each of their claims for relief. The District Court did the same in its Opinion. Opinion, 17-18 (J.A. 18-19). Appellee (the "District"), however ignores the requirement of separate analysis, spending the majority of its brief (the "Appellee Brief") on the standing requirements associated only with Appellants' claim for nominal damages. Appellee conducts no separate discussion of Appellants' claim for injunctive relief.

As a product of this one-sided analysis, Appellee offers no substantive response to Appellants' arguments concerning the Court's ongoing jurisdiction over their claim for injunctive relief. A return to the separate analysis of Appellants' injunctive relief claim highlights the ways in which Appellee has failed to respond to Appellants' arguments.

A. Appellee does not respond to Appellants' argument that it had standing to seek injunctive relief at the outset of this case.

The standing requirements for injunctive relief claims allow plaintiffs to seek to prevent prospective injury as long as the harm is sufficiently certain to occur. A plaintiff must demonstrate that (1) she is under the threat of suffering a concrete and particularized injury-in-fact; (2) the threat is actual and imminent; (3) the injury is fairly traceable to the challenged action of the defendant; and (4) a favorable decision is likely to prevent or redress the injury. *Free Speech Coalition,*

Inc. v. Attorney General U.S., 787 F.3d 142, 167 (3d Cir. 2015). Thus, the District is correct in claiming that Appellants suggest a person who has never come into contact with a challenged display may have standing to "seek an injunction to have the display removed." (Appellee Brief, 30-31). The standing requirements for injunctive relief claims allow Appellants to do so because avoidance of preventable injury is the very purpose of injunctive relief.

The District does not discuss these standing requirements for injunctive relief claims. Without trying to distinguish these well-settled requirements, the District oddly contends that a plaintiff cannot seek injunctive relief for purely prospective harm. Appellee Brief, 30-31. As a result, the District does not challenge Appellants' argument that Doe 1's impending attendance at Valley High School (VHS) gave them standing to seek injunctive relief at the outset of this case.

B. Appellee does not respond to Appellants' argument that they did not moot their case by acting to avoid regular contact with the Ten Commandments Monument.

Once a plaintiff demonstrates standing to seek injunctive relief, the only ongoing jurisdictional inquiry is whether her claim has become moot. A claim is moot only if the court is certain that the plaintiff would not be entitled to any meaningful relief. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)). "As long as the parties have a concrete interest, however small, in the

outcome of the litigation, the case is not moot." *In re ICL Holding Co., Inc.*, 802 F.3d 547, 553 (3d Cir. 2015) (citing *Knox v. Service Employees Intern. Union, Local 100*, 132 S.Ct. 2277, 2287 (2012)). Unlike standing, the defendant bears the burden of raising a mootness challenge. *Friends of the Earth*, 528 U.S. at 189.

The District does not advance any argument that Appellants' claim for injunctive relief is moot. The District does not even discuss the law on mootness in its Brief. Yet, mootness is a front-and-center issue in this case, having consumed a significant part of the district court's Opinion and Appellants' Opening Brief. The District's failure to address this issue in any way can mean only that, if Appellants had standing to pursue their injunctive relief claim at the outset of the case, the District does not believe that claim is now moot.

Instead of addressing mootness, the District argues that Appellants' post-complaint altered conduct did not *retroactively confer standing* on Appellants to seek injunctive relief. The District also argues that Appellants have waived any after-the-fact standing argument because they did not raise it before the district court. In fact, however, Appellants' Brief did not argue that the individual Appellants' altered conduct gave them standing—they could not have because, as the parties seem to agree, standing must exist at the time a case is filed. Because the District contends that Appellants have waived an argument that they have not made, the District's waiver argument is misplaced and immaterial.

The facts surrounding Appellants' arguments concerning their claim for injunctive relief shed further light on the District's misapprehension of those arguments. All of the facts necessary to Appellants' argument that this Court has ongoing jurisdiction to adjudicate their claim for injunctive relief can be found in Appellant Schaub's declaration. J.A. 677-81 ("Schaub Declaration"). Schaub testifies to the following facts essential to this argument:

- As an atheist, the Ten Commandments Monument offends Schaub and makes her feel as if the District is "commanding" students to worship "thy God." J.A. 678-69.
- Schaub wishes for the religious or non-religious upbringing of Doe 1 to be her responsibility. J.A. 678.
- Because Schaub does not want Doe 1 to come into contact with the Ten Commandments Monument her family made the decision to move Doe 1 to a different school district to begin 9th grade. J.A. 679-80.
- If the Ten Commandments Monument were removed Doe 1 could enroll at Valley High School. J.A. 680.

These facts show that Appellants had standing to seek injunctive relief when the case was filed. When Schaub later made the decision to remove Doe 1 from the New Kensington-Arnold School District (NKASD), Appellants faced an imminent

threat: concrete and particularized injury in the form of daily contact with the Ten Commandments Monument (Schaub as the parent of Doe 1, and Doe 1 as a student attending VHS). Although Doe 1 was further from attending VHS when the case was originally filed, her eventual attendance there was no less certain. Clearly, Appellants satisfied the remaining requirements of standing because the District's display of the monument is at the heart of the threatened injury, and a favorable decision by a court would have prevented that injury from occurring. The District, however, does not offer any response to Appellants' argument that they had standing to seek injunctive relief at the outset of this case—it does not even discuss the standing requirements for an injunctive relief claim.

Appellee mistakenly portrays Schaub's decision to move Doe 1 as some sort of artifice designed to advance Appellants' claim for *standing*. In reality, if Schaub's decision has had any effect, it has been to create an obstacle for Appellants in this litigation, i.e., the potential *mootness* of their claim for injunctive relief. After all, the district court's conclusion that the claim for injunctive relief should be dismissed—despite the court's acknowledgment that the claim was likely viable at the outset[1]—stemmed from Schaub's very decision that Appellee suggests was mere gamesmanship.

[1] Opinion, 17 (J.A. 18). (opining "it would have been reasonable to infer that [Appellants] would be forced to come into regular contact with the monument had

As Appellants argued in their Opening Brief, this decision does not moot their claim for injunctive relief. In the Establishment Clause context, courts have long recognized that altering conduct to avoid contact with a challenged display is a constitutional injury. *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 n.9 (1963) (holding that standing was present because "impressionable school children were subjected to unwelcome religious exercise *or were forced to assume special burdens to avoid them"*) (emphasis added). Appellants' altered conduct to avoid contact with the Monument is ongoing, and it can be remedied by an injunction. Additionally, Appellants must receive nominal damages for having been forced to endure the injury they sought to avoid when the case was filed. Appellee does address these mootness issues *at all*. Appellants' argument that there remains a live controversy in spite of the decision to move Doe 1 to a different school district is wholly unrebutted.

II. The declarations of Appellant Marie Schaub are valid.

The District's Brief attacks the validity of the Schaub Declaration.[2] Because the Court cannot weigh evidence or make credibility determinations at this stage of

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Doe 1 remained in the [NKASD] and started attending classes at the high school in 2014").

[2] Interestingly, if the Schaub Declaration is disregarded as Appellee seems to argue it should be, there would be no record evidence indicating that Doe 1 was attending school in a different school district. As the district court observed, if Doe 1 were attending school in the District, her claim for injunctive relief would remain live.

the proceedings, *Hill v. City of Scranton*, 411 F.3d 118, 124-25 (3d Cir. 2005), Appellee can only seek the Court's rejection of Schaub's Declaration under the "sham affidavit" doctrine. The District, however, waived this argument by failing to raise it before the district court. Even in its Appeal Brief, the District does not outright ask the Court to disregard the Schaub Declaration based upon the sham affidavit doctrine.

At this stage of the proceedings, the District's attack on the Schaub Declaration is an all-or-nothing proposition. Unless the entire declaration or certain statements meet the requirement of the sham affidavit doctrine, Schaub's statements must be fully considered as part of the record. Under the sham affidavit doctrine, the Court disregards statements contained in a post-discovery declaration only when the testimony contained in the declaration *contradicts* a party's prior testimony. *See, e.g., Jiminez v. All American Rathskellar, Inc.*, 503 F.3d 247, 254 (3d Cir. 2007). In order to be disregarded, the contradiction between the testimony must be clear. *See, Baer v. Chase*, 392 F.3d 609, 624-26 (3d Cir. 2004) (permitting a party's post-discovery affidavit to stand while contrasting the case with *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703 (3d Cir. 1998) where the

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While Appellant does not argue the Court should decide this case on an incomplete record, this observation serves to undercut the District's claims that the removal of Doe 1 from the District was a maneuver designed to *help* Appellants' case.

affidavit at issue was disregarded because it "flatly contradicted" prior testimony on precisely the same issue).

None of the statements in the Schaub Declaration *flatly contradict* testimony given by Schaub in her deposition. Rather than attempting to identify contradictions between Schaub's Declaration and her prior testimony, Appellee's criticism of the Schaub Declaration points primarily to things that Schaub and Doe 1 "did not testify to" in their depositions. Appellee Brief, 10, 34-35. Appellee's tack cannot show the type of contradiction that is necessary for an affidavit to be ruled out by virtue of the sham affidavit doctrine. Appellee failed to identify contradictory testimony, and Schaub's Declaration must be given full weight by the Court.[3]

[3] Although Appellee does not specifically argue that Schaub's second declaration (J.A. 733-34) should be disregarded, it clearly does not credit any of its testimony. In her second declaration, Schaub clarified that she was a member of Freedom From Religion Foundation at the time the case was filed. J.A. 734. The deposition testimony that Appellee points to for support of its argument that Schaub was not a member does not support its argument. Nonetheless, Schaub provided a second declaration for the purposes of explaining her deposition testimony to the extent that it could be read to suggest that she was not a member of FFRF at the time the case as filed. Given the nature of the question asked by Appellee's counsel in the deposition, the explanation contained in Schaub's second declaration is perfectly reasonable and precisely the type of clarifying testimony that the Third Circuit permits. *See Jimenez*, 503 F.3d at 254 (recognizing that even contradictory statements will be accepted in this Circuit where evidence "establish[es] that the affiant was understandably mistaken, confused, or not in possession of all facts during [a deposition]") (internal quotations and citation omitted). Thus, Schaub's

Because the District made no attempt to identify actual contradictions in testimony, it seems clear that the District's attack on the Schaub Declaration is simply an attempt to discredit Schaub's credibility. For example, Appellee suggests that because Schaub permitted Doe 1 to attend a dance at VHS, she could not then credibly maintain that her family made the decision to withdraw Doe 1 from the District in order to avoid daily contact with the Monument. But these are separate decisions in different circumstances. Schaub's testimony about Doe 1's attendance at a single school dance does not preclude Schaub from acting to prevent continuous daily contact with the Monument. Holding Establishment Clause plaintiffs to such a standard would require them to precisely calibrate their reactions to a challenged display in order to maintain standing and avoid mootness. *See* Opening Brief, 34 (quoting *Suhre v. Haywood County*, 131 F.3d 1083, 1089 (4th Cir. 1997)). While the Court should not disregard Schaub's declaration, it should disregard this sort of credibility attack by the District.

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second declaration must also be given full weight and consideration at this stage of the proceedings.

III. The Statement of Facts in Appellee's Brief mischaracterizes the record.

Before responding to Appellee's legal arguments on Appellants' claim for nominal damages, misleading factual issues in Appellee's Statement of Facts must be addressed. Appellee's incomplete factual picture is a product of Appellee (1) constructing a factual reality based upon what Appellants did *not* testify to in their depositions; (2) selectively quoting testimony that is in the record; and (3) ignoring testimony in the record. Appellant addresses these issues in turn below.

Before proceeding to these issues, it is important to note two things. First, while there are more misleading facts contained in Appellee's Brief than are addressed below, Appellant has elected to address only those facts that could be material to the issues presented to this Court for review. Second, none of these issues affect the Court's ability to find ongoing jurisdiction as to Appellants' claim for injunctive relief. The facts necessary to that determination are not challenged by the District.

The District's numerous statements about what Appellants did *not* testify to can be disregarded by the Court. The District does not point to deposition questions that might have solicited such testimony; it merely asserts that Appellants did not take it upon themselves to say particular things. As a result, the District does not—because it cannot—cite to the record to support these

statements. Local Appellate Rule 28.3(c) requires that assertions of fact in briefs be supported by specific reference to the record. 3d Cir. L.A.R. 28.3(c). Since all of these statements violate Local Rule 28.3, they can be disregarded by the Court.

The disagreements over facts actually reflected in the record can be divided into two categories. In the first category, Appellee clarifies misstatements in its Statement of Facts later in its Brief. For example, in its Statement of Facts, Appellee states only that Doe 1 did not feel that the Monument made her feel like she has to believe in God. Appellee Brief, 9, 13. In reality, the full statement from which this "fact" is derived states:

> Q: Right. Do you feel like you have to believe in god?
> A: No, I don't feel like I have to believe in god *but I feel like since it's there in front of a school that they kind of want you to be that way.*
> Q: Is that something that your mom told you?
> A: No, it's something I feel myself.

J.A. 864 (emphasis added). The District, however, does not provide the full testimony given by Doe 1 until well into the argument section of its Brief. Truncating Doe 1's testimony in this manner materially misconstrues Doe 1's feelings about the Monument.

In the second category, Appellee's misstatements remain uncorrected throughout the entirety of the Appellee Brief. In particular, Appellee misstates

three facts that relate directly to the individual Appellants' prior contact with the Monument. Contrary to what Appellee contends:

- Schaub last encountered the Monument a couple years prior to her deposition. *Contra* Appellee Brief, 7 (stating that Schaub last encountered the Monument four or five years before the lawsuit was filed).
- Schaub was a member of FFRF when the case was filed. *Contra* Appellee Brief, 8, 29-30 (stating that Schaub was not a member of FFRF when the case was filed).
- Doe 1 did actually look at Monument itself. *Contra* Appellee Brief, 8-9, 27 (stating that Doe 1 only ever looked at a picture of the Monument).

Regarding Schaub's encounters with the Monument, the District claimed—without citation—that Schaub had not been in the presence of the Monument for four or five years prior to the filing of the lawsuit. Appellee Brief, 7. This statement is not supported by a citation to the record, and the Court may disregard it. Beyond that, the record indicates that Schaub had been in the parking lot near the Monument on two occasions to drop her sister off at the school so that her sister could attend to necessary business at the school. J.A. 67-71. Furthermore, Schaub testified that, as of the time of her deposition (April 18, 2014), it had only been a "couple years" since she had been to VHS. J.A. 819.

The District's continued insistence that Schaub was not a member of FFRF at the time this case was filed suffers from two fatal flaws. First, Schaub definitively confirmed in her second declaration that she was a member of FFRF when the case was filed. J.A. 734 ("I was a member of FFRF before the Complaint in this case was filed"). Second, the record evidence the District attempts to rely upon does not support its claims.

During Schaub's deposition, the following exchange occurred:

> Q: Okay. Are you a member of the Freedom From Religion organization?
> A: Yes.
> Q: And was the membership provided for you as a gift?
> A: Yes.
> Q: And you don't pay anything for the membership?
> A: No, not currently.
> Q: And how long are you a member for?
> A: This year.
> Q: Okay. Is that all?
> A: Yes, I believe my membership expires in 2015.
> Q: Were you provided that membership for participating in this lawsuit?
> A: No, not that I know of.

J.A. 834.

It is unclear how Schaub's responses suggest that she was not a member of FFRF when the case was filed. Nonetheless, Schaub filed her second declaration to clarify her responses and her understanding of the questions of the District's counsel. Even if Schaub's responses could be read to suggest that she was not a

member of FFRF when the case was filed, her explanatory declaration is precisely the type of affidavit or declaration this Circuit has recognized as sufficient to overcome any contradictory conclusions that could be drawn from Schaub's testimony.

Apparently, the District persists in its claim regarding Schaub's membership in FFRF because doing so furthers the District's campaign to portray Schaub as a "enlisted" plaintiff. *See* Appellee Brief, 7. The District repeatedly has suggested that Schaub's status as an allegedly recruited plaintiff subjects all of her claims to increased skepticism. In particular, the District characterizes the Schaub Declaration as nothing more than ongoing gamesmanship by Schaub and FFRF to establish standing in this case. As discussed above, in addition to being immaterial, this sort of character attack should carry no weight at the summary judgment stage.

Finally, the District incorrectly maintains that Doe 1 has never "looked at the Monument itself." Appellee Brief, 8. Instead, trying to further the view of Schaub as a recruited plaintiff, the District suggests that Doe 1 has only looked at a picture of the Monument because Schaub brought it to her attention. Appellee Brief, 8-9. Doe 1's deposition testimony in the record before the Court directly contradicts this claim.

Doe 1 was specifically asked whether she has looked at the Monument since the karate event that she and Schaub testified about. J.A. 687. In response, Doe 1

stated that she has seen the Monument in person, indicating that she has seen the Monument when she drives to visit her friend who lives near VHS. *Id.* Therefore, the record contradicts the District's contention that Doe 1 has never looked at the Monument itself.

IV. The Court should not adopt Appellee's *regular or continuing* "direct, unwelcome contact" standard to evaluate Appellants' standing to seek nominal damages.

The District argues that standing for nominal damages claims in the Establishment Clause setting requires that any "direct, unwelcome" contact with a challenged display be regular or continuing. In this regard, the District piggybacks on the district court's Opinion, which reached much the same conclusion. Although the District takes a different path than the district court, its conclusion is still wrong.

Page 21 of the Appellee Brief sets forth—without citation—the specific standard the District urges this Court to adopt. The District claims, "[t]o 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." Appellee Brief, 21. The District's path to this conclusion has many problems.

The District relies heavily on *Freedom From Religion Foundation v. Zielke* in spite of the extensive criticism this decision has received. 845 F.2d 1463 (7th Cir. 1988). Appellants' discussion of *Zielke* in its Opening Brief is sufficient to defeat the District's reliance upon this case, though it is worth noting that the District accuses Appellants of creating "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." Appellee Brief, 17. To the extent that Appellants have read *Zielke* as requiring altered conduct from Establishment Clause plaintiffs in order to establish standing, they are not alone in their reading. *See e.g.*, *Suhre*, 131 F.3d at 1088 (interpreting *Zielke* to require altered behavior and declining to adopt a "change-in-behavior requirement"); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989) (reading *Zielke* to require altered behavior); *Vasquez v. Los Angeles ("LA") Cty*., 487 F.3d 1246, 1253 n.5 (9th Cir. 2007) (suggesting *Zielke* requires affirmative avoidance and rejecting that approach). Likewise, the district court in this case—just like every Circuit Court of Appeals to address the issue—properly disregarded *Zielke* as imposing too high a burden on Establishment Clause plaintiffs. Opinion, 10-13 (J.A. 11-14).

The District does not try to distinguish its proposed standard from the "direct, unwelcome contact" standard used by the many cases that openly criticize *Zielke*. Instead, it actually *cites* to several of those cases, claiming that they support

the *regular or continuing* "direct, unwelcome contact" standard. Appellee Brief, 21. An examination of the District's reliance upon these cases in its construction of this heightened standard exposes a carefully-executed, results-oriented incorporation of a select few cases that do not actually support the District's position.

The District's selective discussion of the few "direct, unwelcome contact" cases it cites includes only cases that featured frequent and regular contact by plaintiffs. Appellee Brief, 21 (citing *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 682-83 (6th Cir. 1994); *Vasquez*, 487 F.3d at 1252; *Foremaster*, 882 F.2d at 1491). But the "direct, unwelcome contact" cases cited by the District did not profess to establish any sort of regularity element to the "direct, unwelcome contact" standard. The District merely harvested quotes from these cases where the court references the regular contact that actually occurred in those cases. This language actually comes from the application of the *unqualified* "direct, unwelcome contact" standard to the unique facts in those cases, all of which involved regular contact by the plaintiffs. By using these cases in an attempt to buttress its argument, the District was able to continue its pursuit of a standard that includes a regularity-of-contact requirement without ignoring entirely the cases that are at odds with *Zielke*.

However, this selective use of these few cases ignores the many other "direct, unwelcome contact" cases that utilize the same standard as the cases mentioned by the District to find standing where plaintiffs lacked frequent or regular contact. *See, e.g.*, *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987) (holding that there is "no minimum quantitative limit required to show injury") (citing *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973) ("identifiable trifle" is a sufficient injury to establish standing); *Books v. Elkhart County, Ind.*, 401 F.3d 857, 862 (7th Cir. 2005) (finding standing where plaintiff passed by challenged display as little as once per year). The District has made no attempt to distinguish these cases or others like them. For these reasons and those set forth in Appellants' Brief, this Court should adopt the "direct, unwelcome contact" standard without imposing a regularity requirement.

V. Appellants have standing to seek nominal damages.

Under the proper "direct, unwelcome contact" standard, Appellants have demonstrated the injury-in-fact required for standing to pursue nominal damages. As noted in Appellants' Brief, Appellants have not located any cases in which a plaintiff who resided in the same community as a challenged display with which she had prior, direct contact was denied standing under the "direct, unwelcome contact" standard. The District has not pointed the Court to any such cases in its Brief. This case does not warrant being the first such decision.

Faced with this reality, the District touts the *regular or continuing* "direct, unwelcome contact" standard the district court employed in granting the District's motion for summary judgment. The reason for this is obvious. Because the District limits Appellants' contact with the Monument to just a handful of incidents by discounting their contact with the Monument from the nearby road, the District can argue that the facts of this case fail the regular contact requirement it asks the Court to adopt. For the reasons discussed above and in Appellants' Brief, this is not the appropriate standard.

Likely in recognition of that fact, the District makes three additional arguments against Appellants' claim of standing. First, the District argues that Appellants' contact with the Monument was not "unwelcome." Second, the District claims that this situation is distinguishable from those in which contact with a display from a distance was found to be constitutionally significant. Finally, the District portrays Appellants as having nothing more than the sort of "generalized grievance" that the Supreme Court was concerned about in *Valley Forge*. These arguments will be addressed in turn.

A. Appellants' contact with the Ten Commandments Monument was unwelcome.

Appellant Schaub testified that her first direct contact with the Monument caused her stomach to turn and that she views the Monument as "commanding"

that students and visitors worship "thy God." J.A. 824. Doe 1 testified that the Monument makes her feel that the District "kind of want[s] [her] to [believe in God.]" J.A. 864. This testimony of the Appellants is sufficient to support their claim that their contact with the Monument is "unwelcome."

Despite Appellants' testimony on their feelings about the Monument, the District argues that Appellants have failed to demonstrate that their contact was unwelcome. The District's argument again focuses on testimony Appellants did not give—i.e., that Appellants failed to "say the magic words." This argument is ironic given how little weight the District is willing to give to the words of Appellants. It seems likely that, if Appellants had simply recited that their contact with the Monument was "direct and unwelcome," the District would point to that testimony as more evidence that Appellants were simply "enlisted" plaintiffs doing what they were told by FFRF. Appellants' genuine testimony about the feelings the Monument evokes in them is clearly sufficient to constitute the "identifiable trifle" that is required for standing purposes. *See Saladin*, 812 F.2d at 691; *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.3d 1098 (11th Cir. 1983) (both citing *SCRAP*, 412 U.S. at 689 n.14).

B. Appellants' contact with the Ten Commandments Monument from the nearby road is constitutionally significant.

Like the plaintiffs dealing with symbolic displays in public areas in the Ninth Circuit (*see* Opening Brief, 32-33), Appellants were well aware of the message being conveyed by the Ten Commandments Monument, even when they saw it from a distance. That awareness stemmed from their familiarity with the contents of the Monument. J.A. 817 (Schaub testifying that the Monument is visible from the main road and that even from the road "you know what it is and you know what it says"); 687 (Doe 1 testifying that she can see the Monument from the road). Nonetheless, the District's attempts to distinguish the Ninth Circuit cases on the basis that the *shape* of the Ten Commandments Monument is not distinctive. Even if the shape of the Monument was non-distinct—which is not the case given the fact that the Monument was designed to represent "the kind of stone the first commandment was written on and given to Moses" (J.A. 31-32)—this argument would still fail.

Like the Ninth Circuit cases, the key concern in this case is whether plaintiffs suffered a particularized injury from contact with a challenged display. Under the "direct, unwelcome contact" standard, an injury sufficient to confer standing occurs when a plaintiff has contact with a display she finds unwelcome because of the message conveyed by the display. In this case, Appellants'

awareness of the message being conveyed by the Monument based upon their prior exposure to it is indistinguishable from that of plaintiffs whose perception of the display's message stems from its shape. In this regard, Appellants' contact with the Monument from the nearby road is constitutionally significant and amounts to "direct, unwelcome contact" with the Monument.

C. Appellants' claim for nominal damages is more than a generalized grievance.

Appellants' contact with the Monument takes this situation beyond the sort of "generalized grievance" that is insufficient to confer standing. By discounting Appellants' contact with the Monument because of distance or purported lack of sufficient injury, the District seeks to push the facts of this case towards the category of generalized grievances found to be insufficient to convey standing by the Supreme Court in *Valley Forge*. As discussed in Appellants' Brief, Appellants' claim for nominal damages is a far cry from the claims of the long-distance plaintiffs in *Valley Forge*.

Unlike the plaintiffs in *Valley Forge*, Appellants can point to the following facts in support of their claim for standing:

- Appellants are members of the community in which the Monument is displayed;

- Appellants have experienced direct, unwelcome contact with the Monument by virtue of residing in the community, including close contact and contact from the nearby road;
- Doe 1 regularly encounters the Monument when driving to her friend's house;
- Doe 1 was a student within the very school district that was displaying the Ten Commandments Monument when the case was filed; and
- Doe 1 would have had regular, certain contact with the Monument when she reached high school age were not for the decision to enroll in her a different school district.

In light of these facts, the District cannot place this case within the realm of generalized grievances that are insufficient to convey Article III standing.

CONCLUSION

Based upon Appellants' unrebutted arguments that they had standing to seek injunctive relief when this case was filed and that their claim remains live, the Court must remand this case to the district court for a decision on the merits of that claim. Furthermore, when the record facts are considered in light of the proper

legal standard, the Court should also remand Appellants' claim for nominal damages to be decided on the merits.

Respectfully submitted,

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COMPLIANCE CERTIFICATIONS

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

1. **My name appears on the Reply Brief for Appellants, and I am a member of the bar of the United States Court of Appeals for the Third Circuit.**
2. **Appellants' brief complies with the type volume limitation and contains 5,718 words as counted by Microsoft Word.**
3. **Appellants' brief was filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system on February 8, 2015. Opposing Counsel in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.**
4. **The text of the electronic version of Appellants' brief is identical to the text of the paper copies of the same.**
5. **The virus detection program Malwarebytes Anti-Malware, version 2.2.0.1024, has been run against the final PDF version of Appellants' brief prior to filing, and no virus was detected.**

The have hereby been served upon counsel of record via the appellate CM/ECF system on February 8, 2015, as follows:

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