No. ____

IN THE

Supreme Court of the United States

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

v.

ELIZABETH DEAL; JESSICA ROE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), this Court held that a "vague desire to return . . . without any description of concrete plans" is insufficient to establish the requirement of "imminent injury" necessary to provide standing to seek injunctive relief.

Jessica Roe stopped attending Mercer County Schools before initiating litigation against it, and has not stated any intention ever to return to the school district in the future, even if an injunction is entered. Did the Fourth Circuit err by finding Roe has standing to seek to enjoin a school program to which she has no ongoing exposure, and no non-speculative prospect of exposure in the future?

PARTIES TO THE PROCEEDING

Petitioners are Mercer County Board of Education, Mercer County Schools, and Deborah S. Akers in her individual capacity, defendants-appellees in the Fourth Circuit.

Respondents are Elizabeth Deal and Jessica Roe, plaintiffs-appellants in the Fourth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit is reported at 911 F.3d 183 and reprinted in the Appendix to the Petition ("App.") at 1a–16a. The district court's unpublished memorandum and order is reprinted at App. 17a–46a.

JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit issued its decision on December 17, 2018, and denied Petitioner's motion for panel rehearing on January 28, 2019. App. 47a. The Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, clause 1 of the U.S. Constitution provides as follows:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United

States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

INTRODUCTION

Jessica Roe left Mercer County Schools in 2016 and a few months later sued the school district, seeking to enjoin its Bible in the School ("BITS") program. She did not allege she had any desire or intention ever to return to Mercer County Schools, even if the injunction she was seeking was granted. Indeed, the complaint alleged nothing more than past exposure, past injury, and a past decision to leave the school district. The district court determined that Jessica did not have Article III standing to seek to enjoin BITS, because she left Mercer County Schools in 2016 with no concrete plans ever to return. The district court held that in the absence of such concrete plans, Jessica failed to allege a present or future injury giving rise to standing to seek an injunction, and further failed to establish that whatever injury she was claiming would be remedied by an injunction.

The Fourth Circuit reversed. The court rejected as empty "formalism" this Court's long-established requirement that to have standing to seek an injunction, a plaintiff challenging a government policy must allege that the policy poses a non-speculative impediment to the plaintiff's concrete present or future plans. The court acknowledged that Jessica failed to plead any present or future plans

that BITS impeded; the complaint was limited to pleading past exposure and past harm. The Fourth Circuit nonetheless held that the complaint's allegations were sufficient to establish Jessica's standing to seek an injunction, because Jessica's past feelings of marginalization should be presumed to be "ongoing" and "independently actionable," and because her past decision to leave Mercer County Schools should be presumed to constitute ongoing avoidance—even in the absence of any stated intent or even desire ever to return.

The Fourth Circuit's novel theory of a plaintiff's standing to seek prospective injunctive relief contravenes numerous precedents of this Court, and particularly *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). This Court has repeatedly reiterated that a plaintiff cannot have standing to seek an injunction unless the plaintiff can show that a challenged government policy poses a non-speculative impediment to the plaintiff's concrete present or future plans. It is obvious that a student who has left a school district with no stated intention ever to return does not have standing to seek to enjoin a portion of that school district's curriculum. To ensure a faithful application of this Court's injunctive standing doctrine and to avoid the creation of a circuit split, the Fourth Circuit's decision in this case should be summarily reversed.

STATEMENT OF THE CASE

Between 2012 and 2016, Jessica Roe attended kindergarten through third grade in Mercer County Schools. DE21 ¶¶ 34, 43. Jessica enrolled in a neighboring school district for fourth grade in the fall

of 2016, and she has remained there ever since. *Id.* ¶¶ 48–49.

During the years that Jessica was enrolled in Mercer County Schools, the schools offered a Bible In the School ("BITS") program. *Id.* ¶¶ 34, 43. On January 18, 2017, Freedom from Religion Foundation, Inc., Jane Doe, and Jamie Doe filed the underlying action alleging that BITS violated the Establishment Clause and seeking both injunctive relief and nominal damages. DE1. Respondents Jessica and her mother, Elizabeth Deal, were added to the case as plaintiffs in an amended complaint filed on March 28, 2017. DE21. Of these five plaintiffs, only Jessica and Deal are Respondents in this Court, because the other plaintiffs did not appeal the district court's order dismissing the complaint.

Petitioners moved to dismiss the complaint for lack of standing and failure to state a claim. Petitioners acknowledged that Jessica alleged a constitutionally cognizable *past* injury due to her previous exposure to BITS. Petitioners argued that Jessica nevertheless lacked Article III standing to seek an injunction pertaining to the school curriculum because she left Mercer County Schools in 2016 with no stated intention ever to return.[1]

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[1] Petitioners also argued in their motion to dismiss that Jessica lacked standing to seek declaratory relief concerning her alleged past injury, because she failed to seek compensatory damages in the Amended Complaint, and because a request for nominal damages alone does not create a sufficiently concrete interest to give rise to Article III standing. The district court agreed with Petitioners. App. 32a–35a. That issue is not before this Court in this petition, however, because the Fourth Circuit

The district court agreed. The district court acknowledged that the Amended Complaint stated that BITS was a "major reason" for Jessica's removal from Mercer County Schools in 2016. App. 21a. The Amended Complaint does not state, however, that Jessica would not have left Mercer County Schools but for BITS. App. 31a ("[T]he Amended Complaint does not allege that the Bible in the Schools program was the only reason for sending Roe to a school outside Mercer County."). Nor did the Amended Complaint allege that Jessica had any intention or even desire ever to return to Mercer County Schools, even if BITS was enjoined. App. 30a–31a. ("In the stark absence of the contention that Roe intends to return to [Mercer County Schools], Elizabeth Deal and Jessica Roe are not entitled to prospective relief because they do not have a concrete interest in the resolution of those claims."). The district court concluded that Jessica did not have standing to pursue injunctive relief because she had not demonstrated a likelihood of repeated injury or future harm, or that the prospective relief sought by Jessica would redress her grievances. *Id.*

The district court's ruling was further supported by the admission of Jessica's counsel at oral argument that the complaint does not contain any allegation that Jessica had any intention ever to return to Mercer County Schools:

The Court: "Going back to Jessica Roe,

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based its ruling that Roe has Article III standing entirely on her request for injunctive relief and did not address the nominal damages question.

> you haven't alleged in the complaint that she would come back to Mercer County if this program is done away with, have you?
>
> *Mr. Schneider:* We have not, Your Honor. And I don't think that's necessary. . . . It's not realistic to, to require Elizabeth Deal to consider every possible way in which this case might be resolved to make a decision preemptively on speculative circumstances about whether Jessica would return to the district. . . .
>
> *The Court*: Well, the fact that that's all speculative cuts against you more than it does your opponent here, doesn't it?
>
> *Mr. Schneider*: I don't think so, Your Honor.

C.A. App. 287:1–288:9. Jessica thus admitted on the record not only that her complaint contained no allegation of any intention ever to return to Mercer County Schools, but also that it was entirely speculative whether she would return even if BITS was enjoined.

The Fourth Circuit reversed and remanded. The court held that Jessica had sufficiently alleged an Article III injury entitling her to pursue injunctive relief. Specifically, the court found that Roe "claim[ed] to suffer from two actual, ongoing injuries: (1) near-daily avoidance of contact with an alleged state-sponsored religious exercise, and (2) enduring feelings of marginalization and exclusion resulting therefrom." App. 8a. The court explained that

"[u]nlike injuries that occurred in the past and may no longer be imminent, ongoing injuries are, by definition, *actual* injuries for purposes of Article III standing." App. 9a.

The Fourth Circuit based its description of Jessica's supposed "near-daily avoidance" injury entirely on Paragraph 48 of the Amended Complaint, which succinctly states that BITS was "a major reason" that Deal removed Jessica from Mercer County Schools in 2016.[2] The Amended Complaint does not state that Jessica would have remained in Mercer County Schools but for the BITS program, or that the continued existence of BITS was keeping Jessica from attending Mercer County Schools, or that Jessica would return to Mercer County Schools if BITS was removed.[3] But the Fourth Circuit labeled the pleading of concrete future plans of this nature "formalism" that "our standing jurisprudence does not require." App. 11a.

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[2] In its entirety, Paragraph 48 of the Amended Complaint states: "Elizabeth removed Jessica from Mercer County Schools this school year to send Jessica to a neighboring school district. The Bible in the Schools program and the treatment Jessica received as a result of not participating in the bible classes were a major reason for her removal." DE21 ¶ 48.

[3] The Amended Complaint could not possibly assert any of these things, because BITS ceased to exist in May 2017, and yet Roe has not returned to Mercer County Schools. Mercer County first suspended the BITS program on May 23, 2017. App. 21a. The suspension of BITS was made permanent on January 3, 2019, when the Board adopted a resolution stating that "We, the Board of Mercer County Schools, hereby RESOLVE that it schools will never offer or employ the BITS program in any of its schools." C.A. DE 76-2.

The Fourth Circuit based its description of Jessica's supposed "enduring feelings of marginalization and exclusion" injury on Paragraphs 45–47 of the Amended Complaint, which in fact do nothing more than describe Jessica's past experiences and feelings. Those paragraphs state that "Jessica *was* harassed by other students for not participating in bible classes," DE21 ¶ 45 (emphasis added); "[b]ecause Jessica did not join her classmates during bible classes, she *felt* excluded," *Id.* ¶ 46 (emphasis added); and "Elizabeth Deal *felt* that she and Jessica were second-class citizens at the school," *Id.* ¶ 47 (emphasis added). The Amended Complaint does not assert that Jessica's feelings from 2012–2016 in fact endured after she transferred to a different school.

The Fourth Circuit also held that the Amended Complaint adequately pleaded that Jessica's two purportedly ongoing injuries would be redressed by the entry of an injunction. With respect to the alleged "avoidance" injury, the Court held that "if the district court were to enjoin the County from offering the BITS program to students in the future, Deal would no longer feel compelled to send Jessica to a neighboring school district to avoid what Deal views as state-sponsored religious instruction." App. 10a. Paragraph 48 of the Amended Complaint—which states only that BITS was "a major reason" that Deal removed Jessica from Mercer County Schools in 2016—once again provides the entire foundation for this redressability analysis.

The Fourth Circuit further held that "an injunction would also alleviate appellants' ongoing feelings of marginalization" by "eliminat[ing] the

source" of Mercer County Schools' alleged message to Jessica that she is an excluded outsider. App. 10a. The court characterized Jessica's feelings of marginalization as an ongoing "obstacle" to her possible future return to Mercer County Schools, and found that the entry of an injunction would remove these feelings of marginalization and thus give Jessica an "opportunity" to return. The court held that this improved "opportunity" to return to Mercer County Schools was "surely a 'tangible benefit' sufficient to confer standing," without regard to whether Deal or Jessica had a concrete plan (or even an intention) to reenroll Jessica in the event an injunction was entered. App. 11a.

Petitioners moved for panel rehearing on January 14, 2019, arguing that the court's analysis of Jessica's standing to seek injunctive relief cannot be reconciled with Supreme Court precedent, and ub particular with *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), which the panel decision neither analyzed nor mentioned. Panel rehearing was denied on January 28, 2019.

This petition followed, pursuant to a 30-day extension of time to file—up to and including May 29, 2019—which The Chief Justice granted on April 18, 2019.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision should be summarily reversed because it is directly contrary to numerous precedents of this Court establishing the requirements a plaintiff must satisfy to have Article III standing to seek injunctive relief. This Court has

consistently held that where a plaintiff has no ongoing exposure to an offending government policy, she does not have standing to seek to enjoin that policy unless she can show she has concrete and non-speculative present or future plans that are likely to be directly impacted by the challenged policy. This Court applied this principle to hold that plaintiffs lacked standing to pursue injunctive relief in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Rizzo v. Goode*, 423 U.S. 362 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974); and *Golden v. Zwickler*, 394 U.S. 103 (1969), among others.

Applying these precedents to this case, it is inconceivable that Jessica could have standing to pursue an injunction. She left Mercer County Schools in 2016, and has not stated any intention or even a desire ever to return. Simply put, a student who has left a school district with no stated intention ever to go back does not have standing to seek to enjoin that school district's curriculum.

The decision below, however, dismissed this Court's prescribed approach for determining standing to seek an injunction as empty "formalism." The Fourth Circuit instead fashioned an entirely novel approach to determining standing to seek an injunction, holding that a plaintiff's past exposure to an offending government policy—even where the exposure has entirely ceased—should be considered an "ongoing injury" giving rise to standing if either of two conditions are met. First, if the past exposure caused "feelings of marginalization" at the time the exposure occurred, a court should presume—even in

the absence of supporting pleadings—that the feelings of marginalization continue and constitute an "independently actionable" ongoing injury. App. 11a. Second, if the plaintiff removed herself from all continuing exposure to a government policy before filing a lawsuit challenging it, a court should nevertheless presume that the plaintiff is "continu[ing] to avoid" it, even if the plaintiff has made no such allegation, and has not alleged that the policy is having any continuing effect on his or her present or future plans. App. 7a.

The Fourth Circuit's novel approach not only is at odds with this Court's own precedents, but it would nullify the limitations this Court has repeatedly articulated on a plaintiff's standing to seek prospective injunctive relief. Jessica's pleadings focus entirely on her *past* alleged injury: her *past* attendance at Mercer County Schools (which she departed in 2016); her *past* exposure to BITS (which has not existed since a few months after she left); and her *past* feelings of marginalization. By contrast, Jessica has not pleaded any present or future plans or intentions of any kind. By affording Jessica standing to seek an injunction based *solel*y on pleadings of past injury, the Fourth Circuit has effectively created a doctrine of perpetual standing, since a plaintiff's past exposure to a government policy and past decision to leave are fixed events that will always remain true. This Court should grant certiorari and summarily reverse the Fourth Circuit's determination that purely past injuries can be deemed actionable "ongoing injuries" that create standing to seek an injunction without any pleading or demonstration

that the challenged government policy is having a continuing, non-speculative impact on the plaintiff's present or future concrete plans.

I. THE FOURTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH *SUMMERS*

In *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), the Earth Island Institute sought injunctive relief against a policy of the U.S. Forest Service based on alleged harm to two of its members. The first member, Ara Marderosian, alleged that he "had repeatedly visited the Burnt Ridge site, that he had imminent plans to do so again, and that his interests in viewing the flora and fauna of the area would be harmed" if an injunction was not entered. *Id* at 494. The Court noted it was undisputed that this concrete statement of intent imminently to return to a specific, allegedly impacted forest site was sufficient to establish Article III standing to seek injunctive relief. *Id.* However, Marderosian lost his initial standing to seek injunctive relief after the lawsuit was filed, because he settled his claim and made no further demonstration of "any concrete application that threatens imminent harm to his interests." *Id.*

The second member of the Earth Island Institute, by contrast, alleged that "he had suffered injury in the past from development on Forest Service land," and that "he has visited many national forests and plans to visit several unnamed national forests in the future." *Id*. at 495. The Court held that this second member, Jim Bensman, lacked standing to pursue injunctive relief because his vague allegation of a general intent to visit unspecified national forests

in the future did not constitute "a specific and concrete plan of Bensman's to enjoy the national forests" that would be aided by an injunction. *Id.* The Court further expressly rejected any possibility that Bensman's alleged past injury could suffice to create standing to seek an injunction, stating that "it relates to past injury rather than imminent future injury that is sought to be enjoined." *Id.*

In rejecting Bensman's standing to seek an injunction, this Court emphasized not only that a plaintiff necessarily must demonstrate that a challenged policy is directly impacting his present or future plans, but also the *quality* of alleged impact that is necessary to sustain standing to seek an injunction. The plaintiff must show that the challenged policy "will impede a *specific* and *concrete* plan." *Id.* (emphasis added). Furthermore, the plaintiff's stated present or future intentions must be "firm," and not merely based on a vague statement that the plaintiff "wants to" do something. *Id*. at 496. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id*. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)). Moreover, the plaintiff must show that the challenged policy's asserted impact on his or her concrete plans is based on a non-speculative "likelihood," and cannot be founded on "no more than conjecture." *Id*. at 495–96.

In articulating these specific requirements for standing to seek an injunction, the Court reiterated

several well-established standing-doctrine principles from which the Fourth Circuit's decision departs. A plaintiff must have "'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction." *Id.* at 493 (quoting *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975)). A plaintiff "bears the burden of showing that he has standing for each type of relief sought." *Id.* "To seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). "This requirement assures that 'there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.' *Id.* (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)).

Applying these standards, neither the Supreme Court nor any Circuit Court has ever held that a plaintiff who has been completely removed from exposure to allegedly unconstitutional government action has Article III standing to seek to enjoin it absent a showing that the injunction would directly impact the plaintiff's "specific and concrete plans." Lacking any concrete plan whatsoever to return to the school district if BITS was enjoined, Jessica cannot possibly meet that standard. And whereas Jim Bensman at least alleged that he

intended to visit national forests in the future, Jessica has not alleged any intention ever to return to the school district, even if BITS is enjoined. Certainly, there is no basis in the pleadings for the Court to conclude that Jessica is "likely" to return to the school district if an injunction is granted, as *Summers* expressly requires; indeed, Jessica's counsel tellingly refused to make any representation of such a likelihood at oral argument of this matter below.

Under a faithful application of *Summers*, Jessica's pleadings cannot be construed to support her standing to seek an injunction against Mercer County Schools.

II. THE FOURTH CIRCUIT'S NOVEL "ONGOING INJURY" DETERMINATIONS GROSSLY DEPART FROM THIS COURT'S INJUNCTIVE STANDING DOCTRINE

The Fourth Circuit did not disagree that Jessica's pleadings were confined to the past. Indeed, the court acknowledged that Deal failed to plead "in the complaint that she would re-enroll her daughter in a Mercer County school if the district court were to issue an injunction." App. 10a–11a. But the court labeled the well-established requirement that a plaintiff seeking to enjoin a government policy must show that the challenged policy is impeding the plaintiff's concrete present or future plans an empty "formalism" that "our standing jurisprudence does not require." *Id.* In reaching this conclusion, the Fourth Circuit notably did not discuss or even cite *Summers*.

The Fourth Circuit instead determined that it could entirely dispense with this Court's injunctive standing requirements in this case, because the past injury that Jessica pleaded should be understood to have continuing, actionable effect. Critically, the Fourth Circuit did not find that Jessica *pleaded* that her past injury was having any continuing effect, or that she had *pleaded* any concrete present or future plans that were being impeded by the prospect BITS might be reinstated in some form in the future. To the contrary, the Fourth Circuit expressly held that such pleading was unnecessary, because (1) Jessica's past feelings of marginalization should be *presumed* to be "ongoing" and "independently actionable," and (2) Jessica's past departure from Mercer County Schools in 2016 should be *assumed* to constitute "near-daily avoidance" of those schools, even in the absence of any pleading of any intention or even desire ever to return. App. 8a–11a. Neither of these rationales can remotely be squared with this Court's precedents.

A. Past feelings of marginalization do not create standing to seek an injunction.

To be sure, a plaintiff who previously felt marginalized because of a past alleged Establishment Clause injury may have standing to seek compensatory damages. Past feelings do not, however, give rise to Article III standing to seek prospective injunctive relief against a policy to which the plaintiff is no longer exposed. Notably, Jessica did not plead that her feelings of marginalization continued after she left Mercer County Schools. *See* DE21 ¶ 45–47 ("Jessica *was* harassed"; "she *felt* excluded"; "Deal *felt* that she and Jessica were second-

class citizens at the school.") (emphasis added). Even if she had pleaded continuing feelings of marginalization, however, this Court's precedents make clear that asserted psychic impact of this kind is properly the subject of a suit for compensatory damages. Past trauma—even if its psychic effects continue to endure—does not create standing to seek injunctive relief, absent an impediment to concrete present or future plans.

Thus, in *Lyons*, this Court held that a plaintiff who alleged that he was previously "illegally choked by the police" at a traffic stop "has a claim for damages against the City that appears to meet all Article III requirements," but lacked standing to seek an injunction against all future police chokeholds because he failed to "meet[] the preconditions for asserting an injunctive claim in a federal form." 461 U.S. at 105, 108–09. Lyons pleaded that he had continuing "justifiabl[e] fears that any contact he has with Los Angeles police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse." *Id*. at 98. But the Court held that Lyons' continuing fears based on his past injury were insufficient to establish standing to seek prospective injunctive relief. Specifically, Lyons was unable to demonstrate any non-speculative possibility that the City's chokehold policy would impact him in the future. *Id*. at 106. "If Lyons has made no showing that he is realistically threatened by a repetition of his experience of October, 1976, then he has not met the requirements for seeking an injunction in a federal court . . . ." *Id*. at 109.

This Court's other decisions are in accord. The Court explained in *Lyons* that *Rizzo v. Goode*, 423 U.S. 362 (1976), stands for the proposition "that past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy" with respect to prospective injunctive relief. *Lyons*, 461 U.S. at 103. The *Rizz*o plaintiffs alleged they had experienced "widespread illegal and unconstitutional police conduct aimed at minority citizens and against City residents in general," but such showings of past violations did not create standing to seek an injunction absent a showing of a "real and immediate threat" of present or future injury. *Id.* Similarly, this Court held in *O'Shea* that plaintiffs who alleged they were previously subjected to discriminatory criminal law enforcement did not have standing to seek injunctive relief because "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." 414 U.S. at 495–96.

The Fourth Circuit's holding that "feelings of marginalization" arising purely from past exposure give rise to "independently actionable" Article III standing to seek an injunction is not only contrary to these precedents but would produce absurd results. Jessica has not attended Mercer County Schools, and thus has not been exposed to BITS, for more than three years, and she did not plead that the feelings of exclusion she experienced between 2012 and 2016 continued after she left the schools. Even if she had, however, the Fourth Circuit's invention of injunctive

standing based on continuing psychic trauma arising from past injuries must be wrong because it is entirely limitless. Twenty years from now, Jessica might theoretically continue to feel marginalized because of her childhood experience. That certainly would not give her standing to pursue an injunction against a school curriculum she voluntarily left behind decades before and to which she could not possibly return, even if the vindication of a judicial ruling might, as the Fourth Circuit put it, "alleviat[e] appellants' ongoing feelings of marginalization." App. 11a. The Fourth Circuit's theory of lifelong standing to pursue an injunction based on past trauma is far more radical than the theories of injunctive standing that this Court rejected in *Summers*, *Lyons*, *Rizzo*, and *O'Shea,* and accordingly the decision below should be summarily reversed.

B. A plaintiff's past decision to remove herself from exposure to a challenged policy does not constitute ongoing avoidance in the absence of concrete plans.

Jessica alleged that BITS was "a major reason" for Jessica's removal from Mercer County schools in 2016. DE21 ¶ 48. However, she did not allege that BITS was the only reason that she left Mercer County Schools or that she would not have left had BITS been rescinded. And most significantly, she did not allege that she had any desire or even any intention to return to Mercer County Schools at any point in the future, even if BITS was enjoined. The Fourth Circuit nonetheless held that Jessica's pleading concerning her past removal decision should be construed to state

a *present and ongoing harm* of "continu[ing] to avoid the BITS program," App. 7a, even in the absence of any allegation that such continued avoidance was in fact occurring, or that Jessica and Deal had any concrete plan to cease such avoidance and return to Mercer County Schools in the event an injunction was entered.

The Fourth Circuit clearly erred in deeming a plaintiff's previous voluntary removal from exposure to a challenged government program to qualify as an "ongoing injury" of continued avoidance in the absence of any statement of concrete present or future plans to return to Mercer County Schools. A person may leave a school district motivated in part by the quality of the teaching, or rampant bullying, or concerns about the drug culture in the school. That stated past motivation for leaving, however, cannot be translated into "near-daily avoidance of contact" with the school absent a further statement of a concrete present or future plan to return to the school if the offending aspect is favorably resolved. It makes no linguistic sense to state that a plaintiff is "avoiding" exposure to a program absent a showing that the program is materially impacting the plaintiff's present or future plans.

Summers makes clear the absolute Article III requirement that a plaintiff seeking to enjoin a government program must show that the program poses a non-speculative impediment to the plaintiff's concrete present or future plans. The Fourth Circuit's decision also cannot be reconciled with *Golden v. Zwickler*, 394 U.S. 103 (1969), wherein this Court

held that a former Congressman did not have standing to seek a declaratory judgment that a handbilling policy was unconstitutional—even though he had previously been criminally convicted for violating it—because he had left Congress, he was not then running for office, and he merely speculatively asserted that he could someday be a candidate for Congress again. Like Congressman Zwickler, Jessica alleges that she was previously injured by the challenged government policy, but she acknowledges she is no longer exposed to it and has stated no concrete present or future plans that the challenged policy is impeding.

The Fourth Circuit's novel theory of injunctive standing, which holds that a plaintiff's past removal from exposure to a policy should automatically be deemed actionable "continued avoidance"—even in the absence of any pleaded impediment to the plaintiff's concrete present or future plans—cannot be reconciled with this Court's precedents and should be summarily reversed.

III. IF LEFT TO STAND, THE FOURTH CIRCUIT'S NOVEL "ONGOING INJURY" TEST WOULD CREATE A CIRCUIT SPLIT

The decision below stands out as the *only* published circuit court decision that has failed to faithfully apply this Court's well-established requirement that in order to establish Article III standing to seek an injunction, a plaintiff must plead that a challenged government policy poses a non-speculative impediment to the plaintiff's concrete present or future plans. *See, e.g.*, *ZF Meritor, LLC v.*

Eaton Corp., 696 F.3d 254, 302 (3rd Cir. 2012) (finding plaintiffs lack standing to seek an injunction, where evidence established no more than a possibility that the plaintiff might one day reenter the market); *Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 343 (5th Cir. 2012) (finding plaintiffs lacked standing to sue for injunctive relief, in the absence of evidence of concrete plans to purchase an overpriced casket from the SCI or Alderwoods funeral home); *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12–13 (D.C. Cir. 2011) (finding trade association lacked standing to seek declaratory and injunctive relief, because it was speculative whether the challenged determination would ultimately impact any of the association's members). To avoid creating a circuit split, this Court should summarily reverse the decision below.

CONCLUSION

This Court should summarily reverse the judgment of the Fourth Circuit. In the alternative, the Court should grant the petition for a writ of certiorari, set the case for full merits briefing, and reverse the judgment below.

Respectfully submitted,

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