IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC. et al., Plaintiffs, v. MERCER COUNTY BOARD OF EDUCATION et al., Defendants.	Civil Action No. 1:17-cv-00642 Hon. David A. Faber Oral Argument: June 19, 2017

REPLY CONCERNING RIPENESS IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Pursuant to the Court's July 6, 2017 Order directing briefing on the issue of ripeness, Defendants[1] submit this brief in support of their Motion to Dismiss Plaintiffs' First Amended Complaint (the "Motion" (ECF No. 25)). (*See* ECF No. 36 (directing the parties to answer two questions: 1) Whether this case is ripe for decision; and 2) Whether the court need decide the issue of standing prior to considering ripeness).) The claims in this case are not ripe for decision, and accordingly present an alternative ground for dismissal in addition to Plaintiffs' lack of standing and other deficiencies that were raised in the Motion. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction.") (quotation omitted).

Because ripeness—like standing—is a threshold justiciability concern that Plaintiffs must demonstrate is present before the Court may reach the merits of the case, *see Miller v. Brown*, 462 F.3d 312, 318-19 (4th Cir. 2006) ("The burden of proving ripeness falls on the party bringing suit."), the Court may choose to decide ripeness before standing and in so doing dismiss the unripe claims. *See, e.g.*, *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits."); *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) ("[T]he prudential standing doctrine, represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction."); *Toca Producers v. FERC*, 411 F.3d 262, 265 n.* (D.C. Cir. 2005) ("[B]ecause the ripeness requirement, even in its prudential aspect, likewise calls for a threshold inquiry that does not involve an adjudication on the merits, it likewise may be resolved without first addressing

[1] As with other papers filed in support of the pending Motion to Dismiss (ECF Nos. 26, 30), the term "Defendants" does not apply to Rebecca Peery, who has not been served and thus is not before this Court. However, the arguments herein and in the other papers related to that Motion apply with equal force to Ms. Peery.

whether the producers have Article III standing."). Because no Plaintiff has a certainly impending encounter with the conduct about which they complain, their claims are not ripe and should be dismissed.

I. THE DOE PLAINTIFFS' CLAIMS ARE NOT RIPE AND THE COURT MAY DISMISS THEM ON THAT GROUND

The claims brought by Plaintiffs Jane Doe and Jamie Doe (the "Doe Plaintiffs") are not ripe for decision for many of the same reasons these Plaintiffs lack standing to sue: any purported injury was not certainly impending when they filed this lawsuit and was instead merely speculative. *See, e.g.*, *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427–28 (D.C. Cir. 1996) ("Ripeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in fact be certainly impending. It is only the prudential aspect of ripeness—where a court balances the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration, that extends beyond standing's constitutional core.") (quotations and citations omitted). This bedrock principle was brought into stark relief when the Bible in the Schools curriculum was indefinitely suspended pending a robust review such that it will not be offered in Mercer County Schools next year. (*See* ECF No. 30 at 4.)

Indeed, inasmuch as Plaintiffs Doe do not (and cannot) allege that they have been harmed, the ripeness inquiry as to them "coincides squarely" with the injury-in-fact prong of standing.

> Whether the question is viewed as one of standing or ripeness, the Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional "case or controversy," that the issues presented are "definite and concrete, not hypothetical or abstract." In assuring that this jurisdictional prerequisite is satisfied, we consider whether the plaintiffs face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement", or whether the alleged injury is too "imaginary" or "speculative" to support jurisdiction. We need not delve into the nuances of the distinction between the injury in fact prong of

> standing and the constitutional component of ripeness: in this case, ***the analysis is the same***.

Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (en banc) (quotations omitted and emphasis added). Accordingly, because their claims were premised upon a brittle speculative chain (since conclusively broken by the passage of time), the Doe Plaintiffs both lack standing to sue and have brought claims unripe for decision. No matter the angle from which the Court observes the issue, the result does not change: the Court lacks subject matter jurisdiction over the Doe Plaintiffs' claims. *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013) ("Often, the best way to think of constitutional ripeness is as a specific application of the actual injury aspect of Article III standing."); *Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006) ("Despite the conspicuous overlap of the two doctrines, we discuss standing and ripeness separately. But whether this case is examined through the prism of standing or ripeness, it can be distilled to a single question: whether the Plaintiffs have sufficiently alleged an imminent and concrete threat of future injury . . . ."); *see also, e.g.*, *Action All. of Senior Citizens v. Heckler*, 789 F.2d 931, 940 n.12 (D.C. Cir. 1986) ("[T]he claim is unripe whether the balance is so lopsided as to raise constitutional questions or is only weighty enough to generate prudential concerns.").

II. THE ROE PLAINTIFFS' PROSPECTIVE CLAIMS ARE NOT RIPE AND THE COURT MAY DISMISS THEM AND THE ROES' RELATED CLAIM FOR NOMINAL DAMAGES

Likewise, the prospective claims brought by Elizabeth Deal and Jessica Roe (the "Roe Plaintiffs") are not ripe. Just as an injunction would not benefit the Roe Plaintiffs because they have no intention for Roe to return to school in Mercer County (and thus the Roe Plaintiffs lack standing as to these claims), that request for injunction is not ripe because the Bible in the Schools program has been indefinitely suspended for review and modification in concert with

members of the public (including Plaintiffs, if they so choose). (*See* ECF No. 30 at 4.) Thus, what the Court ***could*** enjoin at this juncture is not "substantively definitive enough to be fit for judicial decision." *Bryant Woods Inn, Inc. v. Howard Cty.*, 124 F.3d 597, 602 (4th Cir. 1997); *see Doe v. Duling*, 782 F.2d 1202, 1205 (4th Cir. 1986) ("Federal courts are principally deciders of disputes, not oracular authorities."). Nor will withholding a merits decision (which could not be reached in any event, because the Roe Plaintiffs lack standing) result in hardship for the Roe Plaintiffs: they have no intent for Roe to return to school in Mercer County (and thus also lack standing), and even if they did so intend and Roe enrolled in Mercer County Schools for the 2017-2018 school year, the Bible in the Schools classes will not be offered and so could not affect her. *Bryant Woods Inn*, 124 F.3d at 602 ("In deciding whether an issue is ripe, we decide . . . whether hardship will result from withholding court consideration.").

The Roe Plaintiffs' nominal damages claim should be dismissed for the reasons stated in Defendants' other papers in support of the Motion (ECF No. 26 at 5-14; ECF No. 30 at 2-10), including that a nominal damages claim standing alone does not redress an injury and therefore these Plaintiffs lack standing. *Elend*, 471 F.3d at 1205 ("Thus, there may be standing without ripeness . . . or there may be ripeness without standing, as when an injury is fully formed, but the remedy sought would simply not redress the harm[.]") (citations omitted). The Court may also dismiss Roe Plaintiffs' nominal damages claim on the ground of prudential ripeness. *See Ruhrgas Ag*, 526 U.S. at 585. Because the damages sought are nominal only (no compensatory damages have been sought by the Roe Plaintiffs—an admission that they have not suffered actual damages), no hardship will result from withholding judicial consideration. *Bryant Woods Inn*, 124 F.3d at 602. Indeed, the Roe Plaintiffs will be free to assert this nominal damages claim in

the unlikely event their claims for injunctive relief become ripe in the future.[2] But if the Court determines that the Roe Plaintiffs have standing to assert their nominal damages claim and that it is prudentially ripe, it should be dismissed for failure to state a claim for violations of 42 U.S.C. § 1983 for the reasons set forth in Defendants' other papers. *See also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

CONCLUSION

For the reasons stated above, in prior briefing in support of Defendants' Motion, and at oral argument before this Court on June 19, 2017, this case should be dismissed in its entirety.

[2] *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) ("Always we must balance the heavy obligation to exercise jurisdiction against the deeply rooted commitment not to pass on questions of constitutionality unless adjudication of the constitutional issue is necessary.") (quotations and citations omitted); *but see Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) ("To the extent respondents would have us deem petitioners' claims nonjusticiable on grounds that are 'prudential,' rather than constitutional, that request is in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.") (quotation omitted and emphasis added); *Miller v. City of Wickliffe*, 852 F.3d 497, 503 n.2 (6th Cir. 2017) ("[I]n view of the question, we choose to rely on a more solid foundation for deciding the case—namely, constitutional-standing principles.")

Dated: August 4, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2017 the foregoing REPLY CONCERNING RIPENESS IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

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