No. 17-2429

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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.

On Appeal From The United States District Court
For The Southern District of West Virginia at Bluefield
The Honorable David A. Faber
Case No. 1:17-cv-00642

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 17-2429 Caption: Elizabeth Deal, et al. v. Mercer Cty. Bd. of Educ., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Mercer County Board of Education; Mercer County Schools; Deborah S. Akers
(name of party/amicus)

who is Appellees, 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/ Hannah Dunham Date: 05/04/2018

Counsel for: Appellees

CERTIFICATE OF SERVICE

****

I certify that on 05/04/2018 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/ Hannah Dunham
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STATEMENT OF THE CASE

Appellants ask this Court to reinstate their complaint in order to pursue claims for which they lack standing and which are unripe for review. The program that Appellants challenged as unconstitutional no longer exists and even before its suspension, Appellants had already removed themselves from its effects with no intention of returning. If in the future some form of the program were reinstated, Appellants would lack standing to challenge it; adjudication of its legality now would be premature and wholly speculative. As Appellants seek only prospective relief, not compensatory damages for past injuries, the District Court properly dismissed their claims.

Appellant Elizabeth Deal is the mother of Jessica Roe, a student who used to attend elementary school in Mercer County, West Virginia, first at Memorial Primary School and then at Bluefield Intermediate School.[1] JA29, 32-33, 34-35, DE 21 ¶¶ 12, 34, 43, 48. At the time the First Amended Complaint was filed, fifteen elementary schools, one intermediate school, and three middle schools in Mercer County offered the "Bible in the Schools" program (BITS) to their students. JA31, DE 21 ¶ 25. BITS was a privately-funded, optional educational

[1] This case was initially brought by Freedom From Religion Foundation, its member Jane Doe, and Jane Doe's child, Jamie Doe, who attends a Mercer County elementary school. JA13, DE 1 ¶¶ 8-10. After Appellees filed a motion to dismiss for lack of standing and lack of a cognizable legal claim, DE 20, Plaintiffs filed their First Amended Complaint, adding Deal and Roe as plaintiffs. JA29, DE 21 ¶¶ 12-13. Only Deal and Roe appeal the opinion below.

program instructing participating students about the Bible. JA153-54, DE 26 at 3-4. Both Memorial Primary School and Bluefield Intermediate School offered BITS. JA32-34, DE 21 ¶¶ 34, 43. When Roe attended Mercer County schools, Deal did not sign a permission slip for her to attend BITS, JA33, DE 21 ¶¶ 35, 38, and Roe was accordingly placed elsewhere in the school while the classes took place. JA34, DE 21 ¶¶ 42, 45.

Deal removed Roe from Mercer County Schools at the start of the 2016-2017 school year and sent her to a neighboring school district. JA35, DE 21 ¶ 48. Deal has alleged that BITS was "a major reason for [Roe's] removal." *Id*. Deal did not specify what her other reasons were for removing Roe from the school district. Significantly, however, Deal did not allege that BITS was a but-for cause of her removal of Roe, nor that she would have kept Roe in the school district were it not for the program. Nor did Deal assert that if BITS was eliminated or changed she would return Roe to school in Mercer County.

On March 28, 2017, after Deal withdrew Roe from the Mercer County Schools, she initiated this lawsuit, seeking declaratory and injunctive relief, as well as nominal damages. Deal and Roe did not seek any compensatory damages for Roe's past exposure to the BITS program.

On April 11, 2017, the Board terminated the employment of all BITS teachers. *See* JA215, DE 30-1 ¶ 4. On May 23, 2017, the Mercer County Board of

Education voted to suspend BITS for at least a year while the Mercer County Board of Education undertakes a thorough review of and modification to the BITS curriculum. *See* JA214, DE 30-1 ¶ 3; JA203-04, DE 30 at 4-5. And, at the hearing on the motion to dismiss below, held on June 19, 2017, counsel for Appellees[2] "assured the court . . . that the BITS curriculum of which plaintiffs are complaining does not exist and will not come back," a representation that the court accepted and that Appellants do not challenge. JA365, DE 47 at 5. Despite the fact that the program about which she complains no longer exists, however, Deal has failed to return Roe to school in Mercer County.

SUMMARY OF THE ARGUMENT

Deal and Roe lacked standing to challenge the BITS program when they filed their complaint (the relevant point in time) because at that point Deal had removed Roe from school in Mercer County with no intention to ever return, no matter the circumstances. It is not enough that Deal averred the BITS program was one of several reasons—even a "major" reason—for removing Roe from the school district. Deal and Roe cannot have had a sufficiently concrete interest and redressable injury to satisfy the stringent requirements of Article III standing at the time they filed their complaint unless BITS was the but-for cause of Roe's removal

[2] The term "Appellees" refers to Mercer County Board of Education, Mercer County Schools, and Mercer County Schools' Superintendent Dr. Deborah S. Akers; the term does not refer to Rebecca Perry. On Apr. 16, 2018, Rebecca Peery filed with this Court a Motion to Dismiss her from this appeal. Doc. 50.

from the district, and unless Deal intended to return Roe to the school district if BITS was no longer offered to students who wanted to participate. And it is clear that is not the case, not only because of the stark absence of any supporting averment from Deal, but also because BITS was officially suspended by the School Board a year ago and, glaringly, Deal and Roe have failed to introduce any evidence that Roe has returned or intends to return. Throwing a request for nominal damages into a complaint is plainly insufficient to manufacture Article III standing where there otherwise is none. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). In short, at the time the complaint was filed, Appellants lacked standing to challenge the BITS program as it then existed.

Appellants' challenge is also unripe and currently unfit for review because BITS has been indefinitely suspended, and any possible replacement "Bible in the Schools" curriculum remains uncertain and speculative. Moreover, Roe does not now attend Mercer County Schools, and Deal has no intention of changing that fact. Thus, Appellants lack standing to seek prospective injunctive relief and would face no harm in delaying review of the BITS program until the time of its potential future reinstatement. This Court should therefore affirm the lower court's dismissal of the case.

ARGUMENT

I. APPELLANTS LACK STANDING

In order to have standing to bring a claim in federal court, a plaintiff must plead facts sufficient to plausibly show that: 1) she suffered an actual or threatened injury that is concrete, particularized, and imminent; 2) there is a causal connection between her injury and the defendant's conduct; and 3) the relief sought would redress her injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Standing is analyzed at the time the suit is filed. *Davis v. FEC*, 554 U.S. 724, 734 (2008). Appellants failed to plead a concrete and imminent injury, and failed to plead any claim for relief that would be sufficient to address the past injury they allege. Thus, this Court should affirm the lower court's dismissal of Appellants' claims for lack of standing.

A. Appellants do not have standing to pursue injunctive relief because there is no likelihood of repeated injury or future harm in the absence of an injunction.

The lower court correctly held that Appellants do not have standing to pursue claims for prospective relief. JA375, DE 47 at 15. To bring a claim for injunctive relief, a plaintiff "must demonstrate that he 'is ***immediately in danger*** of sustaining some direct injury' as the result of the challenged official conduct." *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012) (emphasis added) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). "A plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury

requirement but must show that he or she will be injured in the future." *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998); *see also Lebron*, 670 F.3d at 561. "Past 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." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

Appellants alleged only past injury, yet sought only prospective relief. They fail to recognize that such allegations of past conduct show no immediate and concrete harm that could satisfy the stringent injury requirement needed to plausibly entitle a plaintiff to injunctive relief. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Any theory of Appellants that they may face ***future*** injury is too attenuated to support standing to seek an injunction—they admit they are no longer exposed to BITS, have no intention to return to the school district even if a successor to the BITS program was enjoined, and indeed have not introduced any evidence that Roe returned to the school district even though BITS (consistent with the representations of counsel in the court below, *see* JA200, DE 30 at 1; JA279:2-12, has not been part of the optional curriculum in Mercer County for more than a year.

Appellants mischaracterize the issue presented in this case in an effort to square it with settled case law. The question is decidedly ***not*** whether avoiding

direct, unwelcome contact with a challenged practice is sufficient for Article III standing. Rather, the question is whether Appellants had standing at the time they filed their complaint for the relief they sought—they had left the school district nearly a year prior to filing their case, BITS was not the but-for cause of their departure, and they have no intention to return to the school district if a successor program to BITS was enjoined. Those uncontested facts amply demonstrate that Appellants lack standing to seek injunctive relief, for which a plaintiff must plausibly allege facts that show there is a threat of future injury that is "sufficiently real and immediate." *Lyons*, 461 U.S. at 103 (quoting *O'Shea*, 414 U.S. at 496). Moreover, as discussed *infra* at II, lacking standing to pursue declaratory or injunctive relief, Appellants cannot purport to manufacture standing and proceed to federal court by throwing a line in their complaint asking for nominal damages.[3]

[3] The Freedom From Religion Foundation (FFRF) was a party below who was also dismissed by the district court, but failed to appeal (as did other plaintiffs it purported to represent by association). Nevertheless, counsel for FFRF also represent Appellants in this appeal. FFRF has a serial history of unsuccessfully attempting to manufacture standing in federal courts across the country (including in this Court), and this case must necessarily be viewed in light of those facts. *See, e.g.*, *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 606 (4th Cir. 2012) ("The facts to support standing for Ellen Tillett and her child are notably thin . . . . Our conclusion that Tillett was not injured by the School District's policy requires the further conclusion that the Freedom From Religion Foundation also lacks standing."); *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 821 (7th Cir. 2014) ("A plaintiff cannot establish standing to challenge such a provision without having personally claimed and been denied the exemption."); *Gaylor v. Lew*, No. 16-cv-215, 2016 WL 6962315, at *1-2 (W.D. Wis. Oct. 24, 2016) ("This is the second time that officers of [FFRF] have brought this challenge. In *Freedom*

As the lower court ably recognized, Roe does not currently attend a Mercer County school, nor does she intend to again attend a Mercer County school if the injunction Appellants seek was granted. JA376, DE47 at 16. Roe thus has no concrete interest in the future of the BITS program, and has no Article III standing to seek to change or eliminate it.

Appellants principally rely on *Suhre v. Haywood County* to say that they have a continuing injury that is immediate enough to justify an award of injunctive relief. 131 F.3d 1083 (4th Cir. 1997). *Suhre* involved a challenge to a Ten Commandments display within a county courthouse. *Id*. at 1084-85. There, plaintiff, who had already been party to a number of legal actions adjudicated in the courthouse, sought a declaratory judgment that the continued presence of the display was unconstitutional, and an injunction against maintaining the tablets on

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from Religion Found., Inc. v. Lew . . . I dismissed plaintiff's challenge . . . for lack of standing . . . . [here] plaintiffs do not have standing[.]"); *Freedom From Religion Found., Inc. v. Franklin Cty.*, 133 F. Supp. 3d 1154, 1158 (S.D. Ind. 2015) ("By seeking only nominal damages, plaintiffs concede at the outset . . . that they suffered no actual injury, or at least that the injury they claim cannot be redressed by an award of actual damages; thus appearing to have no standing.") *Freedom From Religion Found. v. Werfel*, No. 12-cv-946, 2013 WL 4830749, at *1 (W.D. Wis. Sept. 10, 2013) ("The problem was that plaintiffs were seeking to enjoin preferential treatment for churches, but they did not identify an ongoing injury . . . Thus, even if plaintiffs prevailed on their claim, it would not redress their injury."); *Freedom from Religion Found., Inc. v. Ayers*, 748 F. Supp. 2d 982, 989 (W.D. Wis. 2010) ("Finally while plaintiffs argue that denying them taxpayer standing here would seemingly reward and encourage a sham, it derives from a constitutional principle that federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution.") (quotations omitted).

which the commandments were displayed. *Id*. at 1085. In holding that plaintiff had standing to pursue his Establishment Clause claims, this Court repeatedly emphasized the importance of his ongoing and future contact with the display:

> Suhre comes into contact with the Ten Commandments display as a participant in local government. He attends public meetings in the courtroom on matters of local concern . . . . The display he challenges is in the main courtroom of Suhre's home community. This public facility lies at the center of local government, and Suhre must confront the religious symbolism whenever he enters the courtroom on either legal or municipal business.

Id. at 1090. This Court further emphasized that plaintiff's standing did "not rest on past injury alone . . . . Suhre has stated an ***unmistakable intention*** to participate in future judicial and municipal business at the courthouse when the occasion arises." *Id*. at 1091 (emphasis added). Thus, the plaintiff plausibly demonstrated an immediate danger of future injury: namely, his "unmistakable intention" to return to the location of the Ten Commandments display. *Id*.

Appellants, on the other hand, face no such immediate alleged harm. Deal admits that the BITS program was one reason (among others) that she removed Roe from the school district, and her complaint notably did not allege that Roe would ***return*** to Mercer County schools if the BITS program was enjoined. Appellants argue that requiring them to state such an intention to establish their standing "undermines the significance of the injury-in-fact requirement [because] Establishment Clause plaintiffs would be encouraged to simply 'say the magic

words' to get into Court." Br. at 32. Appellants further contend that pleading the "magic words" of avowed return would be unverifiable and unenforceable, and thus in their view meaningless. Not so. Counsel must have a good faith basis to believe in the accuracy of the facts they incorporate into signed pleadings. *See* Fed. R. Civ. P. 11. And, well knowing that requirement, Appellants have not been able to bring themselves to declare an intention to return to the school district—despite the wall of authority holding that such an intention is integral to their standing—presumably ***because*** they have no such intention and know very well that saying otherwise would be untrue and subject them to sanctions. *See* Fed. R. Civ. P. 11(c).

Another case filed by FFRF, *Freedom from Religion Foundation, Inc. v. New Kensington Arnold School District*, further supports the importance of distinguishing plaintiffs who can benefit from an injunction and those who cannot, and shows that FFRF knows how to plead what is necessary to pursue a claim for injunctive relief when the underlying facts support it. 832 F.3d 469 (3d Cir. 2016). In that case, the FFRF-supported plaintiff and her daughter brought an Establishment Clause challenge to a Ten Commandments monument at their local Valley High School. *Id*. at 472. The plaintiff enrolled her daughter at another high school, but "avow[ed] that were the monument removed from Valley High School, she would permit Doe 1 to enroll there." *Id.* at 474. In holding that the plaintiff

had standing to pursue an injunction, the Third Circuit explained that the plaintiff's decision to send her daughter to the other high school did not mean she lacked standing to seek injunctive relief because she "represents that she intends to enroll Doe 1 at Valley High School if the monument is removed and that Doe 1 wishes to take courses at the adjoining career center, demonstrating that an injunction, if granted, could provide relief." *Id*. at 481 (also addressing why plaintiff's claim for injunctive relief was not moot due to the daughter's enrollment in another high school)*; see also Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391, 1399 (10th Cir. 1985) (plaintiffs had standing to pursue an injunction where "[e]ach plaintiff still has children who would be enrolled in the Little Axe School District had they not been forced to move for the physical and emotional health of their families.").

Appellant Deal, by contrast, has steadfastly refused to avow that she would allow Roe to reenroll in a Mercer County school if the BITS program was enjoined.[4] Nor has Roe expressed interest in attending classes at a Mercer County school. Appellants' return to Mercer County schools is thus too speculative to meet the jurisdictional bar required to bring a claim for injunctive relief. The Court should therefore affirm the lower court's finding that Deal and Roe lack standing to pursue injunctive relief.

[4] Deal could have done so in opposition to Appellee's Motion to Dismiss below, but conspicuously failed to do so. JA207, DE 30-1 at 8.

B. Declaratory relief is likewise inherently forward-looking and thus cannot benefit Appellants.

Appellants also do not have standing to seek declaratory relief. Such relief is forward-looking and—by definition—cannot redress Appellants' alleged past injuries. *Los Angeles Cty. v. Humphries*, 562 U.S. 29, 31 (2010) (declaratory judgment is a claim for prospective relief and is different from a claim alleging past harm); *see Safir*, 156 F.3d at 344 ("A plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future."). In order to have standing to bring a claim for declaratory relief, "there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.'" *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937)); *see Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479 (1990) ("[I]n order to pursue the declaratory and injunctive claims . . . [plaintiff] must establish that it has a specific live grievance . . . and not just an abstract disagreement over the constitutionality of such application . . . . the mere power to [do something again] is not an indication of the intent to do so, and thus does not establish a particularized, concrete stake that would be affected by our judgment.") (quotations and citations omitted). Appellants' alleged interest in the future of the BITS program (if any) is too speculative to be a "present right" redressable by a

declaratory judgment, meaning they lack standing to seek it.

II. NOMINAL DAMAGES CANNOT MANUFACTURE STANDING

As set forth above, Appellants do not have standing to seek declaratory or injunctive relief. They notably also do not seek any compensation for their alleged past constitutional injury, which was completed well before they filed their complaint. JA32-33, 34-35, DE 21 ¶¶ 34, 42-48. Instead, Appellants have attempted to manufacture standing for themselves out of whole cloth through the simple expedient of a throwaway line in their complaint requesting nominal damages. Article III does not, however, permit litigants access to the federal courts to seek what is effectively an advisory opinion merely by appending to their pleadings a request for six cents.[5] Adopting Appellants' proposed nominal damages end-around would obliterate Article III's standing requirement, and is particularly inappropriate in this case because Appellants are seeking a declaration concerning a program that no longer exists and is in the process of being substantially retooled and reshaped. JA214, DE 30-1 ¶ 3; JA279.

[5] Further demonstrating that Appellants have no concrete interest in the outcome of this litigation, and instead merely seek an advisory opinion, Deal failed to accept Appellees' April 7, 2017 Rule 68 offer of judgment for $1,500, which was orders of magnitude more than any nominal damages amount that Deal could be awarded. DE 24. Deal thus cannot gain a monetary award greater than what she has already been offered, and further cannot be awarded reimbursement of costs or fees incurred after that date. Fed. R. Civ. P. 68(d).

A. Nominal damages cannot redress a past injury.

To have standing to seek an Article III adjudication of a controversy, a plaintiff must show that the relief sought will ***redress*** a concrete and particularized injury. *Lujan*, 504 U.S. at 560; *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("a plaintiff must demonstrate standing separately for each form of relief sought."). Standing must exist at the outset of a case. *See Davis*, 554 U.S. at 732-34. Nominal damages do not and cannot provide compensation for harm suffered, do not redress past injuries, and cannot alone support standing. Where, as here, a plaintiff has no standing no seek declaratory or injunctive relief, and brings a claim at the outset of a case solely for nominal damages, the plaintiff lacks standing because his or her claim is incapable of redressing their alleged injury.[6]

"Nominal damages are damages in name only, trivial sums such as six cents or $1." 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 3.3(2) (2d 3d. 1993). Nominal damages "do not purport to compensate for past wrongs. They are symbolic only." *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1264 (10th Cir. 2004) (McConnell, J., concurring). Rather, nominal damages serve essentially the

[6] Appellants failed to plead a claim for compensatory damages, which serve to make a plaintiff whole for the loss inflicted by a defendant. *See* Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 Wash. & Lee L. Rev. 67, 68 (1992). If Appellants had plausibly pleaded a claim for compensatory damages, Appellants may have satisfied the constitutional requirements for standing.

same purpose as (and are effectively indistinguishable from) declaratory judgments, and indeed were originally created by the courts as a mere ***vehicle*** for obtaining declaratory relief before Congress empowered federal courts to issue declaratory judgments in their own right. *See* Douglas Laycock, *Modern American Remedies: Cases and Materials* 561 (3d ed. 2002) ("The most obvious purpose [of nominal damages] was to obtain a form of declaratory relief in a legal system with no general declaratory judgment act."); 1 Dobbs, *supra*, at 295 ("Lawyers might have asserted a claim for nominal damages to get the issue before the court in days before declaratory judgments were recognized."); 13A Wright, Miller, & Cooper, *Federal Practice and Procedure* § 3533.3, at 266 (2d ed. 1984) ("The very determination that nominal damages are an appropriate remedy for a particular wrong implies a ruling that the wrong is worthy of vindication by an essentially declaratory judgment."). Thus, a claim for nominal damages is both fully analogous to, and indistinguishable from, a claim for declaratory relief, and must be treated as such. *See Utah Animal Rights Coal.*, 371 F.3d at 1265 (McConnell, J., concurring) ("For justiciability purposes, I see no reason to treat nominal and declaratory relief differently."); *see also Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 610 (6th Cir. 2008), *cert. denied Morrison v. Bd. of Educ. of Boyd Cty.*, 555 U.S. 1171 (2009) ("[N]ominal damages are a vehicle for a declaratory judgment.").

In order to have standing to bring a claim for nominal damages, the relevant question, as with a declaratory judgment, is "whether an award of nominal damages will have practical effect on the parties' rights and responsibilities in the future." *Utah Animal Rights Coal.*, 371 F.3d at 1266 (McConnell, J., concurring) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401-04 (1975); *Golden v. Zwickler*, 394 U.S. 103, 108-10 (1969)). A claim for nominal damages may thus serve as a ***vehicle*** for obtaining declaratory relief, but standing to seek such relief must exist independently of the claim for nominal damages itself, based on its concrete effect on the parties' future legal rights. *Morrison*, 521 F.3d at 611; *Utah Animal Rights Coal.*, 371 F.3d at 1265 (McConnell, J., concurring) (citing Laycock, *supra*, at 561) (nominal damages are appropriate in a suit for trespass brought to determine a disputed boundary). By contrast, where a plaintiff "seeks nominal damages based on a regime no longer in existence," nominal damages "would have *no* effect on the parties' legal rights." *Morrison*, 521 F.3d at 611 (emphasis in original). As the Sixth Circuit concisely observed: "Allowing [a case] to proceed to determine the constitutionality of an abandoned policy—in the hope of awarding the plaintiff a single dollar—vindicates no interest and trivializes the important business of the federal courts." *Id*.

Further, if a standalone claim for nominal damages ***could*** confer standing, a plaintiff could manufacture Article III standing "by the mere expedient of

pleading." *Utah Animal Rights Coal.*, 371 F.3d at 1266 (McConnell, J., concurring). Accordingly, "[b]y seeking only nominal damages," Deal and Roe are "conced[ing] at the outset . . . that they suffered no actual injury, or at least that the injury they claim cannot be redressed by an award of actual damages; thus appearing to have no standing." *Freedom From Religion Found., Inc. v. Franklin Cty.*, 133 F. Supp. 3d 1154, 1158 (S.D. Ind. 2015). Article III of the Constitution limits the jurisdiction of federal courts to actual cases or controversies, which the doctrine of standing serves to identify. *Lujan*, 504 U.S. at 560. Thus, "the irreducible constitutional minimum of standing," laid out in *Lujan*, necessarily limits the claims that may be brought in federal court, and Article III's redressability requirement is a key element of this limitation. *Id*. Appellant's proposed rule allowing every claim asserting constitutional injury to move forward simply by seeking nominal damages would obliterate the redressability prong of standing, and would effectively allow plaintiffs to confer standing on themselves through their pleadings. Where a plaintiff seeks nominal damages solely to "determine the constitutionality of an abandoned policy," *Morrison*, 521 F.3d at 611, a claim for nominal damages redresses no injury and, thus, does not satisfy the constitutional requirements for standing. *See Freedom From Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1032–33 (E.D. Wis. 2008) (FFRF's claim was not justiciable "where nominal damages were the only

monetary relief sought from the beginning" of the case).

B. Supreme Court precedent does not hold that a standalone nominal damages claim can create standing where none exists.

Appellants rely primarily on two cases, *Carey v. Piphus*, 435 U.S. 247 (1978), and *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), to support their contention that a claim for nominal damages alone satisfies the redressability requirement for standing. Br. at 45-46. This reliance is misplaced. *Carey* was decided in the unique context of a deprivation of procedural due process, and plaintiffs in that case had brought claim from the outset of the case for ***both*** compensatory and nominal damages, not for nominal damages alone. 435 U.S. at 251-52. Specifically, *Carey* addressed what kind of damages are appropriate in a Section 1983 case where a plaintiff fails to adduce evidence of actual harm after a trial, even though compensable injuries (such as an actual loss of valuable school days) were adequately alleged and presumably withstood scrutiny after Fed. R. Civ. P. 12 and 56 motions. *Id*. at 266. *Stachura* also involved a claim for both compensatory and nominal damages, and addressed the question of what kinds of damages were appropriate after a violation of rights was found. 477 U.S. at 304. Both cases thus left open the question of whether nominal damages ***alone*** at the outset of a case can support standing.

The plaintiffs in *Carey* brought suit under 42 U.S.C. § 1983 to vindicate their procedural due process rights under the Fourteenth Amendment, seeking

declaratory and injunctive relief, as well as actual and punitive damages. 435 U.S. at 250-51. The jury had awarded the plaintiffs a substantial award of damages without proof of actual injury. *Id*. at 253-54. The Supreme Court reversed, holding that the plaintiffs were entitled to "at least" nominal damages for the school's violation of their procedural due process rights, and remanding to the lower court to determine whether plaintiffs were ***also*** entitled to compensatory damages based on an actual injury. *Id*. at 266-67. In doing so, the Court stated:

> Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed…we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

Id. at 266 (citations omitted). This statement has no application to the present case for several reasons.

First, the specific question before the Court in *Carey* was whether compensatory and punitive damages could be awarded where there was no proof of damages, ***not*** whether nominal damages, standing alone at the outset of a case, could create a claim in federal court that satisfies the requirements of Article III standing. ***Second***, injunctive and declaratory relief had already been granted to the *Carey* plaintiffs by the Court of Appeals for the Seventh Circuit (after the lower court found plaintiffs were entitled to declaratory relief but did not enter such a judgment), and there was no question that the plaintiffs were still attending the

schools in question and had a concrete interest in the procedures enjoined. *Piphus v. Carey*, 545 F.2d 30, 31 (1976). Thus, *Carey* falls squarely within the standing analysis discussed *supra* at Section IIA: a claim for nominal damages does not confer standing where it otherwise does not exist, but could serve as a (now obsolete, in view of 28 U.S.C. § 2201) vehicle for obtaining relief for a plaintiff who otherwise meets the "irreducible constitutional minimum" of standing. *Lujan*, 504 U.S. at 560. ***Third***, by its own terms, the statement on which Appellants rely was expressly limited to the unique context of violations of procedural due process, which frequently result in actual economic injuries to plaintiffs (in *Carey*, the loss of a number of days of in-school education) that nonetheless are exceedingly difficult to prove, value, or measure. *Carey*, 435 U.S. at 263-64.

Stachura in no way changes this conclusion. In that case, the plaintiff brought suit under 42 U.S.C. § 1983 to vindicate his procedural due process rights and his First Amendment right to academic freedom, seeking compensatory and punitive damages. 477 U.S. at 301-02. The Court held that damages based on the abstract value of a constitutional right are not a permissible element of ***compensatory*** damages, citing to *Carey* to emphasize that "nominal damages . . . are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury," and compensatory damages "should be awarded to compensate actual injury." *Id*. at 308 n.11. Appellants take this footnote out of

context and ignore that *Stachura*, like *Carey*, dealt with whether ***compensatory*** damages were appropriately awarded, not with whether a claim for nominal damages, standing alone at the outset of a case, can confer Article III standing where none exists. It cannot.

C. This Court's precedent does not hold that a standalone nominal damages claim can create standing where none exists.

Covenant Media of SC, LLC v. City of North Charleston also does not stand for the proposition that a claim for nominal damages, standing alone, can confer standing on a plaintiff to seek what amounts to an advisory opinion on abstract constitutional principles. 493 F.3d 421 (4th Cir. 2007). There, the defendants allegedly failed to timely process the plaintiff's application for a billboard. *Id*. at 428. Plaintiffs sought injunctive relief, and compensatory and nominal damages. *Id*. at 429 n.4. Based on a summary judgment record—and thus, on the merits—the court determined that plaintiffs ultimately were not entitled to compensatory damages because they could not establish that the allegedly unconstitutional policy proximately caused their asserted injuries.

In affirming the lower court's grant of summary judgment for the defendants, this Court stated that the plaintiff had standing to bring its challenge because the plaintiff "has suffered an injury by the City's application of an unconstitutional ordinance that is redressable ***at least*** by nominal damages." *Id*. (emphasis added) (citing to *Carey*, 435 U.S. at 266). Appellants misread this

statement to mean that this Court has said that a claim for nominal damages is sufficient in and of itself at the outset of a case to confer standing to seek a federal court adjudication of an alleged constitutional violation. This is wrong for at least two reasons. ***First***, tort plaintiffs routinely lose claims they plead in good faith for compensatory damages because they fail on the merits to prove proximate causation, but that merits failure of course does not mean that the court must at that late point declare itself without standing to hear the case and wipe the record and all its findings clean. *See Davis*, 554 U.S. at 732-33. The *Covenant Media* plaintiffs asserted plausible, redressable economic injuries and sought compensatory damages for them, and although the court ultimately found against them on those claims, a claim for nominal damages was not the sole hook on which plaintiffs sought the adjudication in the first instance. *Covenant Media*, 493 F.3d at 427. ***Second***, the opinion expressly relied on *Carey*'s reference to the unique, narrow, judicially-created doctrine of awarding nominal damages in procedural due process cases, where, as noted, resulting economic damages are often very real but exceedingly difficult to prove, value, or measure.

D. Although several Circuits, including this Court, have held that a claim for nominal damages saves a case from mootness, standing requires a redressable injury at the onset of litigation.

The lower court correctly distinguished standing from mootness in holding that nominal damages will not redress any alleged past injury of Appellants, and,

thus, a claim for nominal damages alone will not satisfy the requirements of standing. JA379-80, DE 47 at 19-20. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). This Court should affirm this holding and recognize that the constitutional requirements of standing are not the same as those analyzed in deciding whether a case is moot. Rather, standing requires that a claim redress an injury ***at the outset of the litigation***, and, because standalone nominal damages cannot do so here, Appellants lack standing. *See Franklin Cty.*, 133 F. Supp. 3d at 1158.

To bolster their claim that a claim for nominal damages alone confers standing, Appellants point to a circuit split regarding whether a claim for nominal damages could salvage a case that has become moot; but mootness, while quite similar to standing, is a separate justiciabiltity requirement. Thus, this Court's precedent that a remaining claim for nominal damages saves a case from mootness does not apply here, and should not constrain this Court from holding that a claim for nominal damages alone at the outset of case does not confer standing.

The Supreme Court has described the doctrine of mootness 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)." *Laidlaw*, 528 U.S. at 170 (quotations omitted). However,

the Court in *Laidlaw* expanded on this comparison:

> Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal. This argument from sunk costs does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest . . . . **But the argument surely highlights an important difference between the two doctrines**.

Id. at 191-92 (emphasis added). The Court used *Lyons* to highlight a situation where a mootness claim requires less adversity than standing, stating: "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Id*. at 190. This distinction is key. Standing may, at times, require something more than mootness. While *Lyons* concerned injunctive relief, the concept applies broadly to the standing and mootness doctrines.

With this framework, this and other Circuits' holdings that a standalone claim for nominal damages saves what has become an otherwise moot case is clearly distinguished from the fact that a standalone claim for nominal damages at the outset of a case ***cannot*** create standing. In *American Humanist Association v. Greenville County School District*, this Court held in part that that, where other claims for damages became moot as the case progressed, a standalone claim for

nominal damages allows the case to continue. 652 F. App'x 224, 232 (4th Cir. 2016). In so holding, this Court stated that "[t]he plaintiffs' claim for nominal damages based on a prior constitutional violation is not moot because the plaintiffs' injury was complete at the time the violation occurred." *Id*.

Similarly, eight other Circuits have come to the same conclusion. *See, e.g., Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001); *Utah Animal Rights Coal.*, 371 F.3d at 1257-58.[7] However, while the Second Circuit has held that a claim for nominal damages saves an otherwise moot case, it has ***also*** held that a "claim for nominal damages, which is clearly incidental to the relief sought, cannot properly be the basis upon which a court should find a case or controversy where none in fact exists." *Kerrigan v. Boucher*, 450 F.2d 487, 489-90 (2d Cir. 1971); s*ee also Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 387 (2d Cir. 1973). This holding sensibly highlights the difference between mootness and standing: although a claim for nominal damages may save an ongoing case from becoming moot (an application of the "sunk costs" principle, *see Laidlaw*, 528 U.S. at 191-92), such a claim does not satisfy the requirements of standing, which is judged at the outset of a case. The concurrence dubitante in *New Kensington*

[7] *See also Kuperman v. Wrenn*, 645 F.3d 69, 73 n.5 (1st Cir. 2011); *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.2d. 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. Cty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002).

succinctly described this difference: "As mentioned earlier, the standing requirement is slightly more rigorous than the mootness doctrine's greater flexibility, which may explain the difference [in the Second Circuit's decisions]." 832 F.3d at 487 n.7 (Smith, C.J., concurring dubitante).

In contrast, both the Eleventh and Sixth Circuits have held that nominal damages, standing alone, do not save an otherwise moot case from dismissal. *Flanigan's Enters. Inc. v. City of Sandy Springs*, 868 F.3d 1248, 1268-69 (11th Cir. 2017); *Morrison*, 521 F.3d at 610-11. In holding such, the *Flanigan's* court explained that a claim for nominal damages "is nothing of any practical effect . . . . Because the availability of such a practical remedy is a prerequisite of Article III jurisdiction, we must conclude that the prayer for nominal damages will not sustain this case." 868 F.3d at 1264. The court also noted that "[a]ppellants did not request actual or compensatory damages." *Id*. at 1263 n.11. Similarly, the court in *Morrison* explained: "[N]ominal damages are a vehicle for a declaratory judgment. As such, nominal damages…do not otherwise alter the legal rights or obligations of the parties." 521 F.3d at 610 (quoting *Utah Animal Rights Coal.*, 371 F.3d at 1267). And, while the court "may have allowed a nominal-damages claim to go forward in an other-wise moot case…we are not required to relax the basic standing requirement that the relief sought must redress an actual injury." *Morrison*, 521 F.3d at 611 (citations omitted).

Appellees are not asking this Court to overrule its precedent and hold that a standalone claim for nominal damages does not save a case that is otherwise moot, an issue that is not presented here. Rather, we are asking the Court to recognize that this is a case where the fact that standing has different and greater requirements than mootness is salient and dispositive. The opinions in *Flanigan's* and *Morrison* adeptly explain why a standalone claim for nominal damages does not provide for standing. Nominal damages do not alter the legal rights or obligations of the parties.[8] As such, nominal damages do not redress an injury, failing to satisfy the constitutional requirements for standing. Thus, this Court should affirm the lower court's decision that Appellants lack standing to pursue their claims.

[8] Appellants refer to *Farrar v. Hobby* for the proposition that nominal damages change the relationship of the parties. 506 U.S. 103, 113 (1992). *Farrar* discussed whether nominal damages were sufficient to make a party a "prevailing party" under the meaning of 42 U.S.C. § 1988. There, the plaintiff won nominal damages of $1 out of $17 million sought, and that victory, the Court held, was not a material victory sufficient to award him attorneys' fees under § 1988. *Id*. at 120-21. As evidenced by the amount of damages he sought, the plaintiff sought ***both*** nominal and compensatory damages. *Id*. The Court also described the formula for determining whether a plaintiff is a prevailing party as a "generous formula," and distinguished its prevailing party analysis from the analysis of whether a party is entitled to a declaratory judgment. *Id*. at 109-10. Thus, *Farrar* can be limited to its facts. Put simply, "[i]t stands only for the proposition that where nominal damages are properly awarded in a case within the court's Article III jurisdiction, the plaintiff has 'prevailed' within the meaning of 42 U.S.C. § 1988." *Utah Animal Rights Coal.*, 371 F.3d at 1267 (McConnell, J., concurring).

III. APPELLANTS' CLAIMS FOR PROSPECTIVE RELIEF ARE NOT RIPE FOR REVIEW

Appellants' claims for prospective relief are unripe for review. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (quotations omitted)). Ripeness requires that the court evaluate (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *Id*. at 300-301 (quotations omitted).

Appellants' claims are not fit for review because they seek prospective relief against a program that has been suspended for review and will be re-implemented, if at all, in a substantially different form. Moreover, Appellants' claims are not fit for review for the same reason they lack standing to sue: any purported injury was not concrete or immediate when they filed this lawsuit, but rather was merely speculative. Nor do Appellants make any showing of hardship should the court withhold consideration of their claims.

A. BITS has been indefinitely suspended, and its potential content is not definitive enough to be fit for judicial decision.

Appellants' request for an injunction is not ripe, because the BITS program has been indefinitely suspended for review and modification in concert with members of the public (including Appellants, if they choose). JA203, DE 30 at 4.

What the court could enjoin at this juncture—the content of the curriculum of any hypothetical future BITS program—is thus 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.").

Fitness for decision, like standing, requires a concrete impending injury in fact. *See, e.g., Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427–28 (D.C. Cir. 1996) ("Ripeness . . . shares the constitutional requirement of standing that an injury in fact be certainly impending."). Here, the deficiencies of Appellants' assertion of ripeness mirror those of their assertion of standing: Appellants cannot show likelihood of repeated injury or future harm, *supra* at IA, and nominal damages by themselves do not redress an injury, *supra* at IIA.

Appellants argue that their claims are sufficiently definitive, not hypothetical or abstract, because those claims refer only to the BITS program as it existed at filing, not as it exists currently or as it may exist in the future. Br. 48-51. But that cannot be, as Appellants seek prospective injunctive relief, which requires ongoing or certainly-impending injury. "Past 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." *O'Shea*, 414 U.S. at 495-496.

Appellants also assert that "the district court recharacterized the controversy at issue as a challenge to an unknown future BITS program," and as a result "never addressed the . . . actual controversy: the original challenge to BITS as it existed at filing." Br. at 49; *see also* Br. at 51 (claiming "the district court only considered the ripeness of a challenge to an undefined future version of BITS"). This is flatly false. In considering ripeness, the district court specifically "review[ed] the harmful effects of withholding consideration of the past BITS program." JA389, DE 47 at 29.

If, as they now represent to this Court, Appellants seek only an injunction against the form of the BITS program that no longer exists, which Appellees are bound not to reinstate, JA390, DE 47 at 30 ("The court takes defendants' representations as a binding commitment that the past BITS program no longer exists.") (footnote omitted), they have defeated their own arguments for standing and ripeness, because they seek meaningless relief against an impossible injury. *See supra* at I. If, on the other hand, Appellants seek to enjoin the hypothetical future implementation of the BITS program, then the case is not fit for review, because the content of that program—and any possible future injury—is uncertain. *See Nat'l Treasury Emps. Union*, 101 F.3d at 1427–28 (noting "constitutional

requirement . . . that an injury in fact be certainly impending.").[9]

Because the content of any hypothetical future BITS program is purely speculative, that content—and thus Appellants' attempt to enjoin it—is not fit for judicial decision.

B. Appellants do not intend to return to Mercer County School District whether or not the injunction is granted.

To determine whether a claim is ripe for review, the court must also weigh a claim's relative fitness for decision against the hardship that will result from withholding a decision. The hardship prong is "measured by the immediacy of the threat and the burden imposed on the petitioner who would be compelled to act[.]" *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208-09 (4th Cir. 1992) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967)).

Appellants cannot demonstrate a threat of harm because, even if the injunction were granted, they do not intend to return to Mercer County schools, as discussed *supra* at IA. Appellants are therefore not "required to engage in, or refrain from, any conduct" as a result of "postponing consideration of the questions presented." *Texas*, 523 U.S. at 301 (quotations omitted). Even were they to return

[9] The lower court also made clear that "the remedies available to the court do not include an absolute ban on a future BITS curriculum." JA390, DE 47 at 30 (citing to *School District of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963)). Thus, even ***if*** the court were to enjoin a future Bible in the Schools program, "defendants might remain capable of developing, adopting, and teaching a new BITS curriculum in conformity with Establishment Clause jurisprudence," JA390, DE 47 at 30, further emphasizing the unfitness of Appellants' claims.

to Mercer County schools, they could not encounter the BITS program, which has been suspended. And even ***if*** that program were later reimplemented, Appellants could ***then*** obtain a preliminary injunction against it. *See* JA390, DE 47 at 30. Appellants explicitly disavow any claim for relief against a future implementation of the program, Br. at 51, but if they decide to bring such a claim, there is "no reason to doubt that a district court will deny a preliminary injunction." *Texas*, 523 U.S. at 302. *See also* JA390, DE 47 at 30 n.14 (finding that "a new BITS program is incapable of returning without putting plaintiffs and the court on notice"); *id.* (noting "this district is more than capable of granting a preliminary injunction").

C. Appellants' attempt to avoid determination of ripeness is unavailing.

Appellants also invite this Court to conflate mootness and ripeness, to their obvious advantage, arguing that Appellees must satisfy the voluntary cessation doctrine. Br. at 51-52, 55. They invite this Court to err. Mootness, like ripeness, ***obviously*** requires a constitutional minimum of certainly-impending injury-in-fact, but ripeness analysis "extends beyond standing's constitutional core," adding a "prudential aspect . . . where a court balances the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Nat'l Treasury Emps. Union*, 101 F.3d at 1427-28 (quotations omitted). Appellants mistakenly state that "the relevant question here is whether the challenge to the long-standing BITS program is *moot*." Br. at 51 (emphasis in original).

Appellants fail to recognize what the lower court ably did: the issue is whether the Bible in the Schools program "is sufficiently definite and clear to permit sound review by this court," ***not*** whether the Appellants' challenge to the BITS program is moot. JA386, DE 47 at 26 (citing *Abbott Labs.*, 387 U.S. at 148-149). Here, ***ripeness*** is at issue, and the unfitness of Appellants' claims for adjudication combine with the total absence of harm from withholding adjudication to render those claims unripe.

Appellants allege that the court in *Staley v. Harris County* took their suggested approach. Br. at 50-51. There, the Fifth Circuit considered an Establishment Clause challenge to a monument, but, before the appeal was heard, the display was placed in storage for an extended period of renovations. 485 F.3d 305, 309 (5th Cir. 2007). Appellants allege that the *Staley* court evaluated the plaintiffs' claims with regard to past state action only for mootness, not ripeness, because "the constitutionality of a certain display was (and remained) concrete." Br. at 50. The court, Appellants contend, then considered a hypothetical challenge to the "probable redisplay" of the monument, and found only that *this* challenge would be unripe. *Id*. at 50-51.

This account distorts *Staley* beyond recognition. Nowhere did the court consider a recharacterization of those plaintiffs' claims. Nowhere did the court suggest that a plaintiff may avoid analysis of ripeness by disavowing his claim for

prospective relief. And nowhere did the court suggest that the *Staley* plaintiffs disavowed their claims for prospective relief.

Rather, the *Staley* court did precisely what the district court did in this case: it determined that even "a probable redisplay" of the monument at issue was "not ripe because there are no facts before us to determine whether such a display might violate the Establishment clause." 485 F.3d at 309. Indeed, *Staley* is directly contrary to Appellants' effort to avoid determination of ripeness: there, as here, a plaintiff could not establish ripeness by pointing to the possibility of reimplementation, because the form that reimplementation might take was yet undetermined. *Id*. The district court's decision correctly applied the proper standard to the claims at issue. Thus, this Court should dismiss Appellants claims as unripe for review.

REQUEST FOR ORAL ARGUMENT

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

Respectfully submitted,

By: */s/ Hannah Dunham*

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 8,897 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: May 4, 2018

/s/ Hannah Dunham
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, the foregoing document was electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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