No. 15-3083

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

Plaintiffs-Appellants,

v.

NEW KENSINGTON–ARNOLD SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Pennsylvania
Case No. 2:12-cv-01319-TFM
The Honorable Terrence F. McVerry, District Judge

BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE ANTI-DEFAMATION LEAGUE, THE CENTRAL CONFERENCE OF AMERICAN RABBIS, THE JEWISH SOCIAL POLICY ACTION NETWORK, THE SIKH COALITION, AND THE UNION FOR REFORM JUDAISM IN SUPPORT OF PLAINTIFFS-APPELLANTS

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 15-3083

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

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NEW KENSINGTON-ARNOLD SCHOOL DISTRICT

Instructions

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If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Americans United for Separation of Church and State (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:
None.

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/s/ Stephen M. Shapiro Dated: 12/17/15
(Signature of Counsel or Party)

United States Court of Appeals for the Third Circuit

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If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Anti-Defamation League makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:
None.

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/s/ Stephen M. Shapiro
(Signature of Counsel or Party)

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If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Central Conference of American Rabbis makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:
None.

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/s/ Stephen M. Shapiro
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If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Jewish Social Policy Action Network (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:
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Pursuant to Rule 26.1 and Third Circuit LAR 26.1, The Sikh Coalition makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None.

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Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Union for Reform Judaism makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
None.

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/s/ Stephen M. Shapiro
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Dated: 12/17/15

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are Americans United for Separation of Church and State, the Anti-Defamation League, the Central Conference of American Rabbis, the Jewish Social Policy Action Network, The Sikh Coalition, and the Union for Reform Judaism. Descriptions of the *amici* appear in the appendix to this brief.[1]

Amici represent diverse religious and secular perspectives but they are united in the view that all Americans, regardless of their faith, must have access to the courts to enforce their fundamental civil rights, including the rights protected by the Establishment and Free Exercise Clauses of the First Amendment to the U.S. Constitution. *Amici* have therefore consistently opposed incorrect uses of justiciability doctrines to dismiss church-state claims.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state that (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Marie Schaub and her daughter, Doe 1, filed this suit because a 6-foot-tall, 2,000-pound monument displaying the Ten Commandments stands sentinel outside of Valley High School, the public secondary school that Doe 1 was assigned to attend. Rejecting the requests of Ms. Schaub and Doe 1 that the monument be removed, the New Kensington–Arnold School District publicly reaffirmed its commitment to keeping the display. Thus, the School District ensured that Plaintiffs would be put to an unfair and constitutionally impermissible choice once Doe 1 graduated from middle school. Either Doe 1 would matriculate in Valley High School and suffer unwelcome exposure to the stone Ten Commandments monolith on a near-daily basis. Or she would be forced to leave behind her friends and community during a crucial developmental period and attend a school outside the School District—at additional cost and inconvenience.

Despite Ms. Schaub's and Doe 1's prior unwelcome contact with the monument during their participation in various community events, and the imminent—and unreasonable—choice between attending Valley High School with the monument still standing or being forced to

attend a different school, the district court dismissed this action for want of jurisdiction. It held that Plaintiffs lacked standing to seek retrospective relief—that is, damages—because it found their pre-suit, repeated, if sporadic, contact with the monument was not an "injury in fact," even though the court recognized that direct and unwelcome contact with religious displays suffices to confer standing in Establishment Clause cases.

And, conflating justiciability doctrines, the district court held that Plaintiffs lacked standing for prospective injunctive relief because Ms. Schaub, Doe 1, and their family had chosen the metaphorical Charybdis when Doe 1 graduated from middle school: They made the difficult decision that Doe 1 should be separated from her friends and attend a high school in a different district to stay away from Valley High School so as to avoid the massive stone monument at the school. Plaintiffs' standing should have been evaluated solely on their circumstances when they commenced this action, at which time—as the district court acknowledged—Doe 1's attendance was sufficiently certain. Yet the court concluded that the decision to remove Doe 1 from the high school deprived Plaintiffs of standing. The court erred by failing to analyze the

removal solely under the mootness doctrine, which places upon defendants a heavy burden of showing that the controversy between the parties is truly dead.

The School District cannot meet that burden here, for it has never been disputed that Doe 1 will be allowed to return to Valley High School once the monument is removed. Although the nature of the injury that Plaintiffs are now suffering (detrimentally altering their conduct to avoid the monument) may be different from the type of injury that they were threatened with at the time they filed the case (direct and unwelcome contact with the monument), either type of injury is sufficient to support federal jurisdiction in religious-display cases. And many kinds of cases make clear that a lawsuit does not become moot just because the nature of the injury that a plaintiff suffers changes during the course of the litigation. The Plaintiffs should not be penalized for choosing between Scylla and Charybdis when it was the School District that set them on that course.

The district court's holdings are plainly wrong. They are contrary to controlling Supreme Court precedent and the prior decisions of this Court. Plaintiffs had standing to bring their Establishment Clause

claims and are entitled under the Constitution to consideration of their merits. This Court should reverse the district court.

ARGUMENT

I. Plaintiffs Have Standing To Pursue Their Establishment Clause Claims.

To have standing under Article III of the Constitution, a "plaintiff must have suffered an 'injury in fact'" that is "(a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical" at the time that the plaintiff commences her action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The injury-in-fact requirement "serve[s] as at least a rough attempt to" ensure that the adversarial process is "in the hands of those who have a direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (injury in fact "serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem"). Ms. Schaub and Doe 1 have alleged in their complaint and proven at summary judgment that when they filed this suit they had suffered actual (for retrospective relief) and imminent (for prospective

relief) concrete injury in fact. Plaintiffs[2] have the requisite direct stake in this litigation. Their claims should not have been dismissed.

A. Official Use Of Religious Symbols Can Inflict Substantial Injury.

Injury in fact has never been limited to physical injury to a person or damage to a prospective plaintiff's economic interests; "standing may be predicated on noneconomic injury." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 486 (1982); *see also Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1024 (8th Cir. 2012) ("To the extent that emotional harms differ from other, more readily quantifiable harms, that difference lacks expression in Article III's case-or-controversy requirement."). "A person or a family," such as Plaintiffs here, "may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970).

[2] As the district court found, Plaintiff Freedom From Religion Foundation's standing is predicated on that of its member, Ms. Schaub. JA9 n.2; *see Am. Civil Liberties Union of N.J. v. Twp. of Wall*, 246 F.3d 258, 261 (3d Cir. 2001).

Government action that causes a plaintiff to have direct and unwelcome contact with a religious display in the course of her ordinary civic, business, or personal affairs implicates that spiritual stake because symbols have power. Indeed, their power is such that exposure to symbols manifests itself as measurable psychological and physiological damage.

Symbols not only communicate but also persuade and incite action. As a practical matter, "they attract public notice[;] they are remembered for decades or even centuries afterwards. A symbol speaks directly to the heart." NICHOLAS JACKSON O'SHAUGHNESSY, POLITICS AND PROPAGANDA 102 (2004); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) ("Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design."). The Supreme Court has recognized, for example, the power of the U.S. flag: "Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America.'" *Texas v. Johnson*, 491 U.S. 397, 405 (1989). Similarly, trademark protection allows companies to take advantage of repeated exposure to commercial branding to "induce[ ]

more familiarity and, as a consequence, greater liking" for a product, "independent of any conscious cognitive appraisal." JOHN O'SHAUGHNESSY & NICHOLAS JACKSON O'SHAUGHNESSY, PERSUASION IN ADVERTISING 63, 67 (2004).

The power of symbols is no less true for religious symbols, such as copies of the Ten Commandments. Studies demonstrate, for instance, that even subliminal exposure to a symbol of one's own faith can yield physical as well as psychological benefits, while similar exposure to a negative or opposing symbol can be correspondingly detrimental. In one study, adult test subjects were exposed to a subliminal image on a computer screen. Some were shown a picture of Jesus, and some a Satanic symbol. *See* Max Weisbuch-Remington et al., *The Nonconscious Influence of Religious Symbols in Motivated Performance Situations*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1203, 1207–08 (2005). The test subjects were then asked to prepare and deliver a speech under conditions designed to induce stress. *Id.* at 1208. Relative to baseline measurements, Christian subjects who had viewed the image of Jesus exhibited higher blood-oxygen saturation and less blood-vessel constriction (reflecting lower stress levels), while Christians who had

viewed the Satanic symbol exhibited the opposite responses. *See id.* at 1208–10.

And where the setting is a school, there can be no doubt about the impact of religious symbols on schoolchildren. Studies have shown, for instance, that viewing a religious symbol has statistically significant effects on students' academic performance. Researchers established baseline standardized-test scores for students attending Catholic elementary and junior high schools in the United States, then retested the students, randomly dividing them into three groups. The examiner wore a necklace with a cross while retesting one group, a necklace with a Star of David while retesting the second, and no religious signifier while retesting the third. The researchers found that the students did systematically better when the examiner wore the cross, and systematically worse when he wore the Star of David. *See* Philip A. Saigh, *Religious Symbols and the WISC-R Performance of Roman Catholic Junior High School Students*, 147 J. GENETIC PSYCHOL. 417, 417–18 (1986); Philip A. Saigh et al., *Religious Symbols and the WISC-R Performance of Roman Catholic Parochial School Students*, 145 J. GENETIC PSYCHOL. 159, 159–62 (1984). The researchers conducted a

similar study in religiously diverse Lebanon and obtained similar results. Philip A. Saigh, *The Effect of Perceived Examiner Religion on the Digit Span Performance of Lebanese Elementary Schoolchildren*, 109 J. SOC. PSYCHOL. 167, 168–69 (1979) (both Christian and Muslim students did better when examiner wore their faith's symbol and worse when examiner wore other faith's symbol). The researchers attributed the effect to students' anxiety over "confessional conflict" with an authority figure, on the one hand, and comfort in the presence of a coreligionist, on the other. *See* Saigh, *Junior High*, *supra*, at 418; Saigh, *Parochial School Students*, *supra*, at 163; Saigh, *Lebanese Elementary Schoolchildren*, *supra*, at 170–71. But regardless of the specific psychological mechanism at work, the studies revealed that even slight but direct exposure to religious symbols displayed by authority figures affected students' academic performance.

Courts have recognized the outsize impact that religious displays and coercive religious practices can have on schoolchildren. In public schools, "[t]he State exerts great authority and coercive power through mandatory attendance requirements, . . . the students' emulation of teachers as role models[,] and the children's susceptibility to peer

pressure." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *see id.* at 583–84 ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."). Unwelcome exposure to religious beliefs at public schools in the form of government-sponsored symbols or practices, such as group prayers in *Lee v. Weisman*, 505 U.S. 577, 588, 594 (1992), can therefore result in "embarrassment," "intrusion," "isolation," "affront," "offense," and "coercive pressure[ ]."

In *Stone v. Graham*, 449 U.S. 39, 42 (1980), the Supreme Court invalidated a Kentucky statute requiring the posting of the Ten Commandments in every public school classroom, because the statute's only conceivable effect was "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." The Court noted: "The Commandments do not confine themselves to arguably secular matters . . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Id.* at 41–42; *see also, e.g.*, *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 851 (7th Cir. 2012) (en

banc) ("Displaying religious iconography . . . in a classroom setting" or at school-related events, such as secondary-school graduation, "raises constitutional objections because the practice may do more than provide public school students with *knowledge* of Christian tenets."), *cert. denied*, 134 S. Ct. 2283 (2014); *Washegesic v. Bloomingdale Pub. Sch.*, 813 F. Supp. 559, 563 (W.D. Mich. 1993) (finding that display of a portrait of Jesus Christ in a school for thirty years had the effect of "mak[ing] children look at, meditate upon, and perhaps revere Jesus Christ"), *aff'd*, 33 F.3d 679 (6th Cir. 1994).

B. Direct And Unwelcome Contact With Religious Displays Suffices To Confer Standing To Assert Establishment Clause Violations.

Because of the weight of religious symbols and practices, the Supreme Court held over half a century ago that students and parents "surely" had standing to challenge Bible reading in public school classrooms because they were "directly affected" by the practice. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963). Students (and their parents) were either "subjected to" unwanted religious messages or "forced to assume special burdens to avoid" them. *Valley Forge*, 454 U.S. at 486 n.22 (explaining standing in *Schempp*).

Such direct or personal contact suffices to ensure that prospective plaintiffs do not operate under "a special license to roam the country in search of governmental wrongdoing." *Id.* at 487.

Each of the other circuit courts of appeals that have addressed the constitutional minimum for standing in Establishment Clause cases has determined that direct unwelcome contact is sufficient for standing to exist. *See Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009) (holding that standing existed where plaintiff "alleged a sufficiently 'direct and personal stake' in the controversy" because "he was made uncomfortable by direct contact with religious displays"); *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997) ("The injury that gives standing to plaintiffs in [Establishment Clause] cases is that caused by unwelcome direct contact with a religious display that appears to be endorsed by the state."); *Murray v. City of Austin*, 947 F.2d 147, 149–51 (5th Cir. 1991) (holding that resident plaintiff had standing to challenge use of Latin cross in city insignia based on his personal unwelcome contact with the seal); *Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 429 (6th Cir. 2011) ("In suits b[r]ought under the Establishment Clause, 'direct and unwelcome'

contact with the contested object demonstrates psychological injury in fact sufficient to confer standing."); *Doe v. Cty. of Montgomery, Ill.*, 41 F.3d 1156, 1159 (7th Cir. 1994) (finding "standing to bring claims under the Establishment Clause" based on plaintiffs' "allegations of direct and unwelcome exposure to a religious message"); *Red River Freethinkers*, 679 F.3d at 1024 (8th Cir.) (holding that, because plaintiff's members "'experience[ ] direct, offensive, and alienating contact with the Ten Commandments monument,'" they have suffered a "concrete" injury sufficient to confer standing); *Vasquez v. Los Angeles ("LA") Cty.*, 487 F.3d 1246, 1253 (9th Cir. 2007) ("[I]n the Establishment Clause context, spiritual harm resulting from unwelcome direct contact with an allegedly offensive religious (or anti-religious) symbol is a legally cognizable injury and suffices to confer Article III standing."); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989) ("Foremaster's allegations of direct, personal contact suffice[ ] as non-economic injury."); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987) ("[A] non-economic injury which results from a party's being subjected to unwelcome religious statements can support a standing claim, so long as the parties are 'directly affected by the laws

and practices against wh[ich] their complaints are directed.'" (quoting *Schempp*, 374 U.S. at 224 n.9)).

This Court has applied the same direct-and-unwelcome-conduct standard. Initially, in *American Civil Liberties Union of New Jersey v. Township of Wall*, 246 F.3d 258, 266 (3d Cir. 2001), this Court held that the plaintiffs before it did not satisfy that standard but declined to decide whether satisfying it would be sufficient for standing. Subsequently, however, in *Freethought Society of Greater Philadelphia v. Chester County*, 334 F.3d 247, 254–55, 255 n.3 (3d Cir. 2003), the Court held that two plaintiffs who had direct, unwelcome contact with a Ten Commandments plaque on a county courthouse had standing to challenge it. Then, in *Mordovich v. Allegheny County, Pennsylvania*, 385 F.3d 397, 399 (3d Cir. 2004), without even needing to discuss the standing issue, the Court adjudicated a suit against a different county brought by "two avowed atheists" who "claim[ed] to have had regular and unwelcome contact with [a similar] plaque while entering and walking past th[at county's] courthouse." The Court should now expressly reaffirm that the direct-and-unwelcome-conduct standard governs cases such as this one.

In addition, this Court should correct the district court's misapprehensions of the law. The district court acknowledged that Plaintiffs had offered evidence that they had direct contact with the monument on a number of occasions. Yet the court dismissed those prior interactions as insufficiently frequent. This was error. *See, e.g.*, *Cty. of Montgomery*, 41 F.3d at 1158–59 (one plaintiff had standing even though only evidence of past contact with religious display was when plaintiff registered to vote, obtained absentee ballots, and was called for jury duty), *rev'g* 848 F. Supp. 832 (C.D. Ill. 1994); *Books v. Elkhart Cty.*, 401 F.3d 857, 862 (7th Cir. 2005) (finding standing even though evidence was that plaintiff saw challenged monument as infrequently as once per year); *see also SCRAP*, 412 U.S. at 689 n.14 ("[A]n identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."). The Constitution does not require courts to quantify prospective plaintiffs' direct and unwelcome contact with government-sponsored religious displays.

In contrast to the plaintiffs in *Valley Forge Christian College v. Americans United for Separation of Church and State*—who, though

residents of Maryland, Virginia, and Washington, D.C., complained of a land transfer in Pennsylvania—Ms. Schaub and Doe 1 are not merely "'concerned bystanders'" airing "'generalized grievances'" about government misconduct in a different part of the country. 454 U.S. at 473, 475, 487. They have "a personal connection [with] the challenged display in [their] community." *Suhre*, 131 F.3d at 1087; *see also Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 683 (6th Cir. 1994) ("The practices of our own community may create a larger psychological wound than someplace we are just passing through."). Moreover, that personal connection is intensified by the public school context. Because "[s]tudents and their parents enjoy a cluster of rights vis-à-vis their schools," claims that "their use or enjoyment of a public facility [a school] is impaired by an alleged violation of the Establishment Clause . . . removes them from the sphere of 'concerned bystanders.'" *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466–67 (5th Cir. 2001) (en banc); *see Edwards*, 482 U.S. at 583–84.

And unlike the plaintiffs in *Wall*—one of whom failed to submit evidence of contact with the challenged religious display "in the course of satisfying a civic obligation at the municipal building" where it was

located, while the other failed to submit evidence of any contact whatever, 246 F.3d at 266—Ms. Schaub and Doe 1 encountered the monument in the course of their everyday lives as members of the community, dropping family members off at Valley High School and attending community sports activities there. JA3–4; *see* JA677–78; JA813–17. The Plaintiffs here have been exposed to the iconography of the Ten Commandments monument located on property owned and operated by *their* community's school district; they are not interlopers "roam[ing] the country in search of governmental wrongdoing." *Valley Forge*, 454 U.S. at 487. Given their ties to the community, that unwanted exposure, however occasional, is sufficient to give them a personal stake in the litigation. *See, e.g.*, *Books,* 401 F.3d at 862; *Cty. of Montgomery*, 41 F.3d at 1158–59.

Furthermore, because the Ten Commandments have an impact as a symbol, whether Ms. Schaub and Doe 1 have read the full text of the monument is irrelevant for standing purposes. In *Saladin v. City of Milledgeville*, a challenge to the use of the word "Christianity" on a city seal, the Eleventh Circuit rejected an argument that the plaintiffs lacked standing because the word was smudged and no longer legible.

The court explained that the plaintiffs knew what the smudged word was and were reminded of the seal's inclusion of the word "every time [that] they [were] confronted with" the seal. *Id.* at 691–92.

The district court here should not have minimized the impact of Ms. Schaub's encounters with the monument on the grounds that she read only the first line of its text. The line in question, "I am the Lord thy God," was sufficient to make her aware of the contents and import of the monument—not to mention unambiguously religious all on its own. JA3; JA33; *see* JA823–24; *see also Freethought Soc'y v. Chester Cty.*, 191 F. Supp. 2d 589, 593–94 (E.D. Pa. 2002) (plaintiffs had standing to challenge Ten Commandments plaque even though closure of courthouse entrance where monument was displayed removed any reason for courthouse visitors to get closer to plaque than nearby sidewalk, from which they could read only plaque's title, "The Commandments," not its full text), *aff'd as to standing and rev'd on the merits*, 334 F.3d 247 (3d Cir. 2003); *accord* Weisbuch-Remington, *Nonconscious Influence of Religious Symbols*, *supra*, at 1208–10 (finding that even subliminal exposure to religious symbols has statistically significant effect on study participants). Indeed, Ms. Schaub's testimony

that just seeing the monument made her "stomach turn[ ]" (JA824; *see* JA4; JA16; *see also* JA679) is consistent with the School District's former superintendant's own testimony that the monument moved him to "say a silent prayer" when he passed, even though he surely did not stop to read all ten commandments (JA77–78; *see* JA127). The district court's approach trivializes the impact of symbols without any justification for disregarding the evidence of Ms. Schaub's and Doe 1's direct and unwelcome contact with the Valley High School monument.

C. Prospective Students And Their Parents Have Standing To Challenge Anticipated Unwelcome Exposure To Religious Displays In Public Schools.

At the time that a complaint is filed, a potential injury must be "'imminent'" for a plaintiff to have standing to challenge future wrongdoing. *Lujan*, 504 U.S. at 560–61. But imminence does not mean that plaintiffs need allege or prove that the injury will occur the very next day—or even the next month; it requires only that future injury be sufficiently certain.

"Standing depends on the probability of harm, not its temporal proximity." *520 S. Mich. Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006). What ultimately matters is that the "threat of injury"

not be "'conjectural'" or "'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *see Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). There must be a "realistic danger of sustaining a direct injury from the [complained-of] conduct." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 278 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1738 (2015); *see also Clinton v. City of New York*, 524 U.S. 417, 432 (1998) (presidential action "inflicted a sufficient likelihood of economic injury to establish standing" even though it merely deprived plaintiff organization of a "bargaining chip" that it could use in negotiations); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 343 (2d Cir. 2009) (holding that imminence analysis "seek[s] to ensure that the injury was not speculative"), *aff'd as to jurisdiction and rev'd on the merits*, 131 S. Ct. 2527 (2011); *accord McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 223 (3d Cir. 2012) ("When, as in this case, prospective relief is sought, plaintiff[s] must show that [they are] 'likely to suffer future injury' from the defendant's conduct." (quoting *Lyons*, 461 U.S. at 105)).

The Supreme Court has applied these principles to uphold standing in the Establishment Clause context. In *Lee v. Weisman*, a father, Daniel Weisman, brought suit objecting to the inclusion of a

prayer in the graduation ceremonies at his daughter's high school. 505 U.S. at 581, 583–84. Even though Daniel's daughter, Deborah Weisman, was only a *prospective* freshman—four years from graduation—at the time that Daniel sought to enjoin the graduation prayer, the Supreme Court "f[ou]nd it unnecessary to address" any basis for standing other than Deborah's anticipated graduation. *Id.* at 584; *see also Weisman v. Lee*, 728 F. Supp. 68, 69–70 (D.R.I. 1990). There was "a live and justiciable controversy" because "Deborah Weisman [was] enrolled as a student . . . and from the record it appear[ed] likely, if not certain, that an invocation and benediction [would] be conducted at her high school graduation." 505 U.S. at 584. That Deborah had not even started attending the high school when the claim for injunctive relief was first brought did not deprive the Weismans of standing. *Accord Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718 (2007) (finding parents with children in elementary and middle school had standing to challenge their school district's public-high-school admission system because their "elementary and middle school children may be 'denied admission to the high schools of their choice when they apply for the schools in the future'"). Nor was standing denied due to,

among other contingencies, the possibility that Deborah might not graduate or might move out of the school district before her senior year. *See also Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (5th Cir. 1996) ("There is no need . . . to wait for actual implementation of the statute and actual violations of [plaintiff's] rights under the First Amendment where the statute 'makes inappropriate government involvement in religious affairs inevitable.'"); *Fuller v. Volk*, 250 F. Supp. 81, 82–83 (D.N.J. 1966) (parents of fifth graders had standing to challenge policy affecting only sixth graders).

When Plaintiffs filed the complaint in this case, Ms. Schaub's and Doe 1's circumstances were materially indistinguishable from the Weismans'; indeed, the future injuries threatening Plaintiffs were more proximate in time than were those in *Lee*. Although she had not begun attending Valley High School when she filed this case in September 2012, Doe 1 alleged that she would do so starting in 2014. *See* JA4–5. Valley High School was her assigned school in the School District, so her future attendance was as assured as Deborah Weisman's attendance at her school district's high school. *See* JA4–5; JA18; JA678–80; *see also* 24 Pa. Stat. §§ 13-1326, 13-1327 (requiring school

attendance through age 17 or graduation from high school); *accord Edwards*, 482 U.S. at 584 (noting "mandatory attendance requirements"). By refusing to remove the Ten Commandments monument, the School District guaranteed that Ms. Schaub and Doe 1 would be exposed to it regularly as soon as Doe 1 matriculated. *See* JA5; JA124–26; JA688–89; *see also* JA123 ("We WILL NOT remove this monument without a fight !!!!!"). The six-foot-tall monument stands outside the entrance to the Valley High School gymnasium; even if all the words on the monument are not legible at a distance, the monument itself is impossible to miss. JA2–3; *see* JA35–36. Even the district court recognized that "it would have been reasonable to infer that Plaintiffs would be forced to come into regular contact with the monument had Doe 1 remained in the School District." JA18. The harm that Plaintiffs alleged here was sufficiently imminent when the complaint was filed to establish standing for prospective relief.

II. Plaintiffs Did Not Moot Their Case By Altering Their Conduct To Ameliorate The Daily Effect Of The District's Unconstitutional Display.

Demonstrating the depth of their unease with the School District's continued display of the monument, Doe 1 and her family "decided it

was best to avoid bringing Doe 1 into daily contact with the monument [by] withdr[awing] Doe 1 from the [School District]." JA679–80. Instead of attending Valley High School, Doe 1 has to attend a school in a different district to which she cannot take a public school bus. *Id.* Rather than treating Plaintiffs' decision to avoid the monument as further evidence of how the display injured them, the district court improperly relied on that decision to deny Plaintiffs standing to seek prospective relief. The court's analysis was plainly wrong, for it conflated the question whether Plaintiff had standing to commence the action at the time of its filing with the question whether the case was moot at the time of the parties' motions for summary judgment.

Although standing and mootness both affect a court's power to hear a case, they are not the same thing. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Standing "'must exist at the commencement of the litigation.'" *Id.* at 189 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)). Thus, "[w]hile the standing doctrine evaluates [a litigant's] personal stake as of the outset of the litigation, the mootness doctrine ensures that the litigant's interest in the outcome continues to exist throughout

the life of the lawsuit." *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993). As long as the constitutional injury to Ms. Schaub and Doe 1 was sufficiently imminent when they filed the complaint—which it was, *see* Part I.C, *supra*—the fact that they later took steps to avoid that injury pending resolution of this litigation does not affect whether they had standing. Instead, the decision to remove Doe 1 from Valley High School should be analyzed only under the mootness doctrine.

"The burden of demonstrating mootness 'is a heavy one,'" *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)), however, and "lies with the party asserting mootness" instead of the plaintiff, *Friends of the Earth*, 528 U.S. at 189. *See also Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 227 (3d Cir. 2011). The defendant must "demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'" *W.T. Grant*, 345 U.S. at 633; *see United States v. Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 203 (1968) (defendant must show that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (same); *DeJohn v. Temple Univ.*, 537 F.3d 301,

310 (3d Cir. 2008) (same). Based on the evidence in the record, the School District cannot do so.

Ms. Schaub and Doe 1 found themselves in the same situation as the plaintiffs in *Bell v. Little Axe Independent School District No. 70 of Cleveland County*, 766 F.2d 1391 (10th Cir. 1985), *disapproved of on other grounds by Memphis Community School District v. Stachura*, 477 U.S. 299 (1986). In *Bell*, the "plaintiffs and their families [were forced] to move into the adjoining school district" while their Establishment Clause lawsuit was pending because they were being harassed by other members of their community. *Id.* at 1397–98. Noting that "both families continue to own property and pay taxes in the Little Axe School District," the court recognized that "[e]ach plaintiff still has children who would be enrolled in the Little Axe School District had they not been forced to move." *Id.* at 1399. The court upheld the plaintiffs' standing, explaining that Article III does not require plaintiffs "to remain in a hostile environment to enforce their constitutional rights." *Id.*

Here, it is only because of the Ten Commandments monument that Doe 1 does not currently attend Valley High School. JA679–80. "If

the Ten Commandments monument is removed," Ms. Schaub "would allow Doe 1 to attend Valley High School." JA680; *cf. Dobrich v. Walls*, 380 F. Supp. 2d 366, 373 n.2 (D. Del. 2005) (holding that claim for injunctive relief was moot because student "ha[d] *not* alleged that he would ever return to school in the District" (emphasis added)). And the School District continues to display and "vigorously defends the constitutionality of" the monument. *Parents Involved*, 551 U.S. at 719; *see, e.g.*, JA123. The School District does not dispute any of these points. Because Doe 1 will be permitted to return to Valley High School if the monument is removed, and the School District refuses to take it down, it cannot be "absolutely clear" that Plaintiffs lack an interest in the injunctive relief that they seek. *Concentrated Phosphate,* 393 U.S. at 203. Rather, Plaintiffs have an ongoing interest in removing the monument so that Doe 1 can attend the local public school that she is entitled to attend instead of bearing the burdens and costs associated with attendance in another school district. That is enough to keep Plaintiffs' claims alive.

It makes no difference that the injury Plaintiffs are now suffering (changing their conduct to avoid the monument) could be viewed as

different from the injury they were threatened with at the time they filed this case (direct and unwelcome contact with the monument). Courts have recognized that although direct and unwelcome contact with a religious display suffices for standing, plaintiffs also have standing in display cases if they change their conduct to avoid the display. *See Books*, 401 F.3d at 861 (a plaintiff challenging a religious display can establish standing *either* [1] "by alleging that he has undertaken a 'special burden' or has altered his behavior to avoid the object that gives him offense" *or* [2] by alleging direct and unwelcome contact with the display); *Suhre*, 131 F.3d at 1088 (describing altered conduct as "an extraordinary showing of injury" that is "sufficient" but in no way necessary "to support standing to bring an Establishment Clause claim"); *accord Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1113 (10th Cir. 2010); *Vasquez*, 487 F.3d at 1249–53. By going to a high school outside the School District, Doe 1 plainly has "undertaken a 'special burden'" and "altered [her] behavior to avoid the object that gives [her] offense." *See Books*, 401 F.3d at 861.

What is more, there is no constitutional requirement that the effect of governmental misconduct remain constant for a controversy to

remain live and subject to adjudication under Article III. "[A] court will not dismiss a case as moot if . . . secondary or 'collateral' injuries survive after resolution of the primary injury." *Chong v. Dist. Dir., I.N.S.*, 264 F.3d 378, 384 (3d Cir. 2001); *see also Davis*, 440 U.S. at 631 (a case becomes moot only if "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation"). "[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief." *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001).

Indeed, courts consistently decline to find cases moot where a plaintiff's injury changes during the course of litigation. In *habeas corpus* cases, for example, a prisoner's challenge to her unconstitutional conviction is not mooted upon her release because there are a variety of "collateral consequences" to a conviction that inflict "concrete and continuing" injuries. *Spencer v. Kemna*, 523 U.S. 1, 7, 9 (1998). In the immigration context, this Court held that litigation originally aimed at stopping an alien's deportation did not become moot when the alien was actually deported because the implementation of the challenged

deportation order caused the alien to be statutorily barred from re-entering the United States for ten years. *Chong*, 264 F.3d at 385. And when plaintiffs challenge environmental regulation, courts have recognized that even if the governmental action originally challenged has occurred, the case is not moot where the alleged injury can still be cured by later corrective action. *See Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988).

Courts have not adopted a contrary rule—that a change in the nature of a plaintiff's injury moots a case—because such a rule would drastically harm judicial economy. A plaintiff would be forced to dismiss her lawsuit and file a new one any time her injury changed. When a "case has been brought and litigated . . . for years," as this one has, "abandon[ing] the case at [this] advanced stage" by forcing a plaintiff to bring a new complaint is "more wasteful than frugal." *Friends of the Earth*, 528 U.S. at 191–92. Further, as the Tenth Circuit recognized in *Little Axe*, 766 F.2d at 1399, it would be perverse to penalize Plaintiffs here for taking the types of steps to mitigate their injury that—in other circumstances—could even be required. *See, e.g.*, *Prusky v. ReliaStar Life Ins. Co.*, 532 F.3d 252, 259 (3d Cir. 2008) ("Damages that could

have been 'avoided with reasonable effort without undue risk, expense, burden, or humiliation will be considered . . . as not being chargeable against the defendant.'"). Plaintiffs' claims are not moot.

CONCLUSION

The district court's order dismissing the case for want of jurisdiction should be reversed and this matter should be remanded for consideration of the merits.

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Respectfully submitted,

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APPENDIX: DESCRIPTION OF THE *AMICI CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian, public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents more than 120,000 members, supporters, and activists across the country. Since its founding in 1947, Americans United has regularly served as a party, as counsel, or as an *amicus curiae* in scores of church-state cases before the U.S. Supreme Court, this Court, and other federal and state courts nationwide, including cases addressing the standing of plaintiffs in Establishment Clause cases.

The **Anti-Defamation League** ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the

contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents.

The **Jewish Social Policy Action Network** ("JSPAN") is a membership organization of American Jews dedicated to protecting the Constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. For most of the last two thousand years, Jews lived in countries in which religion and state were one, and in which members of all minority faiths were constantly reminded of their outsider status by prominent government displays of religious symbols.

JSPAN's interest in this case stems directly from the experience of members of the Jewish community, many of whom have personally experienced the often subtle, but always coercive, proselytizing, and stigmatizing impact of sectarian religious displays in government buildings and especially in the public schools.

Since its founding in 2003, JSPAN has often appeared as an *amicus* in the United States Supreme Court and within this Circuit in support of maintaining the separation of church and state in contexts similar to this case, including the placing of religious symbols on public

property. *See, e.g.*, *Salazar v. Buono,* 599 U.S. 700 (2010); *Pleasant Grove City v. Summum,* 555 U.S. 460 (2009); *Busch v. Marple Newtown School District,* 567 F.3d 89 (3d Cir.), *cert denied.,* 558 U.S. 1158 (2009); *Combs v. Homer Center School Dist.,* 540 F.3d 231 (3d Cir. 2008), *cert. denied*, 555 U.S. 1138 (2009); *Borden v. East Brunswick School District*, 523 F.3d 153 (3d Cir. 2008), *cert. denied*, 555 U.S. 1212 (2009); and *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 202 (M.D. Pa. 2005).

The Sikh Coalition was founded on September 11, 2001, to (1) defend civil rights and liberties for all people; (2) promote community empowerment and civic engagement within the Sikh community; (3) create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination; and (4) educate the broader community about Sikhism in order to promote cultural understanding and create bridges across communities. Ensuring religious liberty for all people is a cornerstone of the Sikh Coalition's work. The Sikh Coalition joins this amicus brief out of the belief that the Establishment Clause of the United States Constitution is an indispensable safeguard for religious minority communities and the conviction that taking steps to avoid

further harm pending litigation does not render an Establishment Clause claim moot. Sikh Americans within the Third Circuit have a vital interest in attending schools and other public institutions free from sectarian influence. Moreover, imposing the choice to suffer continued harm or to relinquish one's constitutional rights undermines the very protections afforded by the Establishment Clause. The Sikh Coalition joins this brief to address the United States District Court for the Western District of Pennsylvania's ruling on the Freedom From Religion Foundation's, Marie Schaub's, and Doe 1's standing as one that runs afoul of the United States Constitution and binding precedent.

The **Union for Reform Judaism** ("Union") is the congregational arm of the Reform Movement in North America, including 900 congregations encompassing 1.5 million Reform Jews. The **Central Conference of American Rabbis** ("CCAR") includes 2000 rabbis. The Union and CCAR come to this issue out of our longstanding commitment to the principle that Americans of all faith traditions should be able to access the courts in an effort to uphold their civil rights. This includes cases involving the First Amendment to the

Constitution, which is the bulwark of religious freedom and interfaith amity.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief:

(1) complies with Local Rule 28.3(d) because I am a member of the Bar of the United States Court of Appeals for the Third Circuit;

(2) complies with Local Rule 31.1(c) because the text of the electronic and paper copies of the foregoing Brief are identical, and because the electronic copy has been scanned for viruses using System Center Endpoint Protection, and was found to be virus free;

(3) complies with the type-volume limitation in Federal Rules of Appellate Procedure 29(d) & 32(a)(7)(B) because it contains 6,164 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii) and Local Rule 29.1(b); and

(4) complies with typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Century Schoolbook for both the text and footnotes.

Dated: December 17, 2015

/s/ Stephen M. Shapiro

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2015, I caused the Brief of *Amici Curiae* Americans United for Separation of Church and State, the Anti-Defamation League, the Central Conference of American Rabbis, the Jewish Social Policy Action Network, The Sikh Coalition, and the Union for Reform Judaism in Support of Plaintiffs-Appellants to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system, and I will send ten paper copies of the Brief to the Court by December 17, 2015.

I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system, which will send notice to the following CM/ECF users:

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