ORAL ARGUMENT REQUESTED

16-1049

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

AMERICAN HUMANIST ASSOCIATION, INC.; JOHN DOE, individually, and as parent and next friend of Doe Child-1 and Doe Child-2; DOE CHILD-1, a minor; DOE CHILD-2, a minor; JACK ROE, individually and as a parent on behalf of a minor; JANE ZOE, individually and as a parent on behalf of a minor,

Plaintiffs-Appellants,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1; DOUGLAS COUNTY BOARD OF EDUCATION; ELIZABETH CELANIA-FAGEN, in her official capacity as Superintendent of Douglas County School District; JOHN GUTIERREZ, in his official capacity as Principal of Cougar Run Elementary School; JERRY GOINGS, in his official capacity as Principal of Highlands Ranch High School,

Defendants-Appellees,

MICHAEL MUNIER, in his individual capacity, *et al.*,

Defendants,

and

JILL ROE, individually and as a parent on behalf of a minor,

Plaintiff.

On Appeal from the United States District Court
for the District of Colorado (Denver)
Honorable R. Brooke Jackson, U.S. District Judge
Case No. 1:14-cv-02878-RBJ

BRIEF FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Humanist Association is a nonprofit corporation and makes the following disclosure statement:

1. Is party or amicus a publicly held corporation or other publicly held entity? No.

2. Does party/amicus have any parent corporations? No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? No

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? No

5. Is party a trade association? No

6. Does this case arise out of a bankruptcy proceeding? No

s/ Monica L. Miller
American Humanist Association

May 2, 2016

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STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to 10th Circuit Rule 28.2(C)(1), counsel for Appellants hereby notifies the Court that no other appeal in or from the same civil action in the lower court was previously before this or any other appellate court under the same or a similar title. Additionally, no cases are known to counsel to be pending in this or any other court that will directly affect this Court's decision in the pending appeal.

s/ Monica L. Miller
Monica L. Miller

GLOSSARY

AIM	Adventures in Missions™: Christian Mission Trips
EAA	Equal Access Act
FCA	Fellowship of Christian Athletes
OCC	Operation Christmas Child
SYATP	See You at The Pole
CMS	Cresthill Middle School
CHS	Chaparral High School
DCHS	Douglas County High School
HRHS	Highlands Ranch High School

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this action involves constitutional claims brought under 42 U.S.C. § 1983. On January 20, 2016, the court denied Appellants' motion for summary judgment and granted Appellees' cross-motion. (J.A.1899-1926). Appellants filed a timely notice of appeal on February 16. (J.A.1927). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The lower court denied several families, on standing grounds, the right to sue their school district for alleged Establishment Clause violations, even though they had direct, unwelcome contact with these violations at their schools. Therefore, they turn to this Court to resolve the standing issues, which include:

(1) Christian Fundraising Practice

Zoes/Nominal Damages

A family has standing to seek nominal damages for a past Establishment Clause violation if they had a single direct, unwelcome contact with state-sponsored religion. The court found Zoes had at least two direct unwelcome contacts with their elementary school's fundraisers for Christian organizations and a mission trip. Do Zoes have standing for nominal damages?

Injury

The government's symbolic endorsement of religion violates the Establishment Clause, irrespective of coercion. Zoes' school symbolically and tangibly endorsed Christian organizations and their trip, and pressured Zoe-Son to contribute. The court nevertheless held Zoes lacked a cognizable injury because "staff did not penalize or retaliate against Zoe Son." Did it err in finding no injury-in-fact?

Causation

Did the court err by only considering third party actions – not even mentioned in the complaint – in determining causation was lacking?

Roes/Nominal Damages

Roes' parental interests were directly injured when their son's school fundraised for a Christian organization, and participated in its evangelical project, Operation Christmas Child ("OCC"), while Roe-Son was in school. Do Roes have standing for nominal damages?

Zoes/Injunctive relief

For prospective relief, no past contact is required. Did the court err in disregarding Zoes' standing for prospective relief simply because it found insufficient past contact?

Roes/Zoes/Injunctive Relief

Families have standing to seek injunctive relief if they are: (1) currently injured by the practice or (2) likely to encounter it in the future. Roes and Zoes are currently injured by the practice under *Santa Fe* because it has the purpose and perception of endorsing Christianity, making them feel like religious outsiders in their own community. They are also likely to encounter the practice in the future because it applies to their schools and DCSD defends the practice and refuses to discontinue it. Moreover, DCSD expressly authorizes freshman homeroom

participation in OCC. Roe-Daughter will be a freshman in 2017. Do Roes and Zoes have standing to enjoin this ongoing practice?

(2) Faculty participation in Christian student club practice

The Establishment Clause prohibits faculty from initiating and participating in religious student clubs beyond custodial oversight. Faculty throughout DCSD, including at Roes' school and Zoes' future schools, lead and participate in religious student clubs. DCSD has not changed this practice but instead, defends it. Do Roes have standing to challenge it? Did the court err in failing to consider Zoes' standing altogether?

(3) Equal Access Act (EAA)

Even if the "zone of interests" test applies to EAA standing, the EAA explicitly prohibits faculty from endorsing or participating in religious student clubs. Do families have standing to challenge DCSD's EAA violations?

(4) Municipal taxpayer standing / John Doe

Residents have municipal taxpayer standing if: (1) they are local taxpayers; and (2) local funds were expended on the challenged activity, regardless of the amount. The families met these requirements. Did the court err in holding they lacked standing because: (1) school districts are not municipalities and (2) their funds are comingled with state and federal revenue? Are Doe's municipal taxpayer claims against DCSD moot simply because the charter school settled?

(5) Associational standing

Because at least one AHA member has standing, did the court err in holding that AHA lacked standing?

STATEMENT OF THE CASE

The court denied three local families and an association the right to challenge two ongoing district-wide, district-approved, practices applicable to their schools, which have the purpose and perception of endorsing Christianity, thus violating the Establishment Clause. These practices include, generally:[1]

- **Christian Fundraising Practice:** endorsing, advancing (symbolically and tangibly), diverting school resources toward, and conducting fundraising projects during instructional hours to captive student audiences, for Christian organizations and their evangelical efforts;

- **Faculty Participation Practice:** initiating, leading and participating in, and sponsoring Christian student clubs and religious activity

The families have had, and continue to have, direct, unwelcome contact with these practices. They seek nominal damages and prospective relief. (J.A.58-60).

I. Parties

Appellants are non-Christian families in Appellee Douglas County School District (DCSD or District).[2] They are also District taxpayers and members of Appellant American Humanist Association (AHA).[3]

Jane Zoe's two children attend Cougar Run Elementary (Cougar Run). (J.A.589-91). Zoe-Son was directly "exposed to and influenced by [DCSD's]

[1] (J.A.21-56)(J.A.512-21)(J.A.1633-34)(J.A.1836-39)
[2] (J.A.18-19)(J.A.423)(J.A.582,588-590)(J.A.596)(J.A.1102)(J.A.1685)(J.A.1696)
[3] (J.A.576-78)(J.A.588)(J.A.596-99)(J.A.1685)(J.A.1696)

promotion and endorsement of religion." (J.A.19). Zoe-Children will matriculate to Cresthill Middle School (CMS) and Highlands Ranch High School (HRHS). (J.A.1696). Zoe does not want her "children attending schools that promote and endorse Christianity." (J.A.1698).

Jack Roe's son, Roe-Son, is a senior at Douglas County High School (DCHS) where Roe-Daughter will matriculate in 2017.[4] Roe joined the suit because he wants his children "brought up in a way that they make their own choices about religion." (J.A.1102). Because DCSD is an open district and many DCSD schools promote religion, "this limits the choices that I have." (J.A.1102). After the fundraising practice infiltrated DCHS during litigation, Roe testified they are now seriously "reconsidering whether or not to send our daughter to [DCHS]." (J.A.1688).

John Doe's children attend SkyView Academy. (J.A.581-82). SkyView settled but Doe maintains municipal taxpayer claims against DCSD. (J.A.18)(J.A.502-03).

II. Christian Fundraising Practice

A. HRHS and Cougar Run fundraisers for evangelical Christian organizations and a Christian mission trip

Zoe-Children's school, Cougar Run, and future school, HRHS, fundraised for, participated in, and endorsed two Christian organizations – Fellowship of

[4] (J.A.596-99)(J.A.1102)(J.A.1685)

Christian Athletes (FCA) and "Adventures in Missions™: Christian Mission Trips" (AIM) – to support their evangelical trip to Guatemala in March 2014.[5]

AIM conducts trips to bring "the gospel of Jesus Christ to those who don't know him," and "disciple other Christians." (J.A.42-48)(J.A.264-65). FCA has student clubs throughout DCSD.[6] The Superintendent acknowledged FCA "is inherently Christian." (J.A.989). HRHS's principal, Jerry Goings, acknowledged AIM is "obviously" "faith based." (J.A.1408-09).

The mission trip was school-endorsed in untold ways. Goings admitted it was a "school trip" and Cougar Run facilitated "fundraising."[7] Two HRHS teachers chaperoned, Alex Malach and Bradley Odice, and fourteen students attended.[8] Goings testified faculty were required to chaperone: "obviously for any school trip, it's absolutely policy that they attend." (J.A.839).

DCSD admitted Malach and Odice "were the adult leaders of the FCA students on the trip." (J.A.570). They "were certainly the only adults in charge." (J.A.867,870). The teachers repeatedly referred to the group as "our students."[9] Planning meetings were held in Malach's classroom. (J.A.883-84)(J.A.896).

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[5] (J.A.42-55)(J.A.551-52)(J.A.570)(J.A.589-91)(J.A.762-83)(J.A.834,837,840,844-45)(J.A.854)(J.A.867,880)(J.A.889-90,897)(J.A.974)(J.A.1106-20)(J.A.1053-54)(J.A.1406,1409-10,1414-15)(J.A.1536-65)
[6] (J.A.280-81)(J.A.655)(J.A.989)(J.A.1200-18)
[7] (J.A.839,841,844-45)(J.A.1411,1414-15)
[8] (J.A.551-52)(J.A.570)(J.A.573)(J.A.839)(J.A.867)(J.A.895)(J.A.1055,1068)
[9] (J.A.749-60)(J.A.827)(J.A.872-74,879)(J.A.896,899)(J.A.1109)

The entire trip centered on proselytizing. Odice admitted it did not involve "service work, physical labor and giving less fortunate people resources[.]" (J.A.872)(J.A.901-02). A fundraising webpage prominently featured the HRHS logo, stating: "The [HRHS] chapter of FCA (Fellowship of Christian Athletes), in conjunction with AIM (Adventures in Missions) are sending approximately 15-20 students…[O]ur group's primary goal is to share the love and hope of Jesus." (J.A.288). The "plan was to...introduce [children] to the Bible," and "promote Christianity." (J.A.889-91)(J.A.1068,1072). They shared "Jesus [] to kids who have never heard of Him before." (J.A.749-60).

In a letter seeking donations, Odice wrote: "I have been presented with an opportunity to go on a mission trip in Guatemala with fellow teachers and students…This experience…will allow me to continue to explore my own faith [and] enrich my teaching practice." (J.A.1109). Malach admitted her purpose was "to share Jesus Christ." (J.A.867-68). Students understood Malach as a "pretty devout Christian." (J.A.1070).

DCSD handled the trip funds.[10] Odice directed donors to "make checks payable to [HRHS]." (J.A.1109). Malach directed students to submit documents to

[10] (J.A.553)(J.A.730-44)(J.A.838,841-42)(J.A.877,884)(J.A.895-96,898)(J.A.1055-56,1069-71)(J.A.1109)(J.A.1719-20)

the school's bookkeeper.[11] The funds were handled in the same way as a "District-sponsored" trip.[12]

The proceeds from school fundraisers "did not go to plane tickets" but "went to AIM."[13] Although teachers paid for their own tickets, teachers pay their own way on all "District-sponsored" trips. (J.A893,895,902).

1. Faculty Participation in FCA Mission Trip Activities

DCSD requires all student clubs, such as FCA, to have faculty advisors, and is bound by the EAA.[14] Under the EAA, faculty may be "present at religious meetings only in a nonparticipatory capacity," and there must be "no sponsorship of the meeting by the school." 20 U.S.C. § 4071(c). The advisor may only be present for "custodial purposes" and must not be "promoting, leading, or participating." §4072(2)-(3).

Faculty led and participated in FCA activity before, after, and during the trip.[15] HRHS FCA has not one, but three advisors, called "FCA coaches."[16] They are not merely present as custodians but are "facilitating the meeting." (J.A.1053,1055). FCA students "proposed this mission trip to FCA coaches" and "receiv[ed] approval from the coaches." (J.A.1107-08). A student testified: "I

[11] (J.A.874-75,884)(J.A.1055,1073)
[12] (J.A.841)(J.A.898)(J.A.1411)
[13] (J.A.740-44)(J.A.875,877-78)
[14] (J.A.834-36,847-48)(J.A.906,916-20)(J.A.1406-08)
[15] (J.A.749-60)(J.A.827)(J.A.867,879)(J.A.899,901)(J.A.1062,1079)
[16] (J.A.551-52)(J.A.570)(J.A.834-35,847)(J.A.870)(J.A.1407)

asked the coaches if I could make an announcement about it…and they allowed me to do so." (J.A.1055).

Malach and Odice chaperoned "in lieu of the original FCA coaches."[17] They attended FCA meetings just "to support their club and…the trip." (J.A.891). They prayed with students along with many other teachers. (J.A.870-71)(J.A.891-92).

Odice admitted he and Malach "participate[d] in prayer with students on the trip" at least "once or twice a day" and "led" the students in worship. (J.A.899). They also joined their students in:

- Making "salvation bracelets" that "represent various parts of Jesus' life" for children.[18]
- "Ask The Lord," where they "read pages from the Bible" and "shared" with students. (J.A.879)(J.A.899)
- Sharing "the love of Jesus" by "sitting and reading…Bibles at a church with Guatemalan locals." (J.A.868,879)
- Singing "Jesus Loves Me" with "small kids at church." (J.A.868,879)

Malach's blog on the AIM website refers to herself as the "leader and temporary guardian of my students," and the group as "HRHS Team."[19] She proclaimed: "The heart of this journey is to share, celebrate, and honor Christ."

[17] (J.A.551-52)(J.A.570)(J.A.573)(J.A.838-39)(J.A.893-94)(J.A.1057)(J.A.1106-20)
[18] (J.A.749-60)(J.A.869,879-80)(J.A.899,901)
[19] (J.A.570)(J.A.749-60)(J.A.845)(J.A.866-68)(J.A.1415)

(J.A.702-03). Odice sent a letter thanking donors: "Our students prepared skits to tell stories from the Bible, [and] we worshipped together[.]"[20]

2. School-sponsored fundraising efforts at HRHS

HRHS and Cougar Run actively organized, promoted, and fundraised for the Christian organizations and trip.[21] Faculty "advised" students on fundraising options. (J.A.1069). Malach told a Cougar Run teacher: "I am in charge of both the babysitting night [fundraisers] and the trip to Guatemala as a whole[.]" (J.A.762-83)(J.A.881). She created flyers for FCA, which provided in part: "Email questions to Alexandra.Malach@dcsdkl2.org All proceeds go towards HRHS's Fellowship of Christian Athlete's service trip to Guatemala."(J.A.320)(J.A.1057,1077-78).

Odice emailed these flyers to elementary schools including Cougar Run, Fox Creek, and Acres Green.[22] They put flyers in students' "take home" folders and disseminated emails to "help the FCA program."[23]

On March 10, Odice emailed Cougar Run's principal's office: "Could you please forward this email to your staff? *HRHS* is hosting a babysitting fundraiser through *our* FCA program. *We* are going on a mission trip…and this is *our* last

[20] (J.A.827-28) (J.A.900-01)
[21] (J.A.42-56)(J.A.571)(J.A.715-23)(J.A.762-83)(J.A.837-38)(J.A.875-78)(J.A.896-98)(J.A.1056-58,1060,1071,1076-78)
[22] (J.A.319-21)(J.A.715-23)(J.A.762-83)(J.A.896-97)(J.A.1059,1064-65)
[23] (J.A.715-23)(J.A.839)(J.A.876)(J.A.896-97)(J.A.1059-60)

fundraiser for the event."[24] Cougar Run inserted flyers in students' folders, including Zoe-Son's.[25] No disclaimers appeared on the flyers and emails, required for a "non-district-sponsored trip."[26]

3. Cougar Run partnership and fundraising for Christian organizations and their proselytizing trip

Cougar Run "partnered" with FCA, organizing school-wide fundraisers and supply drives for AIM, FCA, and their Christian mission trip.[27] Their month-long fundraising efforts were faculty-initiated and faculty-led, and held during school hours.[28]

Cougar Run told families, including Zoes, it was "sponsoring" the mission trip in connection with the "curriculum."[29] It asked parents to make checks payable to "Cougar Run Elementary."[30] Principal Gutierrez admitted, "funds were solicited as well as donations…for the mission trip." (J.A.855-56).

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[24] (J.A.319)(J.A.716-17,719-23)(J.A.772-73)(J.A.896-97)(emphasis added)
[25] (J.A.51-52)(J.A.875-76)(J.A.1059)(J.A.1451)
[26] (J.A.716-23)(J.A.745-48)(J.A.842-44)(J.A.850)(J.A.1412-14)(J.A.1539)
[27] (J.A.42-56)(J.A.314-15)(J.A.316-18)(J.A.446-47)(J.A.553-57)(J.A.589-91)(J.A.762-83)(J.A.812-17)(J.A.839,845)(J.A.854,856-58)(J.A.880)(J.A.897-98)(J.A.974)(J.A.1415)
[28] (J.A.762-83)(J.A.845-46)(J.A.854-56,858-59)(J.A.880-81)(J.A.897-98)(J.A.1415)
[29] (J.A.314-15)(J.A.316-18)(J.A.446-47)(J.A.589-92)(J.A.812-17)(J.A.856,858)(J.A.974)
[30] (J.A.314-15)(J.A.318)(J.A.589-92)(J.A.810-11)

Gutierrez also admitted teacher Micki Benge initiated the fundraisers and "was the facilitator." (J.A.855). She also created a flyer received by Zoes.[31] Benge and Gutierrez learned about the trip from an HRHS flyer and also received Odice's email promoting the "mission trip."[32]

On February 18, Benge emailed Malach and Odice, copying Gutierrez: "I saw your name on the flier for the FCA fundraising event…[I] would love to have my 6th graders organize a supply drive!"[33] Malach responded: "I am in charge." (J.A.764-65,769). Benge then emailed Gutierrez: "I will talk with you all tomorrow about how this might look at Cougar Run and will then get our students involved!" (J.A.765).

On March 5, Benge asked Malach: "Can you send me the name of the organization you are working with so that I can add it to the flyer?" Malach responded: "Adventures in Missions." (J.A.778-79). The next day, Benge emailed Cougar Run staff: "We are partnering with HRHS on this effort-specifically the FCA…" (J.A.858).

On March 10, Zoe-Son's preschool teacher Cammile Espinosa forwarded parents, including Zoes, an email from Cougar Run teachers, stating in part:

[31] (J.A.810-11)(J.A.1368)(J.A.1537)
[32] (J.A.715-23)(J.A.762-83)(J.A.810-17)(J.A.858)(J.A.1539)
[33] (J.A.762-83)(J.A.855-56)(J.A.880)(J.A.897-98)(J.A.1113-14)

> Parents,
> A great opportunity to pay it forward! Thank you in advance for your support!...
>
> Just wanted to inform you about a supply drive that our 6th graders are sponsoring called "**Giving to Guatemala**". It begins next Monday the 10th and will run through the week.
>
> *We* are partnering with *HRHS* on this effort - specifically the FCA (*Fellowship of Christian Athletes*) organization…They will be taking the supplies we collect with them.
>
> We have designated grade level supplies but won't turn away additional donations. Students will bring collection boxes to your pods and will be around daily to collect the items. Flyers will be going home in Friday Folders, there will be an email blast to families, and it will be featured during next week's morning announcements.
>
> Proceeds from the sales of Press Paws next week will also go toward our efforts…
>
> **School Wide –** athletic equipment
> **Little Cougars** – temporary tattoos of any type!…
> **6th Grade –** beads and bracelet string for 700 bracelets
>
> ****** Monetary donations are also welcome! Please make checks payable to Cougar Run Elementary…[34]

Cougar Run also sent home a teacher-created flyer, placed in Zoe-Son's folder, stating in part:

[34] (J.A.316-18)(J.A.589-92)(J.A.812-17)(emphasis added)

"Giving to Gautemala [sic]" Supply Drive

March 10th-14th

Sponsored by Cougar Run 6th Graders *partnering with the FCA* (Fellowship of Christian Athletes)…
How Cougar Run can help...We will be collecting basic hygiene supplies, craft items, and new/gently used sports equipment that the *FCA students* will take with them…

Please make checks payable to Cougar Run Elementary.

(J.A.314-15)(emphasis added).

Zoe-Son was asked to bring "temporary tattoos" to school.[35] At Benge's behest, during school hours, "students brought around grade level collection boxes and baggies for monetary donations." (J.A.815-17)(J.A.1118).

On March 10, Benge emailed Cougar Run faculty: "we appreciate any positive talk you can give it in your classrooms. You could also use our 'goal numbers' in your math lessons! We will have kids collect items and $ after our lunch hour - around 1:55 PM." (J.A.815-17)(J.A.1116-18).

Cougar Run's principal also encouraged participation. On March 21, he emailed "Cougar Run Families," stating they were "raising money to donate to our 6th grade project [for the FCA trip]…[A]ny amount beyond that is greatly appreciated." (J.A.805-09)(J.A.854-57). Attached was a copy of the school paper, also announcing Cougar Run "partnered" with FCA. (*Id.*).

[35] (J.A.53)(J.A.314-17)(J.A.589-90)(J.A.764,768)(J.A.811-17)(J.A.1066)(J.A.1452,1455,1458)(J.A.1658,1660)

Additionally, Cougar Run donated proceeds from its newspaper, which Benge used to purchase items for FCA.[36] It also raised funds through a school program, "Muffins with Mom."[37] Benge wrote: "'Muffins with Mom' is scheduled for Friday morning the 14th - we will have kids out in the lobby collecting monetary donations." (J.A.778-79). After collection, HRHS students and teachers went to Benge's classroom for a "packing party."[38]

The items directly furthered proselytization.[39] The beads went toward "Salvation Bracelets" "to help [the children] remember the story of Christ."[40] Sports equipment was used as an "opportunity to discuss Jesus." (J.A.700).

Immediately after receiving the flyer and email, Zoe contacted AHA.[41] After investigation, AHA sent DCSD a cease-and-desist letter, seeking assurances its fundraising practices would discontinue.[42] DCSD received the letter but never responded.[43]

Zoe testified: "my child felt coerced into participating and contributing to this religious fundraiser," because it "was held on school campus and collection took place during school hours," and he "felt that his teachers expected

[36] (J.A.51)(J.A.326)(J.A.446)(J.A.762-83)
[37] (J.A.778-79)(J.A.805-09)(J.A.855,859-60)(J.A.1401)
[38] (J.A.762-83)(J.A.897)(J.A.1065)
[39] (J.A.762-83)(J.A.810-17)(J.A.1116-18)
[40] (J.A.827)(J.A.869,879-80)(J.A.899,901)
[41] (J.A.1451,1453,1457)(J.A.1738)
[42] (J.A.322-31)(J.A.697-706)(J.A.707-08)(J.A.832-33,836-37)
[43] (J.A.448)(J.A.854,859)(J.A.872)

participation." (J.A.583,589-93)(J.A.1456,1461). Additionally, there were "a lot of his peers contributing to it." (J.A.1456). She added: "As non-Christians, the school's actions in promoting and endorsing a Christian organization…made us feel like outsiders[.]"(J.A.590)(J.A.1457).

Gutierrez understood why Zoe "would be upset." (J.A.861). But Cougar Run has not changed its practices and DCSD defends Cougar Run's fundraisers.[44]

B. Operation Christmas Child

DCSD's fundraising practice includes fundraising for an evangelical Christian organization, Samaritan's Purse, and its program, OCC, as part of school-approved, classroom, and co-curricular activity, including at the families' schools.[45]

Samaritan's Purse is "an evangelistic Christian organization" and OCC "is just one of their projects. They…take these boxes to often third-world countries…with the intent of introducing the gospel." (J.A.690). Its president, Franklin Graham, stated "evangelism is the focus." (J.A.179). Christian materials are often inserted in boxes at processing plants.[46] Samaritan's Purse volunteers

[44] (J.A.450-52)(J.A.463)(J.A.550)(J.A.862)(J.A.986)(J.A.1110-11)
[45] (J.A.21-23)(J.A.550-51,559-67)(J.A.569)(J.A.581-82)(J.A.648-49)
[46] (J.A.105-61)(J.A.648,651)(J.A.676)(J.A.982,987)(J.A.1133-51,1154-55)

proselytize to children receiving boxes, and deliver "a booklet in the local language," "filled with scriptures…and a simple presentation of the Gospel."[47]

DCSD's expansive involvement in OCC includes teachers instructing students to participate in OCC during class, using school email and newsletters to promote OCC, and conducting school-wide OCC fundraisers.[48] Schools that have fundraised for OCC include, but are not limited to:[49]

- DCHS
- Chaparral High (CHS)
- Mesa Middle
- Flagstone Elementary
- Legend High
- Mountain Vista High (MVHS)
- Pioneer Elementary
- Larkspur Elementary
- SkyView

A former teacher admitted: "[OCC] is very prevalent all over the place." (J.A.1009). DCSD has no intention of discontinuing this practice. (J.A.550).

[47] (J.A.25-27)(J.A.76-81)(J.A.105-40)(J.A.152)(J.A.162-77)(J.A.184-85)(J.A.582)(J.A.1122-24)(J.A.1133-51)
[48] (J.A.216-220)(J.A.550,559-67)(J.A.834)(J.A.1127-28,1130-32)
[49] (J.A.29-42)(J.A.198-220)(J.A.550,553-57,559-67)(J.A.569)(J.A.582)

Roes have been, and remain, immediately affected by this practice. In 2014, DCHS endorsed and participated in OCC while Roe-Son was in school. (J.A.550,559-60)(J.A.1683-84). DCHS teachers organized and promoted OCC in their 90-minute freshman homeroom classes that meet every other day. (*Id.*). DCSD approves and defends DCHS's actions.[50] Roe-Daughter will be a freshman in 2017 and Roe objects to his "children being subjected to their teachers promoting OCC." (J.A.1685-86).

DCSD also approves OCC participation in homeroom at other schools, and Student Government, a graded class held during instructional hours.[51] The administration has final authority over its projects.[52] According to CHS Student Government teacher, Craig Bowman, "my role would be to approve it, deny it, or modify it[.]" (J.A.645). He testified: "I wouldn't let a kid do something without me having a pretty lengthy conversation with an administrator about…why we were doing it," as he did with OCC. (J.A.646). Bowman confirmed the administration will reject a project that "wasn't promoting our values as a school."(J.A.1591).

Before approving OCC, Bowman visited Samaritan's Purse's website to "see what the purpose of it was." (J.A.647-48). He admitted OCC "endorse[s]

[50] (J.A.550)(J.A.986)(J.A.1725)(J.A.1801)(J.A.1832)
[51] (J.A.550,559-60,564-66)(J.A.645-47)(J.A.660-61)(J.A.680)(J.A.907)(J.A.985)(J.A.1093)
[52] (J.A.645-46)(J.A.674)(J.A.691)(J.A.907-08)(J.A.985)(J.A.1092-93)

Christianity." (J.A.649). After submission "for a vote in front of the entire student government," the entire student body was encouraged to participate. (J.A.682).

CHS participated in OCC three consecutive years.[53] All homeroom classes partook. (J.A.637-39)(J.A.687). Samaritan's Purse provided CHS with shoeboxes, delivered to classrooms during instructional hours.[54] CHS used the school's annual "canned food drive to promote [OCC]." (J.A.685). It offered prizes to induce participation, purchased from the student activity fund.[55] Such "funds are considered a part of the total fiscal operation of the School District…[and] shall be so expended as to benefit the student body as a whole." (J.A.1156). Faculty promoted OCC via District email and Daily Bulletins.[56] Each year, about 80 boxes were collected from homeroom classes. (J.A.687).

SkyView also promoted OCC. (J.A.581-82,589). After receiving AHA's cease-and-desist letter in November 2013, SkyView's principal admitted: "The best attorneys in the land, that defend our religious rights (Alliance Defending Freedom), even said we had an indefensible case[.]" (J.A.245). DCSD's

[53] (J.A.560)(J.A.569)(J.A.656)(J.A.681,692)(J.A.910)
[54] (J.A.569)(J.A.650,652)(J.A.686-87)(J.A.1126)
[55] (J.A.550-559)(J.A.650,656)(J.A.663-64,667-68,677-78)(J.A.685-87)(J.A.1125)
[56] (J.A.206-11)(J.A.550,559)(J.A.569)(J.A.613-17,620-21)(J.A.634-41)(J.A.642)(J.A.651-54)(J.A.662,666)(J.A.685-87,694)(J.A.911-12,927-53)(J.A.1125-26)

Superintendent knew of the letter. (J.A.1129). But DCSD continued OCC participation.[57]

Not only has the fundraising practice continued, but DCSD defends it.[58] DCSD maintains that classroom participation in OCC, and teachers promoting it, is "consistent with DCSD policy." (J.A.550). DCSD even contends that a "school employee" cannot be "excluded from participation in" OCC when it is through a "DCSD program or activity." (J.A.550).

C. Tim Tebow Foundation through Spirit Week

DCSD permits schools to fundraise for Christian organizations through "spirit week" – an annual school-wide activity during which students can dress in fun or silly clothing if they donate money to a school-approved charity.[59] The Superintendent testified this is not "in violation of the district policy." (J.A.977-78).

In September 2012, Rockridge Elementary fundraised for the Tim Tebow Foundation, a "Christian charity," which has as its stated goals to "share the Gospel."[60] A non-Christian parent voiced her concerns but the principal defended the practice on the grounds participation is "optional." (J.A.1104-05). In October, ACLU sent DCSD a cease-and-desist letter. (J.A.1002,1103-04). Rather than discontinue the fundraising practice, DCSD wrote that it would continue such

[57] (J.A.550,559)(J.A.654)(J.A.914-16,931-53)
[58] (J.A.550-59)(J.A.910-12)(J.A.985-86)(J.A.1370)
[59] (J.A.976,978,1001-08)(J.A.1103-05)
[60] (J.A.976,978,1001-08)(J.A.1103-05)

fundraising "activities as an educational opportunity for students." (J.A.1105). DCSD still defends "spirit week" religious fundraisers. (J.A.976-81)(J.A.1726).

III. Faculty participation in religious club practice

A. Faculty participation in FCA

DCSD authorizes faculty to lead and participate in FCA beyond custodial oversight. This practice is pervasive, permeating Roes and Zoes' schools, including:[61]

- DCHS
- HRHS
- CMS
- CHS
- MVHS
- Castle View High
- Ponderosa High (PHS)
- Legend High
- Cimarron Middle
- Mesa Middle

[61] (J.A.655)(J.A.709-10,784-804)(J.A.834-35,846-49)(J.A.870-71)(J.A.891-92)(J.A.906,917-22,956-71)(J.A.994-96,1017-42,1046-49)(J.A.1053,1074)(J.A.1157-1307)

Faculty throughout DCSD: [62]

- Lead and participate in FCA meetings and events
- Initiate FCA clubs
- Pray and proselytize with students
- Recruit students to join FCA
- Organize FCA events
- Fundraise for FCA
- Serve as the contact person for FCA school announcements
- Write letters on behalf of FCA with school letterhead
- Promote FCA football camps (faculty at over 17 schools)

DCSD approves these activities. (J.A.569-571)(J.A.994-98)(J.A.1379).

An HRHS student testified that faculty are the ones "facilitating the meeting." (J.A.1053,1055). FCA activities are "mostly…initiated by the [teachers]," and teachers regularly "initiated…prayers."[63] Malach confirmed it is "typical" for faculty other than the advisors to "join meetings." (J.A.870-71). At two meetings Malach attended, "there were at least eight teachers" present not "as supervisors" but "being a part of FCA." (*Id.*). All teachers "participated" in prayers. (J.A.891-92).

[62] (J.A.655)(J.A.709-10)(J.A.716-23)(J.A.784-804)(J.A.834-35,846-49)(J.A.870-71)(J.A.891-92)(J.A.906,917-22)(J.A.956-71)(J.A.994-97)(J.A.1017-1023)(J.A.1046-49)(J.A.1053,1074)(J.A.1107)(J.A.1157-1359)
[63] (J.A.796-801)(J.A.1053-54)(J.A.1074)(J.A.1409-10)

Faculty at Roes' school, DCHS, also endorse FCA.[64] DCHS's FCA faculty advisor, Lon Smith, participates in FCA beyond "custodial oversight."[65] DCHS's Learning Specialist and Head Football Coach also promotes FCA. (J.A.1331-38)(J.A.1687-88). School announcements for FCA refer to Smith. (J.A.1177-82). Smith has helped recruit students and communicates to parents on FCA's behalf using "we" and "our." (J.A.1183). Smith and other faculty have also sought out speakers for FCA meetings. (J.A.1177-80).

Faculty organize and lead FCA events and activities. For instance:

- 2010 and 2011: CHS teacher organized "Fields of Faith" and was the "event coordinator"[66]
- 2013: faculty organized FCA concert in CHS's gym[67]
- 2014: MVHS teacher hosted "FCA Leadership Retreat"[68]
- 2014: PHS teacher invited "every head coach" to FCA "Ponderosa Coaches Chapel…in the teachers lounge"[69]

Faculty recruit students to join FCA and are often listed as the contact person in FCA announcements.[70] Teachers include FCA in their school signature

[64] (J.A.1176-84)(J.A.1331-38)(J.A.1687-88)
[65] (J.A.1176-84)(J.A.1315-59)(J.A.1469,1505)(J.A.1685-89)
[66] (J.A.1017-22)(J.A.1232-34)
[67] (J.A.1194,1200-18)(J.A.1236-41)
[68] (J.A.1194)(J.A.1200-18)
[69] (J.A.1296-1304)
[70] (J.A.1176-84)(J.A.1219-29)(J.A.1254-55,1260-68)

blocks and bios.[71] PHS teacher's bio states: "Chris also *leads* the [FCA] club." (J.A.1305-06). A CHS's teacher's resume boasts: "2011 [FCA] 'Coach of Influence Award.'" (J.A.1021). Many have served as an FCA advisor for over ten years.[72]

At some schools, staff initiated (or attempted) FCA clubs without any student initiation, including at Zoe-Children's future school, CMS.[73] In 2013 and 2014, teachers at CMS and HRHS worked together to introduce FCA to CMS.[74] That same CMS teacher led a CMS Christian club. (J.A.1307). In addition, in 2014:

- Mesa Middle: a teacher, local pastor, and the outside FCA rep, Seth Olsen, attempted to establish FCA (J.A.1157-72)
- Cimarron Middle: teacher emailed Olsen: "I am interested in bringing FCA to our campus." (J.A.1185-86)
- Legend HS: teacher emailed Olsen: "Would love to…chat about the direction of the Legend FCA." (J.A.1286-87)
- CHS: faculty and Olsen worked together, without any student involvement, to revive FCA at CHS.[75]

DCSD also permits outside FCA reps to direct FCA activity.[76] At Olsen's behest, faculty at many schools filled out an FCA "Ministry Leader Application

[71] (J.A.1023-42)(J.A.1230-1241)(J.A.1285-93)
[72] (J.A.835)(J.A.1189)(J.A.1278)
[73] (J.A.784-89)(J.A.846-47)(J.A.959-64)(J.A.1046-49)(J.A.1157-72)(J.A.1173-75)(J.A.1185-86)(J.A.1236-41)(J.A.1243-55,1260-68)(J.A.1307)(J.A.1696)
[74] (J.A.784-89)(J.A.1307)(J.A.1697-98)
[75] (J.A.918-21,956-64)(J.A.1046-49)(J.A.1236-41)(J.A.1243-49,1254-55,1260-68)

(MLA)," which "covers your Christian beliefs" – "a background check…that help us see if our beliefs are in the same alignment."[77] Olsen's declaration also confirms it "is not uncommon for [DCSD] teachers to attend" meetings beyond oversight. (J.A.1778).

Certain administrators concede that faculty violate EAA. (J.A.839)(J.A.920-21). For instance, Gotchey admitted: "it's clear that some people are not understanding…what the expectations are for club sponsors." (J.A.921). But DCSD still defends its practice.[78]

B. See You At The Pole ("SYATP")

For many years, faculty at HRHS, Zoe-Children's future school, organize and join students in an annual prayer event, SYATP, immediately before school starts.[79] "[L]ots of faculty" participate. (J.A.1074). Faculty also use school email to invite Christian pastors to attend. (J.A.834-35)(J.A.709-10). DCSD and the Superintendent defend this practice. (J.A.996-97)(J.A.1714,1726).

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[76] (J.A.790-804)(J.A.848-49)(J.A.957-64,968-71)(J.A.995-98,1023-42)(J.A.1184-1229)(J.A.1236-41)(J.A.1249,1251-72)(J.A.1279-84)(J.A.1286-88,1292-93)(J.A.1296-1304)(J.A.1307)
[77] (J.A.1185,1190)(J.A.1250,1251,1253)
[78] (J.A.550-559)(J.A.910-12)(J.A.976)(J.A.985-86)
[79] (J.A.709-10)(J.A.835-36)(J.A.996,1043-45)(J.A.1074)(J.A.1696-98)

IV. District tolerance of violations

DCSD contends that school "endorsement" of religion is permissible so long as it is not "disruptive."[80] DCSD asserts faculty participation in FCA is "consistent with" DCSD policy. (J.A.571). HRHS's principal testified: "there's not a firm school policy prohibiting teachers from participating in religious clubs." (J.A.835). He was generally unaware of EAA requirements despite serving as principal for ten years. (J.A.835). CHS's principal was unsure "what is allowed and what isn't allowed," and was "not really" "familiar with the [EAA]" either. (J.A.914,917). The Superintendent herself could not describe what violates the Establishment Clause but said, "I think that we know it when we see it." (J.A.980).

Although DCSD trains faculty on a many issues, it conducts no Establishment Clause or EAA training. (J.A.835)(J.A.885). And there are no ramifications for teachers who participate in FCA meetings. (J.A.917). One teacher contended that school-sponsored OCC was permissible because "students didn't have to get involved." (J.A.644,653). Another asserted: "My understanding is, if it's student led, anything goes." (J.A.1098).

[80] (J.A.981,985-86,988,994-99)(J.A.1364)

I. Procedural History

Families/AHA filed suit on October 22, 2014. (J.A.16-60). On December 9, 2014, the court granted their motion to proceed pseudonymously to protect them from physical harm, harassment and bullying. (J.A.7).

On March 27, 2015, SkyView and Families/AHA jointly moved, with DCSD's assent, for a consent decree reflecting SkyView's agreement to discontinue OCC. (J.A.473-75). The court denied the motion. (J.A.494). SkyView subsequently settled on same terms, but without a consent decree. (J.A.502-03).

On August 3, the parties cross-filed for summary judgment, followed by cross-responses and cross-replies. (J.A.511)(J.A.1363). On December 30, the court set the trial preparation conference for January 29, 2016. (J.A.13).

On January 4, DCSD filed a motion *in limine* challenging Families/AHA's standing. (J.A.1858). Families/AHA asserted the motion was redundant of summary judgment and reiterated they had standing. (J.A.1869).

On January 20, the court denied Families/AHA's motion for summary judgment and granted DCSD's cross-motion, concluding "none of the plaintiffs…have legal standing." (J.A.1923). On February 16, Families/AHA filed a timely notice of appeal. (J.A.1927).

SUMMARY OF THE ARGUMENT

The District Court's conclusion that the families lacked standing to challenge the District-wide practices that apply directly to their schools insulates DCSD's systematic promotion of religion from judicial review. For many years, DCSD has sanctioned and overtly promoted Christianity, and specifically evangelical Christianity, in classrooms and school-sponsored activities. These practices occur throughout DCSD and show no sign of abating.

The families seek nominal damages to redress past constitutional violations and declaratory and injunctive relief to address ongoing and future violations.

For Establishment Clause standing, a plaintiff need only demonstrate: (1) direct unwelcome contact (2) with state-sponsored religion. For nominal damages, a single past contact is sufficient. For prospective relief, no past contact is required. A likely future injury suffices. A defendant's refusal to discontinue the practice generally satisfies this threshold.

Zoes undeniably have standing for nominal damages. The court conceded Zoes had at least *two* direct, unwelcome contacts with school-sponsored Christian fundraising. Zoes were repeatedly solicited to donate money and items to support Christian organizations and their evangelical trip. Zoe-Son felt that his teachers and peers expected his participation. Under the controlling "direct, unwelcome

contact" standard, this is beyond sufficient, especially because nominal damages must be awarded for a *single* constitutional violation.

Zoes' claims for injunctive relief against both practices must also be remanded. The court failed to even consider Zoes' injunction claims against the fundraising practice and disregarded all Zoes' claims for the Faculty Participation Practice. Instead, it determined they lacked standing based solely on finding of insufficient *past* contact.

Roes also have standing to challenge both District-wide, District-approved practices because they apply to their school and injure them in an ongoing manner. Roes' likelihood of future injury is also particularly acute because Roe-Daughter will be a freshman at DCHS in 2017 where freshman homeroom participates in OCC. Roes are considering changing schools to avoid the religious practices.

Finally, all three families have municipal taxpayer standing because their District taxpayer dollars are expended on the unconstitutional activities. As explained below, to uphold the court's ruling will abolish municipal taxpayer standing altogether.

ARGUMENT

I. Standard of Review

On cross-motions for summary judgment, this Court's review of the record is *de novo* and the Court "must view the inferences to be drawn from affidavits, attached exhibits and depositions in the light most favorable to the party that did not prevail." *Jacklovich v. Simmons*, 392 F.3d 420, 425 (10th Cir. 2004).

The Establishment Clause requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). Parents "entrust public schools with the education of their children, but condition their trust on the understanding" that they will not advance "religious views that may conflict with the private beliefs of the…family." *Id.*

II. Establishment Clause standing is easy to satisfy.

In denying standing across the board, the court disregarded Article III's relaxed application to the Establishment Clause. Under Article III, a plaintiff must allege: (1) actual or threatened personal injury (2) fairly traceable to defendant's unlawful conduct (3) likely to be redressed by the court. *Foremaster v. St. George*, 882 F.2d 1485, 1487 (10th Cir. 1989).

For Establishment Clause plaintiffs, it is sufficient to show: (1) a direct, unwelcome contact, or likely future contact (2) with state-sponsored religion. *Awad v. Ziriax*, 670 F.3d 1111, 1121-22 (10th Cir. 2012). This Court has made clear that "alleging *only* 'personal and unwelcome contact' with government-sponsored religious [activity] is sufficient to establish standing." *Id.* (citations omitted). *See also Hudson v. Pittsylvania Cnty.*, 2013 U.S. Dist. LEXIS 43012, *13 (W.D. Va. 2013)("All she need prove is that she has had 'direct unwelcome contact' with the offending practice.")(citation omitted). The families satisfied this threshold. (J.A.1911). But the court held they lacked standing, failing to recognize at least two ways in which Establishment Clause standing is unique.

First, the injury need not be tangible, persistent, or result in any adverse consequences. *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1408 (10th Cir. 1985)(finding Establishment Clause violated when teachers "participat[ed] in religiously-oriented meetings involving students"). The injury element is easily satisfied because of "'the myriad, subtle ways in which Establishment Clause values can be eroded.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000)(citation omitted). The government's actions "need not be material or tangible." *Friedman v. Bd. Cnty. Comm'rs*, 781 F.2d 777, 781 (10th Cir. 1985). Even "the unspoken grant of a state 'imprimatur' to religious activity" in public schools is unconstitutional. *Id.* (citing *Bell*, 766 F.2d at 1405).

Second, "standing is even stronger when the plaintiffs are students and parents of students attending public schools. Students and their parents enjoy a cluster of rights vis-a-vis their schools - a relationship which removes them from the sphere of 'concerned bystanders.'" *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466-67 (5th Cir. 2001). The Supreme Court has recognized parents' constitutionally-protected interest in guiding "the religious future and education of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Thus, parents can, "on their own behalf, assert that the state is unconstitutionally acting to establish a religious preference affecting their children." *Bell*, 766 F.2d at 1398.

III. Zoes and Roes had direct unwelcome contact with the Christian Fundraising Practice, conferring standing for nominal damages.

To seek nominal damages for an Establishment Clause violation, a parent must simply show a past, direct, unwelcome contact with state-sponsored religion. *Tandy v. City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004); *Bell*, 766 F.2d at 1398-99. The likelihood of future contact is irrelevant. *Id.*

A. Zoes had direct unwelcome contact with Cougar Run's religious fundraisers.

At a minimum, Zoes have standing to seek nominal damages. (J.A.1911-14). The court correctly found Zoes had direct, unwelcome contact with school-sponsored religious activity. (J.A.1911). It even recognized Zoe had "personal contact with the alleged violations" on at least "*two occasions*, both of which

related to Cougar Run's fundraising efforts for the HRHS Guatemala trip." (J.A.1911)(emphasis added). This was enough. *Awad*, 670 F.3d at 1122.

Yet the court held Zoes lacked standing, finding their direct, unwelcome contact insufficient. (J.A.1913-14). Instead, it reformulated the standard to "direct, *prolonged*, *repeated* and unwelcome contact" and "actual coercion." (J.A.1911-13). Applying this new stringent test, the court concluded Zoes lacked a cognizable injury because "Zoe only received one flyer and one email about a fundraising effort for a one-time trip." It further held that even if Zoes showed "prolonged" exposure, Cougar Run did not penalize or retaliate against Zoe-Son. (J.A.1912).

Applying the proper standard to the undisputed facts, Zoes suffered the requisite particularized injury, traceable to the school's actions, *infra.*

B. Neither "prolonged" exposure nor repeated contacts is required.

The court's prolonged and repeated requirement for nominal damages defies controlling precedent. In *Tandy*, this Court made clear that a plaintiff satisfies "injury in fact" if "she suffered *a* past injury." 380 F.3d at 1283-84 (emphasis added). "An identifiable trifle is enough for standing[.]" *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973)(citation omitted). There is "no minimum quantitative limit required to show injury." *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987)(citing *SCRAP*).

In *Lee v. Weisman*, for instance, the father's daughter was exposed to less than two minutes of nondenominational prayer at a *single* middle school graduation. 505 U.S. 577, 583-84 (1992). She would only encounter the challenged activity *once* more, *if at all*, in four years at her senior graduation. *Id.*

Federal courts have repeatedly found a single contact sufficient for Establishment Clause standing, even when the plaintiff would never encounter the practice again:

- A short prayer in one-time graduation[81]
- A one-time police community prayer vigil found unlikely to recur[82]
- A single flyer promoting a single event that plaintiffs would not attend[83]
- A 45-minute mass at a 3-day secular municipal festival that plaintiff would not personally encounter[84]
- A single two-hour graduation held in a nondenominational chapel that graduating students would encounter only once[85]
- A "brief two minute nativity scene" at the end of a school program[86]

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[81] *E.g.*, *Lee*; *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999); *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996); *Doe v. Gossage*, 2006 U.S. Dist. LEXIS 34613 (W.D. Ky. 2006); *Gearon v. Loudoun Cnty. Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993)

[82] *Am. Humanist Ass'n v. City of Ocala*, 2015 U.S. Dist. LEXIS 115443, *18 (M.D. Fla. July 2, 2015)(nominal damages)

[83] *Newman v. East Point*, 181 F. Supp. 2d 1374, 1377-78 (N.D. Ga. 2002)

[84] *Doe v. Crestwood*, 917 F.2d 1476 (7th Cir. 1990)

[85] *Does 1 v. Elmbrook Joint Common Sch. Dist.*, 2010 U.S. Dist. LEXIS 72354, *16-17 (E.D. Wis. 2010), *standing aff'd*, 687 F.3d 840 (7th Cir. 2012)(en banc), *cert. denied*, 134 S. Ct. 2283 (2014); *Does 1 v. Enfield Pub. Sch.*, 716 F. Supp. 2d 172 (D. Conn. 2010)

- A single prayer at a single awards ceremony that the graduated senior would never again encounter[87]
- A Bible distributed on a once-a-year occurrence that the student would not encounter again[88]

The court made no attempt to distinguish these cases or others like them.

Because a single contact is enough, Zoes' direct unwelcome contact with the flyer *and* email "promoting" and "sponsoring" Christian organizations and mission trip were beyond sufficient. (J.A.811). "'Allegations of personal contact with a state-sponsored image suffice to demonstrate this kind of direct injury.'" *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1113 (10th Cir. 2010)(citation omitted). The same is true of "unwelcome religious statements." *Saladin*, 812 F.2d at 692.

For instance, residents in *Newman* had standing to challenge a single event based solely on encountering a flyer publicizing the event. 181 F. Supp. 2d at 1377-78. The court in *AzCLU v. Dunham* similarly held residents' "unwelcome direct contact with [a temporary] banner proclaiming Bible Week also constitutes a sufficient injury for standing." 88 F. Supp. 2d 1066, 1078 (D. Ariz. 1999).[89]

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[86] *Doe v. Wilson Cnty. Sch. Sys.*, 564 F. Supp. 2d 766, 800 (M.D. Tenn. 2008)
[87] *M.B. v. Rankin Cnty. Sch. Dist.*, 2015 U.S. Dist. LEXIS 117289 (S.D. Miss. 2015)
[88] *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1164 (7th Cir. 1993); *Roe v. Tangipahoa Parish Sch. Bd.*, 2008 U.S. Dist. LEXIS 32793, *2-4 (E.D. La. 2008); *Jabr v. Rapides Parish Sch. Bd.*, 171 F. Supp. 2d 653, 656-57 (W.D. La. 2001)
[89] *See also Crestwood*, 917 F.2d at 1479 ("newspaper published by the Village" promoting a single event)

By analogy, in *Saladin*, the plaintiffs claimed that a city seal with the word "Christianity" denigrated them. 812 F.2d at 689. Even though they lived outside the city, the Eleventh Circuit found standing merely because they received stationery with the seal and were "directly affronted by the presence of the allegedly offensive word." *Id*. at 693. If mere contact with *another* city's stationery was enough, Zoes must have standing for encountering flyers and emails *soliciting money* for, and "sponsoring," "Christian" organizations, in their *own* school. The "psychological feeling of being excluded or denigrated on a religious basis in one's own community is enough." *FFRF v. Chino Valley Unified Sch. Dist. Bd. of Educ*., 2016 U.S. Dist. LEXIS 19995, *22 (C.D. Cal. Feb. 18, 2016). *See Catholic League v. San Francisco*, 624 F.3d 1043, 1049-52 (9th Cir. 2009)(residents had standing to challenge "hortatory resolution" – a "one-time occurrence" – because it made them feel like "second class citizens" in their own community).[90]

In adopting this requirement, the court selectively harvested quotes from three cases happening to feature regular contact. (J.A.1912-13). But those cases did not profess to establish any sort of regularity element to the "direct, unwelcome contact" standard. To the contrary, they reaffirmed it. *See Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1028 (10th Cir. 2008)("'[a]llegations of personal contact

[90] *Id.* at 1075-76, 1079 (Graber, J., dissenting)

with a state-sponsored image suffice'")(citation omitted); *Foremaster*, 882 F.2d at 1490-91; *Bell*, 766 F.2d at 1398-99.

In *Weinbaum*, rather than hold "'conspicuous'" and "'constant exposure'" – language from plaintiffs' complaint – were required, the Court simply held: "These facts *suffice*." 541 F.3d at 1028 (emphasis added). In *Foremaster*, pervasiveness was only relevant to *injunctive* relief because the plaintiff moved. 882 F.2d at 1490-91. The city argued he would no longer see the display, rendering injunctive relief moot. *Id*. It was in this narrow context the Court said: "Given this pervasive contact…his current residence outside the city does not defeat his standing." *Id.* Finally, nowhere in *Bell* did this Court suggest, let alone require, "prolonged exposure" when it held parents had standing to challenge meetings their children did not attend. 766 F.2d at 1398-99.

Regardless, the court's discussion ignores many other "direct, unwelcome contact" cases where plaintiffs lacked frequent contact and still had standing, *supra*.[91] Circuit courts agree "'unwelcome' direct contact with the offensive object *is enough*.'" *Washegesic v. Bloomingdale Pub. Sch*., 33 F.3d 679, 682 (6th Cir. 1994)(citation omitted, emphasis added). *See Red River Freethinkers v. Fargo*, 679 F.3d 1015, 1023-24 (8th Cir. 2012)(recognizing this is "by far the prevailing view"); *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1252-53 (9th Cir. 2007)(same). The

[91] *See also Books v. Elkhart Cnty.*, 401 F.3d 857, 862 (7th Cir. 2005)(citizens passed by display as little as once per year)

"standing calculus is no different here" than in a "public display case." *Hudson*, 2013 U.S. Dist. LEXIS 43012, at *14 ("contact with the Board's Christian prayer practice"). *E.g.*, *Littlefield v. Forney Indep. Sch. Dist*., 268 F.3d 275, 294 n.31 (5th Cir. 2001)("Families have alleged that the application of the opt-out policy appears to favor certain organized religions…This direct exposure to the policy satisfies the 'intangible injury' requirement").

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464 (1982), in no way overruled *Abington Sch. Dist. v. Schempp*'s recognition in that unwelcome religious endorsement in a plaintiff's own public school "surely suffices to give the parties standing." 374 U.S. 203, 224 n.9 (1963). Like *Schempp*, "*Valley Forge* recognized that direct contact with an unwelcome religious exercise or display works a personal injury distinct from…each citizen's general grievance[.]" *Suhre v. Haywood Cnty*., 131 F.3d 1083, 1086 (4th Cir. 1997).

The Supreme Court provided additional support for the "direct, unwelcome contact" standard after *Valley Forge*. *See Allegheny*, 492 U.S. 573; *Lynch v. Donnelly*, 465 U.S. 668 (1984). In *Allegheny* and *Lynch*, the Supreme Court ruled on the merits of challenges to displays by plaintiffs who alleged only direct, unwelcome contact. *See Awad*, 670 F.3d at 1121 n.6 (finding previous merits

decisions instructive). Accordingly, the court erred in concluding Zoes lacked standing after conceding they had direct, unwelcome contact. (J.A.1911).

1. The court was obligated to award nominal damages but instead gave the government a free pass – and future invitation – to violate the Constitution.

The court's unwarranted requirement gives the government carte blanche for "one-time" constitutional violations, or, as in this case, repeated unconstitutional conduct. (J.A.1912).[92] But *Lee* "clearly established that the 'once-in-a-lifetime event' does not justify allowing a public school to authorize" religious activity. *Black Horse*, 84 F.3d at 1482. *See Lee*, 505 U.S. at 594.

Moreover, the requirement ignores the purpose of nominal damages. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). By "making the deprivation of such rights actionable for nominal damages…the law recognizes the importance to organized society that those rights be scrupulously observed." *Id.* They perhaps serve their most important function in "one-time" situations. The "rationale for the award of nominal damages being that federal courts should provide some marginal vindication for a constitutional violation." *Price v. City of Charlotte*, 93 F.3d 1241, 1246 (4th Cir. 1996).

The Supreme Court "obligates a court to award nominal damages when a plaintiff establishes the violation of [a constitutional right]." *Farrar v. Hobby*, 506

[92] *See Catholic League*, 624 F.3d at 1049 (a court's standing analysis cannot "be used to disguise merits analysis")

U.S. 103, 112 (1992). This Court made clear that "an award of nominal damages is *mandatory* upon a finding of *a* constitutional violation." *Searles v. Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001)(emphasis added). And it is specifically "an appropriate remedy for a violation of the Establishment Clause." *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005)(citation omitted).

In *Comm. for First Amend. v. Campbell*, this Court reversed the denial of summary judgment because the court ignored nominal damages after finding injunctive relief moot. 962 F.2d 1517, 1526-27 (10th Cir. 1992). Students and faculty sought an injunction to require a university to show a film, and nominal damages for its initial refusal. Because the university showed the film, injunctive relief was moot. *Id.* The Court ruled: "the district court erred in dismissing the nominal damages claim which relates to *past* (not future) conduct." *Id.* If that court erred by refusing to *award* nominal damages for a single violation, then the court below necessarily erred in failing to even recognize *standing* to pursue nominal damages.

Cougar Run's "symbolic" endorsement of FCA and AIM, without more, violated the Establishment Clause, conferring not only standing upon Zoes but entitling them to nominal damages. *Friedman*, 781 F.2d at 779. The "Establishment Clause…prohibits the government's support and promotion of religious communications by religious organizations." *Allegheny*, 492 U.S. at 600.

It must not: "place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989). Cougar Run is guilty of all of the above. *Id.*

The faculty-created flyer and emails were alone violative. In *Roberts v. Madigan*, this Court held that a teacher's display of religious books on his desk (for a limited period of time) "had the primary effect of communicating a message of endorsement of a religion" even though his actions were "passive and *de minimis*" and "discreet." 921 F.2d 1047, 1057-58 (10th Cir. 1990); *id.* at 1061 (Barrett, J., dissenting).

Cougar Run's actions are not passive, *de minimis* or discrete. Rather than a single teacher, the entire school, administration, and HRHS faculty, were involved. Cougar Run's emails and flyers declared they were "Sponsoring" and "Partnering" with "Fellowship of Christian Athletes." (J.A.314)(J.A.811,813)(J.A.1088). [93] Gutierrez even admitted it conveyed a religious message. (J.A.858,860-62). What's more, DCSD *tangibly* advanced Christianity by providing money, beads, and

[93] *Cf. Duncan*, 637 F.3d at 1115-16 (permitting private citizens to erect privately-funded crosses on highway unconstitutionally endorsed religion); *Crestwood*, 917 F.2d at 1478-79

equipment, which were directly used to proselytize.[94] *See Gilfillan v. Philadelphia*, 637 F.2d 924, 930-31 (3d Cir. 1980)("regardless of imprimatur, the City's assistance had effectively enabled the Pope to reach large numbers of persons").

2. The court failed to grasp the full harm of which Zoes complain.

Though two unwelcome contacts are exceedingly adequate, *supra*, the court construed Zoes' injuries "too narrowly." *Bell*, 766 F.2d at 1408. Its refusal to look beyond the email and flyer failed to account for the full scope of their injuries in at least three ways.[95]

First, it overlooked injuries unique to *Zoe-Son* resulting from his exposure to fundraisers during school hours and coercive pressures to participate. (J.A.589-90)(J.A.1456). *See Berger*, 982 F.2d at 1170 ("If the Supreme Court was concerned about the coercive pressures on fourteen-year-old Deborah Weisman, then we must be even more worried about the pressures on ten- and eleven-year-old fifth graders"). Coercion is a *separate* yet particularly "serious" Establishment Clause "injury." *Santa Fe*, 530 U.S. at 300.

Second, Zoes were injured by the entire, multi-week, religious fundraising efforts, not just the flyers and emails promoting them. Opposing counsel even

[94] (J.A.762-83)(J.A.812-17)(J.A.869,879-80)(J.A.899,901,827)(J.A.1116-18)(J.A.1130)(J.A.1643)
[95] (J.A.589-92)(J.A.762-83)(J.A.806-17)(J.A.854-56,859)(J.A.1116-18)(J.A.1452,1457-58)

asked if Zoe was offended only by the emails and flyers and she responded: "No…It's the fact that [Cougar Run] partnered with the [FCA]" and that she felt "uncomfortable…they were asking for donations…from his class[.]" (J.A.1452,1458).

Third and relatedly, Zoe objected to "this whole Guatemala trip," as Cougar Run was "asking for donations for a mission trip." (J.A.1457). In *Bell*, this Court held that parents had standing to seek damages for faculty participating in religious club meetings even though their children never attended the meetings. 766 F.2d at 1396-99. It was sufficient they encountered promotional materials for the meetings. *Id.* at 1405, 1408.

Ultimately, the court's conception of Article III would deny a remedy to plaintiffs who suffer a "one-time" constitutional violation. Controlling precedent, however, requires nominal damages for a single violation, and *a fortiori*, standing to challenge a single violation.

C. Zoes were not required to prove more than unwelcome direct contact – coercion, retaliation, or penalization – for Zoe-Son's non-participation.

In addition to prolonged contact, the court held Zoes had to show Cougar Run "penalize[d] or retaliate[d] against Zoe Son because he did not participate." (J.A.1913). But this Court has repeatedly rejected the argument that plaintiffs must show more than direct, unwelcome contact. *See Awad*, 670 F.3d at 1122 & n.7;

Duncan, 637 F.3d at 1113; *Foremaster*, 882 F.2d at 1491. Anything more would "add 'insult' to the existing 'injury' requirement." *Suhre*, 131 F.3d at 1088-90. *See ACLU v. City of Plattsmouth*, 358 F.3d 1020, 1029 (8th Cir. 2004)(holding that *Valley Forge* does not require "coercion to establish standing.").

Adding a coercion element would contravene the Establishment Clause itself. A "violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Schempp*, 374 U.S. at 223. An "implicit symbolic benefit is enough." *Friedman*, 781 F.2d at 781.

Significantly however, Zoe-Son *was* coerced, resulting in a "serious constitutional injury." *Santa Fe*, 530 U.S. at 313-14. In *Santa Fe*, the Court held that student-initiated, student-led prayers at extracurricular high school football games, which were completely voluntary, failed the coercion test. *Id.* at 301-02, 310-12. Necessarily then, Cougar Run's actions also "exact[ed] an unconstitutional toll on the consciences of religious objectors." *Id.* (quoting *Lee*). Zoe-Son was solicited by "school officials to donate money and bring in a specific item to support a Christian Mission Trip." (J.A.590). Zoe emphasized: "The fundraiser was held on school campus and collection took place during school hours. As such, [my son] felt that his teachers expected participation." (J.A.591-92). She added: "there was a lot of his peers contributing to it. And we had to say no." (J.A.1456).

"Elementary schoolchildren" like Zoe-Son "are vastly more impressionable than high school" students. *Bell*, 766 F.2d at 1404. The "State exerts great authority and coercive power…because of the students' emulation of [school officials] as role models and the children's susceptibility to peer pressure." *Edwards*, 482 U.S. at 584. Many courts have held that simply allowing Bibles to sit on a table once a year is coercive, "[e]ven if none of the teachers…handed a Bible to a child or instructed that the child pick one up from the tables." *M.B.*, 2015 U.S. Dist. LEXIS 117289, *28-30.[96] In light of Zoe-Son's serious injury, the court's failure to recognize standing was erroneous.

D. Zoes' Establishment Clause injuries are directly traceable to DCSD's actions.

To satisfy causation, a plaintiff need only show the injury is "'fairly traceable to the challenged action of the defendant.'" *Awad*, 670 F.3d at 1120 (citation omitted). Zoes' injury is "direct and unwelcome contact with an Establishment Clause violation." *Fargo*, 679 F.3d at 1024-25. Thus, if the challenged actions violate the Establishment Clause, they are "the cause" of Zoes' injuries. *Id*.

Traceability is easy to satisfy and is rarely disputed. This Court in *Green v. Haskell Cnty. Bd. of Comm'rs*, observed that the causation element "is not disputed

[96] *E.g.*, *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 287-88 n* (4th Cir. 1998); *Berger*, 982 F.2d at 1169

and is easily met here: Mr. Green's Establishment Clause claim is based on the Board's approval of and support for the Monument that allegedly caused his injury." 568 F.3d 784, 794 (10th Cir. 2009).[97]

Yet the court held Zoes failed to demonstrate causation. (J.A.1913). DCSD argued, and the court surprisingly agreed, Zoes were required to show adverse consequences. (J.A.1849)(J.A.1912). Zoes responded that while their direct unwelcome contact was enough, *incidentally*, Zoe-Son did experience adverse consequences from being a religious minority in a district that systemically promotes Christianity. (J.A.1649-50). Aside from peers harassing Zoe-Son for not believing in a God (J.A.1464), Zoes presented evidence of threats of violence from the community at large (J.A.336-410), enough for the court to grant anonymity:

- "humanists should be gassed to death"
- "'humanists' need to be flogged"
- "the name of the unhappy parent must be released to the media so that person is taking the heat"
- "reveal the names and pictures of these bigots and harass them a while"

Additionally, students at SkyView marched with large banners: "HUMANISTS HATE KIDS!!" (J.A.581,584)(J.A.1439). While hurtful and even terrifying, these

[97] *See also Fargo*, 679 F.3d at 1024-25 (admonishing district court for devoting "analysis to explaining why Freethinkers had failed to demonstrate causation"); *Felix v. City of Bloomfield*, 36 F. Supp. 3d 1233, 1241 (D.N.M. 2014)("once the injury-in-fact element of standing is established, the other two elements of standing are 'easily satisfied.'")(citation omitted)

were never the basis for Zoes' *constitutional* claims. They were not even mentioned in the complaint.

Oddly though, in finding causation lacking, the court focused solely on Zoe-Son's "negative interactions with other children." (J.A.1913). But Zoes do not claim their rights are violated *because* "other children treated Zoe Son poorly." (J.A.1914). The complaint challenges DCSD's Establishment Clause violations.[98]

The District Court committed the very same reversible error as the district court in *Bell*, 766 F.2d at 1408. That court mistakenly "only considered incidents such as the hair pulling, house burning, and threats by third parties in determining that no causal relationship had been established between the Establishment Clause violations by defendants and plaintiffs' injuries." *Id.* This Court reversed, holding a "distinction must be made between the injuries caused by others and those inflicted by the actions of defendants that violated the Establishment Clause." *Id.* As in *Bell*, Zoes "are entitled to recover…even if they are unable to demonstrate consequential injury." *Id.*

The county in *Green* similarly averred: "Green's injury…should be construed as primarily evidencing an opposition to the comments…not the Monument itself." 568 F.3d at 794. This Court disagreed: "While the district court did note that there were inconsistencies in Mr. Green's testimony as to whether he

[98] (J.A.1,51-57)(J.A.589-91)(J.A.1451-53)

was more offended by the Monument itself or by commissioners' statements[,]…from the outset of the lawsuit Mr. Green has challenged the Monument." *Id.*

That Zoes – unlike most plaintiffs – provided evidence supporting their feelings of marginalization, should not preclude them from pursuing their Establishment Clause claims when such evidence was never required in the first place. *AzCLU v. Dunham*, 112 F. Supp. 2d 927, 933-35 (D. Ariz. 2000). Rather, this evidence makes their standing even stronger than in cases where adherents had standing to challenge governmental favoritism of their own religion.[99]

E. Roes have standing to seek nominal damages because the fundraising practice injured their parental interests.

As this case was pending, Roes suffered the actual injury they sought to enjoin because it was impending at the outset of the case.[100] Specifically, the Christian Fundraising Practice expanded to DCHS, with teachers endorsing OCC during instructional hours while Roe-Son was in school.[101]

Contrary to the court's opinion, Roe-Son was not required to be in the same room for Roes, as parents, to suffer an injury-in-fact. (J.A.1910). *E.g.*, *Bell*, 766 F.2d at 1397-98 (religious meetings children did not attend). *Bell* is consistent with

[99] *E.g.*, *Buono v. Norton*, 371 F.3d 543, 548 (9th Cir. 2004); *Kaplan v. Burlington*, 891 F.2d 1024, 1025 (2d Cir. 1989)

[100] (J.A.550,559)(J.A.1102)(J.A.1466)(J.A.1685-88)

[101] Roes are entitled to relief even though this injury materialized after the complaint was filed. *E.g.*, *Church of Scientology v. U.S.*, 506 U.S. 9, 12-13 (1992)

a long line of cases recognizing parental standing to challenge "religious activities occurring school wide *or* within the plaintiffs' own classrooms." *Roberts*, 921 F.2d at 1051-53 (emphasis added). When DCHS brought OCC into Roe-Son's school under a District-wide policy permitting it, DCSD injured Roes' "parental interest in having [their] children educated in a public school free of religious activities." *Steele v. Van Buren Sch. Dist*., 845 F.2d 1492, 1493-95 (8th Cir. 1988).

Relying on *Santa Fe*, the court in *Kitzmiller v. Dover Area Sch. Dist.*, ruled:

> Although students subjected to the ID Policy in the classroom are affected most directly, courts have never defined Establishment Clause violations in public schools so narrowly as to limit standing to only those students immediately subjected to the offensive content.

400 F. Supp. 2d 707, 709 n.1 (M.D. Pa. 2005). The court *Oxford v. Beaumont Indep. Sch. Dist*., similarly recognized: "That Oxford's children did not participate in CIS is not important because children and their parents generally have a right to receive a public education that is coterminous with the Establishment Clause." 224 F. Supp. 2d 1099 (E.D. Tex. 2002).

Like *Bell*, parents had standing to challenge off-site religious courses even though their children did not attend the courses in *Zorach v. Clauson*, 343 U.S. 306, 309-10 &n.4 (1952) and *Lanner v. Wimmer*, 662 F.2d 1349, 1357-59 n.9 (10th Cir. 1981). Roes' standing is even more significant because, unlike here, the religious

instruction took place completely off school property and the instructors were not public school teachers. *Id.*[102]

IV. Roes and Zoes have standing to enjoin the Christian Fundraising Practice because they are currently injured by it and are also likely to encounter it in the future.

The families have standing to enjoin the ongoing Christian Fundraising Practice even if they had no past contact because the injury for injunctive relief need not "be actualized." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). Because an injunction prevents future violations, "it can be utilized even without a showing of past wrongs." *Mitchell v. Hertzke*, 234 F.2d 183, 187 (10th Cir. 1956). Plaintiffs need only show that they are either:

(1) currently suffering a cognizable injury (*Santa Fe*), or

(2) likely to suffer future injury (*Lee*).

A. The court didn't even evaluate Zoes' standing for prospective relief.

The court completely disregarded Zoes' standing for prospective relief. After concluding Zoes had insufficient *past* contact, the court stopped its analysis. (J.A.1911-14). This Court has made clear, however: "Standing to obtain injunctive and declaratory relief must be analyzed separately from standing to obtain

[102] *See also H.S. v. Huntington Cnty. Cmty. Sch. Corp.*, 616 F. Supp. 2d 863, 869-73 (N.D. Ind. 2009)(private released-time in trailers); *Herdahl v. Pontotoc Cnty. Sch. Dist.*, 933 F. Supp. 582, 589-92 (N.D. Miss. 1996)(standing to challenge meetings her children did not witness or participate in)

retrospective relief." *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir. 1991)(citation omitted). This is essential because the "'injury in fact' requirement is satisfied differently." *Tandy*, 380 F.3d at 1283-84 (citations omitted). Therefore the "court erred by analyzing their standing in gross." *Id.* at 1280, 1284.

B. The families are currently injured by the ongoing District-approved practice.

The families are currently injured by the practice because it applies to their schools and has the purpose and perception of endorsing the religion. (J.A.1682-88,1696-99). *See Santa Fe*, 530 U.S. at 316 ("[t]he simple enactment of this policy" was a "constitutional injury"). Under *Santa Fe*, parents have standing to challenge such a policy even if their children will never directly encounter religious activity authorized by it. *Id.*

The court erroneously assumed the Supreme Court is "concerned only with the serious constitutional injury that occurs when a student" is compelled to participate in a religious practice. *Id.* at 313-14. But the Establishment Clause guards "against other different, yet equally important, constitutional injuries." *Id.* "One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion." *Id.*

In *Santa Fe*, parents and students had standing to challenge a district's unimplemented policy permitting students to deliver an invocation or message before football games. *Id.* at 297-98. The district argued that they lacked standing,

asserting the policy "cannot be invalidated on the basis of some 'possibility or even likelihood' of an unconstitutional application.'" *Id.* at 313-16. The Court agreed there was "no certainty" prayers would be ever be delivered but concluded that the "mere passage" of the policy was "serious constitutional injury." *Id.*

As in *Santa Fe*, the "simple" adoption of the practice was "a constitutional violation." *Id.* It is immaterial the practice is not a formal policy. Tenth Circuit precedent explicitly "allows facial challenges to unwritten policies." *Faustin v. Denver*, 423 F.3d 1192, 1196 n.1 (10th Cir. 2005). And, for the "purpose of an Establishment Clause violation, a state policy need not be formal [or] written." *Canell v. Lightner*, 143 F.3d 1210, 1214 (9th Cir. 1998).[103] Clearly, if a statute "authorizing the teachers' activities would be unconstitutional, then the activities, in the absence of a statute, are also unconstitutional." *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (11th Cir. 1983), *aff'd*, 466 U.S. 924 (1984). *Accord Lee*, 505 U.S. at 587. Besides, DCSD expressly confirmed the practice is consistent with "DCSD policy." (J.A.550)(J.A.986). This is tantamount to any written policy.

1. Roes' ongoing injury is particularly intrusive.

The court's failure to recognize Roes' standing is troubling since they alleged injuries "beyond the 'personal and unwelcome contact'" standard. *Awad*,

[103] *See Steele*, 845 F.2d at 1495 ("Based on the Board's failure to act and [the principal's] tacit approval of [the teacher's] conduct, the…district had a custom or policy allowing prayer")

670 F.3d at 1122-23. The court even acknowledged, "Roes asked their children to modify their behavior at school." (J.A.1917). Additionally, after DCHS adopted the OCC practice during litigation, Roe testified: "I am reconsidering whether or not to send our daughter to [DCHS]." (J.A.1684,1688).

This is "an extraordinary showing of injury." *Suhre*, 131 F.3d at 1088-89. Roes' altered conduct would warrant at least nominal damages. *E.g.*, *Bell*, 766 F.2d at 1399. Under *Bell*, they would be entitled to injunctive relief too. *Id.* But "[c]ompelling plaintiffs to avoid public schools…is to impose on them a burden that no citizen should have to shoulder." *Suhre*, 131 F.3d at 1088-89.

2. Roes' injuries are entirely different from the "psychological consequence" in *Valley Forge* because they are produced by religious practices in their own school district.

In denying Roes' standing, the court relied "heavily on the language in *Valley Forge* that the 'psychological consequence presumably produced by observation of conduct with which one disagrees' is not sufficient to confer standing." *Washegesic*, 33 F.3d at 682-83. (J.A.1908). The *Valley Forge* plaintiffs, a nonprofit organization and four employees, attempted to challenge the transfer of property to a religious institution. *Awad*, 670 F.3d at 1120-21. They only "learned about the conveyance through a press release. None of them lived in or near Pennsylvania, the site of the property at issue." *Id.* They were denied standing

"because they had absolutely no personal contact with the alleged establishment of religion." *Suhre*, 131 F.3d at 1086.

Appellate courts have educed two key attributes of *Valley Forge*. First, *Valley Forge* "reaffirmed [the Supreme Court's] prior holdings that noneconomic injury could serve as a basis for standing." *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1106-07 (11th Cir. 1983).

Second, "psychological consequence" *does* constitute concrete harm where, as here, it "is produced by government condemnation of one's own religion or endorsement of another's *in one's own community*." *Catholic League*, 624 F.3d at 1052 (emphasis added). For example, "in the school prayer and football game cases, nothing bad happened to the students except a psychological feeling of being excluded." *Id.*

Valley Forge is thus readily distinguishable. Roes "live in the school district in which the [practice] is maintained, and are compelled by law to attend some of the very [DC]SD schools in which the [practice] is implemented." *Beaumont*, 173 F.3d at 283-84. Roes "are not simply claiming that the Constitution has been violated in some distant place." *Id.* To the contrary, they "leave home every morning of the school year to attend schools in which the [practice] is ongoing." *Id.* This "Damoclean threat removes [Roes'] claim from the realm of generalized grievance." *Id.*

C. DCSD's pattern of repetitive violations and refusal to discontinue the practice makes future injury likely.

Irrespective of whether the practice amounts to an ongoing injury, *supra*, the families have standing to enjoin it if "likely to suffer future injury." *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). They need not even establish that "'such recurrence is probable.'" *Truth v. Kent Sch. Dist*., 524 F.3d 957, 965 (9th Cir. 2008)(citing *Honig v. Doe*, 484 U.S. 305 (1988)).

While by no means necessary, "[p]ast exposure to wrongful conduct bears on whether there is a real and immediate threat of repeated injury." *Tandy*, 380 F.3d at 1289. Indeed, where as here, the "defendants have repeatedly engaged in the injurious acts in the past, there is a sufficient possibility that they will engage in them in the near future." *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001).

When "a past violation is found," courts "balance that finding against factors indicating a reasonable likelihood that the violation will not recur, such as the [defendant's] intent to comply, extraordinary efforts taken to prevent recurrence, the absence of repetitive violations, and the absence of bad faith." *Metzler v. IBP Inc*., 127 F.3d 959, 963-65 (10th Cir. 1997)(citations omitted). Applying these principles to the present case, recurrence is beyond sufficiently likely:

- DCSD expressed *no intent* to cease the practice
- *No efforts* have been taken to prevent recurrence
- DCSD defends and approves the practice

- DCSD's violations are longstanding, repetitive, and widespread

The practice has been ongoing since at least 2011 and applies throughout DCSD including Zoes' and Roes schools. (J.A.559-67). DCSD defends Cougar Run's actions, making Zoe-Children's future contact sufficiently likely.[104]

Roe-Daughter is also likely to encounter the practice in 2017. The court did not dispute that a "number of schools within the District, including [DCHS]…have participated in OCC." (J.A.1901). DCSD authorizes DCHS faculty to conduct OCC during freshman homeroom and has not discontinued the practice. (J.A.1685).

To defeat families' standing, DCSD must demonstrate it is "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 189-90 (2000)(citation omitted). This is a "'heavy burden.'" *Id*. Such a "burden will typically be met only by changes that are permanent in nature and that foreclose a reasonable chance of recurrence of the challenged conduct." *Tandy*, 380 F.3d at 1291.

When "a defendant retains the authority and capacity to repeat an alleged harm," the plaintiff retains standing even when the defendant *discontinued* the practice. *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014). A defendant's assertion that it has no intention of reinstating the practice "does not suffice." *United States v.*

[104] (J.A.550)(J.A.1363)(J.A.1717,1727)

W.T. Grant Co., 345 U.S. 629, 632-33 (1953). Even the formal repeal of a statute can be insufficient.[105]

Remarkably, DCSD identifies no changes to its policies and practices that would establish—let alone establish with *absolute* clarity—that it will not endorse and fundraise for Christian organizations in the future. On the contrary, it defends the practice, averring it is "consistent" with "DCSD policy."[106] Beyond DCSD's explicit approval, many facts contribute to the likelihood of recurrence:

- It pervades DCSD (J.A.21-56)(J.A.550-67)
- Even the Superintendent approves the practice (J.A.986)
- DCSD principals, including from Cougar Run, have been directly involved in the practice[107]
- DCSD eschewed multiple formal warnings about the unconstitutionality of the practice, at a minimum one from ACLU and two from AHA[108]
- Schools have continued to fundraise for OCC during litigation (J.A.550,559-60)
- DCSD fails to train faculty on Establishment Clause issues[109]

In *Berger*, a father of two challenged their school's practice of permitting Gideons to distribute Bibles to fifth graders once a year. 982 F.2d at 1164. The

[105] *E.g.*, *Longstreth v. Maynard*, 961 F.2d 895, 900 (10th Cir. 1992)
[106] (J.A.550)(J.A.571)(J.A.986)(J.A.994-96)(J.A.1909-10)
[107] (J.A.634-35)(J.A.651,653)(J.A.685)(J.A.806-09)(J.A.854-57)(J.A.1125-26)
[108] (J.A.322-31)(J.A.448)(J.A.697-708)(J.A.832-33,36-37)(J.A.855)(J.A.1107-08,1110-11)(J.A.1401)
[109] (J.A.518-21)(J.A.847)(J.A.885)(J.A.902)(J.A.975)

school argued he lacked standing because neither child received Bibles. The practice discontinued when his oldest was in fifth grade and his youngest was "several years shy of the fifth grade." *Id.* But the Seventh Circuit held he had standing because "the school board could renew the allegedly wrongful activity at any time." *Id.* Further, the principal "refused to say in his deposition how he would treat further requests by the Gideons." *Id.*

The facts here are far more compelling. Roe-Daughter is just *one year* shy of becoming a freshman, and rather than cease the practice, DCSD authorizes DCHS freshman homeroom OCC participation. (J.A.550,559). The Superintendent, a principal, and a teacher, testified they *will* approve OCC during instructional hours in the future.[110] The Superintendent even said student government class is "well within their rights" to organize OCC as a school-wide project with homeroom teachers leading participation. (J.A.986)

Yet in the face of this uncontroverted evidence, the court concluded Roes lacked standing, asserting: "There is *no evidence* here that injury to the Roes' daughter is certainly impending[.]" (J.A.1910-11)(emphasis added). The court's conclusion is wrong for at least four reasons.

First, Roes offered ample evidence the practice will continue, *supra.* The court itself did not dispute:

[110] (J.A.653)(J.A.885)(J.A.910-12)

- DCSD authorizes homeroom and student government classes to participate in OCC
- DCHS conducts OCC in freshman homeroom
- "The District states these practices are consistent with DCSD policy"
- "Roes' daughter will attend DCHS in 2017"

(J.A.1909-10). This is a far cry from "no evidence."

Second, Roes' injury is "certainly impending" under *Lee*. The father had standing to enjoin the entire district from graduation prayer even though his daughter only encountered the practice at her middle school and her next graduation was *four* years away, at a different school. 505 U.S. at 583-84, 599. As *Lee* exemplifies, imminence "requires only that the anticipated injury occur with[in] some fixed period of time in the future, not that it happen in the colloquial sense of soon[.]" *NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008). That DCHS endorsed OCC during litigation demonstrates Roes' injuries were in fact "impending."

Third, Roes' parental interests are *currently* being injured. *E.g.*, *Santa Fe*, 530 U.S. at 316. In *Steele*, a mother had standing to enjoin a school district's prayer practices even though the daughter exposed to the prayer had graduated. 845 F.2d at 1493-95. The Eighth Circuit reasoned: "When [the teacher] led…[the] class in prayer, he injured Steele's parental interest…That interest *will continue* so long as she has children in the local schools." *Id.* (emphasis added).

An injury is too speculative only where it is based upon "a highly attenuated chain of [improbable] possibilities." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 11480-50 (2013)(*five* speculative assumptions). For instance, in *Lyons*, "a sequence of [four] individually *improbable* events" would have to occur. *Browning*, 522 F.3d at 1162 (emphasis added). Because Roes' injury is ongoing, it is necessarily imminent.

Fourth, the court failed to distinguish *Lee* and numerous Establishment Clause cases recognizing standing even where: (a) the defendant voluntarily ceased the practice,[111] or (b) future injury was unlikely or speculative. *See Bell*, 766 F.2d at 1399. For instance in *Elmbrook*, parents of students whose next graduation was *five* years away had standing to enjoin a graduation venue practice they were *unlikely* to encounter the practice "given the newly constructed District facilities." 2010 U.S. Dist. LEXIS 72354, at *14-18 n.3.

In *Beaumont*, the Fifth Circuit held that parents had standing to challenge a program even though a small minority of students were chosen to participate, students could decline, and their children had yet to be selected. 173 F.3d at 282-85. The court reasoned: "Doe children attend schools in which the program operates, and they are continually at risk of being selected." *Id.*

[111] *E.g.*, *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 833-34 (11th Cir. 1989); *Hall v. Bd. Sch. Comm'rs*, 656 F.2d 999, 1000 (5th Cir. 1981)

That Roes did not know every detail about the challenged practices when they first filed suit does not mean they did not have "a 'personal stake in the outcome of the controversy.'" *Doran v. 7-Eleven, Inc*., 524 F.3d 1034, 1041-44 (9th Cir. 2008).[112] For prospective relief, it was sufficient Roes were threatened with future injury. (J.A.19)(J.A.1682-84)(J.A.1685-88).[113] Jill testified that from the outset of the case, she feared her "children will be ostracized if they don't participate in the religious fundraising[.]" (J.A.1444,1446). Jack testified that while he joined the suit because he first learned about OCC at other schools, "I am injured in other ways…Douglas County is an open school district…I would not want my children going to a school that promotes religion. And this limits the choices that I have." (J.A.1102). He added: "I'm certainly concerned that the illegal practices we've seen at other schools in [DCSD] are also active in my son's school," and "I have suspicions that teachers are inappropriately involved in promoting the FCA." (J.A.1469). He was correct. (J.A.1686-88).[114]

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[112] *See also Doe v. Mt. Vernon Sch. Dist.*, 2010 U.S. Dist. LEXIS 34590, *34-35 (S.D. Ohio 2010); *Wilson v. Pier 1 Imps., Inc*., 413 F. Supp. 2d 1130 (E.D. Cal. 2006)(plaintiff had standing to challenge barriers he was not aware of until after litigation commenced)

[113] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)("At the pleading stage, general factual allegations of injury…suffice.")

[114] *See Rosewood Servs. v. Sunflower Diversified Servs*., 2003 U.S. Dist. LEXIS 15836, *42 (D. Kan. 2003)(plaintiff had standing to challenge constitutional violations learned about during discovery)

Significantly, in *Rabun*, the Eleventh Circuit held that plaintiffs had standing to enjoin a cross even though they resided "more than 100 miles" from it. 698 F.2d at 1107. Only one "had actually seen the cross prior to the time the suit was filed and that sighting was from an airplane." *Id.* The others "derived their information…from anonymous phone calls and news releases." *Id.* The court held that they were not required to personally encounter the "subject matter of the action prior to filing the suit." *Id.* at n.17.

V. Roes and Zoes have standing to challenge the ongoing District-wide Faculty Participation Practice because they have had, and continue to have, direct unwelcome contact with the practice.

The families have standing to enjoin the Faculty Participation Practice, as it directly applies to their schools. *Schempp*, 374 U.S. at 224 n.9. The Establishment Clause prohibits a school district from permitting "its teachers' activities [to] give[] the impression that the school endorses religion." *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 477 (2d Cir. 1999). *E.g.*, *Bell*, 766 F.2d at 1396-97. Even the presence of more faculty than necessary to monitor meetings is unconstitutional. *Id.* at 1405 ("the attendance by several teachers unmistakably expressed their personal endorsement of religion and, by implication, that of the school."). [115] As their

[115] *See also Bd. of Educ. v. Mergens*, 496 U.S. 226, 250-53 (1990); *Borden v. Sch. Dist.*, 523 F.3d 153, 164, 178 (3d Cir. 2008); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 165-67 (5th Cir. 1993)

grounds for standing is similar to the fundraising practice, families only address issues not previously discussed.

A. The court failed to consider Zoes' standing altogether.

The court completely failed to address Zoes' standing to challenge the practice under the Establishment Clause. (J.A.1911-14). Under *Bell*, Zoes' contact with flyers and emails "partnering" with HRHS FCA confer standing to challenge faculty participation on the trip. And under *Lee*, Zoes have standing to enjoin FCA endorsement at their future schools, CMS and HRHS.

B. DCSD's refusal to discontinue the practice, together with its failure to train, makes future recurrence highly probable.

Roes are sufficiently likely to encounter the practice at DCHS. (J.A.1102)(J.A.1444). It is undisputed DCHS faculty:[116]

- Serve as *the* FCA contact person
- Make announcements for FCA and put their name on flyers
- Talk to parents about FCA using "we" and "our"
- Recruit students to join
- Seek speakers for FCA meetings
- Promote FCA football camps

[116] (J.A.655)(J.A.709-10)(J.A.716-23)(J.A.784-804)(J.A.834-35,846-49)(J.A.870-71)(J.A.891-92)(J.A.906,917-22)(J.A.956-71)(J.A.994-97)(J.A.1017-1023)(J.A.1046-49)(J.A.1053,1074)(J.A.1107)(J.A.1157-1359)

There is no sign of this practice abating.

Nonetheless, the court held Roes lacked standing to enjoin it because: "Roe Son had [no past] contact with the FCA[.]" (J.A.1910). This was wrong for three reasons. First, no *past contact* is required for injunctive relief. Second, the court overlooked Roe parents' constitutionally protected interests for *Roe-Daughter*. Third, Roes did have direct contact with FCA. (J.A.1451). Under *Bell*, Roe-Son was not required to attend FCA meetings for Roes to enjoin faculty participation. Like *Bell*, Roes sufficiently encountered FCA before this lawsuit: "Through many posters and communications at [DCHS]" and "their signs on the wall." (J.A.1448,1469).

Zoe-Children are also likely to encounter the practice in the future. Faculty at Cougar Run, CMS, and HRHS regularly lead, run, initiate, and participate in FCA and SYATP.[117]

Three additional factors substantially increase the probability of future recurrence at Roes and Zoes' schools.

First, DCSD has not discontinued the practice but instead defends it.[118] Goings testified DCSD does not firmly prohibit teachers from "participating in religious clubs." (J.A.835,837,839)(J.A.1409). When asked what he would do

[117] (J.A.784-89)(J.A.847)(J.A.1307)(J.A.1696-98)
[118] (J.A.550)(J.A.571)(J.A.986)(J.A.994-96)(J.A.1909-10)

differently in light of this case, he responded: "I don't know how much other than just be careful." (J.A.849).

Second, DCSD does not train or supervise faculty.[119] "[D]eliberate indifference" may be found even "absent a pattern of unconstitutional behavior" if a "municipality fails to train an employee in specific skills needed to handle recurring situations." *Barney v. Pulsipher*, 143 F.3d 1299, 1307-08 (10th Cir. 1998). Many teachers have served as FCA advisors for over ten years, without any training or evaluation.[120] Some "never learned about the [EAA]" at all. (J.A.885)(J.A.902).

Finally, and even more disturbing than DCSD's failure to train is its administration's own ignorance on the constitutional and statutory requirements, *supra* at 28. The Superintendent testified teachers can even *endorse* religion in classrooms so long as it is not "disruptive." (J.A.999). *See Roberts*, 921 F.2d at 1057-58. Principals admitted they do not "know exactly what is allowed and what isn't allowed."[121] Faced with such facts, the court erred in finding recurrence improbable.

[119] (J.A.518-21)(J.A.847)(J.A.885)(J.A.902)(J.A.975)
[120] (J.A.518-21)(J.A.835)(J.A.847)(J.A.892)(J.A.975)(J.A.1021)(J.A.1278)
[121] (J.A.835,837,839,849)(J.A.905,914-15,917)(J.A.1409)

C. Families have standing to challenge EAA violations.

To challenge EAA violations, families need only satisfy Article III. It is presumed Congress intends statutory standing to "extend to the full limits of Article III and that the courts accordingly lack authority to create prudential barriers to standing in suits brought under" statutes. *L.A. v. Bank of Am. Corp*., 2014 U.S. Dist. LEXIS 85957, at *22-24 (C.D. Cal. June 12, 2014). The court nevertheless held *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S. Ct. 1377 (2014), a non-EAA, imposes a "zone of interests" requirement. (J.A.1915). But, based "on current precedent," a "plaintiff is only required to satisfy Article III." *L.A.*, 2014 U.S. Dist. LEXIS 85957, at *22-24.

Though inapplicable, the "zone of interests test" forecloses "suit *only* when a plaintiff's interests are *so marginally related to or inconsistent* with the purposes *implicit* in the statute that it cannot reasonably be assumed that Congress authorized the plaintiff to sue." *Lexmark*, 134 S. Ct. at 1388-89 (quotation omitted, emphasis added). The "'benefit of any doubt goes to the plaintiff.'" *Id.* (citation omitted). Faculty participation is regulated, and indeed prohibited by the EAA, satisfying this minimal threshold. *See Mergens*, 496 U.S. at 236, 250-53. The Court upheld the EAA *because* of these provisions. *Id*. The Senate Judiciary

Committee also declared that the EAA would guarantee to students: "There would be no 'religious teacher' supplied by the school."[122]

The court's conclusion stemmed from its erroneous assumption that "[t]eacher participation in religious groups does not, by itself," violate EAA. (J.A.1917). But in *Sease v. Sch. Dist. of Philadelphia*, the court held that a school violated the EAA because a teacher participated in a student gospel choir club. 811 F. Supp. 183, 184-85 (E.D. Pa. 1993). The court even contended these actions violated EAA in "significant and substantial ways:"

- Receiving "calls on the Gospel Choir's behalf"
- Corresponding "using the Central High letterhead"
- Organizing concerts

Id. A court within the Tenth Circuit cited *Sease* for the notion that "school support for a gospel choir…violated the [EAA]." *Bauchman v. West High Sch*., 900 F. Supp. 254, 268 n.16 (D. Utah 1995).[123]

VI. The families, including John Doe, have municipal taxpayer standing.

The families, including Doe, have municipal taxpayer standing because District funds are used to subsidize the unconstitutional practices.[124] *E.g.*, *Bell*, 766 F.2d at 1398-99. It is firmly established "resident taxpayers may sue to enjoin an

[122] S. REP. NO. 357, 98th Cong., 2d Sess. (1984)
[123] *See also Pope v. East Brunswick Bd. of Educ*., 12 F.3d 1244, 1255 (3d Cir. 1993)("The Act forbids school sponsorship of a religious group, the Bible Club")
[124] (J.A.18-20)(J.A.577)(J.A.581-82)(J.A.590)(J.A.1650)(J.A.1912-14)

illegal use of the moneys of a municipal corporation." *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923). Local taxpayers need only allege a misuse of municipal funds. *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 210 (6th Cir. 2011). And "the expenditures need not be great, as shown by *Lynch*…in which city taxpayers had standing to challenge the twenty dollars per year that a city spent on a Nativity scene as part of a larger holiday display." *Hinrichs v. Bosma*, 410 F. Supp. 2d 745, 753 (S.D. Ind. 2006)(citations omitted).

A local taxpayer has standing to "challenge a violation of the Establishment Clause by a municipality when [1] the taxpayer is a resident [2] who can establish that tax expenditures were used for the offensive practice." *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1280-81 (11th Cir. 2008). Even the use of "municipal funds, in the form of materials and personnel time" is sufficient. *Id.* In *Newman*, for example, it sufficed that taxpayer funds "were used to print the flyers." 181 F. Supp. 2d at 1377-78. (J.A.1902-03).

The court did not contest: (1) the families are District taxpayers and (2) District funds are expended on the challenged activities.[125] But it held they lacked standing because school districts are not "municipalities" and even if they are, local funds are comingled with state and federal sources. (J.A.1922). These contentions lack merit.

[125] (J.A.589-90)(J.A.1446)(J.A.1922-23)

First, school districts are not immune from municipal taxpayer suits because they are called "political subdivisions." (J.A.1908,1922). This is just another way of saying they *are municipalities* – just like cities and counties – in contrast to arms of the state. *Utah Educ. Ass'n v. Shurtleff*, 512 F.3d 1254, 1263 (10th Cir. 2008); *Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs*, 199 P.3d 718, 729 (Colo. 2009).

Second, the "varied sources that combine to fund municipal treasuries…do not affect the viability" of standing. *Smith*, 641 F.3d at 220-21 (Boyce, J., concurring). Municipal-taxpayer "standing has never hinged on the amount" expended. *Id.* Thus, "standing exists whether a municipality unconstitutionally spends $1,000,000 with ten percent of the funding originating in municipal taxes, or $100,000 entirely from municipal taxes." *Id.*

According to National Center for Education Statistics, most public schools receive a mix of federal and state revenue.[126] In *Elmbrook*, plaintiffs had municipal taxpayer standing even though district funds were comingled with other sources. 2010 U.S. Dist. LEXIS 72354, at *9-10, *18-19. *Accord Spacco v. Bridgewater Sch. Dep't*, 22 F. Supp. 834, 838 (D. Mass. 1989). In *Newman*, it was sufficient: "the flyer was produced by City employees, photocopied on City machines and distributed at the City Holiday Party." 181 F. Supp. 2d at 1380-81. As in these cases, at least a portion of local taxes is expended on the practices. The majority of

[126] http://nces.ed.gov/pubsearch

DCSD's revenue comes from local taxes,[127] and the "state share" is mostly reserved for "English language learners, at-risk students, and disabled children." *Lobato v. State*, 304 P.3d 1132, 1140-41 (Colo. 2013).

VII. AHA has associational standing.

Because at least one AHA member has standing, *supra*, AHA has standing. *See Duncan*, 637 F.3d at 1114.

CONCLUSION

The families' past and continued direct, unwelcome contact with both challenged practices confers standing to seek nominal damages and prospective relief. In light of the foregoing, this Court should reverse the district court's rulings on summary judgment. Further, in the interests of efficiency and judicial economy, together with this Court's *de novo* review, the undisputed material facts, and the fact that the merits have been fully briefed by both parties below, the Court should order that judgment be entered in favor of Families/AHA on all claims, and remand for assessment of attorneys' fees and costs. *See Park City Resource Council v. U.S. Dept. of Agric.*, 817 F.2d 609, 617-18 (10th Cir. 1987)("Although failure to apply correct legal standard could be basis for remand[,]…remand is not necessary where there is no dispute regarding the underlying facts and where it is

[127] https://www.dcsdk12.org/financial-services/budget-accounting

in the interest of judicial economy and efficiency to decide the matter.").[128] In the alternative, this Court should remand for consideration on the merits.

Respectfully submitted,

May 2, 2016

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[128] *See also Ohlander v. Larson*, 114 F.3d 1531, 1538 (10th Cir. 1997)("no dispute regarding the underlying facts exists and the existing record is adequate to address the issues of concern")

REQUEST FOR ORAL ARGUMENT

This case presents vitally important issues that are relevant to all families with children attending public schools. Specifically, it addresses the question of when such families are deemed to have standing to seek recourse against their public schools for violations of the First Amendment. As the case involves multiple families with various experiences, as well as multiple and expansive church-state violations by the school district in question, the facts and issues have a level of complexity that would benefit from having counsel present to answer any remaining questions from the Court. Therefore, Appellants respectfully request oral argument.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 12.2.8 in 14-point font size in Times New Roman.

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CERTIFICATE OF PRIVACY REDACTION

I certify that there is no information required to be redacted pursuant to Federal Rule of Appellate Procedure 25(a)(5) and 10th Circuit Rule 25.5

May 2, 2016 /s Monica L. Miller
Monica L. Miller

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the 10th Circuit *ECF User Manual* § II(I)(b)(5th ed.), I hereby certify that the printed copies delivered to the Clerk are exact copies of the PDF version of the document filed in CM/ECF.

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Monica L. Miller

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Pursuant to the 10th Circuit *ECF User Manual* § II(I)(c)(5th ed.), I hereby certify that I have scanned for viruses in the filed PDF version of the foregoing document, using Microsoft Security Essentials, Virus Definition and Spyware Definition Versions 1.219.583.0, updated May 2, 2016. According to that program, the document was free of viruses.

May 2, 2016 /s Monica L. Miller
Monica L. Miller

CERTIFICATE OF SERVICE

I certify that on May 2, 2016, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to all parties through their counsel of record.

May 2, 2016

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ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 14-cv-02878-RBJ

AMERICAN HUMANIST ASSOCIATION, INC.,
JOHN DOE, individually, and as parent and next friend of DOE CHILD-1 and DOE CHILD-2, minors;
DOE CHILD-1, a minor,
DOE CHILD-2, a minor,
JACK ROE, individually and as a parent on behalf of a minor,
JILL ROE, individually and as parent on behalf of a minor, and
JANE ZOE, individually and as parent on behalf of a minor,

Plaintiffs,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
DOUGLAS COUNTY BOARD OF EDUCATION,
ELIZABETH CELANIA-FAGEN, in her official capacity as Superintendent of Douglas County School District,
JOHN GUTIERREZ, in his official capacity as Principal of Cougar Run Elementary School,
JERRY GOINGS, in his official capacity as Principal of Highlands Ranch High School,
MICHAEL MUNIER, in his individual capacity,
[redacted] and
LISA NOLAN, in her official capacity as Executive Director of SkyView Academy,

Defendants.

ORDER

Plaintiffs complain that the Douglas County School Board and related entities and individuals are unlawfully promoting Christian religion in the County's public schools. All parties have moved for summary judgment. Because the Court finds that none of the plaintiffs who have brought the suit have legal standing to do so, it does not address the merits of the claims. Plaintiffs' motion is denied, and defendants' motion is granted.

BACKGROUND

The following facts are undisputed except where otherwise noted. Plaintiff American Humanist Association, Inc. (AHA) is a nonprofit organization that promotes the "separation of church and state and the constitutional rights of humanists, atheists and other freethinkers." ECF No. 1 at ¶ 5. AHA brings this suit to "assert the First Amendment rights of its members." *Id.* Plaintiffs John Doe, Jill Roe, and Jane Zoe are individual members of AHA. ECF No. 59 at 3.

Doe Plaintiffs. John Doe brings this claim individually and as a parent of his minor children. The Doe children, both of whom were individually named as plaintiffs, attend SkyView Academy, a charter school within the Douglas County School District. ECF Nos. 47 at 2 n.2; 50 at 3.

Roe Plaintiffs. Jack and Jill Roe have two children who attend schools within the District. ECF No. 47 at 2 n.2. Their children were not individually named as plaintiffs. Roe Son is a student at Douglas County High School, and Roe Daughter attends Aspen View Academy, a charter school. ECF No. 50 at 3.

Zoe Plaintiff. Jane Zoe has two children who attend Cougar Run Elementary School. ECF No. 47 at 2 n.2. The children were not individually named as plaintiffs. During the 2013–2014 school year Zoe Son was enrolled in preschool teacher Cammile Espinosa's class. ECF No. 50 at 3. Ms. Zoe later enrolled her younger child (Zoe Daughter) in Ms. Espinosa's preschool class. ECF No. 50 at 7.

Plaintiffs name a number of defendants. The Douglas County School District (sometimes referred to herein as "the District" or as "DCSD") is a large public-school district in the greater Denver area. ECF No. 50 at 2. The District is run by the Douglas County School Board which has seven elected members. *Id.* Elizabeth Celania-Fagen is the superintendent of the District.

Id. John Gutierrez is the principal of Cougar Run Elementary School. *Id.* Jerry Goings is the principal of Highlands Ranch High School. *Id.* Michael Munier and [redacted] are the former and present elementary principals of SkyView Academy, and Lisa Nolan is SkyView's executive director. However, plaintiffs' claims against Mr. Munier were voluntarily dismissed shortly after the Complaint was filed, and the parties later settled plaintiffs' claims against [redacted] and Ms. Nolan. Thus, all claims against the individual SkyView defendants have been dismissed with prejudice. ECF Nos. 35 at 2; 36 at 2; 50 at 4.[1]

Plaintiffs filed this case out of concern about religious events and activities that have occurred at various schools within the District. They allege violations of the Establishment Clause of the First Amendment of the United States Constitution and the Equal Access Act, 20 U.S.C. §§ 4071–4074. ECF No 47 at 2.

Operation Christmas Child.

In July 2014 Mr. Doe contacted Mr. Roe to "discuss pursuing litigation against SkyView and DCSD." ECF No. 50 at 3. Mr. Doe was concerned about Operation Christmas Child (OCC) activities at SkyView. *Id.* Samaritan's Purse, "an evangelistic Christian organization," sponsors OCC. ECF No. 47 at 6. OCC boxes are taken to "processing" centers where Christian materials, including booklets and other literature, are added to them. *Id.* OCC collects items to be placed in shoeboxes "to be sent to needy children around the world." ECF No. 50 at 8.

A number of schools within the District, including Douglas County High School and SkyView Academy, have participated in OCC. ECF No. 47 at 6. In 2014 "DCHS teachers

[1] A charter school is a public school of the school district that approves its charter application and enters into a charter contract with the school. C.R.S. § 20-30.5-104(2)(b). It is subject to accreditation by the district. *Id.* However, it is responsible for its own operation and may sue and be sued in its own name. *Id.* § 7(a), (b). Defendants argue that charter schools are independent of the district such that claims based on activities arising at a charter school must be brought against the school, not the district. *E.g.*, ECF No. 50 at 10. Plaintiffs do not comment on the independence of charter schools as such. However, after noting the dismissal of the claims involving SkyView's personnel, plaintiffs state that "SkyView's involvement is only relevant insofar as it shows Defendant was on notice." ECF No. 58 at 4 n.14.

organized OCC in a 90-minute 'homeroom' class" for freshman at DCHS. *Id.* at 7–8; ECF No. 47-3 at 12. OCC activities at the other schools "generally included teachers organizing OCC during class, using school email and newsletters to promote OCC, and bringing in supplies for student [sic] to pack boxes." ECF No. 47 at 8.

Fellowship of Christian Athletes Trip to Guatemala.

In March 2014 Amanda Berry, a student at Highland Ranch High School, organized a trip to Guatemala. ECF No. 50 at 4. Ms. Berry and the other students involved in the efforts were members of the school's chapter of the Fellowship of Christian Athletes (FCA). *Id.* The FCA is "a Christian organization with clubs in many schools." ECF No 47 at 2. Ms. Berry contacted the Christian organization "Adventures in Missions" (AIM), and AIM "planned all Guatemala Trip activities." ECF Nos. 47 at 2; 50 at 4. Fourteen students traveled to Guatemala over spring break. ECF No. 47 at 2. Two HRHS teachers, Alexandra Malach and Bradley Odice, chaperoned the trip. *Id.* All of the participants, including the chaperones, paid their own way. ECF No. 50 at 5. One goal of the trip was to "introduce [children] to the Bible" and "promote Christianity." ECF No. 47 at 2.

Ms. Malach created "fundraising flyers" to raise money for the trip. *Id.* at 4. Ms. Berry also organized fundraising events including babysitting nights and a pancake breakfast. ECF No. 50 at 5. Cougar Run Elementary School participated in some of the fundraising efforts. ECF No. 47 at 4. For example, Cougar Run "partnered" with FCA to "organize school-wide fundraisers for the mission trip." *Id.* FCA students delivered fundraising flyers to Cougar Run and other elementary schools. ECF No. 50 at 5. Cougar Run placed the flyers in students' "take-home" folders. *Id.* Additionally, Cougar Run teacher Micki Benge volunteered to have her sixth-grade class organize a "supply drive" to benefit the Guatemala trip. ECF No. 47 at 5.

Ms. Benge printed a flyer "promoting the Mission Trip to parents" and sent it home in student folders. *Id*. Ms. Zoe received one of the flyers in her son's folder, which asked Zoe Son and his class to donate "temporary tattoos." *Id*. Additionally, Zoe Son's preschool teacher Ms. Espinosa emailed the parents of children in her class to encourage their participation in the supply drive. *Id*. The email indicated that Cougar Run is "partnering with HRHS on this effort – specifically the FCA (Fellowship of Christian Athletes) organization." *Id.* Principal Gutierrez also emailed Cougar Run families asking for monetary donations. *Id.*

Faculty Participation in Fellowship of Christian Athletes.

Plaintiffs raise concerns about teachers and school staff participating with FCA chapters at numerous schools. ECF No. 47 at 8. Plaintiffs specify that "faculty throughout the District participate in FCA meetings and pray with students, serve as *the* FCA contact person, write letters on behalf of FCA with school letterhead . . . organize FCA events . . . promote FCA football camps, and even *initiate* FCA clubs." ECF No. 58 at 13 (emphasis in original). At some schools, "FCA was initiated by staff without any student initiation of any kind." ECF No. 47 at 9.

Other Religious Events and Activities.

Plaintiffs describe other activities and events around the District. Several schools were involved in a "Belize Mission Trip" in 2014. ECF No. 1 at ¶¶ 217-31. Although not mentioned in the Complaint, plaintiffs' motion for summary judgment states that in 2012 the Rockridge Elementary School held fundraisers for the Tim Tebow Foundation, which is a "registered Christian charity." ECF No. 47 at 8. Additionally, HRHS faculty and students participate in an "annual prayer event" called "See You at the Pole" (SYATP) that occurs before school starts. *Id.* at 10. Finally, plaintiffs state that "the District endorsed and promoted two religious summer

football camps" that were cosponsored by FCA. *Id.* The latter statements, at least, appear to be incorrect. Defendants indicate that one of these camps never happened, and the one that did occur was "not associated with the District in any way." ECF No. 59 at 15.

DISCUSSION

I. Standard of Review.

The Court may grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden to show that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party must "designate specific facts showing that there is a genuine issue for trial." *Id.* at 324. A fact is material "if under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The Court will examine the factual record and make reasonable inferences therefrom in the light most favorable to the nonmoving party. *Concrete Works of Colorado, Inc. v. City & Cnty. of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994).

II. Defendants' Motion for Summary Judgment.

Defendants move for summary judgment on the theory that plaintiffs do not have standing to bring either of their claims, and that even if plaintiffs did have standing, defendants would be entitled to judgment as a matter of law on both the Establishment Clause and Equal Access Act claims. ECF No. 50 at 1. For the reasons described below, the Court finds that the claims of one plaintiff family are moot, and that the remaining plaintiffs do not have standing.

A. Justiciability – Generally.

Article III of the United States Constitution limits the judicial power of the federal courts to the resolution of "cases or controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014). To satisfy this requirement, "a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Chafin v. Chafin*, 133 S.Ct. 1017, 1023 (2013) (internal quotations omitted). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). As relevant here, the case or controversy requirement includes the doctrines of mootness and standing. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000).

1. Mootness – The Doe Family's Claims.

"A suit becomes moot, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Chafin*, 133 S.Ct. at 1023 (internal citations and quotations omitted). This occurs "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* "[I]t is not enough that a dispute was very much alive when suit was filed; the parties must continue to have a personal stake in the ultimate disposition of the lawsuit." *Id.* (internal citations and quotations omitted).

On April 21, 2015, the parties filed a joint motion to dismiss the claims against the remaining SkyView defendants, ECF No. 35, which the Court granted the following day. ECF No. 36. In their motion, the parties acknowledged that "this case involves multiple claims

against two distinct party groups – the School District Defendants and the SkyView Defendants," and "the issues against each party group are separable and distinct." ECF No. 35 at ¶ 6.

The operation of OCC at SkyView, where the Doe children go to school, was the only alleged violation that directly affected the Doe family. While the Doe family might still have general concerns about religious activities within the District, it no longer has a concrete interest in this case. *See Ellis v. Railway Clerks,* 466 U.S. 435, 442 (1984). Because the Doe family no longer has an injury for which this Court could award relief, the Court holds that its claims are moot and will not discuss them further except where applicable in contextualizing the remaining plaintiffs' claims.

2. Standing – Generally.

The remaining plaintiffs' chief justiciability obstacle is whether they have standing to sue. Standing involves both prudential and constitutional requirements, but "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (internal citation omitted). At minimum, plaintiffs must establish they have a "personal stake" in the claim, which ensures that the parties to the case are actually adverse to each other. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

To establish constitutional standing, a plaintiff must demonstrate an "injury in fact" that is "fairly traceable" to the challenged action of the defendant and that will likely be redressed by a favorable decision of the court. *Lujan,* 504 U.S. at 560–61. To sufficiently allege an injury in fact, a plaintiff must demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *U.S. v. Windsor,* 133 S.Ct. 2675, 2685 (2013) (internal quotations and citations omitted). As the party

seeking federal jurisdiction, plaintiffs have the burden of establishing the elements of constitutional standing. *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1154–55 (10th Cir. 2005). At the summary judgment stage, plaintiffs "must set forth by affidavit or other evidence specific facts that, if taken as true, establish each of these elements." *Id.* (internal citation omitted). "A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155–56 (1990).

In addition to these constitutional requirements, plaintiffs must also satisfy a number of prudential principles. *See Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982). First, a plaintiff must "assert his own legal rights and interests" and not those of a third party. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Additionally, the Court must refrain from adjudicating a "generalized grievance" that many people share and that is more properly addressed by the other branches of government. *Id.* Finally, a plaintiff's grievance must fall "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge*, 454 U.S. at 475.

I first consider whether plaintiffs have standing as individuals to bring either their Establishment Clause or Equal Access Act claims. I then analyze whether plaintiffs have standing as taxpayers. Finally, I look at whether the AHA has associational standing.

B. Individual Standing – Establishment Clause.

Plaintiffs argue that defendants are involved in "widespread, flagrant, and acknowledged religious practices" that violate the Establishment Clause. ECF No. 47 at 22. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Fourteenth Amendment extends this prohibition to "the legislative power of the States and their political subdivisions." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290,

301 (2000). Public schools qualify as political subdivisions of the state. *See Bauchman for Bauchman v. West High School*, 132 F.3d 542, 550 (10th Cir. 1997). "At its core, the Establishment Clause enshrines the principle that government may not act in ways that aid one religion, aid all religions, or prefer one religion over another." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1230 (10th Cir. 1998) (internal citations and quotations omitted).

An injury to an individual's "[n]on-economic religious values" can confer standing in Establishment Clause cases. *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005) (internal citation omitted). For example, the Supreme Court has recognized parents' constitutionally-protected interest in guiding "the religious future and education of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Parents can have standing to challenge religious activities in schools due to a concern that "impressionable schoolchildren" might be "subjected to unwelcome religious exercises" or "forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486 n.22.

The Tenth Circuit has held that an allegation of "personal and unwelcome contact with government-sponsored religious symbols is sufficient to establish standing." *Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012) (internal quotations and citations omitted). However, it is "not enough for litigants to claim a constitutional violation." *Id.* They must identify a "personal injury suffered by them *as a consequence* of the alleged constitutional error." *Valley Forge*, 454 U.S. at 485 (emphasis in original). Parents must demonstrate that their children "are *directly affected* by the laws and practices against which their complaints are directed." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963) (emphasis added). The alleged injury must be more "than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Awad*, 670 F.3d at 1121.

In the present case, plaintiffs claim they have standing because "[d]efendant's policies and practices . . . pervade the whole system, injuring each Plaintiff's interest, as a parent and taxpayer."[2] ECF No. 58 at 16. Plaintiffs spend a great deal of time focusing on events and activities that occurred at schools where plaintiffs' children do not attend and with which none of the families had any direct contact. For example, much of the discussion is about OCC, particularly at Chaparral High School where no plaintiff students attend. *See* ECF No. 47 at 6–7. While such activities and events might have Establishment Clause implications, they do not directly impact *these* plaintiffs, and the Court need not consider them for standing purposes. The Court will focus on whether the Roes, Ms. Zoe, or their respective children were directly affected by the events in question, thereby establishing an injury in fact.

1. The Roes at Douglas County High School.

Plaintiffs argue that the Roes are "directly injured by Defendant's District-wide policies in a concrete and immediate way." ECF No. 58 at 17. However, plaintiffs do not offer evidence to support their claim that the alleged Establishment Clause violations actually injured the Roes. In fact, Mr. Roe stated that he "can't speak to [the events in question] with knowledge." Jack Roe Dep. ECF No. 58-3 at 21:3–13. For example, plaintiffs claim that "DCHS teachers organized OCC in a 90-minute 'homeroom' class that meets every other day." ECF No. 47 at 7–8. This is a "Freshman Transition Class." ECF No. 47-3 at 12. However, Roe Son is a senior at

[2] Plaintiffs claim that "system-wide relief is required if the injury is the result of violations . . . that are attributable to policies or practices *pervading the whole system.*" ECF 58 at 16 (quoting *Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001)) (emphasis added by plaintiffs). Unfortunately, plaintiffs are taking case law out of context. This quotation from a Ninth Circuit case is misleading: it is excerpted from the panel's discussion of the appropriate scope of injunctive relief after "the district court's extensive findings of fact setting forth in meticulous detail the injuries suffered by" multiple plaintiffs. *Armstrong*, 275 F.3d at 871. Plaintiffs seem to suggest that the allegedly pervasive nature of violations throughout DCSD affords them standing to seek "system-wide relief" and excuses them from proving an individual injury. This notion would erode one of the basic precepts of standing: the individual plaintiff must suffer a personal and cognizable injury. No matter how pervasive the alleged violations, the individual plaintiff still bears the burden of alleging how the challenged actions injure him.

DCHS, so the introduction of OCC to DCHS freshman homeroom classes did not impact him. ECF No. 58-5 at ¶ 3. Neither Roe Son nor his parents had any personal contact with OCC—he never participated in it nor was he asked to participate. ECF No. 50 at 3; Jill Roe Dep. ECF No. 58-4 at 34:18–22.

Additionally, plaintiffs make multiple allegations regarding FCA activities at DCHS. They claim that the FCA faculty advisor "makes announcements for FCA, serves as its point of contact, talks to parents about FCA using 'we' and 'our,' and seeks out speakers for FCA meetings." ECF No 58 at 17. Additionally, plaintiffs point to the "religious football camp" that DCHS staff "promoted" in 2014. *Id*. However, plaintiffs do not allege that Roe Son had any contact with the FCA, or that the involvement of DCHS teachers in FCA activities impacted him in any way.

Plaintiffs claim that the Roes are susceptible to future injury because "[t]he District states these practices are consistent with DCSD policy," and the Roes' daughter will attend DCHS in 2017. ECF No. 58 at 17. Plaintiffs state that "[the] Roes can reasonably expect [the practices] to continue when their daughter attends DCHS." *Id.* Mrs. Roe is concerned that her children might "feel like outsiders" if the conduct at DCHS continues. Jill Roe Dep. ECF No. 58-4 at 30:8–13. Under certain circumstances, allegations of future injury can satisfy the injury requirement for standing. However, "[a]llegations of *possible* future injury do not satisfy the requirements of Art. III. A threatened injury must be *certainly impending* to constitute injury in fact." *Whitmore*, 495 U.S. at 158 (internal quotations and citations omitted) (emphasis added); *see also Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1282 (10th Cir.2002) ("The threat of injury must be both real and immediate.") (internal quotation and citation omitted). There is no evidence

here that injury to the Roes' daughter is certainly impending or that the Roes' concern about future injury is more than just a mere possibility.

In sum, it appears that the Roes are trying to vindicate their general religious beliefs. *See, e.g.*, Jill Roe Dep. ECF No. 58-4 at 47:10–14 ("I'm here trying to get the school district to stop spreading their religious propaganda in the public school system."). In fact, the Roes decided to join the lawsuit only after hearing Mr. Doe's concerns about the "religious fundraising" activities at SkyView and not because of any specific concern about events at the schools their children attend. Jack Roe Dep. ECF No. 50-14 at 9:10 –10:6; Jill Roe Dep. ECF No. 50-12 at 10:15–11:6. The Court does not in any way question the sincerity of the Roes' concerns. But as mentioned above, the psychological impact from observing disagreeable conduct is insufficient to confer standing. The Roes have not established that they suffered an injury in fact.

2. Ms. Zoe at Cougar Run Elementary School.

Ms. Zoe had personal contact with the alleged violations on only two occasions, both of which related to Cougar Run's fundraising efforts for the HRHS Guatemala trip. First, Ms. Zoe received one of Ms. Benge's flyers about the supply drive in Zoe Son's take-home flyer. ECF No. 50 at 6. Second, she received an email that contained the "Giving to Guatemala" flyer. *Id.* at 6–7. In response, Ms. Zoe contacted AHA out of a concern about a "culture of religion being promoted at Douglas County schools." *Id.* at 6.

Ms. Zoe offers a number of statements about how the request to participate in the fundraisers affected her and her son. She attests that "I feel like an outsider, and it shouldn't be that way." Jane Zoe Dep. ECF No. 58-2 at 62:25–63:1. She also states "my child felt coerced into participating and contributing to this religious fundraiser." *Id.* at 32: 1–4. Ms. Zoe attributes the coercion to the fact that "a lot of his peers [were] contributing to [the fundraising],"

and that his parents told him "we're not going to participate." *Id.* at 32: 5–9. Ms. Zoe admits that Cougar Run staff did not penalize or retaliate against Zoe Son because he did not participate in the fundraiser. *Id.* at 26:12–27:4. No "adverse actions" were taken against him because he did not donate temporary tattoos. *Id.* at 27:2–4.

In support of their claim that Ms. Zoe has standing, plaintiffs cite *Bell v. Little Axe Independent School District No. 70,* 766 F.2d 1391 (10th Cir. 1985). ECF No. 58 at 17. In *Bell,* the court found that parents had standing to challenge religious activities at their children's school, including religious meetings held on school grounds. *Id.* at 1399. The meetings occurred weekly and were promoted through school publications and posters in the halls. *Id.* at 1396–97. The *Bell* plaintiffs had prolonged exposure to the weekly meetings. Here, however, Ms. Zoe only received one flyer and one email about a fundraising effort for a one-time trip to Guatemala. Additionally, in other cases addressing standing to bring an Establishment Clause claim, the Tenth Circuit has found an injury in fact due to personal contact with religious images where the exposure to the religious activity had a degree of constancy or conspicuousness that is lacking in Ms. Zoe's case. *See Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1028 (10th Cir. 2008) (finding an injury in fact based on allegations that the public display of a religious symbol "directly affects [the plaintiffs] because the use is conspicuous," and that the "constant exposure" to the symbol is "a constant reminder" that plaintiff and his son are "less that [sic] fully accepted in the community and in the schools."); *Foremaster v. City of St. George,* 882 F.2d 1485, 1491 (10th Cir. 1989) (plaintiff had standing to challenge the city's use of a religious logo where the plaintiff had "pervasive contact" with the logo, "frequent and close connection" to it, and was "directly confronted by the logo on a daily basis.").

It is not clear to the Court that Ms. Zoe or Zoe Son suffered a cognizable injury. However, even if Ms. Zoe's concerns about being an outsider or her son's experiencing coercion did amount to an injury in fact, the Court finds that she does not have standing because the alleged injuries are not "fairly traceable" to the challenged actions and activities." *Allen v. Wright*, 468 U.S. 737, 751 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014). The "fairly traceable" requirement "examines the causal connection between the assertedly unlawful conduct and the alleged injury." *Id.* at 753 n.19. The "traceability of a plaintiff's harm to the defendant's actions need not rise to the level of proximate causation," but a plaintiff must offer "proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008) (internal citations omitted). "If speculative inferences are necessary to connect [a plaintiff's] injury to the challenged action, this burden has not been met." *Id.* (internal citations and quotations omitted).

Ms. Zoe does not offer sufficient evidence to show that the request to participate in the fundraiser caused her and her son to feel coercion or stigmatization. Ms. Zoe alleges that Zoe Son has had negative interactions with other children about religion. She states that he has told her that "other kids [at school] are wanting him to believe in God." Jane Zoe Dep. ECF No. 58-2 at 62:3–5. She adds that she has "seen kids yell at him." *Id.* at 62:21–22. Specifically, she says that "a neighbor kid yelled at him saying, 'Why don't you believe in God?'" *Id.* at 62:21–23. She attributes these actions to the DCSD's "culture of religion" in schools. *Id.* at 15:13–14; 61:16–19; 62:23–24. Other than ascribing these events to DCSD's general environment, Ms. Zoe does not offer any evidence that ties the treatment of her son to the fundraising efforts at Cougar Run. In contrast, the *Bell* plaintiffs alleged that other students accused their children of

not believing in God because they did not attend the religious meetings. *Bell*, 766 F.2d at 1396. The other students' treatment of the *Bell* plaintiffs' children was directly linked to the meetings held on school grounds. Additionally, after the *Bell* plaintiffs filed their lawsuit, they received threats and experienced bullying. *Id.* at 1397. This negative treatment was also casually connected to the plaintiffs' challenge to the religious activities in the school.

The Court acknowledges that the other children's comments to Zoe Son are unkind and potentially injurious. However, despite the troubling nature of these interactions among kids, the Court would need to make a series of "speculative inferences" to conclude that other children treated Zoe Son poorly because of the events surrounding the fundraising drive. The Court will not take such inferential leaps. Ms. Zoe has not sufficiently alleged that her injury is fairly traceable to the defendants' conduct. In the absence of this causal link, she has no standing.

C. **Individual Standing – Equal Access Act**.

Plaintiffs also claim that defendants have violated the Equal Access Act (EAA). ECF No. 47 at 21. The EAA applies to any public secondary school that receives federal financial assistance and has a "limited open forum." 20 U.S.C. § 4071(a). A limited open forum is "an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." *Id.* at § 4071(b). Public schools that provide a limited open forum may not "deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." *Id.* at § 4071(a).

The statute essentially requires that these schools either grant official recognition and associated rights and privileges only to student groups that are directly related to the body of

courses offered by the school (a "closed forum") or, if such recognition and privileges are granted to any noncurriculum related student group, then equal access must be extended to all such groups. *See Palmer High School Gay/Straight Alliance v. Colorado Springs School Dist. 11*, No. Civ.A.03-M-2535, 2005 WL 3244049, at *2 (D. Colo. 2005). The school cannot deny equal access to school facilities on the basis of the focus or viewpoint of the student group. *Board of Educ. of Westside Community Schools v. Mergens By and Through Mergens*, 496 U.S. 226, 245 (1990). Congress intended to "develop legislation that respects both the Establishment Clause and the Free Exercise and Free Speech Clauses of the First Amendment[.]" 130 Cong. Rec. 23, 32316 (1984). The Supreme Court has interpreted the legislative intent to "address perceived widespread discrimination against religious speech in public schools." *Mergens*, 496 U.S. at 239.

In order to bring their EAA claim, plaintiffs must establish statutory standing, which differs from Article III standing. "[A] statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1388 (2014) (internal quotations and citations omitted). "[T]he question of whether a party 'falls within the class of plaintiffs whom Congress has authorized to sue' under a particular statute . . . is a question of statutory interpretation." *Niemi v. Lasshofer*, 770 F.3d 1331, 1344 (10th Cir. 2014) (internal quotation and citations omitted).

Plaintiffs argue that they "fall squarely within the 'zone of interest' of the EAA provisions that prohibit religious endorsement." ECF No. 58 at 18. I disagree. The EAA's plain language and legislative history demonstrate that Congress provided a remedy to a distinct class of plaintiffs. Even when construing facts and inferences in plaintiffs' favor, the individuals

named as plaintiffs in the present case do not have standing to sue under this statute because they do not share the interests that Congress intended to protect.

To begin, the statute only applies to students enrolled in federally-funded public secondary schools. § 4071(a). In Colorado, a secondary school is a "public middle, junior, or high school." C.R.S. § 22-91-102. With the exception of Roe Son who is a student at DCHS, none of the remaining plaintiffs' children is a secondary school student.[3] Cougar Run is an elementary school, so it falls outside the coverage of the EAA. Therefore, Ms. Zoe, whose children attend Cougar Run, does not have standing to sue under the EAA. Accordingly, the Court will consider plaintiffs' allegations about the EAA only as they relate to Roe Son and his parents.

The plain language and legislative history demonstrate a congressional intent to create a remedy for students and student groups who were denied access to a school's limited open forum. *See Mergens*, 496 U.S. at 235. Plaintiffs do not allege that Roe Son falls into such a group of individuals. They do not offer any evidence that Roe Son was ever denied equal access to DCHS' limited open forum. Roe Son participated in volleyball and mock trial at DCHS. Jack Roe Dep. ECF No. 58-3 at 54:24 –55:1. Regarding whether Roe Son was ever "denied access to meeting space" at DCHS, Mr. Roe states that he does not know because he is "not close enough to be able to answer that [question regarding Roe Son's] activities at school." Jack Roe Dep. ECF No. 58-3 at 55:2–6. The only time Mr. Roe recalls his son's having trouble with accessing the school's facilities is when Mr. Roe received "an e-mail that [the volleyball team] was unable to practice volleyball because another group was using the facilities." *Id.* at 55: 9–12. The Roes offer no evidence that this was anything more than a one-time scheduling snafu.

[3] As mentioned above, the Doe Family's claims are moot and are not considered here.

Plaintiffs focus their EAA allegations on teacher and staff participation in religious groups and activities. ECF No. 47 at 21. They argue that "Roes' standing is particularly strong because numerous EAA violations occur at DCHS." ECF No. 58 at 20. Plaintiffs claim that "[i]t is irrefutable that faculty 'participate' in FCA; some even run the clubs, violating the express terms of the EAA." ECF No. 47 at 21. Plaintiffs' focus on faculty involvement with religious groups is not relevant to whether the Roes suffered an individual injury that is actionable under the EAA, namely whether Roe Son was involved in a student group that was denied a fair opportunity to participate in DCHS' limited open forum.[4]

The plaintiffs do allege that the Roes asked their children to modify their behavior at school. ECF No. 58 at 19. Mr. Roe stated that he "requested them [sic] that they should not discuss religion at school. They should not participate in any religious activity." Jack Roe Dep. ECF No. 58-3 at 40:2–7. Similarly, Mrs. Roe is concerned that her "children will be ostracized if they don't participate in the religious fundraising that's going on in the schools." Jill Roe Dep. ECF No. 58-4 at 26:1–3. She does not allege that this has ever happened, nor does she establish any factual basis for her concern that her children might be ostracized in the future. *Id.* at 27:20–28:12. The Roes' request to their children seems to be in response to general concerns about DCHS's culture of promoting religion and not in reaction to any specific occurrences involving Roe Son. *See* Jack Roe Dep. ECF 58-3 at 26, 27:3–5 (explaining that "[t]here's nothing specific

[4] In order to ensure that a school provides student groups with equal access to its limited open forum, the EAA lists five standards that if met demonstrate that a school offers "a fair opportunity to students[.]" §§ 4071(c)(1–5). For example, in evaluating whether a school has offered a fair opportunity to its students, a court would look at whether "employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity." § 4071(c)(3). Teacher participation in religious groups does not, by itself, constitute a violation of the EAA. Under different facts and circumstances, the issue of teacher participation in religious student groups might be relevant to the merits of an Establishment Clause claim, but as discussed above, the Roes do not have standing to sue under the Establishment Clause.

that I'm aware of [in terms of events at DCHS], which doesn't mean it's not happening based on the attitude of the district.").

Plaintiffs argue that teacher participation in religious groups is "consistent" with DCSD's policies, so "all Plaintiffs are affected." ECF No. 58 at 19–20. The effect of this argument would be to place *any* student enrolled at *any* of the DSCD's schools within the EAA's "zone of interest" regardless of whether the individual student suffered any kind of personal injury. The Roes are clearly concerned that their children might be exposed to or impacted by the religious activities at their schools, but such broad apprehensions, no matter how understandable, do not establish standing under the EAA. The Court finds that plaintiffs do not have standing to bring their EAA claims.

D. Municipal Taxpayer Standing.

The Supreme Court has addressed federal, state and municipal taxpayer standing. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 613–14 (1989) (describing distinctions among them). A plaintiff generally cannot (and the present plaintiffs do not) assert standing on the basis of paying taxes to the federal government. *Frothingham v. Mellon*, 262 U.S. 447, 487–89 (1923) (holding that federal taxpayers have no standing to challenge the unconstitutional use of their tax dollars). There is a narrow exception to this ban where federal taxpayers asserting an Establishment Clause claim can challenge a specific congressional authorization of spending. *Flast v. Cohen*, 392 U.S. 83, 88 (1968). That has no application here.

A state taxpayer can establish standing when his challenge to state spending constitutes "a good-faith pocketbook action." *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 434 (1952). In *Doremus*, state taxpayers challenged a state law that permitted the reading of the Bible in public schools. *Id.* at 430. The Supreme Court found that this did not constitute a

"direct dollars-and-cents injury." *Id.* at 434. There was no evidence that the Bible reading was funded through a "separate tax" or any "particular appropriation" or that it raised the cost of "conducting the school." *Id.* at 433. The Supreme Court emphasized that the guiding question with the good-faith pocketbook test is not whether the plaintiffs have a "religious difference" with the conduct but whether the taxpayers have the "requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct." *Id.* at 434–35.

The Tenth Circuit addressed the scope of state taxpayer standing when it considered the "good-faith pocketbook" test from *Doremus*. *Colorado Taxpayers Union, Inc. v. Romer,* 963 F.2d 1394, 1401 (10th Cir. 1992), *cert. denied,* 507 U.S. 949 (1993). The court held that state taxpayers lacked standing to challenge the state's use of funds on a campaign against a tax reform initiative. 963 F.2d 1394 at 1403. Plaintiffs rely on *Romer* in support of their claim of municipal taxpayer standing by alleging that DCSD funds were "spent for unlawful purposes." ECF No. 58 at 19 (quoting *Romer*, 963 F.2d. at 1401). But plaintiffs' reliance on *Romer* is misplaced. The *Romer* panel only addressed municipal taxpayer standing in passing and clearly distinguished between state and municipal taxpayers. 963 F.2d at1402 (rejecting the Ninth Circuit's approach to state taxpayer standing approach "because it equates state taxpayers with municipal taxpayers for standing purposes.").

The *Romer* panel took a narrow approach to state taxpayer standing, interpreting Supreme Court jurisprudence to mean "state taxpayers must be likened to federal taxpayers." 963 F.2d at 1402. A state taxpayer must show that "money was appropriated and spent for an allegedly unlawful purpose," and "that a distinct and palpable injury resulted from the allegedly illegal appropriation or expenditure." *Id.* Such an injury exists if the taxpayer "suffered a monetary loss due to the allegedly unlawful activity's effect his tax liability." *Id.* Plaintiffs have

not satisfied these strict standards. They have not identified how DCSD's use of its funds resulted in a "direct and palpable" injury. Furthermore, they fail to offer any evidence that they have suffered any "monetary loss" through a change in their tax liability.

Apparently recognizing the difficulties inherent in asserting standing on the basis of being federal or state taxpayers, plaintiffs instead assert that they have "municipal taxpayer standing" to bring their claims. ECF No. 58 at 19. *Frothinghman* distinguished between federal and municipal taxpayer standing based on the nature of the individual taxpayer's relationship to the respective funds. 262 U.S. at 486–87. Regarding federal taxpayers, the Supreme Court reasoned that the individual taxpayer's interest in the federal treasury is too "remote," "indeterminable," and "shared with millions of others" to constitute a case or controversy. *Id.* at 487. In contrast, a municipal taxpayer can have standing to challenge allegedly unlawful expenditures because his interest in the use of his tax dollars is "direct and immediate." *Id.* at 486. The Court likened the relationship between the taxpayer and the municipality to that of the stockholder and the corporation. *Id.* at 487. An injunction can be an appropriate remedy to prevent the misuse of municipal tax dollars. *Id.* at 486.

The Supreme Court has referenced the doctrine in subsequent cases, but it has not directly defined its scope, nor has it ever afforded a plaintiff standing as a municipal taxpayer. *See Asarco*, 490 U.S. at 613–14; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349 (2006) (finding that the plaintiffs could not use their status as municipal taxpayers to challenge a state franchise tax credit). The Tenth Circuit has not directly addressed municipal taxpayer standing. *Foremaster v. City of St. George*, 882 F.2d at 1485, 1493 n.5 (10th Cir. 1989) (finding standing due to direct economic injury and not reaching plaintiff's arguments about taxpayer standing); *Young v. Unified Gov't of Wyandotte Cnty.*, 520 F. App'x. 636, 638 (10th Cir. 2013)

(unpublished) (rejecting claim because taxpayer failed to allege the requirements of municipal taxpayer standing).

Other courts have taken varying approaches to municipal taxpayer standing. It has been suggested that it no longer exists. S*ee D.C. Common Cause v. District of Columbia,* 858 F.2d 1, 11 (D.C.Cir.1988) (Williams, J., concurring) (suggesting that "on its face" the doctrine of municipal taxpayer standing seems inconsistent with the modern approach to standing). However, most federal courts appear to consider the doctrine of municipal taxpayer standing to be good law. *See, e.g., U.S. v. City of New York,* 972 F.2d 464, 471 (2d Cir. 1992) ("It is not our job to anticipate [how the Supreme Court will treat *Frothingham* in future opinions]. Accordingly, we join our sister circuits in finding that *Frothingham* still states the law on municipal taxpayer standing.").

Despite the lack of clear case law on this topic, a plaintiff must, at a minimum, be a municipal taxpayer who is alleging that the municipality is directing his tax dollars to unlawful practices. *See, e.g., Young,* 520 Fed. App'x. at 638 ("Even if we give him the benefit of the doubt by assuming he alleges injury as a county taxpayer, he fails to identify any plausible allegations of illegal expenditure of taxpayer funds that would satisfy the remaining elements of municipal taxpayer standing."); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995) (requiring plaintiffs to show that they pay taxes "to the relevant entity" and that "tax revenues are expended on the disputed practice."); *Smith v. Jefferson Cnty. Bd. Of Sch. Comm'rs,* 641 F.3d 197, 215 (6th Cir. 2011) ("As a threshold matter, we note that Jefferson County is considered a municipality under Tennessee law."). This simply reflects the general rule that a plaintiff must show injury, causation, and redressibility in order to establish standing. *See D.C. Common Cause,* 858 F.2d at 5 (internal citations omitted).

Assuming without deciding that the Tenth Circuit might recognize municipal taxpayer standing under certain circumstances, this Court holds that there is no municipal taxpayer standing on the facts alleged in the present case. First, it is not clear that the plaintiffs are challenging municipal action. In the Supreme Court's most recent consideration of taxpayer standing, the Court did not permit the plaintiffs to "leverage the notion of municipal taxpayer standing beyond challenges to municipal action." *Cuno*, 547 U.S. at 349 (noting that plaintiffs attempt to challenge a state tax credit as municipal taxpayers without identifying any "municipal action contributing to [the] claimed injury."). The doctrine of municipal taxpayer standing hinges on the close relationship between the local taxpayer and the municipality such that municipal expenditures can constitute an injury for the purposes of standing. But under Colorado law, public school districts and the school boards that administer them are considered "political subdivisions" of the state. *Bagby v. School Dist. No. 1, Denver,* 528 P.2d 1299, 1302, 186 Colo. 428, 435 (Colo. 1974); *see also* Colo. Const. art. IX § 15 (establishing the organization of school districts and the boards of education that have "control of instruction in the public schools"). In *Bagby,* the Colorado Supreme Court held that "[a] school district is a subordinate division of the government," and it exercises "authority to effectuate the state's education purposes." *Id.*

Second, even if these entities were considered municipalities, school districts—and by extension the school boards that oversee them—receive a mixture of state and local funds. *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1011 (Colo. 1982) ("Since 1935, a combination of local property tax levies and direct state contributions has been the principal source of financial support for Colorado's public school system."). Here, in plaintiffs' one paragraph on municipal taxpayer standing, they make general allegations about the misuse of school funds.

They claim that "[f]aculty frequently use school resources, like District email and letterhead, to promote religious organizations (OCC, FCA, AIM) and events (SYATP, 'Fields of Faith.')." ECF No. 58 at 19. Plaintiffs further attest that "[s]chool funds were directly used to provide rewards for collecting OCC boxes and cans," and that "[s]chool funds and resources (flyers, proceeds from the newspaper, etc.) were directly expended on the Mission Trip [.]" *Id.* These allegations do not offer any insight into the source of the funds that DCSD is using for these purposes. Plaintiffs do not provide any evidence that DCSD directed *local* tax dollars rather than *state* funds to these ends. Given the comingled nature of the funding stream, the Court finds that the doctrine of municipal taxpayer standing is not available to the plaintiffs.

E. Associational Standing.

AHA is an out-of-state nonprofit that brings "this action to assert the First Amendment rights of its members." ECF No. 1 at ¶ 5. "An association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth*, 422 U.S. at 511. Or "an association may have standing solely as the representative of its members." *Id*. (internal citation omitted). AHA has not alleged an injury to itself in an organizational capacity. Therefore, to assert a claim on behalf of its members, AHA would first need to establish that "its members would otherwise have standing to sue in their own right." *Romer*, 963 F.2d at 1397–98 (internal citation omitted). Here, AHA cannot satisfy this requirement because I have found that none of the individuals named as plaintiffs have standing to sue. Therefore, AHA is not entitled to associational standing.

III. Plaintiffs' Motion for Summary Judgment.

Because the Court finds that plaintiffs do not have standing to bring any of their claims, the plaintiffs' motion for summary judgment is denied.

ORDER

Plaintiffs' motion for summary judgment [ECF No. 47] is DENIED, and defendants' motion for summary judgment [ECF No. 50] is GRANTED. The individual plaintiffs' claims in this civil action are dismissed with prejudice. American Humanist Association's claims are dismissed without prejudice. Final judgment will enter in favor of defendants and against plaintiffs. As the prevailing party, defendants are awarded costs pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

DATED this 20th day of January, 2016.

BY THE COURT:

R. Brooke Jackson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 14-cv-02878-RBJ

AMERICAN HUMANIST ASSOCIATION, INC.,
JOHN DOE, individually, and as parent and next friend of DOE CHILD-1 and DOE CHILD-2, minors;
DOE CHILD-1, a minor,
DOE CHILD-2, a minor,
JACK ROE, individually and as a parent on behalf of a minor,
JILL ROE, individually and as parent on behalf of a minor, and
JANE ZOE, individually and as parent on behalf of a minor,

Plaintiffs,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
DOUGLAS COUNTY BOARD OF EDUCATION,
ELIZABETH CELANIA-FAGEN, in her official capacity as Superintendent of Douglas County School District,
JOHN GUTIERREZ, in his official capacity as Principal of Cougar Run Elementary School,
JERRY GOINGS, in his official capacity as Principal of Highlands Ranch High School,
MICHAEL MUNIER, in his individual capacity,
[redacted] and
LISA NOLAN, in her official capacity as Executive Director of SkyView Academy,

Defendants.

FINAL JUDGMENT

Pursuant to and in accordance with Fed. R. Civ. P. 58(a), all Orders entered during the pendency of this case, and the Order entered by the Honorable R. Brooke Jackson, United States District Judge, on January 20, 2016, it is

ORDERED that Plaintiffs' motion for summary judgment [ECF No. 47] is DENIED, and defendants' motion for summary judgment [ECF No. 50] is GRANTED. The individual plaintiffs' claims in this civil action are DISMISSED WITH PREJUDICE. American Humanist Association's claims are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that Final Judgment is entered in favor of

defendants and against plaintiffs. As the prevailing party, defendants are awarded costs pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

DATED this 20th day of January 2016.

BY THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/Deborah Hansen
Deborah Hansen, Deputy Clerk