

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

FREEDOM FROM RELIGION
FOUNDATION, INC., et al.,

Plaintiffs,

vs.

MERCER COUNTY BOARD OF
EDUCATION, et al.,

Defendants.

Civil Action No. 1:17-cv-00642

Hon. David A. Faber

PLAINTIFFS' MEMORANDUM OF LAW ON JUSTICIABILITY

Plaintiffs' First Amended Complaint presents a concrete controversy that is ripe for judicial review: whether the Bible in the Schools program is unconstitutional. The 70-year-old Bible in the Schools program that existed when the First Amended Complaint was filed consists of fixed policies, practices, and curriculum. The Court faces no ripeness problem in evaluating the constitutionality of this long-established program under the Establishment Clause of the First Amendment.

Defendants' alleged "suspension" of the program for "at least a year" does not change the controversy before the Court, and as a result, does not affect the ripeness of this case. Defendants' misguided standing arguments in their Reply Brief appear to have caused the Court justiciability concerns arising out of the prospect of reviewing a suspended program or a future program that does not yet exist. But Plaintiffs' claim before the Court remains its constitutional challenge to the particular program in place

when this case was initiated—not some undefined future program—and the review of the Bible in the Schools program remains ripe.

When properly characterized, the controversy at the center of this case satisfies all justiciability requirements. As set forth at length in Plaintiffs' Response and Sur-Reply Briefs, these Plaintiffs are appropriate parties to bring this case (i.e., they have standing) because they face either imminent or ongoing interaction with the program. The challenge to the program is sufficiently concrete because it challenges a well-established, decades-old practice (i.e., it is ripe). And adjudication of this controversy will still remedy real-world harms being suffered by the Plaintiffs because the program may well return in the same form at the beginning of the 2018 school year (i.e., the case is not moot).

To the extent the Court has justiciability concerns arising out of the suspension of the program under review, any such concerns are fully handled by mootness considerations and the well-established voluntary cessation doctrine. Defendants' have fallen well short of meeting their burden under that doctrine, which requires them to prove with absolute clarity that the challenged behavior will not recur. Where that heavy burden is not met, justiciability jurisprudence prohibits a defendant from gaming its way out of a lawsuit by temporarily ceasing a practice. The court must consider the alleged change in circumstances under this voluntary cessation doctrine, continue to protect the vital policies underlying the doctrine, and not create a new avenue for defendants to avoid accountability through temporary action undertaken in response to litigation.

I. Standing and Ripeness

The fundamental purpose of the justiciability doctrines is to determine whether a

particular case presents the sort of “case” or “controversy” sufficient to confer jurisdiction to federal courts under Article III of the Constitution. *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). Standing, ripeness, and mootness all “originate” from Article III’s “case” or “controversy” requirement. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

Standing ensures the appropriate party has brought a controversy before the Court by requiring a plaintiff to demonstrate she “(1) has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan*, 504 U.S. 555, 560-61 (1992)). In the Fourth Circuit, standing has been recognized as “perhaps the most important” condition of justiciability. *Friends of Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 153 (4th Cir. 2000) (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

Ripeness ensures that courts are engaged to consider issues only after the controversy has become “clean-cut and concrete.” *Miller v. Brown*, 462 F.3d 312, 318-19 (4th Cir. 2006) (quoting *Rescue Army v. Mun. Court of City of Los Angeles*, 331 U.S. 549, 584 (1947)). Often times, this requires courts to consider whether the timing of the lawsuit is appropriate. *Cooksey v. Futrell*, 721 F.3d 226, 240 (citing *Renne v. Geary*, 501 U.S. 312, 320 (1991)). To assess whether the controversy raised by a case is “clean-cut and concrete,” courts “balance the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration.” *Miller*, 462 F.3d at 319.

Before evaluating the fitness of a controversy for decision, the Court must first frame the controversy being presented for review. This important task of framing the controversy at issue is aided by consideration of the standing doctrine's actual or imminent concrete injury requirement. Identifying the injury being alleged helps to frame the controversy because it identifies the nature of the controversy the particular plaintiffs in a case are situated to raise. Therefore, even though the Court need not consider standing if it finds this case to be unripe, review of standing and ripeness in tandem will ensure the proper framing of the controversy that must be reviewed for ripeness.¹

A. The controversy presented in the First Amended Complaint is a concrete challenge to the Bible in the Schools program ripe for review.

Both the Doe Plaintiffs and the Deal Plaintiffs present concrete challenges to the Bible in the Schools program in place when the First Amended Complaint was filed. The Doe Plaintiffs faced an imminent infringement of their constitutional rights as a result of the Bible in the Schools program, which has been ensconced in Mercer County for the past 70 years. (FAC ¶ 18). The Deal Plaintiffs are incurring additional burdens and costs to send Jessica to a school outside of Mercer County because of Defendants'

¹ Numerous courts, including the Fourth Circuit, have found that the analyses attendant to evaluating standing and ripeness are similar, if not identical. *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) (citing Erwin Chemerinsky, *Federal Jurisdiction* § 2.4 (4th ed. 2003)) (“ . . . there is an obvious overlap between the doctrine of standing and ripeness”); *Cooksey*, 721 F.3d at 240 (“Our ripeness inquiry, however, is inextricably linked to our standing inquiry.”); *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 n.5 (2014) (“ . . . standing and ripeness issues in this case boil down to the same question”) (internal quotations and citations omitted). This overlap seems attributable to the fact that the actual or imminent concrete injury requirement of standing largely subsumes any inquiry into whether the controversy arising from that injury is sufficiently clear-cut and concrete. *See, e.g.*, Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 Conn. L. Rev. 677, 682-83 (1990) (analysis of injury requirement in standing test results in the ripeness inquiry “merg[ing] almost completely with standing”).

implementation of the Bible in the Schools program, which caused the Deal Plaintiffs to suffer actual harms during the time that Jessica attended a Mercer County school. (FAC ¶¶ 39-50). These injuries provide both sets of Plaintiffs standing to challenge the Bible in the Schools program identified and described in the Amended Complaint.

This controversy set forth in the First Amended Complaint is clear-cut and concrete because it challenges the constitutionality of the well-defined Bible in the Schools program. The First Amended Complaint makes specific allegations about the program, its teachers, and its content. (FAC ¶¶ 53-67). When the First Amended Complaint was filed, the Bible in the Schools program had a defined, written curriculum taught by Mercer County teachers who, at a minimum, had “a degree in Bible.” (FAC ¶¶ 53, 55). Consideration of the constitutionality of these and other well-established features of the program involves a purely legal question likely to be decided by cross-motions for summary judgment. Because the First Amended Complaint sets forth a concrete controversy fit for judicial review, the controversy is ripe for decision, and the Court need not assess the burdens associated with any delay in adjudication.

B. The controversy presented in this case remains unchanged despite Defendants’ voluntary conduct.

Defendants’ decision to “suspend” the Bible in the Schools program does not recast the controversy in this case as a challenge to a future version of the program. Plaintiffs, as the masters of their complaint, continue to pursue review of the Bible in the Schools program that existed when this case was initiated, and there is no legal support for recasting the controversy at the heart of this case because of Defendants voluntary conduct in response to the litigation. Plaintiffs’ challenge to the Bible in the Schools program was ripe at the outset of the case and remains so now. The only question of

justiciability before the Court is whether Plaintiffs' request for a review of the program that existed when the case was filed is moot as a result of Defendants' conduct.

The voluntary cessation doctrine controls whether this case is moot. Under the doctrine, "[a] defendant's 'voluntary cessation of a challenged practice' moots an action only if 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000)). Defendants bear a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* (internal quotations omitted) (quoting *Laidlaw*, 528 U.S. at 189). Courts have been "particularly unwilling to find" this formidable burden is met where a "defendant expressly states that, notwithstanding its abandonment of a challenged policy, it could return to the contested policy in the future." *Porter v. Clarke*, 852 F.3d 358, 365 (4th Cir. 2017).

The voluntary cessation doctrine clearly establishes that a review of the Bible in the Schools program, as it existed when this case was filed, is not moot. In *Porter*, the Fourth Circuit held that inmates' Eighth Amendment challenge to prison policies was not mooted by the prison's voluntary adoption of changes in the challenged policies because the prison would not rule out the possibility of a return to the old policies. *Porter*, 852 F.3d at 366 (citations omitted) (holding the prison had not met its "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur"). Here, Defendants have done even less than the prison in *Porter*—they have merely suspended the challenged program for one year while noting that the program may possibly change before it is returned. Under this Circuit's voluntary

cessation doctrine, this conduct does not moot Plaintiffs' challenge to the Bible in the Schools program that existed when the case was filed.

The existence of the voluntary cessation doctrine compels the conclusion that the controversy presented in this case remains whether the Bible in the Schools program is unconstitutional. The doctrine rests on the idea that defendants "should not be able to evade judicial review . . . by temporarily altering questionable behavior" and prevents "manipulative litigant[s]" from altering their behavior while a suit is pending only to reinstate it immediately after dismissal of a case. *Porter*, 852 F.3d at 364. If a defendant could avoid the application of the voluntary cessation doctrine by undertaking a "review" of its policies and presenting a ripeness argument, all of these important policies would be offended and the voluntary cessation doctrine would be eviscerated. The Court must guard against such a wholesale destruction of this well-established doctrine by analyzing standing and ripeness under the fixed controversy set forth in the complaint and considering Defendants' voluntary conduct under the voluntary cessation doctrine.

C. Plaintiffs face significant burdens if review of the Bible in the Schools program is delayed.

While the fitness of Plaintiffs' challenge obviates the need for the Court to evaluate the burdens that would exist if review of Plaintiffs' claims is delayed, the burdens that exist further support the ripeness of the controversy presented in this case. The hardship portion of the ripeness analysis measures the "immediacy of the threat and the burden imposed on the plaintiffs." *Miller*, 462 F.3d at 319 (internal quotations and citations omitted). Here, the burdens Plaintiffs face if this case is not reviewed immediately further support a finding of ripeness.

The uncertainty surrounding the Bible in the Schools program presents immediate

harm to both the Doe Plaintiffs and the Deal Plaintiffs. While Defendants “review” the suspended Bible in the Schools program, the Deal Plaintiffs continue to suffer direct harm in the form of their ongoing assumption of burdens to enroll in a neighboring school system to avoid the program. The Doe Plaintiffs suffer harm because they have lost their ability to obtain advanced review of the program before Jamie is enrolled in a school in which the program has been implemented and because Jamie will now develop familiarity with his local school and classmates that she may ultimately be forced away from if the program returns. Such harms have been found to support immediate review of sufficiently concrete controversies in this Circuit.

In the case of the Doe Plaintiffs, the loss of an opportunity for advanced review of a challenged practice has been found to be a significant harm for ripeness purposes. In *Miller*, the Fourth Circuit held that a case involving open primary requirements was ripe for review despite the fact that potential candidates had not yet been affected and would not be affected for some time. 462 F. 3d at 319. While the State Board of Elections argued that the application of the rule was uncertain and the case unripe, the Court honed in on the small window of time in which judicial review would be forced to occur if the court waited for the policy to have a harmful effect. *Id.* at 320 (finding the prospect of leaving parties with a small window of time to present a novel constitutional question to be “troublesome”). Here, the Doe Plaintiffs sought to preemptively challenge the Bible in the Schools program, approximately seven months before they would face the actual program in the classroom. By further delaying adjudication of this controversy, the Court will have little to no time to review the constitutional question presented prior to Jamie Doe facing exposure to the program. Moreover, any last minute, court-imposed

injunction would be highly disruptive in the school context, just as such last minute relief would have been in *Miller* in the election context.

In the case of the Deal Plaintiffs, their continuing inability to return Jessica to her home school district due to the uncertainty surrounding the Bible in the Schools program is a constitutionally significant harm. In *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, a homeowners association and its residents were “*presently* unable to avail themselves of” competing cable providers, and the Fourth Circuit found their harm as immediate as possible. 713 F.3d 187, 199 (4th Cir. 2013). (citing *Miller*, 462 F.3d at 321). Similarly here, so long as it remains possible the Bible in the Schools program will return, the Deal Plaintiffs will be forced to continue their assumption of burdens to remain outside their home school district. *See Cooksey*, 721 F.3d at 241 (case was ripe where plaintiff was not free from the *threat* of harm despite suggestions that “discourse could occur” and no “final decision on the issue” had been made).

II. The Court lacks evidence to find this case unripe.

Because the controversy at issue relates to the Bible in the Schools program in place when this case was filed, the new circumstances introduced by Defendants in their Reply Brief do not affect the Court’s analysis of the ripeness of this case. Likewise, as discussed at length in Plaintiffs’ Sur-Reply Brief, the new circumstances do not affect Plaintiffs’ claim to standing, which is based upon the facts as they existed at the time of filing. The only way in which the new circumstances are relevant to the justiciability of Plaintiffs’ claims is in the context of mootness. On the issue of mootness, even accepting Defendants’ claimed facts as true, the facts do not establish that the Bible in the Schools

program will never recur again. As this review of the justiciability doctrines demonstrates, the Court can deny Defendants' motion to dismiss without addressing whether the evidence offered by Defendants actually supports its factual claims.

However, in the event the Court finds Defendants' claims to affect ripeness (or standing), the Court must find that Defendants have not supported their claims through admissible evidence. In their Reply Brief, Defendants claim to convert their facial jurisdiction challenge to a factual challenge, but the evidence provided through attached exhibits does not provide admissible support for Defendants' claims. The support consists exclusively of newspaper articles and a "board memo" in which Defendant Akers recommends that the Bible in the Schools program be suspended for one year to be reviewed (ECF No. 30-4). This evidence is insufficient to render the case moot or unripe.

Conclusion

The voluntary cessation doctrine, and this Circuit's recent decision in *Porter* should guide the procedural understanding of this case—the appropriate (and *only*) justiciability question arising out of Defendants' conduct is whether Plaintiffs' challenge to the Bible in the Schools program that existed when the case was filed is now moot. Defendants' temporary suspension of the Bible in the Schools program does not affect the ripeness of this case or Plaintiffs' standing. Under the voluntary cessation doctrine, Defendants have failed to meet the heavy burden necessary to obtain dismissal. In light of this failure, the Court must reject any ripeness argument Defendants' may belatedly make and instead uphold the long-standing voluntary cessation doctrine that would be dismantled by a finding of unripeness in this case. Defendants' motion to dismiss must be denied.

Respectfully submitted,

/s/ Marcus B. Schneider, Esquire

Marcus B. Schneider, Esquire

W.V. I.D. No. 12814

STEELE SCHNEIDER

428 Forbes Avenue, Suite 900

Pittsburgh, PA 15219

(412) 235-7682

(412) 235-7693/facsimile

marcschneider@steleschneider.com

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2017, the foregoing **PLAINTIFF'S MEMORANDUM OF LAW ON JUSTICIABILITY** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

/s/ Marcus B. Schneider, Esquire
Marcus B. Schneider, Esquire