**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**No. 17-2429**

ELIZABETH DEAL; JESSICA ROE,

*Plaintiffs-Appellants,*

FREEDOM FROM RELIGION FOUNDATION, INC.; JANE DOE; JAMIE DOE,

*Plaintiffs,*

v.

MERCER COUNTY BOARD OF EDUCATION; MERCER COUNTY SCHOOLS; DEBORAH S. AKERS, in her individual capacity; and REBECCA PEERY, in her individual capacity,

*Defendants-Appellees.*

*Appeal of the United States District Court for the Southern District of West Virginia Memorandum Opinion and Order of Court Dated November 14, 2017 at Docket No.: 1:17-cv-0642*

# APPELLANTS' REPLY BRIEF

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## Introduction

Contrary to the view of the district court and Mercer County Parties, BITS and its adverse effects on the life of Appellants are not buried in the past. To be sure, Elizabeth Deal and Jessica Roe have suffered past injuries: opting to avoid exposure to BITS, Jessica was harassed by her peers and deprived of instruction time in school. But Appellants' complaint alleges ongoing injuries as well. It tells of Deal incurring additional expense to send Jessica to a neighboring school district, and it describes the feelings of exclusion and marginalization Deal endures as a resident of Mercer County who cannot send her daughter to the County's schools because she is not a member of its favored religion.

Although Deal specifically alleged these ongoing injuries in her complaint and argued they confer standing in her Opening Brief, Mercer County Parties' Response addresses only whether Deal's *past* injuries suffice for standing to seek injunctive relief. But for their past injuries, Appellants seek only nominal damages—the appropriate retrospective relief for constitutional injuries. Appellants request injunctive relief to remedy their *ongoing* injuries. They need not allege these injuries are imminent—they are *ongoing*.

Nor must Deal contend with Mercer County Parties' post-complaint "suspension" of BITS. For the suspension to affect the Court's justiciability analysis, it must be *absolutely clear* BITS will not return—only then could the

"suspension" potentially render Deal's forward-looking claims moot. Given the thin evidence regarding the "suspension" and the comments of Mercer Schools officials indicating a hope that BITS will return, the fate of BITS is anything but clear. Because of the uncertainty surrounding the future of BITS, the "suspension" cannot be considered as a factor in the Court's justiciability analysis.

When properly characterized, the FAC asserts past and ongoing injuries that will be remedied by retrospective and forward-looking relief. Because Mercer County Parties have failed to adequately prove BITS will not return, the injunction of the decades-old BITS program being administered when the case was filed will remedy Deal's ongoing injuries. Likewise, nominal damages will remedy Appellants' past injuries. Having set forth cognizable injuries redressable by the relief sought in the FAC, Deal has standing to pursue her claims.

## Argument

### I. Deal has standing to pursue injunctive relief to redress her ongoing avoidance of BITS and feelings of marginalization and exclusion.

The key to resolving whether Deal has injunctive relief standing is the proper framing of Deal's injuries. As discussed in Appellants' Opening Brief, Deal has standing to pursue injunctive relief based upon two *ongoing* injuries: (1) avoidance of Mercer Schools and (2) feelings of marginalization and exclusion. These are the forward-looking injuries alleged in the FAC and, thus, the injuries the Court must consider in evaluating whether Deal has standing to pursue an

injunction. Yet Mercer County Parties ignore these ongoing injuries and argue Deal's injunctive relief claim is based only upon *past* injury that will not recur in the future.

The reason for this is clear: if the Court finds Deal has alleged *ongoing* injuries of avoidance and stigmatization, she has standing to pursue injunctive relief. Mercer County Parties offer no rebuttal to Deal's legal arguments that avoidance and stigmatization represent injuries sufficient to confer standing to Establishment Clause plaintiffs. Instead, they seek to draw the Court's attention away from these determinative *ongoing* injuries by addressing only whether they believe Deal is likely to suffer direct contact with BITS in the future.

Mercer County Parties employ this misdirection for two reasons. First, by focusing on whether the FAC alleges *likely future contact* with BITS, Mercer County Parties have a platform to showcase their contrived "suspension" of the program, claiming that it conclusively precludes Deal from ever being able to demonstrate sufficiently imminent future injury. Second, by framing the relevant injury as potential future contact with BITS, Mercer County Parties can dwell on the absence of an avowal by Deal in the FAC that Jessica will return to Mercer Schools if BITS is removed. Neither of these issues affect Deal's standing to pursue injunctive relief for her ongoing injuries.

The purported "suspension" of BITS has no bearing on the Court's standing analysis. Setting aside the fact that Mercer County Parties have failed to sufficiently demonstrate that BITS has actually been ended for good—a matter more fully addressed in Section III below—the Court cannot consider Mercer County Parties' post-complaint actions because a party's standing is evaluated based upon the facts as they exist at the time a case is filed. *Davis v. Federal Election Com'n*, 554 U.S. 724, 734 (2008) (citations omitted). When this case was filed, Mercer County Parties were administering the thirty-first year of the challenged BITS program. Therefore, for standing purposes, BITS is—and always will be—alive and well.

Likewise, the absence of an avowal by Deal to return Jessica to Mercer Schools if BITS is enjoined does not affect Deal's standing based upon her *ongoing injuries*. According to the allegations of the FAC, Deal is a citizen of Mercer County (1) actively undertaking burdens to send her daughter to a school outside of Mercer County (2) who feels like a second-class citizen because of Mercer Schools' administration of a Christian bible class. These two ongoing injuries would be meaningfully redressed by an injunction stopping BITS: with BITS gone, Deal *could* send Jessica to Mercer Schools without her being exposed to Christian instruction and Deal *will* no longer feel like a second-class citizen in her home community.

Mercer County Parties' argument that Deal must avow Jessica would return to Mercer Schools misses an important distinction between the "actual and ongoing" injuries alleged by Deal and the sort of "threatened" future injuries that must be imminent to confer standing. If Deal had pointed to her and Jessica's *past* contact with BITS as the injury supporting her standing to pursue injunctive relief, she would obviously be obligated to show that the same injury is "threatened" in the future. But Deal has identified *actual* injuries that by their very nature satisfy any obligation to show future injury because they are *ongoing*. *Wikimedia Foundation v. National Security Agency*, 857 F.3d 193, 211 (4th Cir. 2017) (an imminence analysis is inapplicable where plaintiff seeks injunctive relief based upon "actual and ongoing injury" as opposed to "prospective or threatened injury").

Although Mercer County Parties claim their misreading of standing jurisprudence is supported by a "wall of authority," they cite to only three cases to support their argument. Resp. Br. 10-11. Rather than support the Mercer County Parties' position that Deal must avow Jessica will return to Mercer Schools, these cases further underscore that this is unnecessary where the actual injuries alleged are ongoing.

Mercer County Parties' reliance upon *Suhre v. Haywood County* is misplaced because, unlike Deal, Suhre did not allege ongoing injury to support his

claim for injunctive relief standing. 131 F.3d 1083, 1091 (4th Cir. 1997). Instead, the injury alleged was Suhre's past unwelcome contact with the challenged display. Because the injury was past contact, in order to find Suhre had standing to seek injunctive relief, this Court naturally found it essential that Suhre alleged he would suffer future contact with the challenged display.

The Fourth Circuit cases more analogous to the standing situation presented here are *Moss v. Spartanburg Cty. School Dist. No. 7*, 683 F.3d 599, 607 (4th Cir. 2012) and *Int'l Refugee Assistance Project v. Trump*, No. 17-2231, 883 F.3d 233, 258-60 (4th Cir. Feb. 15, 2018) (*IRAP II*). The plaintiffs in both of those cases alleged *ongoing injury* in the form of feelings of marginalization based upon personal interaction with challenged government action. Opening Br., 16-18; *IRAP II*, 883 F.3d at 260 (plaintiffs "are suffering" feelings of marginalization and exclusion); *Moss*, 683 F.3d at 607. This Court found standing in both cases without any discussion of imminent future injury. *IRAP II*, 883 F.3d at 260-61; *Moss*, 683 F.3d at 607. Likewise, in *Wikimedia*, this Court recognized the *difference in kind* between actual and ongoing injuries and prospective or threatened injuries for purposes of standing to seek injunctive relief. *Wikimedia*, 857 F.3d at 211.

Once the injuries supporting Deal's injunctive relief standing are properly characterized, Mercer County Parties' redressability arguments are easily dismissed. An injunction ending BITS will remove BITS as an obstacle preventing

Deal from sending Jessica to Mercer Schools and dismantle the figurative "Not Welcome" sign that has caused Deal to feel like an outsider in her own community. To be effective in these regards, Jessica need not actually return to Mercer Schools. The removal of BITS as an obstacle to attendance—and not Jessica's actual return to Mercer Schools—is the issue before the Court.[1] *See IRAP II*, 883 F.3d at 261 (holding that a favorable decision need not relieve a plaintiff's "every injury" and

[1] Because Deal need not allege that Jessica will return for her alleged ongoing injuries to be actionable, Mercer County Parties' increasingly bold overstatements of the facts as related to Jessica's potential return need not be addressed. *See e.g.* Resp. Br. 3 (Deal removed Jessica with "no intention to ever return, no matter the circumstances"), 6 (Appellants "admit they . . . have no intention to return to the school district if a successor to the BITS program was enjoined"), 11 (Deal has "steadfastly refused to avow she would allow Roe to reenroll" in Mercer Schools if BITS was enjoined). These conclusions cannot be drawn from the mere *absence* of an avowal that Jessica will return to Mercer Schools.

Mercer County Parties seem to base these overstatements, at least in part, upon the fact that Deal did not provide a statement in response to their motion to dismiss the FAC. However, Mercer County Parties original motion to dismiss was a facial challenge to the FAC, which would not have permitted Deal to respond with extra-complaint facts. Although Mercer County Parties attempted to convert their challenge to a factual challenge in their reply brief on their motion to dismiss (ECF No. 30, 4 n.3 (JA203)), Deal continues to dispute that such a maneuver is permissible. But even if a defendant can convert their Rule 12 challenge to a factual challenge in a reply brief, the new facts Mercer County Parties introduced—assertions that BITS had been suspended—cannot affect the standing analysis because standing is determined as of the time a case is filed. Therefore, Deal had no reason to introduce a statement avowing a return to Mercer Schools if BITS is enjoined.

finding certain concerns about the effectiveness of an injunction beyond the scope of the constitutional challenge to the challenged presidential proclamation).

The two other cases making up Mercer County Parties' "wall of authority" are in agreement. In *Freedom From Religion Foundation Inc. v. New Kensington Arnold Sch. Dist.*, the Third Circuit addressed the ability of an injunction to redress the alleged harm where a parent had removed her child from a school because of the presence of a Ten Commandments monument. 832 F.3d 469, 480-81 (3d Cir. 2016). The court found that an injunction removing the monument had the capacity to redress the parent's grievance merely because her child "*could return*" to the school. *Id.* at 481 (emphasis added). Similarly, in *Bell v. Little Axe Indep. Sch. Dist. No. 70*, the Tenth Circuit found parent-plaintiffs had standing to seek injunctive relief even though they had moved out of the school district because they continued to own property in the defendant-district and their children would have been enrolled in the defendant-district were it not for the district policy being challenged. 766 F.2d 1391, 1399 (10th Cir. 1985).

Deal's request for injunctive relief is consistent with and will meaningfully remedy her alleged ongoing injuries of avoidance and stigmatization. By attempting to recast the injury supporting Deal's claim for injunctive relief as one of only past injury, Mercer County Parties fail to respond to the legal issues determinative to the Court's analysis of Deal's standing to seek injunctive relief.

Because Jessica need not return to Mercer Schools for an injunction ending BITS to remedy the actual injuries alleged in the FAC, Deal has standing to seek such relief.

## II. Deal has standing to pursue a claim for nominal damages based upon her past constitutional injuries.

Despite the Supreme Court's clear characterization of nominal damages as the *appropriate means* of vindicating past constitutional deprivations, Mercer County Parties argue that nominal damages are not meant to compensate for past injuries. Appellees present two alternative arguments in support: (1) that nominal damages are a form of forward-looking relief, indistinguishable from a declaratory judgment and (2) that nominal damages are nothing more than a fallback claim where a plaintiff fails to prove compensatory or punitive damages. Neither of these arguments can be squared with Supreme Court caselaw. Moreover, the arguments demonstrate precisely why Deal's nominal damages claim should be actionable in this case.

### A. Nominal damages compensate plaintiffs for past constitutional injury.

On numerous occasions, the Supreme Court has recognized that nominal damages compensate plaintiffs for past constitutional injury. *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n. 11, 309 (1986) (nominal damages "are the appropriate means of

vindicating rights whose deprivation has not caused actual, provable injury") (internal quotations omitted); *cf. Hudson v. Michigan*, 547 U.S. 586, 598 (2006); *id.* at 610 (Breyer, J., dissenting) (discussing decisions awarding nominal damages for violations of the Fourth Amendment "knock and announce" rule). The decisions in this Circuit are in agreement. *Covenant Media of SC, LLC v. City of North Charleston*, 493 F.3d 421, 428 (citing *Carey*, 435 U.S. at 266); *American Humanist Ass'n v. Greenville Sch. Dist.*, 652 Fed.Appx. 224, 231-32 (4th Cir. 2016) (recognizing nominal damages as damages for prior constitutional violation in Establishment Clause case).

Apart from parroting the arguments advanced by Judge McConnell in his concurrence in *Utah Animal Rights Coal. v. Salt Lake City Corp.*, Mercer County Parties have done little to challenge this proposition. 371 F.3d 1248, 1264 (10th Cir. 2004 (McConnell, J., concurring); Resp. Br. 14-17. Despite the contrary Supreme Court caselaw and in conflict with the controlling law in the Tenth Circuit[2], Judge McConnell (and, consequently, Mercer County Parties) contends nominal damages are nothing more than a vehicle for obtaining declaratory relief. But this argument cannot be squared with *Carey* and *Stachura*. Those cases clearly

[2] It bears noting that the reason Judge McConnell's opinion was expressed in a concurrence because it conflicts with the controlling law in the Tenth Circuit, which recognizes that nominal damages relate to "*past (not future) conduct*." *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1526-27 (10th Cir. 1992) (emphasis added).

indicate that nominal damages are the only appropriate form of relief to compensate plaintiffs for the abstract value of the constitutional deprivation they have suffered. *Stachura*, 477 U.S. at 308 n.11.

### B. Nominal damages are the *appropriate remedy* for past Establishment Clause violations that do not cause compensable injury.

Contrary to the argument advanced by Mercer County Parties, nominal damages are an appropriate form of relief in more than just due process cases. Although *Carey* dealt specifically with the propriety of nominal damages as an appropriate remedy for past denials of procedural due process, *Stachura* involved alleged violations of First Amendment rights. *Carey*, 435 U.S. at 266; *Stachura*, 477 U.S. at 309. More importantly, the Supreme Court's reasoning in both cases reflects that nominal damages are equally appropriate for most, if not all, of the constitutional deprivations made actionable by 42 U.S.C. § 1983.

*Carey* observed that nominal damages were originally awarded by common-law courts where certain "absolute" rights had been violated, even if no demonstrable "actual injury" was shown. *Carey*, 435 U.S. at 266. In *Carey*, the Court found the right to procedural due process to be among these "absolute" rights because it "does not depend upon the merits of a claimant's substantive assertions" and because it is important "to organized society that procedural due process be observed." *Id.* *Stachura* cited approvingly to the reasoning in *Carey* and

found it applicable to the First Amendment right of academic freedom at issue there. *Stachura*, 477 U.S. at 309 (treating procedural and substantive rights alike and noting that *Carey* did not establish a "two-tiered system of constitutional rights").

Given this reasoning, it is unsurprising that this Circuit has recognized the appropriateness of nominal damages in a variety of Section 1983 cases. *See, e.g.*, *Gray v. Spillman*, 925 F.2d 90, 93-94 (4th Cir. 1991) (recognizing availability of nominal damages in excessive use of force case); *American Humanist Ass'n v. Greenville Sch. Dist.*, 652 Fed.Appx. 224, 231-32 (4th Cir. 2016) (recognizing availability of nominal damages in Establishment Clause case); *cf. Project Vote/Voting for America, Inc. v. Dickerson*, 444 Fed.Appx. 660, 662 (4th Cir. 2011) (holding plaintiff was "prevailing party" under Section 1988 petition where only nominal damages were obtained in First Amendment case). In *Gray*, for example, after discussing *Carey* and *Stachura*, this Court found that a plaintiff alleging a substantive violation of the Fourth Amendment was entitled to nominal damages merely by proving a constitutional violation: "The existence of an interrogee's physical injuries is relevant in assessing the amount of actual damages; *it is not a prerequisite to suit*." *Gray*, 925 F.3d at 93 (emphasis added) (citations omitted). As this case demonstrates, nominal damages are appropriate in

cases alleging violations of "absolute rights" outside of the procedural due process arena.

### C. Nominal Damages claims do not merely tag along with compensatory damages claims.

With a proper understanding of nominal damages as a form of retrospective relief, it becomes clear that nominal damages are more than just a fallback claim for plaintiffs who allege but fail to prove compensatory damages. Mercer County Parties downplay the significance of *Carey* and *Stachura* because those cases involved live claims for compensatory damages until the end of the case, whereas this case does not. But *Carey* and *Stachura* make clear that while both forms of damages are based upon past constitutional injuries, nominal and compensatory damages compensate Section 1983 plaintiffs for different things: compensatory damages compensate plaintiffs for actual (proven) damages and nominal damages compensate plaintiffs for the abstract value of the constitutional deprivation they endure. *Stachura*, 477 U.S. at 308 n.11, 309.

Section 1983 plaintiffs should be free to seek either or both forms of retrospective relief. A rule requiring constitutional plaintiffs to assert a claim for compensatory damages in order to have standing for a nominal damages claim would wrongly and unnecessarily limit the litigants' right to choose what relief to pursue. Given the non-economic nature of the injuries likely to be suffered in cases implicating absolute constitutional rights and the difficulty with proving injuries in

those cases, a plaintiff asserting a deprivation of these rights should be free to assert only a nominal damages claim.

Mercer County Parties concern that this approach would cause the dockets of the federal courts to swell beyond control is misplaced. Appellees concede that if Deal had asserted a compensatory damages claim—based upon *the same constitutional violations* underlying her nominal damages claim—she might have standing. Resp. Br. 14 n.6. But if Deal could secure standing by asserting a compensatory damages claim—no matter how small—the "standing by mere expedient of pleading" nightmare portrayed by Mercer County Parties already exists.

There is no significant pleading hurdle that would stop Section 1983 plaintiffs from asserting a compensatory damages claim in every case. While not every case would have out-of-pocket costs like those borne by Deal to send Jessica to a different school, plaintiffs could easily assert claims of mental and emotional distress stemming from an alleged constitutional deprivation. *Carey*, 435 U.S. at 263 ("we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of [the asserted constitutional right"). And since there is no minimum amount of damages for federal courts to have jurisdiction over Section 1983 claims, plaintiffs could simply assert these claims generically to meet the requirements of standing. Thus, the same variety of

claims Mercer County Parties argue should not go forward here could be litigated for compensatory, rather than nominal damages.

This demonstrates why such a form over substance approach should be rejected. In these hypothetical Section 1983 cases, the nominal and compensatory damages asserted would stem from the same underlying injuries. The *injuries alleged*, rather than the form of damages sought for those injuries, should inform the standing analyses of the courts. To hold otherwise would lead to standing being resolved over just a few dollars: plaintiffs seeking $100 in compensatory damages for out-of-pocket expenses would have standing but plaintiffs seeking $1 in nominal damages for the same constitutional deprivation would not. The more sensible approach—and the one dictated by Article III's focus on the *injury* suffered by a plaintiff—is to assess whether past injury has been alleged, regardless of the form of damages a Section 1983 plaintiff chooses to seek.

## III. The voluntary cessation doctrine renders Mercer County Parties' "suspension" of BITS meaningless for purposes of their motion to dismiss.

Despite Mercer County Parties' feigned surprise, there is nothing new about Deal's position that she is challenging the thirty year-old BITS program that was in existence when the FAC was filed. Deal's position on how the program's "suspension" affects her claims has been consistent: unless Mercer County Parties prove with absolute clarity that BITS cannot reasonably be expected to return, the

"suspension" changes nothing. Opening Br. 48-51; ECF No. 33, 9-10 (JA258-259); ECF No. 43, 1-2, 5-7 (JA307-308, JA311-312). The voluntary cessation branch of the mootness doctrine imposes this heavy burden on Mercer County Parties, and it is mootness—not ripeness—that governs whether Deal's challenge to the longstanding BITS program are justiciable.

The voluntary cessation doctrine provides an essential protection to plaintiffs: it prevents manipulative defendants from *temporarily* modifying their behavior to destroy the justiciability of a plaintiff's claims. *Porter v. Clarke*, 852 F.3d 358, 364 (4th Cir. 2017). The doctrine provides this protection by imposing a heavy evidentiary burden—one requiring "absolute clarity"—on defendants who seek to evade review of their conduct in this way. *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (citations omitted). If litigants are free to skirt this heavy *mootness* burden by assuming the truth of their self-serving actions in the advancement of *ripeness* arguments, the voluntary cessation doctrine is meaningless.

Mercer County Parties' conduct illustrates this. They have never responded to Deal's arguments that their evidence of cessation falls short of meeting the heavy burden imposed by the voluntary cessation doctrine. Yet they continue to flaunt their defiance of the doctrine by discussing the "suspension" of BITS as if it has been conclusively shown that the program will never return and as if this Court's justiciability analysis can assume that to be true.

But the evidence surrounding Mercer County Parties' self-serving representations tells a much different story. Akers's public comments demonstrate that the suspension is merely temporary and that she hopes BITS will return:

> Since the Bible class is an elective, I would like to include community members and religious leaders along with our teachers in this [review] process. In order to conduct a thorough review, we need to allow at least a year to complete the task. Therefore, I am recommending that we suspend Bible classes until this review is completed.
>
> ***
>
> We are still vigorously contesting it . . . But we have these mandatory timelines that we're up against that puts us in this position. We haven't stopped contesting it. We're still fighting it.

JA224, JA226. Considering these statements in conjunction with the fact that BITS has a decades-long history in Mercer Schools, it is clear that Mercer County Parties have fallen well short of demonstrating with absolute clarity that BITS will never return.

Having failed to meet the burden imposed by the voluntary cessation doctrine, for justiciability purposes, it is as if the "suspension" never happened. Standing is considered as of the time a case is filed, so the "suspension" can play no part in the Court's standing analysis. The "suspension" does not moot the case because Mercer County Parties have not met their evidentiary burden. And because of that evidentiary failure, the "suspension" has no effect on the ripeness of Deal's

claims: without a cessation of the program, Deal's challenge to the longstanding BITS program remains as ripe as it was when the case was filed.

## Conclusion

Given that Mercer County Parties "suspension" of BITS has no effect on the justiciability of Appellants' claims, the question facing the Court is purely whether the facts alleged in the FAC provide Elizabeth Deal and Jessica Roe with standing to challenge BITS. The alleged facts reveal that Elizabeth and Jessica have suffered three injuries that confer standing: (1) ongoing avoidance of BITS and Mercer Schools; (2) ongoing feelings of marginalization and exclusion as a result of Mercer County Parties' administration of BITS; and (3) past exposure to BITS and encounters with the consequences of opting out of the class. Appellants' ongoing injuries will be remedied by the forward-looking injunction of BITS, and their past injuries will be remedied by an award of nominal damages. Because they have alleged constitutionally-significant injuries redressable by the relief they seek, this Court must reverse the decision of the district court and reinstate the FAC.

Respectfully Submitted,

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**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**
**Effective 12/01/2016**

**No.** 17-2429 **Caption:** Elizabeth Deal, et al v. Mercer Cty. Bd. of Ed., et al

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(s) /s/ Marcus B. Schneider

Party Name Elizabeth Deal; Jessica Roe

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**Certificate of Service**

I certify that on May 29, 2018, the foregoing Appellants' Reply Brief was served on all parties or their counsel of record through the CM/ECF system.

May 29, 2018

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