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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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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
AHA	American Humanist Association
Jane Zoe	Mother of two students at Cougar Run Elementary School
Jack Roe	Father of two students, one at Aspen View Academy and one at DCHS
John Doe	Father of Doechild-1 and Doechild-2, both at Skyview Academy

INTRODUCTION[1]

DCSD fails to rebut the central argument in Appellants' brief: That the families unquestionably have standing to sue for the Establishment Clause violations in their children's schools. Standing is founded on several grounds, including the fact that the families have had – and remain imminently threatened with – personal, unwelcome contact with DCSD's two unconstitutional practices.

The families, confronted with direct exposure to these violations in their children's schools, were dismissed by the lower court for lack of standing due to a serious misapplication of standing law. DCSD asks this Court to affirm the erroneous conclusions of the court, but provides no legal basis for doing so. Not only, for example, do DCSD and the lower court deny that direct contact with unconstitutional activity confers standing, but each incorrectly assert that plaintiffs in Establishment Clause cases must show retaliation, changed behavior, or other consequential damages. This and other mistaken interpretations of Establishment Clause standing law, adopted by the lower court but shown to be erroneous in Appellants' brief, are repeated almost verbatim in DCSD's brief.

[1] Appellants' brief ("P.Br."); Appellee's brief ("D.Br.")

ARGUMENT

I. DCSD's Statement of the Case distorts the record.

Before responding to DCSD's legal arguments, misleading factual issues must be addressed.

A. DCSD misrepresents Zoe's testimony.

DCSD grossly falsifies Zoe's testimony. DCSD would have the Court believe Zoe's injury is limited to a single flyer and email, asserting:

- "Zoe did not find the donation drive itself objectionable, or the request for her son's class to donate" (D.Br.10)
- "Aside from the flyer and redundant email, there were no other specific actions…Zoe found objectionable" (D.Br.10)
- "[I]n her deposition, Ms. Zoe admitted that she did not find the donation drive itself objectionable" (D.Br.26 n.8)

But Zoe testified she *did* object to the donation drive itself, stating she was "uncomfortable…they were asking for donations…from his class." (J.A.1658). She added: "there was a lot of his peers contributing to it. And we had to say no." (J.A.1661). Opposing counsel even asked if she was offended only by the emails and flyer and Zoe responded: "No…It's the fact that [Cougar Run] partnered with the [FCA]" for "the purpose of the trip." (J.A.1663). Additionally, Zoe objected to "this whole Guatemala trip," as Cougar Run was "asking for donations for a mission trip." (J.A.1662). She averred: "my child felt coerced into

participating and contributing to this religious fundraiser. As non-Christians, the school's actions…made us feel like outsiders[.]" (J.A.590).

B. DCSD omits significant facts regarding the school-sponsored nature of the Christian Mission Trip.

DCSD's selective discussion of the mission trip endorsed at both HRHS and Cougar Run omits significant facts of school sponsorship. DCSD wants the Court to believe the trip was purely private and nonreligious. (D.Br.6-9). But the undisputed facts tell a much different story:

- HRHS FCA went on an AIM mission trip to proselytize Christianity[2]
- Two teachers chaperoned, as required by school policy[3]
- The principal approved these teachers as chaperones (J.A.838-39)
- HRHS teachers created and disseminated flyers for FCA[4]
- The flyers listed a teacher as *the* contact person[5]
- DCSD's email was used to fundraise[6]
- Both teachers participated in the fundraisers[7]
- DCSD handled the trip funds[8]

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[2] (J.A.42-55)(J.A.273-74,277)(J.A.282-313)(J.A.551-52)(J.A.570)(J.A.589-91)(J.A.762-83)(J.A.837-40,844-45)(J.A.854)(J.A.866-68,880)(J.A.889-90)(J.A.974)(J.A.1108-09)
[3] (J.A.551-52)(J.A.570)(J.A.573)(J.A.839)(J.A.867,870,872-73)(J.A.895)(J.A.1055,1057,1068)
[4] (J.A.319-20)(J.A.1057,1077-78)
[5] (J.A.320)(J.A.1058,1070,1077-78)
[6] (J.A.316-321)(J.A.716-23)(J.A.762-81)(J.A.806-09)(J.A.813-17)(J.A.855-59)(J.A.1077-78)
[7] (J.A.319-21)(J.A.716-23)(J.A.762-81)(J.A.856-57)(J.A.1057,1077-78)

- Teachers led and participated in worship with students on the trip[9] and at FCA meetings[10]
- Teachers worked with Cougar Run faculty to fundraise[11]
- Cougar Run organized a school-wide supply drive and other fundraisers in "partnership" with the "Fellowship of Christian Athletes" to aid the HRHS Mission Trip[12]
- Cougar Run solicited parents and schoolchildren on numerous occasions to make monetary and in-kind donations[13]
- School officials, including the principal, emailed parents urging them to donate[14]
- Parents were asked to make checks out to "Cougar Run Elementary" (J.A.314-18)
- Cougar Run placed a flyer announcing its "sponsorship" of and "partnership" with FCA in Zoe-Son's folder[15]
- Zoe-Son was asked to donate temporary tattoos to bring to school[16]
- A teacher directed students to collect items during school hours[17]
- Cougar Run donated the proceeds from its newspaper[18]
- A regular school program, "Muffins with Mom," was used to fundraise[19]

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[8] (J.A.553)(J.A.730-44)(J.A.775)(J.A.838,841-42,845)(J.A.877,884)(J.A.896,898)(J.A.1055-56,1069-71)(J.A.1109)
[9] (J.A.749-60)(J.A.868-69,879-80)(J.A.899,901)
[10] (J.A.796-802)(J.A.870-71)(J.A.891-92)(J.A.996-97)(J.A.1053-54,1074)
[11] (J.A.314-20)(J.A.717-18,723)(J.A.762-83)(J.A.858)(J.A.896-97)
[12] (J.A.42)(J.A.314-21)(J.A.445-47)(J.A.553-57)(J.A.589-91)(J.A.717-18,723)(J.A.762-83)(J.A.812-17)(J.A.839,845)(J.A.855-58)(J.A.896-98)
[13] (J.A.589-90)(J.A.855-56)(J.A.1058-60)(J.A.1451-52)(J.A.1504-05)
[14] (J.A.320-21)(J.A.719,722-23)(J.A.806-09)(J.A.855-57)(J.A.876)(J.A.1059-60)
[15] (J.A.51-52)(J.A.590)(J.A.1657,1662)
[16] (J.A.314-17)(J.A.1658,1660)
[17] (J.A.778)(J.A.815-17)(J.A.1116-18)
[18] (J.A.51)(J.A.446)(J.A.806,809)(J.A.855)(J.A.774,778-79,781)(J.A.1116-17)

- The supply-drive was part of the "curriculum"[20]

DCSD instead focuses almost entirely on one student, Amanda Berry, distorting the degree of school involvement to a point of absurdity, *infra*.

DCSD first argues: "In contrast to District-sponsored trips, Ms. Berry did not submit any forms to HRHS,…All attendees had to pay their own way, including the adult chaperones, Alexandra Malach and Bradley Odice." (D.Br.7). But the principal admitted the Mission Trip was a "school trip" and that "it's absolutely policy" teachers attend. (J.A.839). Teachers directed donors to "make checks payable to Highlands Ranch High School." (J.A.1109). Of the numerous flyers and emails promoting the trip, not one featured a disclaimer, as required for a non-school-sponsored trip.[21]

Additionally, the funds were handled in the same way as a "District-sponsored" trip. (J.A.841-42). Teachers "pay their own way" on "District-sponsored" trips and do not submit forms unless they are driving students. (J.A.894-95,898,902).

Second, DCSD asserts only that "Berry organized several fund-raisers," (D.Br.8)(J.A.1367), omitting that HRHS teacher Malach was "*in charge* of both

[19] (J.A.778-79)(J.A.859)
[20] (J.A.314-17)(J.A.856)(J.A.974)
[21] (J.A.314-15)(J.A.716-23)(J.A.747)(J.A.844,850)(J.A.1077-78)

the babysitting night [fundraisers] and the trip to Guatemala as a whole." (J.A.764)(emphasis added).

Third, DCSD states: "FCA students made flyers." (D.Br.8)(J.A.1367). This is false. Malach created the first flyer because Berry "had a lot going on."[22] And both flyers designated Malach as *the* contact person.[23]

Fourth, DCSD contends, "FCA students" "decided to hand-deliver [the flyers] to elementary schools." (D.Br.8)(J.A.1367). But it fails to mention that HRHS teacher Odice emailed the flyers to elementary schools, including Cougar Run.[24]

Fifth, DCSD avers only that "Berry and the other students eventually picked up the donations collected from the supply drive from Ms. Benge's classroom." (D.Br.11). But HRHS students *and teachers* went to Benge's classroom for a "packing party." (J.A.780-83)(J.A.897)(J.A.1065).

Sixth, that "AIM representatives led and facilitated the daily activities" (D.Br.11) is irrelevant because DCSD admitted "Malach and Mr. Odice were the adult leaders of the FCA students on the trip."[25] The teachers "led" the students in worship and regularly "participate[d] in prayer with students." (J.A.899).

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[22] (J.A.1057-59,1070)(J.A.1077)
[23] (J.A.320)(J.A.876)(J.A.1058,1070)(J.A.1077-78)(J.A.1536)(D.Br.9)
[24] (J.A.716-23)(J.A.772-73)(J.A.896-97)(J.A.1064-65)
[25] (JA.570). *See also* (J.A.551-52)(J.A.870)(J.A.1108)

Seventh, the FCA students were given special treatment because of the trip.[26] Malach testified that afterwards, students would "swing by the classroom" and get help with "college applications." (J.A.883). One student was invited to be the "guest speaker" at Cougar Run's "Sixth Grade Continuation" because of the trip. (J.A.1119-20).

DCSD's final assertion that the "chaperones were not attending as teachers" because "some students even called Ms. Malach, 'Mom'" (D.Br.12) is bizarre and irrelevant. Again, HRHS's principal testified it's a "school trip, it's absolutely policy that [faculty] attend." (J.A.839). The flyers included the teacher's school webpage and email, and the trip meetings were held in her "classroom."[27]

Furthermore, Malach and Odice repeatedly referred to the group as "our students."[28] Malach wrote she was the "leader and temporary guardian of **my students**." (J.A.299). 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 also enrich my **teaching** practice." (J.A.1109)(P.Br.9).

C. DCSD ignores the trip's Christian purpose.

Remarkably, DCSD avoids any mention of AIM's Christian agenda and the overtly religious purpose of the trip it fundraised for. It even suggests the trip was

[26] (D.Br.12)(J.A.883)(J.A.1119-20)
[27] (J.A.320)(J.A.718)(J.A.838)(J.A.876)(J.A.896)(J.A.1058,1070)(J.A.1077-78)(J.A.1536)(D.Br.9)(P.Br.8)
[28] (J.A.288)(J.A.299-301)(J.A.757)(J.A.777-78)(J.A.827)(J.A.901)(J.A.1109)(J.A.1117)

secular. (D.Br.6,9,11-12). As its only evidence, DCSD proffers: "The students chose to describe the trip as a 'service' trip rather than a 'mission' trip because it better reflected the intent of those in attendance and the planned activities of the trip." (D.Br.9 n.5). But Berry admitted: "the plan was to sit with children and introduce them to the Bible" and to "promote Christianity."[29] Their fundraising webpage stated: "our group's primary goal is to share…Jesus." (J.A.288) Malach testified the purpose was "to share Jesus Christ with those who don't know him" (J.A.868), and Odice said it was to bring "faith to people in Guatemala." (J.A.889)

If anything, "service" was used to deceive donors. Odice testified: "we did not do" "service work, physical labor and giving less fortunate people resources." (J.A.901-02). *See also* (J.A.872).

Regardless, the flyers and emails *did* refer to "mission," and thus, had a "religious connotation."[30] And each referred to FCA or "Christian Athletes," which the superintendent admitted is "inherently Christian." (J.A.989). Even Cougar Run's principal admitted its flyer conveyed a religious message. (J.A.858,860-62).

Additionally, DCSD omits the fact that the items collected from the Cougar Run fundraisers directly furthered proselytization.[31] The beads went toward

[29] (J.A.1068-69,1072). *See also* (J.A.750-52)
[30] (J.A.314-15,319-321)(J.A.716-17,719-23)(J.A.773)(J.A.811)(J.A.1069)(J.A.1076)
[31] (J.A.827)(J.A.869,879-80)(J.A.899,901)

"Salvation Bracelets" "to help [the children] remember the story of Christ."[32] Sports equipment was used "to discuss Jesus." (J.A.298).

D. DCSD ignores Operation Christmas Child.

DCSD indisputably endorses and fundraises 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.[33] DCSD's statement neglects OCC even though Roes are directly subject to the practice DCHS. (D.Br.19-21)(P.Br.19,34-35,50). DCHS teachers promoted OCC in freshman homeroom classes while Roe-Son was in school.[34] DCSD approves DCHS's actions[35] and maintains that classroom participation in OCC is "consistent with DCSD policy." (J.A.550)(J.A.986). 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).

E. DCSD ignores the Faculty Participation Practice.

DCSD authorizes faculty throughout the District to lead and participate in FCA beyond custodial oversight. (P.Br.23-28).[36] DCSD disregarded this practice

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[32] (J.A.827)(J.A.869,879)(J.A.899,901)
[33] (J.A.21-42)(J.A.198-220)(J.A.550-51,556,564-66)(J.A.569)(J.A.581-82)(J.A.648-49)(J.A.1127-28,1130-51)
[34] (J.A.550,559-60)(J.A.599)(J.A.1682)(J.A.1686)
[35] (J.A.550-51)(J.A.910-12)(J.A.985-86)(J.A.1725)(J.A.1832-33)
[36](J.A.709-10,784-804)(J.A.906,917-22,956-71)(J.A.994-96)(J.A.1017-42)(J.A.1047-49)(J.A.1157-1307)

even though it applies to Roes' school, DCHS, and Zoes' future schools, CMS and HRHS. (P.Br.7). DCSD states only that it "ensures that its employees do not endorse religion." (D.Br.13). Faculty at DCHS, however, endorse and participate in FCA. (P.Br.10-27).[37] The same is true at HRHS. Faculty are the ones "facilitating the meeting." (J.A.1053-55). DCSD even asserts that faculty participation in FCA is "consistent with" DCSD policy (J.A.571) and that school "endorsement" of religion is permissible so long as it is not "disruptive."[38] DCSD also conducts no Establishment Clause or EAA faculty training.[39]

F. DCSD's widespread violations are relevant to standing for injunctive relief.

Finally, DCSD intentionally avoids the challenged practices at other schools. (D.Br.12-13). But such evidence is undoubtedly relevant to standing for injunctive relief. "Past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." *Tandy v. Wichita*, 380 F.3d 1277, 1283-84, 1289 (10th Cir. 2004). 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). Indeed, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) compels "courts to consider the government's past violations of the Establishment Clause when

[37] (J.A.1176-86)(J.A.1331-38)(J.A.1669)(J.A.1682-84)(J.A.1686-89)
[38] (J.A.981,985-86,988,995-99)
[39] (J.A.835)(J.A.885)(J.A.917)(P.Br.28)

evaluating its present conduct." *ACLU v. McCreary Cnty.*, 354 F.3d 438, 457-58 (6th Cir. 2003).

II. Zoes have standing to challenge the Christian Fundraising Practice.

A. DCSD does not deny that Zoes had personal, unwelcome contact with Cougar Run's religious fundraisers, sufficient for nominal damages.

1. Zoes' personal unwelcome contact was the injury-in-fact.

For Establishment Clause standing, it is sufficient to show: (1) a personal, unwelcome contact (2) with state-sponsored religion. *Awad v. Ziriax*, 670 F.3d 1111, 1121-22 (10th Cir. 2012). This Court made clear that "alleging *only* 'personal and unwelcome contact' with government-sponsored religious [activity] is sufficient to establish standing." *Id.* (citations omitted). DCSD does not dispute that Zoes had personal, unwelcome contact with Cougar Run's fundraisers. (D.Br.6,9-10,25).[40] DCSD even admits Zoes had "personal contact with the alleged violations" on at least "two occasions." (D.Br.25). Accordingly, DCSD logically concedes Zoes' standing.

DCSD nevertheless argues: "Zoe's receipt of 'one-flyer and one email about a fundraising effort for a one-time trip to Guatemala' did not rise to the level of injury-in-fact." (D.Br.26). This cannot seriously be maintained.

[40] *See also* (D.Br.6)(conceding Zoes had the "most substantive contact")

In *Tandy*, this Court held that a plaintiff seeking retrospective relief satisfies the "injury in fact" requirement "if she suffered *a* past injury." 380 F.3d at 1283-84 (emphasis added). The injury in Establishment Clause cases *is the* "unwelcome direct contact" with state-sponsored religion. *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1086 (4th Cir. 1997). An Establishment Clause violation itself "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Moreover, "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).

Adopting DCSD's rule – as the District Court mistakenly did – allows governments to violate the Constitution for "one-time" events. (P.Br.41-42). But *Lee v. Weisman* clearly established that the "once-in-a-lifetime event" does not justify allowing a public school to violate the Establishment Clause. 505 U.S. 577, 594 (1992). Nor can the injury be "refuted by arguing…[it is] of a *de minimis* character." *Id*.

A plaintiff has standing even if her exposure to a one-time occurrence is brief, as in *Lee*, where the student would only encounter two-minutes of prayer. *Id.* (P.Br.36). "An identifiable trifle is enough for standing." *U.S. v. SCRAP*, 412 U.S. 669, 689 n.14 (1973)(citation omitted). There is "no minimum quantitative limit." *Saladin v. Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987)(citing *SCRAP*).

DCSD, however, still urges the Court to adopt the District Court's unprecedented reformulation of the well-settled "personal unwelcome contact" standard to add two additional requirements: (1) more than *two* contacts; and (2) consequential injury. (D.Br.26-29). But these "'go beyond what any court has heretofore decreed.'" *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1252 (9th Cir. 2007)(quoting *Suhre*). As set forth in Appellants' brief (P.Br.36-37), and briefly below, this Court has outright rejected these requirements, *infra.*

Furthermore, Zoes' injuries are not even limited to "two" contacts – a "flyer" and "email"–the underpinning of DCSD's argument. DCSD states that "Plaintiffs do not dispute" that "Zoe had personal contact…on only two occasions.'" (D.Br.25). But Plaintiffs *do* dispute this because it: (1) completely ignores Zoe-Son's *continuous*, week-long exposure to the teacher-led fundraisers at his school, during school hours, and the pressures he felt to contribute; and (2) construes Zoes' injuries "too narrowly," *Bell v. Little Axe Indep. Sch. Dist*., 766 F.2d 1391, 1408 (10th Cir. 1985), erroneously implying they do not object to their school actually fundraising for a Christian mission trip, *supra*, at 2-3.

2. Even assuming Zoes' injuries are limited to the words on a flyer and email, they have standing because a single, unwelcome contact is enough.

Federal courts have consistently found a single contact sufficient, including when the plaintiff will never encounter the practice again. (P.Br.36-37)(citing over

twelve cases).[41] DCSD has not pointed to a single case holding that more than one contact is required for nominal damages. Further, DCSD ignores the cases in Appellants' brief demonstrating that a *single* contact is sufficient. (P.Br.36-37).

DCSD merely cites two cases that happened to feature prolonged contact. (D.Br.26). But those cases did not profess to establish any sort of regularity element to the "personal, unwelcome contact" standard. (P.Br.38-39). Instead, they reaffirmed it. *See Weinbaum v. Las Cruces*, 541 F.3d 1017, 1028 (10th Cir. 2008); *Foremaster v. St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989)("allegations of direct, personal contact suffices").

The only other cases DCSD relies upon are *Caldwell v. Caldwell*, 545 F.3d 1126 (9th Cir. 2008) and *FFRF v. Obama*, 641 F.3d 803 (7th Cir. 2011). *Obama* is distinguishable because the plaintiffs claimed *no direct* contact with the challenged activity. *Id.* at 806-08. Rather, they "learned about the National Day of Prayer through the media, through their friends, and by visiting the White House website." *Id.* at 812 (Williams J., concurring). In contrast, Zoes' *own* school *personally* urged them to donate to Christian organizations for collection during school hours.[42] Religious endorsement in a plaintiff's own school "surely suffices to give the

[41] *E.g.*, *Does 1 v. Elmbrook Joint Common Sch. Dist.*, 2010 U.S. Dist. LEXIS 72354 (E.D. Wis. 2010), *standing aff'd*, 687 F.3d 840 (7th Cir. 2012)(en banc), *cert. denied*, 134 S. Ct. 2283 (2014), *remand*, 2:09-cv-00409 [Doc.101](damages for single graduation); *Am. Humanist Ass'n v. City of Ocala*, 127 F. Supp. 3d 1265 (M.D. Fla. 2015)(one-time prayer vigil)

[42] (J.A.51-52)(J.A.590)(J.A.1657,1662)

parties standing to complain." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963).

Moreover, unlike Zoes, the *Obama* plaintiffs were seeking *injunctive relief* only, not damages. 641 F.3d at 805. "Standing to obtain injunctive and declaratory relief must be analyzed separately from standing to obtain retrospective relief." *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir. 1991)(citation omitted). For damages, "a past injury" suffices. *Tandy*, 380 F.3d at 1283-84.

Caldwell is also distinguishable because like *Obama*, the plaintiff merely objected to a webpage for which she had no personal ties. 545 F.3d at 1128. Her interest in using the website was too "abstract" and "tenuous" and no different than anyone else's. *Id*. at 1132-33. Her connection to the website was unlike "the relationship in *Schempp* between parents whose children are directly exposed to unwelcome religious exercises in the classroom and the school district." *Id.*

3. Zoes need not leave the school or suffer retaliation.

DCSD's second requirement is equally unwarranted. DCSD argues that Zoes did not suffer an injury-in-fact because "[n]o retaliation took place, and the Zoes did not make any changes to their daily life. In fact, they enrolled their younger daughter in Ms. Espinosa's preschool class." (D.Br.10). But Zoes were not required to show *any* "consequential injury," let alone leave their school. *Bell*, 766 F.2d at 1408.

"Compelling 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. Forcing an Establishment Clause plaintiff to avoid a practice "to gain standing to challenge it only imposes an extra penalty on individuals already alleged to be suffering a violation of their constitutional rights." *Id.*

More to the point, this Court has repeatedly rejected the argument that a plaintiff must make "changes to their daily life." (D.Br.10,29)(P.Br.33,39). In *Foremaster*, the Court considered and rejected the requirement that a plaintiff allege a change in his behavior to gain standing. 882 F.2d at 1490-91. Similarly, in *Am. Atheists, Inc. v. Duncan*, the plaintiffs alleged "'direct personal and unwelcome contact with the crosses.'" 637 F.3d 1095, 1113 (10th Cir. 2010). In *Awad*, the Court noted that in *Duncan*: "We concluded that the plaintiffs suffered an Establishment Clause standing injury because they encountered an unwelcome government-sponsored religious symbol." 670 F.3d at 1121-22. Although one "alleged that he was forced to alter his travel route to avoid contact with the crosses," this Court held "such an allegation *was not necessary* for standing." *Id.* at n.7 (citations omitted).

Additionally, even assuming, *arguendo*, Zoes' injuries were limited to a single flyer, DCSD's argument that the "flyer does not satisfy the injury component" (D.Br.28) is wrong. *E.g.*, *Newman v. East Point*, 181 F. Supp. 2d 1374,

1377-78 (N.D. Ga. 2002)(plaintiff had standing to challenge event based on encountering flyer publicizing event). "Allegations of personal contact with a state-sponsored image suffice to demonstrate this kind of direct injury." *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005). The same is true of "unwelcome religious statements." *Saladin*, 812 F.2d at 692. In *Saladin*, the plaintiffs took offense to a city seal with the word "Christianity." *Id.* at 689. Although some lived in a different city, they had standing merely because they received another city's stationery with the seal. *Id*. at 693.

The flyer alone would even be sufficient to violate the Establishment Clause. (P.Br.42-44). In *Duncan*, this Court held that privately-funded crosses erected on a highway by private individuals unconstitutionally endorsed religion because they bore the Utah Highway Patrol insignia, "linking the State to that religious sign." 637 F.3d at 1121. Cougar Run's flyers and emails did not just casually "link" it to the Christian organizations but expressly declared Cougar Run's "Sponsoring" and "Partnering" with the "Fellowship of Christian Athletes."[43] Cougar Run did far more than just convey a religious message though – it tangibly supported these Christian organizations.[44] The "'degree of school involvement'" made it clear that

[43] (J.A.314-18)(J.A.445-47)(J.A.589-91)(J.A.776)(J.A.809)(J.A.855,857,860)
[44] (J.A.42)(J.A.314-21)(J.A.445-47)(J.A.553-57)(J.A.589-91)(J.A.717-18,723)(J.A.762-83)(J.A.812-17)(J.A.839,845)(J.A.855-58)(J.A.896-98)

the trip bore "'the imprint of the State and thus put school-age children who objected in an untenable position.'" *Santa Fe*, 530 U.S. at 305 (citation omitted).

4. DSCD's actions caused Zoes' constitutional injuries.

Once "the injury-in-fact element of standing is established, the other two elements of standing are 'easily satisfied.'" *Felix v. Bloomfield*, 36 F. Supp. 3d 1233, 1241 (D.N.M. 2014)(citation omitted). For causation, a plaintiff need only show that the "injury is 'fairly traceable to the challenged action of the [government] defendant.'" *Awad*, 670 F.3d at 1120.

This test is so straightforward that it is perplexing DCSD devotes substantial "analysis to explaining why [Zoes] had failed to demonstrate causation." *Red River Freethinkers v. Fargo*, 679 F.3d 1015, 1024-25 (8th Cir. 2012). Zoes' injury was "direct and unwelcome contact with an Establishment Clause violation." *Id.* Thus, if DCSD's fundraisers, or even the flyer, violated the Establishment Clause, then DCSD "is the cause of that injury." *Id. See Weinbaum*, 541 F.3d at 1028-29 (finding element satisfied in single sentence).

Yet DCSD maintains that Zoes were required to offer "evidence that ties [negative] treatment of her son to the fundraising efforts." (D.Br.29). *Bell* makes clear, however, that Zoes "are entitled to recover…for the loss of the inherent value of their rights under the Establishment Clause, even if they are unable to demonstrate *consequential injury*." 766 F.2d at 1408 (emphasis added). In *Bell*,

this Court held that the district court mistakenly "only considered incidents…by third parties in determining that no causal relationship had been established." *Id.* The Court admonished that 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.* (P.Br.49).

DCSD makes no attempt to distinguish *Bell* on this point, relying instead on two inapposite non-Establishment Clause cases, *Nova Health Sys. v. Gandy*, 416 F.3d 1149 (10th Cir. 2005), and *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1224-25 (10th Cir. 2008). In *Habecker*, plaintiff's loss of an election constituted an injury-in-fact. *Id*. But he failed to show that losing the election was "'fairly traceable' to the defendants' actions" because it was the product of "independent action of some third party not before the court," namely, "the votes cast by voters of the town." *Id.* Causation in *Nova* was likewise lacking because "the wrong defendant was selected." *Chamber of Commerce of the U.S. v. Edmondson*, 594 F.3d 742, 773-74 (10th Cir. 2010)(citing *Nova*). Here, DCSD is unquestionably the proper defendant and responsible for Zoes' *constitutional* injuries.

5. DCSD ignored Zoes' claims for nominal damages.

Awarding nominal damages will redress Zoes' past injuries by providing "vindication for a constitutional violation." *Price v. Charlotte*, 93 F.3d 1241, 1246 (4th Cir. 1996). Although the District Court did not dispute redressability, DCSD

now challenges "'redressability,'" alleging, "Plaintiffs have offered no evidence that any similar trips are likely to occur *in the future*." (D.Br.29-30)(emphasis added). This completely ignores Zoes' nominal damages claim, which "relates to *past* (not future) conduct." *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1526-27 (10th Cir. 1992).

B. Zoes have standing to enjoin the Christian Fundraising Practice.

The court's failure to separately analyze Zoes' prospective claims was fatal because injunctive relief does not depend on *past* exposure. (P.Br.52-53,57). DCSD apparently does not disagree.

III. Roes have standing to challenge the Christian Fundraising Practice.

A. Roes have standing to seek injunctive relief.

Even if Roes had no *past* exposure to the practice (*but see* P.Br.50-52), a sufficient threat of future injury existed at the time of the complaint. (P.Br.7-23,52-64). *E.g.*, *Lee*; *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 467 (5th Cir. 2001). DCSD once again fails to distinguish between retrospective and prospective relief. Specifically, it states that for *injunctive* relief, Roes must have *already* suffered an injury-in-fact. (D.Br.18,22).

The "purpose of an injunction is to prevent future violations,…and, of course, it can be utilized even without a showing of past wrongs." *Mitchell v. Hertzke*, 234 F.2d 183, 187 (10th Cir. 1956). It is axiomatic that "the injury

required for standing need not be actualized." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008). Inexplicably, DCSD argues that this is "incorrect." (D.Br.22). It offers no counter authority but instead endeavors to distinguish *Davis*. (D.Br.22-23). But *Davis* was cited merely to demonstrate the well-settled principle that past exposure is not required for injunctive relief. (P.Br.52). *E.g.*, *Sanchez v. Ledezma*, 422 Fed. Appx. 735, 737-38 (10th Cir. 2011)(citing *Davis*). DCSD's extended discussion of *Davis*'s facts is therefore a straw man argument.

Numerous controlling cases, including *Santa Fe*, *Wallace*, and *Awad*, *infra* at 25, stand for the identical proposition for which DCSD makes no attempt to distinguish. In *Awad*, for instance, the Court rejected DCSD's very argument, finding: "As in other Establishment Clause cases, Mr. Awad alleges that the amendment *threatens* him with noneconomic injuries." 670 F.3d at 1116, 1120-22 (emphasis added).

The Eleventh Circuit has likewise held: "we can conceive of no rational basis for requiring the plaintiffs to view in person the subject matter of the action prior to filing the suit." *ACLU v. Rabun Cnty. Chamber of Commerce*, 698 F.2d 1098, 1107 n.17 (11th Cir. 1983). The plaintiffs had standing to challenge a cross even though "each of the plaintiffs resides in Atlanta, which is more than 100 miles from the state park." *Id* at 1107. Only one had actually seen the cross before "the suit was filed and that sighting was from an airplane." *Id.* The "other plaintiffs

derived their information about the cross from anonymous phone calls and news releases." *Id.* The court reasoned that unlike in *Valley Forge*, the "plaintiffs in this case are residents of Georgia who make use of [Georgia] public parks." *Id.*

Roes' standing is far more direct than *Rabun*. (P.Br.55-56,64). Plaintiffs have standing to assert "that their use or enjoyment of a public facility is impaired by an alleged violation of the Establishment Clause." *Beaumont*, 240 F.3d at 466-67. "Such a claim of 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.'" *Id.* (citation omitted, emphasis added).

In *Beaumont*, the Fifth Circuit held that parents had standing to challenge a program where clergy were brought into school to provide counseling, 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 274, 282-85 (5th Cir. 1999). The court explained: "Doe children attend schools in which the program operates, and they are continually at risk of being selected." *Id*. The same risk is present here.

Other than pointlessly distinguishing *Davis*, DCSD contends that "[t]he second reason Plaintiffs are mistaken is because they gloss over the detailed, fact-specific inquiry an Establishment Clause standing analysis requires." (D.Br.23). This is a *non sequitur.* A plaintiff has standing to enjoin a future Establishment

Clause injury, regardless of past exposure, just as much as any other case. *E.g.*, *Awad*, *supra*. Tellingly, DCSD cites only two *non*-Establishment Clause cases for this proposition. (D.Br.23-24).

DCSD also has it exactly backwards. Whereas Appellants consistently urged the court to consider *all* relevant facts pertaining to the scope of DCSD's practices and past violations, DCSD took every step possible to thwart a fact-specific inquiry.[45] With the facts decidedly against it, DCSD first argued that "evidence of actions that occurred [before] October 22, 2012" is barred by statute of limitations. (J.A.1711). Next, DCSD attempted to preclude all evidence related to the religious nature of OCC and AIM on hearsay grounds. (J.A.1709-10). Lastly, DCSD filed a *motion in limine* seeking to preclude evidence of its widespread violations bearing on the "threat of repeated injury." *Tandy*, 380 F.3d at 1283. (J.A.1859).

1. Roes' future injury is imminent under *Lee*.

Roes need only show that they are threatened with future injury. *E.g. Lee*, 505 U.S. at 584. 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)). Roe-Daughter is particularly likely to encounter the practice in 2017. The court did not dispute that a "number of schools within the District,

[45] *Compare* (D.Br.1-14)(J.A.1709-11)(J.A.1858-68) *with* (P.Br.6-28)(J.A.1835-36) (J.A.1869-1884)

including [DCHS]…have participated in OCC." (J.A.1901). DCSD authorizes faculty to conduct OCC during freshman homeroom, including at DCHS.[46]

DCSD has not demonstrated that 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). (P.Br.18,57-64). On the contrary, it defends the practice.[47] Moreover, DCSD's pattern of repetitive violations and refusal to discontinue the practice makes future injury very likely. (P.Br.30).

DCSD nonetheless contends that Roes lack standing, asserting that 2017 is not "certainly impending" since it is "three years after the Complaint was filed." (D.Br.21-22). In *Lee*, however, the father had standing to enjoin graduation prayer throughout the district even though his daughter would only encounter the challenged activity, if at all, once in ***four years*** at a different school. 505 U.S. at 583-84. The Court explicitly found "a live and justiciable controversy is before us." *Id*. 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). DCSD fails to cite *Lee* let alone distinguish it.

[46] (J.A.550,559-60)(J.A.599)(J.A.1682)(J.A.1686)
[47] (J.A.550-51)(J.A.910-12)(J.A.985-86,994-96)(J.A.1725)(J.A.1832-33)

Additionally, DCSD ignores cases in which the future injury was entirely speculative. For instance, in *Elmbrook*, the Seventh Circuit recognized parents' standing to enjoin holding graduations in a church even though their children would not graduate for ***five years*** and their probability of encountering the practice was *unlikely* due to construction of new district facilities. 2010 U.S. Dist. LEXIS 72354, at *14-18, *standing aff'd*, 687 F.3d at 848.

The parents in *Santa Fe* had standing to enjoin prayer at school events for which they had no prior contact and there was "no certainty that any of the statements or invocations will be religious." 530 U.S. at 313-16. The plaintiffs in *Wallace v. Jaffree* similarly had standing to challenge an *unimplemented* voluntary "moment of silence" statute. 472 U.S. 38, 41-42, 60 (1985). DCSD urges the Court to ignore these cases because they "do not discuss standing." (D.Br.24). But the standing "analysis in these cases is instructive." *Cope v. Kan. State Bd. of Educ*., 821 F.3d 1215, 1221 n.** (10th Cir. 2016). *Accord Awad*, 670 F.3d at 1121 n.6.

More importantly, DCSD has not shown that the impending injury is based upon "a highly attenuated chain of [improbable] possibilities." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 11480-50 (2013)(plaintiff's claim was not certainly impending where it rested upon *five* speculative assumptions). For example, in *Los Angeles v. Lyons*, 461 U.S. 95 (1983), "a sequence of [four] individually improbable events" would have to occur:

> (1) Lyons would have to do something to cause another run-in with the Los Angeles police; (2) the city would have to have authorized all police officers to use choke holds unnecessarily; (3) the police officers in that specific encounter would have to use a choke hold; and (4) the use in that situation would have to have been unnecessary.

Browning, 522 F.3d at 1162 (citing *Lyons*). Here, Roe-Daughter need only matriculate to DCHS and be subject to the Christian Fundraising Practice. Neither of these events is at all improbable; both are indeed quite likely, *supra.*

DCSD relies upon three cases for its "conjectural" argument but none involve Establishment Clause claims and each is readily distinguishable. (D.Br.21-22). The injury in *Lujan v. Defs. of Wildlife* was too conjectural because the affiants merely professed an "intent" to return "to the places they had visited before," but lacked concrete plans to visit foreign countries that might have endangered species. 504 U.S. 555, 564 (1992). Roes profess far more than mere "'intent' to return" to the school where the violation occurred; Roe-Daughter will matriculate to DCHS in 2017 unless Roes move to avoid the religious practices they seek to enjoin. (P.Br.7)(J.A.1684)(J.A.1688).

This case is also plainly distinguishable from *Whitmore v. Arkansas*, a third-party standing case in which a capital defendant did not have standing to force appellate review of another defendant's death sentence. 495 U.S. 149, 157 (1990).

Finally, unlike in *Clapper* where respondents' feared their communications might be intercepted based on a chain of events that was both "highly attenuated"

and "highly speculative," 133 S. Ct. at 1148, the risk that Roe-Daughter will encounter OCC is immediate and very real. Indeed, DCHS already endorsed OCC while Roe-Son was in school.[48]

2. Roes are not merely "concerned bystanders."

DCSD relies extensively on *Valley Forge* to argue that Roes are nothing more than "concerned bystanders." (D.Br.19,47). But 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. (P.Br.55-56).

B. Roes have standing to seek nominal damages.

As this case was pending, Roes suffered the actual injury they sought to enjoin *because* it was impending at the outset of the case. (P.Br.50). Nominal damages will symbolically vindicate Roes' rights. While standing must ordinarily be evaluated from when the complaint was filed, notable exceptions exist where, as here, the threatened injury materialized after the complaint. *E.g.*, *Church of Scientology v. U.S.*, 506 U.S. 9, 12-13 (1992)("Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes [during litigation], a court does have power to effectuate a partial remedy").

[48] (J.A.550,559-60)(J.A.1683-84)

And contrary to DCSD's argument, Roe-Son was not required to be in the same room for Roes to suffer an injury-in-fact. In *Bell*, parents had standing to seek damages for religious student club meetings even though their children never attended the meetings. 766 F.2d at 1397-98. Appellants cited many other cases finding an injury-in-fact despite the children having no contact with the activity. (P.Br.50-54).[49] Rather than distinguish these cases, DCSD instead string-cites cases having nothing to do with the Establishment Clause or public schools. (D.Br.20). Yet standing is most expansive when parents challenge public school practices under the Establishment Clause. *See Beaumont*, 240 F.3d at 466-67.

IV. Roes and Zoes have standing to challenge the ongoing Faculty Participation Practice.

A. Zoes have standing to enjoin this practice.

Just like the District Court, DCSD ignored Zoes' standing to challenge the practice under the Establishment Clause. (P.Br.65). This was a reversible error (*id.*) and DCSD has not shown otherwise.

B. Roes have standing to enjoin their school's promotion of FCA.

Roes have standing to enjoin the practice because, at the time of the complaint, it applied to their school and threatened them with future injury.

[49] *E.g.*, *Zorach v. Clauson*, 343 U.S. 306 (1952); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981)

Schempp, 374 U.S. at 224 n.9.[50] DCHS faculty regularly initiate FCA activity, participate beyond mere oversight, and promote FCA.[51] And the fact that DCSD has "repeatedly engaged in the injurious acts in the past" makes it sufficiently likely DCSD "will engage in them in the near future." *Armstrong*, 275 F.3d at 861.

Indeed, this practice is itself an ongoing constitutional injury. *Santa Fe*, 530 U.S. at 316. When DCHS faculty promote FCA, DCSD is injuring 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). That "interest will continue so long as [they have] children in the local schools." *Id.*

With such overwhelming evidence against it, DCSD only dedicates one paragraph to Roes' standing to enjoin this practice and offers no counter evidence. (D.Br.21). Instead it merely tries, unsuccessfully, to distinguish *Bell.* In *Bell*, parents had standing to enjoin faculty participation 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. Like *Bell*, Roes also encountered FCA promotional materials: "Through many posters and communications at [DCHS]" and "their signs on the wall." (J.A.1669,1678). DCSD's argument erroneously assumes that Roes "had no

[50] (J.A.19)(J.A.1102)(J.A.1682-84)(J.A.1685-88)
[51] (J.A.655)(J.A.709-10)(J.A.784-804)(J.A.906,917-22)(J.A.956-71)(J.A.994-97) (J.A.1177-86)

personal contact with FCA." (D.Br.20). But Roes' contact with FCA is indistinguishable from *Bell*. (P.Br.65-66). In fact, Roes' standing is much stronger because the *Bell* family would not encounter the practice again since they moved. 766 F.2d at 1399.

Roes' standing is also supported by additional controlling precedent for which DCSD makes no attempt to distinguish. For instance, parents had standing to challenge off-site religious courses in *Zorach* and *Lanner* even though their children did not attend the courses. (P.Br.51-52).

C. The families have standing under the EAA.

Even if the zone-of-interest test applies to the EAA (*but see* P.Br.68-69), DCSD failed to show how Appellants' interests in preventing faculty participation in FCA are "marginally related to or inconsistent with the purposes implicit in the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388-89 (2014)(citations omitted). The analysis takes a "lenient approach" and the "'benefit of any doubt goes to the plaintiff.'" *Id.*

While DCSD dedicates nearly seven pages to EAA standing, it does not explain how the EAA provisions, *expressly* prohibiting faculty participation, fall outside the "zone-of-interests." (D.Br.42-49). Even DCSD acknowledges: "Congress sought to respect the constitutional demands of the *Establishment*, Free Exercise, and Speech Clauses." (D.Br.45)(emphasis added). The Congressional

Debates are illustrative: "The reason for [those provisions], in religion at least, is that some of them will have teacher leadership and the relationship would be such that it might infringe on the establishment clause."[52]

V. This Court should not overrule the municipal taxpayer doctrine.

It has long been held that "resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation." *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923). This applies equally to school district taxpayers raising Establishment Clause challenges to district expenditures. *Everson v. Bd. of Educ.*, 330 U.S. 1, 3-4 (1947). DCSD does not deny that the families are district taxpayers and that district funds are expended on the challenged practices. (D.Br.30-42).

In contrast to state and federal standing, "the expenditures need not be great, as shown by *Lynch v. Donnelly*…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).[53] Even local funds "in the form of materials and personnel time" is sufficient. *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1267 (11th Cir. 2008). In *Newman*, for instance, it was sufficient that local taxpayer funds "were used to print the flyers." 181 F. Supp. 2d at 1377-78.

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[52] Cong. Rec. 19,223 (June 1984)
[53] *Accord Citizens Concerned v. Denver*, 508 F. Supp. 823, 825-26 (D. Colo. 1981)

At a minimum, DCSD personnel time and materials are expended on the practices, including creating and printing flyers and donation letters, organizing fundraisers, and using District email to promote Christian organizations.[54] Conceding these expenditures are enough under municipal taxpayer jurisprudence, DCSD asks this Court to abolish municipal taxpayer standing altogether. (D.Br. 36). But this is the Supreme Court's "prerogative alone." *U.S. v. Hatter*, 532 U.S. 557, 567 (2001).

DCSD relies upon *Doremus*'s citation of *Frothingham* as evidence that the Court meant the pocketbook-injury requirement to extend to municipal-taxpayer cases, "but nothing about *Doremus*'s citation of *Frothingham* suggests that inference." *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 212-13 (6th Cir. 2011). (D.Br.33,36-37). Certainly, "if the Court had intended the pocketbook-injury requirement to apply to municipal taxpayers, it could have said so much more directly." *Id.* Circuit courts "should be very careful to suggest the Supreme Court has implicitly reversed itself." *Cressman v. Thompson*, 2013 U.S. App. LEXIS 11705, *48 (10th Cir. June 12, 2013).

That school districts are called "political subdivisions" is irrelevant. (D.Br.30-32)(P.Br.71). Colorado statutes define "political subdivision" to include

[54] (J.A.319-21)(J.A.650,654,656)(J.A.715-23)(J.A.762-83)(J.A.805-09)(J.A.827-29) (J.A.839)(J.A.854-59)(J.A.876)(J.A.885)(J.A.896-97)(J.A.900-03)(J.A.1003-09) (J.A.1057-60,1064-65,1077-78)(J.A.1156,1158-1359)

"every county, city and county, city, town, school district."[55] And municipal taxpayer standing undoubtedly applies to counties and cities.[56] Therefore, DCSD's argument leads to the absurd result that counties and cities are exempt from municipal taxpayer standing.

Whatever the label, DCSD is a local entity with separate taxing power. The cases DCSD relies upon support this conclusion. (D.Br.30-32). In *Owens v. Colo. Cong. of Parents*, the court made clear that "local control requires a school district to have discretion over any instruction paid for with locally-raised funds." 92 P.3d 933, 939 (Colo. 2004).

Nor does it matter that DCSD receives some funding from other sources. *Smith*, 641 F.3d at 210-16; & *id.* at 220-21 (Boyce, J., concurring). "[M]unicipal-taxpayer standing has never hinged on the amount by which an expenditure would affect the municipal treasury." *Id.* In *Elmbrook*, for instance, certain plaintiffs had municipal taxpayer standing to challenge a school district's practice of holding graduations in a church even though the funds were comingled with other revenue sources. 2010 U.S. Dist. LEXIS 72354, at *9-10, *18-19.

CONCLUSION

The families' past and continued personal, unwelcome contact with both challenged practices confers standing to sue. DCSD brings forth no coherent

[55] *E.g.*, C.R.S.11-101-301 (Financial Institutions); C.R.S.24-72-202 (CORA)
[56] *E.g.*, *Denver*, 508 F. Supp. at 825-26

standing analysis but instead asks this Court to affirm the conclusions of the lower court, which Appellants have shown to be unquestionably erroneous. Accordingly, Appellants ask the Court to reverse, order that judgment be entered for Appellants, and remand for attorneys' fees and costs. (P.Br.72-73). Alternatively, they ask the Court to remand for consideration on the merits.

Respectfully submitted,

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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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

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Monica L. Miller

CERTIFICATE OF SERVICE

I certify that on July 29, 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.

August 1, 2016

s/ Monica L. Miller
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