

APPENDIX A

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

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| <p>FREEDOM FROM RELIGION FOUNDATION, INC. et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>MERCER COUNTY BOARD OF EDUCATION, et al.,</p> <p>Defendants.</p> | <p>Civil Action No.: 1:17-cv-00642</p> <p>Hon. David A. Faber</p> |
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**DEFENDANTS' MOTION TO
STAY PROCEEDINGS AND VACATE
SCHEDULING ORDER**

(Filed Feb. 22, 2019)

Come now Defendants, by counsel, pursuant to 28 U.S.C. §2101, and move this Honorable Court to stay these proceedings and vacate the Scheduling Order entered February 5, 2019, such that Defendants may seek a writ of certiorari from the Supreme Court of the United States. In support of their Motion, Defendants state as follows:

1. This Court entered an Amended Memorandum Opinion and Order, ECF No. 47, on or about November 14, 2017, wherein this Court granted Defendants' Motion to Dismiss and dismissed this matter in its entirety without prejudice.

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2. On or about December 14, 2017, Plaintiffs filed a Notice of Appeal wherein Plaintiffs appealed the aforementioned Order to the United States Court of Appeals for the Fourth Circuit.

3. On or about December 17, 2018, the United States Court of Appeals for the Fourth Circuit issued a published opinion, ECF No. 59, reversing the aforementioned November 14, 2017, Order of this Court.

4. Based upon Defendants' filing of a Petition for Rehearing, the United States Court of Appeals for the Fourth Circuit issued a Stay of Mandate, ECF No. 62, on January 15, 2019.

5. The United States Court of Appeals for the Fourth Circuit issued an Order on January 28, 2019, ECF No. 63, denying the Petition for Rehearing.

6. Based upon the foregoing, this matter was remanded to this Court where an Order was entered February 5, 2019, ECF No. 66, establishing Rule 26 deadlines and a scheduling conference.

7. A party may seek review of a judgment or order by the Supreme Court of the United States within ninety (90) days from the entry of such judgment or order. 28 U.S.C. §2101.

8. If a petition for rehearing is timely filed, or is otherwise entertained, before a circuit court of appeals, the time for seeking review by the Supreme Court of the United States begins to run from the denial or other disposition of such a petition for rehearing. Sup. Ct. R. 13.

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9. As the United States Court of Appeals for the Fourth Circuit denied Defendants' Petition for Rehearing on January 28, 2019, Defendants have ninety (90) days therefrom to seek a writ of certiorari from the Supreme Court of the United States.

10. When a decision of a lower court is subject to review by a writ of certiorari, the matter may be stayed for such reasonable time as is necessary for a party to seek a writ of certiorari. 28 U.S.C. §2101.

11. As Defendants anticipate seeking to obtain a writ of certiorari from the Supreme Court of the United States to review the published Opinion of the United States Court of Appeals for the Fourth Circuit, this matter should be stayed for such time as is necessary for Defendants to seek such writ of certiorari.

12. If the Supreme Court reinstates this court's order, then the case is final and any expenses toward continuing this litigation will have been wasted. Therefore, this stay is necessary to avoid wasting the Court's and the parties' resources litigating issues that may be resolved by the Supreme Court after review.

13. Moreover, the Fourth Circuit's decision runs contrary to several other circuits that indicate courts must give solicitude to government officials on issues of voluntary cessation. *See e.g., Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009) ("[C]ourts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooted cases that might have been allowed to proceed had the defendant not been a public entity.");

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Yarls v. Bunton, 905 F.3d 905, 911 (5th Cir. 2018) (“[W]ithout evidence to the contrary, we assume that formally announced changes to official government policy are not mere litigation posturing.”); *Marcavage v. Nat’l Park Serv.*, 666 F.3d 856, 861-862 (3d Cir. 2012) (“This presumption [that government officials act in good faith] and the changes to the Park Service’s regulations . . . make it unreasonable to expect that future constitutional violations will occur.”); *see also Nelson v. Miller*, 570 F.3d 868, 882 (7th Cir. 2009) (finding a case moot where the government changed its behavior “and there is no evidence in the record” that it would resume its old behavior.)

14. While the Fourth Circuit never passed upon the January 3, 2019, resolution adopted by the Mercer County Board of Education resolving that it does not intend now or in the future to offer a Bible elective curriculum in any of its elementary schools, nor employ teachers for that purpose, we believe that resolution definitively resolves any possible concerns the court may have about the program’s future: the curriculum is gone permanently. Nonetheless, Defendants intend to seek review of the Fourth Circuit’s opinion concerning the important standing and ripeness issues it raises.

WHEREFORE, Defendants request this Honorable Court grant their Motion, enter an Order staying these proceedings and vacating the Scheduling Order for such time to permit them to seek review of the published Opinion of the United States Court of Appeals for the Fourth Circuit by the Supreme Court of the

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United States, and award them such other and further relief as this Court deems proper.

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

/s/ Kermit J. Moore

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CERTIFICATE OF SERVICE

I, Kermit J. Moore, counsel for Defendants, hereby certify that on the 22nd day of February, 2019, I electronically filed the preceding DEFENDANTS' MOTION TO STAY PROCEEDINGS AND VACATE SCHEDULING ORDER with the Clerk of this Court using the CM/ECF system, which, in turn, will send

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notification of such filing to the following CM/ECF participants, counsel of record:

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/s/ Kermit J. Moore

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
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| FREEDOM FROM RELIGION FOUNDATION, INC. et al., | |
| Plaintiffs, | Civil Action No.: |
| v. | 1:17-cv-00642 |
| MERCER COUNTY BOARD OF EDUCATION, et al., | Hon. David A. Faber |
| Defendants. | |

**DEFENDANTS MERCER COUNTY BOARD OF
EDUCATION, MERCER COUNTY SCHOOLS, AND
DR. DEBORAH AKERS'S MOTION TO DISMISS**

(Filed Apr. 10, 2019)

Come now defendants Mercer County Board of Education, Mercer County Schools, and Dr. Deborah Akers (collectively “Defendants”), by counsel, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and move this Honorable Court to dismiss the claims set forth against them for failure to state a claim upon which relief may be granted. In support of their Motion, Defendants state as follows:

1. On December 17, 2018, the United States Court of Appeals for the Fourth Circuit (hereinafter “Fourth Circuit”) held that the instant case is not moot because the Bible in the Schools (hereinafter “BITS”)

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program was suspended, rather than eliminated outright. ECF No. 59.

2. On January 3, 2019, the Mercer County Board of Education (hereinafter the “Board”) passed a resolution stating that the Board: (1) “will never offer or employ the BITS program in any of its schools;” (2) “does not now or in the future intend to offer a Bible elective curriculum in any of its elementary schools;” and (3) “will not now or in the future employ teachers for the purpose of teaching a Bible elective curriculum in any of its elementary schools.” See Declaration of Paul Hodges, incorporated and attached hereto as Exhibit 1.

3. Plaintiffs’ First Amended Complaint fails to identify any personal actions taken by Dr. Akers, but relies only upon allegations that Dr. Akers is liable as a supervisor. ECF No. 21, ¶ 98.

4. According to Plaintiffs’ First Amended Complaint, Jessica Roe was exposed to the BITS program no later than 2013, but did not file the present suit until January 18, 2017. ECF No. 21, ¶¶ 34-35.

5. Where a legislative body formally repeals a policy, the Fourth Circuit has held that the case is moot unless “reenactment is not merely possible but appears probable.” *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006).

6. A claim for nominal damages does not prevent a determination that a case is moot. See *Am. Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001).

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7. In an action against a supervisor under § 1983, a plaintiff “must show actual or constructive knowledge of a risk of constitutional injury, deliberate indifference to that risk, and an affirmative causal link between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff.” *Carter v. Morris*, 164 F.3d 215, 221 (4th Cir. 1999) (internal quotations omitted).

8. Qualified immunity “protects government officials from civil damages in a 42 U.S.C.S. § 1983 action insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 250 (4th Cir. 1999).

9. When analyzing the applicability of qualified immunity, a court may first look to whether the right allegedly violated is “clearly established;” if the allegedly violated right is not clearly established, immunity is proper. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

10. A right is clearly established only when it has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state. *Doe v. S.C. Dep’t. of Soc. Servs.*, 597 F.3d 163, 176 (4th Cir. 2010).

11. Establishment Clause precedents lack clarity and consistency, and fall into an area of “hopeless disarray”. *Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

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12. To establish § 1983 liability for a municipality, a plaintiff must show that the violation was made by a final policy making official. *Semple v. City of Moundsville*, 195 F.3d 708, 712 (4th Cir. 1999).

13. A claim brought pursuant to § 1983 is subject to the statute of limitations for a personal injury action in the state it is brought; in West Virginia, that is two years. *Bell v. Bd. of Educ.*, 290 F. Supp. 2d 701, 709 (S.D.W. Va. 2003).

14. As the Board has terminated, rather than suspended, the BITS program and has proclaimed its intention that the program will never be revived, Plaintiffs' claims are moot, even when considering their request for nominal damages.

15. Plaintiffs have failed to establish a § 1983 claim against Dr. Akers because there is no personal action of Dr. Akers alleged to have caused any injury.

16. Even if Plaintiffs have established a § 1983 claim against Dr. Akers, she is entitled to qualified immunity because the lack of clarity and consistency in Establishment Clause jurisprudence evidences the rights allegedly violated were not "clearly established."

17. Mercer County Schools is not the final policy making body for the school district and therefore is not subject to a § 1983 claim.

18. Plaintiffs filed this suit more than three years after their claim accrued; thus, their claims are barred by the two-year statute of limitations for a § 1983 claim.

19. Defendants incorporate the supporting Memorandum of Law filed contemporaneously herewith.

WHEREFORE, Defendants request this Honorable Court grant their Motion; enter an Order dismissing the case as moot, or in the alternative, dismiss all claims as barred by the statute of limitations, or in the further alternative, dismiss the claims against Dr. Akers and Mercer County Schools for failure to state a claim, or dismiss the claims against Dr. Akers based upon qualified immunity; and, award them such other and further relief as this Court deems proper.

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

/s/ Kermit J. Moore

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CERTIFICATE OF SERVICE

I, Kermit J. Moore, counsel for Defendants, hereby certify that on the 10th day of April, 2019, I electronically filed the preceding DEFENDANTS MERCER COUNTY BOARD OF EDUCATION, MERCER COUNTY SCHOOLS, AND DR. DEBORAH AKERS'S MOTION TO DISMISS with the Clerk of this Court using the CM/ECF system, which, in turn, will send notification of such filing to the following CM/ECF participants, counsel of record:

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