No. 18-1487

IN THE

Supreme Court of the United States

MERCER COUNTY BOARD OF EDUCATION; MERCER COUNTY SCHOOLS; DEBORAH S. AKERS, IN HER INDIVIDUAL CAPACITY,
Petitioners,

v.

ELIZABETH DEAL; JESSICA ROE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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In a published, precedential decision, the Fourth Circuit held that a student who leaves a school district with no stated intention ever to return—even if awarded all relief sought—nevertheless has Article III standing to seek to enjoin that school district's curriculum. The Fourth Circuit dismissed as empty "formalism" this Court's longstanding requirement that to establish standing to seek an injunction, a plaintiff must allege that a challenged government policy poses a non-speculative impediment to the plaintiff's concrete present or future plans. Instead, the Fourth Circuit held that a plaintiff can establish standing to enjoin a government policy merely by hypothesizing that an injunction might help redress "enduring feelings of marginalization" allegedly caused by *past* exposure to the policy, or could remove an obstacle to the speculative possibility that the plaintiff might one day decide to return. App. 8a-11a. For all the reasons set forth in Petitioners' opening brief, the decision below should be summarily reversed. *See Am. Tradition P'ship v. Bullock*, 567 U.S. 516, 516-17 (2012) (per curiam) (summary reversal is appropriate where "[t]here can be no serious doubt" that the decision below is wrong, and any arguments to the contrary have "already [been] rejected" by other decisions).

Respondents contend that the Petition should be denied because "[t]he Question Presented is trivial." Opp. 11. But as the amicus brief filed in support of the Petitioners by the States of Texas, Alabama, Alaska, Arkansas, Indiana, Louisiana, South Carolina, South Dakota, and West Virginia explains, "Article III's

standing requirements protect governmental entities from unnecessary, speculative, and burdensome lawsuits grounded not in actual injuries but rather in policy disagreements." Amicus Br. 1. The Fourth Circuit's stark departure from *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), *see* Pet. 12-15, would open the floodgates for ideologically committed plaintiffs to seek intrusive injunctive relief against schools and other under-resourced governmental entities based on nothing more than asserted hurt feelings or speculative future possibilities. Indeed, Respondents proudly trumpet the fact that following the Fourth Circuit's remand they have been permitted to subject Mercer County Schools to burdensome discovery, Opp. 6; but that admission sharply illustrates the importance of strictly enforcing Article III's requirement that standing to seek an injunction be limited to plaintiffs who would actually, concretely benefit from one. If the decision below is left to stand, that bedrock requirement will no longer be the law in the Fourth Circuit.

Respondents frivolously assert that the case is not in a proper posture for review by this Court because it is "interlocutory," and contend that the Court should wait to review the standing ruling below until the remand proceedings conclude. To begin, this Court has granted petitions for writs of certiorari in numerous Article III standing cases in recent years that were in a similar procedural posture. *See, e.g., Clapper v. Amnesty Int'l USA,* 568 U.S. 398 (2013) (district court dismissed complaint for lack of standing; the Second Circuit reversed and remanded; petition for certiorari granted); *Spokeo v. Robins*, 136

S. Ct. 1540 (2016) (district court dismissed complaint for lack of standing; the Ninth Circuit reversed and remanded; petition for certiorari granted). The question presented by this Petition will not ripen with further remand proceedings. And allowing the Fourth Circuit's decision to stand in the meantime would not only subject Petitioners to the significant burden of improper injunctive relief litigation they can ill afford to defend,[1] but it would also subject other governmental entities within the Fourth Circuit (including amici South Carolina and West Virginia) to a distorted, capacious Article III standing regime that will encourage plaintiffs to overwhelm them with improper injunctive relief lawsuits too.

Respondents also attempt to defend the Fourth Circuit's decision on the merits, relying on the straw man that a plaintiff who is avoiding a government policy has Article III standing to sue to enjoin it, and

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[1] Respondents assert that Petitioners' burden of further defending the case is inevitable because "a decision from this Court would simply take one form of relief off the table, allowing the balance of the case to proceed." Opp. 10. Not so. The decision below based its holding that Jessica has Article III standing *entirely* on her injunctive relief claim. But Jessica has not asserted any claim for compensatory damages, so dismissal of the injunctive relief claim would leave her with only a standalone claim for nominal damages. A reversal and remand would thus require the Fourth Circuit to grapple with the standing question that the district court decided in favor of Petitioners but that the Fourth Circuit sidestepped on appeal: whether a standalone claim for nominal damages can create a sufficiently concrete interest to give rise to Article III standing. Pet. 4 n.1; *compare* App. 11a n.5. The case could not and would not proceed unless Jessica prevailed on that question (and she did not prevail on it before the district court, *see* App. 32a-35a).

that "the word 'avoid' does the requisite work." Opp. 12. But even if that was true, the word "avoid" is nowhere in the Amended Complaint, nor does it describe acts of avoidance. Pet. 7-8. The Amended Complaint alleges that Jessica experienced past, completed harms in Mercer County Schools; states that those past harms were a "major reason" that Deal removed her from Mercer County Schools; and does not state any intention or desire ever to return, under any set of circumstances. Pet. 8. Without any stated intention or desire ever to return to Mercer County Schools, Jessica's former school's former curriculum cannot possibly be interfering with any concrete present or future plan that she or Deal may have, and an injunction will not benefit them. It is immaterial for standing purposes that Deal may be spending money to send Jessica to the school she currently attends, Opp. 17, since the Amended Complaint gives no indication that an injunction would cause Deal to return Jessica to Mercer County Schools, and thereby relieve her of that expense.[2]

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[2] Indeed, given that the program leading to the controversy was ended shortly after Jessica left Mercer County Schools and she has made not even the slightest inquiry into returning, it is plain that this suit is simply a vehicle for Respondents to express their strident disagreement with the school's former policy. However, a disagreement between parties is insufficient to create Article III standing. *See Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."); *see also Am. Legion v. Am. Humanist Ass'n,* 139 S. Ct. 2067, 2099 (2019), Gorsuch, J. *concurring*. ("If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the judiciary's limited

Finally, Respondents are simply wrong when they flippantly label the injunctive standing requirements set forth in *Summers* a "magic words" exercise that would easily be circumvented through "nothing more than an editorial adjustment." Opp. 12. Words matter: the laws of perjury and the rules of civil procedure and professional responsibility prohibit litigants and attorneys alike from making false statements to courts. Indeed, this case amply demonstrates the power of this principle in practice, as when pressed at oral argument in the district court to aver that Jessica would return to Mercer County Schools if the court entered an injunction, counsel for Respondents repeatedly refused to do so. Opp. 4. Making such a representation would obviously have bolstered counsel's argument that his clients had standing to pursue injunctive relief, yet he declined to do so because he knew there was no factual basis for such a statement. Our system of justice relies on the notion that litigants and attorneys can similarly be expected to adhere to their duty of candor when presenting their cases to the courts, even if that means that under a proper application of Article III standing requirements their case will be dismissed.

CONCLUSION

This Court should summarily reverse the judgment of the Fourth Circuit. In the alternative, the Court should grant the petition for a writ of certiorari, set the case for full merits briefing, and reverse the judgment below.

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constitutional mandate and infringing on powers committed to other branches of government.").

Respectfully submitted,

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