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

Herman Mays Jr., on his own behalf and as next friend and parent of C.M.; Elizabeth Mays, on her on behalf and as next friend and parent of C.M.; Bethany Felinton, on her own behalf and as next friend and parent of S.F., E.F., and C.F.; Jana Tigchelaar, on her own behalf and as next friend and parent of C.T. and S.T.; and Max Nibert. ***Plaintiffs,*** **vs.** **The Cabell County Board of Education; Ryan Saxe, in his official capacity as Superintendent of Cabell County Schools; Daniel Gleason, in his individual capacity and in his official capacity as Principal of Huntington High School, and Jeff Jones, in his individual capacity and in his official capacity as a Cabell County Schools teacher.** ***Defendants.***	**CIVIL ACTION NO.: 3:22-cv-00085**

Plaintiffs' Omnibus Response in Opposition to Defendants' Motions to Dismiss

Introduction

Defendant Cabell County Board of Education (the "Board") and its named-Defendant administrators, Ryan Saxe and Daniel Gleason, maintain a custom of permitting school administrators, teachers, and outside third parties to promote evangelical Christianity and conduct religious activities directed at Cabell County Schools ("CCS") students. The Board and its administrators established this custom over a course of years through deliberate indifference towards the constitutional rights of their students, even in the face of multiple written complaints. By creating and maintaining this custom, CCS has aligned itself with evangelical Christianity

and created an ongoing risk to CCS students that they will be exposed to unlawful promotions of this faith by CCS, its administrators and teachers, and outside parties.

The risks stemming from this custom manifested most recently on February 2, 2022, when an in-school religious revival was directed towards students in the Huntington High School ("HHS") auditorium. Pursuant to Defendants' custom, Defendants Gleason and Jeff Jones coordinated and organized the revival, and Defendant Gleason scheduled it.

The occurrence of this recent in-school revival can be used to frame both forms of relief sought by Plaintiffs. In connection with their injuries stemming from the revival, Plaintiffs seek retrospective relief in the form of nominal damages. Looking forward, Plaintiffs seek prospective relief to enjoin Defendants' longstanding custom that allowed this recent constitutional violation to occur and threatens to produce similar violations of the rights of CCS students in the future.

Defendants miss this distinction entirely. They fundamentally misapprehend Plaintiffs' case as presenting only claims that rise and fall on the events of February 2, 2022. As a result, Defendants fail to confront the custom-based municipal liability claim at the heart of Plaintiffs' case. This failure renders Defendant Board's and Defendant Saxe's Motions to Dismiss mere *partial motions* because they do not address the core theory of liability supporting Plaintiffs' request for injunctive relief against the Board and Saxe in his official capacity. This failure is not rescued by Defendants' arguments, collectively spanning more than a dozen pages, that injunctive relief sought by Plaintiffs is too broad; prayers for relief do not provide a basis for dismissal at the Rule 12 stage. Thus, the moving Defendants have failed entirely to challenge the cognizability of Plaintiffs' municipal liability claim.

Defendants' misapprehension of Plaintiffs' claims is apparent in their flawed standing arguments as well. Defendants challenge the standing of those students who did not attend the

February 2, 2022 "assembly," arguing that such attendance can be the only basis for standing since the case "arises out of events that occurred at Huntington High School on February 2, 2022." Again, Defendants' narrow view of Plaintiffs' claims misses entirely the risk of future injury stemming from the ongoing custom outlined in the Amended Complaint. This ongoing risk of future constitutional rights deprivations is a cognizable injury-in-fact for which all student-Plaintiffs and their parents may seek injunctive relief.

Beyond misapprehending Plaintiffs' claims, Defendants cavalierly introduce new facts—not contained in the Amended Complaint—to support their legal arguments. The impropriety of this conduct is well established. A defendant may not premise Rule 12 arguments on facts outside the complaint. Defendants' egregious disregard of this precept must not be countenanced by the Court, and their arguments that rely upon such improperly proffered facts must be disregarded.

Defendants' flawed characterization of Plaintiffs' claims and improper introduction of new facts to render the majority of Defendants' arguments nothing more than strawman attacks to the actual Amended Complaint. These arguments fail to meaningfully address the actual facts and legal claims before the Court. Properly characterized, Plaintiffs' claims and their supporting facts present cognizable claims for retrospective and prospective relief. Thus, Defendants' motions must be denied in their entirety.

Factual Allegations

I. Cabell County Schools Board of Education and its administrators maintain a custom of permitting school administrators, teachers, and outside third parties to promote evangelical Christianity and conduct religious activities directed at Cabell County Schools students.

Defendants Cabell County Board of Education, Saxe, and Gleason maintain a custom of permitting outside adults into schools to promote religion to students. Amended Complaint

("AC") ¶ 84. This custom also extends to permitting CCS teachers to initiate and lead religious activity towards students. AC ¶ 85.

Several instances of religion-promoting conduct by teachers and outsiders have occurred pursuant to this custom. A middle school teacher acting under the auspices of a student group (the Fellowship of Christian Athletes) holds religious meetings in which he attempts to convert middle school students to evangelical Christianity (AC ¶¶ 94-101); a Huntington High School teacher, with the knowledge of the Board and administration, hosts prayer on school property before the official start of the school day (AC ¶¶ 103-106); an elementary school ceremony included a guest speaker who spoke extensively about God and encouraged fifth graders to listen to their priests and pastors (AC ¶ 112); a religious group known as Generation NXT allegedly operated out of Huntington Middle School and Cabell Midland High School (AC ¶¶113-116); Huntington High School held an assembly with a guest speaker who proselytized to students (AC ¶¶ 120-124); and Huntington High School held an assembly with Christian rappers where presenters told students to pray (AC ¶¶ 125-127).

Moving Defendants have had knowledge of these prior incidents and the custom they have created, but they have failed to act to disband or disavow the custom and have failed to train CCS's employees regarding the Establishment Clause rights of students. AC ¶¶ 87, 94, 103-104, 110-11, 113, 118-19, 125, 129-132.

II. Principal Gleason and Jeff Jones acted pursuant to this custom by personally organizing and scheduling a revival performed by Nik Walker Ministries on February 2, 2022.

On February 2, 2022, Nik Walker Ministries, through evangelist Nik Walker, conducted a religious revival in the Huntington High School auditorium, during the school day and before students (the "Nik Walker revival"). AC ¶¶ 17, 24. At the revival, Walker intimidated students

and urged them to follow Jesus. AC ¶¶ 38-45. Two entire classes, in which Plaintiffs C.M. and S.F. were students, were required to attend the Nik Walker revival.[1] AC ¶¶ 50-52, 58-65.

The Nik Walker revival was not student initiated, and was organized by Principal Gleason, teacher Jeff Jones, and local ministers. AC ¶¶ 25-26. Defendant Jones coordinated with a pastor at Christ Temple Church and Defendant Gleason to organize the revival, and Defendant Gleason approved and scheduled the Nik Walker revival. AC ¶¶ 27-32. Before the assembly, Defendants Gleason and Jones attempted to recruit students to attend. AC ¶¶ 33-35.

Standard of Review

While the well-settled standard for review for consideration of motions to dismiss seldom bears mentioning, it warrants discussion here because of Defendants' blatant disregard for its parameters. To defeat a Rule 12(b)(6) motion to dismiss, a plaintiff's allegations must demonstrate that her claim is "facially plausible." *Wag More Dogs v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (citation omitted). Importantly, at this stage, the court "must accept as true all of the factual allegations contained in the complaint" and may ignore "bare legal conclusions" and "unwarranted inferences, unreasonable conclusions, or arguments." *Williams v. West Virginia State Police*, 2017 WL 833051, at *2 (Mar. 2, 2017) (internal quotations and citations omitted). Thus, extra-complaint contentions in briefing by counsel for a party moving to dismiss under Rule 12(b)(6), must be disregarded by the Court. *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 449 (4th Cir. 2011) (citation omitted).

I. Plaintiffs have Establishment Clause standing to sue these Defendants.

As discussed above, Defendants' motion to dismiss for lack of standing is premised upon a fundamental misunderstanding of the nature of Plaintiffs' claims. Defendants do not challenge

[1] Allegations of the other Plaintiffs are reviewed in Section I.B. of Plaintiffs' Argument.

the standing of C.M. and S.F. (and their parents) because they were forced to attend the Nik Walker revival, while Defendants challenge the standing of the remaining plaintiffs because they did not attend the revival. ECF No. 20, 16-18; ECF No. 22, 15-17; ECF No. 24, 13-15. But as discussed above, these Plaintiffs who did not attend the revival premise their claims upon the Board's custom of permitting outside promotion of evangelical Christianity, the past events this custom has encouraged, and the risks this custom poses for them in the future. Fourth Circuit caselaw supports that all Plaintiffs have standing to pursue their claims for nominal damages for past injury and injunctive relief to prevent future rights deprivations.

A. The Fourth Circuit recognizes Establishment Clause standing premised upon contact with, avoidance of, and future risk as to CCS's unlawful religious activity and association with religion.

Two of the many injuries-in-fact the Fourth Circuit has found sufficient to confer Establishment Clause standing are relevant to this case.[2] *See Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 258-59 (4th Cir. 2018), *vacated on other grounds*, 138 S. Ct. 2710 (2018). The classic Establishment Clause injury of "direct, unwelcome contact" with religious activity or avoidance of the same confers standing in this Circuit. *Deal*, 911 F.3d at 188 n.2 (citing *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1087-88 (4th Cir. 1997). In addition, specific "[f]eelings of marginalization and exclusion are cognizable forms of injury." *Moss v. Spartanburg*, 683 F.3d 599, 607 (4th Cir. 2012) (citing *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005)). These spiritual and value-laden injuries are sufficient Establishment Clause injuries-in-fact, "because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the

[2] The Fourth Circuit has recently reinforced that Rule 12 challenges to standing are subject to the general rule that requires courts to consider only those facts alleged in the complaint, construed in favor of the plaintiffs. *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 187 (4th Cir. 2018) (citations omitted).

State from sending a message to non-adherents of a particular religion 'that they are outsiders, not full members of the political community.'" *Id.* As such, these injuries "need not rest on a single isolated fact but can instead arise from multiple related factors." *Int'l Refugee Assistance Project,* 883 F.3d at 259; (citing *Moss,* 683 F.3d at 607).

B. All student Plaintiffs and their parents have suffered and are suffering recognized Establishment Clause injuries-in-fact.

All student Plaintiffs and their parents have suffered and are suffering Establishment Clause injuries-in-fact recognized by the Fourth Circuit. While not all Plaintiffs were directly exposed to the Nik Walker revival, all Plaintiffs have been made to feel like outsiders in their school community as a result of events like the Nik Walker revival and Defendants' custom of permitting outsider religious activity and promotion. This custom subjects students like Plaintiffs to unwanted religious activity without warning (as happened for C.M. and S.F. in the case of the Nik Walker revival), negatively affects their relationships with other students, and requires their parents to take on burdens to ensure their children are not exposed to religious activity to which these parents object.

These injuries and threats of future injury are the sort of injuries-in-fact that confer standing under applicable Supreme Court and Fourth Circuit caselaw. The students have been turned into outsiders on a religious basis in their school communities. *See Deal,* 911 F.3d at 188; *Moss,* 683 F.3d at 607 (Recognizing "ongoing feelings of marginalization and exclusion" as injuries in fact). The students' parents have "assumed special burdens" to protect their children from future unwelcome religious exercises. *Deal,* 911 F.3d at 188; (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 n.22 (construing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963)). Even with these efforts, all the Plaintiff-students are at risk of future exposure to unwanted religious activity and the ongoing

association between Defendants and evangelical Christianity. Thus, if the Complaint includes allegations supporting the presence of these injuries, Plaintiffs have standing to seek nominal damages based upon their past injuries and injunctive relief to prevent similar future injuries.

1. Bethany Felinton, E.F., and C.F. have been made to feel like outsiders in the community, and Bethany Felinton must undertake special burdens due to the risk that these Plaintiffs will suffer these feelings and contact with unwanted religious activity in the future.

Bethany Felinton' is the parent of S.F., who was forced to attend the Nik Walker revival. AC ¶ 10. She is also the parent of E.F., another Huntington High School student, and C.F., a Southside Elementary School student. AC ¶ 10. C.F. will attend Huntington Middle School next school year and eventually will attend Huntington High School. AC ¶ 175. While S.F. was the only family member forced to attend the Nik Walker revival, the entire family has suffered the consequences of the event and the school's association with evangelical Christianity as evidenced by the event and Defendants' custom of permitting such events to occur. AC ¶172.

Foremost, these Plaintiffs have been made to feel like outsiders in their community. After Bethany Felinton publicly expressed disapproval of the Nik Walker revival, the family's home received proselytizing literature in their mailbox. AC ¶ 157. C.F. was bullied at Southside Elementary School because it was known that C.F's family had objected to the Nik Walker Ministries revival. AC ¶ 174. These feelings of marginalization are exacerbated by the prior religious activity at Southside Elementary School and Huntington Middle School, which occurred pursuant to Defendants' widespread custom and practice these Plaintiffs now challenge. AC ¶¶ 111-117.

In addition, Bethany Felinton, as a parent of S.F, E.F, and C.F. feels obligated to undertake additional burdens to monitor school activities to ensure that her children will not be indoctrinated in religious matters while at school. AC ¶ 171. This is necessary because it is

important to her as a parent that her children are not improperly influenced on religious matters by their school. AC ¶ 173. By virtue of Defendants' longstanding custom, even with these extra burdens being undertaken by Bethany Felinton, her children are at risk of future contact with this unwanted religious activity and influence, as well as future feelings of marginalization.

2. Jana Tigchelaar, C.T. and S.T. have been made to feel like outsiders in the community, and Jana Tighcelaar must undertake special burdens due to the risk that these Plaintiffs will suffer these feelings and contact with unwanted religious activity in the future.

Jana Tigchelaar is also the parent of CCS students impacted by the Defendants' custom and practice challenged by the Amended Complaint. C.T. is a Huntington High School student and S.T. attends Huntington Middle School. AC ¶ 11. S.T. will continue to attend Huntington Middle School next school year and then will attend Huntington High School. AC ¶ 182.

C.T. has been made to feel like an outsider by Defendants' longstanding custom and the Nik Walker revival this custom enabled. C.T. was aware that Nik Walker Ministries held an in-school revival and does not want the Schools, the Board, or its administrators and teacher to promote religion and encourage students to attend religious events, especially events that conflict with C.T.'s personal views on religion. AC ¶¶ 74-75. While C.T. identifies as Christian, C.T. is neither a member of an evangelical Christian church like those preferred by Huntington High School, nor does C.T. share the evangelical Christian beliefs touted at these churches or the Nik Walker revival. AC ¶ 76. Thus, C.T. feels like a second-class Christian in C.T.'s school because the school has a close connection with a preferred version of evangelical Christianity. AC ¶ 77. C.T. will continue to attend Huntington High School and is concerned that C.T. will be subject to prayer and religious worship conducted by ministers or school staff members. AC ¶ 78. Because it was known that C.T's family was opposed to the Nik Walker Ministries revival, C.T.'s relationships with other students have been negatively impacted. AC ¶ 184.

Jana Tigchelaar, as a parent of C.T. and S.T., has also been made to feel like an outsider in her community, and she has been forced to undertake additional burdens to monitor school activities to ensure that her children will not be indoctrinated in religious matters while at school. AC ¶¶ 178, 183. For Jana Tigchelaar and her children, religion is a personal matter, and she does not want her children's school involved in providing religious worship activities. AC ¶ 179. She has been very selective about which Christian church her family attends based on the views and beliefs of the church. AC ¶ 180. Jana Tigchelaar does not wish for her children to participate in religious worship activities sponsored by Christ Temple Church or Nik Walker Ministries. AC ¶ 181. After she publicly expressed disapproval of the Nik Walker revival, the family's home received proselytizing literature in their mailbox. AC ¶ 157.

3. Max Nibert was made to feel like an outsider by virtue of Defendants' maintenance of a custom permitting outsider religious activity and promotion in Cabell County Schools and the Nik Walker revival that this custom enabled.

Max Nibert attended Huntington High School.[3] AC ¶ 12. Max attended school on February 2, 2022 and was aware that Nik Walker Ministries held a revival at HHS during the school day. AC ¶ 79. Max is nonreligious and does not want his school promoting any religion or encouraging students to attend religious events, especially events that conflict with his personal views on religion. AC ¶ 80. Max felt excluded by CCS's continuing affiliation and promotion of evangelical Christianity, and as a result, he had to undertake significant efforts to oppose CCS's promotion and affiliation with evangelical Christianity. AC ¶¶ 82, 162. He organized a school

[3] Max graduated from Huntington High School on May 26, 2022. Since Max has graduated, he no longer seeks prospective relief in the form of declaratory relief or an injunction. Max maintains a request for nominal damages.

walk out to oppose the school's affiliation with one religion. AC ¶¶158-59. After publicly expressing disapproval of the revival event, Max received evangelical materials. AC ¶ 157.

C. Defendants' standing arguments misapprehend Plaintiffs' claims for relief.

Defendants' flawed standing argument stems from their failure to appreciate that Plaintiffs seek injunctive relief to avoid future constitutional violations based upon Defendants' longstanding and widespread custom—not just the Nik Walker revival. As the foregoing discussion demonstrates, the Amended Complaint makes clear that its focus is broader than the Nik Walker revival, especially as it relates to Plaintiffs' request for injunctive relief. Yet Defendants' standing argument makes clear that they are seeking dismiss the case they wish had been filed, not the case actually presented by Plaintiffs.

To be sure, Plaintiffs seek nominal damages for their injuries stemming from the Nik Walker revival in the form of direct contact with the activity itself (in the case of C.M. and S.F.) and feelings of marginalization and exclusion attributable to the event and its aftermath (in the case of all Plaintiffs and their parents). But Plaintiffs' request for injunctive relief stems from the ever-looming threat created by Defendants' custom—thoroughly articulated and supported in the Amended Complaint—that places Plaintiff-students at risk of again being subjected to unwanted religious activity without notice to parents. As students in Cabell County Schools, all student Plaintiffs are subjected to and risk being impacted by Defendants' widespread custom and practice of allowing outsiders to impose religion on students, the ongoing maintenance of which sends a continuing message of religious preference. The Amended Complaint discusses these injuries and forward-looking claims for relief at length, and the claims premised on these injuries must be permitted to go forward. AC ¶¶ 1-4, 83-138. 167-68, 185, 191-92.

II. Plaintiffs' requested injunctive relief is appropriate to remedy their ongoing harm and is not a basis to dismiss their claims.

The specific articulation of the injunctive relief requested by Plaintiffs has nothing to do with whether they have alleged cognizable § 1983 claims. A motion under Rule 12(b)(6) challenges the sufficiency of a plaintiff's *claims*, not the relief requested. F.R.C.P. 12(b)(6) ("failure to state a *claim* upon which relief can be granted"). "Because a demand for relief is not part of a plaintiff's statement of the claim, the nature of the relief included in the demand for judgment is immaterial to the question of whether a complaint adequately states a claim upon which relief can be granted." *Kaufmann v. Foley*, 2022 WL 1056089 (W.D. Va. 2022) (quoting *Charles v. Front Royal Volunteer Fire and Rescue Dept., Inc.*, 21 F.Supp.3d 620, 629 (W.D. Va. 2014)); *see also Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C.*, 635 F.3d 1106, 1108-09 (8th Cir. 2011) ("The amount of damages to be recovered is based upon proof, not the pleadings. Under the federal rules of civil procedure, a court may dismiss a complaint only if it is clear that *no* relief could be granted under any set of facts.") (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). Thus, even if Plaintiffs' requested injunction is overly broad, Rule 12(b)(6) does not permit dismissal of the Complaint at this stage of the case.

Yet each Defendant raises an argument challenging the appropriateness of Plaintiffs' requested relief, arguing that the requests for declaratory and injunctive must "fail as a matter of law" because they are over broad. ECF No. 20, 9-16; ECF No. 22, 8-15; ECF No. 24, 3-13. Because this argument is fatuous at the pleading stage, the Court should disregard entirely the legal arguments advanced by Defendants in these sections of their briefs.

The Court should further disregard these flawed legal arguments because of they rely upon factual premises stemming from Defendants' improper introduction of extra-Complaint facts. At its heart, Defendants' challenge to Plaintiffs' requested relief is a furtherance of its attempt to supplant Plaintiffs' factual allegations with Defendants' own version of facts. Most

significantly, Defendants' attack on Plaintiffs proposed injunction is premised upon Defendants' factual assertion that CCS maintain a public forum for private individuals or groups to hold events during the school day.[4] Not only do Defendants fail to offer the Court a reason to consider this extra-Complaint allegation (or any of the other new facts presented in Defendants' motions), the assertion is actually in direct contradiction with the Amended Complaint's allegations. AC ¶¶140-45. The well-settled standard of review applicable to Defendant' motions demands rejection of these factual contentions and disregard of the arguments premised upon them.[5]

The reason for Defendants' disregard of this well-established precept is clear: Defendants would prefer this be a case about equal access to a limited public forum than one about rank religious indoctrination by a School Board and its administrators and teachers and the longstanding custom that allowed it to occur. This is apparent given that Defendants' attempted reframing of the case as one about free speech and equal access requirements also provides a more favorable foundation to present a qualified immunity argument. But it is the allegations of the Amended Complaint and not Defendants' wishful framing of the claims in this case that must guide the Court's decision.

III. Defendant Gleason is not entitled to qualified immunity as to the individual capacity claim asserted against him.

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4 This is true of every part of the Defendants' argument related to Plaintiffs' requested relief, including all three subheadings. Each section presents argument premised on the existence of a forum and neutral policies that apply equally to all clubs.

5 Nor can Defendants maintain that the Schools maintained a limited public forum during the relevant portion of the school day as a matter of law. Defendants' bald assertion that "schools are a limited public forum for distribution of a wide variety of ideas and social discussion," ECF Nos. 20, 22, 24 at 5, is unsupported by any caselaw. Not all schools have limited public forums—or *any* type of forum for public use—and government entities may create and close limited public forums by choice. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391 (1993) (holding that "the District need not have permitted after-hours use of its property," but finding that a forum existed because "[t]he District, however, did open its property for [some after-hours] uses").

To succeed on his qualified immunity defense, Principal Gleason bears the burden of demonstrating either (1) that Plaintiffs have failed to allege facts that make out a violation of a constitutional right or (2) that the right at issue was not clearly established at the time of its alleged violation. *See Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 395–96 (4th Cir. 2014) (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). The Fourth Circuit has recognized that a defendant "faces a formidable hurdle" and "is usually not successful" when they assert a qualified immunity defense at an early phase in the proceedings. *Owens*, 767 F.3d at 396 (quoting *Field Day, LLC v. Cty. of Suffolk*, 463 F.3d 167, 191–92 (2d Cir. 2006)). At the 12(b)(6) phase of litigation, the court must view the facts related to qualified immunity in the light most favorable to plaintiffs, *see Tobey v. Jones*, 706 F.3d 379, 388 (4th Cir. 2013), and dismissal is only appropriate "if a plaintiff fails to state a claim that is *plausible* on its face." *Owens*, 767 F.3d at 396.

To meet the mark of clearly established law, "the unlawfulness [of government conduct] must be apparent" "in the light of pre-existing law." *Thompson v. Va.*, 878 F.3d 89, 98 (4th Cir. 2017) (citations omitted). However, a plaintiff need not point to a case on all fours with the case at hand: "a 'general constitutional rule . . . may apply with obvious clarity . .. even though the very action in question has not previously been held unlawful.'" *Id.* (*quoting Hope v. Pelzer*, 536 U.S. 730 (2002)); *see also Hunter v. Town of Mocksville*, 789 F.3d 389, 401 (4th Cir. 2015) ("To ring the 'clearly established' bell, there need not exist a case
on all fours with the facts at hand...'Rather, the unlawfulness must be apparent in light of pre-existing law.'") (citations omitted).

Defendant Gleason does not contest that the complaint makes out a violation of a constitutional right under part one of the qualified immunity analysis. Nor could he succeed on

such an argument. Plaintiffs' Amended Complaint makes the straightforward allegation that Principal Gleason facilitated the Nik Walker revival by acting pursuant to a Board custom "of allowing adults into CCS schools to preach to students." AC ¶¶ 84, 146-151. Specifically, Principal Gleason approved the Nik Walker Ministries assembly, knowing that it was a religious worship event organized by school staff and ministers. AC ¶¶ 24, 31, 146. He set the date of the assembly and scheduled it. AC ¶ 32. Then he attended the assembly, where he was observed by C.M. and S.F. AC ¶¶ 56, 63, 147. While in attendance, Principal Gleason observed that the Nik Walker Ministries assembly was an evangelical revival, AC ¶ 148, that it was not student-led, AC ¶ 149, and that a minister, Nik Walker, was speaking not as a guest of any student group, but as the host of a religious revival. AC ¶ 150. And Principal Gleason allowed the Nik Walker Ministries assembly to continue, despite observations that the assembly was evangelical and not student-led. AC ¶ 151. These allegations make out a straightforward constitutional violation.

While Principal Gleason claims that the constitutional right was not "clearly established" under part two of the qualified immunity analysis, in reality, the right of public school students to be free from school-sponsored religious worship and prayer could not be more firmly established. It is well settled that public schools may not advance or promote religion via prayers and Bible readings. *See, e.g.*, *Schempp*, 374 U.S. 203. The Supreme Court has consistently ruled that this prohibition on school-sponsored prayer and similar religious activity extends beyond classrooms, to non-instructional school-sponsored events. In *Lee v. Weisman*, the Supreme Court extended the prohibition to prayers to high school graduations, *see* 505 U.S. 577 (1992), and similarly ruled that organized prayers at school-sponsored athletic events were unconstitutional, even if student-led. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000).

In light of these pre-existing Supreme Court decisions, the constitutional rights of students to be free from the sort of religious activity engaged in by Nik Walker Ministries was clearly established. Based upon this caselaw, public school principals well understand they cannot organize and permit a minister-led religious revival during the school day that included prayer and sought to convert students to evangelical Christianity. The unlawfulness of the Nik Walker revival that Defendant Gleason organized and attended was so apparent that a high school student in attendance immediately understood that the assembly was wrong. *See* AC ¶ 53.

Instead of contending with this Supreme Court precedent, Principal Gleason urges this Court to ignore the well-established constitutional right at the heart of Plaintiffs' Amended Complaint and instead analyze the case as one about free speech in a public forum in the context of a student-sponsored speaker. ECF No. 20, 6 (claiming the right at issue is "whether Mr. Gleason can permit a speaker, sponsored by a Christian club, to present to students in an assembly sponsored by that Christian club, talking about religious principles during non-instructional time of the school day."). But as discussed above, such a characterization is at odds with the facts alleged in the Amended Complaint and is based upon newly alleged facts introduced by Defendant Gleason. AC ¶¶ 140–44. Namely, this framing of the issue depends upon Gleason's extra-Complaint contentions that Huntington High School possesses a public forum for private speakers to hold events during COMPASS time. This contention by counsel is directly contradicted by the Complaint and cannot be considered on a Rule 12(b)(6) motion. Thus, the Court must reject Principal Gleason's qualified immunity arguments.

IV. The Amended Complaint sufficiently alleges that Principal Gleason caused a deprivation of Plaintiffs' First Amendment rights and that Plaintiffs are entitled to injunctive relief against him.

Similar to his qualified immunity defense, Defendant Gleason's argument that Plaintiffs have not sufficiently alleged that he deprived them of their constitutional rights depends upon new facts introduced by his counsel and his counsel's wishful reframing of the claims alleged against him in Plaintiffs' Amended Complaint. Again, the specific conduct alleged against Defendant Gleason that gave rise to constitutional deprivations is plain. Principal Gleason approved and set the date of the Nik Walker revival with knowledge regarding its content and objectives, and he then attended the event without undertaking any intervention as he witnessed an attempt by an outside group to convert students to evangelical Christianity. Yet Defendant Gleason begins his argument by contending that the Nik Walker revival was an FCA-sponsored event, a fact that is not supported by and at odds with the allegations of the Amended Complaint. Thus, here again, the Court should reject Defendant Gleason's argument because it is premised upon newly alleged facts introduced by counsel.

In addition, Defendant Gleason's argument rests upon a fundamental misapprehension of the requirements of the Establishment Clause. While Defendants appear to believe that "voluntary" attendance would negate any potential Establishment Clause violation, courts have consistently held that school-sponsored religious exercises themselves are an Establishment Clause violation and are not saved by purported voluntariness. *See Schempp*, 374 U.S. at 288 (Brennan, J., concurring) ("Thus, the short, and to me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question"); *Lee*, 505 U.S. at 596 ("It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."); *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003) ("VMI cannot avoid Establishment Clause problems by simply asserting that a cadet's attendance at supper or his or

her participation in the supper prayer are 'voluntary.'"); *Deal*, 911 F.3d at 186 (finding that parent and student had standing to challenge school-sponsored bible classes where "[p]articipation is ostensibly voluntary"). Thus, the characterization of the Nik Walker revival as a "voluntary assembly" is not sufficient to defeat Plaintiffs' claims against Defendant Gleason, even if such a contention was consistent with the allegations of the Amended Complaint.

Although he cites no authority in support, Principal Gleason also objects that the declaratory and injunctive relief sought by Plaintiffs cannot remedy the harm they suffer, because "Mr. Gleason has not established a policy of promoting one religion over another, or religion over non-religion." ECF No. 20, 8. This argument can be rejected first and foremost because, again, it is contradicted by the plainly stated allegations in the Amended Complaint. *See* AC ¶ 2 (alleging administrators' knowledge of and acquiescence to a "practice and custom" of constitutional violations); ¶ 84-86 (alleging the same). To the extent that Defendant Gleason's argument is meant to suggest that Plaintiffs' claims are not redressable—which is, of course, a requirement to maintain standing, *see MacDonald v. Moose*, 710 F.3d 154, 161-62 (4th Cir. 2013) (citation omitted)—his argument is similarly incorrect. Plaintiffs allege that under the current customs and practices to which he adheres and under which he acts, Defendant Gleason is violating Plaintiffs' constitutional rights. Defendant Gleason disagrees. It is thus necessary for the court to issue declaratory and injunctive relief against Defendant Gleason.

V. Defendant Saxe is not entitled to qualified immunity in an official capacity claim.

Because Plaintiffs have sued Defendant Saxe in his official capacity only, he is not entitled to qualified immunity. Qualified immunity "may be invoked by a government official sued in his personal, or individual, capacity." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006) (citing *Kentucky v. Graham*, 473 U.S. 159, 165–67 (1985)). "This

defense is not available in an official-capacity suit brought against a government entity or a government officer as that entity's agent." *Id.* The Amended Complaint makes clear that Defendant Saxe has been sued only in his official capacity as Superintendent of CCS. Thus, Defendant Saxe cannot claim qualified immunity and his request for dismissal on the basis of qualified immunity must be denied.

VI. Plaintiffs have properly pled an Establishment Clause claim against Superintendent Saxe in his official capacity.

Like his qualified immunity argument, Defendant Saxe's argument that Plaintiffs' requested declaratory judgment and injunction against him "must fail" appears to misapprehend that Plaintiffs assert official-capacity claims against him. Defendant Saxe suggests that his lack of involvement in and knowledge of the Nik Walker revival should allow him to escape liability. While these facts might be relevant if Plaintiffs had alleged an individual capacity claim against Defendant Saxe, they are not material to the official capacity claim against him that stems from the custom of permitting teachers and outside parties to promote evangelical Christianity to students, which Defendant Saxe and the Board are alleged to have created and maintained. Thus, Plaintiffs' official-capacity claim against Defendant Saxe is based upon the existence a custom borne out of Defendant Saxe's deliberate indifference to the constitutional rights of students.

This theory of liability also renders irrelevant Defendant Saxe's curious assertion that he "has no policy of sponsoring religion," ECF No. 22, 7. While it is true Plaintiffs' Amended Complaint does not identify a policy, it thoroughly details an existent custom that Defendant Saxe has played a part in creating and maintaining. Plaintiffs allege that school administrators have systematically disregarded the religious freedom of their students. *See* AC ¶¶ 1-4, 130-132. In addition, Plaintiffs allege that, as an administrator, Defendant Saxe has repeatedly been indifferent to the Establishment Clause rights of students, as he had previously received actual

notice of Establishment Clause violations within CCS and failed to prevent similar violations from occurring. *See* AC ¶¶ 2, 84-87, 111-117. His role in the creation of this custom is consistent with his position within CCS. W. Va. Code § 18-4-11(1)-(2) (requiring superintendent to observe instruction and classroom management and report to the county board incompetence and misconduct in office of any teacher or employee). As such, injunctive and declaratory relief against Defendant Saxe are necessary to protect the First Amendment rights of Plaintiffs.

Conclusion

Defendants' Motions to Dismiss create strawmen that are easily mowed down. Instead of grappling with the content of Plaintiffs Complaint, Defendants erect a narrow misrepresentation to attack with newly-introduced factual allegations. The Federal Rules of Civil Procedure prevent such fallacious arguments by redirecting the Court to the content of the Amended Complaint.

The factual allegations there are sufficient to support plausible claims for nominal damages and injunctive and declaratory relief on behalf of all Plaintiffs as against all moving Defendants. The specific articulation of the forward-looking relief is not a subject ripe for consideration in Defendants' Rule 12 motions. Plaintiffs have standing to seek both forms of relief based upon the injuries-in-fact identified in the Amended Complaint. Principal Gleason is not entitled to qualified immunity because his actions were indispensable to an outside group being given the opportunity to preach religious conversion to HHS students during the school day—an act that has long been prohibited by Supreme Court precedent. Nor is Defendant Saxe entitled to qualified immunity in an official capacity claim against him. Thus, Defendants' Motions to Dismiss must be denied in their entirety.

Respectfully Submitted,

/s/ Marcus B. Schneider, Esq.

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CERTIFICATE OF SERVICE

Counsel of record Defendants The Cabell County Board of Education, Ryan Saxe, in his official capacity as Superintendent of Cabell County Schools, and Daniel Gleason, in his individual capacity and his official capacity as Principal of Huntington High School will receive notice of and a copy of the foregoing Omnibus Response in Opposition to Defendants' Motions to Dismiss via the Court's CM/ECF system.

/s/ Marcus B. Schneider
Marcus B. Schneider