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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, INDIANA, LOUISIANA, SOUTH CAROLINA, SOUTH DAKOTA, AND WEST VIRIGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Court should summarily reverse a decision that contravenes basic principles of standing in a way that obviates a plaintiff's obligation to demonstrate a specific and concrete injury.

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INTEREST OF AMICI CURIAE

"In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). Amici are the States of Texas, Alabama, Alaska, Arkansas, Indiana, Louisiana, South Carolina, South Dakota, and West Virginia. Article III's standing requirements protect governmental entities from unnecessary, speculative, and burdensome lawsuits grounded not in actual injuries but rather in policy disagreements. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408-09 (2013). Amici therefore have an interest in any case, such as this one, that undermines those core constitutional protections.

This Court has long held that injunctive relief is not available absent a concrete threat of imminent harm. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). The Fourth Circuit dismissed that bedrock rule as empty "formalism." Pet. App. 10a-11a. That erroneous holding eliminates a plaintiff's burden of demonstrating the existence of an actual case or controversy. It threatens harm to all defendants in the Fourth Circuit—and forebodes nationwide harm should the rule below be adopted elsewhere. As governmental entities, amici ask the Court to reaffirm Article III's stringent requirements and summarily reverse the decision below.

Amici provided counsel of record timely notice of amici's intent to file this brief under Rule 37.

SUMMARY OF ARGUMENT

The Court should summarily reverse the decision below because it is plainly wrong and upends bedrock Article III principles.

I. *Summers* stands atop a long line of precedent establishing that a plaintiff must face an "actual and imminent" "threat" of legal injury "[t]o seek injunctive relief." 555 U.S. at 493. *Summers* made clear that a past injury is insufficient to confer standing to seek an injunction barring a government action. So, too, is the mere *possibility* of a future injury. Rather, a plaintiff must, at a minimum, have a "firm intention" to engage in activity that will subject him to harm. *Id.* at 496. Allowing anything less "would be tantamount to eliminating the requirement of concrete, particularized injury in fact." *Id.*

II. Applying this body of precedent, there is no question that respondents—Elizabeth Deal and her daughter, Jessica—have not alleged facts that satisfy their burden to show standing to obtain an injunction. Respondents necessarily rely on *past* exposure to Mercer County's Bible in the Schools program because Jessica has left Mercer County's school district and has no plans to return. Because Deal has no "firm intention" to return Jessica to Mercer County Schools, neither face an "actual and imminent" "threat" of legal injury from petitioners. *Id.* at 493.

III. The district court correctly dismissed respondents' complaint for lack of standing. In reversing, the Fourth Circuit cast aside this Court's precedent. The decision below reasoned that requiring Deal to have a "firm intention," *id.* at 496, to return Jessica to Mercer County

Schools was empty "formalism," Pet. App. 10a-11a. Instead, the decision below concluded that respondents could seek an injunction because Jessica faced an unalleged continuing injury in the form of "ongoing feelings of marginalization." Pet. App. 11a.

The decision below is plainly wrong. Allowing hurt feelings to fill in for an imminent threat of harm would render much of this Court's standing jurisprudence superfluous. No longer would a direct connection between a plaintiff and a challenged action be needed—all a plaintiff would need to allege and prove is that the government action (past or ongoing) continues to cause him emotional distress. That "would be tantamount to eliminating the requirement of concrete, particularized injury in fact." *Summers*, 555 U.S. at 496.

What is more, because Jessica's feelings of marginalization are unconnected to any current exposure to Mercer County's Bible in the Schools program, it is speculative that an injunction barring the program will redress her hurt feelings. An injunction cannot wipe away the source of Jessica's feelings—her *past* exposure to the program. What respondents seek is mere vindication, but that is insufficient to create a case or controversy. For this reason, also, the decision below allowing respondents' case to continue merits summary reversal.

ARGUMENT

Summary reversal is appropriate here because "[t]here can be no serious doubt" that the decision below is wrong, and the arguments in support of the judgment below "were already rejected" elsewhere. *Am. Tradition*

P'ship v. Bullock, 567 U.S. 516, 516, 517 (2012) (per curiam). This Court does not hesitate to summarily reverse lower-court decisions that apply incorrect legal standards at the motion-to-dismiss stage. *See, e.g.*, *Sause v. Bauer*, 138 S. Ct. 2561, 2563 (2018) (per curiam).

Under settled law, a student who has left a school district with no stated intention ever to return does not have standing to seek to enjoin a portion of that school district's curriculum. Because the Fourth Circuit held the opposite—and violated bedrock principles of Article III in doing so—summary reversal is warranted.

I. Injunctive Relief Is Available Only Upon a "Specific and Concrete" Showing of Future Harm.

Summers articulated two bedrock principles relevant here. First, a plaintiff lacks standing to seek injunctive relief when his complaint "relates to past injury rather than imminent future injury that is sought to be enjoined." 555 U.S. at 495. A "past injury" might give rise to a claim for damages, but it cannot be the basis for injunctive relief. *See id.* Second, to obtain injunctive relief, a plaintiff must demonstrate a "specific and concrete" injury that necessitates an injunction. *Id.*

The facts of *Summers* illustrate those two principles. Environmental-protection activists sought to enjoin the U.S. Forest Service from enforcing certain regulations regarding fire-rehabilitation and timber-salvage projects. *Id.* at 490. Those regulations were not targeted at any activist, but rather at agency procedures. *Id.* at 493. So, to demonstrate standing, the Court required the ac-

tivists to show "application of the regulations by the Government will affect *them*," *id.* at 494, consistent with Article III's "fundamental limitation"—i.e., "a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Id.* (emphasis and citation omitted). The Court summarized that "[t]o seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Id.* (quoting *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)).

Two activists stepped up to the task of demonstrating standing. First, Ara Marderosian alleged that he "had repeatedly visited Burnt Ridge[, a specific forest site subject to the challenged regulations], that he had imminent plans to do so again, and that his interests in viewing the flora and fauna of the area would be harmed" by the challenged regulations. *Id.* at 494. But Marderosian settled that claim as to Burnt Ridge. *Id.* In reaching that settlement, he fully "remedied" his injury and lost standing to challenge "the regulation in the abstract." *Id.*

Second, Jim Bensman alleged "that he had suffered injury in the past from development on Forest Service land." *Id.* at 495. He further alleged "that he has visited many national forests and plans to visit several unnamed national forests in the future." *Id.* Bensman insisted that those allegations sufficed to satisfy Article III; this Court disagreed.

The Court held that the allegation regarding past injury was insufficient for several independent reasons, including that "it relates to past injury rather than imminent future injury that is sought to be enjoined." *Id.* The Court held too that the allegations regarding future visits to forests were insufficiently "specific and concrete." *Id.* The Court acknowledged that "[t]here may be a chance . . . that Bensman's wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations." *Id.* But that "chance" was "hardly a likelihood," and that doomed Bensman's standing. *Id.* The Court summarized: "Accepting an intention to visit the national forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact." *Id.* at 496.

The principles *Summers* described are among the most well settled in the canon of constitutional law. *Summers* simply drew from longstanding principles articulated in cases like *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Friends of Earth*, 528 U.S. at 180-81. *Lyons*, for example, addressed whether a plaintiff who alleged that he had been injured by an improper police chokehold had standing to pursue injunctive relief barring use of the hold in the future. 461 U.S. at 108. The Court held no; his allegations were "no more than conjecture." *Id.* The Court explained that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *Id.* at 102 (cleaned up).

Lujan articulated the same principles. The plaintiffs there sought injunctive relief aimed at preserving the environment so that they might enjoy future sightseeing. *See* 504 U.S. at 564. But as in *Summers*, those vague allegations were not sufficient to show a concrete and particularized injury today. *See id.* The Court explained that "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id.*

II. Respondents Seek Injunctive Relief Based on Past Injuries Without Any Allegation of Specific and Concrete Future Harm.

Against that backdrop, the allegations in the complaint now before the Court do not suffice to establish subject-matter jurisdiction.

A. "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Respondents' complaint alleges that Jessica attended Mercer County Schools from kindergarten through third grade. DE21 ¶¶ 34, 43.[*] But in 2016, Jessica left Mercer County Schools. DE21 ¶¶ 48, 49. She began attending "a neighboring school district." DE21 ¶¶ 48, 49. She vaguely explains that the Bible in

[*] The operative complaint is available as entry 21 on the district court's docket. We will cite that complaint as "DE21," followed by the relevant paragraph.

the Schools program, and the treatment she received because of her refusal to participate in that program, "were a major reason" for her transfer to a different district. DE21 ¶ 48.

Three core paragraphs of the complaint describe respondents' injuries—and each occurred in the *past*. First, in paragraph 45, the complaint speaks in the past tense to allege that "Jessica *was* harassed by other students for not participating in bible classes." DE21 ¶ 45 (emphasis added). Paragraph 46 also speaks in the past tense: "Because Jessica did not join her classmates during bible classes, she *felt* excluded." DE21 ¶ 46 (emphasis added). The same goes for paragraph 47: "Elizabeth Deal felt that she and Jessica *were* second-class citizens at the school." DE21 ¶ 47 (emphasis added). The complaint does not allege any continuing harassment, exclusion, or other mistreatment. It contains no allegation of a current, ongoing injury.

The complaint contains no allegations suggesting any desire to return Jessica to Mercer County Schools. The complaint suggests only that Jessica experienced past injuries related to harassment and a psychological harm several years ago, and she transferred to a different district for that and other reasons. *See* DE21 ¶¶ 34, 43, 45-49.

B. Those allegations, combined with respondents' request for injunctive relief, are plainly insufficient to demonstrate subject-matter jurisdiction.

It is black-letter law that a plaintiff seeking to enjoin a government program must show that the program poses a non-speculative impediment to the plaintiff's con-

crete present or future plans. *See supra* Part I; *Summers*, 555 U.S. at 495. Even an allegation that Jessica would "some day" want to return to Mercer County Schools would be insufficient. *See Lujan*, 504 U.S. at 564. Yet respondents have not even pleaded that much; their complaint seeks injunctive relief despite the absence of any allegation that they would change their conduct if the injunction were granted.

The complaint provides no reason to believe that anything would change for respondents if they received the injunction they seek. Under Article III, that is not enough. Dismissal is warranted.

III. The Decision Below Relies on a Novel Theory of Lifelong Standing and Merits Summary Reversal.

For the reasons set out above, petitioners are entitled to dismissal. There are several reasons why summary reversal is warranted.

The decision below is plainly wrong. As set out in Part I, *supra*, a plaintiff lacks standing to seek injunctive relief in connection with past injuries. As respondents pleaded only past injuries, they cannot seek injunctive relief. *See supra* Parts I, II.

Moreover, the error in the decision below endangers Article III's limitations by inventing a new theory of standing contrary to this Court's precedent based on a continuing psychological injury. *See* Pet. App. 11a. The decision below reasoned that Jessica must experience unalleged "ongoing feelings of marginalization." Pet. App. 11a. But this Court has oft stated that "past wrongs do not in themselves amount to that real and immediate

threat of injury necessary to" seek injunctive relief. *Lyons*, 461 U.S. at 103. There is no allegation that anyone is currently marginalizing Jessica. And there is no imminent risk of further marginalization because Jessica has no plans to return to Mercer County Schools. Even if the Fourth Circuit correctly divined that Jessica suffers ongoing feelings of marginalization not alleged in respondents' complaint, "hurt feelings differ from legal injury," *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (Easterbrook, C.J.), and they cannot transform past injuries into current, litigable harms.

As the Petition explains, a contrary rule would allow anyone who suffered a psychological injury to seek injunctive relief at any point in the future—even decades later—merely by claiming ongoing "feelings of marginalization." Pet. 18-19. And as far as amici can tell, neither this Court nor any other court has ever held that a plaintiff has standing to seek injunctive relief as to a matter with which he is no longer involved merely because he continues to be upset about an event many years previous. *Cf. Am. Legion v. Am. Humanist Ass'n*, No. 17-1717, 2019 WL 2527471 at *25 (U.S. June 20, 2019)(Gorsuch, J., concurring) (demonstrating that a currently "offended observer" does not have standing to pursue an Establishment Clause claim). After all, it cannot be the case that the plaintiffs in *Lujan* and *Summers* could have avoided dismissal simply by alleging that their feelings continued to be hurt either by past actions of the government or ongoing actions to which they are not exposed. *See Summers*, 555 U.S. at 494 (explaining that a party who settled an action premised on an imminent

harm does not continue to have standing to challenge the source of that harm); *Lujan*, 504 U.S. at 563-67 (holding that a plaintiff must, at the very least, have a specific connection to a location or animal to have standing to bring a claim under the Endangered Species Act). "Such a holding would fly in the face of Article III's injury-in-fact requirement." *Summers*, 555 U.S. at 494.

On top of that, if Jessica feels marginalized because of *past* wrongs and despite having no plan to return to the source of those feelings, then it is wholly speculative that an injunction barring Mercer County's Bible in the Schools program will redress her "injury." A plaintiff who alleges a cognizable injury-in-fact must additionally demonstrate that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (citation omitted). That demonstration is impossible if one accepts the theory of injury adopted by the decision below, which has no connection to current conditions in Mercer County Schools. Rather, Jessica's injury—feelings of marginalization—is based wholly on past events that an injunction cannot undo. The mere desire for vindication is insufficient to support standing. *See Diamond v. Charles*, 476 U.S. 54, 62 (1986).

The lynchpin of the decision below was Jessica's feelings of marginalization. *See* Pet. App. 10a-11a & n.4. But the decision also suggested that Jessica may have standing based on a redressable "avoidance-based" injury because enjoining the Bible in the Schools program would provide Jessica the "'opportunity'" to return to her old school, even though she has no concrete plans to do so in

that event. Pet. App. 10a-11a. That conclusion is irreconcilable with *Lujan*. It was assumed in *Lujan* that enjoining the challenged conduct would provide the plaintiff there the "opportunity" to one day see the threatened species again. 504 U.S. at 564. But that was not enough, because, similar to this case, the plaintiff had no "concrete plans" to return to the animals' habitat. *Id.* This is an additional clear error that justifies summary reversal.

Finally, the decision below would create a circuit split if left intact. As the Petition persuasively demonstrates, the complaint would not have survived dismissal outside the Fourth Circuit. *See* Pet. 21-22; *Doe v. Purdue Univ.*, No. 17-3565, 2019 WL 2707502, at *9 (7th Cir. June 28, 2019) (concluding that a plaintiff did not have standing to seek an injunction against Purdue's Title-IX hearing process because "[h]e has not alleged that he intends to re-enroll at Purdue"). Summary reversal would preclude the development of this split and safeguard Article III against further damage by misguided courts of appeals.

* * *

The decision below can be reversed on narrow grounds. All the Court need do is analyze the complaint to see that there is no allegation of any specific and concrete future plan to re-enroll Jessica in Mercer County Schools. *See supra* Part II; *cf. Sause*, 138 S. Ct. at 2563. Respondents have paired a past injury with a request for injunctive relief without alleging that they would do anything differently if that relief were granted. *See id.* That pleading formula is constitutionally inadequate to confer subject-matter jurisdiction. *See supra* Part I. The Court need go no further to summarily reverse the decision below.

CONCLUSION

This Court should summarily reverse the judgment of the Fourth Circuit.

Respectfully submitted.

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