

April 8, 2013

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SETH TAYLOR; JACOB COBOS, by
and through his parents Ralph and
Adrienne Cobos; LACY CORMAN, by
and through her parents Gary and
Ladonna Corman; ARIELLE GREEN, by
and through her parents Joseph and
Socorro Green; REED MAY, by and
through his parents Bruce and April May,

Plaintiffs - Appellants,

v.

ROSWELL INDEPENDENT SCHOOL
DISTRICT; MICHAEL GOTTLIEB, in
his capacity as Superintendent of Schools
for Roswell Independent School District,

Defendants - Appellees.

No. 11-2242

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. NO. 2:10-CV-00606 LFG-ACT)

Mathew D. Staver, Liberty Counsel, Maitland, Florida (Stephen M. Crampton, Mary E. McAlister, and Matthew H. Krause, Liberty Counsel, Lynchburg, Virginia, and Anita L. Staver, Liberty Counsel, Maitland, Florida, with him on the briefs), appearing for Appellants.

Jerry A. Walz, Walz and Associates, Albuquerque, New Mexico, appearing for Appellees.

Before **KELLY, HOLLOWAY**, and **MATHESON**, Circuit Judges.

MATHESON, Circuit Judge.

The plaintiffs are, or at all relevant times were, high school students from Roswell, New Mexico, who belong to a religious group called “Relentless” (“Plaintiffs”).¹ They sued Roswell Independent School District and Superintendent Michael Gottlieb in his official capacity (collectively “the District”) seeking declaratory and injunctive relief. Their complaint alleged that school officials violated their First and Fourteenth Amendment rights by preventing them from distributing 2,500 rubber fetus dolls to other

¹ When the complaint in this case was filed, Plaintiffs were students at either Goddard or Roswell High. Our review of the record indicates that four of the five plaintiffs have since graduated and one plaintiff, Jacob Cobos, is expected to graduate in May 2013. Plaintiffs seek declaratory and injunctive relief. They do not seek damages, even nominal damages. In *Board of School Commissioners of Indianapolis v. Jacobs*, 420 U.S. 128 (1975) (per curiam), the Supreme Court dismissed as moot a challenge by high school students to regulation of their school newspaper after the Court learned at oral argument that all of the plaintiffs had graduated.

In this case, however, at least one plaintiff, Mr. Cobos, remains in school. He clearly has standing, and his claim is not moot. “[T]he presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.” *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). See also *Campbell v. Buckley*, 203 F.3d 738, 740 n.1 (10th Cir. 2000) (“Because the individual plaintiffs . . . have standing, and because [they] jointly raise the same substantive arguments on appeal . . . there is no need to address the standing of the [other] plaintiffs.”) (citing *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)); *Nat’l Rifle Ass’n v. Magaw*, 132 F.3d 272, 278 n.4 (6th Cir. 1997) (“[A]s long as one plaintiff meets the requirements of Article III, the court can adjudicate the issues raised in the complaint.”).

We therefore proceed to the merits.

students. It also challenged the District's policies requiring preapproval before distributing any non-school-sponsored material on school grounds.

A magistrate judge granted summary judgment for the District on all claims, and Plaintiffs appealed.² Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the dismissal of Plaintiffs' free speech, free exercise, and equal protection claims. We also affirm dismissal of Plaintiffs' facial challenge to Roswell District's preapproval policies. We note that the public school setting is important to our analysis.

I. BACKGROUND

A. *Factual History*

The five plaintiffs in this case are, or at all relevant times were, students of two high schools, Roswell and Goddard High. They belong to a religious youth group called Relentless, which is affiliated with a local church called Church on the Move. Relentless is not affiliated with any school.

Relentless members testified in depositions that they routinely engaged in religious expression at school. For example, they often spoke to other students, in groups and one-on-one, about their religious beliefs and anti-abortion views; and they regularly prayed, silently and aloud, while on school grounds, including during class. Plaintiffs were never disciplined or asked to stop these activities.

² Both parties consented to proceed before Magistrate Judge Lorenzo F. Garcia, with the understanding that appeal from any judgment entered by the magistrate judge would be to the United States Court of Appeals for the Tenth Circuit. *See* 28 U.S.C. 636(c); Fed. R. Civ. P. 73(b).

In late 2009, Plaintiffs and other Relentless members began an outreach campaign to express kindness and charity to fellow students and teachers, and to “put God back into the schools.” Aplt. Appx., Vol. I at 195. Each week they distributed different items at both schools. A pastor from Church on the Move, Tim Aguilar, led the students in organizing and planning these events and was present on school grounds for the distributions. Relentless initially gave 220 McDonald’s chicken salad sandwiches (donated by a church member) to the faculty at both high schools. In ensuing weeks, they distributed to students and faculty hot chocolate, candy canes with religious messages, and “affirmation rocks” with scriptural references painted on one side. Aplt. Appx., Vol. IV at 993-95.

When these distributions began, Roswell District had two policies concerning distribution of non-school related materials on campus. Policy 7110 required advance permission from the District before distribution in any quantity of promotional items or advertisements on campus. A separate, longstanding but unwritten policy required students to obtain permission before on-campus distribution of non-school-sponsored literature. These policies are described in more detail later in this section.

The Relentless students did not seek permission before distributing the previously mentioned items.³ They were not disciplined, reprimanded, or asked to stop. There is no evidence these distributions caused disruption.

1. The Rubber Fetus Doll Distributions

On January 29, 2010, Pastor Aguilar and the Relentless students planned to distribute 2,500 small rubber dolls, one to every student at both schools. Each two-inch doll was designed to be a realistic representation of a human fetus. A card attached to each doll explained that it represented the actual size and weight of a “12 week old baby,” that is, a fetus at 12 weeks of gestation. Aplee. Appx., Vol. I at 22-23. One side of the card encouraged students to visit or call the Chaves County Pregnancy Resource Center, a clinic affiliated with Church on the Move. The other side featured a Relentless logo and this scriptural passage:

For you formed my inward parts; You wove me in my mother[']s womb. I will give thanks to You, for I am fearfully and wonderfully made; Wonderful are your works, And my soul knows it very well.

Psalms 139:13-14

Aplee. Appx., Vol. I at 23.

³ Although it is undisputed that the Relentless students did not seek permission for the early distributions, Pastor Aguilar testified in his deposition that he and other adult organizers from the church sought and received verbal permission for at least one distribution. He could not recall which administrator gave permission or for which distribution.

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