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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

C.H. a minor, by and through her next friend, Ronald Hudak, Plaintiff, v. Bridgeton Board of Education; Dr. H. Victor Gilson, Superintendent, in his individual and official capacities; Lynn Williams, Principal of Bridgeton High School, in her individual and official capacities; and Stephen Lynch, Assistant Principal of Bridgeton High School, in his individual and official capacities; Defendants.	Case No. 1:09-cv-05815-RBK-JS Hon. Robert B. Kugler MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION ORAL ARGUMENT REQUESTED RETURN DATE March 15, 2010

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I. INTRODUCTION

In 1965, Mary Beth Tinker, an eleven-year-old student, as well as her siblings in other grades, wore black armbands to school as a silent protest of the Vietnam War. Pursuant to a policy banning the armbands, which was adopted when school officials caught wind of the small protest, Mary Beth and her siblings were suspended from school until they would return without the armbands. This incident gave rise to *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), a landmark case regarding student rights. In *Tinker,* the Supreme Court held that the school's restriction on armbands was unconstitutional, and that students have the right to speak unless there is specific evidence of a material or substantial disruption.

Forty years after the landmark decision in *Tinker,* the Defendants prohibited Plaintiff C.H., a high school student, from wearing a red arm band with the word "LIFE" written on it as a silent protest against abortion—the *very same* type of speech at issue in *Tinker*. They also prohibited her from peacefully distributing pro-life literature during non-instructional times. C.H. was informed by school officials that her speech was prohibited because nothing "religious" is allowed in public schools. Defendants' censorship of C.H.'s religious speech, and the policies on which that censorship was based, violate the First and Fourteenth Amendments[1] to the United States Constitution, as well as decades of case law. In addition, Defendants'

[1] C.H. has not briefed her Fourteenth Amendment equal protection claim. C.H. submits that these constitutional rights were also violated by Defendants and will accordingly brief this claim at a later stage of this case.

prohibition on C.H.'s speech prevented her from participating in the Day of Silent Solidarity, a nationwide event for students to protest abortion, and continues to prevent her from engaging in her silent, non-disruptive protest, which she still desires to do. Defendants have ignored C.H. and her father's attempts to resolve the situation, and continue to stand by their unconstitutional policies, despite clearly established case law to the contrary. C.H. is therefore suffering irreparable injury each day she is not permitted to exercise her constitutional rights, and she requires a preliminary injunction against Defendants' policies.

II. STATEMENT OF FACTS

Plaintiff C.H., a minor, is a student at Bridgeton High School, and is a resident of Bridgeton, New Jersey. (Compl. ¶ 15). Ronald Hudak, as next friend, is C.H.'s parent and guardian and is a resident of Bridgeton. (*Id*. ¶ 22). Bridgeton High School is a public high school located in Bridgeton, New Jersey, and educates students from ninth through twelfth grade. (*Id*. ¶¶ 32-33). Bridgeton is located in Cumberland County, New Jersey, which has the highest rates of teen pregnancy in the state. (Hudak Decl. ¶ 6; Hudak Ex. 1, pp. 5-7). It also has one of the highest rates of abortion in the state. (Hudak Decl. ¶ 7; *See also* Hudak Ex. 7). There is a "Teen Center" located on the Bridgeton High School campus which gives information to students regarding sex, pregnancy and abortion. (C.H. Decl. ¶¶ 21-22; C.H. Ex. 1 - Flyers from the "Teen Center" on sexual activity, including oral and anal sex (pp. 2-5,

18-19), abortion (pp. 9), birth control (pp. 2,4, 10-11), and pregnancy (pp. 14-17)). All ninth grade students at Bridgeton High School are required to take a course dealing with sex education, where they learn about puberty, reproductive systems, sex, pregnancy, and childbirth. (*Id.* ¶¶ 9-10). Materials regarding New Jersey's Safe Haven Infant Protection Act have been posted at both Bridgeton High School and at the elementary school, (Hudak Decl. ¶¶ 12-13; C.H. Ex. 1, p. 28), and the school's guidance counselor gave a presentation about the Act to C.H.'s class and told stories about women who threw unwanted children into the trash (C.H. Decl. ¶ 23).

Starting in seventh grade, C.H. has known several girls who became pregnant. (C.H. Decl. ¶ 5). She has also known several girls who have had abortions. (*Id.*) In seventh grade, C.H. knew one girl who had already had multiple abortions. (*Id.* ¶ 6). Right now, C.H. knows a girl who very recently had an abortion. (*Id.* ¶ 7). Currently, C.H. knows students who are sexually active. (*Id.* ¶ 8).

Plaintiff is an adherent of the Christian faith and desires to share her religious views with classmates. (Compl. ¶ 18; Ans. ¶ 18[2]). Plaintiff believes in the sanctity of human life and that unborn children should be protected. (Compl. ¶ 19; Ans. ¶ 19). Plaintiff desires to reach out to her peers and to offer them advice, assistance, and education, based on her religious beliefs. (Compl. ¶ 20; Ans. ¶ 20). Plaintiff also seeks

[2] Under Fed. R. Civ. P. 8(d), a failure to deny an averment in the complaint is treated as an admission. *See e.g. Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F.Supp.2d 98, 102 n.4 (D. Mass 2003) (Response stating that the Plaintiffs are left to their proof is improper and is treated as an admission by the Defendants).

to discuss relevant issues facing students at school, including faith and religion, personal responsibility, sexual abstinence, keeping children in the event of pregnancy, just to name a few. (Compl. ¶ 21; Ans. ¶ 21). C.H. desires to distribute religious pro-life flyers and wear an arm band with the word "LIFE" written on it to school without facing censorship or punishment. (Compl. ¶ 16; Ans. ¶ 16). Plaintiff also desires to distribute other flyers with religious messages at school. (Compl. ¶ 17; Ans. ¶ 17).

A. Defendants' Censorship of Plaintiff's Speech on the Pro-Life Day of Silent Solidarity, and Retaliation Against Plaintiff

On October 20, 2009, students across the country participated in the Pro-Life Day of Silent Solidarity ("DOSS"), which originated with Stand True Ministries, a non-profit, religious, pro-life organization. (Compl. ¶ 35). DOSS is a day when students take a stand for life by remaining silent for the day, wearing pro-life t-shirts and armbands, and distributing literature explaining why they are silent. (Compl. ¶ 36). C.H. desired to participate by remaining silent for the day (except when called upon in class), by distributing the pro-life flyers during non-instructional time to let other students know why she was remaining silent, and by wearing a red armband with the word "LIFE" written on it to communicate that she was speaking (silently) on behalf of those who cannot speak for themselves, the unborn. (Compl. ¶ 37).

C.H. requested permission from school officials to participate in DOSS over two weeks before the event was to occur. (Compl. ¶ 38; Ans. ¶ 38). She also supplied school officials with a copy of the flyer that she wished to distribute. (Compl. ¶ 39;

Ans. ¶ 39; C.H. Ex. 2). School officials waited until the day before the event to deny her request. (Compl. ¶ 40; *See also* Ans. ¶¶ 28, 30). She was told by school officials that her request was denied because nothing "religious" was allowed at a public school. (Compl. ¶ 41; C.H. Decl. ¶ 17; Ans. ¶¶ 28, 30).

After C.H. was denied permission to participate in DOSS, Mr. Hudak spoke with Defendant Lynch in an attempt to secure permission for his daughter to engage in her religious speech at school, but he too was rebuffed. (Compl. ¶¶ 42-43; Hudak Decl. ¶12). The only reason given to Mr. Hudak as to why his daughter would not be permitted to engage in her desired speech was that nothing "religious" was allowed in public school. (Hudak Decl. ¶12). When Mr. Hudak told Mr. Lynch that they would be contacting a legal firm, Mr. Lynch threatened him. Mr. Lynch warned Mr. Hudak that as a parent, he should make an informed decision for his daughter because a wrong decision could affect her grades and performance at school. (Compl. ¶44).

The Hudaks subsequently retained counsel, who drafted and sent a demand letter to Defendants on October 21, 2009, requesting that C.H.'s speech be permitted immediately, and advising that such denial violated C.H.'s constitutional rights. (Compl. ¶45). The letter also stated that legal action would be brought if the violation was not corrected. (*Id*. ¶46). Defendants have ignored the letter and have failed to send a response. (*Id*. ¶47; Ans. ¶ 47).[3]

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[3] Since that time, Defendants Williams and Lynch have lived up to their threats of repercussions for C.H. if she stood up for her rights. (Compl. ¶48). Earlier in October 2009, the Hudaks contacted the attendance office at the school to inform them that

B. Defendants' Policies

Defendants have several policies that govern student speech. (Compl. ¶52). To say that these policies are not a model of clarity is an understatement. Policy 1140 is titled "Distribution of Materials by Pupils and Staff," and states that

> "[p]upils . . . shall not be used for advertising or promoting the interests of any person, nonschool sponsored agency or organization, public or private, without the approval of the Superintendent or designee; and such approval granted for whatever cause or group shall not be construed as an endorsement of said cause of group by the board."

(Compl. ¶ 54; Hudak Ex. 2, p. 2). According to this policy, students can be used for promoting the interests of any person or group as long as the Superintendent or his designee decides it is permissible. (Compl. ¶ 55; Hudak Ex. 2). The policy, however, contains no guidelines to restrain the discretion of the Superintendent. (Compl. ¶ 56; Hudak Ex. 2).

Policy 6145.3 is titled "Publications" and seemingly governs only school publications that are part of the instructional program, stating that "[t]he Board of Education sponsors pupil publications as important elements of the instructional program." (Compl. ¶ 57; Hudak Ex. 3, p. 2). The Policy, however, goes on to state that

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C.H. would have to miss 2 days of school due to an illness in the family. (*Id*. ¶49; Ans. ¶ 49). School officials instructed them to submit a note making the request and stated that the absences would be excused. (Compl. ¶50). But three weeks after the Hudaks were told the absences would be excused, and after Defendants received the letter sent by counsel for Plaintiff, Defendants Williams and Lynch denied the request for the excused absence, writing "No" on the request letter, and checking a box on a form that stated simply, "The principal declined to excuse the absence." (Compl. ¶51; Hudak Decl. ¶ 13). Only after this lawsuit was filed alleging retaliation did Defendants reverse course, excusing the absence. (*Id*. Decl. ¶ 14).

"Pupils who violate this policy by expression, publication or distribution of any materials... may be subject to appropriate discipline." (Compl. ¶ 58; Hudak Ex. 3, p. 2; Ans. ¶ 58). Materials will be denied if they are "poorly written, ungrammatical, inadequately researched, biased or prejudiced," "supportive of conduct inconsistent with board policy or the shared value of a civilized social order, or representative of a viewpoint that may associate the school district with a position other than neutrality on matters of political controversy." (Compl. ¶ 59; Hudak Ex. 3, p. 2; Ans. ¶ 59). These restrictions clearly have no discernible objective meaning, but may mean whatever the school official who enforces them wants them to mean. (Compl. ¶ 60).

C. Plaintiff Is Suffering Irreparable Injury

C.H. is a Bible-believing Christian who desires to share her faith and beliefs with other students and to discuss how the Bible addresses issues such as abortion. (Compl. ¶ 61). C.H.'s sincerely held religious beliefs compel her to share her faith and beliefs and to address relevant subjects from a Biblical point of view with her classmates at school. (*Id*. ¶ 62). C.H. wishes to accomplish this goal through the distribution of literature during non-instructional time, and through the wearing of armbands. (*Id*. ¶ 63). C.H. desires to engage in this religious speech, absent fear of reprisal, facing punishment, or being made to silence her message. (*Id*. ¶ 64).

III. ARGUMENT

When deciding whether to issue a preliminary injunction, a district court must

consider: "(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest." *United States v. Bell*, 414 F.3d 474, 478 n. 4 (3d Cir. 2005); *c.f. Winter v. Nat'l Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).

C.H. meets each factor of this test because she is likely to succeed on the merits of her claims, she is now suffering irreparable injury and will continue to suffer irreparable injury if relief is not granted, Defendants will suffer no harm from injunctive relief, and an injunction protecting the exercise of constitutional rights is clearly in the public interest. Thus, a preliminary injunction should be entered against Defendants and their policies, allowing C.H. to engage in her desired expression.

A. C.H. Is Likely To Succeed On The Merits Of Her Claims.

Defendants—through their actions and their policies—have prohibited C.H. from engaging in the *very type* of speech the Supreme Court held 40 years ago was protected speech in the school context—the wearing of an armband as a silent protest. *Tinker*, 393 U.S. 503. Additionally, Defendants denied C.H. the right to distribute literature during non-instructional time, an activity clearly protected by the First Amendment. Defendants specifically prohibit all religious speech, a content and viewpoint-based distinction that violates the First Amendment in multiple ways. And

Defendants' policies unconstitutionally restrict student speech, are unconstitutionally vague, and allow administrators to apply them at their whim. Defendants' actions and policies cannot be justified under relevant case law, making it far more than a "reasonable possibility" that C.H. will succeed on her First Amendment claims.

1. Defendants' Policies and Censorship of C.H.'s Speech Violate the Free Speech Clause of the First Amendment.

As the Supreme Court very recently repeated, "First Amendment standards . . . must give the benefit of any doubt to protecting rather than stifling speech." *Citizens United v. Fed. Election Comm'n,* __S.Ct.___, 2010 WL 183856, *11 (Jan. 21, 2010) (internal quotations omitted)

a. C.H.'s Speech is Protected by the First Amendment.

It is a firmly established constitutional principle that religious expression is protected by the First Amendment. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("religious worship and discussion . . . are forms of speech and association protected by the First Amendment"). As the United States Supreme Court has explained,

> [o]ur precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

The forms of C.H.'s desired expression—the wearing of an armband and

distribution of literature—are also recognized as protected speech. In *Tinker*, the Supreme Court held that the symbolic act of wearing an armband with the purpose of expressing certain views is "closely akin to 'pure speech', which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." 393 U.S. at 505-06. Similarly, distribution of literature is also a classic form of expression entitled to strong First Amendment protection. "The right of free speech encompasses the right to distribute literature." *Gregoire v. Centennial Sch. Dist.,* 907 F.3d 1366, 1382 (3d. Cir. 1990) (citations omitted).

Consequently, the relevant legal analysis dictates that unless a particular student's expression "materially and substantially interfere[s] with . . . appropriate discipline," that speech is entitled to full constitutional protection under the First Amendment. *Tinker*, 393 U.S. at 513 (internal quotation marks and citation omitted); *see also Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school,").

C.H. desires to engage in peaceful, non-disruptive religious expression regarding her beliefs about abortion. The evidence shows that school officials denied C.H. permission to engage in her desired expression not because they had any reasonable belief that it would be materially disruptive, but simply because of its religious content. (Compl. ¶¶41-43; Hudak Decl. ¶16, C.H. Decl. ¶15). Because

religious speech is clearly protected by the First Amendment, even in the school setting, and because there was no reasonable belief of substantial disruption, Defendants violate C.H.'s First Amendment rights by prohibiting her speech.

b. Defendants' Policies and Censorship of C.H.'s Expression Are Unconstitutional Under *Tinker*.

Aside from being controlling precedent in this case, the U.S. Supreme Court's decision in *Tinker* shows that Defendants not only unconstitutionally prohibited C.H.'s religious expression, but also unconstitutionally prohibited the *very same* form of expression at issue in *Tinker*: an armband for silent protest. *Tinker* announced the general principle that directs a court's analysis of student speech in public schools:

> In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

393 U.S. at 513 (emphasis added); *Morse*, 551 U.S. at 403 ("In *Tinker*, this Court made clear that 'First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students'"). The *Tinker* Court stated that "students are entitled to freedom of expression of their views," 393 U.S. at 511, and that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id*. at 506; *see also Morse*, 551 U.S. at 422 (Alito, J., joined by Kennedy, J., concurring)

("The opinion of the Court correctly reaffirms the recognition in *Tinker*...of the fundamental principle that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"); *Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972) ("*Tinker* made clear that school property may not be declared off limits for expressive activity by students"); *Shelton v. Tucker*, 364 U.S. 479, 487 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"). *Tinker* also made it clear that the protections of the First Amendment extend not just to the "cafeteria" or the "playing field," but to "classroom hours" as well. 393 U.S. at 512.

i. Plaintiff C.H.'s Speech Presented No Threat of Material or Substantial Disruption at School.

The question of when school officials might be permitted to regulate student speech is addressed squarely in *Tinker*. The Supreme Court held that prohibitions on student speech are unconstitutional unless there is a showing that the student speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," or "substantially interfere with the work of the school or impinge upon the rights of other students." *Id*. at 509 (internal quotation marks and citations omitted). And the Court warned school officials that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id*. at 508.

Here, C.H. merely asked for permission to wear a red armband, remain silent

unless called on in class, and distribute flyers to other students during non-instructional time explaining why she was silent and containing a message regarding abortion. (Compl. ¶¶ 37-39, 72; Ans. ¶¶ 38-39, 72). The facts of this case are wholly devoid of any evidence that C.H.'s expression would have caused substantial disruption, material interference with school activities, or interfere with the rights of other students. In fact, it is quite challenging to imagine how such a circumstance could result from the type of religious expression sought to be engaged in by C.H. Moreover, potential disruption was *not* the reason C.H.'s speech was prohibited by Defendants—they prohibited her speech because it was religious. (Compl. ¶¶ 41-43; Hudak Decl. ¶ 12, C.H. Decl. ¶ 17; Ans. ¶¶ 30, 75-76, 93, 99). This further indicates that no fear of disruption can even be said to be present, let alone a reasonable fear. *See id.* at 509 (school officials made no reference to anticipation of disruption when explaining why the armbands were prohibited).

ii. Plaintiff C.H.'s Speech Does Not Impinge Upon the Rights of Others.

Tinker also makes clear that a desire to avoid controversy is not enough, and simply because speech regarding certain issues may arouse some disagreement does not mean that school officials would have a reasonable belief that the speech would cause a material disruption. In *Tinker*, the plaintiffs wished to wear armbands signifying their protest of the Vietnam War—a controversial topic, both then and now. *Id.* at 504. But that alone did not justify the prohibition of such expression where there

was no evidence of a material and substantial disruption. *Id.* at 512-13. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509.

In *DePinto v. Bayonne Board of Education,* 514 F. Supp. 2d 633 (D. N.J. 2007), this court granted a preliminary injunction against a school's prohibition of buttons depicting Hitler Youth worn by fifth graders to protest a mandatory uniform policy. The court pointed out that "[t]he passive expression of a viewpoint in the form of a button worn on one's clothing is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom." *Id.* at 645 (D. N.J. 2007) (quoting *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992) (internal quotation omitted)). The *DePinto* court went on to find that the school's censorship of the buttons was unwarranted because the defendants "failed to demonstrate a 'specific and significant fear of disruption, not just some remote apprehension of disturbance.'" *Id.* at 645 (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001)); *see also Lowry v. Watson Chapel Sch. Dist.,* 540 F.3d 752 (8th Cir. 2008) (applying *Tinker* to hold that school's punishment of students for wearing armbands in protest of uniform policy was unconstitutional).

Here, C.H. wished to engage in a silent protest of abortion pursuant to her

religious beliefs and to distribute flyers to other students explaining her opposition. Obviously, abortion can be a controversial topic, but there is nothing to suggest that it impinges on the rights of others such that high school students would be incapable of having a civil discussion about it, especially at C.H.'s particular school, where there is a "Teen Center" on campus, all ninth graders are required to take a course on sex education, many of C.H.'s classmates have become pregnant and had abortions as early as middle school, and the county has the highest teen pregnancy rates in the state of New Jersey. (Hudak Decl. ¶¶ 6, 8-9; C.H. Decl. ¶¶ 5-10, 21-22). In fact, discussion of abortion in such a context is very relevant to the students' lives.

Furthermore, it is instructive to note that Defendants do not prohibit all types of potentially controversial expression from occurring on campus. Defendants' policies allow for the distribution of literature on campus, subject to the approval of administrators. (Hudak Exs. 2 & 3). Students are permitted to wear colored rubber wristbands advocating a wide variety of views, including support of the troops and cancer awareness. (C.H. Decl. ¶¶ 14-15). Students part of the organization "Students Against Destructive Decisions" were permitted to stage a "dead day," paint their faces white, wear black shirts over their uniforms, and hang a sign around their necks indicating how they "died." (*Id*. ¶ 16). This shows that singling out C.H.'s speech for prohibition is purely based on its content and viewpoint. *See Tinker,* 393 U.S. at 510-11 ("It is also relevant that the school authorities did not purport to prohibit the

wearing of all symbols of political or controversial significance . . . . Clearly, the prohibition of expression of one particular opinion . . . is not constitutionally permissible.")[4]

iii. Plaintiff C.H.'s Speech is Protected Both in the Classroom and in Common Areas at School.

Defendants also cannot succeed in any attempt to argue that they can prohibit C.H.'s speech in the classroom. An undeniable element of *Tinker* is its demonstrated view that the classroom also includes free speech protection. The point that the *Tinker* Court repeatedly sought to convey is that a student's freedom of speech is also accommodated beyond the classroom, in other contexts of school experience (e.g., the

[4] After the Verified Complaint was filed, Defendant Gilson publicly stated that C.H.'s request was denied because she would have been in violation of the "dress code." (*See* Hudak Exs. 4-6). Not only was this never mentioned as a reason for the denial to either C.H. or her father, but it is clear that C.H. would not have violated the dress code if she wore an armband. (C.H. Decl. ¶ 20). Also, given that students are permitted to wear colored rubber wristbands with various messages on them with no repercussions, an armband would have been no different. (*Id*. ¶ 14-15). Additionally, since C.H.'s armband represented pure speech, it may only be prohibited if it would cause a material and substantial disruption, which can hardly be the case, given that students are permitted to wear the wristbands, necklaces, and other clothing and accessories that do not comply with the "dress code" every day. (*Id*.). Finally, the dress code has nothing to do with the flyers C.H. wanted to distribute, but she was also denied permission to distribute flyers. (Ans. ¶¶ 28, 30). It is clear that the dress code is simply a post hoc attempt to cover up the District's discrimination against religious speech, and was not a legitimate reason why C.H.'s speech was prohibited. "Without determinate standards, *post hoc* rationalizations by the [government] official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the [official] is permitting favorable, and suppressing unfavorable, expression." *C.E.F. v. Anderson Sch. Dist.*, 470 F.3d 1062, 1068 (4th Cir. 2006) (citing *City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750,763-64 (1988)).

"cafeteria" and "playing field"). Yet the baseline assumption demonstrated in the Court's oft-relied upon opinion is that the classroom itself is a zone in which free speech operates. *See Tinker*, 393 U.S. at 512 ("The *classroom* is peculiarly the 'marketplace of ideas....The principle of these cases is *not confined* [merely] to the supervised and ordained discussion which takes place in the *classroom*....A student's rights...do not embrace *merely the classroom hours*") (emphasis added); *see also id*. at 513, "we do not confine the permissible exercise of First Amendment rights to. . .supervised and ordained discussion in a school classroom").

Here, this point is worth emphasizing since Defendants may assert that because C.H.'s desired religious expression would partially occur in the classroom—namely, remaining silent unless called on and wearing an armband—it can be suppressed. But nothing could be further from the truth. *Tinker*'s protections plainly apply to the classroom and the Court's opinion affords no support for such a view. Simply put, under the applicable standard set forth in *Tinker*, Defendants' censorship of C.H.'s religious expression is constitutionally intolerable.

c. Defendants' Policies Pertaining to Student Speech Are Unconstitutional Prior Restraints.

Any regulation requiring authorization from a public official before expressive activity may occur in a public forum is a prior restraint on speech. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). In this case, Defendants must approve any literature to be distributed by students. (Hudak Exs. 2 & 3). This is

essentially a permit requirement and is therefore a prototypical prior restraint. *See Citizens United*, slip. op at *18 (speaker "must ask a governmental agency for prior permission to speak. These onerous restrictions thus function as the equivalent of a prior restraint"). Because prior restraints censor speech before it occurs, they are presumptively unconstitutional. *Bantam Books v. Sullivan,* 372 U.S. 58, 70 (1963). This is justified by the fact that "prior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1975). In order to survive constitutional scrutiny, a regulation or scheme amounting to a prior restraint may not delegate overly broad discretion to a government official. *Forsyth County,* 505 U.S. at 130.

i. Defendants' Policies Give Unbridled Discretion to School Officials, Allowing Them to Discriminate Based on Content and Viewpoint.

The Supreme Court "has long been sensitive to the special dangers inherent in a law placing unbridled discretion directly to license speech, or conduct commonly associated with speech, in the hands of a government official." *City of Lakewood*, 486 U.S. at 767-68. This is because a law or policy that permits "communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship," and "this danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Id.* at 763. Thus, the Court has "often and uniformly held that such statutes or policies

impose censorship on the public or the press, and hence are unconstitutional." *Id.* "The First Amendment stands against attempts to disfavor certain subjects or viewpoints. . . . Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United*, slip. op. at *24.

Several cases struck down school policies which prohibited student literature distribution or required prior approval as unconstitutional prior restraints. One case rejected language nearly identical to the language in Policy 1140, Hudak Ex.2, p. 2, challenged here, *Riseman v. School. Comm.*, 439 F.3d 148 (1st Cir. 1971):

Defendants' Policy	***Riseman* Policy**
Pupils, employees, and district facilities shall not be used for advertising or promoting the interests of any person nonschool sponsored agency or organization public or private, without the approval of the Superintendent or designee.	Pupils, staff members, or the facilities of the school may not be used in any manner for advertising or promoting the interests of any community or non-school agency or organization without the approval of the School Committee.

Applying *Tinker*, the *Riseman* court held that the policy "is vague, overbroad, and does not reflect any effort to minimize the adverse effect or prior restraint." *Id.* at 149.

Likewise, in *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988), the Ninth Circuit applied *Tinker* and held that a school policy requiring high school students to obtain prior approval before they could distribute any materials was unconstitutional. Similarly, the Fourth Circuit in *Baughman v. Freienmuth*, 478 F.2d 1345, 1348 (4th Cir. 1973), held that "what is lacking in the present regulation, and what renders its

attempt at prior restraint invalid, is the absence both of any criteria to be followed by the school authorities in determining whether to grant or deny permission, and of any procedural safeguards on the form of an expeditious review procedure of the decision of school authorities." *See also Westfield High School L.I.F.E. Club,*249 F.Supp.2d at 114, (applying *Tinker* and striking policies banning student literature distribution stating that "[i]t is now textbook law that when [the student] walked onto the grounds of Westfield High School the day she shared . . . religious messages with her fellow students, she carried constitutional rights to free speech and expression").

ii. Defendants' Policies Do Not Provide Criteria for Approving Literature Distribution.

In *Slotterback,* the court rejected a policy banning religious or political materials which gave school officials discretion whether to approve distribution because the policy contained no procedural obligations to ensure that speech was not burdened unnecessarily. The court noted that the terms "religious" and "political" are open-ended and give officials unbridled discretion in determining whether materials fall within those categories. *Slotterback v. Interboro Sch. Dist.,* 766 F. Supp. 280, 297 n. 14, 298-99 (E. D. Pa. 1991).

The Defendants' policies regarding literature distribution do not allow students to distribute literature on campus unless the Superintendent or his designee approves it. (Hudak Exs. 2 & 3). But neither policy contains any restraints on the discretion of these officials in deciding whether to allow the distribution. Policy 1140 provides no

criteria for deciding when literature distribution will be allowed, and does not place any time limits on when the district official must respond to the request. (Hudak Ex. 2, p. 2).

Policy 6145.3 states that distribution of "[m]aterials will be denied if they are "poorly written, ungrammatical, inadequately researched, biased or prejudiced, supportive of conduct inconsistent with board policy or the shared value of a civilized social order, or representative of a viewpoint that may associate the school district with a position other than neutrality on matters of political controversy." (Hudak Ex. 3, p. 2). These are explicitly content-based criteria which contain terms that are clearly open to interpretation—"biased," "prejudiced," "political," "controversy." And exactly what kinds of material would "support conduct inconsistent with board policy or the shared value of a civilized social order" is completely unclear. The lack of defined standards in this policy means that, like Policy 1140, Policy 6145.3 allows administrators to disallow speech they simply do not like. This is exactly the evil the prior restraint doctrine is meant to prevent. Thus, Policy 1140 and 6145.3 are unconstitutional prior restraints and should be enjoined.

d. Defendants' Policies and Censorship of C.H.'s Expression Violate the Time, Place and Manner Test.

In addition to violating the requirements of *Tinker*, the District's treatment of C.H.'s speech also fails the time, place and manner test.[5] *See Ward v. Rock Against*

[5] The Third Circuit has traditionally evaluated restrictions on student speech under the *Tinker* standard. *See Walker-Serrano v. Leonard,* 325 F.3d 412, 416 (3d Cir.

Racism, 491 U.S. 781 (1989). The *Ward* test allows a reasonable restriction of speech only if it is content neutral, narrowly tailored to a significant government interest, and leaves open ample alternative channels of communication. *Id.* at 791.

i. Defendants' Restriction of C.H.'s Speech is Content-Based.

"Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). Restrictions on speech are content-based when the message determines whether the speech is subject to the restriction. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (the requirement is content-neutral if it is "justified without reference to the content of the regulated speech").

Defendants' restrictions on C.H.'s speech are based on the content and viewpoint of her speech. School officials told her she could not engage in her desired expression because "religious" expression was not allowed in public school. (Compl. ¶¶38-41; *See also* Ans. ¶¶ 28, 30). School officials allow students to engage in similar forms of expressive activity—wearing colored wristbands advocating a wide variety of causes, (C.H. Decl. ¶¶ 14-15)—but would not permit C.H. to do so simply because of the religious content and viewpoint of her speech. Defendants permit discussion of sex, pregnancy, and abortion on its campus, so these are not excluded topics. (*Id.* ¶¶

2003); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.,* 307 F.3d 243, 253 (3d Cir. 2002); *Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 212 (3d Cir. 2001).

9-10). Excluding religious speech on an otherwise allowable topic is unconstitutional. *Good News Club v. Milford Cent. Schs.,* 533 U.S. 98, 111-12 (2000).

Further, Defendants' Policies are content and viewpoint-based in that they allow school officials to posses the unbridled discretion to favor or disfavor speech based on its content and viewpoint "even if the discretion and power are never actually abused." *Tong v. Chicago Park District*, 316 F.Supp.2d 645, 659, 661 (N.D. Ill. 2004); *Forsyth County*, 505 U.S. at 133 ("nothing in the [policy] or its application prevents the official from encouraging some views and discouraging others through the arbitrary application"); *C.E.F. v. Montgomery County Public Schools*, 457 F.3d 376, 388 (4th Cir. 2006) (striking down literature distribution policy because "nothing in the policy prohibits viewpoint discrimination, requires viewpoint neutrality, or prevents exclusion of flyers based on [defendants'] assessment of the viewpoint expressed in a flyer"). Defendants' restriction of C.H.'s speech are not only unconstitutional under *Tinker,* they are unconstitutional under *Wade*.

ii. Defendants' Restriction of C.H.'s Speech is Not Narrowly Tailored.

To be narrowly tailored, a regulation must promote a "substantial government interest that would be achieved less effectively absent the regulation" but may not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. "A restriction cannot be 'narrowly tailored' in the abstract; it must be tailored to the particular government interest

asserted." *Snell v. City of York*, 564 F.3d 659, 669 (3d Cir. 2009). "Only when the contours of that interest are clear may [the court] decide whether the means selected to accomplish it have been 'narrowly tailored.'" *Id.*

Based on Defendants' response to C.H.'s request, the only conceivable interest Defendants had in denying C.H. permission to engage in her desired speech was to avoid anything "religious" being conveyed to students in school by other students. (*See* Ans. ¶¶ 28, 30.) But this is not a legitimate government interest, much less a significant one that justifies a complete ban on all religious expression in the school.

First, students are permitted to engage in and are exposed to other types of expression in the school which may be controversial—thus, there is no specific need to "protect" students from religious expression by fellow students. (Decl. C.H. ¶¶14-16). Indeed, the Supreme Court has made it quite clear that a student "may express his opinion, even on controversial subjects . . . ." whether he is in the classroom, cafeteria, playing field or other areas of the campus. *Tinker*, 393 U.S. at 513.

Second, in the event the Defendants have a mistaken belief that they are required to eradicate all student religious expression from the school based on the Establishment Clause of the First Amendment, courts have made clear for many years that the Establishment Clause does not justify censorship of religious expression of private individuals, even in a public school setting. Such a concern is misplaced because private speech does not violate the Establishment Clause. The Establishment

Clause restricts the power of government, not the rights of individuals acting on their own behalf. As the Supreme Court has held:

> [T]here is crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 250 (1990).

Both the Ninth Circuit and the Seventh Circuit have held that public schools should educate students about the First Amendment rather than censor speech:

> We agree with the Seventh Circuit that the desirable approach is not for schools to throw up their hands because of the possible misconceptions about endorsement of religion, but that instead it is 'far better to teach students about the First Amendment, about the difference between private and public action, about why we tolerate divergent views. The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.'

Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1055 (9th Cir. 2003) (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299-1300 (7th Cir.1993)).

The Third Circuit has repeatedly held that granting equal access to religious speakers does not violate the Establishment Clause. *See Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. Sch. Dist.,* 386 F.3d 514 (3d Cir. 2004) (Alito, J.);

Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211 (3d Cir. 2003); *Gregoire,* 907 F.2d 1366. The Third Circuit has also held that a high school's flat ban on the distribution of religious materials was unconstitutional because it was not justified by a strong government interest, and specifically rejected an Establishment Clause defense. *Gregoire,* 907 F.2d at 1382-83; *see also Miller ex rel. Miller v. Penn Manor Sch. Dist.,* 588 F. Supp. 2d 606, 628 (E.D. Pa. 2008) (enjoining policy which "attempted to restrict what effectively amounts to all religious speech, which is clearly not permissible under the First Amendment"); *Slotterback,* 766 F. Supp. at 293-97 (striking down a ban on student distribution of religious materials and rejecting claim that the policy was required to avoid an Establishment Clause violation.)

Finally, the breadth of Defendants' restriction on religious speech—a flat ban of *anything* "religious" (*See* Ans. ¶ 30)—indicates that the restriction is not "narrowly tailored." There is no sense that the ban is tailored to address any specific harm caused by certain types of religious speech, and indeed, it is difficult to think of any such harm in this context. Thus, the Defendants' ban on all religious speech—and C.H.'s desired speech—burdens far more speech than necessary to accomplish any significant interest, and is therefore unconstitutional.

iii. Defendants' Restriction of C.H.'s Speech Does Not Leave Open Ample Alternative Channels of Communication.

In addition to the other criteria, Defendants' restriction of C.H.'s speech must

also leave open ample alternative channels of communication. *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994); *Ward*, 491 U.S. at 791. It is clear, however, that it does not meet this criteria as well; they have prohibited her from engaging in her desired speech anywhere at school through the wearing of armbands and through literature distribution. (Ans. ¶ 28, 30).

Defendants may argue that C.H. is free to engage in speech outside of school, but this does not allow them to escape constitutional scrutiny. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). The school campus is undoubtedly an appropriate place for expression, as the Supreme Court made clear forty years ago in *Tinker*: "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506.

Moreover, as courts have recognized, where the location of speech is integral to the message, alternative locations may not be "ample" enough to pass constitutional scrutiny. *See City of Ladue*, 512 U.S. at 56 (discussing location of speech as part of the message as a factor in determining whether there are ample alternative channels of communication); *Long Beach Area Peace Network v. City of Long Beach,* 574 F.3d 1011, 1025 (9th Cir. 2009) (same). Additionally, where the speaker is not permitted to reach their intended audience, alternatives are not "ample" enough to satisfy this

inquiry. *See Berger v. City of Seattle,* 569 F.3d 1029, 1049 (9th Cir. 2009); *Weinberg v. City of Chicago,* 310 F.3d 1029, 1042 (7th Cir. 2002).

This is certainly the case here. Since she was in seventh grade, C.H. has watched as friends and classmates became pregnant, and many of them got abortions. (C.H. Decl. ¶¶ 4-8). C.H. therefore feels very strongly about being able to share information with her classmates about abortion, and given that she may not see many of these individuals outside of the school context, the location of her speech at the school is very important. Additionally, due to the fact that (1) the "Teen Center" in the middle of the campus presents students with information concerning sexual activity, abortion, and contraceptives and (2) students learn about sex and pregnancy in mandatory classes (*Id*. ¶¶ 21-22; C.H. Ex. 1, pp. 2-5, 10-11, 14-19), the location of C.H.'s expression is crucial in acting as a counterpoint to that message. Through their prohibition of anything "religious" in school, Defendants have effectively shut down C.H.'s desired speech and left her with no adequate alternatives. Defendants' policies violate the *Ward* test, entitling C.H. to an injunction.

iv. Defendants' Restriction is Unreasonable Because it is Not Based on a Fear of Disruption or Other Pedagogical Concern.

The Defendants' policies are unreasonable because it prohibits all student speech without regard to whether the speech is likely to cause a disruption or whether it is related to the school's pedagogical concerns. The Defendants' policy requires

C.H. to obtain permission from school officials before distributing any literature to her fellow students. Such restrictions are not reasonable under *Tinker*.

In *Raker v. Frederick County Public Schools*, 470 F.Supp.2d 634 (W.D.Va. 2007), the court held that the school's time, place and manner restrictions requiring pre-approval of all literature and then only permitting it to be distributed either before or after school to be unreasonable. "Regardless of whether the court classifies the [school] hallways and cafeteria as closed fora or limited public fora, the Regulation's restriction of the distribution of written materials to before and after school fails even the least exacting reasonableness test, especially when viewed in light of *Tinker*'s disruption principle."*Id*. at 641. Similarly in *M.B. ex rel. Martin v. Liverpool Central School Dist.*, 487 F.Supp.2d 117, 142 (N.D.N.Y. 2007), the court ruled that a school policy requiring pre-approval of all student literature distribution was an unreasonable time, place and manner restriction because the school "offered no evidence showing that this regulation, which, in effect, prohibits all written student speech that is not related to the elementary school's pedagogical concerns, is narrowly tailored to serve its interests in the orderly distribution of written material and the avoidance of unnecessary controversy and litter on school premises." The Defendants' ban on the distribution of "religious" literature is unreasonable because the Defendants have not established that C.H.'s pro-life literature is likely to cause a disruption or otherwise come into conflict with a legitimate pedagogical concern of the school.

2. Defendants' Policies Are Unconstitutionally Vague in Violation of the Due Process Clause of the Fourteenth Amendment.

Defendants' policies are unconstitutionally vague because they deny students fair notice of prohibited conduct and permit the unrestricted enforcement of the policies against any student, thereby inviting arbitrary, discriminatory, and overzealous enforcement. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Grayned*, 408 U.S. at 108-09.

Regulations and policies are void for vagueness when persons "of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926). Vague statutes or policies are unconstitutional because they "fail to provide fair warning of prohibited conduct," and they authorize and encourage arbitrary and discriminatory enforcement because they do not establish minimal guidelines to govern their enforcement. *Morales*, 527 U.S. at 56; *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). In a facial vagueness challenge, the ordinance need not be vague in all applications if it reaches a "substantial amount of constitutionally protected conduct." *Kolender*, 461 U.S. at 359 n.8. When First Amendment freedoms are at stake, a greater degree of specificity and clarity is required. *NAACP v. Button*, 371 U.S. 415, 432-33 (1963); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

Unclear policies like Defendants' provide *carte blanche* to administrators to

enforce them at their whim. As discussed above, the terms of the policies are open-ended and allow administrators to enforce them in an unfettered fashion, but they also clearly lack specific standards in practice. And as the Supreme Court has pointed out, where a policy has no clearly defined limits on its face, the court may not simply presume they are there. *City of Lakewood,* 486 U.S. at 770 (citation omitted). Presuming constitutional application of a vague, standardless policy is the "very presumption that the doctrine forbidding unbridled discretion disallows." *Id.*

After the Verified Complaint was filed in this case, Defendant Gilson was quoted explaining several "policies" of the district, but it is not clear which of the written policies of the district, if any, he was referring to, and he contradicts himself as to what the actual policy of the district is with regard to literature distribution. In one article, Gilson states that "we don't allow students to pass out literature" (although the written Policy clearly states otherwise, Hudak Ex. 2) (Hudak Ex. 4, p. 2 [NJ.com]). In another, Gilson states that "students are not allowed to pass out *partisan* literature" (whatever that may mean). (Hudak Ex. 5, p. 2 [Press of Atlantic City]). In an Associated Press article, Gilson states that the "school has a policy that generally doesn't allow students or staff to distribute literature without prior approval." (Hudak Ex. 6, p. 3 [Associated Press]). Obviously, if the superintendent himself cannot decipher the district's policies with respect to literature distribution, students like C.H. certainly cannot be expected to.

Additionally, Defendants' policy of prohibiting all "religious" speech from the school is also unconstitutionally vague since what is and is not "religious" is not necessarily clear. "[A]mple authority exists for declaring a ban on 'religious' speech void for vagueness." *Slotterback,* 766 F. Supp. at 297 n. 14 (citing *e.g., Rivera v. E. Otero Sch. Dist.,* 721 F. Supp. 1189, 1197 (D. Colo. 1989) ("religion" and "politics" are not self-defining terms, and school officials were improperly given unfettered discretion to define them).

Furthermore, the ban on religious speech is not spelled out in a written policy, presenting a further vagueness problem. A student like C.H. simply could not have known that religious speech was prohibited at school. As the Third Circuit has said:

> The need for specificity is especially important where . . . the regulation at issue is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech . . . . A vague rule may authorize and even encourage arbitrary and discriminatory enforcement by failing to establish minimal guidelines to govern enforcement.

Sypniewski, 307 F.3d at 266 (internal quotations and citations omitted).

Defendants' application of unwritten policies to exclude C.H.'s religious speech is the essence of vagueness. Thus, Defendants' literature distribution policies not only offend the First Amendment, but also run afoul of the Fourteenth Amendment's Due Process Clause, creating an additional reason these policies should be enjoined.

3. Defendants' Discrimination Against Religious Speech Violates the Establishment Clause of the First Amendment.

a. Defendants' Discrimination Evidences a Hostility Towards Religion.

The Establishment Clause requires neutrality and forbids hostility toward religion. As the Supreme Court has explained, the Establishment Clause "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Board of Education*, 330 U.S. 1, 18 (1947); *accord Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (Establishment Clause forbids government action with an effect that "inhibits religion"). The suppression of the religious expression of private parties "would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248. Further, the Establishment Clause "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995); *accord McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment) ("The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion"); *Peck v. Upshur Bd. of Educ.*, 155 F.3d 274, 284 (4th Cir. 1998) ("to exclude religious literature as such from the forum . . . would evince [unconstitutional] hostility toward religious speech").

In *Good News Club*, the Supreme Court took special notice of the "danger" that an observer could "perceive a hostility toward the religious viewpoint" when a government body denies equal access for religious expression. 533 U.S. at 117-18. Here, Defendants have unequivocally conveyed the message that C.H. is somehow a second class citizen, since they ban only "religious" expression, but allow many other forms of expression by students on their campus. (*See* Ans. ¶ 28, 30). It is not hard to see how religious students like C.H. at Bridgeton High School could reasonably perceive themselves as political outsiders. See, e.g., *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006) ("Where...the charge is one of official preference of one religion over another, such governmental endorsement sends a message to nonadherents [of the favored denomination] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community").

b. Defendants' Discrimination Creates an Excessive Entanglement with Religion.

Moreover, discriminatory suppression of religious speech requires the censor to make a judgment about what is and is not religious. This creates additional constitutional problems of "entanglement," see *Lemon*, 403 U.S. at 613 (Establishment Clause forbids "excessive government entanglement with religion") (internal quotation marks and citation omitted). The school district

would risk greater "entanglement" by attempting to enforce its exclusion

> of . . . "religious speech" . . . . Initially, [school officials] would need to determine which words and activities fall within "religious [speech]." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion.

Widmar, 454 U.S. at 272 n.11 (internal quotation marks and citations omitted).

Thus, treating religious expression on equal terms with secular expression "would in fact *avoid* entanglement with religion," *Mergens*, 496 U.S. at 248 (emphasis in original; citation omitted). In *Slotterback,* a case involving a similar ban on distributing religious materials, the court stated that it was the

> school district's current policy that involves excessive government entanglement with religion: School officials are required to screen all nonschool written materials in order to identify and exclude materials that proselytize particular religious beliefs. Were the school district to adopt a content-neutral distribution policy, the need for such screenings would be eliminated, and the school officials would avoid excessive entanglement.

Slotterback, 766 F. Supp. at 296 (citations omitted); *see also Gregoire*, 907 F.2d at 1381 (prohibiting religious meetings exacerbates entanglement); *Rivera*, 721 F. Supp. at 1195-96 (policy of prohibiting distribution of religious literature would cause hopeless entanglement).

Here, Defendants have created the problem of entanglement through their open-ended policies allowing administrators unfettered discretion in deciding which speech to allow and which to deny, and their prohibition on anything "religious" in school. (*See* Ans. ¶¶ 28, 30). Government officials are therefore compelled to classify the speech of students according to their perceived religious or non-religious nature:

> Merely to draw the distinction would require the school district – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

Widmar, 454 U.S. at 269 n.6. Even if such a task were workable—and it is not—it would be a wholly improper role for a government censor. *Id*. at 269 n.6, 272 n.11. The law does not permit Defendants to try to discern which private student speech is too "religious" in nature to be permitted and which is not. For this reason, Defendants' censorship of C.H.'s speech at issue in this case violates the Establishment Clause.

4. Defendants' Discrimination Against Religious Speech Violates the Free Exercise Clause of the First Amendment.

The Supreme Court held in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990) that laws "impos[ing] special disabilities on the basis of religious views or religious status" are presumptively unconstitutional. *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible"). So too are laws that burden religiously motivated conduct, yet lack neutrality or general applicability. *Smith*, 494 U.S. at 879; *accord Lukumi*, 508 U.S. at 546. Laws that expressly target particular religious views or that lack neutrality or general applicability are invalid unless they are "justified by a compelling interest and . . . narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533.

The speech C.H. wished to engage in was motivated by sincerely held religious

beliefs. (Compl. ¶¶16-21, 61-63). Defendants prohibited her speech on a non-neutral basis—purely because it was "religious," but do not prohibit other students from engaging in similar, non-religious speech. (Ans. ¶¶ 28, 30; C.H. Decl. ¶¶14-17). Moreover, Defendants informed C.H. that *nothing* religious was allowed in school, (C.H. Decl. ¶17) meaning that C.H. is left with no other avenue through which to express her religious viewpoints at school, save for outside the "schoolhouse gate." This violates her free exercise rights according to the standard in *Smith*, requiring strict scrutiny under the compelling interest test.

Articulating the high threshold that the government must show to substantiate a compelling interest, the Supreme Court stated: "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

C.H. has already demonstrated that Defendants cannot even meet the less stringent "material disruption" standard in Tinker, so their discriminatory policies obviously fail to satisfy the more demanding compelling interest test. C.H. is therefore likely to succeed on her free exercise claim, and Defendants' prohibition of C.H.'s speech should be enjoined on this additional basis.

B. C.H. Has No Adequate Remedy At Law And Will Suffer Irreparable Injury If A Preliminary Injunction Is Not Issued.

The second consideration for the Court in determining whether to grant a motion for preliminary injunction is "whether the movant will be irreparably injured by denial of the relief." *Bell*, 414 F.3d at 478 n. 4. C.H. has suffered irreparable harm because she was denied the right to participate in the Day of Silent Solidarity (C.H. Decl. ¶ 17), and she is continuing to suffer irreparable harm each day her desired speech is prohibited by school officials. Furthermore, Defendants' policies are vague and are unconstitutional prior restraints, which also cause injury to C.H.'s First Amendment rights. And as the Supreme Court has stated, "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citation omitted).

C. If A Preliminary Injunction Is Not Issued, C.H. Will Suffer Greater Injury Than Defendants, Tipping The Balance Of Hardships In Her Favor.

C.H. satisfies the third requirement for issuance of a preliminary injunction: "whether granting preliminary relief will result in even greater harm to the nonmoving party." *Bell*, 414 F.3d at 478 n. 4. Enjoining unconstitutional and impermissibly vague policies will not harm the defendants. *Miller,* 588 F. Supp. 2d at 630-31 (citing *Sypniewski,* 307 F.3d at 259). When, as here, it has been shown that the challenged restrictions are unconstitutional, "no substantial harm to others can be said to inhere in [their] enjoinment." *See Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville &*

Davidson County, 274 F.3d 377, 400 (6th Cir. 2001). As stated above, C.H. is suffering irreparable harm due to the loss of her First Amendment rights each day she is prohibited from engaging in the constitutionally protected expression that she desires to. The balance of hardships therefore clearly rests in C.H.'s favor.

D. Issuance Of A Preliminary Injunction In This Case Is In The Public Interest.

The final consideration for the Court in determining whether a preliminary injunction should be issued is "whether granting the preliminary relief will be in the public interest." *Bell*, 414 F.3d at 478 n. 4. "In the absence of legitimate countervailing concerns, the public interest clearly favors the protection of constitutional rights. . . " *Council of Alternative Political Parties v. Hooks,* 121 F.3d 876, 884 (3d Cir.1997). The Supreme Court has held that preventing the violation of a party's constitutional rights is in the public interest. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979). Because C.H. is suffering the loss of her constitutional rights, it is imperative that she receive immediate injunctive relief, and the public interest is served through the protection of our most fundamental freedoms.

VI. CONCLUSION

C.H. has satisfied all aspects of the requirements for issuance of a preliminary injunction against Defendants' unconstitutional policies and prohibition of her speech. C.H. also ask that the Court waive any bond requirement under Fed. R. Civ. P. 65(c), because this case involves protecting fundamental constitutional rights, and the

Defendants will in no way suffer any financial loss if an injunction is issued. *Westfield High School L.I.F.E. Club*, 249 F.Supp.2d at 128-29 (waiving bond requirement in case involving student club seeking a preliminary injunction where "requiring a security bond. . . might deter others from exercising their constitutional rights") C.H. therefore requests that this Court grant her request for a preliminary injunction.

Dated this 11th day of February, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2010, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to the following:

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