IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

A.P., a minor by and through his next friend, D.B.,	)	
Plaintiff,	)	CASE NO. 3:08-cv-00176-slc
v.	)	Magistrate Judge Crocker
TOMAH AREA SCHOOL DISTRICT; ROBERT FASBENDER, in his official capacity as District Administrator of the Tomah Area School District; CALE JACKSON, in his official capacity as Assistant Principal of Tomah High School; and JULIE MILLIN and MARGI GENRICH, in their official capacities as Tomah High School faculty members,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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I. INTRODUCTION

Art is, and has perennially been, a medium through which persons aspire to express their personal beliefs, including those that are religious. Some of the most acclaimed artwork produced in the past thousand years or more has been religious, seeking to express a human sense of the Almighty or memorializing Biblical narratives. Michelangelo's "The Statue of David," Leonardo da Vinci's "The Last Supper" and Rembrandt's "Christ on the Cross" immediately spring to mind. Few would question that art, stripped down to its essence, is an expression of oneself and an accessible way to communicate one's beliefs. That is, unless you happen to be a Christian student in the Tomah Area School District ("District").

The District encourages its students to "relate art to his/her own experiences and culture" through art classes that provide "a variety of visual experiences." (Verified Complaint ("Compl.") ¶¶7, 58; Ex. C.) Yet the District penalizes (only) Christian student expression through written Policies banning artwork portraying "blood, violence, sexual connotations, [or] religious beliefs," and "drug, gang, or religious symbols." (Compl. ¶¶3, 6, 81, 112; Ex. D; Ex. E (relevant portions underlined for ease of reference).) Pursuant to these Policies, the District picks and chooses which student artwork is allowed and which is not by examining the content and viewpoint of the expression therein. This is the very definition of an unlawful *ad hoc* scheme, as shown below. And, when Plaintiff A.P. dared to respectfully object to the District's illicit Policies (and the suggestion that he had somehow "signed away his First Amendment rights") he was retaliated against by District officials and made to serve two detentions. (Compl. ¶¶81-84, 96; Ex. A. ¶¶54-61,78.) Such a draconian atmosphere demonstrates not only a cold-shoulder turned by the District toward student

religious expression, it evinces a manifest hostility toward Christianity. The First Amendment demands more, indeed, much more.

In looking for examples of the District's discriminatory scheme, one need not look far. Artwork reflecting Hindu, Buddhist, and Satanic themes and portraying violence and alcohol is permitted, while artwork reflecting Christian themes is not. (Compl. ¶¶124-27, 130-37; Ex. A. ¶¶121-28, 132-43, 145, 147-50, 154) Such permitted artwork is turned in and graded. It is hung in the hallways. And it is displayed in classrooms (including the very classroom where District officials met to reiterate to A.P. that his Christian religious expression warranted no constitutional protection). At the same time, District officials censor A.P.'s Christian beliefs in the context of art assignments and refuse to grade his projects on par with secular-themed projects (or projects expressing other, non-Christian religious beliefs) – even though he satisfies all relevant assignment criteria. Indeed, the facts of this case show that the District gave A.P. a zero on his landscape assignment for drawing a cross and including the words "John 3:16. A sign of love" in the background. (Compl. ¶¶3, 97; Ex. A. ¶¶31-33, 70; Ex. G.) This they did not because his response to the assignment somehow failed to meet the stated criteria (which was not the case), but rather because of the Christian religious nature of the drawing. (Compl. ¶¶72, 75; Ex. A. ¶¶34-36, 38, 39.) This is classic viewpoint-based discrimination. These facts also preclude the District from validly claiming that a *per se* ban on student religious expression reasonably furthers a legitimate education interest.

Moreover, any Establishment Clause "endorsement" concerns are without merit. There is a crucial difference between government speech endorsing religion (which the Establishment Clause forbids) and private student speech endorsing religion (which the Free Speech and Free Exercise

Clauses safeguard). Here, A.P.'s religious expression in responding to class assignments cannot possibly violate the Establishment Clause. Government endorsement of a message contained in one student's art projects can hardly be a plausible concern given the dozens of student responses to a variety of class projects (and when the fact is clear and well-known that these projects are indeed created by students, and not District officials). Moreover, the District is certainly not claiming that it is endorsing all student artwork, including the several demonic and alcohol-themed pictures that adorn its hallways and classroom walls. Put succinctly, the mere presence of religious speech by students in a government school does not violate the Establishment Clause.

In bringing this action, A.P. does not seek censorship of the artwork that Defendants currently allow. A.P. recognizes that such artwork reflects the individual views and beliefs of the artist, and believes that so long as student artwork satisfies all relevant assignment criteria, it should be graded accordingly. A.P. merely asks that his particular artwork, containing Christian elements, be treated fairly, *i.e.*, graded according to stated project criteria and not subjected to unlawful censorship for its religious aspects.

Plaintiff also does not dispute the District's well-settled authority to set policy and otherwise determine curriculum standards for its schools. He challenges the District's unlawful exercise of this authority in censoring his individual response to an assignment, when the response otherwise met all previously set grading criteria, simply because it includes religious aspects. The facts in this case are clear; so is relevant United States Supreme Court case law. This is accordingly a straightforward case.

This is also a case that requires swift relief, as the need for an injunction is immediate. A.P. merely desires to have his drawing assignment graded according to the criteria established by the

teacher (and not given a zero merely because it includes religion). (Ex. A. ¶157.) He also desires to express his religious beliefs where appropriate in upcoming class assignments for the remainder of the school year (before he graduates in less than two months). (*Id.* ¶5, 158.) This fall, A.P. plans to attend college. (*Id.* ¶159.) Absent temporary injunctive relief from this Court, the disciplinary marks on A.P.'s academic record arising from the District's retaliatory actions against him (for respectfully tearing the illicit Policy) will be forwarded to his college as part of his final transcript. (*Id.* ¶160.) This obviously has the potential to negatively impact his college acceptance, not to mention future graduate programs to which A.P. desires to apply. (*Id.* ¶161.) A.P. has also made several attempts to resolve this dispute informally. (Compl. ¶¶90-95; Ex. A. ¶¶71, 79-83.) These attempts were rebuffed at every turn. (*Id.*) Only injunctive relief can now secure A.P.'s protected religious expression in the classroom and ensure that his post-high school academic plans are not harmed.

II. STATEMENT OF FACTS[1]

III. ARGUMENT

A. STANDARD FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

To obtain a preliminary injunction or, in this case, a temporary restraining order, a plaintiff must show that (1) he has a likelihood of success on the merits of his claims; (2) no adequate remedy at law exists; and (3) he will suffer irreparable harm if the injunction is not granted. *Washington v. Indiana High School Athletic Ass'n*, 181 F.3d 840, 845 (7th Cir. 1999). If this threshold showing

[1]The facts in this case are straightforward. Due to the press of time and to avoid needless duplication, the facts alleged in the Verified Complaint and included in the accompanying Proposed Findings of Fact are herein incorporated into Plaintiff's Memorandum by reference.

is made, a court weighs the harm to the plaintiff if an injunction is not issued against the harm to the defendants if it is issued. *Id*. This balancing exercise consists of a sliding scale analysis – the greater a plaintiff's chances of success on the merits, the less strong a showing he must make that the balance of harm weighs in his favor. *FoodComm International v. Barry*, 328 F.3d 300, 303 (7th Cir 2003). Thus, even a plaintiff with a less than fifty percent chance of prevailing on the merits may merit a temporary restraing order and preliminary injunction when the balance of harms would weigh heavily in his favor. See *id*. In the final part of this equitable analysis, a court weighs the public interest by considering the effect of granting or denying relief on non-parties. *Washington*, 181 F.3d at 845. As demonstrated in this Memorandum, each element necessary for a temporary restraining order and preliminary injunction is met in this case, and the balance of harms weighs heavily in favor of Plaintiff A.P.

B. A.P. IS LIKELY TO SUCCEED ON THE MERITS OF HIS CLAIMS.

In the preliminary injunction context, the Seventh Circuit has held that a plaintiff need not demonstrate a high likelihood of success on the merits; rather, he must demonstrate only a "better than negligible" chance of success. *Meridian Mutual Ins. Co. v. Meridian Ins. Group, Inc*., 128 F.3d 1111, 1114 (7th Cir. 1997). As shown below, A.P. certainly has a better than negligible chance of success. In fact, the likelihood that he will prevail on his claims against the Defendants here is quite strong. This is attributable to Defendants' viewpoint-based censorship of student expression that otherwise satisfies class assignments pursuant to Policies granting Defendants unbridled discretion. The numerous constitutional provisions implicated here include the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, as well as the Equal Protection and Due Process

Clauses of the Fourteenth Amendment.[2] As to each, A.P. establishes a strong likelihood that he will prevail, thereby satisfying the first prong necessary for a preliminary injunction to issue.

1. Defendants' Policies and practice violate A.P.'s right to the freedom of speech by censoring his religious expression in art projects that otherwise satisfy all assignment guidelines.

a. A.P.'s religious expression is safeguarded 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) (internal citations omitted) (emphasis in original). Consequently, as discussed below, the relevant legal analysis dictates that unless a particular student's religious expression "materially and substantially interfere[s] with . . . appropriate discipline," that speech is entitled to full constitutional protection under the First Amendment. *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 513 (1969) (internal quotation marks and citation omitted); *Morse v. Frederick*, 127 S.Ct. 2618, 2625 (2007) ("*Tinker* held that student expression may not be suppressed unless school officials

[2]Due to time and length concerns, A.P. has not brief his Fourteenth Amendment equal protection and due process claims. A.P. submits that these constitutional rights were also violated by Defendants and will accordingly brief these claims at a later stage of this case.

reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school'"). The facts in this case dictate such full constitutional protection for A.P.'s speech. A.P. expressed his religious beliefs by drawing a cross and including the words "John 3:16. A sign of love" in the background of a landscape project. (Compl. ¶71; Ex. A. ¶¶31-33.) A.P. also desires, in the future, to continue to express his religious beliefs through artwork in otherwise responding to class assignments. (Ex. A. ¶158.) The law is clear as to the above religious expression by A.P. – it is safeguarded by the First Amendment.[3]

b. *Tinker* condemns Defendants' Policies and practice that prohibit student religious expression.

Again, A.P. does not dispute that Defendants possess authority to set policy and curriculum standards for its schools. Rather, A.P. takes issue with Defendants' unlawful exercise of this

[3]Any insistence by Defendants that A.P. somehow "waived" his First Amendment rights by affixing his signature to Defendants' unconstitutional Policies is wrong. A waiver of First Amendment rights will be found only on the basis of clear and compelling evidence that the party understood his rights and intentionally relinquished or abandoned them. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143-45 (1967) ("[W]e are unwilling to find waiver in circumstances which fall short of being clear and compelling"). Further, the facts and circumstances surrounding the waiver must make it clear that the party foregoing its rights "has done so of its own volition, with full understanding of the consequences of its waiver." *Ruzicka v. Conde Nast Publications, Inc*. 733 F.Supp. 1289, 1297 (D. Minn. 1990) (internal quotation and citation omitted). "Among the facts and circumstances examined are the language of the purported waiver, the sophistication of the parties, the balance of bargaining power, and whether the parties received advice from counsel." *Id*. Here, the facts do not demonstrate that A.P. intentionally relinquished or abandoned his constitutional rights. At the time he signed the Policy, A.P. had no idea that it would be so restrictive of his religious expression in responding to class assignments. (Ex. A. ¶¶55-56.) Ms. Millin never explained to A.P. that the Policy he was signing would be so restrictive of religious expression in the class. (Ex. A, ¶57.) And the facts show that at the time that A.P. signed the Policy, he did not think that including something like a small cross, or a simple scripture verse reference, would be subject to censorship when the drawing satisfied all stated project criteria. (Ex. A. ¶58.) Defendants are in a position of authority (holding an edge in bargaining power), A.P. is a minor, and A.P. did not have an opportunity to seek advice from counsel prior to being required to affix his signature. Any assertion of waiver as to A.P.'s protected constitutional rights cannot be countenanced here.

authority in censoring his individual response to an assignment when the response otherwise met all previously set grading criteria just because he included a few religious aspects as an expression of his experiences. Controlling precedent in this case, the U.S. Supreme Court's decision in *Tinker v. Des Moines Indep. Comm. Sch. Dist*., shows that Defendants fall woefully short in how they treat student religious expression.

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 v. Frederick*, 127 S.Ct. 2618, 2625 (2007) ("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," *Tinker*, 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,* 127 S.Ct. at 2625 (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 (emphasis added). Also notable is that school officials' "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id*. at 508.

An undeniable element of *Tinker* is its demonstrated view that the classroom also includes free speech protection. The point the Court in *Tinker* 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 "cafeteria" and "playing field"). Yet the baseline assumption demonstrated in the Court's oft-relied up 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"; *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 importune that because A.P.'s religious expression occurred in the classroom, it can be suppressed. Nothing could be further from the truth. *Tinker's* protections plainly apply to classroom activities and the Court's opinion affords no support for such a view. A crucial point too, and one from which Defendants cannot escape, is the fact that the classroom setting in which A.P.'s religious expression occurred obviously differs from a typical classroom environment, such as math, for example, where including religion in response to an assignment may not be appropriate. There, unlike in A.P.'s Drawing I and Jewelry/Art Metals classes, student creativity and the expression of personal views in response to

assigned projects is not as expressly promoted. Defendants' own description of the THS art curriculum supports the view of a more personalized response, describing the school's art curriculum as "provid[ing] a variety of visual experiences for the student to relate art to his/her own experiences and culture." (Ex. C.) It follows, then, that under *Tinker*, student speech is appropriately protected in A.P.'s art classes.

The remaining question as to when school officials might be permitted to regulate student speech is also addressed squarely in *Tinker*. There, the Court affirmed 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, as noted *supra*, 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, A.P. drew a cross and wrote "John 3:16. A sign of love" in otherwise fulfilling the assigned landscape drawing project in his Drawing I class. (Compl. ¶3, 71; Ex. A. ¶¶31, 39; Exs. G, B.) The facts of this case are wholly devoid of any evidence that A.P.'s artwork caused substantial disruption of or material interference with school activities or of interference with the rights of other students. In fact, it is quite challenging to imagine how such a circumstance could result from they type of religious expression included by A.P. in his art projects. Simply put, no other reasonable conclusion can be reached that under the applicable standard set forth in *Tinker*, censorship of A.P.'s religious expression is intolerable.

c. *Hazelwood* is inapposite because only private, not school-sponsored speech is at issue here.

Tinker controls this case as demonstrated above. Yet the District may assert that a standard apart from *Tinker* should be applied by this Court in analyzing A.P.'s claims, *i.e.*, the standard set forth in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1987). But *Hazelwood* is out of place here for, as discussed below, A.P.'s religious speech is private, not school-sponsored speech. See *Saxe v. State College Area School District*, 240 F.3d 200, 213-14 (3d Cir. 2001) (*Hazelwood* applies only when the student speech "could reasonably be viewed as *speech of the school itself*") (emphasis added). *Tinker*, and only *Tinker*, governs this matter.

In *Hazelwood*, the Court created a distinct method for resolving student speech claims in a specific context. 484 U.S. at 260. The Supreme Court in that case established a division between student speech which would be considered under the terms of *Tinker* and that under its separate design in *Hazelwood*, and it delineated this second category in the following fashion:

> The question whether the First Amendment requires a school to *tolerate* particular student speech-the question that we addressed in Tinker-is different from the question whether the First Amendment requires a school *affirmatively to promote* particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The later question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and other members of the public *might reasonably perceive to bear the imprimatur of the school*.

Id. at 270-71 (emphasis added).

Here, A.P.'s private religious expression through his artwork is not a school newspaper or a school play. The question presented, then, (and properly answered in the negative) is whether his artwork is sufficiently similar to those things to fall into the associated "other expressive activities." That latter category is to be interpreted in light of the former two: "publications" and "theatrical

productions." A school paper and a school play are such that "members of the public might reasonably perceive [them] to bear the imprimatur of the school." However, with that gauge in mind, the *Hazelwood* category of "expressive activity" clearly would not contain A.P.'s artwork any more than it would contain the written compositions that A.P. or others students turn in for a creative writing assignment. Of course the category of student speech falling within the purview of *Hazelwood* is not that which is broadly "part of the school curriculum" (*Tinker's* analysis militates against any such erroneous proposal), but rather only that speech which is like a school newspaper or school play. A better analogy to A.P.'s religious messages would be the example of text printed on a t-shirt worn by a student during a school-sponsored field trip – obviously not a *Hazelwood*-amenable circumstance. *See*, *e.g.*, *Morse*, 127 S.Ct. at 2627, 2629 (applying *Tinker* analysis to circumstances involving a student banner unfurled at school-sponsored event and deeming *Hazelwood* inapplicable because "no one would reasonably believe that [the student's] banner bore the school's imprimatur"). The message there, as here, is merely found in the context of a school-administered activity. Clearly the District is not aiming "to convey its own message" through student artwork, but rather to facilitate "a diversity of views from private speakers." *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, 386 F.3d 514, 525 (3d Cir. 2004) (deeming *Hazelwood* inapplicable to private speakers in the school setting).

Moreover, while the school may dictate its own curriculum and assignments, and set parameters for fulfilling such, it may not censor a student's individual response to that assignment when it otherwise meets all previously set grading criteria solely because it includes religious aspects. This is especially so when the assignment specifically requests the student's own views and experiences to be included, such as in art class. It is certainly not constitutionally permissible for

the school to permit a student to reflect his "demonic" interests, but not his Christian interests. And it is most certainly not constitutionally allowable for the school to permit a student (ostensibly well under 21 years of age) to reflect his interest in alcoholic beverages, but not his Christian interests. *See* Ex. V (true and correct pictures of student drawings of martini glasses filled with alcohol on display in Defendant Millin's classroom). The analysis set forth in *Tinker* governs and in its application, Defendants' censorship violates the First Amendment.

d. A *per se* ban on student religious expression in the classroom cannot be reasonably related to any legitimate pedagogical concern.

Can it be a legitimate educational interest to ban religious speech and thought outright from public schools? Should we teach our children that there is no place for religion in Art, Music, or Literature, for example? Should we teach them that religion, Christianity in particular, is "illegal" or somehow inappropriate in school? Does this prepare them to be good, well-educated citizens? The only answer to these questions is "no." *See*, *e.g.*, *People of State of Ill. ex rel. McCollum v. Board of Ed. of School Dist. No. 71*, 333 U.S. 203, 235-36 (1948) (Jackson, J., concurring) ("[I]t would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view . . . . One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared"); see also, *School District of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963) ("[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of

civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities"); *Florey v. Sioux Falls School Dist. 49-5*, 619 F.2d 1311, 1316 (8th Cir. 1980) ("[T]o allow students only to study and not to perform [] religious art, literature and music when [] such works . . . have developed an independent secular and artistic significance would give students a truncated view of our culture") (internal quotation and citation omitted).

Even under *Hazelwood* the Defendants' Policies and practice are unconstitutional. *Hazelwood* dictates that unless a regulation of student speech is "reasonably related to legitimate pedagogical concerns," public educators trample upon protected First Amendment rights. *Hazelwood*, 484 U.S. at 273. The District here acts pursuant to Polices that (incredibly) ban student religious speech in class *per se*. (Ex. D. (Policy banning artwork with "violence, blood, sexual connotations, [or] religious beliefs"); Ex. E. (Policy prohibiting artwork portraying "drug, gang, or religious symbols").)[4] However, relevant precedent affirming protections for student speech at school, *supra*, coupled with an examination of Defendants' own Policies and practice, illustrate that no legitimate pedagogical purpose is served in the school through such a ban.

First, the notion that a complete and total exclusion of student religious expression from a school, simply because it is religious, could even be *considered* a plausible pedagogical concern is beyond the pale. The law knows nothing of this. (Again, "a free-speech clause without religion would be Hamlet without the prince." *Pinette*, 515 U.S. at 760.) As the United States Department of Education has cautioned school administrators: "Students may express their beliefs about religion

[4]It should also be noted that while Defendants' Policies purport to prohibit students from expressing violent or bloody themes in their artwork, in practice Defendants readily permit such content. A survey of Defendant Millin's classroom reveals at least three student drawings depicting blood and or violence. (*See* Ex. R (picture of exploding grenade and blood); Ex. S (picture of woman with blood dripping from her lips); Ex. T (picture of needle nearing eye of anime figure).)

in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance . . . ." GUIDELINES ON CONSTITUTIONALLY PROTECTED PRAYER IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS (2003) (emphasis added) (attached hereto as Ex. CC); see also, STUDENT RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS: UNITED STATES DEPARTMENT OF EDUCATION GUIDELINES 128 (Revised May 1998) (same) (attached hereto as Ex. DD). It is also ironic that Defendants seek to impose their censorship upon A.P.'s speech in his Drawing I and Jewelry/Art Metals classes, where Defendants purport to foster a creative atmosphere "provid[ing] a variety of visual experiences for the student to relate art to his/her own experiences and culture." (Ex. C.)

Second, the District cannot assert that allowing a student to include religious content in otherwise responding to a class assignment conflicts or otherwise detracts from the pedagogical objectives of the school's classroom efforts. It must be remembered that A.P.'s art projects satisfied the stated criteria for each of his assignments and at no time did District officials inform A.P. that his projects failed to satisfy the criteria. (Compl. ¶75; Ex. A. ¶¶38-39; Ex. B.) By way of example, the landscape drawing assignment in Drawing I called for A.P. and others to create a drawing (i) in black and white, (ii) using pencil/charcoal or a combination of the two, (iii) abiding by size and border guidelines of 18"x18" up to 18"x24", with a one inch boarder; (iv) with at least 80% of the drawing constituting landscape elements and 20% constituting objects; (v) portraying realistic elements or fantasy; (vi) looking to photos or books for reference, if desired; (vii) sketching out the drawing first; and (viii) using three drawing techniques. (Compl. ¶65; Ex. B.) A.P. satisfied each

and every element of the project's stated criteria and was never told that his drawing failed any such requisite elements. (Compl. ¶75; Ex. A. ¶¶38-39.)

As to the extra credit opportunity in Jewelry/Art Metals, the project parameters were very open-ended – students were to create a small item of their choosing using metal materials. (Compl. ¶102; Ex. A. ¶¶84-86.) Bearing these parameters in mind, A.P. sought to create a small chain mail cross, using metal pieces placed together to form a mesh, which would have satisfied all of the project's requirements. (Compl. ¶103; Ex. A. ¶¶87-88.) A.P.'s proposed cross was denied for the reason that it was a religious symbol, not because it did not comply with the project's requirements. (Compl. ¶105; Ex. A. ¶¶92-93.) Importantly, each of A.P.'s art assignments relevant to this case encouraged him to pull from his own experiences and culture in creating the projects. (Ex. C.) He acted accordingly, satisfying the requirements for each and was never told that his projects and/or project ideas did not meet stated requirements. A.P.'s projects should be been treated free of discrimination. *See* Ex. CC, U.S. DEPT. OF EDUC. GUIDELINES ("[I]f a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content").

Significant too is the assortment of religious artwork on display in the School's hallways and classrooms; the school cannot claim a legitimate pedagogical interest in banning religion *per se* in student responses to class assignments while at the same time flaunting other religious art, both student created and otherwise, in the school. For example, an incredible fact in this case is that in the *very same room* in which Defendants Jackson, Millin, and Genrich conducted their parent-teacher conference with A.P. and his family – and reiterated their Policies banning student religious

expression in class assignments – Defendants displayed student drawings of the Greek goddess Medusa; a demonic figure with horns, scales, and protruding tongue; several demonic masks; and a drawing of the Grim Reaper, holding a scythe. (Compl. ¶¶133-135, 137; Ex. A. ¶¶140, 138, 154, 137; Exs. L, H, K.) Also while this parent-teacher conference was taking place, in a neighboring social studies classroom a teacher prominently displayed various items of eastern religious art – including a seated and praying Hindu figure, plugged into the wall as part of a fountain circulating water; a second Hindu figurine – a woman, standing and playing a fluted instrument; and a Buddha with outstretched arms (described by the teacher's student assistant as a "skinny" Buddha). (Compl. ¶¶124-26; Ex. A. ¶¶121-28; Exs. M, N.) Leading into this same social studies classroom, affixed to a window, was a circular, multicolored picture depicting a seated figure engaged in a meditation exercise used by practitioners of eastern religions. (Compl. ¶127; Ex. A. ¶127; Ex. O.)

But these displays are not the sum total of what Defendants allow. While penalizing A.P.'s religious expression, Defendants prominently display in the School's hallway a large painting of a six-limbed Hindu woman riding a swan figure. (Compl. ¶131; Ex. A. ¶133; Ex. P.) Elsewhere, on a hallway bulletin board, there hangs a drawing of a robed sorcerer. (Compl. ¶132; Ex. A. ¶135; Ex. Q.) Another student drawing of a Satanic-looking figure titled "Master of the Moon" (believed to be an album cover reproduction of the Satanic black-metal band Dio's 2004 release bearing the same moniker) is prominently featured in a hallway display case. (Compl. ¶136; Ex. A. ¶¶149-51; Ex. I)[5]

[5] Ronnie James Dio, founder of the band Dio, is avowedly anti-Christian (*See* March 27, 2000 interview, available here: http://www.kaos2000.net/interviews/dio/dio00.html (last accessed April 13, 2008) ("[The] Bible was not only a book of such ancient origin that has been changed from time immemorial so that it becomes not even close to what, if those people actually wrote it - you know what I mean. It's crap. Come on. I tell you a story, you tell fifteen other people, and by the end of the day it becomes something else. I don't believe in it . . . . [T]he Bible was probably written by a bunch of fraternity guys on another planet. They put it in a little rocket ship and whoosh, there

A student drawing of the fictional character Spawn, who gets sent to hell then returns to earth after making a deal with the devil himself, is also displayed in Defendant Millin's classroom. (Ex. A. ¶47; Ex. V.)

Buddhist figurines. Hindu paraphernalia and paintings. A Satanic being. Demonic masks. A drawing of Medusa. Examples of religious art abound throughout the halls and classrooms of Defendants' School. In addition to the fact that a *per se* ban on religious expression by students in response to class assignments is unlawful as a matter of fixed constitutional principle, Defendants's ban is not sanctioned by *Hazelwood* as a legitimate pedagogical interest given the plethora of other (albeit non-Christian) art permitted in class assignments and displayed throughout the School.

e. Independent of the *Tinker* and *Hazelwood* analyses, Defendants' viewpoint-based censorship of A.P.'s speech is unconstitutional.

When the government denies a speaker access to a speech forum based solely on the viewpoint that speaker expresses on an otherwise permissible subject matter, viewpoint discrimination occurs. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 806 (1985). Viewpoint discrimination is "prohibited in all forums." *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 n.4 (4th Cir. 2006). Viewpoint discrimination, let alone unconstitutional hostility toward religion (see *infra* §III.B.3), occurs at its most basic level when the government permits religion to be discussed in a forum, yet picks and chooses which religious views it will permit to be expressed, and which it will not.

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it goes. It happened to land on Earth and somebody went, "Whoa! This is the sh** and we've discovered it." That's my impression of religion. That's the way I feel.)) (True and accurate copies of the "Master of the Moon" album cover and several other Dio album covers, including the 1983 release, "Holy Diver" which features on its cover a devil figure killing a Catholic priest, are attached as Exhibits J, W, X, Y, and Z.)

By way of example, in *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, 386 F.3d 514, 519 (3d Cir. 2004), a defendant school district opened a forum in which it permitted local community groups to distribute literature to students. The community groups would create the flyers and deliver them to individual schools within the district; the teachers at these schools would then hand the flyers out to the children. *Id*. at 520. The school district opened the forum to groups that expressed religious views, but excluded the plaintiff's flyers because the district "disfavored . . . the particular religious views that Child Evangelism espouses." *Id*. at 529. As the Third Circuit succinctly put it, "Suppressing speech on this ground is indisputably viewpoint-based." *Id*. at 530.

Here, the School permits some religious expression in its classrooms and hallways, so long as it is not *Christian* religious expression. For example, students can pursue Satanic and demonic drawings and masks in responding to class assignments,[6] and Defendants allow other pieces of religious art (*e.g*., Hindu and Buddhist items) to be prominently displayed in these same areas. (Ex. I ("Master of the Moon" drawing); Ex. L (Medusa); Ex. H (demonic faced being with horns); Ex. K (demonic masks); Ex. M (seated and praying Hindu figure); Ex. N (Hindu figurine standing and playing a fluted instrument); Ex. N (Buddha with outstretched arms); Ex. O (seated figure engaged in meditation exercise used by practitioners of eastern religions); Ex. P (six-limbed Hindu woman riding a swan); Ex. Q (drawing of a robed sorcerer).) A simple glance around the school indicates that "religion" from many viewpoints is allowed. Yet, A.P.'s artwork, which satisfied all assignment

[6]At a minimum such artwork represents atheistic themes, and the Seventh Circuit has recently recognized atheism as a religion. *See Kaufman v. McCaughtry*, 419 F.3d 678, 684 (7th Cir. 2005) ("Atheism is [the plaintiff's] religion, and the group that he wanted to start was religious in nature even though it expressly rejects a belief in a supreme being").

criteria in his Drawing I and Jewelry/Art Metals classes, is excluded from the forum based solely on the particular Christian religious views expressed by him therein. Moreover, according to Defendants' viewpoint discriminatory scheme, if A.P. had drawn a peace sign (instead of writing "A sign of love") and referenced a secular text (rather than the Bible), his drawing would not have been censored. This is the scheme within which Defendants operate. Such playing of favorites with speakers on the basis of viewpoint is unlawful and is confirmed by the facts here.

Defendants also cannot banish A.P.'s religious expression by broadly asserting that it "infringes on the rights of other students" because it may be "offensive." (Compl. ¶¶73, 89, 92; Ex. A. ¶¶34-35, 68, 71, 73, 81, 82, 93, 100; Ex. E.) The law is very clear on this point: it is impermissible for the government to regulate speech based on "the public's reaction to the speech." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133-134 (1992). Indeed, as the Third Circuit held in the public school context, to exclude a speaker from a forum because of the "controversial or divisive" nature of his or her speech "is viewpoint discrimination" and necessarily unlawful. *CEF*, 386 F.3d at 527 (emphasis added); *see also*, *Tinker*, 393 U.S. at 509 ("a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is not enough to justify the suppression of speech); *Saxe*, 240 F.3d 125 ("The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it"); *Cornelius*, 473 U.S. at 812 (warning that "the purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers"); *Texas v. Johnson*, 505 U.S. 377, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself

offensive or disagreeable"). A negative comment regarding A.P.'s artwork, when used to justify exclusion of his artwork from the forum, constitutes an unlawful heckler's veto that cannot stand.

In sum, Defendants' exclusion of A.P.'s religious expression indisputably constitutes viewpoint discrimination. This discrimination triggers strict scrutiny, which the School's actions cannot survive because the School lacks a compelling interest for excluding A.P.'s religious expression, as addressed below.

f. Defendants have no legitimate, let alone compelling reason for their discrimination.

Defendants cannot rely on the tired and oft-rejected Establishment Clause defense to justify their censorship of A.P.'s religious expression. For one, the First Amendment forbids the *government* from making a law respecting an establishment of religion. A.P.'s religious expression in responding to class assignments cannot violate the Establishment Clause for, among other reasons, he is a *private citizen*. The Establishment Clause simply does not restrict the rights of individuals, like A.P., from speaking on their own behalf according to the dictates of conscience. *See Board of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) ("[T]here is a 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") (emphasis in original). The mere presence of religious speech by students in a government school does not violate the Establishment Clause.

Within the public school context, the Supreme Court has flatly rejected the proposition that public schools will be held to "endorse everything they fail to censor." *Mergens*, 496 U.S. at 250. The Seventh Circuit's decision in *Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118* is

wonderfully instructive on this point, and worth quoting at length:

> School districts seeking an easy way out try to suppress private speech. Then they need not cope with the misconception that whatever speech the school permits, it espouses. Dealing with misunderstandings – here, educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement – is, however, what schools are for. . . . Yet [the school here] proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship. What a lesson [the school] proposes to teach its students! Far better to teach them 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.

9 F.3d 1295, 1299 (7th Cir. 1993) (emphasis in the original).

But in Defendants' Drawing I and Jewelry/Art Metals classes, State "endorsement" of the message contained on one student's project can hardly be a plausible concern when there are dozens of student responses to a variety of projects, and when the fact is evident to and known by all that the various student projects are in fact created by students in response to an assignment. To paraphrase the Seventh Circuit in *Hedges*, a school official's unfounded concern that someone might think the school administration favors religion does not authorize that administration to act in a way definitively demonstrating that it opposes religion (or, in fact, just one religion).

In this case, Defendants demonstrate that the only reason for their censorship was the religious viewpoint of A.P.'s message. A.P. satisfied all stated criteria for his Drawing I and Art/Metals class assignments and was never told otherwise. Defendants have not enunciated a valid educational purpose behind their censorship, and clear precedent applicable to this context thoroughly rejects the notion that an ostensive Establishment Clause concern is reasonable in the circumstances presented by this case.

2. Defendants violated the First Amendment by retaliating against A.P. for respectfully expressing his opposition to Defendants' illegal Policy.

It is well established that an otherwise permissible act "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir.2000); see also, *Zimmerman v. Tribble*, 226 F.3d 568, 573 (7th Cir. 2000) ("[O]therwise permissible conduct can become impermissible when done for retaliatory reasons."). In order to prevail on a First Amendment retaliation claim, a plaintiff must demonstrate that his conduct was constitutionally protected, that the defendants took adverse action against him, and that their action was a motivating factor in the retaliation against his constitutionally protected speech. *Mosely v. Board of Education of the City of Chicago*, 434 F.3d 527, 533 (7th Cir. 2006); see also, *Spiegla v. Hull*, 371 F.3d 928, 935, 942 (7th Cir. 2004). As the Seventh Circuit has noted "[a]ny deprivation under color of law that is likely to deter the exercise of free speech . . . is actionable." *Mosely*, 434 F.3d at 534 ("[T]he alleged injury need not be great in order to be actionable") (internal quotations and citations omitted). A plaintiff "cannot be muzzled or denied . . . [a] benefit . . . because []he engaged in constitutionally protected activity." *Id*. at 535. Once the plaintiff proves that an improper purpose was a motivating factor, "the burden shifts to the defendant . . . to prove by a preponderance of the evidence that the same actions would have occurred in the absence of the protected conduct." *Spiegla*, 371 F.3d at 942-43.

There is no question that A.P. has demonstrated success on his First Amendment retaliation claims. After being presented with the illegal written Policy banning "blood, violence, sexual connotations, [or] religious beliefs," and being told by Defendant Millin that he had "signed away his First Amendment rights," A.P. expressed his opposition to the illegal Policy, and Defendants'

censorship of his religious expression thereunder, by stating that he did not know he had agreed to such heightened censorship of his religious expression. (Compl. ¶82-85; Ex. A. ¶¶55-58.) He then tore the Policy, with substantial communicative intent and impact, as an outward expression of his opposition. (Ex. A. ¶¶59-60.) A.P.'s conduct was pure, simple, and clear symbolic speech offered to state that he had not indeed voluntarily "waived" his First Amendment rights and to protest Defendants' censorship of his religious artwork that otherwise satisfied all assignment criteria. (*Id*.)

A.P.'s protected speech also resulted in Defendant taking adverse action against him (i.e., assigning him two detentions), and this action was clearly a motivating factor (indeed, the *only* motivating factor) in their retaliation against his speech. Only after he tore the illegal Policy was A.P. given the detentions. (Compl. ¶¶5, 96; Ex. A. ¶¶76-78.) A.P. has had *zero* behavior or academic related problems at school, and his disciplinary record prior to Defendants' assigned detentions was void of any actions taken by District officials against him for any adverse reason. (Compl. ¶¶5, 20; Ex. A. ¶¶6-7.) A.P. ranks in the top 20% of his class. (*Id*.) He carries better than a 3.5 grade point average. (*Id*.) And he has always got along well with his teachers. (*Id*.) The facts indicate that his symbolic expression of opposition to the illegal Policy motivated Defendants to punish him with detentions. (Compl. ¶5, 96; Ex. A. ¶78.) That Defendants' retaliatory actions were taken in response to A.P.'s protected expression cannot be legitimately contested.

Having met his burden of proof, Defendants must demonstrate that they would have taken the same actions even in the absence of A.P.'s protected expression. *Spiegla*, 371 F.3d at 942-43. The facts of this case, coupled with A.P.'s sparkling academic and disciplinary record, leave Defendants grasping at the wind to satisfy a standard of proof they cannot meet. A.P. has

demonstrated that Defendants' unlawfully retaliated against him for exercising his protected expression opposing the unconstitutional Policy.

3. Defendants violate the Establishment Clause in Censoring Speech When Motivated by Hostility to its Religious Content.

Establishment Clause jurisprudence requires neutrality and forbids hostility toward religion. As the Supreme Court has often explained, the Establishment Clause "requires the state to be a 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 discriminatory 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 University of Virginia*, 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") (and cases cited).

In *Good News Club v. Milford Central School*, 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. 98, 117-18 (2001). As in *Good News*, here any person in the school "could conceivably be aware of the school's . . . policy and its exclusion of [religious expression], and could suffer . . .from viewpoint discrimination." *Id*. This sends the message that religious believers were somehow second-class citizens, outsiders, and not full members of the political community. Cf. *Pinette*, 515 U.S. at 773 (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in judgment) (explaining "endorsement" test under Establishment Clause).

Defendants also send the message that Christian students like A.P. are political outsiders by excluding Christian art from the forum while concurrently permitting all other religious expression. As addressed, *supra*, the facts show that all manner of Satanic, Hindu, Buddhist, and other religious artwork is permitted to be displayed around the school and included in class assignments. Christian art, however, for some reason elicits a visceral reaction from Defendants and is censored. It is not hard to see how Christian students at THS 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") (internal quotation and citation omitted).

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. 602, 613 (1971) (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 . . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

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).

Here, Defendants prohibit religious expression which it deems "religious" regardless of whether the student's assignment would otherwise be permissible. A.P.'s landscape drawing, for example, was – in secular terms – just one of many student drawings in response to the landscape assignment. Defendants prohibited this otherwise permissible drawing because it contained some religious language and graphics. (Compl. ¶¶3, 72, 99; Ex. A. ¶¶34-36, 68-73, 81-82.) This is the antithesis of neutrality.

Moreover, Defendants' Policies require school officials to identify speech of a "religious" nature by students in order to enforce their Policies of exclusion. Government agents are thus compelled to classify the speech of students according to their perceived religious-versus-nonreligious 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 and those above, Defendants' censorship of A.P.'s artwork at issue in this case violates the Establishment Clause.

4. Defendants violated the Free Exercise Clause through selectively imposing a burden on A.P.'s religious speech.

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.

Here, A.P. desired to respond to the his Drawing I assignment as an expression of his religious beliefs. (Compl. ¶¶19, 71; Ex. A. ¶33.) The School imposed a special disability on A.P.—exclusion of his religious expression from the forum—based solely on the religious beliefs expressed in his artwork. (Compl. ¶¶3, 72; Ex. A. ¶¶34-36, 68-73, 81-82.) This alone runs afoul of *Smith's* prohibition on laws that target religious views for special disabilities. Yet even worse, the School does not impose this disability on all religious speakers, (a practice that would also violate

the Free Exercise Clause), but only those speakers who espouse particular religious viewpoints. The School permits the expression of religious beliefs and viewpoints through artwork in classrooms and school hallways, but nevertheless prohibited A.P. from expressing his particular beliefs. Such selective treatment of religious views within a public forum violates *Smith's* prohibition on laws that target religious views for special disabilities. Moreover, the School's Policies and practice lack general applicability because they do not apply the same to all religious beliefs. For the reasons stated in relation to A.P.'s Free Speech claim, the School possesses no compelling interest justifying its infringement on A.P.'s right to free exercise of religion.

C. A.P. HAS NO ADEQUATE REMEDY AT LAW AND WILL SUFFER IRREPARABLE INJURY IF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ARE NOT ISSUED.

A.P. has shown that Defendants have violated his First Amendment rights. Nothing but injunctive and declaratory relief will restore the loss of these rights. *See National People's Action v. Village of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990) (noting that injunctions are "especially appropriate" in the context of First Amendment violations). And as the Seventh Circuit has noted, the irreparable harm that stems from the loss of first Amendment freedom is such that "money damages are not adequate." *Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). A.P. thus has no adequate remedy at law.

In addition, A.P. is entitled to a presumption of irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *Walker*, 453 F.3d at 859 (same). Moreover, the Court's task is necessarily "simplified" as to this injunction factor, *Walker*, 453 F.3d at 859, as satisfaction of the TRO/preliminary injunction standard – demonstrating a reasonable likelihood of

success on the merits – necessarily satisfies the irreparable injury standard. See *Digrugilliers v. City of Indianapolis*, 506 F.3d 612, 618 (7th Cir. 2007) (plaintiff's demonstration that his statutory claim had at least some merit triggered inquiry by the Court into the balance of irreparable harms). A.P. has demonstrated a strong likelihood of success on his First and Fourteenth Amendments and will suffer irreparable injury if the Defendants are not immediately enjoined from enforcing their Policies and practices challenged herein.

D. IF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ARE NOT ISSUED, GREATER HARM WILL RESULT TO A.P. THAN TO THE DEFENDANTS.

The irreparable harm to A.P. involves his most fundamental constitutional rights. For the remainder of his high school career, he will miss several upcoming opportunities to express his religious beliefs through his artwork in otherwise fulfilling class assignments. (Ex. A. ¶158.) He also faces a zero – bringing down his final grade – and a mark on his final transcripts regarding the disciplinary action taken against him arising from Defendants' censorship and his First Amendment objections thereto. (Ex. A. ¶160.) A.P. is slated to graduate in less than two months and plans to attend college. (Ex. A. ¶¶5, 159.) Such an existing stain on his final transcripts has the potential to negatively ipact his post-high school education when his transcripts are forwarded to collegiate admissions offices (as well as any graduate institutions to which he intends to apply after college). (Ex. A. ¶161.) Defendants, on the other hand, will not be harmed if a temporary injunction issues to have them grade his assignment according to the previously set criteria applied to all other students and by enjoining enforcement of their illicit Policies and practice. *See*, *e.g.*, *Newsom ex rel. Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (noting that a public school "is in no way harmed by issuance of a preliminary injunction which prevents it from

enforcing a regulation, which . . . is likely to be found unconstitutional"); *Mitchell v. Cuomo*, 748 F.2d 804, 807-08 (2d Cir. 1984) ("Faced with . . . a conflict between the state's . . . administrative concerns on the one hand, and the risk of substantial constitutional harm to plaintiffs on the other, we have little difficulty concluding that . . . the balance of hardships tips decidedly in plaintiffs' favor"). Injunctive relief would simply require Defendants to comport with their duty to treat A.P.'s artwork the same as all other student artwork and to refrain from viewpoint discrimination.

E. THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION WILL BENEFIT THE PUBLIC INTEREST.

"[I]njunctions protecting First Amendment freedoms are always in the public interest." *Walker*, 453 F.3d at 859 (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) ("The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression . . . . By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information"); *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003) ("neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law"). Because Defendants' policies violate Plaintiffs' constitutional rights, the requested injunction would serve the public interest. By enjoining Defendants' policies, this Court would restore students' rights to freedom of speech in otherwise responding to class assignments. A.P. would certainly not be alone in benefitting from an order of this Court that restores constitutionally protected religious expression in Defendants' schools.

IV. CONCLUSION

Plaintiff respectfully requests that this Court grant his request for a temporary restraining order and preliminary injunction, without condition of bond.

Dated this 15th day of April, 2008.

By: s/ David A. Cortman

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2008, I electronically filed the foregoing Memorandum of Law in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction with the Clerk of Court using the CM/ECF system which will send email notification of such filing to all counsel of record. I also certify that I will cause a copy of the Memorandum of Law to be served by UPS overnight delivery upon all named Defendants in this action.

s/ David A. Cortman
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