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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PHOENIX DIVISION

E.K., a minor by and through her next friend, L.K. Plaintiff, v. Deer Valley Unified School District No. 97, of Maricopa County, et al., Defendants.	Case No. 2:08-cv-00194-DGC **PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF LAW IN SUPPORT** Oral Argument Requested

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PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

NOW COMES Plaintiff, E.K., by and through counsel, and hereby moves this honorable Court for a preliminary injunction, pursuant to Fed. R. Civ. P. 65, prohibiting Defendants from discriminating against Plaintiff and the Common Cause Club based on the religious content of Plaintiff's intended speech, requiring Defendants to grant Plaintiff's Common Cause Club equal access to all club benefits and privileges, and enjoining Defendants from enforcing their policies that prohibit Plaintiff's distribution of religious literature. Plaintiff requests waiver of any bond requirement. As grounds for this Motion, Plaintiffs rely upon the Amended Verified Complaint and exhibits attached thereto, the exhibits and affidavit attached to this Motion, any oral argument regarding this Motion, and the following memorandum of law.

I. Introduction

Defendants are denying Plaintiff and her Christian club ("Common Cause") their rights under the Equal Access Act ("EAA") and the First Amendment, and pursuant to policies that grant school officials unbridled discretion over student speech. Specifically, Defendants denied Plaintiff's request to air a video announcement inviting students to a prayer at the pole event. The text of the video announcement reads: "Our Motto Is . . . Don't Worry About Anything . . . Instead, PRAY About Everything! . . . Common Cause Presents . . . We Pray . . . Together . . . Encouragingly . . . Hopefully . . . Upliftingly . . . COME JOIN Common Cause . . . 7:20 am Friday Mornings . . . At the Flag Pole outside the Administrative Office." (Am. Compl. ¶ 72; Pl's MPI Ex. A (video).) Defendants are prohibiting Plaintiff's video based solely on its religious content and viewpoint. (Am. Compl. ¶ 73 (denying video because it contains the word "pray"); ¶ 98 (stating video is problematic because it contains a cross next to Common Cause's name); ¶ 104 (denying video because it is "too religious").) Defendants permit other clubs to air video announcements promoting their clubs' purposes, activities, and events, like Young Democrats of America ("YDA"), whose recent video encouraged students to volunteer at the campaign offices of a 2008 democratic presidential candidate, and to come to YDA

meetings to learn about "controversial issues." (Am. Compl. ¶ 63; Pl's MPI Ex. C). The YDA video also stated, "In 2006, young voters ages 18-29 supported Democratic candidates by an impressive 58%;" and "We're Young . . . We're Democrats and . . . We're Voting." (Am. Compl. ¶ 63; Pl's MPI Ex. C). Defendants also permitted the Trap Door Thespian Society to air a video promoting a play they were presenting. (Am. Compl. ¶ 65; Pl's MPI Ex. D.) Defendants' denial of Plaintiff's video based solely on its religious content violates the EAA and the First Amendment.

Defendants also permit student clubs to have written announcements read to the student body promoting their purposes, activities, and events. (Am. Compl. ¶ 66, Ex. B (FCCLA announcements promoting Secret Santa event and bake sale); ¶ 67, Ex. C (International Club announcements inviting students to meetings where the musical group Nosotros Sound would "bring[] [students] the sounds of Latin-America"); Pl's MPI Ex. E (Interact club urging students to donate "unused and outdated cell phone[s]").) However, Defendants are denying Plaintiff's written announcements describing Common Cause's meetings and activities based solely on their religious content and viewpoint. Plaintiff submitted an announcement promoting the prayer at the flagpole activity (Am. Compl. ¶ 71 ("Common Cause will be having weekly prayer every Friday morning at 7:20 at the administration flagpole, come join us!"), and Defendants denied it because it contained the word prayer. (Am. Compl. ¶ 73.) Similarly, when Plaintiff asked if club meeting announcements could reference books of the Bible, Defendant Principal Poulson said "no." (*Id*. ¶ 84.) Contradicting Principal Poulson, and highlighting the unbridled discretion Defendants' Policies grant school officials, counsel for Defendants stated that references to the Bible were permissible, but that encouraging students to "bring their Bibles to the [Common Cause] meeting" was close to being too religious to be read over the announcements. (*Id*. ¶ 103.) Defendants' denial of Plaintiff's written announcements based solely on their religious content and viewpoint, and the unbridled discretion they have to approve or deny such announcements, violates the EAA and the First Amendment.

Finally, Defendants' policy regarding literature distribution is an unconstitutional prior restraint because, like the Defendants' policies regarding student club speech, it contains no guidelines to constrain school official decision-making over protected speech. The Defendants' literature distribution policy states: "Approval must be obtained from the administration at least two days prior to distribution. A student denied approval may have the right of appeal to the principal as part of due process." (Am. Compl. Ex. E.) Pursuant to this policy of unbridled discretion, Defendants denied Plaintiff her right to peacefully distribute a flyer inviting students to prayer at the pole (a copy of which is attached as exhibit H to the Amended Complaint) during noninstructional time. In denying Plaintiff's request to distribute flyers, Principal Poulson told Plaintiff that students were not allowed to hand out flyers during the school day, and that Common Cause flyers could not contain any religious symbols. (Am. Compl. ¶¶ 87-89.)

In sum, this is a straight-forward case. The EAA, the First Amendment, and the prior restraint doctrine, as interpreted and applied by federal courts to policies similar to the Defendants, prohibit the Defendants' Policies and actions here, and a preliminary injunction should issue.

II. Facts[1]

III. Argument

The standard for a preliminary injunction is satisfied when the movant shows either: (1) a likelihood of success on the merits and the possibility of irreparable harm; or (2) the existence of serious questions going to the merits and the balance of hardships tips in the movant's favor. *Foti v. City of Menlo Park*, 146 F.3d 629, 634 (9th Cir. 1998). "Additionally, '[i]n cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff.'" *Id.* (citation omitted). Plaintiff easily satisfies both of these alternative preliminary injunction standards.

[1] Rather than repeating every fact alleged in the Amended Verified Complaint, Plaintiff hereby incorporates those facts by reference.

A. Plaintiff Presents Serious Questions Going To The Merits Of Her Claims, And The Balance of Hardships Tips Decidedly In Her Favor.

Plaintiff easily satisfies the serious questions/balance of hardships test. Under Ninth Circuit law, to demonstrate that a "serious question" exists, a plaintiff "need not show a certainty of success, nor even demonstrate a probability of success," but rather must merely show "a 'fair chance of success on the merits.'" *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Zielinski*, 187 F. Supp. 2d 1263, 1267 (D. Or. 2002) (quoting *National Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1517 (9th Cir. 1985)). In *Warsoldier v. Woodford*, the Ninth Circuit held that a plaintiff presented "serious questions going to the merits" regarding his claim that a prison grooming policy that required him to cut his hair contrary to his religious beliefs violated his rights under the Religious Land Use and Institutionalized Persons Act. 418 F.3d 989, 1001 (9th Cir. 2005). Similarly, the constitutional and statutory claims at issue here present sufficiently serious questions going to the merits to warrant preliminary injunctive relief.

Moreover, the balance of hardships tips decidedly in Plaintiff's favor. Without an injunction, Plaintiff would on a daily basis lose her constitutional and statutory rights. On the other hand, the issuing of an injunction would have no impact on the Defendants. *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"). Indeed, Defendants already recognize many noncurriculum student clubs, and permit these clubs to promote their meetings, activities, and events through various avenues. (Am. Compl. ¶¶ 3-8, 61-67.) Injunctive relief would simply require Defendants to refrain from denying Plaintiff and Common Cause equal access to the benefits of club recognition based solely on the religious content and viewpoint of their speech, which is precisely the duty the EAA and First Amendment imposes on Defendants. Similarly, Defendants' Policies permit the distribution of non-school literature (*id.* Ex. E (policy permitting literature distribution subject to approval)), and thus an injunction requiring Defendants to comply with their constitutional duty to permit

Plaintiff to distribute her flyer free of content and viewpoint discrimination will not harm Defendants at all. Plaintiff thus satisfies the serious question/hardship balancing preliminary injunction test, and nothing more is required for an injunction to issue.

B. Plaintiff Is Suffering Irreparable Harm, And Has A Likelihood Of Succeeding On The Merits.

In addition to satisfying the above test, Plaintiff also satisfies the alternative test of demonstrating a likelihood of success and the possibility of irreparable harm.

1. The Plaintiff Is Suffering Irreparable Harm.

Plaintiff 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). Under Ninth Circuit law, "a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002). Here, the Plaintiff has demonstrated far more than a merely "colorable" First Amendment claim. Well-settled law establishes that each day that passes where Defendants deny Plaintiff equal access to the written and video announcements to invite students to Common Cause's prayer activity, and her right to distribute religious literature regarding the same, Plaintiff's fundamental rights are being violated. Only an injunction from this Court can bring an end to the irreparable harm Plaintiff is suffering.

2. Plaintiff Has A Likelihood Of Success On The Merits.

Defendants have adopted Policies that grant school officials unbridled discretion over the speech of clubs and students, and that target religious speech for censorship. Pursuant to these Policies, Defendants are denying Plaintiff her rights to invite students to a prayer activity via the written and video announcements, and peaceful literature distribution, based solely on the content and viewpoint of her speech. Defendants' Policies and actions violate numerous constitutional provisions, including, but not limited

to, the Free Speech Clause of the First Amendment and the federal Equal Access Act.[2] As to each of her claims, Plaintiff demonstrates a clear likelihood of success.

a. Defendants Are Violating The Equal Access Act.

Defendants violate the EAA by denying Plaintiff and her religious club equal access to the same benefits other student clubs receive, based solely on the religious content and viewpoint of Plaintiff's desired speech. *See* 20 U.S.C. § 4071 *et seq.* (public schools are required to provide equal access to limited open fora irrespective of religious, political, or other content of student speech); *Prince v. Jacoby*, 303 F.3d 1074, 1077 (9th Cir. 2002) ("the School District violated . . . the Act . . . by denying [the plaintiff's] Bible club the same rights and benefits as other School District student clubs and by refusing to allow the Bible club equal access to school facilities on a religion-neutral basis"). Here, the benefit Defendants have denied Plaintiff is access to the written and video announcements whereby clubs may promote their activities, events, and purposes to students. However, the EAA mandates that the Defendants provide the Plaintiff and her club all the benefits afforded students of other recognized clubs, and she seeks an order to that effect.

i. Defendants have triggered the EAA.

The EAA provides that "[i]t shall be unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." *Board of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 235 (1990) (quoting 20 U.S.C. § 4071(a)). The first two requirements triggering the EAA are met: MRHS is a public secondary school and it receives federal financial assistance. (Am. Compl. ¶¶ 53-54.)

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[2] Due to the length limitations in LRCiv 7.2(e) for motions, Plaintiff has not briefed her due process, equal protection, free association, and free exercise claims herein. These rights were also violated and Plaintiff will include these claims as the case proceeds.

The third requirement triggering the EAA is satisfied too—creation of a limited open forum. The EAA dictates that a school has created such a forum "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). When making this determination, the Supreme Court gives the EAA "[a] broad reading . . . consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion." *Mergens*, 496 U.S. at 239.

Defendants grant official club status to numerous non-curriculum clubs including, but not limited to: Young Democrats of America ("YDA"); Gay/Straight Alliance ("GSA"); Teenage Republicans; Anime Club; Chess/Gamers Club; Youth Alive; Best Buddies; Interact; Students Against Destructive Decisions ("SADD"); Family, Career, and Community Leaders of America ("FCCLA"); International Club; and Trap Door Thespian Society. (Am. Compl. ¶¶ 8, 57, 114-15; Am. Compl. Ex. A.) While MRHS has these and many more non-curriculum clubs, only one is needed to trigger the EAA. *See Mergens*, 496 U.S. at 236 ("[E]ven if a public secondary school allows only one 'noncurriculum related student group' to meet, the Act's obligations are triggered . . . .").

For a club to be "curriculum related," it must be directly tied to a class. *Id.* at 239 ("[T]he term 'noncurriculum related student group' is best interpreted broadly to mean any student group that does not relate to the body of courses offered by the school"). "For example, a French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future." *Id*. at 240. None of the recognized school clubs listed above are directly related to the "body of courses offered at [MRHS]" like the French club in *Mergens*. They are accordingly non-curricular clubs, and the EAA is triggered. *Id*.

ii. Defendants' denial of equal benefits to Plaintiff and Common Cause violates the EAA.

"Equal access" under the Act requires schools to provide the same rights and benefits to all noncurriculum related clubs, not merely some of the benefits. Federal

courts, including the Supreme Court, have so held. For example, in *Mergens*, 496 U.S. at 226, a school district allowed a religious club to meet on campus, but, as here, refused to provide the student members all of the rights and benefits given to student members of other noncurriculum related clubs because of the religious content of the club's speech. The Court held that the school district violated the club's right to "equal access" under the EAA by denying the club access to rights and benefits of recognition, including "access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair." *Id*. at 247. *See also Prince*, 303 F.3d at 1077 (where Bible club was permitted to meet but denied same benefits of other clubs the court held that EAA required Bible club to have equal access to yearbook appearance, use of student club funds, and access to the public address system and bulletin boards, since these same benefits were afforded to secular student clubs); *Straights and Gays for Equality (SAGE) v. Osseo Area Schools-Dist. No. 279*, 471 F.3d 908, 912 (8th Cir. 2006) (same).

Here, Defendants permit noncurriculum clubs to air written and video announcements informing students about their purposes, activities, and events (Am. Compl. ¶¶ 5-6, 61-67, Exs. B&C; Pl's MPI Exs. C, D, & E), yet are denying Plaintiff's announcements based solely on the religious nature of her speech. (Am. Compl. ¶ 73 (Plaintiff's announcements denied because they contained the words "pray" and "prayer"); ¶ 104 (prayer at pole video announcement denied because it was too religious).) The EAA prohibits such blatant content- and viewpoint-based discrimination.

b. Defendants are violating the Free Speech Clause.

In addition to violating the EAA, Defendants' refusal to grant Plaintiff access to the written and video announcements likewise violates her First Amendment rights. Further, Defendant's denial of Plaintiff's request to distribute religious literature inviting students to pray at the pole violates the First Amendment as well. The Defendants' actions, and the standardless Policies they are based upon, should be enjoined.

i. Plaintiff's announcements and flyers inviting students to pray at the pole are protected speech.

Religious speech 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 Supreme Court has explained:

> Our 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. . . . [I]n Anglo-American history . . . 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 & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (citations omitted). Here, Plaintiff's announcements and flyers inviting students to her club's activities and describing the religious nature of those activities are religious speech (Am. Compl. Exs. F-H (written announcements and flyer); Pl.'s MPI Ex. A (video announcement)), and thus are fully protected by the First Amendment.

ii. Defendants have created a designated public forum.

"[A] public forum may be created by government designation of a place or channel of communication . . . for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). The Supreme Court has held that school facilities become public forums when "school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (citation omitted). A government's "policy and practice" are central to determining whether the government intended to designate a place not usually open for speech as a public forum. *Cornelius*, 473 U.S. at 802.

Two binding forum cases are directly applicable here, *Widmar* and *Prince*, and mandate a finding that MRHS is operating a designated public forum. In *Widmar*, the Supreme Court held that by opening its facilities to meetings by student organizations, a public university had "created a forum generally open for use by student groups." 454

U.S. at 267. The Court required the university to justify its exclusion of the plaintiff religious groups in that case under the strict scrutiny standard, *id*. at 270, clearly indicating that the university had created a designated public forum. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (restrictions on speech in designated forum subject to strict scrutiny). And in *Prince*, the Ninth Circuit evaluated a school district's student organization forum indistinguishable from the forum in this case, and treated it as a designated public forum. 303 F. 3d at 1090-91 (applying strict scrutiny to exclusion of religious student group from a student organization forum).

Here, Defendants' Policies and practice "evince[] a clear intent to create a public forum." *Cornelius*, 473 U.S. at 802. Defendants impose no limit on the subject matters that may be addressed by students, other than the individual interests and beliefs of the students who seek to establish such clubs. (Pl.'s MPI Ex. K (District policy stating that "Interest clubs may be for any type of activity in which the members have a common interest").) Indeed, Defendants recognize student clubs, such as GSA, YDA, and SADD, to name a few, where the members take various views on issues pertaining to community service, homosexuality, promoting respect for others, leadership, and personal integrity. (Am. Compl. ¶¶ 58, 120; Pl.'s MPI Exs. F-J (specifying purposes of other recognized clubs).) Defendants' forum is plainly a designated forum for private student speech.

iii. Defendants' content-based exclusion of Plaintiff from the student organization forum violates her free speech rights.

In a designated public forum, content-based restrictions on speech are subject to strict scrutiny; they must serve a compelling state interest and be narrowly tailored to achieve that interest. *Widmar*, 454 U.S. at 270. Defendants' discrimination against Plaintiff's intended religious speech is akin to the discriminatory exclusion struck down in *Widmar*. There, like Defendants are doing here, a university opened up its facilities for use by student groups but excluded a religious student club from that forum. 454 U.S. at 265. The university excluded the group because, like the Club at issue here, it engaged in "religious worship and discussion." 454 U.S. at 265. The Court held that the university's

"discriminatory exclusion [was] based on the religious content of [the] group's intended speech," and required the university to "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id*. at 269-70. Like the university in *Widmar*, the Defendants aim their discrimination at Plaintiff's desired religious speech and viewpoint, by denying access to the written and video announcements based solely on the religious nature of her intended speech. (Am. Compl. ¶¶ 73, 84, 104 (specifying the religious content Defendants relied on in denying Plaintiff's requested announcements).) In *Widmar*, the university's content-based discrimination could not withstand strict scrutiny, and neither can the Defendants' discrimination against the Plaintiff's religious speech here. *See* § III.B.2.b.v., *infra*.

iv. Defendants' viewpoint-based discrimination against Plaintiff's speech violates the First Amendment.

Viewpoint discrimination occurs 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. *Cornelius*, 473 U.S. at 806. Federal courts, including the Ninth Circuit, have found schools guilty of viewpoint discrimination under circumstances similar to this case. *See, e.g.*, *Prince*, 303 F.3d at 1074, 1090-91 (where school district offered noncurriculum clubs access to "student/staff time, school supplies, AV equipment, and school vehicles to convey their club messages," but denied the same access to a student Bible club, such exclusion was "based purely on the [club's] religious viewpoint in violation of the First Amendment"); *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 226 (3d Cir. 2003) ("[The Bible Club] is a group that discusses current issues from a biblical perspective, and school officials denied the club equal access to meet on school premises during the activity period solely because of the club's religious nature. Accordingly, we hold that the exclusion constitutes viewpoint discrimination").

Defendants' actions here are indistinguishable from the unlawful actions of the school officials in the above cases. Similar to the groups there, Plaintiff seeks to express

her religious views regarding subject matters permitted to be discussed within the MRHS student organization forum. For example, Defendants have opened the video announcements to messages concerning student club activities, events, and purposes. (Am. Compl. ¶¶ 5-6, 61-67, Exs. B&C; Pl.'s MPI Exs. C, D, & E.) Pursuant to this practice, Defendants permitted the members of YDA to air a video announcement encouraging students to join their club, volunteer at the campaign offices of a 2008 democratic presidential candidate, learn about controversial issues and protesting major issues, and declaring that young voters are more likely to vote democratic. (Am. Compl. ¶¶ 63-64; Pl.'s MPI Ex. C.) Like YDA, Plaintiff simply desires to air a video describing one of Common Cause's activities (prayer at the flagpole) and, like YDA, invite students to participate if they so choose. (Pl.'s MPI Ex. A (Plaintiff's prayer at flagpole video announcement).) The Defendants excluded Plaintiff's video pertaining to the permissible subject matter of club activities and events based solely on its religious perspective (Am. Compl. ¶ 98 (Plaintiff's video announcement problematic because it contained a cross, in violation of District policy); ¶ 104 (prayer at pole denied video because it was too religious)), which is unconstitutional viewpoint discrimination.

Similarly, Defendants permit clubs to have written announcements read to the student body concerning club activities, and encouraging students to participate in them. For example, Defendants permitted the Interact club to have an announcement read inviting students to "bring in those unused and outdated cell phone[s] to help victims of stalking and domestic violence." (Pl.'s MPI Ex. E.) Like Interact, Plaintiff merely seeks to have announcements read describing and inviting students to Common Cause's activities, and Defendants have denied those announcements based solely on their religious content and viewpoint. (Am. Compl. ¶ 73 (denying prayer at pole announcement because it contains word "prayer"); ¶ 84 (prohibiting references to specific books of the Bible in Common Cause club meeting announcements).) Again, this is blatant viewpoint discrimination.

Other student clubs address topics such as homosexuality (*e.g.*, GSA), leadership and integrity (*e.g.*, Interact), respect and dignity toward others (*e.g.*, GSA, YDA, and Interact), destructive decisions like underage drinking (*e.g.*, SADD), and impacting the world for Christ (*e.g.*, FCA). (Am. Compl. ¶¶ 58, 115-16; Pl.'s MPI Exs. F at 6 (Interact clubs discuss "leadership skills and personal integrity"); G at 7 (FCA clubs seek to "see the world impacted for Jesus Christ"); H at 8 (SADD clubs "dedicated to preventing destructive decisions, particularly underage drinking, other drug use, impaired driving, teen violence and teen depression and suicide"); I at 29 (YDA clubs believe in "safe, legal, and rare abortions"). Plaintiff and Common Cause desire to speak and pray about these and other issues from a religious perspective at their meetings and around the flagpole (Am. Compl. ¶¶ 27, 139; Pl.'s MPI Ex. M, ¶¶ 17-38), but are chilled and prevented from doing so by Defendants' discriminatory application of their policies that permit unbridled discretion over student club speech (*id.*, ¶ 45.)

v. Defendants cannot justify their discrimination.

Defendants argue that they must prohibit Plaintiff's announcements inviting students to join them in prayer at the pole to avoid the appearance of violating the Establishment Clause. (Am. Compl. ¶ 74 (denying proposed announcements based on belief that they would "violate the separation of church and state").) This position is untenable given relevant decisions of the Supreme Court and the Ninth Circuit holding that in the free speech context, the Establishment Clause does not justify the exclusion of religious speakers and clubs from student organization speech fora. *See, e.g.*, *Mergens*, 496 U.S. at 248 ("[T]he message [of equal access] is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion"); *Prince*, 303 F.3d at 1094 ("As in *Mergens*, the School District here can dispel any 'mistaken inference of endorsement' by making it clear to students that a club's private speech is not the speech of the school. There is no indication . . . that requiring access to religious groups would endorse religion any more than in *Mergens*"). Put simply, neutral accommodation of

religious activity does not violate the Establishment Clause, and providing a neutral government benefit without discrimination upholds the Constitution.

vi. Defendants' policy banning religious symbols on non-school literature violates the First Amendment.

The Supreme Court has held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), and that they may engage in protected, non-disruptive expression "in the cafeteria, or on the playing field, or on the campus during the authorized hours," *id*. at 512-13. *Tinker* laid out the following standard regarding student speech: "[a student] may express his opinions . . . if he does so without materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." 393 U.S. at 513.

Defendants' Policy banning religious symbols on student literature (Pl.'s MPI Ex. M, Affidavit of E.K., ¶¶ 40-43 (Principal Poulson told Plaintiff her flyers could not include a religious symbol pursuant to District policy); Am. Compl. Ex. D ("Use of Religious Symbols" policy Principal Poulson stated prohibited the display of religious symbols on student literature)) violates *Tinker*'s standards. Because there is no evidence at all that E.K.'s flyer inviting students to Common Cause's prayer at the pole activity would disrupt school activities, Defendants cannot lawfully prohibit her distribution.

Many federal courts have held that similar bans on student religious literature distribution violated the First Amendment. In *Slotterback v. Interboro School District*, 766 F. Supp. 280, 285 (E.D. Pa. 1991), the court struck down a policy that prohibited student distribution of literature that promoted "a religious or political belief." The court held that a "blanket ban on religious and political literature" did not further the school's interest in "preventing material, substantial interference with the work of the schools and with the rights of other students," and struck the policy. *Id*. at 297. Similarly, in *Clark v. Dallas Indep. Sch. Dist.*, 806 F. Supp. 116, 120 (N.D. Tex. 1992), the court struck down a school policy that prohibited the distribution of religious

literature before and during school. As the Court put it, "Defendants have failed to establish that Plaintiffs' distribution of the religious tracts gave rise to a material and substantial disruption of the operation of [the school]." *Id*. Defendants' Policy banning the display of religious symbols on non-school student literature clearly violates *Tinker*.

vii. Defendants' Policies And Practices Are Unconstitutional Prior Restraints.

Prior restraints are government regulations that give "public officials the power to deny use of a forum in advance of actual expression." *Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989). Defendants' Policies and practices governing the speech of student clubs and the distribution of student literature are prior restraints because students must seek permission to express club messages via District provided avenues of communication, and to distribute literature, before they can speak. (Pl.'s MPI Ex. M, ¶ 5 (clubs must get approval before written and video announcements may be played); Am. Compl. Ex. E (literature distribution policy requiring prior submission).)

Laws that grant unbridled discretion to enforcement officials are presumptively unconstitutional: "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). As the Supreme Court has said, unbridled discretion is prohibited because it "has the potential for becoming a means of suppressing a particular point of view." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

In *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988), the Ninth Circuit struck a school district policy similar to those at issue here as an unconstitutional prior restraint. In *Burch*, the school district required prior approval from school officials before students could distribute any non-school literature. *Id*. After reviewing numerous sister Circuit cases dealing with similar pre-approval policies, the Ninth Circuit concluded that "a policy which subjects all non-school-sponsored communications to predistribution review for content censorship violates the first amendment." *Id*. at 1157. Other federal courts

have also struck down policies virtually identical to Defendants' policies here. In *Slotterback*, 766 F. Supp. at 298, the defendant school district adopted a policy that required "a party desiring to distribute nonschool written materials [to] present a sample to the building principal three days before the day of proposed distribution." The court held that the policy was an invalid prior restraint because it both gave "school officials unbridled discretion to suppress protected speech in advance," and imposed "no time limits or other procedural obligations on school officials to ensure that speech is suppressed only briefly and for significant reasons, rather than arbitrarily." *Id*. at 299. *See also Hall v. Bd. of School Comm'rs*, 681 F.2d 965, 969 (5th Cir. 1982) (striking down policies that required prior approval to distribute literature on a school campus as an unconstitutional prior restraint because they "do not furnish sufficient guidance to prohibit the unbridled discretion that is proscribed by the Constitution").

Defendants' Policies governing student club speech and student distribution of non-school literature suffer from the same constitutional defects as the policies stricken in the above cases: they lack any criteria or standards to guide a school officials' decision on whether to allow or prohibit protected student expression.[3] (Am. Compl. ¶¶ 92, 105, 134, 148-51 (Policies relied on in denying Plaintiff's announcements and literature distribution contain no standards to guide decision-making); *id*. Ex. E (District's literature distribution policy which contains no criteria or guidelines).) Under the Defendants' Policies, school officials have boundless authority to permit or restrict the messages of student clubs and the distribution of non-school literature for any reason, thereby permitting them to hide viewpoint discrimination and commit unchecked "abuse[s] of censorial power," *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988), which is precisely what the prior restraint doctrine forbids.

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[3] The *ad hoc* enforcement permitted by the lack of any standards in Defendants' policies governing speech by student clubs is illustrated by the fact that Principal Poulson stated that Plaintiff could not refer to specific books of the Bible in her announcements regarding Common Cause's meetings (Am. Compl. ¶ 84), while Counsel for the Defendants stated that references to books of the Bible were permissible, (*id*. ¶ 103.)

In addition to lacking specific criteria to guide a school officials' decision-making, the Defendants' literature distribution policy also lacks numerous procedural safeguards that other courts have found fatal under the prior restraint doctrine. For instance, in *Baughman v. Freienmuth*, 478 F.2d 1345, 1345 (4th Cir. 1973), the Fourth Circuit held that prior restraints on student speech must contain the following safeguards to pass constitutional muster: 1) prompt approval or disapproval of the requested speech; 2) a specific statement as to the effect of a decision-maker's failure to act promptly; and 3) an adequate and prompt appeal procedure. *Baughman*, 478 F. 2d at 1351. The Fourth Circuit struck the policy at issue in *Baughman* for failing to comply with these standards, and the same action should be taken here. The Defendants' policy does not provide a time frame when a decision must be made, but merely says approval must be obtained two days before the desired distribution. (Am. Compl. Ex. E.) Similarly, the policy fails to specify the effect of a decision-maker's failure to promptly act, lacks a clear appeal process (indeed, the policy says only that a denial "may" be appealed), and does not specify who the materials should first be submitted to. (*Id*.) The Defendants' literature distribution policy violates the prior restraint doctrine for these additional reasons.

C. The Public Interest Heavily Favors An Injunction.

Ninth Circuit precedent requires this Court to "examine the public interest in determining the appropriateness of a preliminary injunction." *Sammartano*, 303 F.3d at 974. Here, a preliminary injunction would serve the public interest. As the Ninth Circuit has put it, there is a "significant public interest in upholding First Amendment principles." *Id*. *Accord Newsom*, 354 F.3d at 261 (preliminary injunction "upholding constitutional rights serves the public interest"). And clearly, the public interest would be well served by eliminating, rather than perpetuating, the Defendants' discrimination here.

IV. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that this Court grant her request for a preliminary injunction, without condition of bond.

Respectfully submitted this 27th day of February, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2008, I electronically filed the foregoing document and exhibits with the Clerk of Court using the ECF system. I also hereby certify that this document and exhibits, along with a copy of the Amended Complaint, will be personally served by a process server on the following Defendants:

Dr. Virginia McElyea, in her official capacity as
Superintendent of Deer Valley Unified School District
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