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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

P.A., a minor by and through her next friend, N.A. Plaintiff, v. DIANE GORDON, MATTHEW DEAN, MARGIE MITCHELL, PAM PARKER, and ROYCE PETERSON, all individually and in their official capacities as Members of the Campbell Union High School District Board of Trustees; RHONDA FARBER, in her individual capacity and in her official capacity as Superintendent of the Campbell Union High School District; and OWEN HEGE, in his individual capacity and in his official capacity as Principal of Westmont High School, Defendants.	CASE NO. PLAINTIFF'S NOTICE OF, AND MOTION FOR, PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES Note on Calender for: February 29, 2008, at 9:30 a.m.

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NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

TO EACH PARTY AND THEIR ATTORNEYS OF RECORD: Please take notice that on February 29, 2008, at 9:30 a.m., or as soon thereafter as this matter can be heard, Plaintiff, by and through counsel, will appear before the United States District Court for the Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose, CA 95113, for a hearing on her preliminary injunction motion now brought to enjoin Campbell Union High School District Board Members Diane Gordon, Matthew Dean, Margie Mitchell, Pam Parker, and Royce Peterson, District Superintendent Rhonda Farber, and Owen Hege, Principal of Westmont High School (collectively "Defendants"), from continuing to violate the Equal Access Act, 20 U.S.C. §§ 4071-74 (1984), as well as the First and Fourteenth Amendments to the United States Constitution.

This Motion is brought pursuant to Federal Rule of Civil Procedure 65 (a) and Civil L.R. 7.1 and 7.2 to prevent further irreparable harm to Plaintiff's rights during the pendency of this litigation. The harm to Plaintiff's rights stems from Defendants' ongoing refusal to provide equal access to Plaintiff's student club, presently named "Live Action" (hereinafter "Pro-Life Club"). Plaintiff moves this Court to order Defendants to grant Plaintiff all of the rights, benefits, and privileges given to other students of recognized clubs at Westmont High School ("WHS"). In addition, Plaintiff requests that this Court enjoin Defendants' Policies and practice that permit Defendants to censor student club speech based on the content and viewpoint of that speech.

Absent such relief, Plaintiff will continue to suffer irreparable injury to her statutory and constitutional rights to express her religious views at WHS. Indeed, for each day that passes where Plaintiff is denied access to *all* of the rights and benefits given to students of other recognized clubs, she is prevented from expressing her religious and political views through all available communicative avenues. The irreparable harm Plaintiff experiences cannot be discontinued absent preliminary injunctive relief from this Court.

Plaintiff also asks this Court to waive any requirement of bond. *See, e.g., Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F.Supp.2d 98, 128-29 (D.Mass. 2003) (waiving bond requirement in case involving student Bible club seeking a preliminary injunction where "requiring a security bond. . . might deter others from exercising their constitutional rights")*; City of Atlanta*

v. Metropolitan Atlanta Rapid Transit Auth., 636 F.2d 1084, 1094 (5th Cir. 1981) (upholding waiver of bond requirement where "[i]n a real sense . . . plaintiffs were engaged in public-interest litigation, an area in which the courts have recognized an exception to the Rule 65 security requirement"); *Doctor John's, Inc. v. City of Sioux City*, 305 F.Supp.2d 1022, 1043-44 (N.D. Iowa 2004) ("Requiring a bond to issue before enjoining potentially unconstitutional conduct . . . simply seems inappropriate, because the rights potentially impinged by the governmental entity's actions are of such gravity that protection of those rights should not be contingent upon an ability to pay").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants' actions in this case strike at the heart of statutory and constitutional protections that have been afforded to public school students for decades, and undermine the spirit of open discourse essential to public education in a democratic republic. *See*, *e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers the truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection'"); *Shanley v. Northeast Indep. Sch. Dist.*, 462 F. 2d 960, 972 (5th Cir. 1972) ("[T]he purpose of education is to spread, not to stifle, ideas and views"). Rather than promoting the exchange of ideas, views, and beliefs, Defendants trample upon Plaintiff's private religious and political expression because of disagreement with her message, thereby shirking their duties of equal treatment imposed by the Federal Equal Access Act ("EAA") and the United States Constitution.

The degree to which the Defendants disregard their statutory and constitutional duties – and thus stamp out Plaintiff's religious and political views – is quite remarkable and cannot be understated, for she is *literally silenced* in every way imaginable at her school. (Ex. C, Plf's Aff. ¶17.) Not only is she denied equal access to communicative avenues, such as the morning announcements and school bulletin boards (as addressed in §§ III and IV, *infra*)), Defendants demand that Plaintiff not even *mention the existence* of the Club to anyone else because it is allegedly "too controversial." Consequently, while Plaintiff's Club is technically permitted to meet

by Defendants on campus, it is in a very real sense completely prevented from even functioning as a student club because every available communicative avenue is cut off from them.

Defendants' attempt to justify this discriminatory treatment by claiming that Plaintiff's Pro-Life Club is simply "too controversial," (Compl. ¶71, 76, 109; Ex. C ¶18), teeters on the edge of frivolity, for it is well-established that excluding a group from a forum "simply because it is controversial or divisive is viewpoint discrimination," and necessarily unlawful. *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. School Dist*., 386 F.3d 514, 527-28 (3d Cir. 2004). Even in the public school setting, "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" fails to justify the suppression of speech. *Tinker*, 393 U.S. at 509. Defendants' viewpoint-based discrimination is also evident when one stops to inquire whether other student clubs on campus that discuss "controversial" issues – such as the Gay Straight Alliance – are denied equal access to benefits in the same manner as Plaintiff's Club. The answer is "no." Only Plaintiff's Club is singled out for disparate treatment.[1]

This discriminatory treatment indicates a two-tiered scheme implemented by the Defendants that violates both the EAA and the First Amendment. The facts clearly show that the Defendants have established a public forum for expression by clubs on virtually limitless topics. In doing so, the law requires them to provide Plaintiff's Pro-Life Club the exact same access to school facilities and benefits as they provide to other recognized student groups. *See* 20 U.S.C. § 4071, *et seq*. (requiring schools to provide "equal access" to all aspects of school's limited open forum); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990) (holding that EAA required school to grant Bible club access to same benefits provided to other students clubs); *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002) (same); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F. 3d 211 (3d Cir. 2003) (same); *Widmar v. Vincent*, 454 U.S. 263 (1981) (First Amendment required university to provide religious student group equal access to all benefits received by other student groups).

[1]Moreover, if Defendants' standard is that "controversial" clubs are denied equal access, while clubs deemed by them not to be "controversial" are given all benefits, etc., this standard in and of itself is an unconstitutional restriction granting unbridled discretion to Defendants to discriminate against Plaintiff's religious and political speech. *See* Compl. ¶¶ 135-141.

Moreover, it is well-settled law that Defendants may not sidestep the requirements of the EAA by providing *some* access, but not *equal* access, as they attempt to do here. While Defendants technically allow the Club to meet on campus, they insist on foreclosing every single communicative avenue available to her. Defendants apparently believe that allowing the club to meet on campus is all that the EAA requires. They are plainly mistaken. "This same situation presented itself in *Mergens*, in which the Court held that the defendant school district violated the Act by not affording *equal* access." *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1248 n.4 (3d Cir. 1993) (emphasis in original) (finding a violation of the EAA where the Bible Club was permitted to meet, but denied the right to utilize the public address system, bulletin boards, and other privileges accorded to nonreligious groups); *see also, Prince*, 303 F.3d at 1077 (where the Bible club was permitted to meet as a separate category club, the court held "that the School District violated . . . the [EAA] . . . by denying her 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") (emphasis added); *Straights and Gays for Equality (SAGE) v. Osseo Area Schools-Dist. No. 279*, 471 F.3d 908, 912 (8th Cir. 2006) ("[The school] does not prohibit SAGE from meeting at the school or utilizing some avenues of communication; however, the issue is not whether SAGE has access to some avenues of communication but whether it has equal access to the same avenues of communication as other noncurriculum related groups. We hold that it does not").

In sum, *Mergens*, *Prince*, and other cases on point show that this is not an arduous case. The EAA and the First Amendment condemn Defendants' discriminatory treatment of Plaintiff and her Club. Rather than complying with their statutory and constitutional duties, Defendants here prohibit Plaintiff from expressing her religious and political views concerning abortion, abstinence, and many other issues that recognized student clubs are permitted to address based solely on the religious and political content and viewpoint of her desired speech. Defendants' content- and viewpoint- based discrimination is blatantly unconstitutional and must be enjoined.

II. STATEMENT OF ISSUES TO BE DECIDED

Whether Defendants' Policies and practice related to student club formation, both facially and as applied to Plaintiff's religious and political speech, violate the Equal Access Act, 20 U.S.C.

§§ 4071-74 (1984), and the First and Fourteenth Amendments to the United States Constitution.

III. STATEMENT OF RELEVANT FACTS

Plaintiff P.A., a minor, is a resident of Campbell, California and a student at Westmont High School. (Compl. ¶18.) N.A., next friend, is P.A.'s parent and guardian, and at all times relevant to this Complaint, is a resident of Campbell, California. (*Id*. ¶24.)

Defendants Diane Gordon, Matthew Dean, Margie Mitchell, Pam Parker, and Royce Peterson are Members of the Campbell Union High School District Board of Trustees and are sued both individually and in their official capacities. (*Id*. ¶¶25-29.) These five Defendants (collectively "Board") are responsible for the enactment, enforcement, and existence of policies and practices related to the rights, benefits, and privileges afforded to student clubs at WHS. (*Id*. ¶30.) The Board bears responsibility for denying Plaintiff's Club the same rights, benefits, and privileges given to other student clubs at the school pursuant to its policies and practice. (*Id*. ¶31.) The Board is likewise responsible for the implementation and application by the Superintendent and Principal of its policies and practices pertaining to student clubs. (*Id*. ¶32.) In addition, the Board is charged with delegating to the Superintendent and Principal final authority as to the official recognition of student clubs. (*Id*. ¶33.) Moreover, the Board acquiesced in and approved of Defendant Farber's denial of Plaintiff's request to form a pro-life club. (*Id*. ¶34.)

Defendant Rhonda Farber is the Superintendent of the Campbell Union High School District. (*Id*. ¶35.) Defendant Farber possesses responsibility, final authority, and discretion, as delegated by the Board, as to the administration of Board policies as they relate to student activities on campus. (*Id*. ¶36.) Defendant Farber also has responsibility, final authority, and discretion, as delegated by the Board, as to the administration of Board policies related to the establishment of student clubs, as well as the benefits said clubs receive. (*Id*. ¶37.) In this capacity, Defendant Farber possesses final supervisory responsibility over the Principal of WHS. (*Id*. ¶38.) Defendant Farber bears responsibility for the Policies and practice leading to the denial of equal benefits to Plaintiff's Club, as well as for the denial itself. (*Id*. ¶¶39-40.) Defendant Farber instructed Defendant Hege to deny Plaintiff's request to form her Pro-Life Club. (*Id*. ¶41.) Defendant Farber is sued both in her individual capacity and in her official capacity as Superintendent of the District. (*Id*. ¶42.).

Defendant Owen Hege is the Principal of WHS and is charged with its administration, including Board-delegated responsibility, authority, and discretion as to enforcement of Board policies relating to student clubs. (*Id*. ¶¶43-44.) Defendant Hege is responsible for the Policies and practice leading to the denial of equal benefits to Plaintiff's Club, as well as for the denial itself. (*Id*. ¶¶45-46.) Defendant Hege made the decision to deny equal benefits to Plaintiff's Club pursuant to the Policy and practice implementation and direction of the Board. (*Id*. ¶48.) This decision by Defendant Hege to deny equal benefits and privileges to Plaintiff's Club was made at the direction of the Superintendent and of the Board. (*Id*. ¶49.) Defendant Hege is sued both in his individual capacity and in his official capacity. (*Id*. ¶47.)

WHS and the Student Club Forum Created and Implemented by the Defendants

WHS is a public high school located in Campbell, California and is under the direction of the Board. (*Id*. ¶¶50-51.) WHS includes grades 9 through 12 and is classified as a secondary school under California law. (*Id*. ¶52.) Upon information and belief, both WHS and the Board receive federal financial assistance. (*Id*. ¶53.)

The Board, acting through Defendants Farber and Hege, as Superintendent and Principal, respectively, grant official club status to non-curriculum related student clubs. (*Id*. ¶54.) Acting through Defendants Farber and Hege, the Board allows said clubs to meet on school premises at WHS during non-instructional time. (*Id*. ¶55.) Non-curriculum related clubs currently recognized by the Board include, among others, the Gay Straight Alliance; B-Buoy (break dancing); Chess Club; Sci-Fi/Horror Movie Club; Running Club; Key Club; Culture Club; Link Crew; Color Talk; Christian Club; and Invisible Children. (*Id*. ¶56.) These clubs address issues involving, among others, promoting respect, dignity, and safety for students at WHS; premarital sex, including homosexual behavior; community service and involvement; leadership; supporting freshman facing difficult decisions and/or situations; appreciation of cultural identity; equality of, and respect for, all human life regardless of color; faith and religion; and various human rights issues. (*Id*. ¶57.) Participation in such clubs is neither required nor directly encouraged by WHS faculty in connection with curriculum course work. (*Id*. ¶¶58-59.)

Defendants, pursuant to their Policies and practice, permit officially recognized

non-curriculum related clubs to (i) conduct meetings during non-instructional time on campus; (ii) utilize morning public address announcements to convey information about any upcoming club meetings or planned activities to the student body; (iii) use space on school bulletin boards to display information about any upcoming club activities and/or meetings; (iv) advertise club activities and meetings through respectful and non-disruptive flyer distribution activities on WHS grounds during non-instructional time; (v) have a descriptive club name of their own choosing, so that the club may adequately convey its purpose and ideals to interested students; (vi) have their club name and a description of the club listed on the WHS website; and (vii) announce Club meetings and/or activities on the WHS "Daily Bulletin," via the school's website. (*Id*. at ¶¶60-66.)

Plaintiff and Her Pro-Life Club

Plaintiff is an adherent of the Christian faith and desires to share her religious and political views and beliefs with her classmates. (*Id*. ¶19.) Pursuant to her sincerely held religious beliefs, Plaintiff desires to meet with other students through the Pro-Life Club at WHS. (*Id*. ¶20.) Plaintiff believes in the sanctity of life and that abstinence is the best way to avoid unwanted pregnancies. (*Id*. ¶21.) Plaintiff also desires to reach out to her peers and to offer them love, advice, assistance, education, and service based on her religious and political beliefs and opinions. (*Id*. ¶22.) In addition, Plaintiff desires to fellowship together with other students and to discuss relevant issues facing students including, among others, faith and religion; community service; personal responsibility; leadership; assisting underclassmen faced with difficult choices and/or situations; sexual abstinence; keeping and raising children in the event of pregnancy; human rights issues; promoting respect toward others; and equality of, and respect for, all human life. (*Id*. ¶23.)

Defendants Deny Plaintiff and Her Pro-Life Club Equal Access to the Student Club Forum

In October, 2007, Plaintiff, pursuant to her sincerely held religious and political beliefs, submitted a written request to Defendants requesting to start the Pro-Life Club at WHS. (*Id*. ¶67.) Plaintiff requested that her Club to be granted official club status, with all attendant rights, benefits, and privileges. (*Id*. ¶68.) Plaintiff also asked that the Club be named the "Live Action – Pro-Life Club." (*Id*. ¶69.)

In response to Plaintiff's request, Defendants proceeded to technically permit Plaintiff and

other Club members to meet during non-instructional time, but denied (and continue to deny) Plaintiff and fellow Club members any avenue through which they might tell other students about the Club. (*Id*. ¶70.) For example, Defendants prohibit Plaintiff from even telling other students at WHS about the Club's existence, let alone the Club's intended pro-life message, for the stated reason that it is "too controversial." (*Id*. ¶71.) Defendants also bar Plaintiff access to morning P.A. announcements and access to school bulletin boards, prevent Plaintiff from distributing flyers, prohibit Plaintiff from selecting a club name, bar Plaintiff from using the term "pro-life" in the club name, prohibit Plaintiff from listing the Club on the WHS website, and proscribe Plaintiff from announcing Club meetings and activities on the WHS "Daily Bulletin." (*Id*. ¶¶72-78.) Incredibly, Defendants even refused to provide Plaintiff with information regarding any policies, guidelines, or procedures related to student clubs even though she requested such information. (*Id*. ¶79.)

Acting pursuant to their Policies and practice, Defendants have denied equal access to the above described rights, benefits, and privileges because of the religious and political nature and speech of the Club. (*Id*. ¶80.) This denial of equal access—whether pursuant to the Board's Policies regarding formation of student clubs, or pursuant to Defendants Farber's and Hege's final decision-making authority over student club requests—violates and continues to violate Plaintiff's constitutional and statutory rights. (*Id*. ¶¶ 30-34; 36-41; 44-49.) Plaintiff desires to express her religious at political views at WHS as soon as possible without facing discipline. (Ex. C. ¶30.)

IV. ARGUMENT

It is firmly established that the Equal Access Act and the First Amendment prohibit public school officials from discriminating against the content and viewpoint of a student club's speech and that of its members. Yet, that is precisely what Defendants are guilty of here. Defendants would grant Plaintiff's Pro-Life Club all of the benefits and privileges given to other student clubs but for the religious and political content of Plaintiff's desired speech. This illicit censorship and denial of equal access should not be permitted to continue. A preliminary injunction must issue to end the Defendants' blatant content- and viewpoint- based discrimination against Plaintiff's speech.

We turn initially to Plaintiff's demonstrated satisfaction of the necessary elements for an injunction to issue (*see* §§ IV(A) through (E), *infra*), then close by rebutting any feeble attempt by

Defendants to justify their discrimination (*see* §IV(F), *infra*).

A. STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

This Court may issue a preliminary injunction when the movant demonstates either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in the movant's favor. *Brown v. California Dep't of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003). "Each of these two formulations requires an examination of both the potential merits of the asserted claims and the harm or hardships faced by the parties." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002). These two formulations represent "two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Id*. (citation omitted.) Additionally, "[i]f the public interest may be affected by the proposed injunction, it should also be factored into the analysis." *Bernhardt v. County of Los Angeles*, 339 F.3d 920, 925 (9th Cir. 2003).

Usually, a preliminary injunction "preserve[s] the *status quo* pending a final determination of the action on the merits." *Chalk v. United States Dist. Ct.*, 840 F.2d 701, 704 (9th Cir. 1988). But it is entirely appropriate to alter the *status quo* to protect a party from irreparable harm. *See, e.g., Brown*, 321 F.3d 1217 (issuing a preliminary injunction and altering the *status quo* where a plaintiff's First Amendment rights were violated). Here, Plaintiff seeks a limited, temporary alteration of the *status quo* to protect her from further irreparable harm to her speech, equal access, and equal protection rights resulting from Defendants' ongoing discrimination. As shown below, Plaintiff satisfies each element necessary for an injunction to issue.

B. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS OF HER CLAIMS

Defendants' practice of denying equal access to student members of clubs based on the content and viewpoint of the student's desired speech (pursuant to Policies granting them unbridled discretion over access to the student club forum) implicate a host of constitutional provisions, including the Free Speech Clause of the First Amendment and the EAA. As to each of her claims, Plaintiff demonstrates a clear likelihood of success.

1. DEFENDANTS' POLICIES AND PRACTICE VIOLATE THE EAA.

Defendants violate the EAA and well-settled precedent in withholding rights and benefits

afforded members of other student clubs based on the religious content 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); *Mergens*, 496 U.S. at 247 ("Given that the Act explicitly prohibits denial of equal access . . . on the basis of the religious content of the speech at [club] meetings . . . we hold that [the school district's] denial of respondents' request [for official recognition of their] Christian club denies them "equal access" under the Act") (citation omitted); *Prince*, 303 F.3d at 1077 ("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"). Again, (and as described fully in §III, *supra*) these rights and benefits include access to school bulletins boards, the P.A. system, and flyer distribution efforts, among others. As shown below, Defendants triggered the EAA. The equality mandated by the Act requires Defendants to provide all of the same rights and benefits afforded students of other recognized clubs.

a. Defendants Created a Limited Open Forum Triggering 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." *Mergens*, 496 U.S. at 235 (quoting 20 U.S.C. § 4071(a)). The first two requirements for the EAA to apply are met in this case: WHS is a public secondary school under California law and it receives federal financial assistance. (Compl. ¶¶50-53; 86-87.)

The third requirement triggering the EAA is also met. Defendants have created a limited open forum. The Act dictates that a school has a limited open 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 clubs that are non-curriculum related,

including the Gay Straight Alliance, B-Buoy, Chess Club, Sci-Fi/Horror Movie Club, Key Club, Culture Club, Link Crew, Color Talk, Christian Club, and Anime Club, just to name a few. (Compl. ¶¶7, 56; Ex. C ¶8; Ex. A at 1-2 (providing a non-exhaustive list of recognized student clubs at WHS and including a description of each).) While WHS has, at a minimum, twenty non-curriculum related clubs, only *one* is needed to trigger the EAA. *See Mergens*, 496 U.S. at 235-240 ("[E]ven if a public secondary school allows only one 'noncurriculum related student group' to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time"). 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 directly 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 offer the subject in the future." *Id*. at 240. *None* of the recognized school clubs listed above are directly related to the "body of courses offered at [WHS]" like the French club in *Mergens. Id*.

Further, Defendants have granted official recognition (and accompanying benefits) to two student clubs—Key Club and the Gay Straight Alliance—that other federal courts have determined to be non-curriculum related clubs, thus triggering the EAA. In *Pope*, the Third Circuit Court of Appeals held that a Key Club was a non-curriculum club. 12 F.3d at 1251-54. The *Pope* Court found that the Key Club was non-curriculum related despite the fact that the defendant school district taught a unit on "homelessness, hunger, and poverty" in its History and Humanities class, and required students in the class to participate in and coordinate several of the Key Club's community service projects. *Id*. at 1252. Similarly, in *Colin v. Orange Unified Sch. Dist*., 83 F.Supp.2d 1135, 1143-44 (C.D. Cal. 2000), the Central District held that both a Key Club and a Gay Straight Alliance were non-curriculum related. And, in *Boyd Cty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cty., KY*, another federal district court held that a Gay Straight Alliance to be unrelated to a school's curriculum. 258 F.Supp.2d 667, 687, 693 (E.D. KY. 2003) ("Defendants must give the [Gay-Straight Alliance] Club and its members equal access to those activities of student groups permitted at [the school] and not directly related to the curriculum . . ."). Defendants' grant of

official recognition to the Key Club and the Gay Straight Alliance triggers the EAA in this matter because both of these clubs (in addition to the others at WHS) are non-curriculum related.

b. Defendants' Refusal to Give the Students of the Pro-Life Club the Same Benefits as Students of Other Clubs Violates the EAA.

"Equal access" under the EAA requires public schools to provide the *same* rights and benefits to students of all non-curriculum related clubs, not merely *some* of the benefits. Equal means just that. As addressed *supra*, federal courts, including the Supreme Court, have so held. For example, in *Mergens*, 496 U.S. at 226, the defendant school district technically allowed a religious club to meet on campus (as Defendants allow here). But, the school district refused to provide the student members all of the rights and benefits given to student members of other non-curriculum related clubs because of the religious content of the club's speech (again, as here). The Court held that the school district violated the club's right to "equal access" under the EAA both 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 the same benefits of other clubs, the court held that EAA required the 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); *SAGE*, 471 F.3d at 912 (when a student club was permitted to meet on campus but denied communicative avenues afforded other groups, EAA not satisfied).

Defendants are denying the students of the Pro-Life Club the rights and benefits afforded student members of other recognized student clubs based solely on the religious content and viewpoint of Plaintiff's desired speech. It is clear that such blatant discrimination against student speech is prohibited by the EAA. Plaintiff's likelihood of success of her statutory claim is clear.

2. DEFENDANTS ARE VIOLATING THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

In addition to violating the EAA, Defendants ongoing denial to Plaintiff of equal club rights, benefits, and privileges violates her First Amendment rights.

a. Plaintiff's Speech is Protected by the First Amendment.

Religious speech is indisputably protected by the First Amendment. *Widmar*, 454 U.S. at 269 ("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). Plaintiff's political speech is also entitled to the full protection of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (citation omitted) ("The First Amendment affords the broadest protection to . . . political expression . . . "); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) ("Core political speech occupies the highest, most protected position" under the First Amendment). Here, Plaintiff desires to express her religious and political views on a whole host of subject matters already being discussed by student clubs at WHS. (Compl. ¶¶23, 57, 90, 94, 105 ; Ex. C. ¶¶20-30.) Plaintiff's speech is clearly protected by the First Amendment.

b. Defendants Have Created a Designated Public Forum for Speech by Student Groups.

Designated public forums are created by the government for use by the public as places for expressive activity. "[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). Importantly, 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).

Government intent is the central question in determining whether a designated public forum has been established. *Cornelius*, 473 U.S. at 802. Under Supreme Court precedent, the government's "policy and practice" are the key to determining whether the government "intended

to designate a place not traditionally open to assembly and debate as a public forum." *Id*. The example of a government-created designated forum the Supreme Court relied on in *Cornelius* is particularly apt to the case here, since that case involved a student organization forum:

> For example, in *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981), we found that a state university that had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use. *Id*., at 267, 102 S. Ct., at 273. The policy evidenced a clear intent to create a public forum . . . .

Cornelius, 473 U.S. at 802. The Ninth Circuit similarly held in *Prince*, 303 F. 3d at 1090-91, that a public high school's provision of meeting facilities and various benefits, rights, and privileges to student organizations created a designated public forum for student speech.

The student organization forums in *Widmar* and *Prince* are indistinguishable from the student club forum created by Defendants. Here, Defendants' Policies and practice "evince[] a clear intent to create a public forum." *Id*. Defendants impose virtually no limit on the subject matters that may be addressed by students, other than the individual interests, passions, and beliefs of the students who seek to establish such clubs. Indeed, Defendants recognize student clubs, such as the Gay Straight Alliance, Link Crew, Key Club, and Christian Club, and Invisible Children, where the members take various views on a number of issues. (Compl. ¶¶56, 90, 105; Ex. C. ¶¶21, 23, 25, 27.) Defendants' forum is plainly a designated forum for private student speech.

c. 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, and can survive only if they serve a compelling state interest and are narrowly tailored to achieve that interest. *Widmar*, 454 U.S. at 270. The Defendants' exclusion of Plaintiff's Pro-Life Club based on the religious and political content of her desired speech violates the First Amendment. In *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), the Supreme Court held that

> government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Defendants' discrimination against the Pro-Life Club's intended political and religious speech (*see* Compl. ¶¶ 93, 94, 105) (specifying the intended political and religious content of the Club's meetings and activities) is no different than the discriminatory exclusion struck down in *Widmar*. There, the defendant university, like Defendants here, opened up its facilities for use by student organizations, yet excluded a religious student club from that forum because, like the Plaintiff's Club here, it engaged in religious activity and discussion. 454 U.S. at 265. The Supreme Court found that the university's "discriminatory exclusion [was] based on the religious content of [the] group's intended speech," and thus required the university to "show that its regulation is necessary to serve a compelling interest and that it is narrowly tailored to achieve that end." *Id*. at 269-70. The Defendants here have also aimed their discrimination at Plaintiff's desired political speech, by denying equal benefits to Plaintiff's Club based on her intent to express her political views regarding abortion. (Compl. ¶71, 76, 105-106.) In *Widmar*, the university's content-based discrimination could not withstand strict scrutiny, and neither can the Defendants' discrimination against the Plaintiff's religious and political speech here.

d. Defendants' Viewpoint-Based Exclusion of Plaintiff from the Student Organization Forum Violates the First Amendment Regardless of the Type of Forum.

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*, 473 U.S. at 812 (cautioning that "the purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers"). 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). Indeed, federal courts have found schools guilty of viewpoint discrimination under similar circumstances. *See, e.g., Child Evangelism Fellowship of New Jersey, Inc.*, 386 F.3d at 527-28 ("To exclude a group [from access to the school setting] simply because it is controversial or divisive is viewpoint discrimination"); *Prince*, 303 F.3d at 1074, 1091-92 (where school district offered non-curriculum 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*, 336 F. 3d at 226 ("[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"); *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 828-833 (1995) (holding that university's denial of funding to student group amounted to impermissible viewpoint discrimination where the denial was premised on the ground that the contents of the group's publication revealed an avowed religious perspective).

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 and political views regarding subject matters permitted to be discussed within the WHS student organization forum. Other students address topics such as premarital sex, including homosexual behavior (*e.g.*, Gay Straight Alliance), community service , leadership, and a focus on the spiritual, rather than material, values of life (*e.g.*, Key Club), promoting respect, dignity, and tolerance toward others (*e.g.*, Gay Straight Alliance), helping freshmen with difficult decisions and/or situations (*e.g.*, Link Crew), faith and religion, including daily living of the Golden Rule (*e.g.*, Christian Club and Key Club); and embracing different cultures and lifestyles (*e.g.*, Culture Club, Christian Club, and the Gay Straight Alliance) (Compl. ¶¶57, 90; Exs. A at 1-2 (listing many student clubs at WHS along with a description of their "main purpose"); D at 1 ("Gay-Straight Alliances (GSAs) are student-led clubs . . . that work to address anti-LGBT name-calling, bullying and harassment in the schools and promote respect for ALL students"); E at 1 ("Key Club . . . is a student-led organization that teaches leadership through serving others"); E at 2 (listing among the Key Club "Objects" to "give primacy to the human and spiritual, rather than to the material values of life," and to "encourage the daily living of the Golden Rule in all human relationships"); F at 3("Before their 9th grade year begins, new students are introduced to the school, to its academic and support programs and to campus life by sophomores as a part of the Link Crew Program); G at 2 ("[WHS] has many . . . student clubs that embrace the different cultures and lifestyles of our student body – such as . . . Culture Club, Christian Club, and the Gay-Straight Alliance . . . . [T]hese clubs . . . provide

positive experiences, teach tolerance, and improve student relations and Westmont's atmosphere"); Plaintiff desires to speak to these issues from a religious perspective, but is kept from doing so by Defendants' viewpoint discrimination. (Compl. ¶¶93, 94, 107-110; Ex. C. ¶¶22, 24, 26, 28-30.)

In addition, Defendants' stated justification for their refusal of equal benefits (*i.e*. that the Pro-Life Club is "too controversial") is implausible given the facts of this case and clearly shows illicit viewpoint discrimination. As noted at the outset of this Memorandum, at least one non-curriculum, the Gay Straight Alliance, is afforded equal treatment despite the fact that it discusses and deals with controversial issues. Defendants cannot credibly explicate how the Gay Straight Alliance is not controversial in nature, but that the Pro-Life Club is. Indeed, the *only* explanation for this unequal treatment is the Defendants' viewpoint- based discrimination against Plaintiff.

C. PLAINTIFF IS SUFFERING IRREPARABLE HARM

It is well established that "[t]he 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); *see also*, *SAGE*, 471 F.3d at 913 (8th Cir. 2006) ("[T]he . . . presumption of irreparable harm arises in the case of violations of the Equal Access Act because it protects expressive liberties") (quotation and citation omitted). In this Circuit, "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*, 303 F.3d at 973.

Plaintiff has much more than a colorable claim here, as shown above. Defendants continue to prohibit Plaintiff and her Club from obtaining equal access to rights and benefits received by other student clubs. This violates her rights under both the First Amendment and the EAA, and the harm to these rights is ongoing. For each day that passes where Plaintiff is not permitted to form her Pro-Life Club, and to express her religious and political views at WHS, she is experiencing irreparable harm. There is no money or other compensation that can replace Plaintiff's lost speech.

Relevant also as to the issue of irreparable harm is the Eight Circuit's discussion in *SAGE* given that case's factual similarities to this instant matter:

> [A]lthough [the school] has afforded students the opportunity to hold SAGE meetings in school classrooms and place posters on a community bulletin board outside the meeting place, they have not, like student members of [other noncurriculum groups], been allowed to communicate via the PA, yearbook, and

> scrolling screen. Additionally, the students have been prohibited from holding fundraising events or having field trips. Therefore, the student members of SAGE are entitled to a presumption of irreparable harm, as they will not be able to exercise their rights absent a preliminary injunction.

SAGE, 471 F.3d at 913 (emphasis added). Just as in *SAGE*, Plaintiff has shown here that she is technically permitted to meet with other Club members on campus, but is denied access to all of the communicative avenues given to other student clubs. This showing entitles Plaintiff to a presumption of irreparable harm, as she cannot exercise her rights absent injunctive relief.

D. PLAINTIFF RAISES SERIOUS QUESTIONS OF LAW AND THE BALANCE OF HARDSHIPS TIPS SHARPLY IN HER FAVOR.

As set forth above, the issues presented by the facts of this case present grave constitutional concerns, and the overwhelming weight of the law as applied to those facts favors Plaintiff. It is beyond cavil to suggest that Plaintiff has not satisfied the requirement of serious questions going to the merits. If not allowed access to all student club rights, benefits, and privileges, Plaintiff and her fellow Club members will continue to suffer religious discrimination and will continue to be second-class citizens within the student forum community. (Ex. C. ¶¶29-30.)

In addition, the balance of hardships tips decidedly in Plaintiff's favor. Plaintiff's loss would perpetuate actions by Defendants violative of the EAA and the First Amendment, while Defendants' "gain" would be peripheral and token, at best. *See*, *e.g.*, *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"); *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 non-curriculum related student clubs at WHS, permitting students to speak about many subjects. (Compl. ¶¶57, 90.) Plaintiff merely desires to address these topics from her religious point of view. (*Id*. ¶¶ 93, 94, 105; Ex. C. ¶¶22, 24, 26, 28, 30.) Injunctive relief would simply require Defendants to treat members of the Club the same as members of other clubs.

E. GRANTING EQUAL ACCESS TO PLAINTIFF SERVES THE PUBLIC INTEREST

In this case, the public interest would be served by applying binding, well-established Supreme Court and Ninth Circuit authority to require Defendants to cease discriminating against Plaintiff and to ensure that she is treated equally. In this Circuit, "[t]he public interest inquiry primarily addresses impact on non-parties rather than parties." *Sammartano*, 303 F.3d at 974. In its *Sammartano* decision, the Ninth Circuit highlighted the following authority, among others, for the proposition that federal courts "considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles":

> See *Homans v. Albuquerque*, 264 F.3d 1240, 1244 (10th Cir.2001) ("[W]e believe that the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression."); *Iowa Right to Life Comm'e, Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir.1999) (finding a district court did not abuse its discretion in granting a preliminary injunction because "the potential harm to independent expression and certainty in public discussion of issues is great and the public interest favors protecting core First Amendment freedoms"); *Suster v. Marshall*, 149 F.3d 523, 530 (6th Cir.1998) (holding candidates for judicial office were entitled to preliminary injunction of expenditure limit given likelihood of success on the merits, irreparable harm and lack of public interest in enforcing a law that curtailed political speech); *Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir.1997) . . . .

303 F.3d at 974. Here, the public has no interest in seeing ongoing enforcement of Defendants' blatantly unlawful Policies and practice to squelch First Amendment and EAA freedoms, and every interest in seeing Plaintiff's rights protected. *See*, *e.g.*, *Westfield High School L.I.F.E. Club*, 249 F.Supp.2d at 128-29 ("[T]he public interest is served when public high school students seek to preserve their rights to free expression and free exercise of religion").

F. DEFENDANTS HAVE NO JUSTIFICATION FOR DENYING EQUAL ACCESS.

To the extent the Defendants attempt to justify their denial of equal benefits for the reason that the Pro-Life Club is "too controversial," this argument would be a sham under the facts of this case. As explained *supra*, at least one non-curriculum club, the Gay Straight Alliance, is afforded equal treatment despite the fact that it discusses controversial issues. There is simply no conceivable way for the Defendants to explain how the Gay Straight Alliance is not controversial, while at the same time classifying the Pro-Life Club as such. Indeed, the *only* explanation for this disparate treatment is Defendants' content- and viewpoint- based discrimination against Plaintiff's speech.

Moreover, if the Defendants argue that they are justified in excluding Plaintiff's Pro-Life Club from the student club forum to avoid the appearance of violating the Establishment Clause, this argument too should fail under the facts of this case. The Defendants have already granted recognition to a religious club – the Christian Club. (Compl. ¶7; Exs. C. ¶8; G. at 2.) Because the Defendants did not view granting recognition to the Christian Club as posing any Establishment Clause problems, then neither does granting recognition to Plaintiff's religious club.

Of course, it is also well-settled law that the Establishment Clause does not justify the exclusion of religious speakers from private speech fora, like the student club forum at issue here. The Supreme Court and several other federal courts have repeatedly rejected the argument that the Establishment Clause justifies exclusion of religious speakers in the context of the EAA and First Amendment speech fora. For instance, in *Mergens*, the Court held constitutional the EAA's requirement that a school grant equal access to a religious student club. As the Court put it,

> there 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. We think that secondary school students are mature enough . . . to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

Mergens, 496 U.S. at 250; a*ccord Prince*, 303 F. 3d at 1092 ("It does not violate the Establishment Clause for a public [school] to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises.") (quoting *Rosenberger*, 515 U.S. at 842)); *Donovan*, 336 F. 3d at 227 (same).

Outside the EAA context, the Supreme Court has repeatedly come to the same conclusion. In *Widmar*, a case involving a student organization speech forum similar to the forum involved here, the Supreme Court explained that where a forum is available to a broad class of speakers, allowing religious speech "*does not confer any imprimatur of state approval on religious sects or practices*." 454 U.S. at 274 (emphasis added). The *Pinette* Court reaffirmed this holding:

> We have twice previously addressed the combination of private religious expression, a forum available for public use, content-based regulation, and a State's interest in complying with the Establishment Clause. Both times, we have struck down the restriction on religious content. . . . And as a matter of Establishment Clause

> jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.

515 U.S. at 762, 763-64. Neutral accommodation of religious activity does not violate the Establishment Clause, and providing a neutral government benefit *upholds* the Constitution.

V. CONCLUSION

In a post-*Mergens*, post-*Prince* world, Defendants lack a valid excuse for their failure to provide equal access to Plaintiff and her Club. Justice requires that Defendants' discrimination against Plaintiff be enjoined during the pendency of this litigation, thereby affording Plaintiff and her Club equal access to all rights, benefits and privileges obtained by other clubs at WHS.

Dated this 10th day of January, 2008.

Respectfully submitted,

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certified that a copy of the foregoing Plaintiff's Notice of, and Motion for, Preliminary Injunction and Memorandum of Points and Authorities will be served upon all Defendants to this action by manner of personal service, along with the Verified Complaint.

Dated this 10th day of January, 2008.

Timothy Chandler, CA Bar No. 234325
ALLIANCE DEFENSE FUND