UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOELLE SILVER,

Plaintiff,

Case No. 1:13-cv-00031-RJA-LGF

v.

CHEEKTOWAGA CENTRAL SCHOOL DISTRICT; **BRIAN J. GOULD**, in his official capacity as President, Board of Education, Cheektowaga Central School District; and **DENNIS KANE**, individually and in his official capacity as Superintendent of Schools, Cheektowaga Central School District,

Defendants.

PLAINTIFF'S OBJECTIONS TO U.S. MAGISTRATE JUDGE FOSCHIO'S REPORT AND RECOMMENDATION REGARDING DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitution

INTRODUCTION[1]

Plaintiff Joelle Silver ("Plaintiff") is a Christian. She is also a science teacher in Defendant Cheektowaga Central School District ("School District"). Plaintiff does not cease being a Christian nor does she shed her constitutional rights upon accepting employment with the School District. Indeed, "[a]lmost 50 years ago, [the Supreme] Court declared that citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, No. 13-483, 2014 U.S. LEXIS 4302, at *6 (U.S. June 19, 2014); *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) ("It is well settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.") (internal quotations and citation omitted); *Connick v. Myers*, 461 U.S. 138, 142 (1983) (same); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) ("[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967) ("[T]he theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (stating that it has been "the unmistakable holding" of the Court for decades that neither "students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"). Contrary to the inescapable implications of U.S. Magistrate Judge Foschio's Report and Recommendation (Doc. No. 17) (hereinafter "Report and Recommendation"), there is no *Christian* exception to this longstanding principle. Indeed, the hostility toward religion conveyed by Defendants and condoned by the Report and Recommendation finds no support in our Nation's longstanding traditions. In fact, quite the opposite is true. *Elk Grove Unified Sch.*

[1] Pursuant to Local Rule 72.3, Plaintiff's objections to the Magistrate Judge's Report and Recommendation do not raise new legal or factual arguments.

Dist. v. Newdow, 542 U.S. 1, 35-36 (2004) (O'Connor, J., concurring) ("It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths."). Thus, it is improper to permit the Establishment Clause to be used as a blunt instrument *to target and eradicate religion*, or worse, as a fig leaf to hide government *hostility toward religion*. Contrary to the Report and Recommendation's conclusion, Defendants' concern about an Establishment Clause violation in light of the personal, non-curricular speech at issue (*e.g.*, a small posting of a quote from President Ronald Reagan that mentions "God" and small, handwritten "sticky notes" containing inspirational Bible verses that were discreetly attached to the back of Plaintiff's desk, *inter alia*) is unreasonable.[2] Indeed, it is absurd. And while a public school district retains significant authority over the curriculum that is taught by its teachers,[3] this authority does not extend to a teacher's personal, non-curricular speech—speech that is otherwise permitted by virtue of the School District's policy and practice. (*See* Compl. ¶ 16 [Doc. No. 1]). Otherwise, contrary to Supreme Court precedent, teachers, and in particular *Christian* teachers, <u>do</u> shed their constitutional rights at the schoolhouse gate. *Tinker*, 393 U.S. at 506. In short, this court should deny Defendants' motion in full.

ARGUMENT

I. Plaintiff Objects to the Report and Recommendation's Conclusions that Defendants' Speech Restrictions Did Not Violate the Establishment Clause's Prohibition against Government Hostility toward Religion and that Defendants' Fear of Violating the Establishment Clause Justified the Restrictions.

[2] (*See* Silver Decl. ¶¶ 2-5, Exs. A-D at Ex. 1 [Doc. No. 10-1] [providing photographs of classroom and displays]).

[3] As evidenced by the Complaint and the arguments presented in response to Defendants' motion to dismiss, Plaintiff is not challenging Defendants' restrictions on her speech that relate to curricular matters (*i.e.*, limitations on guest speakers or other aspects of her science "instructional program"). (*See* Pl.'s Opp'n to Defs.' Mot. to Dismiss at 13 n.10 [Doc. No. 10]; *see generally* Compl. [Doc. No. 1]).

Plaintiff objects to the Magistrate Judge's conclusions that (1) Defendants' abject hostility toward Plaintiff's religion did not violate the Establishment Clause and (2) Defendants' viewpoint-based restriction on Plaintiff's speech was in fact justified by a fear of violating the Establishment Clause. We turn to the second objection first.

A. Defendants' Fear of Violating the Establishment Clause Is Unfounded.

The Magistrate Judge begins his substantive analysis of the case by first addressing Plaintiff's Establishment Clause claim. (Report & Recommendation at 16-26). Plaintiff will follow a similar path but for a different reason. And that reason is this: the Magistrate Judge *erroneously* concluded that Plaintiff's claims involving the posting of her personal "religious-themed materials" (free speech and equal protection, in particular) fail because Defendants' viewpoint-based censorship of Plaintiff's personal, non-curricular speech was justified by their fear that permitting this speech would violate the Establishment Clause. (*See* Report & Recommendation at 25). The Magistrate Judge's conclusion is contrary to established law and creates dangerous precedent whereby organizations such as the Freedom From Religion Foundation (whose name tells you enough about this organization's purposes) can simply send a letter on behalf of an "anonymous" complainant threatening frivolous litigation and achieve its objective of religious cleansing without ever having to put to the test its dubious anti-religious claims.[4] Thus, based on this letter (and no serious analysis of the speech at issue to determine whether reliance on this letter was even remotely reasonable), the Magistrate Judge states that "Defendants were rightly concerned about litigation of Plaintiff's display, *regardless of whether*

[4] It is important to bear in mind that the "demand letter" did not even mention many of the "religious-themed materials" at issue. And the reason is simple: these materials were personal, private speech, they were discreetly displayed, and not even the most virulently anti-religious observer (*i.e.*, not the reasonable observer required under the law) would conclude that they are in fact a government-sponsored message that promotes religion in violation of the Establishment Clause.

or not the subject items, ***in fact***, *conveyed a religious message or gave the impression they were on display with the School District's imprimatur*." (Report & Recommendation at 25) (emphasis added). Consider what the Magistrate Judge has concluded in effect: Defendants' viewpoint-based restriction on Plaintiff's personal, non-curricular speech based on a fear of violating the Establishment Clause was justified *even if the fear was demonstrably false and thus entirely unreasonable*. This is wrong as a matter of law simply and because it turns the Establishment Clause on its head, allowing it to be used as a weapon to deny Plaintiff's religious freedom.

To begin, the law does not support Defendants' *irrational* fear of violating the Establishment Clause by allowing the displays. *See generally Marchi v. Bd. of Coop. Educational Servs. of Albany*, 173 F.3d 469, 472 (2d Cir. 1999) (stating that "the scope of the employees' rights must sometimes yield to the *legitimate* interest of the governmental employer in avoiding litigation") (emphasis added). A "legitimate" interest to avoid litigation loses its legitimacy when the threatened litigation is meritless. If the law were otherwise, the government could simply use the mere threat of litigation as a form of "heckler's veto" and eviscerate the government employee's First Amendment right to private speech. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 395 (1993) ("We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded."). Given *Lamb's Chapel*, the Magistrate Judge was required to conduct an analysis regarding whether it was reasonable to conclude that *each* restriction on Plaintiff's speech was in fact justified by a fear that allowing the speech would violate the Establishment Clause.

This is especially so because Defendants' compliance-with-the-Establishment-Clause defense presents a "constitutional justification," which is "a claim that this [court] is well-

equipped to evaluate, [and the court need] not accord [Defendants] the same deference as in other cases involving issues that school officials are uniquely qualified to handle." *Roberts v. Madigan*, 921 F.2d 1047, 1057 (10th Cir. 1990). Consequently, when Plaintiff's speech is viewed through the *proper* legal prism of the First Amendment—and not the unreasonable and illegitimate Freedom From Religion Foundation lens—it is evident that no *reasonable* person would conclude that Plaintiff's personal, non-curricular postings violate the Establishment Clause. That is, Defendants' asserted justification for restricting Plaintiff's speech is unfounded.

And, as noted above, to hold these remarkably innocuous (as well as personal and discreet) postings unlawful would turn the First Amendment on its head, requiring the government to be openly hostile toward *anything* religious. *See Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); *see also Lamb's Chapel.*, 508 U.S. at 400 (Scalia, J., concurring in the judgment) ("What a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general."). As set forth below, this court should reject Defendants' "claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded." *Id*. at 395.

We turn now to the relevant Establishment Clause jurisprudence, which, contrary to the Magistrate Judge's conclusion, *forbids* the hostility toward religion displayed by Defendants here.

B. The Establishment Clause Forbids Defendants' Hostility toward Plaintiff's Christian Faith.

In 1952, the Supreme Court acknowledged the following historical reality: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S.

306, 313 (1952). From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life. Examples include Executive Orders recognizing religiously grounded National Holidays, such as Christmas and Thanksgiving, Congress directing the President to proclaim a National Day of Prayer each year, and the printing on our currency of the national motto, "In God We Trust."

This longstanding tradition is reflected in the quote by President Ronald Reagan that Plaintiff displayed in her classroom.[5] President Reagan famously proclaimed:

> Without God there is no virtue because there is no prompting of the conscience . . . without God there is a coarsening of the society; without God democracy will not and cannot long endure . . . If ever we forget that we are One Nation Under God, then we will be a Nation gone under.

(Compl. ¶ 27 [Doc. No. 1]; Silver Decl. ¶ 4, Ex. C at Ex. 1 [Doc. No. 10-1]).

As the Supreme Court acknowledged in *Lynch v. Donnelly*, 465 U.S. 668 (1984):

> One cannot look at even this brief resume [of public religious expression] without finding that our history is pervaded by expressions of religious beliefs. . . . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, *and hostility toward none*. Through this *accommodation*, as Justice Douglas observed, governmental action has "follow[ed] the best of our traditions" and "respect[ed] the religious nature of our people." (quoting *Zorach*, 343 U.S. at 314).

Lynch, 465 U.S. at 677-78 (emphasis added).

Recognition of the role of God in our Nation's history is consistently reflected in Supreme Court decisions. The Court has acknowledged, for example, that religion has been closely identified with our history and government, and that the history of man is inseparable from the history of religion. *Elk Grove Unified Sch. Dist.*, 542 U.S. at 35-36 (O'Connor, J.,

[5] The bitter irony associated with Defendants' ban of this quote—and the Magistrate Judge's recommendation that this ban was justified by Defendants' fear of violating the Establishment Clause—should not go unnoticed.

concurring) (noting the historical truth that our Nation was "founded by religious refugees and dedicated to religious freedom").

Consequently, efforts by organizations such as the Freedom From Religion Foundation to suppress this recognition and historical acknowledgment are the antithesis of the value of religious tolerance that underlies the Constitution. For example, in *ACLU v. Mercer Cnty.*, 432 F.3d 624 (6th Cir. 2005), a case upholding the public display of the Ten Commandments, the court correctly stated, "Our concern is that of the ***reasonable*** person. And the ACLU, an organization whose mission is 'to ensure that . . . the government [is kept] out of the religion business,' does not embody the reasonable person." *Id.* at 638 (quoting ACLU website) (emphasis added). The very same is true of the Freedom From Religion Foundation. (*See* www.ffrf.org). Thus, it is entirely ***unreasonable*** to rely on a letter from a religiously-hostile organization as justification for a ***complete purging*** of anything religious from a public classroom—a purging which included Plaintiff's personal, non-curricular speech in a forum created by Defendants. (*See infra* sec. II.B.). In fact, as noted, Defendants went even beyond the complaints raised in the letter.

The Sixth Circuit stated further:

> [T]he ACLU makes repeated reference to "the separation of church and state." This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state. Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion.

Id. at 638-39 (citations omitted). Similarly here, Defendants' invocation of the oft-repeated reference to "the separation of church and state" to justify their intolerance and hostility toward Plaintiff's Christian faith is "tiresome," and contrary to our Constitution.[6]

[6] Defendants invoke this extra-constitutional phrase *repeatedly* in their "counseling letter,"

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court reaffirmed this sentiment, stating,

> It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any*. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.

Id. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose *to disapprove of a particular religion or of religion in general*.") (emphasis added).

In sum, Defendants disingenuously suggest that they desire the neutrality required by the Establishment Clause, when, in reality, they seek to use the Establishment Clause as a blunt instrument against all things religious. This court should reject Defendants' harmful and divisive position, which seeks to bring "us into war with our national traditions." To do otherwise would be to succumb to a form of religious devotion hostile to religion *qua* religion. *See, e.g., Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion) (noting that an "untutored devotion to the concept of neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious").

---

including in the letter's *opening* paragraph:

> This counseling letter touches upon your rights and responsibilities under the First Amendment of the U.S. Constitution, especially as they relate to the expression of your religious beliefs and the competing requirement that government (made up of government employees) maintain a *separation of church and state*.

(Counseling Letter [Doc. No. 8-3] at 1[emphasis added]; *see also* Counseling Letter at 2 ["Since *Everson*, the Supreme Court has consistently interpreted the Establishment Clause . . . as requiring the *separation of church and state* . . . ."] [emphasis added]; Counseling Letter at 3 [referring to "the required *separation of church and state*"] [emphasis added]).

Indeed, throughout its decisions, the Supreme Court has consistently described the Establishment Clause as forbidding not only state action motivated by a desire to promote or "advance" religion, *see, e.g., Cnty. of Allegheny v. ACLU,* 492 U.S. 573, 592 (1989), but also actions that tend to "disapprove" of, "inhibit," or evince "hostility" toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); *Lynch*, 465 U.S. at 673; *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973).

As the Court noted in *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." And in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963), the Court stated, "We agree of course that the State may not establish a religion of secularism in the sense of affirmatively opposing or showing hostility to religion, *thus preferring those who believe in no religion over those who do believe*." *Id.* at 225 (internal quotations and citation omitted) (emphasis added).

By joining and indeed *facilitating* the religious hostility promoted by the Freedom From Religion Foundation, Defendants have abdicated their role of neutrality and actively promoted hostility toward religion in violation of the Establishment Clause. And this outcome was unfortunately (and erroneously) endorsed by the Magistrate Judge.

C. Defendants' Restrictions Violate *Lemon* and Its Modifications.

Contrary to the Report and Recommendation, Defendants' speech restrictions, which disfavored Plaintiff's Christian viewpoint, violate the Establishment Clause as to their purpose and effect. And they create an impermissible entanglement. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

1. Purpose and Effect.

"The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review ***in fact*** *conveys a message of* endorsement or *disapproval*. *An affirmative answer to* ***either*** *question* ***should render the challenged practice invalid***." *Lynch*, 465 U.S. at 690 (O'Connor J., concurring) (emphasis added).

"While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and *not a sham*." *Edwards*, 482 U.S. at 586-87 (emphasis added). The secular purpose requirement "reminds government that when it acts it should do so without endorsing [or disapproving of] a particular religious belief or practice . . . ." *Wallace v. Jaffree*, 472 U.S. 38, 75-76 (1985). And "[t]he eyes that look to purpose *belong to an objective observer* . . . ." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862 (2005) (internal quotations omitted) (emphasis added).

In this case, Defendants' "purpose" for banning Plaintiff's *personal, non-curricular speech* was to censor its religious content and viewpoint. And Defendants did so to appease the radically anti-religious Freedom From Religion Foundation. In short, Defendants' purpose is not compelled by the Establishment Clause. Rather, it is prohibited by it.

The "effect" of Defendants' draconian restrictions, regardless of Defendants' alleged "purpose" for them, conveys an unmistakable message of disapproval of religion (and the Christian religion in particular) in violation of the Establishment Clause. *See Lynch*, 465 U.S. at 690 (O'Connor J., concurring) ("The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."). As the Supreme Court explained, when evaluating the effect of government

action under the Establishment Clause (and Defendants' actions here do not escape this analysis),[7] courts must ascertain whether the challenged action is "*sufficiently likely to be perceived*" as a disapproval of religion. *Cnty. of Allegheny*, 492 U.S. at 597 (citations omitted) (emphasis added); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 307 n.21 ("[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.").

As Justice O'Connor explained in *Lynch v. Donnelly*, 465 U.S. 668 (1984):

> Endorsement *sends a message* to nonadherents that they are outsiders, not full members of the political community, and an *accompanying message* to adherents that they are insiders, favored members of the political community. Disapproval *sends the opposite message*.

Lynch, 465 U.S. at 688 (O'Connor, J., concurring) (emphasis added); *see also Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1119 (10th Cir. 2010) ("[G]overnments may not make adherence to a religion relevant *in any way* to a person's standing in the political community. And actions which have the effect of communicating governmental . . . disapproval, *whether intentionally or unintentionally*, make religion relevant, in reality or public perception, to status in the political community.") (emphasis added). The clear effect of Defendants' speech restrictions is to convey a message of disapproval of Plaintiff's Christian religion in violation of the Establishment Clause.

Indeed, it is absurd to suggest, for example, that the display of a small, personal poster quoting President Ronald Reagan mentioning "God" or a poster that states, "***Be on guard. Stand***

[7] *See Lynch*, 465 U.S. at 694 ("***Every*** government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.") (O'Connor J., concurring) (emphasis added); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (stating that "the Constitution . . . requires that [courts] keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded, and guard against other different, yet equally important, constitutional injuries") (internal citation omitted).

true to what you believe. Be courageous. Be strong. And everything you do must be done in love" [8] violate the Establishment Clause. (*See* Compl. ¶ 25 [emphasis added] [Doc. No. 1]; Silver Decl. ¶¶ 3, 4, Exs. B, C at Ex. 1 [Doc. No. 10-1]). Similarly, no *reasonable* observer would conclude that the small, hand-written "sticky notes" containing inspirational Bible verses that were discreetly displayed on the backside of Plaintiff's desk violate the Establishment Clause.[9] (*See* Silver Decl. ¶ 5, Ex. D at Ex. 1 [Doc. No. 10-1]).

In the final analysis, Defendants' religious cleansing was thorough, complete, and constitutionally offensive. Indeed, in their order to remove the small "sticky notes," Defendants added further insult by stating that if Plaintiff needs "to occasionally glance at inspirational Bible verses between classes during the course of the day" she should "keep such material in a discreet folder that only [she] will have access to" and only "so long as [she took] precautions not to share it or disclose its content to [her] students or their parents or guardians." (Compl. ¶ 35 [Doc. No. 1]). Consequently, Defendants forced Plaintiff's Christian faith into a folder to be kept hidden in her desk, treating the Bible verses as if they were obscenity.

2. Excessive Entanglement.

The third prong of the *Lemon* test asks whether the restriction at issue excessively entangles government with religion. *Lemon*, 403 U.S. at 612-13. In *Widmar v. Vincent*, the Court explained: "[T]he University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.' Initially, the University would need to determine which words and activities fall within 'religious worship and religious teaching.'

[8] To further illustrate the unreasonableness of Defendants' actions, consider this undeniable fact: if this *very same quote* (which is not proselytizing in the least) was attributed to a secular leader (as opposed to St. Paul), it could be pasted in banner size throughout the school and hailed, appropriately so, as a beautiful and timeless sentiment.

[9] It should not go unnoticed that even the Freedom From Religion Foundation did not complain about the President Reagan quote or the personal "sticky notes."

This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *Widmar*, 454 U.S. at 272 n.11 (internal quotations and citations omitted). Accordingly, Defendants' attempt to exclude Plaintiff's Christian speech creates "excessive entanglement" in violation of the Establishment Clause.

Having now demonstrated that not only was Defendants' fear of an Establishment Clause violation unfounded and totally unreasonable but that, in fact, their overbroad *religious cleansing*[10] of Plaintiff's personal, non-curricular speech violated the Establishment Clause, we turn to what is now a relatively straightforward analysis of why the Magistrate Judge was clearly erroneous in his recommendation to dismiss Plaintiff's free speech and equal protection claims related to the speech/posting issues.

II. Plaintiff Objects to the Report and Recommendation's Conclusions that Defendants' Viewpoint-Based Restrictions on Plaintiff's Personal, Non-Curricular Speech Did Not Violate the Free Speech Clause (First Amendment) or the Equal Protection Clause (Fourteenth Amendment).

As a threshold matter, the cases principally relied upon by the Magistrate Judge in his Report and Recommendation to conclude that Defendants' viewpoint-based restrictions on Plaintiff's personal, non-curricular speech were justified involved cases in which the court either considered the speech at issue to be curricular related or government speech (*i.e.*, the curriculum itself), which is not the factual situation presented here. In particular, the Magistrate Judge takes issue with Plaintiff's reading of *Marchi v. Bd. of Coop. Educational Servs. of Albany*, 173 F.3d 469, 472 (2d Cir. 1999). (*See* Report & Recommendation at 21 ["A careful reading of *Marchi*

[10] Bear in mind the fact that Defendants also issued the following overbroad and vague prohibition on Plaintiff's speech: "Except for wearing religious jewelry, such as a cross, I am also directing you to refrain from *all other forms of communication* with students during the school day (whether verbal, email, texting, written, etc.) that would conflict with your duty to show complete neutrality toward religion and to refrain from promoting religion or entangling yourself in religious matters." (Compl. ¶ 36 [emphasis added] [Doc. No. 1]).

establishes Plaintiff's argument on this point is without merit."]). However, the directive at issue in *Marchi* was "to refrain from using religion <u>*as part of his instructional program*</u>." *Id.* at 472 (emphasis added). This case will be discussed in greater detail below.

In short, the cases principally relied upon by the Magistrate Judge suggest that the law in general does not favor the constitutional rights of public school teachers. However, none of these cases involves facts as egregious as those presented here. In each case, the government sought to regulate the *curricular/instructional* speech of its teachers.[11] In contrast here, Defendants have restricted Plaintiff's personal, non-curricular speech and have effectively ordered her to cease being a Christian while she is on school property. And while it may be difficult to discern with precision the line between a permissible and impermissible restriction on the speech rights of a public school teacher, Defendants' actions clearly crossed that line, contrary to the Magistrate Judge's conclusions.

A. Defendants' Speech Restrictions Are "Unquestionably a Restraint on" Plaintiff's "First Amendment rights."

As noted previously in the Introduction, it cannot be gainsaid that Plaintiff does <u>not</u> surrender her constitutional rights, including her right to freedom of speech, upon accepting employment with the School District. *See Garcetti*, 547 U.S. at 413; *Connick*, 461 U.S. at 142;

[11] *See Marchi*, 173 F.3d at 472 (upholding a restriction that required the teacher "to refrain from using religion as part of his instructional program"); *Lee v. York Cnty. Sch. Divs.*, 484 F.3d 687 (4th Cir. 2007) (upholding a restriction on teacher speech that was curriculum related); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011) (upholding a restriction of a teacher's patriotic banners based on the conclusion that the banners were government speech); *see also Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (upholding a restriction that prohibited a university teacher from interjecting his religious beliefs during instructional time); *Downing v. West Haven Bd. of Educ.*, 162 F. Supp. 2d 19 (D. Conn. 2001) (upholding a restriction that prohibited a teacher from wearing a "Jesus" t-shirt, which she wore during classroom instruction time); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (upholding a restriction that prohibited an elementary school teacher from "teaching religion" through the "use" of his Bible and other religious materials in the classroom).

Rankin, 483 U.S. at 383; *Tinker*, 393 U.S. at 506. Indeed, in a public school environment, "First Amendment rights . . . are available to teachers and students." *Id.*; *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("In *Tinker*, this Court made clear that 'First Amendment rights applied in light of the special characteristics of the school environment' are available to teachers and students."); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 44 (1983) (stating that "[t]he First Amendment's guarantee of free speech applies . . . within the school"). And Plaintiff's personal speech, "sticky notes," emails, and posters constitute protected speech. *See Capitol Square Rev. & Adv. Bd.*, 515 U.S. at 760 ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); *see generally Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("[S]ign displays . . . are protected by the First Amendment.").

Consequently, there is no question that Defendants' restrictions operate as restraints on Plaintiff's right to freedom of speech. *See Marchi*, 173 F.3d at 475 ("***The directive is unquestionably a restraint on [the plaintiff teacher's] First Amendment rights***.") (emphasis added); *see also Perry Educ. Ass'n*, 460 U.S. at 44 ("There is no question that constitutional interests are implicated by denying [appellee] use of the interschool mail system."). And "the threat of dismissal from public employment is . . . a potent means of inhibiting [Plaintiff's] speech." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

Therefore, the primary question presented by this case is whether Defendants' broad, viewpoint-based restrictions on Plaintiff's private, non-curricular speech—speech which includes the spoken word and messages expressed on "sticky notes," in emails, and on posters—are constitutional in light of the First Amendment interests at stake. As the Supreme Court stated in *Widmar v. Vincent*, 454 U.S. 263, 276 (1981), "[A]chieving greater separation of

church and State than is already ensured under the Establishment Clause of the Federal Constitution . . . ***is limited by*** . . . the Free Speech Clause . . . ." (emphasis added).

B. Defendants' Restrictions on Plaintiff's Private, Non-Curricular Speech Violate the Free Speech Clause of the First Amendment.

The Tenth Circuit in *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), set forth a workable analysis to apply to Plaintiff's free speech claims. In *Roberts*, the court began its free speech "discussion by noting that 'neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id*. at 1056 (quoting *Tinker*, 393 U.S. at 506). The court observed that it was "faced with the tension between" the public school teacher's "right of expression and the need of public school officials to censor classroom materials for the sole purpose of eliminating a possible constitutional violation." *Id*. As a result, the court framed its analysis as follows: "if the speech involved is not fairly considered part of the school curriculum or school-sponsored activities, then it may only be regulated if it would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Id*. at 1057 (quoting *Tinker*, 393 U.S. at 509). The court further noted that "[b]ecause the school district asserts a constitutional justification [*i.e.*, the books at issue "were removed to avoid an Establishment Clause violation rather than for educational or pedagogical reasons," which is similar to Defendants' justification for the restrictions at issue here], a claim that this body is well-equipped to evaluate, we do ***not*** accord [the school district] the same deference as in other cases involving issues that school officials are uniquely qualified to handle." *Id*. (emphasis added). In concluding that the school district's Establishment Clause concern justified the speech restriction, the court focused "on the manner of *use*" to which the

offending materials were put.[12] *Id*. at 1055. And that "use" specifically included *using the materials during instructional time with elementary school students*, *see id*. at 1049 ("In order to set an example for the students, Mr. Roberts silently read [his Bible] during the silent reading time."), a factual predicate that does not exist in this case.[13]

And contrary to the Magistrate Judge's conclusion (*see* Report & Recommendation at 23-25 [discussing *Lee*]), *Lee v. York Cnty. Sch. Divs.*, 484 F.3d 687 (4th Cir. 2007), also supports this approach. In *Lee*, the Fourth Circuit applied the balancing test set forth in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), in light of circuit precedent because the speech at issue (postings on a bulletin board that the teacher used as part of his teaching methodology and to instruct and impart knowledge to his students) was curricular. *See Lee*, 484 F.3d at 700 (concluding that the removed items were curricular because they "constitute school-sponsored speech bearing the imprimatur of the school, and they were designed to impart particular knowledge to the students"). However, the court noted that if the teacher's speech was not curriculum related—that is, if the speech was personal and non-curricular as in this case—then school officials could not restrict the speech unless it "materially and substantially interfere[d] with the requirements of

[12] The dissent concluded otherwise, stating, "[Defendants'] actions forbidding Mr. Roberts from reading his Bible during his fifth grade class' 15-minute silent reading period and ordering the removal of the two challenged books from his classroom library were acts of intolerance, lack of accommodation and hostility toward the Christian religion." *Roberts*, 921 F.2d at 1059 (Barrett, J., dissenting). In Plaintiff's view, the dissent was correct.

[13] As noted previously, the facts of this case distinguish it from the cases relied upon by the Magistrate Judge in which the government sought to regulate a teacher's speech that was related to the curriculum or an instructional program. (*See supra* n.11). Here, Plaintiff is not challenging any restrictions related to the curriculum she teaches, such as the restriction on guest speaker presentations. (*See supra* n.3). Rather, she is challenging Defendants' restraints on her personal, non-curricular speech.

appropriate discipline in the operation of the school."[14] *Lee*, 484 F.3d at 694 n.10 (quoting *Tinker*, 393 U.S. at 509).

This approach would also comport with Second Circuit precedent. In *Marchi v. Bd. of Coop. Educational Servs. of Albany*, 173 F.3d 469 (2d Cir. 1999), the challenged speech restriction required the teacher "to refrain from using religion as part of his instructional program."[15] *Id*. at 472; *see also id*. (quoting the directive at issue, which states, "you are to cease and desist from using any references to religion *in the delivery of your instructional program* unless it is a required element of a course of instruction for your students") (emphasis added). Although it described the issue regarding the "thank you" letter the teacher wrote to a parent as presenting a "*closer question*," the court upheld the restriction because the letter "sufficiently intruded religious content *into a curricular matter*." *Id*. at 477 (emphasis added). Therefore, because the speech at issue involved curriculum and thus raised concerns that the *school district* was engaging in religious indoctrination, the court upheld the restriction on Establishment Clause grounds. *Id*.

---

[14] Here is what the Fourth Circuit said in the cited footnote:

> Under *Tinker*, the School Board would not be able to regulate Lee's speech if it was unrelated to the curriculum and did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509, 89 S. Ct. 733 (internal quotation marks omitted). Because, as explained *infra*, Lee's speech *in this dispute was curricular in nature*, we are obliged to apply the *Pickering-Connick* standard as articulated in *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir.1998) (en banc).

Lee, 484 F.3d at 694 n.10 (emphasis added); *see also Roberts*, 921 F.2d at 1057 ("[I]f the speech involved is not fairly considered part of the school curriculum or school-sponsored activities, then it may only be regulated if it would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" (quoting *Tinker*, 393 U.S. at 509).

[15] Upon concluding that the directive at issue was "unquestionably a restraint on [the plaintiff teacher's] First Amendment rights," the court referenced *Tinker*, noting "the need for affirming the comprehensive authority of the States and of school officials, *consistent with fundamental constitutional safeguards*, to prescribe and control conduct in the schools." *Marchi*, 173 F.3d at 475 (citing *Tinker*, 393 U.S. at 503) (emphasis added).

The Magistrate Judge rejected this proper analysis in favor of relying simply on an imprecise (and hardly dispositive) claim by the Second Circuit that school officials are "permitted . . . to 'direct teachers to refrain from expression of religious viewpoints in the classroom and *like settings*. . . . ' *Marchi*, 173 F.3d at 475 (quoting *Bishop*, 926 F.2d 1077)," from which the Magistrate Judge claims that "the Second Circuit did not hold, as Plaintiff argues, that the speech at issue was part of the plaintiff's (sic) teacher's curriculum; rather, the court held that the speech was made in a setting 'like' the classroom because it was made by the teacher with regard to the student, especially with regard to the use of the audiotape and its effect on the students. *Id*." (Report & Recommendation at 22) (emphasis added). Thus, based on this stretched reading of the case, and in particular, the stretched rendering of the imprecise "like settings" language, the Magistrate Judge concludes that "rather than supporting Plaintiff's argument in opposition to dismissal, *Marchi* supports dismissal . . . ." (Report & Recommendation at 22). The Magistrate Judge is incorrect.

In the present case, Plaintiff did not use the posters or "sticky notes" as part of any instructional program. Thus, there is *no* legitimate basis for concluding that the small, innocuous posters and discreetly displayed "sticky notes" with *personal* inspirational quotes constitute government endorsed religious indoctrination. And they are hardly the factual equivalent of sending a letter *directly to the parent of a student* in which the teacher claims, "I thank you and the LORD for the tape [;] it brings the Spirit of Peace to the classroom.[16] * * * May God Bless you all richly!" (*See* Report & Recommendation at 22 [quoting *Marchi*, 173 F.3d at 473]). It is not even a close call. Indeed, Defendants' insulting directive to Plaintiff that if she needs "to occasionally glance at inspirational Bible verses between classes during the course of the day" she should "keep such material in a discreet folder that only [she] will have access to" and only

[16] Indeed, the teacher was thanking the parent for sending him an audiotape with religious music—a tape that apparently brought "the Spirit of Peace *to the classroom*." (*See* Report & Recommendation at 21-22) (emphasis added).

"so long as [she took] precautions not to share it or disclose its content to [her] students or their parents or guardians," (Compl. ¶ 35 [Doc. No. 1]), makes clear that Defendants understood that these "sticky notes" were for Plaintiff's private, personal use and not for any instructional use.

Moreover, Defendants' restrictions on Plaintiff's personal communications, including the restriction on her use of School District email,[17] are not limited to or tied in any way to the curriculum or any instructional program. Additionally, Plaintiff's personal, non-curricular speech did not disrupt the classroom nor materially interfere with the basic educational mission of the School District. *See Tinker*, 393 U.S. at 513 (holding that the "special characteristics of the school environment" permit restrictions on speech only so long as the speech "materially and substantially disrupt[s] the work and discipline of the school"). And this is not a legal conclusion—it is a fact that must be considered in Plaintiff's favor at this stage of the litigation. (Compl. ¶ 41 [Doc. No. 1]).

In sum, Defendants' viewpoint discrimination is an egregious form of content discrimination that is prohibited by the First Amendment in all forums.[18] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also R.A.V. v. St. Paul*, 505 U.S. 377, 386-92 (1992) (stating that the government may not "impose special prohibitions on those speakers who express views on disfavored subjects" or on the basis of "hostility—or

[17] Defendants have not only restricted Plaintiff's personal email communications, (*see* Compl. ¶ 36 [restricting "all other forms of communication with students during the school day (whether verbal, email, texting, written, etc.)"] [Doc. No. 1]), but they have also placed restraints on Plaintiff's use of the School District's email program (Compl. ¶¶ 37, 38 [Doc. No. 1]).

[18] Consequently, even under a forum analysis, *see Perry Educ. Ass'n*, 460 U.S. at 44 (applying a forum analysis to a restriction on the use of the school's mail system); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985) (adopting "a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes"), Defendants' viewpoint-based restrictions cannot survive constitutional scrutiny. *Perry Educ. Ass'n*, 460 U.S. at 46 (stating that speech restrictions in a nonpublic forum must be viewpoint neutral).

favoritism—towards the underlying message expressed"); *Cornelius*, 473 U.S. at 806 (stating that viewpoint discrimination occurs when the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). Thus, because Defendants' restrictions prohibit Plaintiff from expressing her Christian viewpoint on subject matter that is permissible in the forum at issue,[19] Defendants' restrictions cannot survive constitutional scrutiny. *See Lamb's Chapel*, 508 U.S. at 393 (holding that the challenged restriction was viewpoint based and unconstitutional even though "all religions and all uses for religious purposes [were] treated alike").

In the final analysis, Defendants' restrictions infringed Plaintiff's right to freedom of speech, and they were not justified by the Establishment Clause. Indeed, Defendants' actions constitute "acts of intolerance, lack of accommodation and hostility toward [Plaintiff's] Christian religion," *Roberts*, 921 F.2d at 1059 (Barrett, J., dissenting), in violation of the Free Speech Clause and the Establishment Clause of the First Amendment.

C. Defendants' Restrictions on Plaintiff's Private, Non-Curricular Speech Violate the Equal Protection Clause of the Fourteenth Amendment.

The clearly established and relevant principle of law was articulated by the U.S. Supreme Court in *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *see also Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (stating that for purposes of the equal protection guarantee, the Court has "treated as presumptively invidious those classifications that disadvantage a 'suspect class,' *or that impinge upon the exercise of a 'fundamental right*'") (emphasis added).

In *Mosley*, the Court struck down a city ordinance that prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. The Court

[19] For example, Defendants' restrictions prohibit Plaintiff from expressing a Christian viewpoint on the gay rights issues promoted by the High School social worker. And Plaintiff's personal inspirational messages, *inter alia*, are restricted because they express a Christian viewpoint.

stated, "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, 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." *Mosley*, 408 U.S. at 96; *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980). Here, Defendants granted use of a forum for the personal, non-curricular speech of School District teachers and faculty. Having maintained this forum, Defendants violated Plaintiff's equal protection rights when they prohibited her personal, non-curricular speech based on the viewpoint of her message, while permitting other teachers and faculty to continue their speech in the same forum unfettered.

III. Plaintiff Objects to the Report and Recommendation's Conclusions that Defendant Kane Is Entitled to Qualified Immunity with regard to Plaintiff's First Amendment Claims and Equal Protection Claim Pertaining to Plaintiff's Speech.

As an initial matter, qualified immunity does not protect a defendant against claims for declaratory and injunctive relief, nor does it apply to claims against a municipality, such as the claims advanced against the School District.[20] *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct [or] in an action against a municipality"); *Cannon v. City & Cnty. of Denver*, 998 F.2d 867, 876 (10th Cir. 1993) (stating that "there is no qualified immunity to shield the defendants from claims" for "declaratory and injunctive relief"); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) ("Qualified immunity . . . does not bar actions for declaratory or injunctive relief."). Thus, insofar as the Magistrate Judge granted Defendant Kane qualified immunity with regard to Plaintiff's claims for declaratory and injunctive relief, he was mistaken as a matter of law.

[20] Upon finding a constitutional violation, Plaintiff is entitled to nominal damages as a matter of law. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984) (holding that a civil rights plaintiff "is entitled to an award of nominal damages upon proof of violation of a substantive constitutional right").

Moreover, government officials are protected from personal liability and thus enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, "[t]his is not to say that an official action is protected by qualified immunity *unless the very action in question has previously been held unlawful*,[21] but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted) (emphasis added).

When reviewing a claim of qualified immunity, the court "ask[s] whether there was a constitutional violation. If the answer to this question is yes, [it] must then determine whether *the right* was clearly established at the time of the violation. *Clubside, Inc. v. Valentin*, 468 F.3d 144, 152 (2d Cir. 2006) (emphasis added). The court may decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances" of the particular case. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "A right is clearly established if the law (1) was defined with reasonable clarity, (2) has been affirmed by the Supreme Court or the Second Circuit[,] and (3) where the conduct at issue would have been understood by a reasonable defendant to be unlawful under the existing law." *Looney v. Black*, 702 F.3d 701, 706 (2d Cir. 2012) (internal quotations and citations omitted).

While Defendant Kline must tread carefully when navigating the constitutional minefield of the First Amendment, Supreme Court precedent clearly establishes Plaintiff's constitutional

[21] This is precisely the mistake made by the Magistrate Judge. (*See* Report & Recommendation at 40 ["[T]he court's research has not revealed any case on point in which a public school teacher alleged violations of her First Amendment right to free speech, the Establishment Clause, and Equal Protection based on the display of materials containing a religious theme in an area that was specifically approved by the employing school district for displaying materials of a 'personal and non-curricular' nature. As such, the court cannot say, as a matter of law, that Defendants' conduct in directing Plaintiff to remove such materials, was necessarily established as in violation of Plaintiff's rights as she alleges."]).

rights in the "school house," *Tinker*, 393 U.S. at 506, and it establishes that government officials *must be neutral towards religion*. Indeed in *Rosenberger*, the Court noted that "[m]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers." *Rosenberger*, 515 U.S. at 839. As discussed above, Defendant Kline's restrictions on Plaintiff's personal, non-curricular speech and his overt hostility toward Plaintiff's Christian faith violated clearly established law such that he does not enjoy qualified immunity.

CONCLUSION

For the reasons set forth above and those in Plaintiff's previously filed opposition papers (Doc. Nos. 10, 16), Defendants' motion to dismiss should be denied.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.*
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
(734) 635-3756

/s/ *David Yerushalmi*
David Yerushalmi, Esq.
640 Eastern Parkway
Suite 4C
Brooklyn, New York 11213
dyerushalmi@americanfreedomlawcenter.org
(646) 262-0500

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (P62849)