No. 16-102

In the
United States Court of Appeals for the Second Circuit

JOELLE SILVER,
Plaintiff-Appellant,

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-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
HONORABLE LAWRENCE JOSEPH VILARDO
CASE NO. 13-CV-00031

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

On January 10, 2013, Plaintiff-Appellant ("Plaintiff") filed a civil rights complaint pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief and nominal damages for alleged violations of the First and Fourteenth Amendments. (Compl., Dkt. No. 1 at JA-9-22).[1] The district court had jurisdiction under 28 U.S.C. § 1331.

On March 20, 2013, Defendants-Appellees ("Defendants") moved to dismiss Plaintiff's Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Mot. to Dismiss, Dkt. No. 8). The motion was assigned to U.S. Magistrate Judge Leslie G. Foschio, who issued his Report and Recommendation ("R&R") on June 24, 2014, recommending that the motion be granted in part and denied in part. (R&R, Dkt. No. 17 at JA-88-129). On July 13, 2015, U.S. District Court Judge Richard J. Arcara, the presiding judge at the time, entered his Decision and Order adopting the R&R. (Order, Dkt. No. 31 at JA-130-31).

On December 28, 2015, U.S. District Court Judge Lawrence J. Vilardo entered Judgment in Defendants' favor, making final the Decision and Order on the motion to dismiss and thus resolving all claims. (J., Dkt. No. 50 at JA-143-44).

On January 11, 2016, Plaintiff filed a Notice of Appeal. (Notice of Appeal, Dkt. No. 51 at JA-145-46). This Court has jurisdiction under 28 U.S.C. § 1291.

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[1] Citations to the Joint Appendix appear as "JA-__."

INTRODUCTION

Plaintiff Joelle Silver 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 U.S. Supreme] Court declared that citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014); *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 the lower court's decision,[2] there is no *Christian* exception to this longstanding principle. Indeed, the hostility toward religion conveyed by Defendants and condoned by the district court finds no support in our Nation's longstanding traditions. In fact, quite the opposite is true. *Elk Grove Unified Sch. 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,

[2] The district court adopted the magistrate judge's Report and Recommendation in its entirety with a two-page order that provided no further legal analysis or discussion. (Order, Dkt. No. 31 at JA-130-31). Consequently, our citations and references to the decision below will be to the Report and Recommendation.

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 district court'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.[3] And while a public school district retains significant authority over the curriculum that is taught by its teachers,[4] 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, Dkt. No. 1 at JA-12).

This Court should reverse the district court's order dismissing Plaintiff's claims.

[3] (*See* Silver Decl. ¶¶ 2-5, Exs. A-D at Ex. 1, Dkt. No. 10-1 [providing photographs of classroom and displays referenced in the Complaint] at JA-78-87; *see also* Defs.' Ex. B, Dkt. No. 8-4 at JA-51-70 [same]).

[4] As evidenced by the Complaint itself, 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* Compl., Dkt. No. 1 at JA-9-22).

STATEMENT OF THE ISSUES

I. Whether Defendants violated Plaintiff's First Amendment right to freedom of speech by censoring her non-curricular speech based upon its content and viewpoint.

II. Whether Defendants' restrictions, which prohibit Plaintiff from engaging in religious speech or speech with religious content, including personal, non-curricula speech, lack a valid secular purpose, have the primary effect of inhibiting religion, and create an excessive entanglement with religion in violation of the Establishment Clause.

III. Whether Defendants' actions convey an impermissible, government-sponsored message of disapproval of and hostility toward religion in violation of the Establishment Clause.

IV. Whether Defendants violated the equal protection guarantee of the Fourteenth Amendment by preventing Plaintiff from expressing a religious message in a forum in which personal, non-curricula speech of School District teachers, faculty, and administrators is permitted because Defendants found Plaintiff's religious viewpoint on permitted subject matter unacceptable.

V. Whether Defendant Kane enjoys qualified immunity for violating Plaintiff's clearly established constitutional rights of which a reasonable person would have known.

STATEMENT OF THE CASE

A. Nature of the Case and Relevant Procedural History.

This case presents for review the question of whether public school teachers surrender their constitutional rights at the schoolhouse gate and the extent to which Christian teachers must conceal their faith and thus cease being Christian upon accepting employment with the government.

Plaintiff commenced this lawsuit on January 10, 2013. In her Complaint, Plaintiff alleged that Defendants violated (1) her First Amendment right to freedom of speech, (2) the Establishment Clause of the First Amendment, and (3) the equal protection guarantee of the Fourteenth Amendment by (a) denying her access to a forum for her speech based on its content and viewpoint (equal protection/free speech claim) and (b) selectively enforcing the School District's rules and regulations against her (equal protection/selective enforcement claim). (Compl., Dkt. No. 1 at JA-9-22).

On March 20, 2013, Defendants moved to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. (Mot. to Dismiss, Dkt. No. 8). The motion was assigned to U.S. Magistrate Judge Leslie G. Foschio, who issued his Report and Recommendation ("R&R") on June 24, 2014. (R&R, Dkt. No. 17 at JA-88-129).

In the R&R, Magistrate Judge Foschio recommended granting Defendants' motion as to all Defendants with regard to Plaintiff's First Amendment free speech claim, her Establishment Clause claim, and her equal protection/free speech claim. He also recommended denying Defendants' motion as to Plaintiff's equal protection/selective enforcement claim against the School District and Defendant Kane, concluding as well that Defendant Kane did not enjoy qualified immunity. (R&R at 15-40, Dkt. No. 17 at JA-102-27).

On July 13, 2015, U.S. District Court Judge Richard J. Arcara, the presiding judge at the time, entered his Decision and Order adopting the R&R. (Order, Dkt. No. 31 at JA-130-31).

On July 27, 2015, Defendant Kane filed a notice of interlocutory appeal to this Court, seeking review of the decision denying him qualified immunity as to Plaintiff's equal protection/selective enforcement claim. (Notice of Interlocutory Appeal, Dkt. No. 33). Shortly thereafter, the School District filed a motion with this Court, requesting the Court grant pendent jurisdiction over the surviving equal protection/selective enforcement claim brought against the district.

The parties subsequently engaged in mediation pursuant to this Court's mediation and settlement program (CAMP) on the issue and claims that were pending on appeal (*i.e.*, qualified immunity and the equal protection/selective enforcement claims). A Court staff attorney mediated the dispute, resulting in a

settlement agreement ("Agreement"). Pursuant to the terms of the Agreement, Defendants agreed to withdraw Defendant Kane's interlocutory appeal of the qualified immunity issue (and thus the concomitant request for pendent jurisdiction of the related equal protection/selective enforcement claim against the School District) and to remove the adverse counseling letter from Plaintiff's file. In exchange, Plaintiff agreed to dismiss the equal protection/selective enforcement claims in the district court. (*See* Stipulation, Dkt. No. 47).

Pursuant to the Agreement, the earlier appeals pending in this Court were dismissed, and the mandate subsequently issued. (Mandate, Dkt. No. 46).

Pursuant to Rule 41 of the Federal Rules of Civil Procedure and the terms of the Agreement, the parties stipulated to the dismissal of Plaintiff's remaining equal protection/selective enforcement claims, thereby resolving all claims pending in the district court. (Stipulation, Dkt. No. 47).

Pursuant to Rule 58 of the Federal Rules of Civil Procedure and the terms of the Agreement, the parties requested the entry of final judgment in Defendants' favor, thereby permitting Plaintiff to appeal the claims that were previously dismissed in Judge Arcara's Decision and Order entered on July 13, 2015. (Stipulation, Dkt. No. 47).

On December 28, 2015, U.S. District Court Judge Lawrence J. Vilardo[5] entered Judgment "in Defendants' favor as to Plaintiff's First Amendment free speech claim, her Establishment Clause claim, and her equal protection/free speech claim arising under the Fourteenth Amendment." (J., Dkt. No. 50).

This appeal follows.

B. Statement of Facts.

1. The Parties.

Plaintiff is a Christian. Her Christian faith defines who she is as a person, and it guides all aspects of her life, both public and private. Plaintiff does not cease being a Christian because she is employed by the School District. Plaintiff has taught science classes in the School District for seven years. She currently teaches in the High School. (Compl. ¶¶ 6, 13-15, Dkt. No. 1 at JA-10, 12).

The School District is a public school district in Cheektowaga, New York. It is a municipal corporation and a unit of local government subject to the restrictions of the Constitution. The School District has a right to sue and be sued. (Compl. ¶ 7, Dkt. No. 1 at JA-10).

At all relevant times, Defendant Brian J. Gould was the President of the Board of Education for the School District. The Board of Education is the governing body of the School District and is responsible for creating, adopting, and

[5] On December 4, 2015, the case was reassigned to Judge Vilardo. (Text Order, Dkt. No. 43).

implementing its policies, practices, and customs, including those challenged in this case. (Compl. ¶ 8, Dkt. No. 1 at JA-10-11). At all relevant times, Defendant Dennis Kane was the Superintendent of Schools for the School District. In that capacity, Defendant Kane was responsible for creating, adopting, and implementing School District policies, practices, and customs, including those challenged in this case. (Compl. ¶ 9, Dkt. No. 1 at JA-11).

2. The School District's Policy, Practice, and Custom of Permitting Personal, Non-Curricular Speech.

Pursuant to School District policy, practice, and custom, teachers, faculty, and administrators are permitted to display in their classrooms and offices various personal messages, including inspirational messages, and other items that reflect the individual teacher's personality, opinions, and values, as well as personal, non-curricular messages relating to matters of political, social, or other similar concerns.[6] (Compl. ¶ 16, Dkt. No. 1 at JA-12). As a result, Defendants created a forum for Plaintiff's speech at issue here.

For example, pursuant to this policy, practice, and custom, the High School social worker[7] for the School District displays inside and outside of her office, including on her office door, various non-curricula messages that promote gay

[6] It should be noted that in their Answer, Defendants "admit" the truth of this allegation. (*See* Answer ¶ 16, Dkt. No. 37 at JA-134).

[7] The social worker is the faculty advisor for the Gay-Straight Alliance (GSA) student club. The creation of GSA student clubs is a national project of GLSEN. (Compl. ¶ 19, Dkt. No. 1 at JA-13).

rights, including a poster stating, "Acceptance Practiced Here," which is in the rainbow colors of the gay rights movement and contains the caption, "Brought to you by your GSA and Gay and Lesbian Youth Service of WNY." The social worker is also permitted to post on School District property the following: rainbow "Safe Space" decals that include the following website address: www.glyswny.org, which is the website for the Gay and Lesbian Youth Services of Western New York; a Gay, Lesbian and Straight Education Network (GLSEN) "Day of Silence" decal; a rainbow "Celebrate Diversity" bumper sticker; and a decal with the "equal" symbol of the Human Rights Campaign, a gay rights organization, among other similar displays. Additionally, the social worker has been permitted to display and distribute pamphlets in her office that promote gay rights. All of the social worker's displays are available and visible to the students. (Compl. ¶ 17, Dkt. No. 1 at JA-12).

3. Defendants' Restrictions on Plaintiff's Personal, Non-Curricular Speech.

On June 22, 2012, Plaintiff received a "counseling letter" from Defendants that was signed by Defendant Kane.[8] The "counseling letter" was made a part of Plaintiff's employment file.[9] (Compl. ¶ 20, Dkt. No. 1 at JA-13).

[8] A copy of the counseling letter is provided in the Joint Appendix. (Defs.' Ex. A, Dkt. No. 8-3 at JA-26-33).

[9] Pursuant to the Agreement of the parties, the counseling letter was removed from Plaintiff's employment file on the condition that she not repost any of the

In the "counseling letter," Defendants directed Plaintiff to remove all items, including personal, non-curricula items, of a religious nature from her classroom;[10] it directed Plaintiff to censor her personal, non-curricula speech so as not to express anything religious in nature while she was on School District property; and it pressured Plaintiff into terminating her service as the faculty advisor for the student Bible Study Club, which was formed pursuant to the Equal Access Act. Defendants' "counseling letter" essentially cleansed Plaintiff's classroom, her speech, and her actions of anything religious. (Compl. ¶¶ 21, 22, Dkt. No. 1 at JA-13).

Defendants' "counseling letter" stated the following: "Please be advised that your failure to follow any of the above directions will be considered insubordination, which could lead to serious disciplinary consequences, including the termination of your employment." The emphasis was in the original. (Compl. ¶ 23, Dkt. No. 1 at JA-13-14).

Defendants' "counseling letter" directed Plaintiff to remove a small poster from her classroom that included the following quotation, "*Be on guard. Stand true to what you believe. Be courageous. Be strong. And everything you do must*

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offending materials. Should Plaintiff prevail in this matter, the letter will be permanently removed unconditionally. (*See generally* Stipulation, Dkt. No. 47).

[10] In order to place the small and rather innocuous displays in context, a true and accurate photograph of Plaintiff's classroom is included in the Joint Appendix. (Silver Decl. ¶ 2, Ex. A at Ex. 1, Dkt. No. 10-1 at JA-76, 79).

be done in love. 1 Corinthians 16:13-4." (Compl. ¶ 25 [emphasis added], Dkt. No. 1 at JA-14; Silver Decl. ¶ 3, Ex. B at Ex. 1, Dkt. No. 10-1 at JA-81-82).

Defendants' "counseling letter" directed Plaintiff to remove four small posters from her classroom that included the following messages: "Wash away all my iniquity and cleanse me from my sin. . . . Wash me and I will be whiter than snow. Psalm 51:2, 7"; "The Lord is my rock, and my fortress, and my deliverer; my god, my strength, and whom I will trust. Psalm 18:2"; "The heavens declare the glory of God; the skies proclaim the work of his hands. Psalm 19:1"; "Let them praise the name of the Lord, for His name alone is exalted, His splendor is above the earth and the heavens. Psalm 148:13." (Compl. ¶ 24, Dkt. No. 1 at JA-14; Defs.' Ex. B, Dkt. No. 8-4 at JA-54-58).

Defendants' "counseling letter" directed Plaintiff to remove from her classroom a posted quote from President Ronald Reagan which states: "*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 [emphasis added], Dkt. No. 1 at JA-14; Silver Decl. ¶ 4, Ex. C at Ex. 1, Dkt. No. 10-1 at JA-84).

Defendants' "counseling letter" directed Plaintiff to remove from her classroom a drawing "depicting three crosses on a hill" that Defendants concluded

was "an obvious reference to the crucifixion of Jesus Christ at Calvary, in Jerusalem."[11] (Compl. ¶ 26, Dkt. No. 1 at JA-14; Silver Decl. ¶ 3, Ex. B at Ex. 1, Dkt. No. 10-1 at JA-81-82).

Defendants' "counseling letter" censored Plaintiff's personal, non-curricula speech because it was religious and expressed a religious viewpoint. Defendants did not require other teachers, faculty, or administrators to remove personal, non-curricula items from their classrooms or offices nor did Defendants censor the personal, non-religious speech of other teachers, faculty, or administrators in a manner similar to how Defendants have censored Plaintiff's speech. (Compl. ¶ 28, Dkt. No. 1 at JA-14-15).

When Plaintiff received Defendants' "counseling letter," she was the faculty advisor for the High School's student Bible Study Club, a student club that was formed pursuant to the Equal Access Act.[12] (Compl. ¶ 29, Dkt. No. 1 at JA-15).

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[11] This hand-drawn picture does not contain a caption or any other words describing what it depicts. (*See* Silver Decl. ¶ 3, Ex. B, at Ex. 1, Dkt. No. 10-1 at JA-81-82).

[12] The Equal Access Act prohibits a public school district from denying recognition of a student club because it is religious, *see* 20 U.S.C. § 4071(a) (2000), and it requires the school district to provide the religious club with equal access to school facilities. *Prince v. Jacoby*, 303 F.3d 1074, 1086 (9th Cir. 2002) ("[T]the Act required equal access to the school's limited open forum in the form of official recognition, which included access to the school newspaper, bulletin boards, and the public address system."). Here, the School District provides very broad access to school facilities to support the activities of the GSA (*see, e.g.*, Compl. ¶¶ 39, 40, Dkt. No. 1 at JA-17-18), but does not accord similar access to the Bible Club, thereby further demonstrating Defendants' hostility toward religion.

Defendants' "counseling letter" directed Plaintiff to remove from her classroom the Bible Study Club's "Prayer Request" box that was displayed by the student members of the club. The student club members decorated the box with various quotes, including the following: "Inspired Bible Club Prayer Requests"; "For where two or three have gathered in my name, I am in the midst. Matthew 18:20"; "And whatever you ask in prayer, you will receive, if you have faith. Matthew 21:22"; "Whatever you ask in my name, this I will do, that the father may be glorified in the son. If you ask me anything in my name, I will do it. John 14:13-14"; and "We have to pray with our eyes on God, not on the difficulties. Oswald Chambers." (Compl. ¶ 30, Dkt. No. 1 at JA-15).

Defendants' "counseling letter" directed Plaintiff to remove small sticky notes that she placed on the back of her desk that contained inspirational Bible quotes and religious messages, including the following:

- "I will remain confident of this: I will see the goodness of the Lord in the land of the living. Wait for the Lord; be strong and take heart and wait for the Lord!" Psalm 27: 13-14.
- "For the company of the godless is barren, and fire consumes the tents of the corrupt. They conceive mischief and bring forth iniquity, and their mind prepares deception." Job 15:34-34.

- "So let us seize and hold fast and retain without wavering the hope we cherish and confess, and our acknowledgement of it, for He who promised it is reliable (sure) and faithful to His word." Hebrews 10:23.
- "Lord, when we are wrong make us willing to change, and when we are right make us easy to live with." (quoting Scottish Clergyman, Peter Marshall).

(Compl. ¶ 31, Dkt. No. 1 at JA-15-16; Silver Decl. ¶ 5, Ex. D at Ex. 1, Dkt. No. 10-1 at JA-87; Defs.' Ex. B, Dkt. No. 8-4 at JA-59-64).

Plaintiff's small "sticky notes" containing the inspirational quotes are personal, non-curricular items that she discreetly displayed on the back of her desk. Pursuant to School District policy, practice, and custom, Defendants permit other teachers, faculty, and administrators of the School District to display personal, non-curricular messages and items of a personal nature on their desks, including non-religious inspirational quotes. Defendants' restriction on Plaintiff's inspirational speech was viewpoint based. (Compl. ¶ 32, Dkt. No. 1 at JA-16).

Defendants' "counseling letter" directed Plaintiff to remove a "humorous poster" from her classroom that depicted an antique telephone and contained the following script: "It's for you . . . Good morning, this is God . . . I will be handling all your problems today. I will not need your help, so have a good day." (Compl.

¶ 33, Dkt. No. 1 at JA-16; *see also* Silver Decl. ¶ 3, Ex. B at Ex. 1, Dkt. No. 10-1 at JA-81-82).

Defendants' "counseling letter" stated, "I am therefore directing you to immediately remove all of the afore-described posters, notes, artwork, prayer box, etc., so that anyone visiting or attending your class in the future will not see any religious messages or content attached to or otherwise placed on public property of the District." (Compl. ¶ 34, Dkt. No. 1 at JA-16).

Defendants' "counseling letter" stated, "If you need to be able to occasionally glance at inspirational Bible verses between classes during the course of the day, I suggest that you keep such material in a discreet folder that only you will have access to. You may keep such a folder in a drawer of your desk, so long as you take precautions not to share it or disclose its content to your students or their parents or guardians." (emphasis added). (Compl. ¶ 35, Dkt. No. 1 at JA-16).

Defendants' "counseling letter" stated, "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." (emphasis added). (Compl. ¶ 36, Dkt. No. 1 at JA-17).

Defendants' "counseling letter" referenced School District Policy 8271 and stated, "[Y]ou may not use District projectors, smart boards, copiers, printers, computers, email program, etc., for communicating or relaying any religious messages and materials that are intended or could be perceived to be proselytizing." However, Defendants do not prohibit other School District teachers, faculty, or administrators from using "District projectors, smart boards, copiers, printers, computers, email program, etc., for communicating or relaying" non-religious, non-curricular messages, including non-religious viewpoints on non-curricular subject matter. Consequently, Policy 8271, as applied to Plaintiff's speech, is a viewpoint-based restriction. (Compl. ¶¶ 37, 38, Dkt. No. 1 at JA-17).

Defendants' "counseling letter" stated, "I am also concerned that you are not up to the task of monitoring the High School student's Bible Study Club, in compliance with District Policy and Regulation," referencing Policy 7410 and Regulation 7410R.1 and 7410R.2. The "counseling letter" continued, "Consequently, if you choose to continue monitoring the Bible Study Club next school year, you must carefully re-examine Policy 7410 and Regulation 74l0R.l and 7410R.2, so that you can better protect that club from being disciplined and possibly banned. Under no circumstances should you participate in the club's meetings or activities. Likewise, under no circumstances should you permit any club activities that could be interpreted as being promoted or sponsored by

yourself, or the larger District for which you work." However, Defendants permit the GSA faculty advisor, who is also the faculty advisor for the "Challenge Club," to promote the annual "Day of Silence," which is a national event sponsored by GLSEN, as well as other activities of the GSA that promote gay rights. During the "Day of Silence," students wear signs during the school day and they do not talk for the entire day. In fact, Defendants permit the student participants in the "Day of Silence" to remain silent during actual class time without suffering any adverse consequences for failing to participate in class or answer questions from their teachers. Consequently, Defendants allow other School District teachers, faculty, and administrators to "permit . . . club activities that could be interpreted as being promoted or sponsored by" a teacher, faculty member, or administrator, "or the larger District for which [they] work." Defendants' restriction on Plaintiff's and the Bible Study Club's expressive activities is viewpoint-based. (Compl. ¶¶ 39, 40, Dkt. No. 1 at JA-17-18).

None of Plaintiff's expressive activities have caused, nor would they cause, a material and substantial disruption in the High School or the School District in general. (Compl. ¶ 41, Dkt. No. 1 at JA-18).

Defendants have no legitimate pedagogical basis for their restrictions on Plaintiff's private, non-curricula expressive activities, nor do their restrictions promote any legitimate pedagogical interest. (Compl. ¶ 42, Dkt. No. 1 at JA-18).

Defendants' restrictions are overtly hostile toward religion, and Defendants' actions convey an impermissible message of disapproval of and hostility toward religion. As a result, Defendants' actions send a clear message to Plaintiff that she is an outsider, not a full member of the political and school community because she is a Christian. (Compl. ¶ 43, Dkt. No. 1 at JA-18).

Defendants' restrictions have had a chilling effect on Plaintiff's speech. As a result of Defendants' restrictions, Plaintiff is unable to discuss her faith or discuss other subject matter from her Christian point of view while on School District property. Indeed, Defendants' draconian restrictions require Plaintiff to keep her faith hidden at all times. (Compl. ¶ 44, Dkt. No. 1 at JA-18-19).

SUMMARY OF THE ARGUMENT

Public employees, including public school teachers such as Plaintiff, do not surrender their constitutional rights upon accepting employment with the government. Indeed, Plaintiff does not shed her First Amendment rights at the schoolhouse gate.

Pursuant to School District policy, practice, and custom, teachers, faculty, and administrators are permitted to display in their classrooms and offices various personal messages, including inspirational messages, and other items that reflect the individual teacher's personality, opinions, and values, as well as personal, non-curricular messages relating to matters of political, social, or other similar

concerns. As a result, Defendants created a forum for Plaintiff's speech. Consequently, Defendants' viewpoint-based restrictions on Plaintiff's non-curricular speech, which included, *inter alia*, 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, cannot withstand constitutional scrutiny under the First Amendment.

Similarly, under the Equal Protection Clause, 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. Consequently, Defendants' viewpoint-based restrictions also violate the equal protection guarantee of the Fourteenth Amendment.

And contrary to the lower court's conclusion, Defendants' compliance-with-the-Establishment-Clause defense is unfounded and thus provides no legitimate basis for suppressing Plaintiff's speech. To hold these remarkably innocuous (as well as personal and discreet) postings unlawful under the Establishment Clause would turn the First Amendment on its head, requiring the government to be openly hostile toward *anything* religious. Consequently, rather than justifying Defendants' hostility toward religion, the Establishment Clause prohibits it. The U.S. Supreme Court has long held that the Constitution requires accommodation of

all faiths and all forms of religious expression, and hostility toward none. Contrary to the lower court's and Defendants' view of the First Amendment, the Constitution does not require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Defendants' actions violated this mandate.

Finally, because Defendant Kane violated Plaintiff's clearly established constitutional rights of which a reasonable person would have known, he is not entitled to qualified immunity.

In summary, upon viewing the Complaint liberally, accepting all factual allegations in the Complaint as true, and drawing all reasonable inferences in Plaintiff's favor, this Court should reverse the lower court's order dismissing Plaintiff's claims.

ARGUMENT

I. Standard of Review.

This Court reviews *de novo* a district court's dismissal of a complaint under Rule 12(b)(6). *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 89 (2d Cir. 2004). During this review, the Court must construe "the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002); *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624

F.3d 106, 108 (2d Cir. 2010) ("accepting all factual claims in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor" when reviewing a motion to dismiss). To survive the motion, the Complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To meet this standard, Plaintiff must plead "factual content that allows the court to draw the reasonable inference that [Defendants are] liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In essence, "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Plaintiff's Complaint satisfies this standard.[13]

[13] In support of its motion, Defendants submitted a copy of the "counseling letter," photographs of the displays discussed in the letter, various policies referenced in the letter, and a copy of the letter from the Freedom From Religion Foundation. (Defs.' Exs. A, B, C, Dkt. Nos. 8-3, 8-4, 8-5 at JA-25-74). These documents are fairly embraced by and referenced in the Complaint, and so too are the photographs of the very same displays filed by Plaintiff in support of her opposition. (*See* Silver Decl., Exs. A-D, at Ex. 1, Dkt. No. 10-1 at JA-78-87). Consequently, it is proper for a court to consider these documents when ruling on a motion to dismiss. *See Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (acknowledging that "[d]ocuments that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered" when ruling on a Rule 12(b)(6) motion).

II. Plaintiff Does Not Surrender Her Constitutional Rights upon Accepting Employment with the Government.

It cannot be gainsaid that Plaintiff does not surrender her constitutional rights upon accepting employment with the School District. *See Lane*, 134 S. Ct. at 2374; *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.").

"[T]he theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967). Indeed, it has been "the unmistakable holding" of the Supreme Court for decades that neither "students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Consequently, as a government employee, Plaintiff retains her rights protected by the Constitution, and those rights were violated by Defendants.

III. Defendants Violated Plaintiff's Right to Freedom of Speech.

A. First Amendment Rights Are Available to Plaintiff.

In a public school environment, "First Amendment rights . . . are available to teachers and students." *Tinker*, 393 U.S. at 506; *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. 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 Hill v. Colo.*, 530 U.S. 703, 715 (2000) ("[S]ign displays . . . are protected by the First Amendment.").

Consequently, Defendants' restrictions operate as restraints on Plaintiff's First Amendment rights. *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 475 (2d Cir. 1999) ("The directive is unquestionably a restraint on [the plaintiff teacher's] First Amendment rights."); *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).

The district court *erroneously* concluded that Plaintiff's claims (free speech and equal protection, in particular) involving the posting of her personal "religious-themed materials" fail because Defendants' viewpoint-based censorship of Plaintiff's personal, non-curricular speech was justified by Defendants' fear that permitting this speech would violate the Establishment Clause. (*See* R&R at 25, Dkt. No. 17 at JA-112). The court's conclusion is contrary to established law and creates dangerous precedent whereby organizations such as the Freedom From Religion Foundation (whose name explains the 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.[14] 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 lower court held that "Defendants were rightly concerned about litigation of Plaintiff's display, *regardless of whether 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*." (R&R at 25, Dkt. No. 17 at JA-112) (emphasis added). Consider what the lower court 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 impermissibly allows the Establishment Clause to be used as a weapon to deny Plaintiff's constitutional rights.

Indeed, the law does not support Defendants' *irrational* fear of violating the Establishment Clause by allowing the displays. *See generally Marchi*, 173 F.3d at 472 (stating that "the scope of the employees' rights must sometimes yield to the

[14] It is important to bear in mind that the Freedom From Religion Foundation "demand letter" did not 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.

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 type 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 lower court 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. *See also Marchi*, 173 F.3d at 477 (stating that "the school authorities could reasonably be concerned that communications of this sort would expose it to *non-frivolous* Establishment Clause challenges") (emphasis added).

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—particularly when you consider the fact that the speech restrictions were viewpoint based, an egregious form of content discrimination prohibited in all forums. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination."); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) ("[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.").

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.*, 515 U.S. at 760 ("[P]rivate religious speech . . . 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, and reverse the district court.

We turn now to more fully discuss Defendants' restrictions on Plaintiff's right to free speech.

B. Defendants' Restrictions on Plaintiff's Private, Non-Curricular Speech Cannot withstand Constitutional Scrutiny.

As a threshold matter, the cases principally relied upon by the lower court 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 lower court took issue with Plaintiff's reading of *Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469 (2d Cir. 1999). (*See* R&R at 21 ["A careful reading of *Marchi* establishes Plaintiff's argument on this point is without merit."], Dkt. No. 17 at JA-108). However, the directive at issue in *Marchi* was "to refrain from using religion *as part of his instructional*

program." *Id.* at 472 (emphasis added). This case will be discussed in greater detail below.

In short, the cases principally relied upon by the lower court do 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.[15] 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.

[15] *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. W. 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).

Contrary to the lower court's approach, which accorded no weight to Plaintiff's rights, 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*. 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.[16] *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.[17]

Lee v. York County School Divisions, 484 F.3d 687 (4th Cir. 2007), also supports this approach. In *Lee*, the Fourth Circuit applied the balancing test set

[16] 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). Plaintiff agrees with this conclusion, which is applicable here.

[17] As noted previously, the facts of this case distinguish it from the cases in which the government sought to regulate a teacher's speech that was related to the curriculum or an instructional program. (*See supra* n.15). Here, Plaintiff is not challenging any restrictions related to the curriculum she teaches, such as the restriction on guest speaker presentations. Rather, she is challenging Defendants' restraints on her personal, non-curricular speech—speech that Defendants permit other teachers, administrators, and faculty to express in the very same manner (*i.e.*, posters, *etc*.) on the same subjects ("items that reflect the individual teacher's personality, opinions, and values, as well as personal, non-curricular messages relating to matters of political, social, or other similar concerns") but from a different (*i.e.*, secular) viewpoint. Indeed, Defendants prohibited a message stating, "Be on guard. Stand true to what you believe. Be courageous. Be strong. And everything you do must be done in love." because it came from "1 Corinthians 16:13-4," and for no other reason. This is a classic form of viewpoint discrimination that is prohibited in any forum.

forth in *Pickering v. Board of Education*, 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 appropriate discipline in the operation of the school." *Lee*, 484 F.3d at 694 n.10 (quoting *Tinker*, 393 U.S. at 509).

This approach would also comport with this Court's precedent. In *Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469 (2d Cir. 1999), for example, the challenged speech restriction required the teacher "to refrain from using religion as part of his instructional program."[18] *Id*. at 472; *see also id*. (quoting the directive at issue, which states, "you are to cease and desist

[18] 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 (quoting *Tinker*, 393 U.S. at 503) (emphasis added).

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," this Court upheld the restriction because the letter "sufficiently intruded religious content into a curricular matter." *Id*. at 477. 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*.

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 inspirational quotes constitute government endorsed religious indoctrination. It is not even a close call. Moreover, Defendants' restrictions on Plaintiff's personal communications, including the restriction on her use of School District email,[19] 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

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

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. (*See* Compl. ¶ 41, Dkt. No. 1 at JA-18).

Indeed, Defendants' viewpoint discrimination is an egregious form of content discrimination that is prohibited by the First Amendment in all forums.[20] *Rosenberger*, 515 U.S. at 829; *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 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

[20] Consequently, even under a traditional 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).

Plaintiff from expressing her Christian viewpoint on subject matter that is permissible in the forum at issue,[21] Defendants' restriction 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"); *see generally Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) ("[W]e conclude that a manifestly viewpoint discriminatory restriction on school-sponsored speech is, *prima facie*, unconstitutional, *even if* reasonably related to legitimate pedagogical interests."); *A.M. v. Taconic Hills Cent. Sch. Dist.*, No. 12-753-cv, 2013 U.S. App. LEXIS 2440, at *10-12 (2d Cir. 2013) ("Even under the deferential standard articulated in *Hazelwood*, viewpoint discrimination can only be justified by an 'overriding' state interest. . . .").

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.

[21] 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.

C. The *Pickering* Balancing Test Is Not Applicable Here; Nevertheless, Its Application Favors Plaintiff.

The lower court improperly eschewed any forum analysis in favor of applying the "balancing test" set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968). The *Pickering* test essentially seeks to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick*, 461 U.S. at 140 (quoting *Pickering*, 391 U.S. at 568).

The lower court applied the *Pickering* balancing test to conclude that "the School District's interest in promoting the efficiency of public services performed through its employees, particularly Plaintiff, is outweighed by injury caused by the speech, *i.e.*, the threat of litigation as described by the FFRF." (R&R at 28; Dkt. No. 17 at JA-115).

To begin, this analysis is improper because none of the employee speech cases in which it has applied address a situation in which the government opens a forum for certain expressive activity of its employees, but then prohibits a qualified speaker from expressing a message on an acceptable subject matter in the forum based on her viewpoint, as in this case. Indeed, while *Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469 (2d Cir. 1999), did not

present a forum question like the one at issue here, it too did not rely upon (nor even cite) *Pickering*.

Nonetheless, it is hardly a "balancing" test when the lower court places its thumb on the scale in favor of Defendants by refusing to address whether their claimed "interests" are legitimate. Indeed, the lower court held that "Defendants were rightly concerned about litigation of Plaintiff's display, regardless of whether 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." (R&R at 25, Dkt. No. 17 at JA-112). It is not a "balancing" of interests when the court gives Plaintiff's right to free speech zero weight and impermissibly overweighs the government's illegitimate (*i.e.*, pretextual) Establishment Clause concerns.

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

Far from justifying Defendants' restrictions on Plaintiff's speech, the Establishment Clause *forbids* such hostility toward religion.

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.[22] 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, Dkt. No. 1 at JA-14; Silver Decl. ¶ 4, Ex. C at Ex. 1, Dkt. No. 10-1 at JA-84).

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).

[22] The bitter irony associated with Defendants' ban of this quote should not go unnoticed.

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. As Justice O'Connor observed, "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." *Elk Grove Unified Sch. Dist.*, 542 U.S. at 35-36 (O'Connor, J., concurring).

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 County*, 432 F.3d 624 (6th Cir. 2005), a case upholding the public display of the Ten Commandments, the court 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). The very same is true of the Freedom From Religion Foundation. (*See* www.ffrf.org).

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.[23]

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.

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[23] In their counseling letter to Plaintiff, Defendants use this phrase repeatedly, 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*.

(Defs.' Ex. A [Counseling Letter at 1 (emphasis added)], Dkt. No. 8-3 at JA-26; *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] at JA-27; Counseling Letter at 3 [referring to "the required *separation of church and state*"] [emphasis added] at JA-28).

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.").

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." Indeed, the pernicious effect of Defendants' position is clear. *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").

A. The Establishment Clause Prohibits Hostility toward Religion.

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 *School District of Abington Township 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).

By joining, and indeed, facilitating the religious hostility promoted by the Freedom From Religion Foundation, the School District is abdicating its role of neutrality and actively promoting hostility toward religion in violation of the Establishment Clause.

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

Contrary to the decision below (*see* R&R at 17-26, Dkt. No. 17 at JA-104-13), 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).

"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. 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, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862 (2005) (internal quotations omitted).

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, 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. v. Doe*, 530 U.S. 290, 307, n.21 (2000) ("[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."). 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 incorrect to suggest, for example, that the display of a small, personal poster quoting Ronald Reagan mentioning God or a poster that states, "Be on guard. Stand true to what you believe. Be courageous. Be strong. And everything you do must be done in love" violates the Establishment Clause. Similarly, no *reasonable* observer would conclude that the small, hand-written "sticky notes" containing inspirational Bible verses that were discreetly displayed on the back of Plaintiff's desk violate the Establishment Clause.[24]

In the final analysis, Defendants' religious cleansing was thorough, complete, and offensive. As noted, 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

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

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, Dkt. No. 1 at JA-16). 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 a form of 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.' 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.

V. Defendants' Restrictions Violate the Equal Protection Clause.

The relevant principle of law was articulated in *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). 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 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." *Id.* at 96; *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) ("The Equal Protection Clause was intended as a restriction on [government] action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a "suspect class," *or that impinge upon the exercise of a 'fundamental right.'*") (emphasis added). 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.

VI. Defendant Kane Does Not Enjoy Qualified Immunity.

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.[25] *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.").

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, 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).

When reviewing a claim of qualified immunity, the court "ask[s] whether

[25] 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").

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). 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 Kane must carefully navigate the constitutional minefield of the First Amendment, Supreme Court and Second Circuit precedent clearly establish Plaintiff's constitutional rights in the "school house," *Tinker*, 393 U.S. at 506; *Marchi*, 173 F.3d at 475 (2d Cir. 1999) ("The directive is unquestionably a restraint on [the plaintiff teacher's] First Amendment rights."), as well as her constitutional rights as a public employee in general, *see Lane*, 134 S. Ct. at 2374; *Garcetti*, 547 U.S. at 413; *Connick*, 461 U.S. at 142; *Rankin*, 483 U.S. at 383. And Supreme Court precedent clearly establishes that government officials *must be neutral towards religion*, *see, e.g.*, *Rosenberger*, 515 U.S. at 839 (acknowledging

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"); *see also Lamb's Chapel*, 508 U.S. at 395 ("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."). As discussed above, Defendant Kane'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

Plaintiff hereby requests that the Court reverse the district court.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 12,092 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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