No. _____

In the Supreme Court of the United States

JOELLE SILVER,

Petitioner,

v.

CHEEKTOWAGA CENTRAL SCHOOL DISTRICT, DENNIS KANE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF SCHOOLS, CHEEKTOWAGA CENTRAL SCHOOL DISTRICT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To what extent does Petitioner, a public school teacher, enjoy the right to freedom of speech protected by the First and Fourteenth Amendments while on school property during the school day?

2. Did the School District and its superintendent violate Petitioner's right to freedom of speech by adopting a policy of permitting teachers, faculty, and administrators to display in their classrooms and offices various personal messages, including non-curricular messages relating to matters of political, social, or other concerns, but then denying Petitioner the right to display similar messages based on the religious viewpoint of her speech?

PARTIES TO THE PROCEEDING

The Petitioner is Joel Silver ("Petitioner").

The Respondents are the Cheektowaga Central School District ("School District"), and its superintendent, Dennis Kane, (collectively referred to as "Respondents").

Brian J. Gould, in his official capacity as President, Board of Education, Cheektowaga Central School District, Defendant-Appellee below, is not a party to this proceeding.

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The summary order of the court of appeals appears at App. 1 and is available at 2016 U.S. App. LEXIS 20007. The opinion of the district court, which adopted the U.S. Magistrate Judge's Report and Recommendation, appears at App. 8. The Report and Recommendation appears at App. 10.

JURISDICTION

The order of the court of appeals affirming the dismissal of Petitioner's complaint was entered on November 7, 2016. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner, a public school teacher, commenced this lawsuit on January 10, 2013. In her Complaint, Petitioner alleged, *inter alia*, that Respondents violated her First Amendment right to freedom of speech and the equal protection guarantee of the Fourteenth Amendment by denying her access to a forum for her speech based on its content and viewpoint.

Respondents moved to dismiss Petitioner's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. The motion was assigned to a U.S. Magistrate Judge, who issued a Report and Recommendation, recommending, *inter alia*, the dismissal of Petitioner's free speech and equal protection claims. App. 10-56.

The presiding U.S. District Court Judge adopted the Report and Recommendation. App. 8-9. A final judgment was entered against Petitioner, App. 6-7, and she appealed to the U.S. Court of Appeals for the Second Circuit.

In a summary order, the Second Circuit affirmed. App. 1-5.

This petition for writ of certiorari follows.

STATEMENT OF FACTS

1. The Parties.

Petitioner 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. Petitioner does not cease being a Christian because she is employed by the School District. Petitioner taught science classes in the

School District's high school for seven years. (JA-10, 12).[1]

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. (JA-10).

Respondent Dennis Kane was the Superintendent of Schools for the School District. In that capacity, Respondent Kane was responsible for creating, adopting, and implementing School District policies, practices, and customs, including those at issue in this case. (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.[2] (JA-12).

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[1] Record citations are to the Joint Appendix ("JA") filed in the Second Circuit.

[2] In their Answer, Respondents admit the truth of this allegation. (*See* JA-134).

For example, pursuant to this policy, practice, and custom, the high school social worker[3] for the School District displays inside and outside of her office, including on her office door, various non-curricula messages that promote gay 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. (JA-12).

[3] 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. (JA-13).

3. Respondents' Restrictions on Petitioner's Speech.

On June 22, 2012, Petitioner received a "counseling letter" from Respondents that was signed by Respondent Kane.[4] The counseling letter was made a part of Petitioner's employment file.[5] (JA-13).

In the counseling letter, Respondents directed Petitioner to remove all items, including personal, non-curricula items, of a religious nature from her classroom;[6] it directed Petitioner 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 Petitioner into terminating her service as the faculty advisor for the student Bible Study Club. Respondents' counseling letter essentially cleansed Petitioner's classroom, her speech, and her actions of anything religious. (JA-13).

Respondents' counseling letter stated the following: "Please be advised that your failure to follow any of the above directions will be considered insubordination,

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[4] A copy of the counseling letter was provided in the Joint Appendix. (JA-26-33).

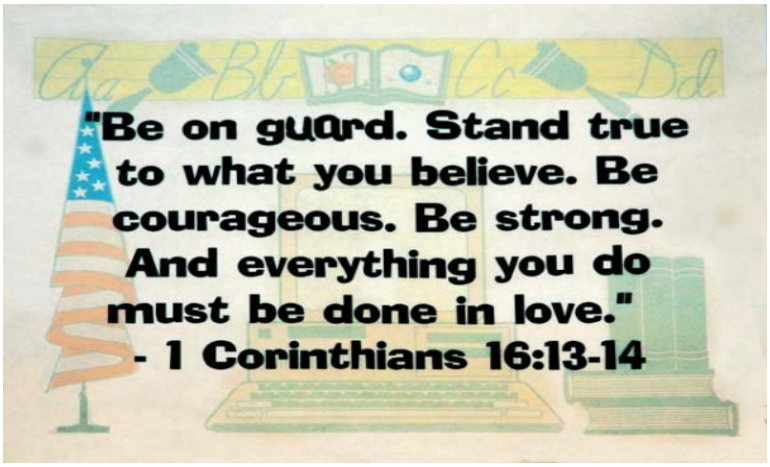
[5] Pursuant to the Agreement of the parties, the counseling letter was removed from Petitioner's employment file on the condition that she not repost any of the offending materials. Should Petitioner ultimately prevail in this matter, the letter will be removed permanently and unconditionally. (*See generally* Stipulation, Dkt. No. 47).

[6] In order to place the small and rather innocuous displays in context, a true and accurate photograph of Petitioner's classroom was included in the Joint Appendix. (JA-76, 79).

which could lead to serious disciplinary consequences, including the termination of your employment." The emphasis was in the original. (JA-13-14).

Respondents' counseling letter directed, *inter alia*, Petitioner 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 be done in love. 1 Corinthians 16:13-4.*" (JA-14; JA-81-82).

The poster appears as follows:

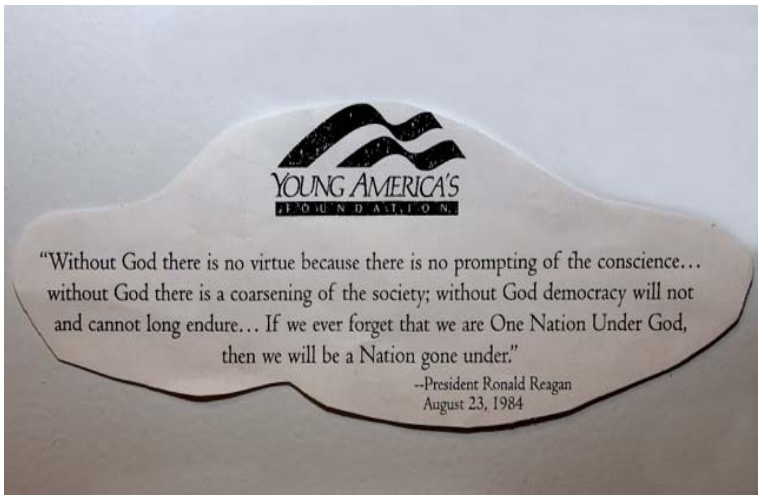


Respondents' counseling letter directed Petitioner to remove four small posters from her classroom that included the following messages: "Wash away all my iniquity and cleanse me from my sin. . . . Wash me and I will be whiter than snow. Psalm 51:2, 7"; "The Lord is my rock, and my fortress, and my deliverer; 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." (JA-14; JA-54-58).

Respondents' counseling letter directed Petitioner to remove from her classroom a small, 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*." (JA-14; JA-84).

The posted quote appears as follows:



Respondents' counseling letter directed Petitioner to remove from her classroom a drawing "depicting three crosses on a hill" that Respondents concluded was "an

obvious reference to the crucifixion of Jesus Christ at Calvary, in Jerusalem."[7] (JA-14; JA-81-82).

Respondents' counseling letter directed Petitioner 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).

(JA-15-16; JA-87; JA-59-64).

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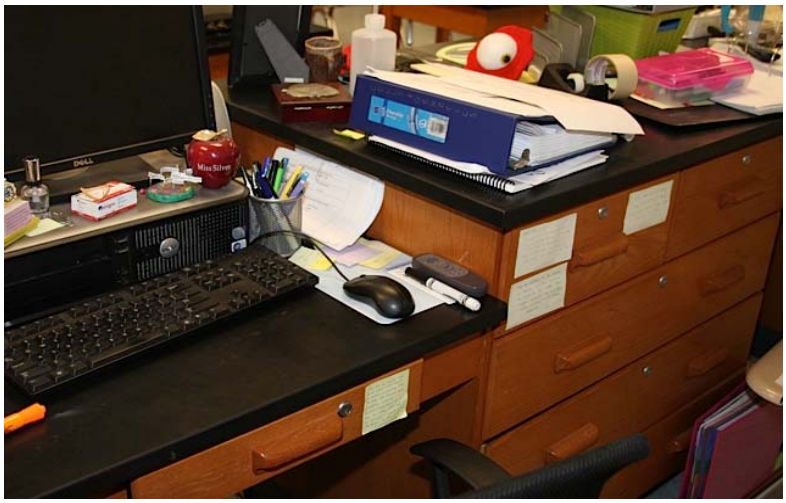
[7] This hand-drawn picture does not contain a caption or any other words describing what it depicts. (*See* JA-81-82).

Petitioner's small "sticky notes" containing these inspirational quotes were discreetly displayed on the back of her desk as follows:



Respondents' 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). (JA-16).

Respondents' counseling letter directed Petitioner 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." (JA-16; *see also* JA-81-82).

When Petitioner received Respondents' 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.[8] (JA-15).

Respondents' counseling letter directed Petitioner 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." (JA-15).

Respondents' 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

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[8] 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), 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.,* JA-17-18), but it does not accord similar access to the Bible Club.

the future will not see any religious messages or content attached to or otherwise placed on public property of the District." (JA-16).

Respondents' 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). (JA-17).

Respondents' 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, Respondents 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. (JA-17).

Respondents' 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, Respondents 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. During the "Day of Silence," students wear signs during the school day and they do not talk for the entire day. In fact, Respondents 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, Respondents 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." (JA-17-18).

Respondents' counseling letter censored Petitioner's personal, non-curricula speech because it was religious and expressed a religious viewpoint. Respondents did not require other teachers, faculty, or administrators to remove personal, non-curricula items from their classrooms or offices nor did Respondents censor the personal, non-religious speech of other teachers,

faculty, or administrators in a manner similar to how Respondents have censored Petitioner's speech. (JA-14-15).

None of Petitioner's expressive activities have caused, nor would they cause, a material and substantial disruption in the high school or the School District in general. (JA-18).

Respondents' restrictions have had a chilling effect on Petitioner's speech. As a result of Respondents' restrictions, Petitioner was unable to discuss her faith or discuss other subject matter from her Christian point of view while on School District property. Respondents' restrictions required Petitioner to keep her faith hidden at all times. (JA-18-19).

REASONS FOR GRANTING THE PETITION

"Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014). This principle of law applies to public school teachers as well. *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").

And while a public school district retains significant authority over the curriculum that is taught by its teachers,[9] this authority should not extend to a

[9] Petitioner is not challenging Respondents' restrictions on her speech that relate to curricular matters (*i.e.*, limitations on guest

teacher's personal, non-curricular speech—particularly when that speech is otherwise permitted by virtue of the school district's policy and practice, as in this case.

However, there is no uniform approach in the courts below for resolving the constitutional issues presented by this petition. And each approach fails to give adequate (if any) weight to the rights of teachers. This Court has not definitively resolved the questions presented, but it should because they consistently arise in the public school context. *See* Sup. Ct. R. 10 (considering for review a case in which "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court").

The Court should grant review.

I. To What Extent Do Public School Teachers Possess First Amendment Rights While on School Property?

As stated by this Court, "First Amendment rights . . . are available to teachers and students." *Tinker*, 393 U.S. at 506. In *Morse v. Frederick*, 551 U.S. 393, 403 (2007), the Court affirmed this principle, stating, "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."; *see also 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"). However, the scope of

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speakers or other aspects of her science "instructional program"). (*See* JA-9-22).

a public school teacher's First Amendment rights within the special characteristics of a school environment is far from clear.

And this scope becomes further blurred when the speech conveys a religious viewpoint, even though the First Amendment fully protects private religious 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.").

The lower courts are not uniform in their response to this question. They have applied variations of *Tinker*, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), when evaluating free speech claims of public school teachers.

The Second Circuit in *Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469 (2d Cir. 1999), for example, acknowledges that directives such as the one at issue here do represent restraints on a public school teacher's First Amendment rights. *See id*. at 475 ("The directive is unquestionably a restraint on [the plaintiff teacher's] First Amendment rights."). However, those rights are sharply curtailed by *any* alleged fear of violating the Establishment Clause.

In its summary order below, the Second Circuit conducted little independent analysis and instead relied upon *Marchi* to conclude that "the restrictions outlined in the counseling letter fell within the scope of the 'leeway' referenced in *Marchi*," which permits

school officials to "direct teachers to 'refrain from expression of religious viewpoints in the classroom and like settings," and that "schools have a constitutional duty to make 'certain . . . that subsidized teachers do not inculcate religion.'" App. 3-4 (citations omitted).

While *Marchi* did not present a forum question, the court acknowledged, as noted above, that teachers do possess First Amendment rights in a public school, but that those rights are sharply limited. *See id*. at 475 (citing, *inter alia*, *Tinker,* 393 U.S. at 507*)*. The Second Circuit did not rely upon nor cite *Pickering* in either *Marchi* or in the decision below.

In *Lee v. York County School Division,* 484 F.3d 687 (4th Cir. 2007), the Fourth Circuit upheld a restriction on a teacher's personal postings on a bulletin board, concluding that the speech was curricular because the postings "constitute school-sponsored speech bearing the imprimatur of the school, and they were designed to impart particular knowledge to the students." *Id*. at 697-700. The court stated that "[i]n evaluating whether a schoolteacher's in class speech is curricular in nature, and thus not a matter of public concern, we are obliged to apply the *Hazelwood* definition of 'curriculum.'" *Lee*, 484 F.3d at 697.

The court applied the *Pickering* balancing test and employed *Hazelwood* in its analysis. Per the Court:

> [U]nder the *Pickering-Connick* balancing standard Lee's classroom postings do not constitute speech concerning a public matter, because they were of a curricular nature. Thus, Lee cannot use the First Amendment to justify his assertion that he is free to place his postings

> on the classroom bulletin boards without oversight by the School Board. In order to constitute protected speech under the First Amendment, the speech at issue must satisfy both prongs of the *Pickering-Connick* framework. . . . Because Lee's speech fails to satisfy the first of those inquiries, we need not reach the second inquiry and decide whether the interests of the School Board (as employer) outweigh those of Lee (as teacher-employee).

Lee, 484 F.3d at 694.

The court concluded as follows:

> Because the Removed Items constitute school-sponsored speech bearing the imprimatur of the school, and they were designed to impart particular knowledge to the students at Tabb High, the Items are curricular in nature. As such, the dispute over Lee's postings of the Removed Items is nothing more than an ordinary employment dispute. . . . The Items do not constitute speech on a matter of public concern and are not protected by the First Amendment.

Lee, 484 F.3d at 700.

In *Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011), the Ninth Circuit rejected the approach taken by the Fourth Circuit, which it described as the "curricular speech doctrine," *id.* at 966 n.11 ("We decline [the school district's] invitation to apply the curricular speech doctrine in this case.") (citing *Lee*, 484 F.3d at 697), and, instead, applied a version of the *Pickering* test.

In its application of the *Pickering* test, the court ultimately concluded that the teacher's classroom postings constituted government speech. *Johnson*, 658 F.3d at 970. Therefore, there was no First Amendment issue since the government is permitted to regulate its own speech. *See id*. Upon doing so, the Ninth Circuit reversed the district court's ruling in favor of the teacher, rejecting the lower court's conclusion that the school district created a forum for the teacher's speech and had impermissibly engaged in viewpoint discrimination. *Id*. at 960-61; *see also id*. at 975 ("[T]he district court made a critical error when it determined that Poway had created a limited public forum for teacher speech and evaluated Poway's actions under a traditional forum-based analysis rather than the controlling *Pickering*-based inquiry.").

In *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), the Tenth Circuit upheld a restriction that prohibited an elementary school teacher from "teaching religion" through the "use" of his Bible and other religious materials that were kept in the classroom and used by the teacher during free reading time.

In *Roberts*, the court stated, in relevant part:

> Our holding is . . . . limited to the issues regarding Mr. Roberts' rights to self-expression and academic freedom in the classroom.
>
> We begin our discussion by noting that "neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969). Nevertheless, the Supreme Court has

repeatedly emphasized that the rights of students and teachers in the public schools "are not automatically coextensive with the rights of adults in other settings." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *see Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). We are thus faced with the tension between Mr. Roberts' right of expression and the need of public school officials to censor classroom materials for the sole purpose of eliminating a possible constitutional violation.

We apply the "substantial interference" or "balancing" standard enunciated in *Tinker* to the competing interests of Mr. Roberts and the school officials. There, the Court concluded that "students may express their opinions at school, even on controversial subjects, so long as they do so without materially disrupting classwork, creating substantial disorder, or invading the rights of others." *Tinker*, 393 U.S. at 513. We find no reason here to draw a distinction between teachers and students where classroom expression is concerned. Thus, 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." *Tinker*, 393 U.S. at 509. If, on the other hand, the conduct endorses a particular religion and is an activity "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," *Kuhlmeier*, 484 U.S.

> at 271, creating the requisite state action, then the activity infringes on the rights of others and must be prohibited.

Roberts, 921 F.2d at 1056-57. Based upon this analysis, the court upheld the restrictions.[10]

The lower courts do acknowledge, however, that *Tinker* applies in a teacher speech case, if only tangentially. Here is what the Fourth Circuit said:

> 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)

In *Roberts*, the court stated, "[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

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[10] *But see Roberts*, 921 F.2d at 1059 (Barrett, J., dissenting) ("[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.").

substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Roberts*, 921 F.2d at 1057 (quoting *Tinker*, 393 U.S. at 509); *see also Johnson*, 658 F.3d at 962-63 ("*Pickering* and *Tinker* are not mutually exclusive concepts. . . . The very basis for undertaking a Pickering-based analysis of teacher speech, whether in-class or out, is the Court's recognition that teachers do not 'relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.'") (citations omitted).

It is evident, however, that if a court is going to take a broad view of curriculum or simply conclude that a teacher's speech while on school property, curricular or otherwise, is government speech, then the courts will have their collective thumbs on the scale of the *Pickering* balancing test and the teacher will lose as a matter of course. The practical result of either approach is that teachers in fact lose their constitutional rights at the schoolhouse gate, despite what this Court said in *Tinker*.

In Petitioner's view, there is room for another approach; an approach that applies a forum analysis when the facts compel it.[11] While the courts below do purport to apply *Hazelwood* in their analyses, in *Hazelwood* this Court noted the possibility of applying a forum analysis in the context of a public high school,

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[11] As noted previously, in *Johnson v. Poway Unified School District*, the district court applied a forum analysis and thus ruled in favor of the teacher. The Ninth Circuit rejected this approach and reversed. *See Johnson*, 658 F.3d at 975.

stating that school facilities could be deemed "public forums" for First Amendment purposes if school authorities "by policy or by practice" opened those facilities for use "by some segment of the public, such as student organizations," *Hazelwood Sch. Dist.*, 484 U.S. at 267—or, as Petitioner argues here, teachers. *See also Perry Educ. Ass'n*, 460 U.S. at 37 (applying a forum analysis to determine the constitutionality of a speech restriction applied to the interschool mail system and teacher mailboxes in a public school district).

In this case, a forum analysis is appropriate, and such an analysis is the only way to give any weight to Petitioner's free speech rights.

II. Did Respondents Create a "Forum" for Petitioner's Speech by Virtue of Its Policy of Permitting the Display of Private, Non-curricular Messages?

The School District has a policy of permitting teachers, faculty, and administrators 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. (JA-12). Petitioner's displays were posted pursuant to this policy.

In *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 800 (1985), this Court adopted "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."

In *Cornelius*, this Court stated that "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. Consequently, by allowing its property to be used for "certain speakers," such as its teachers, the School District created a forum, albeit a limited one, for teachers to express certain personal messages that reflect the individual teacher's personality, opinions, and values. This "forum" was not limited to curricular-only materials.

Petitioner's posters were displayed in this forum pursuant to this policy, and Respondents ordered the removal of these posters because they conveyed a religious viewpoint.

If public school officials were permitted to create a forum for the personal speech of its teachers and were held to no constitutional standard whatsoever, these government officials could permit, for example, teachers to display posters supporting Republican candidates for public office while prohibiting other teachers from displaying posters supporting Democrat candidates. In fact, if school officials possess such plenary, unchecked authority, they could permit all sorts of political or other controversial speech and then engage in viewpoint-based discrimination with impunity. But there is a very good reason why viewpoint discrimination—an egregious form of content discrimination—is prohibited in all forums, *see infra*, and that reasoning should extend to forums created

within our public schools. *See, e.g., Tinker,* 393 U.S. at 511 (noting that "state-operated schools may not be enclaves of totalitarianism").

In sum, a forum analysis is appropriate under the circumstances, and Respondents' viewpoint-based restrictions cannot withstand constitutional scrutiny.

III. Does Respondents' Establishment Clause Defense Justify Their Viewpoint-Based Restrictions on Speech?

Viewpoint discrimination is an egregious form of content discrimination that is prohibited by the First Amendment 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 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").

Because Respondents' restrictions prohibit Petitioner from expressing her Christian viewpoint on subject matter that is permissible in the forum at issue, the restrictions should have to survive the highest level

of scrutiny. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (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. . . .").

At the end of the day, this petition seeks to resolve whether Respondents' broad, viewpoint-based restrictions on Petitioner's personal, 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 this 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 . . . ."

The lower courts concluded that Petitioner's claims (free speech and equal protection, in particular) fail because Respondents' viewpoint-based censorship of Petitioner's speech was justified by their fear that permitting this speech would violate the Establishment

Clause, regardless of whether or not those fears were justified or even reasonable. App. 38. ("Defendants were rightly concerned about litigation over 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.").

This approach is wrong. It allows the Establishment Clause to operate as a blunt instrument against speech that school officials disfavor because of its religious viewpoint.

Indeed, 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 free speech. *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.").

Given *Lamb's Chapel*, the lower courts should be required to conduct an analysis regarding whether it was reasonable to conclude that each restriction on Petitioner's speech was in fact justified by a fear that allowing the speech would violate the Establishment Clause. That did not happen here.[12]

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[12] In its summary order, the Second Circuit simply rubber stamped the lower court's decision, concluding that the restrictions on Petitioner's speech "fell within the scope of 'leeway'" permitted by circuit precedent. App. 4.

The Tenth Circuit's approach to reviewing a compliance-with-the-Establishment-Clause justification for restricting speech provides a workable solution.

In *Roberts v. Madigan*, 921 F.2d 1047, 1057 (10th Cir. 1990), the court described the government's reliance on the Establishment Clause as a basis for restricting teacher speech as presenting a "constitutional justification." As such, the court stated that this is "a claim that this [court] is well-equipped to evaluate"; therefore, the court need "not accord [the government] the same deference as in other cases involving issues that school officials are uniquely qualified to handle." *Id*.

This approach would require a court to view the speech restriction through the legal prism of the First Amendment and not through the biased lens of organizations (such as the Freedom From Religion Foundation, among others) which oppose the public presence of religion. *See, e.g., ACLU v. Mercer Cnty.,* 432 F.3d 624, 638 (6th Cir. 2005) ("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.") (quoting ACLU website).

To hold Petitioner's 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. *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.").

This Court should grant this petition and reject Respondents' "claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded." *See Lamb's Chapel,* 508 U.S. at 395.

In summary, the courts below give little regard to the free speech rights of public school teachers despite this Court's repeated emphasis that public employers do not surrender their First Amendment rights upon acceptance of employment with the government. Similarly, and closely related, the lower courts have increasingly allowed any alleged fear—whether reasonable or not—of an Establishment Clause violation to trump those rights without question, thereby permitting the Establishment Clause to justify viewpoint-based discrimination. Such an approach is impermissible, even in a public school setting. *See 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.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 16-102

[Filed November 7, 2016]

JOELLE SILVER,

Plaintiff-Appellant,

v.

CHEEKTOWAGA CENTRAL SCHOOL DISTRICT, DENNIS KANE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF SCHOOLS, CHEEKTOWAGA CENTRAL SCHOOL DISTRICT, AND BRIAN J. GOULD, IN HIS OFFICIAL CAPACITY AS PRESIDENT, BOARD OF EDUCATION, CHEEKTOWAGA CENTRAL SCHOOL DISTRICT,

Defendants-Appellees.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall Courthouse, 40 Foley Square, in the City of New York, on the 7th day of November, two thousand sixteen.

Present:

ROBERT A. KATZMANN,
Chief Judge,
RICHARD C. WESLEY,
SUSAN L. CARNEY,
Circuit Judges.

For Plaintiff-Appellant: ROBERT JOSEPH MUISE, American Freedom Law Center, Ann Arbor, MI (David Yerushalmi, *on the brief*, American Freedom Law Center, Washington, DC).

For Defendants-Appellees: JEREMY A. COLBY (Michael P. McClaren, *on the brief*), Webster Szanyi LLP, Buffalo, NY.

Appeal from the United States District Court for the Western District of New York (Vilardo, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED**.

Plaintiff Joelle Silver appeals from the judgment of the United States District Court for the Western District of New York (Vilardo, *J.*) dismissing her complaint. We assume the parties' familiarity with the procedural history and facts of this case.

We review *de novo* a district court's dismissal for failure to state a claim, "accepting as true the factual allegations in the complaint and drawing all inferences in the plaintiff's favor." *Biro v. Conde Nast*, 807 F.3d 541, 544 (2d Cir. 2015). First, Silver alleged that the Cheektowaga Central School District had violated her First Amendment right to free speech by imposing the restrictions outlined in the School District's "counseling letter," which included a direction to remove various religiously-themed postings in Silver's classroom. However, this Court has stated that "schools may direct teachers to 'refrain from expression of religious

viewpoints in the classroom and like settings,'" *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 475 (2d Cir. 1999) (quoting *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991)), and that "schools have a constitutional duty to make 'certain . . . that subsidized teachers do not inculcate religion.'" *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) (alteration in original)). Further, "when government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway." *Id.* at 476. Here, the restrictions outlined in the counseling letter fell within the scope of the "leeway" referenced in *Marchi*. Consequently, we affirm the District Court's dismissal of Silver's free speech claim.

Second, Silver alleged that the School District had violated the Establishment Clause of the First Amendment by restricting her religious expression, thereby "convey[ing] an impermissible, government-sponsored message of disapproval of and hostility toward the Christian religion." J.A. 20. "[F]or challenged government action to satisfy the neutrality principle of the Establishment Clause, it must (1) 'have a secular . . . purpose,' (2) have a 'principal or primary effect . . . that neither advances nor inhibits religion,' and (3) 'not foster an excessive government entanglement with religion.'" *Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 238 (2d Cir. 2014) (alterations in original) (quoting *Lemon*, 403 U.S. at 612-13). Here, the restrictions imposed by the School District had the secular purpose of, and primary effect of, "avoidance of the perception of religious endorsement," *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 634 (2d Cir. 2005), and they

did not excessively entangle the School District in religious matters. *See id.* Therefore, we uphold the District Court's dismissal of Silver's Establishment Clause claim.

Third, Silver alleged a violation of the Equal Protection Clause of the Fourteenth Amendment, on the basis that she was "prevented . . . from expressing a religious message in a forum in which personal, non-curricula [sic] speech of School District teachers, faculty, and administrators is permitted because Defendants found Plaintiff's religious views and viewpoint unacceptable." J.A. 21. However, in light of our conclusion that Silver's First Amendment claims fail, we conclude that her equal protection claim, grounded in her alleged right to post or otherwise use the materials referenced in the counseling letter, fails as well. *See African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 363-64 (2d Cir. 2002). As a result, we uphold the District Court's dismissal of Silver's equal protection claim.

We have considered all of Silver's remaining arguments and find in them no basis for reversal. Accordingly, for the foregoing reasons, the judgment of the District Court is **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

/s/_____

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Case No. 1: 13-cv-00031

[Filed December 22, 2015]

JOELLE SILVER,

Plaintiff,

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.

JUDGMENT

Pursuant to the joint stipulation of Plaintiff Joelle Silver, Defendant Cheektowaga Central School District ("District") and Defendant Dennis Kane, Plaintiff's equal protection claims based upon the alleged selective enforcement of the District's rules and regulations are hereby dismissed with prejudice.

Based upon this dismissal and the Decision and Order of U.S. District Court Judge Richard J. Arcara (Dkt. # 31), the presiding judge at the time, which adopted the Report and Recommendation of U.S. Magistrate Judge G. Foschio (Dkt. # 17), all claims pending in this Court have been resolved.

Therefore, judgment is hereby entered in Defendants' favor as to Plaintiffs' First Amendment free speech claim, her Establishment Clause claim, and her equal protection/free speech claim arising under the Fourteenth Amendment.

The parties are responsible for their own costs and fees.

The Clerk of Court is directed to close this case.

So ORDERED this 21st day of December 2015

/s/_____
Hon. Lawrence J. Vilardo
U.S. District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

13-CV-31-A

[Filed July 13, 2015]

JOELLE SILVER,

Plaintiff,

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,

Defendant.

DECISION AND ORDER

The above-referenced case was referred to Magistrate Judge Leslie G. Foschio pursuant to 28 U.S.C. § 636(b)(1) for pretrial proceedings. On June 24, 2014, Magistrate Judge Foschio filed a Report and Recommendation (Dkt. No. 17), recommending that defendants' motion pursuant to Fed. R. Civ. P. 12(b)(6)

to dismiss for failure to state a claim upon which relief may be granted (Dkt. No. 8) be granted in part and denied in part.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a *de novo* determination of the portions of the Report and Recommendation to which specific objections have been made. Upon *de novo* review, and after carefully reviewing the Report and Recommendation, the submissions of the parties, and oral argument, it is hereby

ORDERED, pursuant to 28 U.S.C. § 636(b)(1), that the Court adopts Magistrate Judge Foschio's Report and Recommendation, and for the reasons set forth in the Report and Recommendation, defendants' motion to dismiss (Dkt. No. 8) is granted in part, denied in part.

The case remains committed to Magistrate Judge Foschio under the terms of the Court's prior referral Order.

IT IS SO ORDERED.

Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: July 10, 2015

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

13-CV-00031A(F)

[Filed June 24, 2014]

JOELLE SILVER,

Plaintiff,

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.

REPORT and RECOMMENDATION

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JURISDICTION

This case was referred to the undersigned by Honorable Richard J. Arcara on March 22, 2013, for all pretrial matters including preparation of a report and recommendation on dispositive motions. The matter is presently before the court on Defendants' motion to dismiss the complaint for failure to state a claim for which relief can be granted (Doc. No. 8), filed March 20, 2013.

BACKGROUND

Plaintiff Joelle Silver ("Plaintiff"), commenced this civil rights action on January 10, 2013, asserting employment discrimination based on her religion by Defendants Cheektowaga Central School District ("CCSD"), CCSD Board of Education ("School Board") President Brian J. Gould ("Gould"), and CCSD Superintendent of Schools Dennis Kane ("Kane") (together, "Defendants"). In particular, Plaintiff asserts Defendants violated (1) her First Amendment right to freedom of speech ("Free Speech claim"); (2) the First

Amendment Establishment Clause ("Establishment Clause claim"); and (3) the Fourteenth Amendment Equal Protection Clause ("Equal Protection claim"), by demanding Plaintiff, a science teacher with CCSD who is a Christian, remove several items displayed in Plaintiff's classroom out of fear the items may convey a religious viewpoint to the students which could be interpreted as indicating a preference for students who adhered to Christian beliefs. Plaintiff seeks as relief (1) a declaration that Defendants violated Plaintiff's fundamental rights under the First and Fourteenth Amendment as alleged in the Complaint; (2) a permanent injunction barring Defendants' alleged unconstitutional restrictions of Plaintiff's asserted fundamental rights; (3) removal of a "counseling letter" from Plaintiff's employment file; (4) nominal damages against all Defendants, and (5) an award of reasonable attorney fees, costs and expenses pursuant to 42 U.S.C. § 1988.

On March 20, 2013, Defendants, in lieu of an answer, filed the instant motion to dismiss the Complaint for failure to state a claim for which relief can be granted (Doc. No. 8) ("Defendants' motion"), supported by the attached Memorandum of Law in Support of Defendants' Motion to Dismiss (Doc. No. 8-1) ("Defendants' Memorandum"), the Declaration of Jeremy A. Colby in Support of Defendants' Motion to Dismiss (Doc. No. 8-2) ("Colby Declaration"), and exhibits A through C (Docs. Nos. 8-3 through 8-5) ("Defendants' Exh(s). __"). On April 2, 2013, Plaintiff filed Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss (Doc. No. 10) ("Plaintiff's Response"), to which is attached as Exhibit 1 the Declaration of Plaintiff Joelle Silver (Doc. No.

10-1) ("Plaintiff's Declaration"), attaching exhibits A through D ("Plaintiff's Exh(s). __"). On April 9, 2013, Defendants filed the Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss (Doc. No. 11) ("Defendants' Reply").[1] On May 6, 2013, Plaintiff, with leave of the court, filed Plaintiff's Sur-Reply in Opposition to Defendants' Motion to Dismiss (Doc. No. 16) ("Plaintiff's Sur-Reply"). Oral argument was deemed unnecessary.

Based on the following, Defendants' motion should be GRANTED in part and DENIED in part.

FACTS[2]

Plaintiff Joelle Silver ("Plaintiff" or "Silver"), who adheres to religious beliefs in the Christian tradition,[3] an employee with Defendant Cheektowaga Central School District ("CCSD" or "School District"), has taught science classes for more than seven years and was teaching at the Cheektowaga Central High School ("CCHS" or "the High School"), at all times relevant to this action. Plaintiff maintains that according to School District policy, practice, or custom ("the policy"), School District teachers, faculty and administrators are permitted to display in their classrooms and offices various personal messages. Plaintiff has interpreted the policy as permitting the display in her classroom of

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[1] By Decision and Order filed April 26, 2013 (Doc. No. 15), the attached Reply Declaration of Jeremy A. Colby in Support of Defendants' Motion to Dismiss (Doc. No. 11-1) was stricken from the record.

[2] Taken from the pleadings and motion papers filed in this action.

[3] Whether Plaintiff belongs to any specific denomination of Christian faith is not in the record.

several quotations from the Bible, as well as several other statements containing the word "God," and a picture of three crosses on a hill. Specifically, in addition to numerous photographs of unidentified people, cartoons, nature pictures, and some poems, the items Plaintiff displayed that are at the center of this action include:

- Four small posters of nature scenes posted on a closet door, each poster bearing a verse from the Book of Psalms, including:

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.
2. "The heavens declare the glory of God; the skies proclaim the work of His hands." Psalm 19:1.
3. "The Lord is my rock, and my fortress, and my deliverer; my God, my strength, and Whom I will trust." Psalm 18:2.
4. "Wash away all my iniquity and cleanse me from my sin. . . . Wash me, and I will be whiter than snow." Psalm 51:2, 7.

- A poster on which is superimposed over images of the American flag and books, "Be on guard. Stand true to what you believe. Be courageous. Be strong. And everything you do must be done in love." 1 Corinthians 16:13-14.

- A drawing of three crosses on a hill.

- A poster of a telephone accompanied by, "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.'"

- A quotation from President Ronald Regan stating, "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 we ever forget that we are One Nation Under God, then we will be a Nation gone under."

- Four post-it or "sticky" notes stuck to the drawers on Plaintiff's desk, outside the view of any student seated at a student desk, reading:

1. "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.
2. "For the company of the godless is barren, and fire consumes the tents of the corrupt. They conceive mischief and bring faith iniquity, and their mind prepares deception." Job 15:34-35.
3. "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.
4. "Lord, when we are wrong make us willing to change, and when we are right make us easy to live with.[4]

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[4] Although the source of this statement does not appear on the post-it note, Plaintiff attributes the statement to "Scottish Clergyman Peter Marshall." Complaint ¶ 31.

Because Plaintiff also served as faculty monitor for the High School's "Bible Study Club," ("Bible Club" or "the club"), Plaintiff permitted a box maintained by the club into which prayer requests could be deposited ("the prayer box") to be kept in Plaintiff's classroom. The prayer box appears to be a shoe box,[5] painted black, on which is written "Inspired Bible Club Prayer Requests" on one end, and on the other end and on the top of the prayer box are various Bible verses, including,

1. "And whatever you ask in prayer, you will receive if you have faith." Matthew 21:22.
2. "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.
3. "For where two or three have gathered in my name, I am in their midst." Matthew 18:20.

The top of the prayer box also included a quotation from one Oswald Chambers,[6] "We have to pray with our eyes on God, not on the difficulties."

On May 31, 2012, Plaintiff invited Luther K. Robinson, M.D. ("Dr. Robinson"), to speak to her class as a guest on the topic of genetic defects. As part of his lecture, Dr. Robinson presented a slide show that included two Bible verses:

1. "And the angel of the Lord appeared . . . and said, '. . . Now therefore beware, I pray thee, and drink not wine or strong drink." Judges 13:3, 4.

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[5] The prayer box is depicted in Defendants' Exh. B.

[6] "Oswald Chambers" is not further identified in the record.

2. "Whom shall I send and who will go for Us?" "Then I said . . ." Isaiah 6:7, 8.

By letter to CCSD Superintendent of Schools Dennis Kane ("Kane"), dated June 7, 2012, one Rebecca S. Markert ("Markert"), Staff Attorney with the Freedom from Religion Foundation ("FFRF"), advised it was in receipt of a complaint from a High School student ("complainant"), regarding Plaintiff's posting of a Bible verse, and a drawing of three crosses on the wall near the complainant's desk. ("FFRF Letter"),[7] The complainant also protested Dr. Robinson's inclusion in his slide presentation of two Bible verses which appeared irrelevant to the lecture topic. Markert advised Kane of the "serious constitutional concerns" raised by the allegations, FFRF Letter at 1, asserting the display of religious messages on public school grounds violates the First Amendment's Establishment Clause, and requested Kane "commence an immediate investigation" into the complaint, and direct Plaintiff "to cease promoting religion in her class, to take down the religious displays in the classroom, and to ensure that any future guests in her classroom will not use mandatory class time to promote religion." *Id*. at 2. Markert further directed Kane to "notify [FFRF] immediately in writing of the steps you are taking to remedy these concerns." *Id*.

In a "counseling letter" dated June 22, 2012 ("Counseling Letter"),[8] Defendant Kane advised Plaintiff of the school district's receipt of the FFRF Letter, that Kane's inspection of Plaintiff's classroom

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[7] Defendants' Exh. C.

[8] Defendants' Exh. A.

had confirmed many of the FFRF's allegations, and also lead to the discovery of "additional examples of [Plaintiff's] personal religious expressions in [Plaintiff's] High School classroom that were either missed of omitted by FFRF's June 7th letter." Counseling Letter at 3. According to Kane, because Plaintiff indicated on the "Guest Speaker Request Form" she completed in connection with Dr. Robinson's appearance before Plaintiff's class that she had reviewed Dr. Robinson's material in advance of his presentation, Kane could only conclude Plaintiff was aware of the content of the slides, including those containing biblical passages, prior to the presentation. *Id*. at 5. Kane further stated that upon considering all the facts and circumstances,

> the religious materials that [Plaintiff] posted or displayed in [her] classroom are not solely for you own inspiration. Rather, it is my conclusion that you are using your publicly funded classroom to express your personal religious beliefs to your students, including but not limited to your apparent belief in the divine inspiration and authority of the Bible as the word of God, and to advance Judeo-Christian principles.

Id. at 5-6.

Kane directed Plaintiff to immediately remove the religious materials identified by Kane. *Id*. at 6. Kane suggested that if Plaintiff occasionally needed to glance at inspirational Bible verses between classes, she could "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 contents to your students or their parents or guardians." *Id*. Kane advised Plaintiff to more carefully screen presentations by guest speakers to ensure the material to be presented did not include religious messages or content, and to refrain from making any religious references in delivering instructional material unless such references were a required element of a course. *Id*. Kane directed that, except for wearing religious materials, such as a cross, Plaintiff was "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." *Id*. Kane further directed Plaintiff to review certain CCSD School Board policies, including Board Policy 2005 8271, Acceptable Use of Computers/ Technology and Internet Access ("Policy 8271"), Board Policy 1999 8331, Controversial Issues ("Policy 8331"), Board Policy 1999 8332, Curriculum Areas in Conflict with Religious Beliefs ("Policy 8332"), and Board Policy 1999 7440, Extracurricular Activities ("Policy 7440"), along with Administrative Regulation 2000 7410R.1, Extracurricular Activities Guidelines ("Regulation 7410R.1"), and Administrative Regulation 2000 7410R.2, Student Organizations: Limited Open Forum ("Regulation 7410R.2"). *Id*. at 6-7.

With regard to the lecture presented by Plaintiff's guest speaker, Dr. Robinson, Kane specifically referenced Policy 8271 ¶ 9, Ethical Use (Staff), providing

> [u]se of District network resources and any other CCSD technology resources are a privilege. Religious messages and materials that are intended or could be perceived to be proselytizing are strictly prohibited.

Counseling Letter at 6.

According to Kane, Dr. Robinson's use of a slide projector owned by the School District to display Bible verses was in violation of Policy 8271 ¶ 9. *Id*. Kane advised Plaintiff was on notice that injecting any religious content into her curriculum was in violation of Policy 8331, and that Plaintiff's failure to provide her students with advance notice of the religious content of Dr. Robinson's presentation precluded any student who wished to be excluded from the presentation, as permitted by Policy 8332, from exercising such option. *Id*. at 7.

Kane also expressed concern that in her position as monitor of the High School's student Bible Study Club, Plaintiff may not be acting in accordance with Policy 7410 and Regulations 7410R.1 and 7410R.2. Counseling Letter at 7. In particular, Kane was concerned allowing the club's prayer box to be placed in Plaintiff's classroom throughout the school year was in violation of Policy 7410 and Regulations 7410R.1 and 7410R.2 which "speak only of permitting the club to 'meet on school premises during non-instructional time.'" *Id*. (quoting Regulation 7410R.2 at 2). According to Kane, simply because the Bible Club had received administrative approval from the School District to meet on school premises during non-instructional time "did not amount to carte blanche approval [of] all the activities that the Bible Club might conceive of after

obtaining administrative approval to form as a student group." *Id*. at 7. Kane stated Plaintiff had

> overstepped the boundary of your monitoring role by permitting Bible Club members to requisition space in your publicly owned classroom for the long-term placement of a 'prayer request box'. (To the extent that you allowed such use of your classroom, you were involved to some degree in the club's prayer request box activity). The placement of that box in your classroom is especially problematic because it is too easily perceived as the District endorsing or lending support to religion, which is a violation of the Establishment Clause.

Id.

Plaintiff was warned that should she "choose to continue monitoring the Bible Study Club next school year, [she] must carefully re-examine Policy 7410 and Regulation[s] 7410R.1 and 7410R.2, so that [she] can better protect that club from being disciplined and possibly banned," *id*., and that "[u]nder no circumstances should [Plaintiff] participate in the club's meetings or activities." *Id*.

Kane concluded by advising Plaintiff "<u>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</u>." Counseling Letter at 8 (underlining in original). The Counseling Letter was made a part of Plaintiff's permanent file in connection with Plaintiff's employment with the School District.

Plaintiff maintains that based on the content of the Counseling Letter she felt pressured to discontinue serving as faculty moderator of the Bible Club and was compelled to remove from her classroom all items of a religious nature, which were personal and non-curricular, and to self-censor her speech. Plaintiff also contrasts the treatment to which she was subjected based on the display of certain personal and non-curricular religious-themed items in her classroom with the lack of similar treatment of the High School's social worker ("social worker") who maintains in a display both inside and outside her office "various non-curricular messages that promote the gay rights agenda," including posters, bumper stickers, and decals including one decal with the "'equal' symbol of the Human Rights Campaign, a pro-gay rights, anti-Christian activist organization . . . ," as well as pamphlets which the social worker also has been permitted to distribute. Complaint ¶ 17. According to Plaintiff, although the social worker's display is "intended to create a 'welcoming' environment for those who are gay, lesbian, or transgendered (GLBT) and for those who promote and endorse such a lifestyle, . . . the displays also create an atmosphere of intolerance toward students who have religious objections to promoting the GLBT lifestyle or agenda." *Id*. ¶ 18. Further, the social worker, who is the faculty advisor for the School District's Gay-Straight Alliance (GSA) student club ("GSA Club"), has not been prohibited from using School District resources to promote the GSA Club's activities, nor restricted from promoting or sponsoring GSA Club activities which would be in violation of Policy 7410 and Regulations 7410R.1 and 7410R.2. As such, Plaintiff maintains Defendants' enforcement of such policies only against Plaintiff

constitutes restrictions that are overtly hostile toward religion and send a clear message that Plaintiff's Christianity renders her less than a full member of the school community in violation of her Equal Protection Clause rights.

DISCUSSION

Defendants seek to dismiss Plaintiff's claims for failing to state a claim for which relief can be granted. In particular, Defendants argue schools are permitted to exercise discretion in policing against the establishment of a religion so as to avoid litigation over the matter, Defendants' Memorandum at 7-13, speech by teachers is materially different than speech by students whose attendance at school is mandatory, *id*. at 13-15, the School District did not violate Plaintiff's civil rights under the Establishment Clause, *id*. at 15-16, or under the Free Exercise Clause, *id*. at 16-17, Plaintiff's Free Speech claim fails as a matter of law, *id*. at 17-20, and does her Equal Protection claim, *id*. at 20-22, the official capacity claims should be dismissed against Defendants Kane and Gould, *id*. at 22-23, and Kane is entitled to qualified immunity. *Id*. at 23-25. In opposition, Plaintiff argues Defendants' restrictions on her private, non-curricular speech violated her First Amendment right to free speech and cannot withstand constitutional scrutiny, Plaintiff's Response at 10-16, the Establishment Clause forbids governmental hostility toward religion, including Plaintiff's Christian faith, *id*. at 16-23; Defendants' restrictions violate the Fourteenth Amendment's Equal Protection Clause by censoring Plaintiff's personal, non-curricular speech based on its viewpoint while permitting other teachers and faculty to continue their speech in the same forum

unfettered, *id*. at 23, the action should be permitted to continue against Defendants Kane and Gould in their official capacities, *id*. at 23-24, and Defendant Kane is not entitled to qualified immunity. *Id*. at 24-25. In further support of dismissal, Defendants reiterate that Plaintiff's First Amendment claims fail as a matter of law under the Free Exercise Clause which Plaintiff has not asserted, Defendants' Reply at 3, and the Establishment Clause, *id*. at 3-4, the Free Speech claim fails as a matter of law, *id*. at 4-6, the Equal Protection claim must be dismissed, *id*. at 7-8, the official capacity claims against Kane and Gould should be dismissed, *id*. at 8-9, and Kane is entitled to qualified immunity. *Id*. at 9-10. In further opposition to Defendants' motion, Plaintiff urges the court not to conclude that Plaintiff, upon accepting employment with the School District, surrendered her right to freedom of speech, Plaintiff's Sur-Reply at 3-6, that Plaintiff's Equal Protection claim has merit under recent caselaw, *id*. at 6-9, that Plaintiff correctly sued Defendants Kane and Gould in their official capacities, *id*. at 9-10, and that qualified immunity would protect Kane only insofar as Plaintiff seeks damages, but not as to Plaintiff's request for injunctive relief. *Id*. at 10.

On a motion to dismiss under Fed.R.Civ.P. 12(b)(6) ("Rule 12(b)(6)"), the court looks to the four corners of the complaint and is required to accept the plaintiff's allegations as true and to construe those allegations in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008) (court is required to liberally construe the complaint, accept as true all factual allegations in the complaint, and draw all reasonable inferences in the plaintiff's favor). The

Supreme Court requires application of "a 'plausibility standard,' which is guided by '[t]wo working principles.'" *Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir. 1) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

"First, although 'a court must accept as true all of the allegations contained in a complaint,' that 'tenet' 'is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Harris*, 572 F.3d at 72 (quoting *Iqbal*, 556 U.S. at 678). "'Second, only a complaint that states a plausible claim for relief survives a motion to dismiss,' and '[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id*. (quoting *Iqbal*, 556 U.S. at 679). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The factual allegations of the complaint "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Twombly*, 550 U.S. at 570. Further, the court is obligated to liberally construe a complaint alleging a § 1983 claim, even though not filed *pro se*. *Leonard Partnership v. Town of Chenango*, 779 F.Supp. 223, 234 (N.D.N.Y. 1991) (construing allegation by plaintiff, represented by counsel, that defendant town denied building permit as due process violation even though § 1983 was not mentioned in the complaint where such construction

did not prejudice town given that defendant itself had construed complaint as based on § 1983 and accordingly addressed claim).

In support of their motion seeking dismissal of the Complaint for failure to state a claim, as well as in opposition to such motion, both Defendants and Plaintiff submit exhibits. Significantly, if the court on a motion to dismiss under Rule 12(b)(6), considers matters presented outside the pleadings, the motion must be treated as one for summary judgment under Fed.R.Civ.P. 56, with all parties given notice of the conversion and a reasonable opportunity to present all the materials pertinent to the motion. Fed.R.Civ.P. 12(d). Here, however, there is no need to convert Defendants' motion to summary judgment because all the exhibits submitted by Defendants and Plaintiff are incorporated by reference into the Complaint and, thus, may be considered by the court in resolving Defendants' motion. *See Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir. 2005) (documents incorporated by reference into complaint may be considered on a motion to dismiss without converting to summary judgment). As such, the court need not convert Defendants' motion for failure to state a claim, to a motion for summary judgment and the court therefore considers whether the Complaint should be dismissed pursuant to Rule 12(b)(6) for failing to state a claim for which relief can be granted.

2. Civil Rights Claims

Section 1983, "allows an action against a 'person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'" *Patterson v. County of Oneida*, N.Y., 375 F.3d 206, 225 (2d Cir. 2004) (quoting 42 U.S.C. § 1983). Section 1983, however, "'is not itself a source of substantive rights.'" *Patterson*, 375 F.3d at 225 (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979)). Rather, § 1983 "merely provides 'a method for vindicating federal rights elsewhere conferred'. . . ." *Id*. The elements of a § 1983 claim include (1) the deprivation of a federal constitutional or statutory right, (2) by a person acting under color of state law. *Velez v. Levy*, 401 F.3d 75, 84 (2d Cir. 2005) (citing *Gomez v. Taylor*, 466 U.S. 635, 640 (1980)). Here, Plaintiffs' first two claims for relief allege deprivation of constitutional rights under the First Amendment including violations of the Free Speech Clause, Complaint ¶¶ 45-49 ("Free Speech claim"), and the Establishment Clause, Complaint ¶¶ 50-54 ("Establishment Clause claim"), and under the Fourteenth Amendment's Equal Protection Clause, Complaint ¶¶ 55-58 ("Equal Protection claim").

In the instant action, it is undisputed that Defendant CCSD, as a municipal corporation and unit of local government, as well as that Defendants Kane and Gould, as employees of CCSD, acted under color of state law in connection with all three alleged constitutional violations. As such, the only remaining inquiry is whether Defendants' conduct, as alleged by Plaintiff and assumed to be true, deprived Plaintiff of any federal constitutional right actionable pursuant to § 1983. As discussed, *infra*, the court finds the Complaint fails to state claims for violations of Plaintiff's First Amendment Free Speech and Establishment Clauses, as well as under the

Fourteenth Amendment's Equal Protection clause, except insofar as Plaintiff has alleged a selective enforcement claim. The Complaint also fails to state a claim against Defendant Gould in his individual capacity, but does state a claim against Kane in his official capacity, and Kane is entitled to qualified immunity except for the selective enforcement claim.

A. First Amendment Claims

Plaintiff alleges Defendants, by directing Plaintiff to remove numerous religious-themed items displayed in her classroom containing references to God and biblical quotes, violated her First Amendment right to free speech, Free Speech claim, and the First Amendment's Establishment Clause, Establishment Clause claim. In the interest of clarity, the court addresses Plaintiff's Establishment Clause claim first.

1. Establishment Clause Claim

Plaintiff alleges Defendants' actions in restricting Plaintiff's display in her classroom of various objects with religious content, all personal, non-curricular speech, "lack a secular purpose, have the primary effect of inhibiting religion, and create an excessive entanglement with religion in violation of the Establishment Clause." Complaint ¶ 52. According to Plaintiff, "Defendants' policies, practices, customs, acts, and omissions, engaged in under color of state law, convey an impermissible, government-sponsored message of disapproval of and hostility toward the Christian religion [and] 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 and an accompanying message that those

who disfavor the Christian religion are insiders, favored members of the political and school community in violation of the Establishment Clause." Complaint ¶¶ 52-53. Defendants argue in support of dismissal that relevant caselaw permits the School District to restrict an employee's speech to guard against a possible Establishment Clause violation, Defendants' Memorandum at 7-13, that Plaintiff's speech, as a public school teacher, materially differs from speech by students who are required to attend school, *id*. at 13-15, and that the actions of Defendants Plaintiff challenges were necessary to avoid excessive government entanglement with religion. *Id*. at 15-16. In opposition to dismissal, Plaintiff argues the Establishment Clause forbids the kind of hostility toward her Christian faith to which Defendants' conduct has subjected Plaintiff, Plaintiff's Response at 16-19, as well as hostility toward religion, *id*. at 19-20, and has created an excessive entanglement with religion. *Id*. at 20-23. In further support of dismissal, Defendants reiterate that Plaintiff's First Amendment Establishment Clause claim fails as a matter of law. Defendants' Reply at 1-4. In further opposition to dismissal, Plaintiff asserts Defendants' position on the Establishment Clause claim conveys "a message of hostility toward religion." Plaintiff's Sur-Reply at 4-5.

The First Amendment's Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . . ." The Establishment Clause applies to the states through the Fourteenth Amendment. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 8 n. 4 (2004) (acknowledging the First Amendment's "Religion Clauses apply to the States by incorporation into the Fourteenth

Amendment." (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940))). To survive an Establishment Clause challenge, Defendants' conduct in writing and sending Plaintiff the Counseling Letter, (1) must have a secular purpose; (2) must neither advance nor inhibit religion as its primary effect, and (3) must not foster an excessive government entanglement with religions. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

It is settled that "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concerns." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (citing *Pickering v. Board of Ed. of Township High School Dist. 205, Will County*, 391 U.S. 563, 568 (1968)). Nevertheless, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Id*. at 418 (citing *Waters v. Churchill*, 511 U.S. 61, 671 (1994) ("[T]he government as employer indeed has far broader powers than does the government as sovereign.")). In particular, government employers need "a significant degree of control over their employees' words and actions," to ensure the "efficient provision of public services." *Id*. (citing *Connick v. Meyers*, 461 U.S. 138, 143 (1983)). Further, when public employees who "occupy trusted positions in society" speak out, "they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id*. at 419. As such, not all restraints on First Amendment rights are invalid, and "the validity of a particular restraint depends on the context in which the expression occurs." *Marchi v. Bd. of Cooperative Educational Services of Albany*, 173 F.3d 469, 475 (2d Cir. 1999) ("*Marchi*"). "[A]s the Supreme

Court has repeatedly recognized, the special nature of public educational institutions gives rise to '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.'" *Id*. (quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507 (1969)). Significantly, "'the interest of the State in avoiding an Establishment Clause violation may be a compelling one justifying an abridgement of free speech otherwise protected by the First Amendment.'" *Id*. (quoting *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394 (1993)).

The First Amendment's "Establishment Clause jurisprudence provides that, in addition to having a secular purpose and not having the primary effect of advancing or hindering religion, state policies or actions must not foster excessive government entanglement with religion." *Marchi*, 173 F.3d at 475 (citing *Lemon*, 403 U.S. at 61213). The relevant inquiry is "whether the challenged action can reasonably be viewed as a governmental endorsement of religion." *Id*. (citing *Agostini v. Felton*, 521 U.S. 203, 234 (1997)). As such, "schools may direct teachers to 'refrain from expression of religious viewpoints in the classroom and like settings,'" *id*. (quoting *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991)), and "schools have a constitutional duty to make 'certain . . . that subsidized teachers do not inculcate religion.'" *Id*. (quoting *Lemon*, 403 U.S. at 619).

In *Marchi*, the Second Circuit has articulated the applicable framework when considering claims that

some governmental activity violates the Establishment Clause. First, the court "must be careful not to invalidate activity that has a primary secular purpose and effect and only incidental religious significance." *Marchi*, 173 F.3d at 476. "Second, when government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause and the limitations it imposes might restrict an individual's conduct that might well be protected by the Free Exercise Clause if the individual were not acting as an agent of government." *Id*. (citing *Waters*, 511 U.S. at 671 (government has "freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large")).

Although school districts, like all government instrumentalities, "must observe the basic free exercise rights of its employees," governmental agencies' decisions "in determining when they are at risk of Establishment Clause violations are difficult," and "the scope of the employees' rights must sometimes yield to the legitimate interest of the governmental employer in avoiding litigation" by those contending an employee's actions in exercising his religion "has propelled his employer into an Establishment Clause violation." *Marchi*, 173 F.3d at 476. As such, "[i]n discharging its public functions, the governmental employer must be accorded some breathing space to regulate in this difficult context." *Id*. In particular, "the employee must accept that he does not retain the full extent of free exercise rights that he would enjoy as a private citizen." *Id*.

Thus, because the School District "has a strong, perhaps compelling interest, in avoiding Establishment Clause violations, it may proscribe" conduct that risks giving the impression the School District endorses religion. *Marchi*, 173 F.3d at 477. "A school risks violation of the Establishment Clause if any of its teachers' activities gives the impression that the school endorses religion." *Id*. Further,

> "While at the high school, whether he is in the classroom or outside of it during contract time, [a public school teacher] is not just any ordinary citizen. He is a teacher . . . . He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial."

Id. (quoting *Peloza v. Capistrano Unified School District*, 37 F.3d 517, 522 (9th Cir. 1994)).

The court thus considers whether Defendants' actions in directing Plaintiff to remove from her "personal, non-curricular" display certain religious-themed items bearing reference either to God or the Bible were in violation of the Establishment Clause.

Plaintiff argues that in *Marchi*, the Second Circuit upheld a restriction requiring a public school teacher "to refrain from using religion as part of his instructional program," *Marchi*, 173 F.3d at 472, and, as such, *Marchi* is inapplicable to the instant action where Plaintiff maintains the subject speech is "personal and non-curricular." Plaintiff's Response at

1 n. 2, 12-16. A careful reading of *Marchi* establishes Plaintiff's argument on this point is without merit.

The plaintiff in *Marchi* was a special education teacher who taught socially and emotionally disturbed students in a public high school. *Marchi*, 173 F.3d at 472. After undergoing a "dramatic conversion to Christianity," the plaintiff modified his instructional program to include discussions of forgiveness, reconciliation, and God, until his supervisor issued a "cease and desist" letter directing the plaintiff to refrain from using religion as part of his instructional program. *Id*. at 472-73. When the plaintiff failed to comply with the directive, he was suspended from his teaching position for six months. *Id*. at 473. Upon returning to work, the plaintiff was reassigned to teach students with "little or no communications skills." *Id*. Shortly after resuming teaching, the father of one of the plaintiff's students sent to the school an audiotape of religious music accompanied by a note indicating the student found the music on the audiotape calming. *Id*. In a note to the student's father thanking him for the audiotape, the plaintiff wrote, "I thank you and the LORD for the tape [;] it brings the Spirit of Peace to the classroom. * * * May God Bless you all richly!" *Id*. Upon learning of the note, the plaintiff's supervisor met with the plaintiff, who stated it was his understanding that a note to a parent was not considered part of his "instructional program," and, as such, was outside the purview of the directive's reach. The plaintiff's supervisor informed the plaintiff that because the plaintiff communicated with the parent in his capacity as a teacher, and because students' parents were part of the instructional process, the plaintiff's note to his student's father was covered by the directive. *Id*. The

plaintiff then sued, alleging, *inter alia*, the directive proscribed protected speech between the plaintiff and his student's parent. *Id*. at 474.

The Second Circuit held that although the directive was "unquestionably a restraint on [the plaintiff's] First Amendment rights," the school's interest in avoiding an Establishment Clause violation, and its constitutional duty to ensure that "subsidized teachers do not inculcate religion," permitted the school 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). As such, the Second Circuit did not hold, as Plaintiff argues, that the speech at issue was part of the plaintiff's 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*. Accordingly, rather than supporting Plaintiff's argument in opposition to dismissal, *Marchi* supports dismissal because, as Plaintiff alleges, Complaint ¶¶ 21, 24-28, 30-34, the challenged religious-themed materials were on display in Plaintiff's classroom, many of which were in full view of the students, such that Plaintiff was expressing a religious viewpoint in the classroom, regardless of whether such viewpoint was personal and non-curricular or not.

Similarly, the Fourth Circuit Court of Appeals upheld a school's removal of materials posted on a high school teacher's bulletin board, despite the teacher's insistence that in posting the materials to the classroom bulletin board, he spoke not as a teacher, but

as a private citizen, and the school allegedly maintained an "*unwritten policy, custom, and practice* . . . authorizing teachers in that regard to place materials on bulletin boards that related relate to the curriculum being taught or that are *of personal interest to them*." *Lee v. York County School Div.*, 484 F.3d 687, 690, 694 (4th Cir.) (italics added), *cert. denied*, 552 U.S. 950 (2007). In *Lee*, the challenged materials included some containing references to the Bible, a poster advertising the National Day of Prayer, and newspaper articles outlining religious and philosophical differences between politicians, regarding a Bible study run by then Attorney General Ashcroft, and detailing religious missionary activities of a former local high school student. *Id*. at 690. The court held Defendants' removal of the posted material did not violate the plaintiff's First Amendment rights because the materials "plainly constitute[d] school-sponsored speech bearing the imprimatur of the school" given that the materials were "constantly present for review by students in a compulsory classroom setting," on "school-owned bulletin boards" in the classroom, such that the messages were likely to be regarded by students and parents as in-class speech "approved and supported by the school, as compared to a teacher's out-of-class statements." *Id*. at 698. Accordingly, the court found the materials posted on the bulletin boards were likely to be attributed to the high school. *Id*. at 698-99.

In the instant action, the items in dispute were also posted in the classroom and, as such, were on display for review by students in a compulsory classroom setting. Although many of the items are posted in an area under the heading "Miss Silver's Inspiration,"

seemingly to distinguish the materials posted there as Plaintiff's "personal and non-curricular" items, the materials were, nevertheless, posted on school-owned property and reviewable by students. Additionally, some of the materials, including the four posters with Bible verses superimposed over nature scenes, were posted in another part of the room, unaccompanied by any categorical phrase, and in full view of the students. As for the other Bible passages and religious messages displayed on sticky notes posted to the side of Plaintiff's desk that did not face the classroom, and thus were not readily visible to the students, at least one of these passages, specifically, Job 15:34-34 ("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"), as selectively quoted out of context, could be interpreted by a student or parent who does not read the Bible, as indicating Plaintiff was scornful of those who do not share her beliefs, and thus is especially disconcerting such that the placement of the quotation does little to alleviate Defendants' litigation concerns. Although Plaintiff alleges the subject items on display in her classroom containing references to God and the Bible were displayed pursuant to the School District's policy of permitting faculty members to maintain displays of "various personal messages, including inspirational messages, and other items that reflect the individual teacher's personality, opinion, and values, as well as personal, non-curricular messages relating to matters of political, social, or other similar concerns," Complaint ¶ 16, such policy, if it indeed exists, does not divest Defendants of their authority to regulate and limit such displays so as to avoid litigation alleging a violation of the Establishment Clause. *Marchi*, 173

F.3d at 477. That the FFRF Letter alludes to a "student complainant" who contacted the FFRF regarding Plaintiff's display, as well as the presentation by Dr. Robinson containing Bible verses, FFRF Letter at 1, establishes Defendants were rightly concerned about litigation over 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. *Id*. at 475 (stating schools have constitutional duty to ensure teachers do not "inculcate religion"); *Lee*, 484 F.3d at 698 (religious-themed materials in full view of students could give impression they were displayed with the school's imprimatur).

Furthermore, the comparison Plaintiff draws between the restrictions placed on her display of "personal and non-curricular" objects with religious content to the High School social worker's display, both inside and outside her office, of "various noncurricular messages that promote the gay rights agenda," including posters, bumper stickers, and decals including one decal with the "'equal' symbol of the Human Rights Campaign, a pro-gay rights, anti-Christian activist organization . . . ," as well as the distribution of pamphlets promoting gay rights, Complaint ¶ 17, is inapposite. Specifically, as alleged, the items displayed by the High School social worker are not in furtherance or reflective of a religion, nor of a religious nature. Plaintiff's assertion that some may interpret the social worker's display as indicative of promoting a "gay agenda" that is at odds with traditional Christian tenets, Complaint ¶ 18 ("the displays also create an atmosphere of intolerance toward students who have religious objections to

promoting the GLBT lifestyle or agenda"), is further undermined by Plaintiff's allegation that the social worker's display is "intended to create a 'welcoming' environment for those who are gay, lesbian, or transgendered (GLBT)," *id*., rather than to promote a viewpoint that is hostile to religion.[9]

Accordingly, the Complaint's Establishment Clause claim is not plausible on its face and should be DISMISSED.

2. Free Speech Claim

Plaintiff claims Defendants violated her First Amendment right to free speech by imposing multiple content- and viewpoint-based restrictions on her personal and non-curricular speech, Complaint ¶ 46, and by ordering Plaintiff to refrain from all forms of religious-based communications, including her personal, non-curricular communications. *Id*. ¶ 47. Defendants seeks dismissal of this claim because Plaintiff has no constitutional right to promote religion to her students and, alternatively, if Plaintiff's speech were part of her "official duties," such speech would not be entitled to any First Amendment protection because statements made by public employees pursuant to their official duties are not protected speech under the First Amendment. Defendants' Memorandum at 17-20. In opposition, Plaintiff argues the restrictions Defendants placed on her speech cannot withstand constitutional

[9] Insofar as Plaintiff alleges the social worker's "displays also create an environment of intolerance toward students who have religious objections to promoting the GLBT lifestyle or agenda," Complaint ¶ 18, because Plaintiff is a teacher, rather than a student, Plaintiff is without standing to pursue such claim.

scrutiny because Plaintiff never presented the materials at issue as part of her instructional program, and Defendants' restrictions thus were "'acts of intolerance, lack of accommodation and hostility toward [Plaintiff's] Christian religion.'" Plaintiff's Response at 11-16 (quoting *Marchi*, 173 F.3d at 1059 (dissent) (bracketed material in original). In further support of dismissal, Defendants maintain Plaintiff has mischaracterized the caselaw referenced in opposition to dismissal. Defendants' Reply at 4-6. Plaintiff, in further opposition, argues that under the legal theory on which Defendants move for dismissal, while on school property, no teacher would have any right to freedom of speech, and there is no constitutional prohibition against the government conveying a message of hostility toward religion. Plaintiff's Sur-Reply at 3-6.

Preliminarily, the court observes that insofar as Plaintiff relies in opposition to dismissal on *Tinker*, 393 U.S. 509, for the proposition that Defendants are not allowed to regulate Plaintiff's speech unless it "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school," for which there is no indication in the instant action, Plaintiff's Response at 12-13; Plaintiff's Sur-Reply at 3-4, *Tinker* concerns only the First Amendment protection of speech by students, which is subject to far greater protection than that of teachers and may be restricted only upon a showing that the restriction is necessary to avoid material and substantial interference with school work or discipline. *Tinker*, 393 U.S. at 511. Rather, speech by government employees, including a public school teacher like Plaintiff, is governed by the *Pickering-Connick*

standard, under which "[a]n inquiry into whether a government employee's speech is protected by the First Amendment turns on the 'balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Lee*, 418 F.Supp.2d 816, 821-22 (E.D.Va. 2006), *aff'd*, 484 F.3d 687 (4th Cir.), *cert. denied*, 552 U.S. 950 (2007).

For a government employee's speech to be protected, it must be on a matter of public concern and the employee's interest in expressing herself on the matter must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of public services it performs through its employees. *Waters*, 511 U.S. 661, 668 (1994) (citing *Connick*, 461 U.S. at 142). Here, even assuming, *arguendo*, that Plaintiff's allegation that the speech at issue was "personal and non-curricular," Complaint ¶ 16, and related to "private, non-curricular expressive activities," *id*. ¶ 42, thereby placing the subject speech outside the purview of protected speech "on a matter of public concern," 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. FFRF Letter at 1-2. Significantly, the Supreme Court recognizes "that the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling one' justifying an abridgment of free speech otherwise protected by the First Amendment. . . ." *Lamb's Chapel*, 508 U.S. at 394 (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1980)). *See also Rosario v. John Does*,1-10, 36

Fed.Appx. 25, 27 (2d Cir. June 10, 2002) (affirming trial court's entry at trial of directed verdict on plaintiff teacher's free speech claim in favor of defendant school board which had terminated plaintiff teacher for speaking of religious views to students because "the School Board's 'strong, perhaps compelling interest in avoiding Establishment Clause violations' justified its actions in terminating [the plaintiff]."). Accordingly, Plaintiff has failed to state a claim for violation of her First Amendment right to free speech.

B. Fourteenth Amendment Equal Protection Claim

Plaintiff claims that she has been denied equal protection in violation of the Fourteenth Amendment insofar as she has been counseled against displaying materials with a religious theme in her classroom and overstepping her boundaries as faculty moderator for the High School's Bible Study Club, whereas other School District teachers, faculty, and administrators were not similarly counseled for their personal, non-curricular speech, thereby demonstrating Defendants targeted Plaintiff's religion and religious speech and views. Complaint ¶¶ 56-57. Defendants argue in dismissal of the Equal Protection claim that (1) Plaintiff's claim is based on a misguided comparison to the High School social worker who was not similarly counseled for displaying in her office materials that "promote the gay-rights agenda"; (2) the School District's interest in regulating in-class speech so as to avoid an Establishment Clause violation defeats Plaintiff's Equal Protection claim; and (3) Plaintiff's selective enforcement claim fails because public employees cannot assert equal protection claims based

on an exercise of discretion by a public employer. Defendants' Memorandum at 20-22. In opposition, Plaintiff insists Defendants, after granting School District employees use of a forum for personal, non-curricular speech, violated Plaintiff's right to equal protection by prohibiting Plaintiff's use of the forum based on the viewpoint of Plaintiff's message, while permitting other teachers and faculty members unfettered use of the same forum for their personal and non-curricular speech. Plaintiff's Response at 23. In further support of dismissal, Defendants assert Plaintiff is unable to refute the authorities cited by Defendants and, thus, has ignored them. Defendants' Reply at 7-8. In further opposition to dismissal, Plaintiff argues that even in a limited public forum, such as is at issue in the instant case, *i.e.*, permitting the display of personal, non-curricular messages in the classroom or office, Defendants are not permitted to regulate the speech posted based on its viewpoint. Plaintiff's Sur-Reply at 6-9.

Under the Equal Protection Clause of the Fourteenth Amendment, "'all persons similarly situated should be treated alike.'" *Kwong v. Bloomberg*, 723 F.3d 160, 169 (2d Cir. 2013) (quoting *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985)). By comparing the discipline, *i.e.*, the Counseling Letter which was made a part of Plaintiff's employment file, to which Plaintiff was subjected for displaying religious-themed materials in her classroom and permitting the Bible Study Club to place the prayer box in her classroom to Defendants' failure to similarly discipline the social worker for displaying materials promoting gay-rights and distributing pamphlets and materials advertising the National Day

of Silence on behalf of the GSA Club, Plaintiff attempts to assert an equal protection claim based on selective enforcement. To state a claim for selective enforcement, Plaintiff must state both (1) that she was treated differently from other similarly situated individuals, and (2) that the difference in treatment was based on "'impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" *Harlane Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001) (quoting *LaTrieste Restaurant & Cabaret v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994)). The use of an impermissible consideration, such as religion, must have been intentional and not merely negligent. *Patterson*, 375 F.3d at 226-27. Further, "deliberate indifference" suffices so long as "the defendant's indifference was such that the defendant intended the discrimination to occur." *Gant v. Wallingford Board of Education*, 195 F.3d 134, 141 (2d Cir. 1991).

1. Comparison to Social Worker's Display and Activities

With regard to Defendants' first argument, Defendants' Memorandum at 20 that Plaintiff's Equal Protection claim is based on a misguided comparison to the High School social worker who was not similarly counseled for displaying in her office materials that "promote the gay-rights agenda," because "'gay rights' is not a religion and does not give rise to Establishment Clause concerns," such argument is correct insofar as Plaintiff complains about being directed to remove religious-themed materials from the display in her classroom, whereas the social worker was not directed

to remove the items displayed in the social workers' office bearing messages about gay rights because only the religious-themed materials in Plaintiff's display give rise to Defendants' concerns about litigation for possible establishment clause violations. Nevertheless, Defendants' argument is not valid with regard to the admonition that Plaintiff was possibly overstepping the boundaries applicable to faculty moderators of student-run clubs.

Specifically, the Counseling Letter warned Plaintiff that should she "choose to continue monitoring the Bible Study Club next school year, [she] must carefully re-examine Policy 7410 and Regulation[s] 7410R.1 and 7410R.2, so that [she] can better protect that club from being disciplined and possibly banned," Counseling Letter at 7, and that "[u]nder no circumstances should [Plaintiff] participate in the club's meetings or activities." *Id*. As relevant, Policy 7410 provides that the Board of Education maintains a limited open forum for secondary students to meet for voluntary, student-initiated activities, provided "[t]here is no *sponsorship* of the meeting by the school, . . . or employees." Policy 7410, Extracurricular Activities, Limited Open Forum ¶ b (italics added). Similarly, one of the conditions listed in Regulation 7410R.2, under which student groups shall be permitted to meet on school premises during non-instructional time, is that "School employees may be present only for custodial purposes; they may not participate or provide *sponsorship*." Regulation 7410R.2, Student Organizations: Limited Open Forum ¶ 2 (italics added). "Sponsorship" is defined as "'the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to

a meeting for custodial purposes does not constitute sponsorship of the meeting.'" *Id*. (quoting 20 U.S.C. § 4072[2]). Accordingly, if, as Plaintiff alleges, the social worker's engagement in the GSA Club's activities amounted to sponsorship of the GSA Club, yet the social worker was not disciplined in a manner similar to the way Plaintiff was disciplined for sponsoring the Bible Study Club, then Policy 7410 and Regulation 7410R.2 have been selectively enforced against Plaintiff based on the religions views espoused by the Bible Study Club, which would be an equal protection violation. *Harlane Associates*, 273 F.3d at 499.

This does not mean that Plaintiff's permitting the Bible Study Club to include in its activities the creation of the Prayer Request Box Plaintiff maintained in her classroom was necessarily within the parameters of the activities for which the Bible Study Club had received approval from the School Board; rather, the court only acknowledges that Plaintiff was disciplined for engaging in the Bible Study Club's activities, which is specifically prohibited under Policy 7410, and Regulation 7410R.2, whereas the social worker, who as faculty monitor of the High School's GSA Club, allegedly promoted the GSA Club's activities including, *inter alia*, the annual "Day of Silence," a national event sponsored by the Gay, Lesbian and Straight Education Network ("GLSEN"), and distributed pamphlets promoting gay rights, yet was not similarly disciplined. Insofar as Plaintiff alleges the social worker, by engaging in the GSA Club's activities, also violated Policy 7410 and Regulation 7410R.2 by "sponsoring" a club, yet was not similarly disciplined by Defendants for such conduct, the Complaint states a plausible claim for an equal protection violation based on

selective enforcement of Policy 7410 and Regulation 7410R.2, on account of the religious character of the Bible Study Club, and dismissal of this portion of Plaintiff's Equal Protection claim should be DENIED.

2. Avoidance of Possible Establishment Clause Violation

Defendants asserts as its second argument in support of dismissal that the School District's interest in regulating in-class speech so as to avoid an Establishment Clause violation also defeats Plaintiff's Equal Protection claim. Defendants' Memorandum at 21-22. In support of this position, Defendants rely on *Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011), *cert. denied*, __ U.S. __, 132 S.Ct. 1807 (2012), where a public high school math teacher sued his employer school district alleging violations of his right to free speech, the Establishment Clause and the Equal Protection Clause when he was directed to remove large banners, prominently displayed in his classroom, containing phrases and mottoes appearing in official and historical texts including "In God We Trust"; "One Nation Under God"; "God Bless America"; and "God Shed His Grace On Thee." *Johnson*, 658 F.3d at 958-59. In ordering the plaintiff to remove the banners, the defendant school district suggested that the plaintiff would be permitted to display the entire context of each historical artifact or document from which the subject passages were excerpted, which would not expose the school district to litigation for a possible Establishment Clause violation, but the plaintiff chose not to do so. *Id*. at 959. On cross-motions for summary judgment, the District Court granted summary judgment in favor of the plaintiff teacher,

thereby denying summary judgment as to the defendant school district. In reversing the District Court's decision, the Ninth Circuit Court of Appeals held, *inter alia*, the plaintiff teacher was not denied equal protection of the law when defendant school district ordered the plaintiff to remove from his classroom banners emphasizing God, yet permitted the display by other teachers of materials exhibiting sectarian viewpoints, because the plaintiff possessed no individual right to speak for the government. *Id*. at 975. *See Ceballos*, 547 U.S. at 421-22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

Defendants, however, do not assert this same argument with regard to Plaintiff's conduct as faculty moderator for the High School's Bible Study Club. Because discussion of the Bible was permitted at the Bible Study Club's meeting, references at those meetings to the same Bible verses with which Defendants and the FFRF take issue in the instant case would not be prohibited. Furthermore, insofar as Plaintiff may have overstepped the boundaries of her role as faculty moderator of the Bible Study Club, the Complaint contains allegations that the faculty moderator of the GSA engaged in conduct similar to that against which Plaintiff was counseled in connection with her faculty moderator position, yet was not similarly disciplined. Accordingly, the Complaint plausibly alleges the relevant Policy and Regulations were selectively enforced against Plaintiff, thereby

denying Plaintiff equal protection under the law. *See Harlane Associates*, 273 F.3d at 499 (selective enforcement claim requires plaintiff allege treatment different from other similarly situated individuals based on an impermissible consideration such as, *inter alia*, religion).

Accordingly, insofar as Defendants directed Plaintiff to remove the religious-themed materials from her classroom, Defendants did not deny Plaintiff equal protection, but Defendants may have denied Plaintiff equal protection with regard to Plaintiff's conduct in her position as the Bible Study Club's faculty moderator.

3. Class of One

Finally, Defendant's reliance on *Enquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2007), for the proposition that "class of one" Equal Protection claims in the public employment context are not allowed, is inapposite. In particular, although the Court did hold that "the class-of-one theory of equal protection has no application in the public employment context," *Enquist*, 553 U.S. at 607, the Court specified that its holding was "guided, as in the past, by the 'common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *Id*. (quoting *Connick*, 461 U.S. at 143). In *Enquist*, however, the plaintiff, a former state employee who was laid off from her job during a restructuring of the employing agency, sued as a class of one alleging she had been fired for arbitrary, vindictive and malicious reasons, without asserting the firing was based on the plaintiff's membership in any particular class. *Id*. at 591. Significantly, the court

disallowed the "class of one" claim because the plaintiff did not claim discrimination based on membership in some class or group, in contravention of what the Equal Protection Clause is intended to shield from discrimination. *Id*. at 607-08. In contrast, in the instant case, Plaintiff has alleged she was subjected to disparate treatment in her employment because of her membership in a class, *i.e.*, she is a Christian. Accordingly, there is no merit to Defendants' "class-of-one" argument on Plaintiff's Equal Protection claim.

Therefore, regard to Plaintiff's Equal Protection claim, Defendants' motion should be GRANTED as to Plaintiff's display of religious-themed materials in her classroom, but should be DENIED insofar as Plaintiff was counseled regarding overstepping boundaries as faculty moderator of the High School Bible Study Club.

3. Official Capacity Claims

Plaintiff has sued both Defendants Gould and Kane in their official capacities. Defendants argue such claims are redundant of the claims against the School District and, as such, should be dismissed. Defendants' Memorandum at 22-23. In opposition, Plaintiff maintains that because public entities have certain immunities from liability that are not available when the responsible public officials are sued in their official capacities, it is common to name as defendants to civil rights actions both the entity and the responsible officials in their official capacities. Plaintiff's Response at 23-24. In further support of dismissal, Defendants point out that Plaintiff has failed to specify any such immunity on which Plaintiff relies in support of her claims against Gould and Kane in their official capacities. Defendants' Reply at 8-9. In further

opposition, Plaintiff agrees that any claim against Kane would be redundant as against the School District, and asserts that Gould was sued only in his official capacity because he is listed on the Counseling Letter as School Board President, and it is not clear to Plaintiff at this time whether any liability for the alleged constitutional violations can be asserted against the School Board. Plaintiff's Sur-Reply at 9. Plaintiff states that if Defendants will stipulate that the School District is the only entity responsible for the speech restrictions and, thus, the alleged constitutional violations, Plaintiff will discontinue the action as against Gould, and further maintains that changing the caption to exclude the action as against Kane in his official capacity will not substantively affect the litigation of this matter. *Id*. at 9-10.

"A claim against a government official in his official capacity is merely another way of asserting a claim against the governmental entity that employs the official." *Beckwith v. Erie County Water Authority*, 413 F.Supp.2d 214, 224-25 (W.D.N.Y. 2006) (citing *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 690 n. 55 (1978)). Claims against public officials sued only in their official capacity are routinely dismissed, especially where no allegations against them are made in the Complaint. *See Downing v. West Haven Board of Ed.*, 162 F.Supp.2d 19, 24 & n. 4 (D.Conn. 2001) (granting summary judgment on all claims in favor of defendants sued only in their official capacity in the absence of any allegations or evidence against them). Nevertheless, where Eleventh Amendment Immunity is asserted as a defense, or injunctive relief is sought, claims against government officials sued in their official capacity can proceed. *Ex*

Parte Young, 209 U.S. 123 (1908) (holding prospective injunctive relief provides an exception to Eleventh Amendment immunity); *see Peck v. Baldwinsville Cent. School, Dist.*, 351 Fed. Appx. 477, 479 (2d Cir. Oct. 26, 2009) (recognizing after dismissal of various claims, claim for injunctive relief remained pending against defendants sued in their official capacity, some of whom had retired, such that officials who replaced the retired officials were automatically substituted as parties in their official capacities).

Based on the absence of any allegations in the Complaint against Defendant Gould, Defendants' motion to dismiss the claims against Gould in his official capacity should be GRANTED. *Downing*, 162 F.Supp.2d at 24 & n. 4. As for the claims against Defendant Kane in his official capacity, Defendants maintain they are not asserting any immunity on which Plaintiff relies in support of her official capacity claims. Defendants' Reply at 8-9. Insofar as Defendants have yet to file an answer, choosing instead to move to dismiss the Complaint in its entirety for failing to state a claim, Defendants' argument is premature on this point. Moreover, Plaintiff seeks injunctive relief for each of her claims, Complaint ¶¶ 2, 49, 54, 58, an issue unaddressed by Defendants, which relief can be brought against Kane in his official capacity. *Peck*, 351 Fed. Appx. at 479. Accordingly, Defendants' motion to dismiss the Complaint as against Kane in his official capacity should be DENIED.

4. Qualified Immunity

Defendant Kane asserts he is qualifiedly immune from suit on Plaintiff's claims. Defendants' Memorandum at 23-25. Plaintiff argues in opposition that qualified immunity provides no protection against claims for declaratory and injunctive relief, nor when a defendant's conduct violates a clearly established statutory or constitutional right of which a reasonable person should have known. Plaintiff's Response at 24-25. In further support of qualified immunity, Defendants assert Plaintiff overlooks the fact that insofar as Kane is sued in his individual capacity, injunctive relief is not available against him, and that Plaintiff is unable to refute the caselaw Defendants reference to establish that Kane did not violate any clearly established constitutional right of Plaintiff. Defendants' Reply at 9-10. In further opposition, Plaintiff reiterate that qualified immunity does not protect Kane against claims for equitable relief insofar as Kane is sued in his individual capacity. Plaintiff's Sur-Reply at 10.

"A government official is entitled to qualified immunity from suit for actions taken as a government official if (1) the conduct attributed to the official is not prohibited by federal law, constitutional or otherwise; (2) the plaintiff's right not to be subjected to such conduct by the official was not clearly established at the time of the conduct; or (3) the official's action was objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken." *Cuoco v. Moritsugu*, 222 F.3d 99, 109 (2d Cir. 2000). Whether a right was clearly established at the time of the challenged conduct depends on settled law, as

articulated by the Supreme Court or the Second Circuit. *Powell v. Schriver*, 175 F.3d 107, 113 (2d Cir. 1999) (considering "[i]n determining whether a particular legal principle was 'clearly established' for purposes of qualified immunity . . . 'whether the decisional law of the Supreme Court and the applicable circuit courts supports its existence . . . .'" (quoting *Horne v. Coughlin*, 155 F.3d 26, 29 (2d Cir. 1988))).

Here, with regard to Plaintiff's First Amendment free speech and establishment clause claims, the Second Circuit has stated "[t]he decision governmental agencies make in determining when they are at risk of Establishment Clause violations are difficult and, in dealing with their employees, they cannot be expected to resolve so precisely the inevitable tensions between the Establishment Clause and the Free Exercise Clause . . . ." *Marchi*, 173 F.3d at 476. Significantly, in *Marchi*, the Second Circuit recognized that a municipal entity's desire to avoid an Establishment Clause violation permits conduct restricting speech that may ultimately be determined to violate the First Amendment. *Marchi*, 173 F.3d at 476. Furthermore, the 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. Nevertheless, with regard to

Plaintiff's Equal Protection Claim based on selective enforcement, Defendant Kane is not entitled to qualified immunity because Plaintiff's constitutional rights on that issue were clearly established when Kane wrote the Counseling Letter. *See Harlane Associates*, 273 F.3d at 499.

Accordingly, Defendants' motion, insofar as it seeks qualified immunity for Defendant Kane should be GRANTED as to the First Amendment Claims, and the Equal Protection Claim pertaining to Plaintiff's display of religious-themed materials in her classroom, but should be DENIED as to Plaintiff's Equal Protection Claim based on alleged selective enforcement.

CONCLUSION

Based on the foregoing, Defendants' motion (Doc. No. 8), should be GRANTED in part and DENIED in part.

Respectfully submitted,

/s/ *Leslie G. Foschio*

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: June 24, 2014
Buffalo, New York

ORDERED that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this Report and Recommendation in accordance with the above statute, Rules 72(b), 6(a) and 6(d) of the Federal Rules of Civil Procedure and Local Rule 72.3.

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to the attorneys for the Plaintiff and the Defendants.

SO ORDERED.

/s/ *Leslie G. Foschio*

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: June 24, 2014
Buffalo, New York