UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOELLE SILVER,

Plaintiff,

Case No. 1:13-cv-00031

v.

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

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiff Joelle Silver ("Plaintiff") is a Christian. She is also a science teacher in Defendant Cheektowaga Central School District ("School District"). Plaintiff does not cease being a Christian nor does she shed her constitutional rights upon accepting employment with the government.

While a public school district retains significant authority over the curriculum that is taught by its teachers,[1] this authority does not extend to a teacher's personal, non-curricular speech. Indeed, contrary to Defendants' position, there are limitations on the power of a school district over its employees' speech—and one significant limitation is the Constitution. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 511 (1969) (acknowledging that public school teachers have constitutional rights in the "schoolhouse" and noting that "state-operated schools may not be enclaves of totalitarianism").

The cases principally relied upon by Defendants suggest that the law in general does not favor the constitutional rights of public school teachers. However, none of these cases involves facts as egregious as those presented here. In each case, the government sought to regulate the *curricular/instructional* speech of its teachers.[2] In contrast, Defendants have restricted

[1] As evidenced by Plaintiff's complaint and as discussed further below, Plaintiff is not challenging Defendants' restrictions on her speech that relates to curricular matters (*i.e.*, limitations on guest speakers or other aspects of her science "instructional program").

[2] *See Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 472 (2d Cir. 1999) (upholding a restriction that required the teacher "to refrain from using religion as part of his instructional program"); *Lee v. York Cnty. Sch. Divs.*, 484 F.3d 687 (4th Cir. 2007) (upholding a restriction on a teacher's speech that was curriculum related); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (upholding a restriction that prohibited an elementary school teacher from "teaching religion" through the "use" of his Bible and other religious materials in the classroom); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (upholding a restriction that prohibited a university teacher from interjecting his religious beliefs during instructional time); *Downing v. W. Haven Bd. of Educ.*, 162 F. Supp. 2d 19 (D. Conn. 2001) (upholding a restriction that prohibited a teacher from wearing a "Jesus" t-shirt, which she wore during classroom instruction

Plaintiff's personal, non-curricular speech and have effectively ordered her to cease being a Christian while she is on school property. And while it may be difficult to discern with precision the line between a permissible and an impermissible restriction on the speech rights of public school teachers, Defendants' actions clearly crossed that line.

STANDARD OF REVIEW

In reviewing a Rule 12(b)(6) motion for failure to state a claim, the court must accept the well-pled allegations in the Complaint as true and construe each of them in the light most favorable to Plaintiff. *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 108 (2d Cir. 2010) ("accepting all factual claims in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor" when reviewing a motion to dismiss). To survive the motion, the Complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To meet this standard, Plaintiff must plead "factual content that allows the court to draw the reasonable inference that [Defendants are] liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In essence, "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Plaintiff's Complaint satisfies this standard.[3]

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time); *cf. Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011) (upholding a restriction that prohibited a teacher from displaying patriotic banners based on the conclusion that the banners were government speech).

[3] In support of its motion, Defendants submitted a copy of the "counseling letter," photographs of the displays discussed in the letter, various policies referenced in the letter, and a copy of the letter from the Freedom From Religion Foundation. (Defs.' Mem., Exs. A, B, C [Doc. Nos. 8-3, 8-4, 8-5]). These documents are fairly embraced by and referenced in the Complaint, and so too are the photographs of the very same displays filed by Plaintiff in support of this opposition. (*See* Silver Decl., Exs. A-D, at Ex. 1). Consequently, the court may properly consider these documents when ruling on Defendants' motion. *See Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (acknowledging that "[d]ocuments that are attached to the complaint or incorporated

STATEMENT OF FACTS

I. The Parties.

Plaintiff is a Christian. Her Christian faith defines who she is as a person, and it guides all aspects of her life, both public and private. Plaintiff does not cease being a Christian because she is employed by the School District. Plaintiff has taught science classes in the School District for seven years. She currently teaches in the High School. (Compl. at ¶¶ 6, 13-15 [Doc. No. 1]; *see also* Silver Decl. at ¶ 2, Ex. A at Ex. 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. The School District has a right to sue and be sued. (Compl. at ¶ 7).

At all relevant times, Defendant Brian J. Gould was the President of the Board of Education for the School District. The Board of Education is the governing body of the School District and is responsible for creating, adopting, and implementing its policies, practices, and customs, including those challenged in this case. (Compl. at ¶ 8).

At all relevant times, Defendant Dennis Kane was the Superintendent of Schools for the School District. Defendant Kane is responsible for creating, adopting, and implementing School District policies, practices, and customs, including those challenged in this case. (Compl. at ¶ 9).

II. 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 their personality,

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in it by reference are deemed part of the pleading and may be considered" when ruling on a Rule 12(b)(6) motion).

opinions, and values, as well as personal, non-curricular messages relating to matters of political, social, or other similar concerns. (Compl. at ¶ 16).

For example, pursuant to this policy, practice, and custom, the High School social worker displays inside and outside of her office 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."[4] The social worker is also permitted to post on School District property the following: (1) 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; (2) a Gay, Lesbian and Straight Education Network (GLSEN) "Day of Silence" decal; (3) a rainbow "Celebrate Diversity" bumper sticker; and (4) a decal with the "equal" symbol of the Human Rights Campaign, a gay-rights activist organization, among other similar displays. Additionally, the social worker has been permitted to display and distribute pamphlets in her office that promote gay rights. (Compl. at ¶ 17).

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

On June 22, 2012, Plaintiff received a "counseling letter" from Defendants that was signed by Defendant Kane.[5] The "counseling letter" was made a permanent part of Plaintiff's employment file. (Compl. at ¶ 20).

In the "counseling letter," Defendants directed Plaintiff to remove all items, including personal, non-curricula items, of a religious nature from her classroom; it directed Plaintiff to

[4] The social worker is the faculty advisor for the Gay-Straight Alliance (GSA) student club. The creation of GSA student clubs is a national project of GLSEN. (Compl. at ¶ 19).

[5] The letter was printed on School District letterhead, listing Defendant Kane as "Superintendent of Schools" and Defendant Gould as "President" of the "Board of Education." (Defs.' Ex. A [Doc. No. 8-3]).

censor her personal, non-curricula speech so as not to express anything religious in nature while she was on School District property; and it pressured Plaintiff into terminating her service as the faculty advisor for the student Bible Study Club, which was formed pursuant to the Equal Access Act. Defendants' "counseling letter" essentially cleansed Plaintiff's classroom, her speech, and her actions of anything religious. (Compl. at ¶¶ 21, 22).

Defendants' "counseling letter" stated the following: "Please be advised that your failure to follow any of the above directions will be considered insubordination, which could lead to serious disciplinary consequences, including the termination of your employment." The emphasis was in the original. (Compl. at ¶ 23).

Defendants' "counseling letter" directed Plaintiff to remove four small posters with the following inspirational quotes from Psalms: "Wash away all my iniquity and cleanse me from my sin. . . . Wash me and I will be whiter than snow."; "The Lord is my rock, and my fortress, and my deliverer; my God, my strength, and whom I will trust."; "The heavens declare the glory of God; the skies proclaim the work of his hands."; "Let them praise the name of the Lord, for His name alone is exalted, His splendor is above the earth and the heavens." (Compl. at ¶ 24).

Defendants' "counseling letter" directed Plaintiff to remove a small poster 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." (Compl. at ¶¶ 25; Silver Decl. at ¶ 3, Ex. B at Ex. 1).

Defendants' "counseling letter" directed Plaintiff to remove a drawing "depicting three crosses on a hill" that Defendants concluded was "an obvious reference to the crucifixion of Jesus Christ at Calvary, in Jerusalem."[6] (Compl. at ¶ 26; Silver Decl. at ¶ 3, Ex. B at Ex. 1).

[6] This hand-drawn picture does not contain a caption or any other words describing what it

Defendants' "counseling letter" directed Plaintiff to remove a posted quote from President Ronald Reagan which states: "Without God there is no virtue because there is no prompting of the conscience . . . without God there is a coarsening of the society; without God democracy will not and cannot long endure . . . If ever we forget that we are One Nation Under God, then we will be a Nation gone under." (Compl. at ¶ 27; Silver Decl. at ¶ 4, Ex. C at Ex. 1).

Defendants' "counseling letter" censored Plaintiff's personal, non-curricula speech because it was religious and expressed a religious viewpoint. Defendants did not require other teachers, faculty, or administrators to remove personal, non-curricula items from their classrooms or offices nor did Defendants censor the personal, non-religious speech of other teachers, faculty, or administrators in a manner similar to how Defendants have censored Plaintiff's speech. (Compl. at ¶ 28).

When Plaintiff received Defendants' "counseling letter," she was the faculty advisor for the High School's student Bible Study Club, a student club that was formed pursuant to the Equal Access Act. (Compl. at ¶ 29).

Defendants' "counseling letter" directed Plaintiff to remove from her classroom the Bible Study Club's "Prayer Request" box that was displayed by the student members of the club.[7] 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

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depicts. (*See* Silver Decl. at ¶ 3, Ex. B, at Ex. 1).

[7] The Equal Access Act not only prohibits a public school district from denying recognition of a student club because it is religious, *see* 20 U.S.C. § 4071(a) (2000), it also 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]he 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, it is clear that Defendants provide very broad access to support the activities of the GSA (Compl. at ¶¶ 39, 40), but do not accord similar access to the Bible Club, thereby further demonstrating Defendants' religious hostility.

midst. Matthew 18:20"; "And whatever you ask in prayer, you will receive, if you have faith. Matthew 21:22"; "Whatever you ask in my name, this I will do, that the father may be glorified in the son. If you ask me anything in my name, I will do it. John 14:13-14"; and "We have to pray with our eyes on God, not on the difficulties. Oswald Chambers." (Compl. at ¶ 30).

Defendants' "counseling letter" directed Plaintiff to remove small "sticky notes" that contained inspirational Bible quotes and religious messages, including the following:

- "I will remain confident of this: I will see the goodness of the Lord in the land of the living. Wait for the Lord; be strong and take heart and wait for the Lord!" Psalm 27: 13-14.
- "For the company of the godless is barren, and fire consumes the tents of the corrupt. They conceive mischief and bring forth iniquity, and their mind prepares deception." Job 15:34-34.
- "So let us seize and hold fast and retain without wavering the hope we cherish and confess, and our acknowledgement of it, for He who promised it is reliable (sure) and faithful to His word." Hebrews 10:23.
- "Lord, when we are wrong make us willing to change, and when we are right make us easy to live with." (quoting Scottish Clergyman, Peter Marshall).

(Compl. at ¶ 31; Silver Decl. at ¶ 5, Ex. D at Ex. 1).

These small "sticky notes" are personal, non-curricular items that Plaintiff discreetly displayed on her desk. (*See* Silver Decl. at ¶ 5, Ex. D at Ex. 1). Pursuant to School District policy, practice, and custom, Defendants permit other teachers, faculty, and administrators of the School District to openly display personal, non-curricular messages and items of a personal nature on their desks, including non-religious inspirational quotes. Defendants' restriction on Plaintiff's inspirational speech was viewpoint based. (Compl. at ¶ 32).

Defendants' "counseling letter" directed Plaintiff to remove a "humorous poster" depicting an antique telephone and containing the following script: "It's for you . . . GOOD MORNING, THIS IS GOD . . . I WILL BE HANDLING ALL YOUR PROBLEMS TODAY. I

WILL NOT NEED YOUR HELP, SO HAVE A GOOD DAY." (Compl. at ¶ 33; *see also* Silver Decl. at ¶ 3, Ex. B at Ex. 1).

Defendants' "counseling letter" stated, "I am therefore directing you to immediately remove all of the afore-described posters, notes, artwork, prayer box, etc., so that anyone visiting or attending your class in the future will not see any religious messages or content attached to or otherwise placed on public property of the District." (Compl. at ¶ 34).

Defendants' "counseling letter" stated, "If you need to be able to occasionally glance at inspirational Bible verses between classes during the course of the day, I suggest that you keep such material in a discreet folder that only you will have access to. You may keep such a folder in a drawer of your desk, so long as you take precautions not to share it or disclose its content to your students or their parents or guardians." (emphasis added). (Compl. at ¶ 35).

Defendants' "counseling letter" stated, "Except for wearing religious jewelry, such as a cross, I am also directing you to refrain from all other forms of communication with students during the school day (whether verbal, email, texting, written, etc.) that would conflict with your duty to show complete neutrality toward religion and to refrain from promoting religion or entangling yourself in religious matters." (emphasis added). (Compl. at ¶ 36).

Defendants' "counseling letter" referenced School District Policy 8271 and stated, "[Y]ou may not use District projectors, smart boards, copiers, printers, computers, email program, etc., for communicating or relaying any religious messages and materials that are intended or could be perceived to be proselytizing." However, Defendants do not prohibit other School District teachers, faculty, or administrators from using "District projectors, smart boards, copiers, printers, computers, email program, etc., for communicating or relaying" non-religious, non-curricular messages, including non-religious viewpoints on non-curricular subject matter.

Consequently, Policy 8271, as applied to Plaintiff's speech, is a viewpoint-based restriction. (Compl. at ¶¶ 37, 38).

Defendants' "counseling letter" stated, "I am also concerned that you are not up to the task of monitoring the High School student's Bible Study Club, in compliance with District Policy and Regulation," referencing Policy 7410 and Regulation 7410R.1 and 7410R.2. The "counseling letter" continued, "Consequently, if you choose to continue monitoring the Bible Study Club next school year, you must carefully re-examine Policy 7410 and Regulation 74l0R.l and 7410R.2, so that you can better protect that club from being disciplined and possibly banned. Under no circumstances should you participate in the club's meetings or activities. Likewise, under no circumstances should you permit any club activities that could be interpreted as being promoted or sponsored by yourself, or the larger District for which you work." However, Defendants permit the GSA faculty advisor, who is also the faculty advisor for the "Challenge Club," to promote the annual "Day of Silence," which is a national event sponsored by GLSEN, as well as other activities of the GSA that promote gay rights. During the "Day of Silence," students wear signs during the school day and they do not talk for the entire day. In fact, Defendants permit the student participants in the "Day of Silence" to remain silent during actual class time without suffering any adverse consequences for failing to participate in class or answer questions from their teachers. Consequently, Defendants allow other School District teachers, faculty, and administrators to "permit . . . club activities that could be interpreted as being promoted or sponsored by" a teacher, faculty member, or administrator, "or the larger District for which [they] work." Defendants' restriction on Plaintiff's and the Bible Study Club's expressive activities is viewpoint-based. (Compl. at ¶¶ 39, 40).

None of Plaintiff's expressive activities have caused, nor would they cause, a material and substantial disruption in the High School or the School District in general. (Compl. at ¶ 41).

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

Defendants' restrictions are overtly hostile toward religion, and Defendants' actions convey an impermissible message of disapproval of and hostility toward religion. As a result, Defendants' actions send a clear message to Plaintiff that she is an outsider, not a full member of the political and school community because she is a Christian. (Compl. at ¶ 43).

Defendants' restrictions have had a chilling effect on Plaintiff's speech. As a result of Defendants' restrictions, Plaintiff is unable to discuss her faith or discuss other subject matter from her Christian point of view while on School District property. Indeed, Defendants' draconian restrictions require Plaintiff to keep her faith hidden at all times. (Compl. at ¶ 44).

ARGUMENT

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

It cannot be gainsaid that Plaintiff does not surrender her constitutional rights upon accepting employment with the School District. *See Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) ("It is well settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.") (internal quotations and citation omitted); *Connick v. Myers*, 461 U.S. 138, 142 (1983) (same); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) ("[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.").

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

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

A. First Amendment Rights Are Available to Plaintiff.

In a public school environment, "First Amendment rights . . . are available to teachers and students." *Tinker*, 393 U.S. at 506; *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("In *Tinker*, this Court made clear that 'First Amendment rights applied in light of the special characteristics of the school environment' are available to teachers and students."); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 44 (1983) (stating that "[t]he First Amendment's guarantee of free speech applies . . . within the school"). And Plaintiff's personal speech, "sticky notes," emails, and posters constitute protected speech.[8] *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

[8] *Garcetti v. Ceballos*, 547 U.S. 410 (2006), does not apply here. In *Garcetti*, the Court held that when a public employee makes statements *pursuant to* his official duties, the First Amendment does not prohibit managerial discipline for the speech. The Court, however, rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions," *id*. at 424-25, as Defendants seek to do here. In *Garcetti*, the employee was fired for statements he made pursuant to his official duties as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending criminal case—*a responsibility he was employed to fulfill.* Here, Plaintiff is teaching the required science curriculum and is not challenging Defendants' ability to regulate what she teaches. However, Defendants' authority over the curriculum does not permit them to punish Plaintiff's personal, non-curricular speech.

expression."); *see also Hill v. Colo.*, 530 U.S. 703, 715 (2000) ("[S]ign displays . . . are protected by the First Amendment.").

Consequently, there is no question that Defendants' restrictions operate as restraints on Plaintiff's First Amendment rights. *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 475 (2d Cir. 1999) ("The directive is unquestionably a restraint on [the plaintiff teacher's] First Amendment rights."); *Perry Educ. Ass'n*, 460 U.S. at 44 ("There is no question that constitutional interests are implicated by denying [plaintiffs] use of the interschool mail system."). And "the threat of dismissal from public employment is . . . a potent means of inhibiting [Plaintiff's] speech." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

Therefore, the primary question presented by this case is whether Defendants' broad, viewpoint-based restrictions on Plaintiff's private, non-curricular speech—speech which includes the spoken word and messages expressed on "sticky notes," in emails, and on posters—are constitutional in light of the First Amendment interests at stake. As the Supreme Court stated in *Widmar v. Vincent*, 454 U.S. 263, 276 (1981), "[A]chieving <u>greater</u> separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution . . . <u>is limited by</u> . . . the Free Speech Clause . . . ." (emphasis added).

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

The Tenth Circuit in *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), set forth a workable analysis to apply to Plaintiff's free speech claims. In *Roberts*, the court began its free speech "discussion by noting that 'neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* at 1056 (quoting *Tinker*, 393 U.S. at 506). The court observed that it was "faced with the tension between" the public school teacher's "right of expression and the need of public school officials to censor classroom

materials for the sole purpose of eliminating a possible constitutional violation." *Id.* As a result, the court framed its analysis as follows: "if the speech involved is not fairly considered part of the school curriculum or school-sponsored activities, then it may only be regulated if it would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Id.* at 1057 (quoting *Tinker*, 393 U.S. at 509). The court further noted that "[b]ecause the school district asserts a constitutional justification [*i.e.*, the books at issue "were removed to avoid an Establishment Clause violation rather than for educational or pedagogical reasons," *which is the same as Defendants' justification for the restrictions at issue here*], a claim that this body is well-equipped to evaluate, *we do not accord* [*the school district*] *the same deference as in other cases involving issues that school officials are uniquely qualified to handle*." *Id.* (emphasis added). In concluding that the school district's Establishment Clause concern justified the speech restriction, the court focused "on the manner of *use*" to which the offending materials were put.[9] *Id.* at 1055. And that "use" specifically included using the materials during instructional time with elementary school students, *see id.* at 1049 ("In order to set an example for the students, Mr. Roberts silently read [his Bible] during the silent reading time."), a factual predicate that does not exist in this case.[10]

Lee v. York Cnty. Sch. Divs., 484 F.3d 687 (4th Cir. 2007), also supports this approach. In *Lee*, the Fourth Circuit applied the balancing test set forth in *Pickering v. Bd. of Educ.*, 391

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

[10] As noted previously, the facts of this case distinguish it from the cases relied upon by Defendants in which the government sought to regulate a teacher's speech that was related to the curriculum or an instructional program. (*See supra*, n. 2). Here, Plaintiff is not challenging any restrictions related to the curriculum she teaches. Rather, she is challenging Defendants' restraints on her personal, non-curricular speech.

U.S. 563 (1968), in light of circuit precedent because the speech at issue (postings on a bulletin board that the teacher used as part of his teaching methodology and to instruct and impart knowledge to his students) was curricular. *See Lee*, 484 F.3d at 700 (concluding that the removed items were curricular because they "constitute school-sponsored speech bearing the imprimatur of the school, and they were designed to impart particular knowledge to the students"). However, the court noted that if the teacher's speech was not curriculum related—that is, if the speech was personal and non-curricular as in this case—then school officials could not restrict the speech unless it "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school." *Lee*, 484 F.3d at 694, n.10 (quoting *Tinker*, 393 U.S. at 509).

This approach also comports with Second Circuit precedent. In *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469 (2d Cir. 1999), for example, the challenged speech restriction required the teacher "to refrain from using religion as part of his instructional program."[11] *Id.* at 472; *see also id.* (quoting the directive at issue, which states, "you are to cease and desist from using any references to religion *in the delivery of your instructional program* unless it is a required element of a course of instruction for your students") (emphasis added). Although it described the issue regarding the "thank you" letter the teacher wrote to a parent as presenting a "closer question," the court upheld the restriction because the letter "sufficiently intruded religious content into a curricular matter." *Id.* at 477. Therefore, because the speech at issue involved curriculum and thus raised concerns that the *school district* was

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

engaging in religious indoctrination, the court upheld the restriction on Establishment Clause grounds. *Id.*

In the present case, Plaintiff did not use the posters or "sticky notes" as part of any instructional program. Thus, there is *no* legitimate basis for concluding that the small, innocuous posters and discreetly displayed "sticky notes" with inspirational quotes constitute government endorsed religious indoctrination. It is not even a close call. Moreover, Defendants' restrictions on Plaintiff's personal communications, including the restriction on her use of personal as well as School District email,[12] are not limited to or tied in any way to the curriculum or any instructional program. Additionally, Plaintiff's personal, non-curricular speech did not disrupt the classroom nor materially interfere with the basic educational mission of the School District. *See Tinker*, 393 U.S. at 513 (holding that the "special characteristics of the school environment" permit restrictions on speech only so long as the speech "materially and substantially disrupt[s] the work and discipline of the school"). And this is not a legal conclusion—it is a fact that must be considered in Plaintiff's favor at this stage of the litigation.

Indeed, Defendants' viewpoint discrimination is an egregious form of content discrimination that is prohibited by the First Amendment in all forums.[13] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also R.A.V. v. St. Paul*, 505 U.S.

[12] Defendants have not only restricted Plaintiff's personal email communications, (*see* Compl. at ¶ 36 [restricting "all other forms of communication with students during the school day (whether verbal, email, texting, written, etc.)"], but they have also placed restraints on Plaintiff's use of the School District's email program, (Compl. at ¶¶ 37, 38).

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

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 Defendants' restrictions prohibit Plaintiff from expressing her Christian viewpoint on subject matter that is permissible in the forum at issue,[14] the restriction cannot survive constitutional 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").

In the final analysis, Defendants' restrictions infringed Plaintiff's right to freedom of speech, and they were not justified by the Establishment Clause. Indeed, Defendants' actions constitute "acts of intolerance, lack of accommodation and hostility toward [Plaintiff's] Christian religion," *Marchi*, 173 F.3d at 1059 (dissent), in violation of the Free Speech Clause *and* the Establishment Clause (*see* sec. III, *infra*) of the First Amendment.

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

In 1952, the Supreme Court acknowledged the following historical reality: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life. Examples include Executive Orders recognizing religiously grounded national holidays, such as

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

Christmas and Thanksgiving, Congress directing the President to proclaim a National Day of Prayer each year, and the printing on our currency of the national motto, "In God We Trust."

This longstanding tradition is reflected in the quote by President Reagan that Plaintiff displayed in her classroom:[15]

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

(Compl. at ¶ 27; Silver Decl. at ¶ 4, Ex. C at Ex. 1).

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

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

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

Recognition of the role of God in our Nation's history is consistently reflected in Supreme Court decisions. The Court has acknowledged, for example, that religion has been closely identified with our history and government, and that the history of man is inseparable from the history of religion. As Justice O'Connor observed, "It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35-36 (2004) (O'Connor, J., concurring).

Consequently, efforts by organizations such as the Freedom From Religion Foundation to suppress this recognition and historical acknowledgment are the antithesis of the value of

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

religious tolerance that underlies the Constitution. For example, in *ACLU v. Mercer Cnty.,* 432 F.3d 624 (6th Cir. 2005), a case upholding the public display of the Ten Commandments, the court stated, "Our concern is that of the reasonable person. And the ACLU, an organization whose mission is 'to ensure that . . . the government [is kept] out of the religion business,' does not embody the reasonable person." *Id.* at 638 (quoting ACLU website). The very same is true of the Freedom From Religion Foundation. (*See* www.ffrf.org).

The Sixth Circuit stated further:

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

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

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

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

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

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

A. The Establishment Clause Prohibits Hostility toward Religion.

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

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

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

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

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

1. Purpose and Effect.

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

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

In this case, Defendants' "purpose" for banning Plaintiff's *personal, non-curricular speech* was to censor its religious content and viewpoint. And Defendants did so to appease the

radically anti-religious Freedom From Religion Foundation. In short, Defendants' purpose is not compelled by the Establishment Clause. Rather, it is prohibited by it.

The "effect" of Defendants' draconian restrictions, regardless of Defendants' alleged "purpose" for them, conveys an unmistakable message of disapproval of religion (and the Christian religion in particular) in violation of the Establishment Clause. *See Lynch*, 465 U.S. at 690 (O'Connor J., concurring) ("The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."). As the Supreme Court explained, when evaluating the effect of government action under the Establishment Clause, courts must ascertain whether the challenged action is "*sufficiently likely to be perceived*" as a disapproval of religion. *Cnty. of Allegheny*, 492 U.S. at 597 (citations omitted) (emphasis added); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307, n.21 (2000) ("[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.").

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

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

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

Indeed, it is absurd to suggest, for example, that the display of a small, personal poster that quotes Ronald Reagan mentioning God or a poster that states, "Be on guard. Stand true to what you believe. Be courageous. Be strong. And everything you do must be done in love" (Compl. at ¶ 25) violate the Establishment Clause. Similarly, no *reasonable* observer would conclude that the small, hand-written "sticky notes" containing inspirational Bible verses that were discretely displayed on the backside of Plaintiff's desk violate the Establishment Clause.[16]

In the final analysis, Defendants' religious cleansing was thorough, complete, and offensive. As noted, in their order to remove the small "sticky notes," Defendants added further insult by stating that if Plaintiff needs "to occasionally glance at inspirational Bible verses between classes during the course of the day" she should "keep such material in a discreet folder that only [she] will have access to" and only "so long as [she took] precautions not to share it or disclose its content to [her] students or their parents or guardians." (Compl. at ¶ 35). Consequently, Defendants forced Plaintiff's Christian faith into a folder to be kept hidden in her desk, treating the Bible verses as if they were pornography.

2. Excessive Entanglement.

The third prong of the *Lemon* test asks whether the restriction at issue excessively entangles government with religion. *Lemon*, 403 U.S. at 612-13. In *Widmar v. Vincent,* the Court explained: "[T]he University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.' Initially, the University would need to determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *Widmar,* 454 U.S. at 272, n.11 (internal quotations and

[16] It should not go unnoticed that even the Freedom From Religion Foundation did not complain about the Reagan quote or Plaintiff's personal "sticky notes." (*See* Defs.' Ex. C [Doc. No. 8-5]).

citations omitted). Accordingly, Defendants' attempt to exclude Plaintiff's Christian speech creates "excessive entanglement" in violation of the Establishment Clause.

IV. Defendants' Restrictions Violate the Equal Protection Clause.

The relevant principle of law was articulated in *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Mosley*, the Court struck down a city ordinance that prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. The Court stated, "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id*. at 96; *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980). Here, Defendants granted use of a forum for the personal, non-curricular speech of School District teachers and faculty. Having maintained this forum, Defendants violated Plaintiff's right to equal protection when they prohibited her personal, non-curricular speech based on the viewpoint of her message, while permitting other teachers and faculty to continue their speech in the same forum unfettered.

V. Naming Defendants in Their Official Capacities Identifies the Responsible Parties.

It is true that a claim against a government official in his or her official capacity is a claim against the governmental entity to which he or she represents. *See Kentucky v. Graham*, 473 U.S. 159 (1985); *see also Brandon v. Holt*, 469 U.S. 464, 471-72 (1985) (holding that "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents"). However, it is also true that public entities have certain immunities from liability that are not available when responsible officials are sued in their official capacities. *See, e.g., Ex Parte Young*, 209 U.S. 123 (1908) (holding that prospective injunctive relief provides an exception to Eleventh Amendment immunity). Consequently, it is common for civil rights

plaintiffs to sue the entity and to name responsible officials in their official capacities, as in this case. Accordingly, Plaintiff sued the School District (a municipal corporation), Defendant Gould in his official capacity as President of the Board of Education (the Board of Education), and Defendant Kane, individually and in his official capacity (the person who took official action by signing and issuing the "counseling letter" on behalf of the School District and the Board of Education). Consequently, there is no basis for dismissing any party at this stage of the litigation.

VI. Defendant Kane Does Not Enjoy Qualified Immunity.

As an initial matter, qualified immunity does not protect a defendant against claims for declaratory and injunctive relief, nor does it apply to claims against government entities, such as the School District.[17] *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct [or] in an action against a municipality"); *Adler v. Pataki*, 185 F.3d 35, 48 (2d Cir. 1999) ("Qualified immunity shields the defendants only from claims for monetary damages and does not bar actions for declaratory or injunctive relief."); *Cannon v. City & Cnty. of Denver*, 998 F.2d 867, 876 (10th Cir. 1993) (same); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) (same).

Moreover, government officials are protected from personal liability and thus enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is

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

to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted).

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

While Defendant Kline must tread carefully when navigating the constitutional minefield of the First Amendment, Supreme Court precedent clearly establishes Plaintiff's constitutional rights in the "schoolhouse," *Tinker*, 393 U.S. at 506, and it clearly establishes that government officials *must be neutral—and not hostile—toward religion*, *see, e.g., Rosenberger*, 515 U.S. at 839 (acknowledging that "[m]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers"). As discussed above, Defendant Kline's restrictions on Plaintiff's personal, non-curricular speech and his overt hostility toward Plaintiff's Christian faith violated clearly established law such that he does not enjoy qualified immunity.

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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