IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRAD EDWARD MATHEWSON, by and through his natural mother and next friend, MARION LYNN MATHEWSON Plaintiff, v. WEBB CITY R-VII SCHOOL DISTRICT; and STEPHEN P. GOLLHOFER, in his capacity as Principal of Webb City High School, Defendants.	CASE NO. _____

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

COMES NOW Plaintiff Brad Edward Mathewson, by and through his natural mother and next friend Marion Lynn Mathewson, and, in support of Plaintiff's Motion for Preliminary Injunction, states as follows:

FACTUAL BACKGROUND

Plaintiff Brad Edward Mathewson is a sixteen-year-old junior enrolled at Webb City High School in Webb City, Missouri. Plaintiff is gay. He occasionally wears clothing that expresses his political support for the rights of people of various sexual orientations.

On or about October 20, 2004, Plaintiff attended Webb City High School wearing a T-shirt that said "Gay-Straight Alliance" on the front. The words "Make a Difference," appeared on the back with three pairs of symbols (two male symbols (♂♂), two female symbols (♀♀), and a male and female (♂♀) symbol) and a pink triangle, a well-known symbol of the gay rights movement.

That morning, Plaintiff's homeroom teacher, Ms. Gray, told him that the T-shirt was inappropriate and sent Plaintiff to the office for disciplinary action. At Ms. Gray's direction, Plaintiff met with the assistant principal, Jeff Thornsberry, who told Plaintiff that the shirt was inappropriate, distracting, and offensive to other students. At no time did Plaintiff's T-shirt provoke any outburst or disruption from his fellow classmates. In fact, Plaintiff previously wore this same T-shirt at least six times without incident.

When Plaintiff questioned Thornsberry about why the T-shirt was considered inappropriate, distracting, and offensive to others, Thornsberry refused to explain his statements. When Plaintiff pointed out that other students' notebooks and backpacks bear negative messages about gay marriage, Thornsberry refused to reconsider, and claimed that the other students' expression was different. Thornsberry gave Plaintiff the option of changing his shirt or turning it inside out. Faced with a direct order from Webb City High School's administration, Plaintiff chose the latter option.

On the way to the bathroom to turn his shirt inside out, Plaintiff met a friend in the hallway. Plaintiff's friend is heterosexual. Plaintiff and his friend decided to switch shirts. Unlike Plaintiff's experience, Plaintiff's friend wore the allegedly inappropriate, distracting, and offensive shirt without incident. No teacher or administrator approached him about removing the shirt or turning it inside out.

A second incident occurred on or about October 27, 2004, when Plaintiff wore a T-shirt with a rainbow, a star, and the words, "I'm gay and I'm proud." Similarly, one of Plaintiff's friends wore a T-shirt that declared, "I love lesbians."

Thornsberry approached Plaintiff and demanded that he change shirts or turn the shirt inside out. Thornsberry also demanded that Plaintiff's friend change his shirt. Plaintiff refused

to change his shirt or hide its message. Upset, Plaintiff left school early to talk to his mother about the incident.

On October 28, 2004, Plaintiff and his mother met with Principal Stephen P. Gollhofer, Thornsberry, and Assistant Principal Randy Richardson to discuss their refusal to let Plaintiff wear his political T-shirts. At that meeting, the school administrators told Plaintiff and his mother that the school was trying to protect Plaintiff from other students who might be provoked to act out against Plaintiff because he is gay and publicly supports gay rights. Indeed, Defendant Gollhofer characterized Webb City High School as being in the middle of the "Bible Belt." Defendant Gollhofer warned Plaintiff that he was "flaunting" his homosexuality by wearing the T-shirts and that such conduct could provoke negative treatment from his classmates. The parties failed to reach a final resolution during this meeting.

On October 29, 2004, Plaintiff returned to school. During his homeroom period, Plaintiff and his friend were discussing the two incidents related to Plaintiff's political T-shirts. Ms. Gray, the homeroom teacher, told Plaintiff and his friend in a raised tone of voice not to discuss the issue of Plaintiff's T-shirts. Plaintiff and his friend complied with Ms. Gray's order. Although other students in the same homeroom were having discussions, none were asked to be silent.

After homeroom period, when all the other students had left the classroom, Plaintiff asked Ms. Gray why he was singled out for discipline because of what he was discussing. Ms. Gray refused to answer the question, and when Plaintiff pressed for an answer, Ms. Gray walked Plaintiff down to Defendant Gollhofer's office. After conferring privately with Ms. Gray and then listening to Plaintiff's side of the story, Defendant Gollhofer told Plaintiff that he needed to respect his teacher's in-class orders. Plaintiff pointed out that he stopped discussing the T-shirt

incidents just as Ms. Gray demanded. He also mentioned that he wanted to know why he was singled out because of the topic of his conversation. Plaintiff told Gollhofer that instead of responding, Ms. Gray got agitated and asked him if pressing the issue was worth a discipline referral. Defendant Gollhofer told Plaintiff that he needed to respect a teacher's refusal to discuss an issue. The conversation between Plaintiff and Defendant Gollhofer escalated as the topic of the T-shirt incidents was discussed again. Frustrated and angry, Plaintiff stated that the school administration was narrow-minded and said, "You people suck," an expression Defendant Gollhofer considered to be offensive. He chastised Plaintiff for using it and told him that he would be punished.

Defendant Gollhofer called Plaintiff's mother, Marion Mathewson, and asked that she come to the school to further discuss the situation. When Mrs. Mathewson told Defendant Gollhofer that she and Plaintiff were represented by counsel and that school officials should consult with her lawyers, Defendant Gollhofer refused to communicate with Plaintiff's counsel and told Mrs. Mathewson that Plaintiff would not be allowed back in school until she came to the school to discuss the situation without her lawyers. Mrs. Mathewson picked up Plaintiff from school that day and decided not discuss the situation with school officials without counsel present. Plaintiff was suspended from school for the rest of the day. The suspension notice did not specify any offense and simply read that Plaintiff was allowed back to school after a parent-teacher conference.

On November 2, 2004, Plaintiff, Mrs. Mathewson, and local counsel, William Fleischaker, met with Superintendent Ron Lankford and Defendant Gollhofer. The school officials would not allow Plaintiff back to class unless he refrained from wearing attire that expressed his political support for gay rights. Superintendent Lankford and Defendant Gollhofer

informed Plaintiff that violating this demand would result in further disciplinary action against him. Plaintiff agreed and returned to class after the meeting.

Toward the end of that same school day, Plaintiff saw a student wearing a T-shirt that stated "Adam and Eve, Not Adam and Steve," in an area of the school where school officials were present.

At all relevant times, the Webb City High School Statement of Philosophy was in effect. It states: "We realize the uniqueness of the individual . . . [i]t is important that the student be recognized for his or her own value as a human being[.]"[1] Specifically, the Webb City High School dress code requires that "[d]ress and appearance must not present health or safety hazards, be indecent, disruptive, distracting, or inappropriate for the classroom."[2]

LEGAL STANDARD FOR PRELIMINARY INJUNCTION

To obtain a temporary restraining order or a preliminary injunction in federal court, the movant has the burden of establishing: (1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of an injunction is in the public interest."[3] In evaluating a request for a preliminary injunction, no single factor is dispositive; rather, all four factors must be balanced to determine whether an injunction is appropriate.[4]

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1 *Statement of Philosophy*, *available at* http://www.wccards.k12.mo.us/highschool/studenthandbook/highschoolhandbook.pdf, at 2 [hereinafter "*Statement of Philosophy*"].

2 *Statement of Philosophy*, at 6. The dress code provides the following as a "guideline": "Attire must be worn in the manner for which it was designed and must be free of obscene or suggestive markings, advertisements of tobacco, alcoholic beverages, drugs, and/or other products deemed inappropriate by school officials." *Id*.

3 Entergy, Arkansas, Inc. v. Nebraska, 210 F.3d 887, 898 (8th Cir. 2000); Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 966 (8th Cir. 1999).

4 Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Schimmel, 128 F.3d 689, 692 (8th Cir. 1997).

ARGUMENT

The actions taken by Defendants against Brad Mathewson constitute viewpoint discrimination in violation of Plaintiff's fundamental First Amendment right to personal expression in the public school setting. Plaintiff seeks to vindicate his rights and remedy the wrongs done to him through this lawsuit.

Without the intervention of this Court, Plaintiff will continue to be prevented from exercising his constitutionally protected right to personal expression that was guaranteed to him and other American students by the United States Supreme Court's landmark decision in *Tinker v. Des Moines Independent Community School District*.[5] The Supreme Court has been crystal clear: just like the students in *Tinker*, Brad Mathewson is not required to "shed [his] constitutional rights to freedom of speech or expression at the schoolhouse gate."[6]

Defendants' selective enforcement and arbitrary application of school policy constitutes an egregious violation of Brad Mathewson's fundamental First Amendment right to personal expression. As such, Plaintiff asks this Court to enter a preliminary injunction ordering Defendants to cease interfering with Plaintiff's and other students' constitutionally protected right to express themselves through attire that reflects their political beliefs.

1. There is a substantial likelihood that Plaintiff will prevail on the merits of his case.

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech."[7] While the Supreme Court has recognized public school officials' authority to "prescribe and control [student] conduct," the

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5 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
6 *Id.* at 506.
7 U.S. CONST. amend. I.

protections of the First Amendment extend to students in the public schools.[8] Students may express their views freely, so long as their chosen mode of expression does not cause "material and substantial interference with schoolwork and discipline."[9] A school administrator's fear of disruption or interference must have a genuine basis in fact—"undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[10] Further, the censorship of a particular opinion is not constitutionally permissible in the public school setting.[11]

In *Tinker*, the Court overruled a public school's ban on students wearing black armbands to protest the Vietnam War. The Court held that despite the intense emotional controversy surrounding the war and students' dissent against it—a former student of the high school had been killed in the war—school authorities could not have reasonably anticipated that wearing black armbands in protest of the war would materially and substantially disrupt the operation of the school or interfere with the rights of others.[12] In fact, the Court emphasized that the students engaged in "silent, passive expression" that generated discussion, but did not provoke disorder or an interference with the school's work. While some students were unreceptive to the armbands and some "made hostile remarks" regarding the armbands, the Court noted that there were "no threats or acts of violence on school premises."[13] In the end, the Court found that the school officials' ban was an unconstitutional suppression of a particular opinion. "Students in school . . . may not be confined to the expression of those sentiments that are officially approved."[14]

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8 *Tinker*, 393 U.S. at 506, 507.
9 *Id*. at 511.
10 *Id*. at 508.
11 *Id*. at 511.
12 *Id*. at 514.
13 *Tinker*, 393 U.S. at 508.
14 *Id.* at 511.

Students using clothing as a "silent, passive" medium for personal expression is not new, nor is it controversial. Other Federal Courts have upheld the rights of students to express their political views by wearing attire that conveys a message that others might deem controversial or unpopular.[15]

Brad Mathewson's unconstitutional treatment by Defendants is *Tinker* 35 years later. Here, the school's restrictions on Plaintiff's expression were unequivocally opinion suppression and viewpoint discrimination—conduct the Supreme Court has deemed unconstitutional. Plaintiff's political T-shirts did not disrupt class work or other school activities, nor is there any evidence that the shirts intrude upon the rights of others "to be secure and to be let alone."[16] After all, Plaintiff wore the exact T-shirt several times without generating any school disruption or disturbance. Any controversy that has occurred as a result of the T-shirt is of the school officials' own making, not Brad Mathewson's or his classmates'.

In addition, other students at Webb City High School have been permitted, if not encouraged, to express their political and religious viewpoints. For example, a student has worn a T-shirt that states "God's Army Recruit," and bears a cross and a shield on the front without incident. Another student wore a T-shirt that declared "Adam and Eve, not Adam and Steve," without incident. Students frequently wear items with the logo "WWJD" (What Would Jesus Do?) without incident. In addition, students are occasionally asked to share their political viewpoints during class. In fact, during Brad Mathewson's American Government class, the teacher invited the students to participate in a discussion about the 2004 Presidential Election and

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15 *See, e.g.*, *Castorina v Madison County School Board*, 246 F. 3d 536 (6th Cir 2001) (T-shirt depicting Confederate flag); *Chambers v Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001) (sweatshirt emblazoned with message "Straight Pride"); *Barber v Dearborn Public Schools*, 286 F. Supp. 2d 847 (E.D. Mich. 2003) (T-shirt with picture of President Bush with caption "International Terrorist").

16 *Tinker*, 393 U.S. at 508.

how they would vote if they could. This discussion was held without interference or censorship from the school's administration.

Thus, there is no question that some, but not all, Webb City High School students are permitted to engage in constitutionally protected personal expression every day. However, Defendants have crossed the constitutional line by designating "appropriate" viewpoints while forbidding student dialogue regarding "non-conforming" viewpoints. Our Constitution and the Supreme Court simply do not permit this; the law in the United States is that students are permitted to express their point of view, no matter how controversial, no matter how unpopular, without pre-approval by school faculty or administration so long as the expression does not cause a disruption or disturbance.

It is especially noteworthy that Defendants have yet to offer any basis upon which the Court might find that school officials reasonably concluded that wearing T-shirts that express political support for gay rights would provoke disorder or an interference with the school's work. The only bases articulated by Defendants to Brad Mathewson and his mother for banning the T-shirts was to protect him from students who *may* act out against him. Principal Gollhofer characterized Webb City as being in the middle of the "Bible Belt" and stated that any expression of Brad Mathewson's sexual orientation could provoke negative treatment from his classmates. Like *Tinker*, the school administrators here were acting on an "undifferentiated fear or apprehension of disturbance."[17] The Court in *Tinker* expressly rejected avoidance of controversy as a basis to restrict student speech.[18]

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17 *Id.*

18 *Id*. at 509.

Allowing the school to use this excuse would be an endorsement of the heckler's veto, something the Supreme Court has ruled time and again the First Amendment does not allow.[19] Indeed, in *Tinker*, the Court expressly rejected the avoidance of controversy as a basis to restrict student speech, and that case was explicitly premised on the Court's prior decisions prohibiting a heckler's veto.[20] Defendants concern about *other* students' possible hostile reaction might be well-intentioned, but it does not justify violating Plaintiff's First Amendment right to personal expression.

Most notably, Plaintiff's choice of political apparel has had no negative effect on the educational mission of Webb City High School, nor will it adversely affect any student's rights. After all, the Webb City High School Statement of Philosophy proclaims that school officials "realize the uniqueness of the individual" and aim to celebrate students "for [their] own value as a human being[s]."[21]

Brad Mathewson is not asking school officials to agree with his views; he simply wants them to honor his and other students' constitutionally protected right to express their views freely and without incident. If Brad Mathewson's political T-shirts invite conversation, or even spark a

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19 *See United States v. Eichman*, 496 U.S. 310, 318 (1990) ("[A]ny suggestion that the government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment.").

20 *See Tinker*, 393 U.S. at 509 ("Any departure from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . .") (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)). *See also Boyd County High Sch. Gay Straight Alliance v. Bd. Of Educ. Of Boyd County, Ky.*, 258 F. Supp. 2d 667, 674-76, 688-91 (E.D. Ky. 2003) (applying heckler's veto concept in school context and ruling that public protests over presence of Gay Straight Alliance at high school, including sick-out by half of high school and extensive community opposition, could not justify shutting down students' expressive activity, which was not itself disruptive); *Fricke v. Lynch*, 491 F. Supp. 381, 385, 387 (D.R.I. 1980) (principal's concern about other students' possible violent response if a same-sex couple were permitted to attend the high school prom did not allow the couple's right to free expression to be infringed; "[t]o rule otherwise would completely subvert free speech in the school by granting other students a 'heckler's veto,' allowing them to decide through prohibited and violent methods what speech will be heard.").

21 *Statement of Philosophy* at 2.

heated dialogue, it is this very discourse that the Supreme Court envisioned and vigorously protected in *Tinker*. Other students are entitled to disagree with Plaintiff's message and express themselves accordingly in a non-disruptive manner. That is every student's right. The Supreme Court and Brad Mathewson recognize this point. Now it is time for the Webb City School District to do the same.

Plaintiff recognizes that Webb City High School has an important interest in ensuring the safety and discipline of its students and retains discretion to regulate student conduct to ensure that those goals are met. The school's interest in discipline, however, does not justify imposing a restraint on Brad Mathewson's expression absent evidence that his speech will cause, or did cause, a material disruption to school order. Defendants have provided no such justification to Plaintiff, and indeed there is none. Defendants' refusal to permit Plaintiff to express his political views in favor gay rights has nothing to do with discipline or safety and everything to do with the suppression of Plaintiff's point of view. Defendants' conduct violates the First Amendment, and this Court should enjoin it.

2. Plaintiff is suffering and will continue to suffer irreparable injury unless this Court issues an injunction.

Defendants have prohibited Plaintiff from expressing himself through clothing that reveals his political support for gay rights. If the Court does not enter a preliminary injunction, then Defendants will have successfully prevented Plaintiff from exercising his First Amendment right to freedom of speech and expression.[22] Plaintiff can establish an irreparable injury merely

[22] Plaintiff's choice of clothing is protected as "speech" and "expression": *Tinker*, 393 U.S. at 506 (holding that wearing an armband for purpose of expressing certain views is a type of symbolic act that is within the free speech clause of the First Amendment). "Symbolic acts constitute expression if the actor's intent to convey a particularized message is likely to be understood by those perceiving the message." *Doe v. Yunits*, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (holding that an inverted flag with a peace symbol attached to it conveys a message that others likely understood and constituted expressive speech) and *Chalifoux v.*

by demonstrating that his First Amendment rights have been violated.[23] Plaintiff's constitutional right to personal expression will continue to be infringed upon if he is not permitted to wear clothing that expresses his political support for gay rights. Such injury is serious and irreparable.

Unless this Court enters a preliminary injunction requiring Defendants to cease selectively enforcing school policy and arbitrarily prohibiting Plaintiff from wearing clothing that reveals his political beliefs, Plaintiff will be unable to exercise his constitutionally protected, fundamental right to free speech and expression. Preliminary relief is essential to safeguard Plaintiff's constitutional rights during the pendency of these proceedings.[24]

3. The threatened injury to Plaintiff vastly outweighs whatever damage the preliminary injunction might cause defendants.

Conversely, Defendants cannot show that the entry of a preliminary injunction by this Court will damage them in any way. There is no evidence that Plaintiff's choice of apparel has caused or will cause any disruption to the discipline and daily routine of Webb City High School. In fact, there are students at Webb City High School who express other political and religious messages everyday without incident. Defendants did not articulate a concern for discipline or safety until the second event, when Defendants demanded that Mathewson remove his T-shirt. Most importantly, there is no evidence that Plaintiff's choice of clothing has interfered with school discipline, has infringed upon any other students' rights, or has put him or any of his

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New Caney Independent School Dist., 976 F.Supp. 659 (S.D. Tex. 1998) (ruling that students wearing rosary beads as sign of religious belief constitutes protected speech because others likely understood the message).

[23] *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable harm."); *see also Beussink v. Woodland R-IV School Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) ("Irreparable harm is established any time a movant's First Amendment rights are violated.").

[24] *See McCormack v. Township of Clinton*, 872 F. Supp. 1320, 1327 (D.N.J. 1994) (noting that the "equities weigh exclusively in plaintiff's favor" in free speech case).

classmates in danger. A preliminary injunction in this case will not prevent Defendants from even-handedly enforcing school policies.

4. The preliminary injunction is not adverse to the public interest.

The injunctive relief sought by Plaintiff in this case is not adverse to the public interest. As noted above, Plaintiff's right to use clothing as a means of personal expression will not create a school safety and discipline problem. Defendants' refusal to permit students to express themselves as permitted by the First Amendment of the Constitution is contrary to the fundamental ideals that so many of our finest men and women have fought and died for. Defendants not only have offended Brad Mathewson; they have offended the Constitution of the United States.

It is clear that the Court's entry of the proposed preliminary injunction will further the unquestionable public interest in the dissemination and exposure to different ideas. As the Supreme Court has noted, "[t]he classroom is peculiarly the 'marketplace of ideas. The nation's future depends upon leaders trained through exposure to that robust exchange of ideas . . ."[25]

The Eastern District of Missouri has held that "the public's interest is best served by wide dissemination of ideas."[26] The *Beussink* court continued, writing:

> [I]t is provocative and challenging speech, like Beussink's, which is most in need of the protection of the First Amendment. . . . Speech within the school that substantially interferes with school discipline may be limited. *Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection*.[27]

[25] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (citations omitted).
[26] *Beussink*, 30 F. Supp. 2d at 1181.
[27] *Id*. at 1181-82 (emphasis added). *See also Iowa Right to Life Committee*, 187 F.3d at 970 ("[T]he public interest favors protecting First Amendment freedoms."); *ACLU v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) ("No long string of citations is necessary to find that the public interest in favor of having access to a free flow of constitutionally protected speech.").

Plaintiff's chosen statement and medium of expression is entitled to constitutional protection. It is within society's best interest for this Court to carefully guard the constitutional and legal rights of its members—regardless of age or point of view.

CONCLUSION

By his Motion for Preliminary Injunction, Plaintiff asks only that school officials honor his constitutionally protected right to personal expression by wearing attire that expresses his political views. The facts of this case fall in Brad Mathewson's favor. Consistently, other students have been permitted to display messages that express religious and political sentiments without incident. Defendants' ban of Plaintiff's personal expression smacks of arbitrary and capricious discipline.

In so moving, Plaintiff has met his burden. He has demonstrated that he will likely prevail upon the merits of this case at trial; that he has endured both an ongoing and potential irreparable injury; that his irreparable injury vastly outweighs whatever harm Defendants might suffer by the entry of the preliminary injunction, and that the injunction will serve the public interest.

Plaintiff has endured unnecessary stress in his daily life because of Defendants' violations of his constitutional right to personal expression. Plaintiff asks this Court to enter a preliminary injunction requiring Defendants to cease prohibiting Plaintiff from wearing clothing that expresses his political views, including support for his sexual orientation, and for such other relief as this Court deems just and equitable.

Respectfully submitted,

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