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

LASTAYSHA MYERS, by and through her legal parent and next friend, LEDA MYERS, Plaintiff, v. JEFF THORNSBERRY, in his official capacity as Assistant Principal of Webb City High School; STEPHEN GOLLHOFER, in his official capacity as Principal of Webb City High School; and RONALD LANKFORD, in his official capacity as Superintendent of Webb City R-VII School District, Defendants.	CASE NO. 05-5042

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

COMES NOW Plaintiff LaStaysha Myers, by and through her legal parent and next friend Leda Myers, and, in support of Plaintiff's Motion for Preliminary Injunction, states as follows:

FACTUAL BACKGROUND

In part because she has gay relatives and friends, Plaintiff holds the political belief that that gay people and their supporters should be treated with fairness and dignity. Plaintiff also holds the political belief that gay people and their supporters should be able to express their pro-gay political beliefs. In the fall of 2004, Plaintiff learned that Defendants had engaged in a pattern of censorship of pro-gay student expression, and that the actions taken by Defendants had become a subject of civic discourse. As a result, Plaintiff was moved to express her own pro-gay political beliefs.

On or about October 20, 2004, Plaintiff learned that, earlier that day, Defendant Thornsberry had censored her friend and classmate Brad Mathewson, who is gay, for wearing a T-shirt to school that expressed his pro-gay political beliefs. Defendant Thornsberry had informed him that the T-shirt was inappropriate and offensive, and had instructed him either to change his shirt or to turn it inside-out. On the front of the T-shirt were the words "Gay-Straight Alliance." The words referred to a student organization at an out-of-state high school in which Mathewson had previously been enrolled. On the back of the T-shirt were the words "Make a Difference," 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. Mathewson had previously worn the T-shirt to school on multiple occasions without incident.

On or about October 27, 2004, Plaintiff learned that, earlier that day, Defendant Thornsberry had censored Mathewson for wearing a different T-shirt to school that expressed his pro-gay political beliefs. Defendant Thornsberry had instructed him either to change his shirt or to turn it inside-out. On the front of the T-shirt were the words "I'm gay and I'm proud," a star, and a rainbow, another well-known symbol of the gay rights movement. Plaintiff further learned that, earlier that day, Defendant Thornsberry had censored another friend and classmate for wearing a T-shirt that expressed his pro-gay political beliefs. Defendant Thornsberry had instructed him to change his shirt. On the front of the T-shirt were the words "I love lesbians."

On or about November 7, 2004, Plaintiff learned that Defendants Lankford and Gollhofer had informed Mathewson that he would not be allowed in school unless he refrained from wearing clothing expressing his pro-gay political beliefs.

On or about November 30, 2004, Plaintiff observed Fred Phelps, a well-known political opponent of the gay community, and a handful of his supporters staging a protest in the local community to express their political belief that Mathewson should not be able to express his pro-gay political beliefs.

That night, Plaintiff, with assistance from her mother Leda Myers, made a T-shirt bearing several slogans expressing support for gay people (e.g., "I Support The Gay Rights," "Love Who You Want To," "Who Are We To Judge," "I Support Them All The Way," "We All Have The Right To Be Who We Want To Be"). Several of Plaintiff's friends made similar T-shirts. The following day, Plaintiff wore her T-shirt to school to express both her support for Mathewson and her political belief that gay people and their supporters should be able to express their pro-gay political beliefs. Upon information and belief, Plaintiff's friends wore their T-shirts to school for similar reasons. Defendants cannot show that any disruption resulted from the T-shirts themselves. Indeed, Plaintiff and her friends did not even make it to their first classes for the day before Defendants Thornsberry and Gollhofer stopped them, rendering any assertion of disruption entirely speculative. If any disruption occurred, it resulted from Defendants' own response to the T-shirts. Defendants Thornsberry and Gollhofer instructed Plaintiff and her friends to change their shirts or turn them inside-out. When Plaintiff and her friends refused to do so, Defendants Thornsberry and Gollhofer sent them home for wearing their T-shirts to school. When Leda Myers picked up Plaintiff from school, Defendant Thornsberry informed her that Plaintiff would be further disciplined if she were to wear her T-shirt to school again. The actions taken by Defendants Thornsberry and Gollhofer against Plaintiff and her friends were consistent with the position previously adopted by Defendants Lankford and Gollhofer when censoring Mathewson.

That night, Plaintiff, with assistance from Leda Myers, made a new T-shirt bearing "Webster's dictionary definition" of the word "gay" – "marry [sic]; happy." Plaintiff did so because she wanted to communicate that there is nothing wrong with the word "gay." The following day, Plaintiff wore the new T-shirt to school. Plaintiff believed that she was allowed to do so because it was not the T-shirt that she had worn the previous day. Defendants cannot show that any disruption resulted from the T-shirt itself. Indeed, Plaintiff did not even make it to her first class for the day before Defendants Thornsberry and Gollhofer stopped her, rendering any assertion of disruption entirely speculative. If any disruption occurred, it resulted from Defendants' own response to the T-shirt. Defendants Thornsberry and Gollhofer instructed Plaintiff to change her shirt. When Plaintiff refused to do so, Defendants Thornsberry and Gollhofer sent her home for wearing her T-shirt to school. When Leda Myers picked up Plaintiff from school, Defendant Thornsberry informed her that Plaintiff would be further disciplined if she were to wear any clothing expressing her pro-gay political beliefs to school again. The action taken by Defendants Thornsberry and Gollhofer against Plaintiff was consistent with the position previously adopted by Defendants Lankford and Gollhofer when censoring Mathewson.

Plaintiff and Leda Myers have observed one of Plaintiff's classmates wearing a T-shirt to school expressing his anti-gay political beliefs. Plaintiff has further observed several of her classmates wearing T-shirts, buttons, stickers, etc. to school expressing their pro-religion political beliefs.

Plaintiff wants to wear her T-shirts to school again to express her political belief that gay people and their supporters should be able to express their pro-gay political beliefs. Plaintiff has not done so for fear of further discipline. Plaintiff is deeply concerned by the pattern of censorship of pro-gay student expression in which Defendants have engaged.

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."[1] 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.[2]

ARGUMENT

The actions taken by Defendants against Plaintiff constitute viewpoint discrimination in violation of her First Amendment right to free expression in the public school setting. Plaintiff seeks to vindicate her rights and remedy the wrongs done to her through this lawsuit.

Without the intervention of this Court, Plaintiff will continue to be prevented from exercising her constitutionally protected right to free expression that was guaranteed to her and other American public school students by the United States Supreme Court's landmark decision in *Tinker v. Des Moines Independent Community School District*.[3] The Supreme Court has been crystal clear: Just like the students in *Tinker*, Plaintiff is not required to "shed [her] constitutional rights to freedom of speech or expression at the schoolhouse gate."[4]

Defendants' selective enforcement and arbitrary application of school policy constitutes an egregious violation of Plaintiff's First Amendment right to free expression. As such, Plaintiff asks this Court to enter a preliminary injunction ordering Defendants to cease interfering with

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1 *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).

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

3 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

4 *Id.* at 506.

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 her case.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[5] While the Supreme Court has recognized public school officials' authority to "prescribe and control [student] conduct," the protections of the First Amendment extend to students in the public schools.[6] 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."[7] 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."[8] Furthermore, the censorship of a particular opinion is not constitutionally permissible in the public school setting.[9]

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 in class would materially and substantially disrupt the operation of the school or interfere with the rights of others.[10] 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

5 U.S. CONST. amend. I.
6 *Tinker*, 393 U.S. at 506, 507.
7 *Id*. at 511.
8 *Id*. at 508.
9 *Id*. at 511.
10 *Id*. at 514.

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."[11] 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."[12]

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.[13]

Plaintiff'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."[14] Indeed, any controversy that has occurred as a result of the T-shirts is of school officials' own making, not Plaintiff's or her 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 an anti-gay T-shirt that declared "Adam and Eve, not Adam and Steve" without incident. Another student has worn a pro-religion T-shirt that states "God's Army Recruit" and bears a

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

12 *Id.* at 511.

13 *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").

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

cross and shield without incident. Other students frequently wear items with the logo "WWJD?" (i.e., "What Would Jesus Do?") without incident. In addition, students are occasionally asked to share their political viewpoints during class.

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. The 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 substantial disruption.

It is especially noteworthy that Defendants cannot 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. Like *Tinker*, the school administrators here were acting on an "undifferentiated fear or apprehension of disturbance."[15] The Court in *Tinker* expressly rejected avoidance of controversy as a basis to restrict student speech.[16]

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, recognizing that it would turn the right to free expression on its head to suggest that a minority

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15 *Id.*

16 *Id*. at 509.

viewpoint may be freely censored simply because it is not the majority viewpoint.[17] 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.[18] Defendants' concern about *other* students' possible unsympathetic reaction might be well-intentioned, but it does not justify violating Plaintiff's First Amendment right to free 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]."[19]

Plaintiff is not asking school officials to agree with her views; she simply wants them to honor her and other students' constitutionally protected right to express their views freely and without incident. If Plaintiff's political T-shirts invite conversation, or even spark a heated dialogue, it is this very discourse that the Supreme Court envisioned and vigorously protected in

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17 *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.").

18 *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.").

19 *Statement of Philosophy* at 2.

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 Plaintiff 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 safety and discipline, however, does not justify imposing a restraint on Plaintiff's expression absent evidence that her 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 her political views in favor of gay rights has nothing to do with safety or discipline 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 herself through clothing that reveals her political support for gay rights. If the Court does not enter a preliminary injunction, then Defendants will have successfully prevented Plaintiff from exercising her First Amendment right to freedom of speech.[20] Plaintiff can establish an irreparable injury merely by demonstrating that

[20] 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. New Caney Indep. Sch. 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).

her First Amendment rights have been violated.[21] Plaintiff's constitutional right to free expression will continue to be infringed upon if she is not permitted to wear clothing that expresses her 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 her political beliefs, Plaintiff will be unable to exercise her constitutionally protected right to free expression. Preliminary relief is essential to safeguard Plaintiff's constitutional rights during the pendency of these proceedings.[22]

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 or 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. 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 her or any of her 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

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21 *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.").

22 *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).

a school safety or discipline problem. Defendants' refusal to permit students to express themselves as permitted by the First Amendment 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 Plaintiff; 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 . . ."[23]

The Eastern District of Missouri has held that "the public's interest is best served by wide dissemination of ideas."[24] 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*.[25]

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 her Motion for Preliminary Injunction, Plaintiff asks only that school officials honor her constitutionally protected right to free expression by wearing attire that expresses her political views. The facts of this case fall in Plaintiff's favor. Consistently, other students have

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23 *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (citations omitted).

24 *Beussink*, 30 F. Supp. 2d at 1181.

25 *Id*. at 1181-82 (emphasis added); *see also Iowa Right to Life Comm.*, 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.").

been permitted to display messages that express religious and political sentiments without incident. Defendants' violation of Plaintiff's right to free expression cannot be justified.

In so moving, Plaintiff has met her burden. She has demonstrated that she will likely prevail upon the merits of this case at trial; that she has endured an ongoing irreparable injury; that her 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 asks this Court to enter a preliminary injunction requiring Defendants to cease prohibiting Plaintiff from wearing clothing that expresses her political views, including support for gay people and their supporters, and for such other relief as this Court deems just and equitable.

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