Christine P. Sun (SBN 218701)
Linnea L. Nelson (SBN 278960)
Julia Harumi Mass (SBN 189649)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Phone: (415) 621 2493
Fax: (415) 255 1478
Email: csun@aclunc.org
lnelson@aclunc.org
jmass@aclunc.org

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

T.V., through her next friend and mother HEATHER VICTOR,

Plaintiff,

v.

DAN BEUKELMAN, Assistant Principal of Sierra High School; GREG LELAND, Vice-Principal of Sierra High School,

Defendants.

Case No.: 2:15-cv-02163-JAM-CDK

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: February 9, 2016
Time: 1:30 p.m.
Courtroom: 6
Judge: John A. Mendez

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

"I Support Gay Marriage." "Gay Pride." "Gay People Should Be Treated Equally." "I Support My Gay Friends." Discovery taken since the filing of Plaintiff's Motion has revealed that, in addition to the shirt at issue here, these are among the slogans that are unlawfully prohibited at Sierra High School. (Ex. 1-2.) It is remarkable that in this day and age, when the Supreme Court has held that same-sex couples have the right to marry, and nearly five decades after the Supreme Court declared in *Tinker v. Des Moines* that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," school administrators in California continue to censor student speech in support of lesbian, gay, bisexual and transgender ("LGBT") rights. 393 U.S. 503, 506 (1969).

Unable to demonstrate any "material and substantial disruption" that has or would occur from Plaintiff's speech, Defendants resort to arguing that "Nobody Knows I'm a Lesbian" and the other slogans identified above are "sexually suggestive" or "promote sex," and therefore may be prohibited. As described below and in Plaintiff's opening brief, this position is contrary to the conclusion of every court to have considered the issue of whether speech in support of LGBT rights is protected by the First Amendment. *See, e.g., Gillman v. Sch. Bd. for Holmes Cty.*, 567 F. Supp. 2d 1359, 1369-1371 (N.D. Fla. 2008). Defendants' continued censorship of Plaintiff's speech is legally and factually unsupportable, and the Court should grant Plaintiff's preliminary injunction motion.[1]

ARGUMENT

I. Defendants cannot meet their burden of demonstrating that Plaintiff's censored speech would or did "materially and substantially disrupt the work and discipline" of Sierra High School.

As evidenced by their discovery responses and their Opposition, Defendants have utterly failed to present facts showing that T.V.'s t-shirt stating "Nobody knows I'm a lesbian" "materially and substantially disrupt[ed] the work and discipline of the school." *Tinker*, 393 U.S.

[1] Contrary to defendants' assertion in their Opposition, Plaintiff need not exhaust administrative remedies before bringing claims against defendants for violating her First Amendment right to free expression. *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982) (exhaustion of state administrative remedies not a prerequisite to bringing §1983 claims).

at 513. Fatal to their position is that no substantial disruption of the educational environment at Sierra High School *actually* occurred because of T.V.'s shirt.[2] In their Opposition, Defendants attempt to make much of the fact that Defendants and Sierra High School teacher Mr. Hammarstrom spent time discussing T.V.'s t-shirt in meetings and conversations amongst themselves and with T.V. and her father. Yet it is among the ordinary duties and responsibilities of school administrators at Sierra High School to have conversations and meetings about the supervision, discipline, and grievances of students at the school. (Ex. 6.) In fact, Defendant Beukelman ordinarily spends a significant amount of his work week supervising students (Ex. 7.) and handling student grievances. (Ex. 8.) A significant amount of the "disruption" at Sierra High School from T.V. wearing her shirt was "not to the learning environment" but to the administrative duties of the school staff in having to deal with the lawsuit. (Ex. 9.) This does not even come close to approaching the level of disruption required for school administrators to constitutionally limit a student's expression of social and political viewpoints. *Tinker,* 393 U.S. at 505-08 (noting no material and substantial school disruption where students were targeted for hostile remarks in response to their expression of anti-war views); *id.* at 517 (Black, J., dissenting) (noting evidence that a math teacher "had his lesson period practically 'wrecked' chiefly by disputes" with an armband-wearing student); *Burge ex rel. Burge v. Colton Sch. Dist. 53*, 100 F. Supp. 3d 1057, 1062-64 (D. Or. 2015) (finding no material or substantial disruption where a student commented on his personal Facebook page that his teacher was a "bitch" and "needs to be shot," even though the teacher was "scared," "nervous" and "upset" by the student's comments, because no students missed class, no school staff missed work, and there was no

[2] Defendants claim that T.V. inherently caused "a material and substantial disruption" by wearing her t-shirt to school because she hoped to "get a reaction from her teacher, Mr. Hammarstrom." (Defs' Br. in Opp'n. at 11:1-2.) (Ex. 3.) Even if T.V.'s subjective intent alone was sufficient to justify censorship, Defendants admit that a student's intent to wear messages that promote conversation is entirely appropriate. (Ex. 4.) Indeed, as the Supreme Court declared in *Tinker* about the role of free speech in our schools, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Tinker*, 393 U.S. at 512 (citation omitted). Moreover, Defendant Beukelman describes T.V. as a "very nice young lady," "knowledgeable," and respectful in her interactions. (Ex. 5.)

widespread reaction among the students). Here, Defendants have failed to identify any student except T.V who missed class (and T.V. missed class only because Defendants sent her to the office in reaction to the message on her t-shirt); nor have Defendants identified any school staff who missed work, nor any on-campus reaction of significance among the students to her shirt. (Ex. 10.)

More pertinently, Defendants' censorship of T.V.'s t-shirt *caused* rather than contained the disruption in the school. All of the "disruption" described in Defendants' Opposition and in Defendant Beukelman's deposition testimony stem either from Defendants' decision to censor T.V.'s shirt or from the harassment of T.V. by other students[3] at Sierra High School in response to discovering T.V.'s sexual orientation and in reaction to T.V. filing a lawsuit challenging the unconstitutional censorship of her speech. (Ex. 11.) It is a well-settled point of law that school administrators may not censor a student's speech simply because of a "heckler's veto," that is, because other individuals react disruptively to the speech. *Tinker*, 393 U.S. at 505–06, 508 (citing *Terminiello v. City of Chicago*, 337 U.S. 1 (1949)); *Holloman ex. rel. Holloman v. Harland*, 370 F.3d 1252, 1275 (11th Cir. 2004) (rejecting defendants' contention that it was appropriate to discipline a student for "disruption" for raising his fist during the Pledge of Allegiance, based upon the defendants' concern that other students would behave disruptively); *see also Smith v. Novato Unified Sch. Dist.*, 150 Cal. App. 4th 1439, 1456 (2007) (noting extensive federal constitutional case law underlying the "heckler's veto" rule disallowing schools to prohibit controversial student speech simply because of the disruption it may cause due to the reactions of others). Here, through their actions in censoring T.V.'s speech, Defendants *themselves* and other school staff created most of the very disruption that they are trying to use to justify censoring T.V.'s speech. To accept such circular reasoning would effectively allow school administrators unfettered discretion to circumvent the "material and substantial disruption

[3] Although the harassment of T.V. or any other student is not to be taken lightly, courts have consistently held that a history or potential for severe harassment and threats to a student for expressing her sexual orientation or support for LGBT rights does not justify censorship of that student's speech. *See, e.g., Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001), *Boyd Cty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cty.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003).

standard" articulated in *Tinker* and render null the student speech protections reflected in the nearly 50 years of case law since *Tinker* was decided.

II. Discovery reveals that Defendants have unlawfully censored and continue to censor student speech on purely political issues, including T.V.'s speech in support of the rights of LGBT people.

Defendants have attempted to justify their censorship of slogans that refer to sexual orientation by asserting that the messages are "sexually suggestive" and may be "offensive" to others who hold religious or cultural beliefs that homosexuality (or heterosexuality) is wrong.[4] (Ex. 18-26.) Defendants emphasize that this categorical prohibition applies to messages relating to *both* homosexuality and heterosexuality, as though censoring student speech on both topics justifies the censorship of either. (Defs' Br. in Opp'n. 9:2-12.) (Ex. 27-30.)

Defendants confuse the concepts of "sex," "sexuality," and "sexual orientation" to reach the conclusion that a message in support of individuals or groups identified on the basis of sexual orientation "promotes sex" and therefore may be prohibited under the District dress code policy. According to Defendant Beukelman, the word "lesbian" does not connote anything except physical sexual acts. (Ex. 31.)

Defendants' position is contrary to the law. It is well-established that "[s]tudent expression on LGBT issues is speech on a *purely political topic*, which falls clearly within the ambit of the First Amendment's protection." *Young v. Giles Cty. Bd. of Educ.*, No. 1:15-cv-00107, 2015 WL 9413877 at *2-3 (M.D. Tenn., Dec. 22, 2015) (emphasis added) (noting that "[t]he legal ground covering such issues is so well-trod that the Court finds itself surprised at the need to journey down this path"); *Gillman*, 567 F. Supp. 2d at 1369-1370 (citing a string of cases where federal courts, including in the Ninth Circuit, have repeatedly affirmed students' First Amendment rights to speak freely on the issue of sexual orientation and holding that speech on

[4] Defendants' troubling censorship of student speech is not limited to expression about LGBT issues. Slogans that are or may be prohibited at Sierra High School include the message "I love boobies" in support of breast cancer awareness, (Defs' Brief in Opp'n. 4:3-5) (Ex. 12-13.), messages regarding abortion, (Ex. 14-15.) and messages in support of interracial marriage and evolution. (Ex. 16-17.) The censorship of these slogans is also unlawful. *See, e.g., B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 315 (3rd Cir. 2013).

student clothing in support of equal rights for LGBT people is "not vulgar, lewd, obscene, plainly offensive, or violent, but...is pure [and] political"). Defendants' claim is particularly misguided given that California law requires the inclusion of the political, economic, and social contributions of LGBT people into educational textbooks and the social studies curricula in California public schools.[5] Fair Accurate Inclusive and Respectful Education Act ("FAIR Act"). S.B. 48, 2011–2012 (Cal. 2011).

Moreover, presuming for the sake of argument that words relating to sexual orientation, such as "gay," "lesbian," or "queer," may be "offensive" to some individuals, that alone does not justify Defendants' censorship. *See Morse v. Frederick*, 551 U.S. 393, 409 (2007) (refusing to expand constitutional restrictions on student speech that is lewd, vulgar, profane or plainly offensive to "encompass any speech that could fit under some definition of 'offensive'" since "much political and religious speech might be perceived as offensive to some").

III. The ongoing restraint of Plaintiff's speech is an unconstitutional prior restraint.

Where the government "subject[s] the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards," its action is presumptively unconstitutional. *Shuttlesworth v. City of Birmingham*, 89 S. Ct. 935, 938 (1969). When asked during his deposition about what disruption would occur if T.V. wore her shirt the next day, Defendant Beukelman admitted that he could not speculate on what would happen. (Ex. 32.) This is the very type of "undifferentiated fear or apprehension of disturbance [that] is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction should be granted.

---

[5] Notably, the Supreme Court expressly held that the free speech principles articulated in *Tinker* are "not confined to the supervised and ordained discussion which takes place in the classroom." *Tinker*, 393 U.S. at 512.

DATED: February 2, 2016

Respectfully Submitted,

By: */s/ Linnea Nelson*
Linnea Nelson

Linnea Nelson (SBN 278960)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, California 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-1478
Attorneys for Plaintiff