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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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: January 26, 2016
Time: 1:30 p.m.
Courtroom: 6
Judge: John A. Mendez

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

PRELIMINARY STATEMENT

This is a free speech case on behalf of T.V., a student at Sierra High School who openly identifies as a lesbian. (Declaration of T.V. ("T.V. Decl.") ¶ 2.) On August 10, 2015, T.V. wore a shirt stating "Nobody knows I'm a lesbian" to school in order to express her social and political viewpoint that there is nothing to be ashamed of in being a lesbian and that lesbian, gay, bisexual, and transgender ("LGBT") students should be proud of who they are. (T.V. Decl. ¶ 3.) Defendants Beukelman and Leland, public school officials with the authority to discipline students, reprimanded T.V. for the message on her shirt, declared the shirt impermissible under the school district dress code because of its message, and threatened to discipline T.V. further if she wore clothing with the statement "Nobody knows I'm a lesbian" to school again. (T.V. Decl. ¶ 10.) Defendants' Answer to T.V.'s Complaint in this case confirms that T.V. is prohibited from wearing her shirt to school because Defendants believe that "the shirt is disruptive to the education process." (Answer, ¶ 3.)

The United States Constitution, the California Constitution, and the California Education Code prohibit this type of censorship of public school students. Defendants cannot meet their burden of showing that T.V.'s shirt did or would "materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); *see also J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1111 (C.D. Cal. 2010) (noting that the "decision to discipline speech must be supported by the existence of *specific facts* that could reasonably lead school officials to forecast disruption") (emphasis in original). In fact, T.V. wore her shirt at school on August 10 without incident. (T.V. Decl. ¶ 3.) On that occasion, which was the only occasion T.V. wore her shirt stating "Nobody knows I'm a lesbian" prior to Defendants' censorship of her, T.V.'s speech only inspired compliments from fellow students. (T.V. Decl. ¶ 3.) Defendants' Answer does not present any facts whatsoever that demonstrate any disruption at Sierra High School caused by T.V.'s shirt, other than the disruption caused by the Defendants themselves in taking T.V. out of class and demanding she change her shirt. (Answer ¶ 3.)

Nor can Defendants meet their burden of showing that the message on T.V.'s shirt is inherently disruptive. The expression of a public school student's sexual orientation and views about LGBT rights is entirely appropriate at school. Indeed, California law requires that public high schools—including Sierra High School—teach about inclusion and respect of lesbian, gay, bisexual, and transgender students in history and social studies curriculum, under the Fair Accurate Inclusive and Respectful Education Act ("FAIR Act"). S.B. 48, 2011–2012 (Cal. 2011). Moreover, regardless of the FAIR Act, courts around the country have consistently held that the expression of a student's LGBT identity is "pure speech" that is appropriate and protected at school. *See, e.g.*, *McMillen v. Itawamba County Sch. Dist.*, 702 F. Supp. 2d 699, 705 (N.D. Miss. 2010) (holding that bringing a same-sex date to the prom is "the type of speech that falls squarely within the purview of the First Amendment"); *Gillman ex rel. Gillman v. Sch. Bd. for Holmes County, Florida*, 567 F. Supp. 2d 1359, 1374–75 (N.D. Fla. 2008) (rejecting school district's contention that speech about LGBT issues was inappropriate for middle school or high school students).

Absent a court order, Defendants will continue to violate T.V.'s right to free speech and cause her irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citation omitted); *Garcia v. Google, Inc.*, 786 F.3d 727, 732 (9th Cir. 2015). For these reasons, and the reasons set forth below, Plaintiff respectfully submits that the Court should grant her motion for a preliminary injunction.

FACTUAL BACKGROUND

Plaintiff T.V. is a student at Sierra High School in Manteca, California. (T.V. Decl. ¶ 2.) Defendant Dan Beukelman is an Assistant Principal at Sierra High School and Defendant Greg Leland is a Vice Principal at Sierra High School. Defendants Beukelman and Leland are both vested with the authority to discipline students at Sierra High School. (Answer ¶¶ 9-10.)

T.V. proudly identifies as a lesbian. (T.V. Decl. ¶ 2.) On August 10, 2015, T.V. wore a shirt to Sierra High School that states, in whole, "Nobody knows I'm a lesbian." (T.V. Decl. ¶ 3.)

She received compliments from other students about her shirt. (T.V. Decl. ¶ 3.) In the middle of the school day, during third period, T.V.'s teacher sent her to speak to Defendant Leland in the school office. (T.V. Decl. ¶ 4.) Defendant Leland then instructed T.V. to change her shirt on the ground that she was not allowed to display her "sexuality" on clothing. (T.V. Decl. ¶ 4.) Over the course of the following three days, Defendants Leland and Beukelman offered various additional explanations for why they would not allow T.V. to wear the shirt at Sierra High School, including that T.V. is not allowed to display her "personal choices and beliefs" on a shirt; and that the shirt is "an open invitation to sex," "promoting sex," "promoting sexuality," "disruptive," and possibly "gang related." (T.V. Decl. ¶¶ 5, 6, 7.) T.V. desires to wear her shirt and would do so but for Defendants' censorship. (T.V. Decl. ¶ 10.)

Defendants admit they are prohibiting T.V. from wearing her shirt stating "Nobody knows I'm a lesbian" to Sierra High School because, according to them, "the shirt is disruptive to the education process." (Answer ¶ 3.) Because the Sierra High School and Manteca Unified School District handbooks list willful defiance as grounds for suspension or expulsion, T.V. reasonably fears that she will be disciplined for violating Defendants' unlawful directives or retaliated against for advocating for her free speech rights. (T.V. Decl. ¶ 10.)

ARGUMENT

LEGAL STANDARD FOR PRELIMINARY INJUNCTION

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). If plaintiffs show a "likelihood of irreparable injury and that the injunction is in the public interest," a "preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). Plaintiff meets all the prongs of this test and is entitled to preliminary injunctive relief.

I. There is a substantial likelihood that Plaintiff will prevail on the merits of her case because Plaintiff's speech is a pure expression of her viewpoint on sexual orientation and civil rights, and is therefore "protected speech" under the First Amendment of the United States Constitution.

The First Amendment of the Constitution states that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The message on T.V.'s shirt, "Nobody knows I'm a lesbian," is an example of the most fundamental type of speech that the First Amendment protects. By wearing the shirt, T.V. wishes to publicly, silently and peacefully articulate her sexual orientation and her beliefs on sexual orientation and equal rights. (T.V. Decl. ¶ 2.) Her freedom to do so falls squarely within the protections afforded by the First Amendment, and she is not stripped of those protections when she enters the doors of Sierra High School. *See Tinker*, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

Indeed, the Supreme Court has recognized that schools play an essential role in the formation of a free and tolerant society: "[t]the vigilant protection of constitutional freedoms is nowhere more vital that in the community of American schools. The classroom is peculiarly the marketplace of ideas." *Tinker*, 393 U.S. at 512 (citations omitted); *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291 (C.D. Cal. 2008); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998) (noting that "[t]he Supreme Court has long recognized that the freedom to receive ideas, and its relation to the freedom of expression, is particularly relevant in the classroom setting."). Clearly, this "marketplace of ideas" encompasses speech about LGBT issues, one of the most pressing political and social issues of our time. As one court has remarked, the "issue of equal rights for citizens who are homosexual is presently a topic of fervent discussion and debate within the courts, Congress, and the legislatures of the States, including Florida. The nation's high school students, some of whom are of voting age, should not be foreclosed from that national dialogue." *Gillman*, 567 F. Supp. 2d at 1374.

There can be no reasonable dispute that the message "Nobody knows I'm a lesbian" is a peaceful and non-vulgar expression of sexual orientation. By wearing her shirt, T.V. wishes to express her sexual orientation and her views and beliefs about sexual orientation and equal rights.

(T.V. Decl. ¶ 2.) T.V.'s shirt is "pure speech" that falls squarely within constitutional protections for student speech. *Lack v. Kersey*, No. 1:12-CV-930-RWS, 2012 WL 1080620, at *1 (N.D. Ga. Mar. 30, 2012) (holding that a student body president's speech in support of changing the high school "Prom Court" to be more inclusive of LGBT students is speech protected by the First amendment); *Gillman*, 567 F. Supp.2d at 1369–71 (holding that a school board prohibition on plaintiff's expressions of support for LGBT people and her belief that LGBT people should be afforded equal and fair treatment constituted a ban on pure, political speech protected by the First Amendment); *Gonzalez Through Gonzalez v. Sch. Bd. of Okeechobee Cnty.*, 571 F. Supp. 2d 1257, 1269 (S.D. Fla. 2008) (holding that a high school Gay-Straight Alliance group that desired "to discuss matters pertinent to the challenges presented by their non-heterosexual identity and to build understanding and trust with other heterosexual students sounds in the political speech addressed in *Tinker*."); *McMillen*, 702 F. Supp. 2d 699 at 703–704 (holding that, "according to clearly established case law," defendant school officials violated plaintiff's First Amendment rights by censoring her "peaceful expression of social and political viewpoints central to her sexuality"); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001) (holding that a high school student stated a claim for violation of his First Amendment right to speech when he alleged that school officials prevented him from openly stating he is gay and retaliated against him for doing so).

A. Under *Tinker* and this Circuit's application of *Tinker*, Defendants will not be able to show—as they must—that the censored speech itself would "materially and substantially disrupt the work and discipline of the school."

Public school officials, including Defendants, may not regulate student speech unless they can demonstrate that the speech or expression will "materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 513; *see also id*. at 509 (noting that it is the burden of school officials to justify censorship of student speech because as a general rule, students maintain free speech rights at school); *Morse v. Frederick*, 127 S. Ct. 2618, 2636–37 (2007) (Alito, J., Kennedy, J., concurring) (quoting *Tinker*, 393 U.S. at 506) (stating that "[t]he opinion of the Court correctly reaffirms the recognition in *Tinker* [] of the fundamental principle

that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'").

Accordingly, under *Tinker*, students have the right to express their views freely, so long as their chosen mode of expression does not "materially and substantially disrupt the work and discipline of the school." *Id.* at 513; *see also Morse*, 127 S. Ct. at 2626 (reaffirming *Tinker's* "substantial disruption" test). A school administrator's fear of future disruption or interference must have a genuine basis in fact and be reasonable—"undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. Instead, "the decision to discipline speech must be supported by the existence of *specific facts* that could reasonably lead school officials to forecast disruption." *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1111 (C.D. Cal. 2010) (emphasis in original). Certainly, school officials may not censor speech simply because they disagree with the student's views. *Tinker*, 393 U.S. at 511 (holding that "[s]tudents in school . . . may not be confined to the expression of those sentiments that are officially approved").

Consistent with *Tinker*, the Ninth Circuit and its courts have protected the free speech rights of students when such speech was unaccompanied by "material and substantial disruption" or "collision with the rights of other students to be secure and to be let alone." In *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, a group of students recorded a short video talking about another student in an insulting way, which became a topic of discussion among the student body at school. 711 F. Supp. 2d at 1098. The Ninth Circuit correctly concluded that the speech did not rise to a level of substantial disruption, which requires something more than a "mild distraction or curiosity," because no administrators had to be pulled from their regular duties and nothing about the video "interfered with the work of the school." *Id.* at 1111, 1113. *See also Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992) (overturning district court's finding that student buttons about teacher labor strikes were "inherently disruptive" absent actual substantiation of this conclusion).

In T.V.'s case, there was even less disruption than the "mild distraction or curiosity" found in *R.C.*, which was insufficient to meet the "substantial disruption" test. *See* 711 F. Supp. 2d at 1113. Here, there was no discernable disruption whatsoever to the work of the school beyond that which Defendants caused by their own actions in suppressing T.V.'s protected speech. Defendants cannot show that a message on T.V.'s clothing that "Nobody knows I'm a lesbian" would or did cause "material and substantial interference with work and discipline" of Sierra High School, nor do they attempt to in their Answer to T.V.'s Complaint. *See Tinker*, 393 U.S. at 508–509 (holding that student actions to wear armbands to express anti-war views were protected by the First Amendment because the students' actions constituted a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance"); *Chandler*, 978 F.2d at 531 (holding that "[t]he passive expression of a viewpoint in the form of a button worn on one's clothing is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom").

The slogan that T.V. wishes to display on her shirt, "Nobody knows I'm a lesbian," does not encourage students to misbehave, nor does it incite violence or denigrate other students. *Cf. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1170–71 (9th Cir. 2006) (holding that a student may be prohibited from wearing a shirt to school stating "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" and "HOMOSEXUALITY IS SHAMEFUL" during a schoolwide day-long event to promote tolerance of LGBT people, where the school had experienced a long and documented history of conflicts between students due to "anti-homosexual" speech, because the speech intruded upon the rights of LGBT students), *rev'd on other grounds*, 127 S. Ct. 1484 (2007). No other students at Sierra High School have directed anti-gay slurs towards T.V. or threatened her because of her sexual orientation. (T.V. Decl. ¶ 3.) Indeed, in their Answer to T.V.'s Complaint, Defendants do not even allege facts that indicate *any* disruption caused by T.V.'s shirt—beyond the disruption Defendants themselves caused to T.V.'s school day—let alone disruption that caused material and substantial interference to the operation

of the high school. The only reaction T.V. received from other students on the day she wore her shirt was compliments about her shirt. (T.V. Decl. ¶ 3.)

B. Defendants may not use the disruptive actions of other students to determine the parameters of Plaintiff's constitutional rights.

In *Tinker*, the Supreme Court expressly rejected the argument that public school officials could properly discipline students wearing black anti-war armbands because other students reacted disruptively to them. *Tinker*, 393 U.S. at 505–06, 508 (citing *Terminiello v. City of Chicago*, 337 U.S. 1 (1949)). Despite the fact that other students made hostile remarks to the students wearing armbands, and that other students argued about the armbands instead of paying attention in class, the Court found that such discipline violated the armband-wearing students' rights. *Tinker*, 393 U.S. at 505–08; *id.* at 518 (Black, J., dissenting). In addition, the Court found that the possibility that the armbands might lead other students to start an argument or cause a disturbance still was insufficient grounds to prevent the armband-wearing students' freedom of expression. *Id.* at 508; *see also Holloman ex. rel. Holloman v. Harland*, 370 F.3d 1252, 1275 (11th Cir. 2004) (rejecting school defendants' contention that it was appropriate to discipline a student for "disruption" for raising his fist during the daily Pledge of Allegiance, based upon the school defendants' concern that other students would behave disruptively; and holding the student's actions were constitutionally protected).

In T.V.'s case, there were *no* disruptive actions by other students in response to the message on her shirt on the day she wore it to school or any other day, nor have Defendants claimed to T.V. or in their Answer that there were any disruptive actions by other students. (T.V. Decl. ¶ 3.) The only reaction T.V. received from other students was to compliment her on her shirt. (T.V. Decl. ¶ 3.) Thus, although other students may not exercise the "heckler's veto" to silence T.V.'s speech, in this case, there was no "disruption" by other students at all.

In the context of expression by high school students relating to gay issues, federal courts have long upheld the rights of students to be openly gay at high school, *see Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1076 (D. Nev. 2001); to attend the high school prom with a same-sex date, *see*

Fricke v. Lynch, 491 F. Supp. 381, 385 (D.R.I. 1980) (granting preliminary injunction); and to form gay-straight alliance clubs on high school campuses, *see Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003) (granting preliminary injunction).

In each of the above cases, school officials argued that the disruptive and sometimes violent reactions of other students were reasons to silence speech about sexual orientation and gay civil rights. Yet in each situation, the courts held that school officials could not censor student speech on those grounds. *See, e.g.*, *Boyd Cnty. High Sch. Gay Straight Alliance*, 258 F. Supp. 2d at 688 (noting that "*Tinker* and *Terminiello* are designed to prevent Defendants from punishing students who express unpopular views instead of punishing the students who react to those views in a disruptive manner."); *Fricke*, 491 F. Supp. at 385 (holding that school officials had a duty to enact "appropriate security measures" to address potential disruptive conduct instead of censoring the student's expression); *see also Gillman*, 567 F. Supp. 2d at 1374 (stating that "[i]f a student's conduct traverses the threshold of acceptable heated exchange into the realm of material and substantial disruption, the law requires school officials to punish the disruptive student, not the student whose speech is lawful"); *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 849, 856–57 (E.D. Mich. 2003) (holding that school could not ban shirt labeling President Bush an "International Terrorist," where "there is no evidence that the t-shirt created any disturbance or disruption," even though another student confronted plaintiff in an "angry" and "tense" way about the shirt).

C. Plaintiff's speech is respectful, positive, and supportive of gay and lesbian persons, unlike harassing speech that properly could be limited.

Supreme Court precedent makes it clear that the only applicable exception to T.V.'s right to free speech is *Tinker's* prohibition against speech that is materially and substantially disruptive. Indeed, in their Answer to T.V.'s Complaint, Defendants admit that they are prohibiting T.V. from wearing her shirt to school for the sole reason that "the shirt is disruptive to the education process." (Answer ¶ 3.) There can be no reasonable argument that T.V.'s shirt stating "Nobody knows I'm a

lesbian" is "lewd," "vulgar," "indecent," or "profane," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); that it is "school-sponsored" (e.g., part of the school newspaper or other school publication) or can be "reasonably perceive[d] to bear the imprimatur of the school," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 273 (1988); that it advocates illegal drug use, *Morse*, 551 U.S. 393 (2007); or that the message is related to a criminal gang.

Nor can there be any plausible contention that the message "Nobody knows I'm a lesbian" on T.V.'s shirt constituted any kind of a psychological attack against LGBT students that impinged on their fundamental right to learn.[1] Indeed, T.V. wore the shirt to school as a self-identified lesbian to show support and tolerance for LGBT people. (T.V. Decl. ¶ 2.) Moreover, Defendants have not contended, nor is Plaintiff aware of, any recent significant history of violent conflicts between students at Sierra High School due to expressions of LGBT equality. In any case, the message on T.V.'s shirt is intended to promote tolerance and respect among students rather than to exacerbate violence among them.[2]

D. Plaintiff has a separate independent right to be free from viewpoint discrimination.

T.V. is also entitled to relief for Defendants' viewpoint discrimination. As noted in *Tinker*, in order to justify censoring student speech, school officials must be able to demonstrate that their action "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509; *see also Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1141 (C.D. Cal. 2004) (noting that the First Amendment does not allow educators to act as "thought police" prohibiting discussion of topics that of which school officials do not approve); *Castorina v. Madison Cnty. Sch. Bd.*, 246

[1] *Cf. Harper*, 445 F.3d at 1170–71 (holding that a student may be prohibited from wearing a shirt to school stating "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" and "HOMOSEXUALITY IS SHAMEFUL," where the school had experienced a long and documented history of conflicts between students due to "anti-homosexual" speech, because the speech intruded upon the rights of LGBT students).

[2] *Cf. Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 777–79 (9th Cir. 2014) (holding that where there was an escalating history of violent racial conflict between Caucasian and Hispanic students, and a group of Caucasian students wore American flag shirts on Cinco de Mayo, an important Mexican national holiday, school officials acted lawfully in asking the students to turn the shirts inside-out to prevent further violent disturbance between Caucasian and Hispanic students).

F.3d 536, 540 (6th Cir. 2001) (noting that "viewpoint-specific speech restrictions are an egregious violation of the First Amendment").

In this case, there is evidence that the motivation behind Defendants' censorship of the message on T.V.'s shirt is their lack of tolerance for T.V.'s views and beliefs on LGBT sexual orientation and equal rights. First, both Defendants told T.V. that she was not allowed to wear her shirt stating "Nobody knows I'm a lesbian" because she could not display or promote her "sexuality" on her clothing, (T.V. Decl. ¶¶ 4, 7.), betraying confusion between "sexuality" and "sexual orientation" and a negative attitude about LGBT sexual orientation as something that is inappropriate to discuss in school. (T.V. Decl. ¶ 7.) Second, when T.V. pointed out to Defendant Leland on August 11 that there was no rule in the dress code prohibiting the expression of "sexual orientation" on a shirt, Defendant Leland admitted that the dress code does not prohibit such expression but said that it needed to be added, (T.V. Decl. ¶ 5), again betraying an attitude strongly adverse to messages promoting tolerance of LGBT people. Third, Defendant Beukelman told T.V. on August 11 that a shirt stating "Nobody knows I'm a lesbian" is "promoting sex" and "an open invitation to sex" and therefore not allowed, (T.V. Decl. ¶ 6), thus strongly implying if not outright stating that student expressions of LGBT sexual orientation and support for LGBT rights are inappropriate because they are somehow prurient. Fourth, Defendant Leland told T.V. on August 11 that she could not wear her "personal choices and beliefs" on a shirt (T.V. Decl. ¶ 5), despite the fact that other students at Sierra High School freely wear clothing that express their religious beliefs and their personal choices to support particular sports teams and even specific brands of commercially-available alcohol. (T.V. Decl. ¶ 9.) Thus, Defendant Leland impermissibly singled out T.V.'s "personal choices and beliefs" about LGBT equality for censure while allowing other students to express their personal choices and beliefs about a wide range of topics.

Because there is strong evidence that Defendants' censorship of T.V.'s expression is motivated by Defendants' disapproval of T.V.'s sexual orientation and her beliefs and views on LGBT sexual orientation and equal rights, there is also a substantial likelihood that T.V. will prevail on her First Amendment claim for viewpoint discrimination.

II. There is a substantial likelihood that Plaintiff will prevail on the merits of her case because Plaintiff exercised her right to freedom of speech under the protection of California state constitutional and statutory law.

Art. I, § 2, sub. (a) of the California Constitution states, "Every person may freely speak, write and publish his or her sentiments on all subjects," and "[a] law may not restrain or abridge liberty of speech or press." The California Constitution and California Education Code (which is informed by the California Constitution) afford even greater protection for free speech and freedom of the press in the school setting than does the United States Constitution. *See Leeb v. Delong*, 198 Cal. App. 3d 47, 54, 60 (Ct. App. 1988). All of the arguments articulated above, that T.V. will prevail on the merits of her case because she exercised her freedom of speech under the First Amendment, also apply under California state constitutional and statutory law.

California Education Code § 48907 states that students have the right to express themselves by, among other methods, wearing buttons, badges, or other insignia. Section 48950 separately maintains that a school district may not discipline a student or make any rule that would discipline a student on the basis of speech that is protected under the First Amendment. Case law interpreting student free speech rights under California state law reflects that student speech may be limited or prohibited if it causes a "substantial disruption or material interference" with school functioning; however, "speech that seeks to communicate ideas, even in a provocative manner, may not be prohibited merely because of the disruption it may cause due to reactions by the speech's audience." *Smith v. Novato Unified Sch. Dist.*, 150 Cal. App. 4th 1439, 1456 (Ct. App. 2007). T.V.'s expression of her sexual orientation and her views and beliefs on LGBT sexual orientation and equal rights through wearing a shirt stating "Nobody knows I'm a lesbian" did not disrupt the educational process at Sierra High School. (T.V. Decl. ¶ 3.) The only disruption to the educational process caused by T.V.'s shirt was created by Defendants themselves and constitutes a "heckler's veto" which is specifically disallowed as a basis for censuring student speech under California law. *Smith*, 150 Cal. App. 4th at 1457 n.6.

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

Defendants have made it abundantly clear through personal communications with T.V. and her parents, and in their Answer to T.V.'s Complaint, that T.V. is prohibited from wearing her shirt stating "Nobody knows I'm a lesbian" to school because they claim the shirt violates the dress code. (T.V. Decl. ¶ 5.) Therefore, T.V. has a reasonable fear that she will be punished for violating the school or district dress code or for "willful defiance" of the authority of school officials if she wears the shirt to school again. (T.V. Decl. ¶ 10.)

Since August 10, Defendants have successfully prevented T.V. from exercising her First Amendment right to freedom of speech, and if the Court fails to grant injunctive relief promptly, Defendants have given every indication that they will continue to violate T.V.'s constitutional rights indefinitely. This violation of T.V.'s freedom of expression constitutes a de facto irreparable injury because, as the Supreme Court has noted, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 (citation omitted), *Garcia v. Google, Inc.*, 786 F.3d 727, 732 (9th Cir. 2015). Preliminary relief is essential to safeguard T.V.'s constitutional rights during the pendency of these proceedings, particularly because T.V., who is now a junior, will likely graduate by the time that the lawsuit concludes.

IV. The threatened injury to Plaintiff outweighs whatever harm the preliminary injunction could cause Defendants.

Defendants cannot show that the entry of a preliminary injunction will harm them in any way. There is no evidence that T.V.'s passive and silent expression of her sexual orientation and her views and beliefs about sexual orientation and equal rights have caused or will cause any disruption to the discipline or daily routine of Sierra High School.

A preliminary injunction in this case will not prevent Defendants from even-handedly enforcing school policies against disruptive conduct or misbehavior. To the extent that the Defendants are concerned with possible disruptive reactions to T.V.'s expression at issue here, they may still fairly punish students who break school conduct rules, as is their duty under the law.

V. The relief sought by Plaintiff will serve the public interest.

Protecting T.V.'s right to express her views is in the public interest because it is generally accepted that American society at large, and therefore its subset at Sierra High School, benefits from peaceful expression and the exchange of ideas. As the Supreme Court has stated, "[t]he vitality of civil and political institutions in our society depends on free discussion . . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello*, 337 U.S. at 4 (citing *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)); *Cohen v. California*, 403 U.S. 15, 24 (1971) (noting that "[t]he constitutional right of free expression is powerful medicine in a society as diverse and populous as ours"); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) ("[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 weighs in favor of having access to a free flow of constitutionally protected speech.") (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.")).

Protecting freedom of speech resonates strongly in the context of America's public high schools. Indeed, as the Supreme Court noted in *Tinker*, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). Upon graduation, today's American public school students enter a much more complex and diverse community than their parents did when they graduated. Modern technology has made it possible to connect instantaneously with people of different languages, cultures, and lifestyles; and today's students must be prepared to effectively communicate with and respect individuals who have points of

views different from their own. Stifling a free exchange of ideas about different lifestyles does a disservice to all Sierra High School students, as well as the American public at large.

In fact, following *Tinker*, numerous courts have concluded that the public interest is unequivocally served by permitting students to engage in the free exchange of ideas. *See, e.g.*, *Chambers v. Babbitt*, 145 F. Supp. 2d 1068, 1072–73 (D. Minn. 2001) (overruling school district's censorship of "Straight Pride" t-shirt, and noting that "[a]ll students benefit from the respectful and thoughtful exchange of ideas and sharing of beliefs and practices"); *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 849, 858 (E.D. Mich. 2003) (overruling school district's censorship of "Bush: International Terrorist" t-shirt, and noting that "[i]n fact, as the *Tinker* Court . . . [has] emphasized, students benefit when school officials provide an environment where they can openly express their diverging viewpoints and when they learn to tolerate the opinions of others"). *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988) (finding school's prior review for distribution of written materials violated plaintiff's First Amendment rights, in part, because "[i]nterstudent communication does not interfere with what the school teaches; it enriches the school environment for the students.").

CONCLUSION

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

DATED: November 20, 2015

AMERICAN CIVIL LIBERTIES FOUNDATION OF NORTHERN CALIFORNIA, INC.

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