IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

DOUG GOLD and CHRISTY GOLD, individually, and on behalf of their minor children H. G. and J. G., JAMES WALKER and JENNIFER WALKER, individually, and on behalf of their minor child A. W., LEE MILLER and JANA MILLER, individually, and on behalf of their minor children L. M. and N. M., EDWARD and STACEY JOYCE, individually, and on behalf of their minor child T. J., JON BOUNDS and MELYNDA BOUNDS, individually, and on behalf of their minor child R. B.,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. _____
WILSON COUNTY SCHOOL BOARD OF EDUCATION, JAMES M. DAVIS, individually, and in his official capacity as Director of Schools for Wilson County, STAN MOSS, individually, and in his official capacity as Principal of Lakeview Elementary School, and BERTIE ALLIGOOD, individually, and in her official capacity as Assistant Principal of Lakeview Elementary School	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

COMES NOW Plaintiffs, Dough Gold and Christy Gold, individually, and on behalf of their minor children H.G. and J.G., James Walker and Jennifer Walker, individually, and on behalf of their minor child A.W., Lee Miller and Jana Miller, individually, and on behalf of their minor children L.M. and N.M., Edward and Stacey Joyce, individually, and on behalf of their minor child T.J., Jon Bounds and Melynda Bounds, individually, and on behalf of their minor child R.B., pursuant to Fed. R. Civ. P. 65(a), and respectfully moves this Court for a preliminary

injunction that enjoins Defendants Wilson County School Board of Education, James M. Davis, individually, and in his official capacity as Director of Schools for Wilson County, Stand Moss, individually, and in his official capacity as Principal of Lakeview Elementary School; and Bertie Alligood, individually, and in her official capacity as Assistant Principal of Lakeview Elementary School, their agents, servants, employees, attorneys, and all persons and entities in active concert or participation with them, directly or indirectly, from applying Wilson County Board of Education policy no. 1.806 or any other policy so as to prevent Plaintiffs from using religious phrases on posters advertising events at Lakeside Elementary School.

In absence of a preliminary injunction order, Plaintiffs will suffer irreparable injury, namely, the loss of rights and freedoms guaranteed by the United States Constitution. In support of this Motion, Plaintiffs rely on the following:

A. Affidavit of James Walker, attached hereto as Exhibit "A";

B. Affidavit of Jennifer Walker, attached hereto as Exhibit "B";

C. Affidavit of A. W., attached hereto as Exhibit "C";

D. Affidavit of Doug Gold, attached hereto as Exhibit "D";

E. Affidavit of Christy Gold, attached hereto as Exhibit "E";

F. Affidavit of H. G., attached hereto as Exhibit "F";

G. Affidavit of Jana Miller, attached hereto as Exhibit "G";

H. Affidavit of L. M., attached hereto as Exhibit "H";

I. Affidavit of Stacey Joyce, attached hereto as Exhibit "I";

J. Affidavit of Melynda Bounds, attached hereto as Exhibit "J";

K. Copy of Wilson County School Board of Education ("Board") Policy No. 1.806, attached hereto as Exhibit "K";

L. Copy of Court Order in Doe v. Wilson County School System, attached hereto as Exhibit “L”;

M. Photograph of First A.W. Poster before alteration, attached hereto as Exhibit “M”;

N. Photograph of First A.W. Poster after alteration, attached hereto as Exhibit “N”;

O. Photograph of Second A.W. Poster before alteration, attached hereto as Exhibit “O”;

P. Photograph of Second A.W. Poster after alteration, attached hereto as Exhibit “P”;

Q. Photograph of H.G. Poster before alteration, attached hereto as Exhibit “Q”;

R. Photograph of H.G. Poster after alteration, attached hereto as Exhibit “R”;

S. Photograph of J.G. Poster before alteration, attached hereto as Exhibit “S”;

T. Photograph of J.G. Poster after alteration, attached hereto as Exhibit “T”;

U. Photograph of Joyce Family Poster before alteration, attached hereto as Exhibit “U”;

V. Photograph of Joyce Family Poster after alteration, attached hereto as Exhibit “V”;

W. Photograph of R.B. Poster before alteration, attached hereto as Exhibit “W”;

X. Photograph of R.B. Poster after alteration, attached hereto as Exhibit “X”;

Y. Photograph of Bounds Family Poster before alteration, attached hereto as Exhibit “Y”;

Z. Photograph of Bounds Family Poster after alteration, attached hereto as Exhibit “Z”;

AA. Photograph of disclaimer placed on posters, attached hereto as Exhibit “AA”;

BB. September 19 email from Plaintiffs' counsel to Board Counsel, attached hereto as Exhibit "BB";

CC. September 19 email from Board Counsel to Plaintiffs' counsel, attached hereto as Exhibit "CC";

DD. September 22 letter from Plaintiffs' counsel to Board Counsel, attached hereto as Exhibit "DD";

EE. September 23 letter from Board Counsel to Plaintiffs' counsel, attached hereto as Exhibit "EE";

Verified Complaint; and

Memorandum of Law in Support of this Motion filed simultaneously with this Motion.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that this Honorable Court grant their Motion for Preliminary Injunction.

Respectfully submitted,

BY: _____

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**pro hac vice* motion filed concurrently
***pro hac vice* motion forthcoming

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, along with the Complaint and Summons, has been delivered to a process server for service on defendants, this ____ day of March, 2009.

_____

David Maddox

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

DOUG GOLD and CHRISTY GOLD, individually, and on behalf of their minor children H. G. and J. G., JAMES WALKER and JENNIFER WALKER, individually, and on behalf of their minor child A. W., LEE MILLER and JANA MILLER, individually, and on behalf of their minor children L. M. and N. M., EDWARD and STACEY JOYCE, individually, and on behalf of their minor child T. J., JON BOUNDS and MELYNDA BOUNDS, individually, and on behalf of their minor child R. B.,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. _____
WILSON COUNTY SCHOOL BOARD OF EDUCATION, JAMES M. DAVIS, individually, and in his official capacity as Director of Schools for Wilson County, STAN MOSS, individually, and in his official capacity as Principal of Lakeview Elementary School, and BERTIE ALLIGOOD, individually, and in her official capacity as Assistant Principal of Lakeview Elementary School	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PREMLIMINARY INJUNCTION

The Golds, Walkers, Millers, Joyces, and Bounds challenge Wilson County Board of Education ("Board") policy no. 1.806 that unconstitutionally restricts speech at Lakeview Elementary School ("Lakeview"), both facially and as applied to their religious expression on posters and announcements. Lakeview officials enforce this policy to silence religious messages, while allowing non-religious messages at the school, evincing blatant viewpoint discrimination

and hostility toward religion. Because these violations persist to this day, Plaintiffs seek relief in the form of a preliminary injunction.

STATEMENT OF FACTS

Lakeview is elementary school located in Mt. Juliet, Tennessee. (Verified Complaint, ¶ 17). The school has historically permitted students, parents, and outside groups to place posters and announcements describing student-related activities or events in various hallways, particularly, in the main lobby area and the hallway leading into the cafeteria. (Compl., ¶ 18). Outside groups that have used hallways at Lakeview for announcements and notices include Girl Scouts, Cubs Scouts, and Big Brothers/Big Sisters. (Jennifer Walker Affidavit, ¶ 13, attached to Motion for Preliminary Injunction as Ex. "B").

On a yearly basis, students and parents have placed posters and/or announcements in the Lakeview hallways informing students of an event called "See You At The Pole" ("SYATP"). (Ex. "B," ¶¶ 12-13). SYATP is an annual event that occurs on the fourth Wednesday of September on school campuses across the country. (Ex. "B," ¶ 9). On this day, students gather before school around the school flag pole and pray for their school, teachers, community and families. (Compl., ¶ 21). Students and parents affiliated with Lakeview have also placed posters and/or announcements in the hallways of Lakeview informing students of an event known as "National Day of Prayer" (NDP). (Compl., ¶ 22). NDP is an annual observance held on the first Thursday of May. (Christy Gold Affidavit, ¶ 7, attached to Motion for Preliminary Injunction as Ex. "E"). For NDP, students typically meet on school property and pray before the school day. (Compl., ¶ 23).

Beginning in the 2005/2006 school year, various students attending Lakeview created posters for the SYATP and NDP. (Compl., ¶ 25). Without any school involvement or aid, students and

their families made these posters at home in order to announce and generate interest in these particular events. (Compl., ¶ 25). Posters and notices about SYATP and NDP were placed in the hallways of Lakeview, and subsequently removed, without incident during the 2005/2006, 2006/2007, and 2007/2008 school years. (Ex. "B," ¶¶ 15-16). Parents also put up other notices about these events in the main lobby area of the school. (Compl., ¶ 27). Due to the nature of these particular events, the posters and notices have invariably referred to God and prayer. (Compl., ¶ 27). The Golds, Walkers, Millers, Joyces and Bounds have all been involved in the SYATP and NDP events at Lakeview. (Compl., ¶¶ 29-33).

As of June 3, 2004, the Board had in place a written policy, no. 1.806, concerning materials posted and distributed in schools in their district, including Lakeview. (Compl., ¶ 34). The policy provides in pertinent part as follows:

> No part of the school system, including the facilities, the name, the staff, and the students, shall be used for advertising or promoting the interests of any commercial, political, or other non-school agency or organization except that:
>
> * * *
>
> 4. The principal shall screen all materials prior to distribution to ensure their appropriateness. The principal may prohibit materials that:
>
> - Would be likely to cause substantial disruption of the operation of school;
> - Violate the rights of others;
> - Are obscene, lewd, or sexually explicit; or
> - Would reasonably cause students to believe they are sponsored or endorsed by the school.

(Copy of Wilson County School Board of Education Policy No. 1.806, attached to Motion for Preliminary Injunction Exhibit "K"). Up and until the 2008/2009 school year, no one affiliated with Lakeview or the Wilson County School System, ever indicated that there was anything inappropriate about the posters or notices regarding the SYATP and NDP events. (Compl., ¶ 35).

But this all changed in 2006 when the American Civil Liberties Union, on behalf of an unidentified Doe family (referred to collectively as "ACLU") sued Wilson County School System and Lakeview school officials, claiming that actions and policies at Lakeview violated the Establishment Clause. (Compl., ¶ 37). Among other things, ACLU sought to bar SYATP and NDP events at Lakeview, as well as the posting of posters, notices, and other materials concerning these two events. (Compl., ¶ 38).

Mr. Gold and Mrs. Gold, as well as Mr. Walker and Mrs. Walker, intervened in the ACLU case as Intervenors-Defendants to prevent the elimination of their and their children's expressive activities at Lakeview. (Compl., ¶ 39). After a bench trial, the Court held that Lakeview administrators and some teachers improperly advanced religion at Lakeview, but the Court specifically declined to ban SYATP, NDP, or the promotional posters and notices for these events. (Compl., ¶¶ 40-41). The relevant portion of this order reads as follows:

> (3) The individual Defendants and their successors and all parties' officers, agents, servants, employees, and attorneys acting in concert or participation with them are hereby permanently enjoined, restrained, and directed as follows:
>
> * * *
>
> (g) Lakeview School may permit the See You At The Pole™ event and the National Day of Prayer event to take place on school property during non-instructional hours if the Wilson County Board of Education approves of such activities in advance in accordance with applicable written Board policy; further, no school system employee may organize or promote such events or attend or participate in such events except for the limited purpose of supervising students and/or public school property; further, any flyers, signs, posters, notices or announcements promoting such events must include a disclaimer that the Wilson County School System and the administration of the Lakeview School do not endorse or sponsor the events; further, "I Prayed" stickers may not be worn by Lakeview School administrators, teachers and staff during instructional time, but students may do so; and further, any equipment owned by the Wilson County School System may be used at the event if reasonable compensation is paid for its use in accordance with applicable written Board policy.

(Copy of Court Order in Doe v. Wilson County School System, attached to Motion for Preliminary Injunction Exhibit "L"). In light of this Order, all interested parties fully expected to put up posters at Lakeview about SYATP and NDP as long as the posters and notices contained a disclaimer that Wilson County School System and Lakeview did not sponsor or endorse the events. (Compl., ¶ 42).

For the 2008 SYATP event, Mrs. Walker volunteered to help students organize and promote the 2008 SYATP. (Ex. "B," ¶ 18). In an email, Mrs. Walker asked families to make posters with information describing the event. (Ex. "B," ¶ 18). This information could also include the theme Bible verse for the event, that being, "Speak, for your servant is listening." 1 Sam. 3:9. (Ex. "B," ¶ 18).

The Walkers, Golds, Millers, Joyces, and Bounds all decided to participate in the 2008 SYATP event. (Compl., ¶¶ 46-50). H. G. made a poster for SYATP, as did her brother J.G. (Doug Gold Affidavit, ¶ 15, attached to Motion for Preliminary Injunction as Ex. "D"); (H.G. Affidavit, ¶ 9, attached to Motion for Preliminary Injunction as Ex. "F"); (Picture of H.G. poster before alteration, attached to Motion for Preliminary Injunction as Ex. "Q"); (Picture of J.G. poster before alteration, attached to Motion for Preliminary Injunction as Ex. "S"). The Millers anticipated L. M. making a poster sometime prior to the 2008 SYATP event. (Jana Miller Affidavit, ¶ 9, attached to Motion for Preliminary Injunction as Ex. "G"); (L.M. Affidavit, ¶ 8, attached to Motion for Preliminary Injunction as Ex. "H"). The Joyces made one poster on behalf on their entire family. (Stacey Joyce Affidavit, ¶¶ 9-11, attached to Motion for Preliminary Injunction as Ex. "I"); (Picture of Joyce Family poster before alteration, attached to Motion for Preliminary Injunction as Ex. "U"). R. B. made a poster and another poster was made on behalf the Bounds family as a whole. (Melynda Bounds Affidavit, ¶¶ 7-9, attached to Motion for

Preliminary Injunction as Ex. "J"); (Picture of R.B. poster before alteration, attached to Motion for Preliminary Injunction as Ex. "W"); (Picture of Bounds Family poster before alteration, attached to Motion for Preliminary Injunction as Ex. "Y"). A. W. made two posters for the SYATP event. (A.W. Affidavit, ¶¶ 7-10, attached to Motion for Preliminary Injunction as Ex. "C"); (Picture of First A.W. poster before alteration, attached to Motion for Preliminary Injunction as Ex. "M"); (Picture of Second A.W. poster before alteration, attached to Motion for Preliminary Injunction as Ex. "O").

Mrs. Gold printed the following disclaimer, to be placed on all SYATP posters hung in the Lakeview hallways: "See You At The Pole is a student initiated and student led event and is not endorsed by Lakeview Elementary or Wilson County Schools." (Christy Gold Affidavit, ¶ 17, attached to Motion for Preliminary Injunction as Ex. "E"); (photograph of disclaimer, attached to Motion for Preliminary Injunction as Ex. "AA").

On September 19, five days before the SYATP event, Mrs. Walker went to meet Mrs. Gold at Lakeview to hang the posters about the SYATP event. (Ex. "B," ¶ 21). But when Mrs. Walker arrived at Lakeview, she was informed by a school secretary that SYATP posters would not be allowed at the school in their present form. (Ex. "B," ¶ 22). Specifically, Mrs. Walker was told: "You can't hang up those posters. They have the word 'God' on them. Mr. Moss said they can't be hung up like that." (Ex. "B," ¶ 22). Mrs. Walker was then directed to go to Assistant Principal Alligood's office to discuss the situation further. (Ex. "B," ¶ 25). At that point, Mrs. Gold arrived with the disclaimers for the posters, and she accompanied Mrs. Walker to visit Assistant Principal Alligood. (Ex. "B," ¶ 25).

During this meeting, Assistant Principal Alligood explained that posters containing religious references, like "In God We Trust," "God Bless America," and "come and pray," were precluded

by Board policy and prohibited in the hallways as inappropriate. (Ex. "E," ¶ 22). Mrs. Walker and Mrs. Gold reminded Assistant Principal Alligood that each poster would contain a disclaimer, but Assistant Principal Alligood replied that the posters would still be inappropriate. (Ex. "E," ¶ 23). Mrs. Walker and Mrs. Gold then explained that, under the recent Court Order, posters containing religious sayings should be allowed in the school. (Ex. "B," ¶ 27). In consideration of this concern, Assistant Principal Alligood agreed to contact Director Davis for further input. (Ex. "B," ¶ 27).

Assistant Principal Alligood telephoned Director Davis and passed on Mrs. Gold's and Mrs. Walker's concerns. (Ex. "B," ¶ 28). But Director Davis was not persuaded. After the telephone conversation, Assistant Principal Alligood reiterated that the posters, with phrases like "In God We Trust" and "come and pray," did not comply with Board policy and would not be permitted at Lakeview. (Ex. "B," ¶ 29). Mrs. Walker asked what they could do to alleviate the concern. (Ex. "B," ¶ 30). Assistant Principal Alligood passed along Director Davis' directive that they cover up the religious phrases on the posters. (Ex. "B," ¶ 30). Shortly thereafter, Mrs. Gold and Mrs. Walker were supplied with green paper to cover up all of the religious phrases found on the posters. (Ex. "B," ¶ 32).

Mrs. Walker and Mrs. Gold collected a total of nine (9) SYATP posters for the 2008 event and proceeded to cover up the religious phrases and words on these posters. (Ex. "B," ¶¶ 32-33). On the poster made by H.G., the phrase "In God We Trust" was obscured by green paper. (Picture of H.G. poster after alteration, attached to Motion for Preliminary Injunction as Ex. "R"). Likewise, the poster made by J. G. with the phrase "In God We 'Trust'" was buried behind green paper. (Picture of J.G. poster after alteration, attached to Motion for Preliminary Injunction as Ex. "T"). On one of A.W.'s posters, the "and pray" portion of "come and pray" was covered,

leaving just the word "come." (Picture of First A.W. poster after alteration, attached to Motion for Preliminary Injunction as Ex. "N"). On her other poster, the phrase of "In God We Trust" was covered up by green paper. (Picture of Second A.W. poster after alteration, attached to Motion for Preliminary Injunction as Ex. "P"). The Joyce's family poster was altered by green paper with the purging of both the phrase "In God We Trust here in America" and the theme bible verse for SYATP. (Picture of Joyce Family poster after alteration, attached to Motion for Preliminary Injunction as Ex. "V"). With the poster made by R. B., the SYATP theme verse - "Speak, for your servant is listening" 1 Sam 3:9 - was covered up. (Picture of R.B. poster after alteration, attached to Motion for Preliminary Injunction as Ex. "X"). This same bible verse was concealed on the Bounds family poster. (Picture of Bounds Family poster after alteration, attached to Motion for Preliminary Injunction as Ex. "Z").

Once the religious phrases were covered, the altered posters were hung in the hallways of Lakeview. (Ex. "B," ¶ 34). After receiving the news that about the decision to edit the posters, the Golds, Walkers, Millers, Joyces, and Bounds were all very upset with this decision. (Compl., ¶¶ 70-74). These families believed that the decision evinced hostility toward the concept of God and prayer in general and their faith specifically. (Compl., ¶¶ 70-74).

On September 19, 2008, Mr. Walker contacted Director Davis for a clarification of Board policy. (James Walker Affidavit, ¶¶ 17-18, attached to Motion for Preliminary Injunction as Ex. "A"). Mr. Walker asked Director Davis if the Board was actually requiring phrases such as "In God We Trust," God Bless America," and "Come Pray With Us" to be covered up on SYATP posters. (Ex. "A," ¶ 18). Director Davis confirmed to Mr. Walker that such phraseology would be inappropriate and would have to be excised or covered up as a matter of Board policy. (Ex. "A," ¶ 18). Mr. Walker conveyed his belief that children had a constitutional right to use their

own words on the posters, and this was reflected in the Court's Order, but Director Davis disagreed with Mr. Walker's assessment, and directed him to forward any other questions to the Board attorney. (Ex. "A," ¶ 19).

On that same day, Plaintiffs' counsel attempted to contact Board attorney via telephone and email. (Compl., ¶ 77). The email emphasized the unconstitutional nature of the Board's policy and asked that the censorship of the posters be rescinded. (September 19 email from Plaintiffs' counsel to Board Counsel, attached to Motion for Preliminary Injunction as Ex. "AA"). The Board attorney emailed back and "respectfully disagree[d]." (September 19 email from Board Counsel to Plaintiffs' counsel, attached to Motion for Preliminary Injunction as Ex. "BB"). He elaborated: "The Director is of the opinion that scriptural references would be in violation of the Court's Order and that is the position that the school system has taken." (Ex. "BB"). In a response email, Plaintiffs' counsel asked for further clarification, reminding Board attorney that the Court Order did not preclude the mention of bible verses or any other religious reference, as long as posters contained the requisite disclaimer. (Compl., ¶ 79).

On the following Monday, September 22, Mr. Gold called Principal Moss to inquire further about the restriction on the SYATP posters. (Ex. "D," ¶ 23). Mr. Gold was concerned about the prospect of another conflict and wanted to see if it could be resolved. (Ex. "D," ¶ 23). But Principal Moss was resolute about the policy barring religious references on posters and advised that he was following the directive of Director Davis and the Board attorney on the matter. (Ex. "D," ¶¶ 23-24).

Plaintiffs' counsel then again wrote Board attorney, via facsimile, setting out his understanding of the policy and reiterating constitutional concerns. (September 22 Letter from Plaintiffs' counsel to Board Counsel, attached to Motion for Preliminary Injunction as Ex.

"CC"). He again asked that the policy banning religious references be rescinded. (Ex. "CC"). Counsel also asked to be advised of any possible misunderstanding he may have about Board policy. (Ex. "CC"). In response, Board attorney sent a facsimile letter to counsel. (Compl., ¶ 82). In this letter, Board attorney declined to rescind the policy or offer an alternative view of it and instead steadfastly defended the policy barring religious references. (September 23 Letter from Board Counsel to Plaintiffs' counsel to, attached to Motion for Preliminary Injunction as Ex. "DD"). Board attorney explained that their action in eliminating religious content and symbols was pursuant to the Court's Order and written policies, specifying Board policy no. 1.806 as a basis. (Ex. "DD").

The Golds, Walkers, Millers, Joyces, and Bounds do not want to check their faith at the school house gate. (Compl., ¶¶ 84-88). And in appropriate contexts, these families want to describe and advertise for future SYATP and NDP events. (Compl., ¶¶ 84-88). In particular, they earnestly want to place the messages "In God We Trust" and "In God We Trust Here In America" and other similar messages on posters used to advertise future SYATP and NDP events, including the 2009 NDP event in May. (Compl., ¶¶ 84-88). They also want to recite bible verses associated with the SYATP and NDP events on these posters, and they would like to mention God and prayer on these posters. (Compl., ¶¶ 84-88). They want to put up these posters at Lakeview. (Compl., ¶¶ 84-88). But these families are chilled and deterred from using any religious phrases or referencing God on posters at Lakeview because of the policy in place, and their fear of censorship, reprisal, and reprimand. (Compl., ¶¶ 84-88).

ARGUMENT

In evaluating a preliminary injunction motion, this Court is to consider: (1) Plaintiffs' likelihood of success on the merits, (2) possibility of irreparable harm to the Plaintiffs absent the

injunction, (3) whether the injunction will cause substantial harm to others, and (4) impact of an injunction on the public interest. *Tucker v. City of Fairfield*, 398 F.3d 457, 461 (6th Cir. 2005). These are not prerequisites but factors to be balanced. *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004). As demonstrated herein, all of these factors support Plaintiffs' request for a preliminary injunction.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Lakeview school officials generally allow posters and announcements in the school hallways, but isolate religious sayings for censorship. This ban infringes on Plaintiffs' rights to convey a religious message (violating Free Speech clause), demonstrates hostility toward religion (violating the Establishment clause), and does so in discriminatory fashion (violating Equal Protection clause).

A. Ban Violates Free Speech

1. First Amendment Protects Religious Sayings on Posters

First Amendment protects expression as long as there is "intent to convey a particularized message" and it is likely that "the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Here, Plaintiffs desire to display posters promoting and describing certain religious-oriented events. (Compl., ¶¶ 84-88). This means of communication constitutes protected speech. *See, e.g., Boos v. Barry*, 485 U.S. 312, 318 (1988) (recognizing signs as protected speech). And, religious speech is entitled to the same protection granted any other kind of speech. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[F]ar from being a First Amendment orphan, [religious expression] is as fully protected under the Free Speech clause as secular private expression"). In fact, "[r]eligious expression

holds a place at the core of the type of speech that the First Amendment was designed to protect." *DeBoer v. Village of Oak Park*, 267 F.3d 558, 570 (7th Cir. 2001).

2. School Policy Allows For Unbridled Discretion and Improper Discrimination

Policy 1.806 grants unbridled discretion to school officials to control speech.[1] With unbridled discretion, government officials can cloak viewpoint discrimination behind vague language. *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). Because the effects are so detrimental, unbridled discretion is forbidden in every type of forum, even in a nonpublic forum. *Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public*, 457 F.3d 376, 386 (4th Cir. 2006) (*CEF II*).

According to Policy 1.806, a school principal "shall screen all materials prior to distribution to ensure their *appropriateness*." (emphasis added). The term "appropriateness" has no universal meaning and is left undefined, allowing school officials to interpret to their liking. Speech can be considered "appropriate" or "inappropriate" for any number of reasons, including the viewpoint of the speech. Thus, there is nothing to prevent officials from silencing Plaintiffs' message because the message is religious.

These concerns are not hypothetical at Lakeview. Officials have already determined that Plaintiffs' posters are "inappropriate" because these posters mention religious words like "God" and "pray." (Ex. "B," ¶¶ 26-29).

In *CEF II*, a school district passed a distribution policy allowing elementary schools to preclude any literature that "would undermine the intent of this policy." 457 F.3d at 380. And, the policy specified that the intent of the Board of Education "[is] to designate *appropriate*

[1] For this same reason, Policy 1.806 also violates the Due Process Clause of the Fourteenth Amendment because that policy does not provide "fair notice or warning" and fails to "establish minimal guidelines" to govern enforcement. *Smith v. Goguen*, 415 U.S. 566, 572-74 (1974).

materials for display and distribution and maintain a limited nonpublic forum" *Id*. at 379 (emphasis added). The Fourth Circuit found the language inadequate and invalidated the policy for unbridled discretion. *Id*. at 386-88. Numerous courts have used similar logic to strike down similar language---- "appropriate" and "inappropriate" --- as vague and allowing unbridled discretion. *See, e.g., Flaherty v. Keystone Oaks School Dist.*, 247 F.Supp.2d 698, 703-05 (W.D.Pa. 2003) (holding policy banning "inappropriate" speech in high school vague); *Aubrey v. Cincinnati Reds*, 841 F.Supp. 229, 233 (S.D.Ohio 1993) ("the criterion of 'inappropriate for viewing by children,' standing alone, is hopelessly vague and overbroad.").[2]

In fact, this Court, in *Doe v. Wilson County School System*, cited *CEF II* and indicated that Policy 1.806 presents the same constitutional concerns:

> The Board also adopted a written policy, Number 1.806, that covered the distribution of flyers at the school….The policy also states that the "principal shall screen all materials prior to distribution to ensure their appropriateness." FN10
>
> FN10. The policy does not make clear what is meant by ensuring the "appropriateness" of particular materials. *See Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Sch.*, 457 F.3d 376, 388 (4th Cir. 2006) ("nothing in the policy prohibits viewpoint discrimination, requires viewpoint neutrality, or prevents exclusion of flyers based on [the school's] assessment of the viewpoint expressed in a flyer").

564 F.Supp.2d 766, 797, 797 n.10 (M.D.Tenn. 2008). Despite this Court's remarks, Policy 1.806 is still in place, and is being used to chill religious speech.

3. Ban on Religious Sayings Constitutes Viewpoint Discrimination

Viewpoint discrimination is an "egregious" form of discrimination occurring when "the government targets not subject matter, but particular views taken by speakers on a subject…."

[2] Policy 1.806 is also hopelessly overbroad. Under the overbreadth doctrine, a statute violates the First Amendment if it prohibits a substantial amount of protected expression. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). The subject policy bans "inappropriate" speech, which, as interpreted by the school district, includes all religious messages even if these religious messages come from private citizens and are non-disruptive, non-vulgar, and non-drug related. The banning of all religious messages plainly prohibits a substantial amount of protected speech.

Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 829 (1995). Put simply, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id*. And excluding a religious perspective on an otherwise permissible subject is an obvious form of viewpoint discrimination. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

Viewpoint discrimination is disfavored in any venue, including elementary schools.[3] For example, in *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Tp. Sch. Dist.*, a religious group attempted to distribute literature to students, post information in school hallways, and meet in classrooms in three elementary schools. 386 F.3d 514, 519-521 (3rd Cir. 2004). The schools denied the religious group access, though, because of a purported concern about violating the Establishment Clause. *Id*. Recognizing the religious speech of the group as private – and not government – speech, the Third Circuit rejected the school's position:

> …the Good News Club flyers and permission slips were obviously not official Stafford documents. On the contrary, Stafford had no hand in writing the materials in question and did not pay for them. Nothing in the materials suggested that Stafford had any role in their production or approved of their content. Indeed, the Good News Club flyer contained an express disclaimer stating that the Good News Club was "not a school sponsored activity."

Id. at 525.[4] The restriction on religious messages was struck down as invalid viewpoint discrimination. *Id.* at 527-29. *See also Child Evangelism Fellowship of MD., Inc. v. Montgomery*

[3] Viewpoint discrimination is so problematic that it is not even allowed in a nonpublic forum. *Kincaid v. Gibson*, 236 F.3d 342, 355 (6th Cir. 2001).

[4] Plaintiffs not only include parents, but also students at Lakeview. Student speech can only be silenced if it is 1) substantially disruptive, 2) vulgar/sexually explicit, 3) school sponsored, 4) encourages illegal behavior, or 4) forbidden pursuant to a content neutral time, place, manner restriction. *M.A.L. ex rel. M.L. v. Kinsland*, 543 F.3d 841, 846-47, 848 n.3 (6th Cir. 2008). Plaintiffs' speech falls into none of these exceptions. Their speech is not vulgar, and it does not encourage any form of illegal behavior. It merely refers to God and religion. Neither is this

County Pub. Schs., 373 F.3d 589, 593-94 (4th Cir. 2004) (*CEF I*) (finding viewpoint discrimination when elementary schools prohibited religious group from dispensing flyers to students); *Prince v. Jacoby*, 303 F.3d 1074, 1091-92 (9th Cir. 2002) (finding viewpoint discrimination when school prevented student group from displaying religious poster on school bulletin board).

This case is no different from *Stafford.* Plaintiffs want to promote religious events in the same places and in the same way that non-religious groups want to promote their activities. (Compl., ¶¶ 18-19; 84-88). Other groups at Lakeview, like Cub Scouts, Girl Scouts, and Big Brothers/Big Sisters, are free to promote their events with announcements and posters in the hallways. (Ex. "B," ¶ 13). And, they are allowed to adequately describe their events in an effort to promote them. But, Plaintiffs are not permitted to engage in this basic function. They are unable to promote their events with any meaningful specificity because they are forced to excise religious words from their description of the religious events. (Ex. "B," ¶¶ 28-32).[5] SYATP and NDP are both centered on students gathering and praying to God, and yet, those wishing to promote these events are stymied from mentioning either prayer or God. Lakeview has

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speech school-sponsored. Plaintiffs create and pay for their posters and these posters are unconnected to any school-sponsored event or curriculum. Moreover, the posters contain disclaimers denying school sponsorship. And since Lakeview singles out and censors particular religious words and messages, this action cannot possibly be considered a content-neutral time, place, or manner restriction.

[5] And, just as in *Stafford*, there is no possibility that Plaintiffs' speech could be confused for Lakeview's speech because Plaintiffs' poster contains a sticker disclaiming school endorsement. *See also Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1054 (9th Cir. 2003) ("Indeed, there is even less danger of a perception of "endorsement" for materials containing an express disclaimer that the school does not endorse or sponsor the organization promoting the activity."); *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 (4th Cir. 1988) (school did not violate Establishment Clause when it allowed Gideons to distribute religious materials in hallways because other groups were allowed to distribute information and because officials displayed a disclaimer denying any school endorsement).

effectively singled out Plaintiffs' private religious posters – otherwise permissible posters apart from their content – and excluded those posters because of the religious perspective they portray. This is obvious viewpoint discrimination and cannot be tolerated under the First Amendment.

4. Establishment Clause Cannot Justify Ban on Religious Sayings

Defendants cannot hide behind the Establishment Clause as justification for their viewpoint discrimination. Plaintiffs only want to advertise their events like everyone else. They do not seek special treatment; they only ask for equal and neutral treatment. Treating religious speech like other speech does not violate the Establishment Clause. *See, e.g., Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 420-424 (6th Cir. 2004) (allowing distribution of religious flyers at elementary school under neutral policy did not violate Establishment Clause). *See also Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis in original) ("there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.").

For instance, in *CEF I*, an elementary school prevented a religious group from distributing flyers even though the school allowed other groups to distribute non-religious flyers. 373 F.3d 589, 592-93 (4th Cir. 2004). According to the school, the Establishment Clause required viewpoint discrimination. *Id*. at 594. But the Fourth Circuit did not find the contention compelling because the religious group only sought the same access as other groups. *Id*. at 595. It was irrelevant that the religious message was distributed during school hours (*id*. at 596-97), that students had no choice but to receive the religious flyer (along with non-religious flyers) (*id*. at 597-01), and that school officials participated in distributing the religious flyers (and non-religious flyers) to students (*id*. at 601-02).

As long as private speech is handled in a neutral manner, there is no prospect of an Establishment clause violation, whether the speech takes place at an elementary school or elsewhere. *See, e.g., Mergens*, 496 U.S. at 247, 251 (requiring students to listen to all student announcements, including an announcement inviting students to an after-school religious club meeting, does not violate Establishment Clause); *Rusk*, 379 F.3d at 420-424 (distribution of religious flyers at elementary school did not violate Establishment Clause); *Stafford Tp. Sch. Dist.*, 386 F.3d at 530-35 (religious group could distribute flyers and permission slips and post material on school walls without violating Establishment Clause); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 8 F.3d 1160 (7th Cir. 1993) (distribution of Boy Scout materials and placement of Boy Scout posters in school did not violate Establishment Clause); *M.B. ex rel. Martin v. Liverpool Central Sch. Dist.*, 487 F.Supp.2d 117, 136-140 (N.D.N.Y. 2007) (elementary student's distribution of religious material during non-instructional time did not violate the Establishment Clause); *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F.Supp.2d 98, 120 (D.Mass. 2003) (student's distribution of material with religious message during non-instructional hours did not violate Establishment Clause); *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F.Supp.2d 897 (W.D.Mich. 2000) (distribution of religious groups' materials did not violate Establishment Clause).

A wide variety of non-religious groups have displayed information about their events in the hallways of Lakeview. (Ex. "B," ¶ 13). In the same way, Plaintiffs want to display information about their religious events. (Compl., ¶¶ 84-88). Providing equal access to private religious speech does not raise Establishment Clause concerns.

B. Ban Violates Establishment of Religion

The school ostensibly instituted a ban on religious sayings on posters to an avoid Establishment Clause dilemma, but, ironically, it is the ban itself that actually triggers these concerns. "[The] First Amendment mandates government neutrality between . . . religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The State "may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963).

Unconstitutional hostility towards religion is determined by considering the perspective of a reasonable observer. *Chaudhuri v. Tennessee*, 130 F.3d 232, 237 (6th Cir. 1997). "If a reasonable observer would conclude that the message communicated is one of . . . disapproval of religion, then the challenged practice is unlawful." *Id.* The Supreme Court has found that a reasonable observer would view a school excluding religious groups from facilities open to non-religious groups as being hostile toward religion. *Mergens*, 496 U.S. at 248. *See also Daugherty*, 116 F. Supp 2d at 908. Similarly, the Sixth Circuit concluded that a reasonable observer would infer disapproval of religion if a school refused to distribute fliers advertising religious activities but distributed fliers advertising other kinds of activities. *Rusk*, 379 F.3d at 423.

In this matter, the school's actions reflect blatant hostility towards religion whether the reasonable observers are parents or classmates. *See Rusk*, 379 F. 3d. at 420-21 (holding that parents, rather than students, are relevant audience for fliers placed in student mailboxes). Lakeview officials allow a wide variety of non-religious groups to display information at Lakeview. (Ex. "B," ¶ 13). Lakeview officials even allow Plaintiffs to display posters of their choosing as long as those posters do not contain references to God or religion. (Ex. "B," ¶¶ 30-34). And, the motive of these officials in censoring religious sayings is not in doubt. References

to God, prayer, and bible verses are prohibited solely because of their religious connotation. (Ex. "B," ¶¶ 26-30).

The hostility toward religion and religious ideas could not be more blatant. Any reasonable observer would have to conclude that Lakeview disapproves of religious viewpoints and does not want these viewpoints expressed at Lakeview.[6] Just as in *Mergens* and *Rusk*, Defendants reveal their hostility toward religion by prohibiting religious activities of exactly the same kind as the secular ones they allow. Such hostility is not allowed under the Establishment Clause.

C. Ban Violates Equal Protection

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). If similarly-situated persons receive disparate treatment and that treatment invades a fundamental right such as speech or religious freedom, the defendants' actions "are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 806-07 (E.D. Mich. 2003) (prohibiting students from expressing their viewpoint that homosexuality is wrong violated Equal Protection Clause).

As shown herein, the school forbids Plaintiffs and other students from expressing religious messages on posters or from advertising religious events on posters. Meanwhile, Lakeview lets similarly-situated students and groups express any other conceivable non-disruptive message on

[6] This is exemplified by the affidavits submitted with this Motion. For example, J.G. and H.G. both voiced their concerns to their mother. (Ex. "E," ¶ 29). Likewise, A.W. evinced sadness regarding the school's decision. (Ex. "B," ¶ 35). Both the Gold and the Walker Families believe that the action to censor the posters communicates hostility toward their religion. (Ex. "E," ¶ 30); (Ex. "B," ¶ 36). The same is true for the Bounds family, the Joyce family and the Miller family. (Ex. "J," ¶ 12); (Ex. "G," ¶¶ 15-18); (Ex. "I," ¶¶ 15-17).

posters. There is no reasonable basis for such disparate treatment. Thus, Lakeview is violating the Equal Protection clause.

II. PLAINTIFFS ARE SUFFERING IRREPARABLE HARM

Without the requested injunction, Plaintiffs are perpetually prevented from exercising their First Amendment rights at Lakeview. Plaintiffs desire to speak for the NDP event coming this Spring and in the upcoming future SYATP and NDP events, but the fear of punishment prevents them from doing so. Thus, the loss of his constitutional right to speak is both actual and imminent. This loss of First Amendment freedoms results in irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 363 (6th Cir. 1998) (explaining that a likelihood of success on the merits of a First Amendment claim demonstrates irreparable harm).

III. INJUNCTION WILL CAUSE NO HARM TO DEFENDANTS

Granting Plaintiffs request for injunctive relief - which essentially commands Defendants to comport with constitutional requirements - will cause no harm to Defendants. *See Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (noting that public school would "in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which, on this record, is likely to be found unconstitutional.").

IV. PUBLIC INTEREST FAVORS PRELIMINARY INJUNCTION

"It is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). In this matter, the public interest will be best served by the elimination, rather than the continuation, of the discrimination against Plaintiffs' speech. The public is best served by preserving the foundation of American democracy via informed public discourse in public schools.

CONCLUSION

For reasons set forth herein, Plaintiffs respectfully request that this Court grant their Motion for Preliminary Injunction.

Respectfully submitted,

BY: _____

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*_pro hac vice_ motion filed concurrently
**_pro hac vice_ motion forthcoming

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, along with the Complaint and Summons, has been delivered to a process server for service on defendants, this ____ day of March, 2009.

_____
David L. Maddox