APPEAL NO. 06-5380/5406/5407

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY ALLEN MORRISON, II, BY AND THROUGH HIS NEXT FRIENDS, TIMOTHY MORRISON AND MARY MORRISON; TIMOTHY AND MARY MORRISON; BRIAN NOLEN; AND DEBORA JONES,
Plaintiffs-Appellants,

v.

SARAH ALCORN, WILLIAM CARTER, DAVID FANNIN, LIBBY FUGETT, TYLER MCCLELLAND, AND JANE DOE,
Intervenors-Appellants,

BOARD OF EDUCATION OF BOYD COUNTY, KENTUCKY
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CIVIL CASE NO. 05-38-HRW

INTERVENORS-APPELLANTS' FINAL BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 6th Circuit Rule 26.1, Intervenors-Appellants, Sarah Alcorn, William Carter, David Fannin, Libby Fugett, Tyler McClelland, and Jane Doe make the following disclosures:

1. Are said parties subsidiaries or affiliates of any publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome?

   No.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Intervenors-Appellants ("Intervenors") join the request of Plaintiffs-Appellants ("Plaintiffs") for oral argument. Particularly in light of the fact that there are numerous alternative constitutional theories presented to the Court for its consideration, Intervenors agree that oral argument would assist the Court in understanding the issues and in deciding this case.

JURISDICTIONAL STATEMENT

A. JURISDICTION OF THE DISTRICT COURT

The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343, as Plaintiffs advanced claims under the United States Constitution, particularly the First and Fourteenth Amendments, and under federal law, particularly 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. §§ 1983 and 1988.

B. JURISDICTION OF THE COURT OF APPEALS

On February 17, 2006, the District Court issued a Memorandum and Order (1) granting the Defendant's Motion for Summary Judgment, (2) granting in part and denying in part Intervenors' Motion for Summary Judgment, (3) denying Plaintiffs' Motion for Summary Judgment, and (4) dismissing the case. Plaintiffs timely filed a Notice of Appeal on March 14, 2006. On Intervenors' motion, the District Court entered a Corrected Judgment on March 17, 2006, to reflect the fact that it had decided the issues currently on appeal against both Plaintiffs and Intervenors. On March 21, 2006, Intervenors timely filed a Notice of Appeal from the District Court's March 17, 2006, Corrected Judgment and its February 17, 2006, Order and Judgment. On March 22, 2006, Plaintiffs filed a second Notice of Appeal. Accordingly, this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

(1) Did the District Court err when it declined to adjudicate the constitutionality of Defendant's anti-harassment policies that were in force during the 2004-2005 school year because (a) the policies were no longer in force at the time of the District Court's ruling, (b) Plaintiffs failed to seek compensatory damages, and (c) Plaintiffs failed to prove nominal damages?

(2) Did the District Court err in failing to rule that Defendant's anti-harassment policies that were in force during the 2004-2005 school year were unconstitutionally overbroad in violation of *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969)?

STATEMENT OF THE CASE

Intervenors are former students at Boyd County High School and the mother of current students in the Boyd County School District. After over a year of litigation in a separate action by the student Intervenors against the Board of Education of Boyd County, Kentucky ("Board" or "Defendant"), the District Court entered a consent decree in which the Board agreed (1) to add sexual orientation and gender identity as protected categories to its existing anti-harassment policies, and (2) to implement a multi-year program of mandatory anti-harassment trainings, starting in Fall 2004, to protect students from discrimination and abuse because of their real or perceived sexual orientation or gender identity.

Plaintiffs are students and parents of students who asserted below that the Board's 2004-2005 anti-harassment policies violated their rights under the First and Fourteenth Amendments. Plaintiffs also asserted below – but do not pursue on appeal – that students who objected to the Board's mandatory anti-harassment trainings were constitutionally entitled to opt out of the trainings without consequence.

Intervenors joined this litigation to ensure that the Board complied with its obligations under the Consent Decree by, among other things, conducting mandatory anti-harassment trainings. After careful review of the Board's 2004-2005 anti-harassment policies, however, Intervenors came to agree with Plaintiffs

that the policies were broader than the Constitution permits.[1] Accordingly, Intervenors both joined the Board in moving for summary judgment with respect to the claims seeking a constitutional right to opt out of the anti-harassment trainings, and joined Plaintiffs in moving for summary judgment with respect to the claims involving the anti-harassment policies.

In its Memorandum Opinion dated February 17, 2006, the District Court ruled that there was no constitutional right to opt out of the Board's mandatory anti-harassment trainings. The District Court, however, declined to rule on the question of whether the Board's 2004-2005 anti-harassment policies were unconstitutional. The District Court's decision rested on three grounds: (1) the challenged policies were no longer in effect; (2) Plaintiffs had failed to seek compensatory damages; and (3) Plaintiffs had failed to prove nominal damages. For each of these reasons, the District Court believed that it would be imprudent to pass on the constitutionality of the Board's 2004-2005 anti-harassment policies. The District Court then rejected Plaintiffs' claims seeking a constitutional right to

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[1] With the exception of securing the addition of the terms "sexual orientation" and "gender identity" to the Board's anti-harassment policies, Intervenors played no role in the drafting or formulation of the anti-harassment policies in place during the 2004-2005 school year. During the course of this litigation, Plaintiffs and Intervenors offered revisions to the Board's anti-harassment policies to bring them into compliance with the Constitution. Prior to the commencement of the 2005-2006 school year, the Board adopted these revisions. Accordingly, the parties do not dispute that the Board's anti-harassment policies are constitutional in their current form.

opt out from the Board's mandatory anti-harassment trainings, and dismissed the case.

In its February 17th Order and Judgment, the District Court inadvertently failed to acknowledge that, while it had ruled for Intervenors with respect to Plaintiffs' claims seeking an opt out from the anti-harassment trainings, it had also ruled against Intervenors with respect to the claims involving the constitutionality of the Board's 2004-2005 anti-harassment policies. To avoid any confusion with respect to their appeal rights, Intervenors filed a Motion to Alter Judgment on March 15, 2006, seeking clarification as to the District Court's February 17, 2006 Order and Judgment. On March 17, 2006, the District Court entered a Corrected Judgment, specifying that it had both granted Intervenors' Motion for Summary Judgment in part (as to the opt out claims) and denied it in part (as to the anti-harassment policies claims).

STATEMENT OF THE FACTS

A. Prior Litigation Regarding Anti-Gay Harassment and Discrimination in the Boyd County School District.

Background regarding prior litigation in the Boyd County School District will help the Court understand the context for this litigation. Boyd County High School ("BCHS") has a well-documented history of deliberate indifference to harassment of and discrimination against students who are, or are perceived to be,

lesbian, gay, bisexual or transgender ("LGBT"). The numerous acts of overt homophobia to which school officials turned a blind eye include the following:

- In October 2002, students in a BCHS English class stated that "they needed to take all the fucking faggots out in the back woods and kill them."
- In January 2003, during a basketball game, students used megaphones to chant "faggot-kisser," "GSA,"[2] and "fag-lover" at one of the students attempting to establish the GSA.
- Students would call out "homo," "fag," and "queer" at a gay student as he walked in the hallway between classes.
- During a lunchtime observance of the National Day of Silence in 2002 by LGBT-supportive BCHS students, other students threw things at them and used anti-gay epithets.
- One student dropped out of BCHS because of harassment based on sexual orientation, and another student dropped out because of both anti-gay harassment at school as well as problems at home.

Boyd County High Sch. Gay Straight Alliance v. Board of Educ., 258 F. Supp. 2d 667, 670-71 & n.1 (E.D. Ky. 2003).

In early 2002, in response to the hostile environment that school officials had enabled, a group of BCHS students circulated a petition to create a Gay Straight Alliance ("GSA") student club, with the hope of "provid[ing] students with a safe haven to talk about anti-gay harassment and to work together to promote tolerance, understanding and acceptance of one another regardless of

[2] GSA is an acronym for Gay Straight Alliance, a type of non-curricular student club intended as a safe haven for lesbian, gay, bisexual, and transgender students and their supporters. As discussed below, during the 2003-2004 school year, student Intervenors sought to form a GSA at BCHS.

sexual orientation." *Id.* at 670.[3] Their efforts to form this club were met with tremendous hostility from other students and other members of the community. *Id.* at 671-72. As a result, Principal Johnson asked the students to postpone submitting their application.

The passage of time, however, did not see any diminishment of the desire within the community to suppress the expression of the GSA. When the students' application was finally approved at a public meeting on October 28, 2002, "the reaction from GSA opponents was acrimonious," and the crowd became openly hostile. *Id.* at 673. As Principal Johnson explained:

> The crowd directly confronted the GSA supporters "with facial expressions, hand gestures . . . some very uncivil body language . . . people were using loud voices and angry voices, and, again, beginning to point . . . it took some effort just to calm the meeting down and get through it and get out of there . . . that was the first time that I stared into the face of someone that I thought would hurt someone involved

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[3] Plaintiffs' description of the GSA as a "homosexual club," Plaintiffs-Appellants' Initial Brief ("Pl. Open. Br.") at 5, n.3, 7, is inaccurate. Many students who seek to form or participate in a GSA are heterosexual students who wish to create a more supportive environment at their school for people who are, or are perceived to be, lesbian, gay, bisexual or transgender. *See* Gay Lesbian Straight Education Network, *The GLSEN Jump Start: A How-To Guide for New and Established GSAs* at 4 (Oct. 2001) (listing various reasons why heterosexual (as well as LGBT) students would be interested in joining a GSA), *available at* <http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/182-2.pdf> (last visited Dec. 28, 2006) (attached as Addendum A). Likewise, Plaintiffs' description of the BCHS GSA as a club focusing on "issues relating to homosexual behavior," Pl. Open. Br. at 26, mischaracterizes the purpose and activities of the group. *See id.*; *see also* discussion *supra*, note 2.

> in this issue if given the opportunity. That was alarming to me and frightening and disheartening."

Id. (quoting Principal Johnson).[4]

Two days later, when the GSA was scheduled to meet for the first time, a group of students congregated outside the school and shouted at other students that they were "supporting faggots" if they went inside. *Id.* at 674. Then, on November 4, 2002, approximately one half of the BCHS student body was absent from school to protest the decision to allow the GSA to meet. *Id.* Throughout that month, the GSA's faculty advisor received threatening notes from students and her car was vandalized. *Id.*

Boyd County School District Superintendent Capehart ultimately responded to these events by purporting to ban all non-curricular student clubs for the 2002-2003 school year. *Id.* at 675. He expressly informed the GSA's faculty advisor that the group could no longer meet at BCHS. *Id.* at 676. Notwithstanding the purported suspension of all non-curricular student clubs, certain groups continued to meet at BCHS. *Id.* Consequently, the GSA sued under the Equal Access Act, which requires schools receiving federal funding to treat non-curricular student

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[4] Others present at this meeting shared Principal Johnson's concern. Board Member Teresa Cornette explained that she was "appalled" at the reaction of the group. 258 F. Supp. 2d at 673 ("There was nothing but hatred in that room and ignorance showed by moms and dads and grandparents . . . . It was horrible. And I literally left that meeting with a fear of what was going to happen in our school the next few days.").

clubs equally. On April 18, 2003, the District Court granted the GSA preliminary injunctive relief, holding that the GSA had demonstrated a likelihood of success on the merits of their claim. *Id.* at 693.

On February 10, 2004, the GSA and the Board entered into a Consent Decree, settling the GSA litigation. (R-26, Intervenor-Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, filed on April 28, 2005, Exh. A (Consent Decree); Joint Appendix ("JA") 100-19). The Consent Decree provided that the GSA would be permitted to meet at BCHS on the same terms as other non-curricular student clubs. (*Id.* at 2-3; JA 101-02) The Consent Decree also obligated the Board to conduct mandatory staff trainings and age-appropriate student trainings on issues pertaining to sexual orientation and gender identity harassment. (*Id.* at 3-6; JA 102-05) Finally, under the Consent Decree, the Board agreed to amend its anti-harassment policies to reflect that harassment and discrimination based on actual or perceived sexual orientation and gender identity would be prohibited, and agreed to appoint Compliance Coordinators to report and investigate all claims of harassment and discrimination, including but not limited to discrimination and harassment on the basis of sexual orientation and gender identity. (*Id.* at 6-10; JA 105-09)

Prior to the 2004-2005 academic year, the Board added "sexual orientation" and "gender identity" to its preexisting non-discrimination and anti-harassment policies.

B. Anti-Harassment Policies and Practices in Effect During 2004-2005 Academic Year.

The following anti-harassment policies and practices were in effect during the 2004-2005 academic year.

Anti-Harassment Policy. In relevant part, the Board's anti-harassment policy in effect during the 2004-2005 academic year read as follows:

> Policy 09.42811—Harassment/Discrimination
>
> Harassment/Discrimination is unlawful behavior based on race, color, national origin, age, religion, sex [sic] actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment.
>
> The provisions in this policy shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions where the speech does not otherwise materially or substantially disrupt the educational process, as defined by policy 09.426, or where it does not violate provisions of policy 09.422.

(R-26, Intervenor-Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, filed on April 28, 2005, Exh. B; JA 120).[5]

[5] Defendant also filed a copy of this document as Exhibit B to its brief in response to the motions for summary judgment of Plaintiffs and Intervenors. (R-54, Combined Response to Motions for Summary Judgment of Plaintiffs and Intervenor-Defendants on Behalf of Board of Education of Boyd County, Kentucky, Exh. B; JA 106).

Student Codes of Conduct. The Boyd County High School Code of Conduct contained a provision defining "Harassment/Hate Crimes:"

> Harassment/Hate Crimes (Refer to Harassment Section):
> Harassment/discrimination is intimidation by threats of or actual physical violence; the creation by whatever means, of a climate of hostility or intimidation, or the use of language, conduct, or symbols in such manner as to be commonly understood to convey hatred, contempt, or prejudice or to have the effect of insulting or stigmatizing an individual.

(R-50, Plaintiffs' Motion for Summary Judgment ("Plaintiffs' SJ Motion"), Exh. A at 16; JA 452) (emphasis added).[6]

The Boyd County Middle School (BCMS) Planner contained a provision on "Harassment/Hazing" that included the same restriction on speech that "[has] the effect of insulting or stigmatizing [another student]" as that found in the BCHS Code. (R-50, Plaintiffs' SJ Motion, Exh. B at 15; JA 480). Collectively, these documents constitute what are referred to as the 2004-2005 anti-harassment policies.

Fall 2004 Training Video. Pursuant to its obligation under the Consent Decree, in November 2004, the Board dedicated a class period at BCHS and

[6] Earlier in the BCHS Code of Conduct, a different definition of harassment appeared: "Harassment/discrimination is unlawful behavior based on race, color, national origin, age, religion, sexual [sic] actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment." (R-50, Plaintiffs' SJ Motion, Exh. A at 3; JA 439).

BCMS to an anti-harassment training, which consisted of a video lasting approximately one hour. (R-50, Plaintiffs' SJ Motion, Exh. C (BCHS training video transcript) & Exh. D (BCMS training video transcript); JA 481-514, 515-41).

Even though, pursuant to the Consent Decree, the trainings were supposed to focus on preventing harassment and discrimination against students based on their real or perceived sexual orientation and gender identity, specific references to either of these characteristics were few and far between.[7] Rather, the training was much more of a general anti-harassment training, which discussed a broad range of characteristics – including weight, disability, and ethnicity, as well as real or perceived sexual orientation and gender identity – that could cause a student to become the target of harassment and discrimination.[8]

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[7] Even the most cursory review of the training video transcripts reveals that Plaintiffs' description of the anti-harassment trainings as "a training program[ ] educating students about homosexual behavior," Pl. Open. Br. at 26 (emphasis added), is patently false. *See also id.* at 4, n.1 (describing anti-harassment training as "a diversity training program on homosexual behavior"). In fact, there is only one segment in the video (less than 3 minutes of an hour-long training) that is specifically dedicated to the issue of harassment against students who are perceived to be gay. (R-50, Plaintiffs' SJ Motion, Exh. C at 24, & Exh. D at 16-17; JA 504, 530-31). And, of course, at no point in the video does the trainer discuss or otherwise seek to "train" students with respect to same-sex intimacy.

[8] In the high school video, there was an additional segment (lasting approximately 10 minutes) that talked in general and somewhat stilted terms about sexual attraction. (R-50, Plaintiffs' SJ Motion, Exh. C, at 16-24; JA 496-504). This section contained at least one statement to which Plaintiffs objected because it suggested that one's sexual orientation is something that cannot be changed. (*Id.*) ("who you're attracted to . . . happens automatically"). With the exception of this segment, the BCHS and BCMS videos were identical.

The video began by explaining to students that the trainer was going to talk about the problems that bullying, name-calling and hatred can cause. The video then discussed the many ways in which students are different from each other, and provided a few vignettes from students who had experienced harassment or bullying in school.

Toward the end of the video, the trainer instructed students about how they should conduct themselves and outlined what behavior was prohibited by school policy. At this point, the video became constitutionally problematic. Specifically, the trainer stated that students who disagreed with something about another student (without specifying the subject of disagreement) did not have "permission" to point it out to them. In the same section, the trainer also told students that they were not "required" to tell a classmate when they think that something about the classmate is wrong. The relevant excerpt from the training video states as follows:

> Just because you believe that [*i.e.*, someone is "wrong"] does not give you permission to say anything about it. It doesn't require that you do anything. You just respect, you just exist, you continue, you leave it alone. There is not permission for you to point it out to them. They probably know that you disagree. Most people know that not everybody believes what they believe. Most people know that not everybody is like them. All of us know that on some levels, not everybody likes us. We all know that. It's not something that we need to have pointed out to us. And it's not something that you are required to point out to other people.

(R-50, Plaintiffs' SJ Motion, Exh. C at 29-30; Exh. D at 22; JA 509-10, 536).

Shortly after this segment, the trainer reemphasized this point with the following statement:

> And we [mistakenly] think that it's our job to tell other people they're wrong, or to tell other people "I don't like you," and to make faces and to exclude, and to make little nice groups and keep other people out because they're different . . . . It's what you do about them that makes it wrong . . . . Its [sic] when you say you're wrong. Okay so they're wrong. Nothing else is needed. You don't need to point out that they're wrong . . . . It's not your job to try to change them, and its [sic] not your job to let them know that you believe that they are wrong.

(*Id.*, Exh. C at 30, Exh. D at 22; JA 510, 536)

Finally, the trainer read the language from the Board's anti-harassment policies, including the restriction on speech that is "insulting" and "stigmatizing." (*Id.*, Exh. C at 31, Exh. D. at 24; JA 511, 538) These segments appeared in the video used for the training at both the Middle School and the High School.

Contrary to Plaintiffs' description of the training, at no point in the video did the trainer specifically tell students they were prohibited from saying that they objected to "the homosexual lifestyle" or "from communicating to a [gay student] the belief that the homosexual lifestyle is wrong." Plaintiffs-Appellants' Initial Brief ("Pl. Open. Br.") at 9, 10. Rather, the only statements in the video instructing students that they were not permitted to express their opinion that they believed that something about another student was "wrong" were those excerpts from the video reproduced above.

Likewise, at the conclusion of the video, the trainer explained the steps that school officials might take, which could include notification of and referral to the local police, if a student engaged in "terroristic threatening." (R-50, Plaintiffs' SJ Motion, Exh. C at 33, Exh. D at 25-26; JA 513, 539-40). At no point in the video, however, were students ever told that they would be "turned over to the police if they spoke out against homosexual behavior." Pl. Open. Br. at 24, 42.[9]

C. District Court Proceedings.

In February 2005, Plaintiffs filed this lawsuit, which asserted four claims: (1) violation of the freedom of speech under the First Amendment on the grounds of (a) viewpoint discrimination, (b) overbreadth, (c) vagueness, and (d) compelled speech; (R-1, Compl. ¶¶ 55-63; JA 29-30) (2) violation of the Due Process Clause due to (a) the anti-harassment policies' vagueness and (b) the Board's failure to "allow parents to opt their children out of diversity training, even if it violates their ideological, moral and sincerely held religious beliefs;" (*Id.* at ¶¶ 64-69; JA 30-31) (3) violation of the Equal Protection Clause for "treat[ing] Plaintiffs and other students and parents differently . . . on the basis of the content of their speech and

[9] Plaintiffs claim that the Board has actually admitted that the policies and/or the training video discriminated against anti-gay viewpoints. Pl. Open. Br. at 22-23. (*See also* R-50, Plaintiffs' SJ Motion at 10, 14-15; JA 592, 596-97) In its Answer, however, the Board admitted the various allegations made by Plaintiffs "only to the extent actually consistent with policies, procedures, and training materials/content in effect and in fact implemented in the Defendant school district, and denies all allegations inconsistent therewith." (R-6, Answer ¶¶ 9, 11, 14; JA 38-39) In other words, the video speaks for itself.

viewpoint, as well as their ideological, moral and religious beliefs;" (*Id.* at ¶¶ 70-73; JA 31) and (4) violation of the Free Exercise Clause for "requiring students to undergo mandatory diversity training that attempts to change their ideological, moral and religious beliefs." (*Id.* at ¶¶ 74-81; JA 32-33) Plaintiffs sought declaratory and injunctive relief and damages from the Board for its actions during the 2004-2005 academic year.

Plaintiffs filed a motion for a preliminary injunction on March 28, 2005. After being granted leave to intervene, Intervenors filed a brief in response to Plaintiffs' motion that supported the right of the Board to conduct the mandatory anti-harassment trainings, but agreed with Plaintiffs that the Fall 2004 training video contained statements that prohibited or, at a minimum, chilled speech protected by the First Amendment. Intervenors also agreed with Plaintiffs that the Board's 2004-2005 anti-harassment policies could not pass constitutional muster.

Following mediation before the District Court, Plaintiffs and Intervenors proposed language that they believed would bring the Board's various anti-harassment policies into compliance with the First Amendment. The Board thereafter adopted the revised anti-harassment policies proposed by Plaintiffs and Intervenors. (R-63, Notice of Filing of Board Policy and School Codes of Conduct, filed February 15, 2006; JA 629-65). In addition, after considering the concerns of Plaintiffs and Intervenors, the Board developed a new training video

for use during the 2005-2006 school year. Shortly thereafter, Plaintiffs withdrew their motion for a preliminary injunction, and the Court directed the parties to file motions for summary judgment on all outstanding legal issues.

In their motion for summary judgment, Intervenors sought a ruling from the District Court granting summary judgment for Plaintiffs on their First Amendment overbreadth claim and granting summary judgment for the Board on Plaintiffs' due process claim, First Amendment free exercise claim, and First Amendment compelled speech claim.[10] (R-49, Intervenor-Defendants' Motion for Summary Judgment, filed on December 20, 2005; JA 377-431). Plaintiffs also filed a Motion for Summary Judgment, seeking, among other things, a declaratory judgment and nominal damages with respect to their claim that the Board's 2004-2005 anti-harassment policies were unconstitutional. (R-50, Plaintiffs' SJ Motion, 1-2, n.2 and n.3; JA 432-33).

In its decision, the District Court noted that "Plaintiffs and Intervenor-Defendants contend that policies in effect for the 2004-2005 school year suffer from constitutional infirmities in light of *Tinker* as well as problems of overbreadth

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[10] In their summary judgment papers, Intervenors urged the District Court to rule that the Board's 2004-2005 harassment policies were unconstitutionally overbroad in violation of *Tinker*, which would obviate the need to reach Plaintiffs' vagueness, Equal Protection and Free Exercise claims. (R-49, Intervenor-Defendants' Motion for Summary Judgment, filed on December 20, 2005, at 11-22; JA 396-407). Likewise, in this appeal, Intervenors submit that this is the appropriate course. *See infra*, Section II.D-F.

and vagueness." (R-64, Opinion at 6; JA 671). Notwithstanding the existence of these claims, the District Court declined to rule on the constitutionality of the policies. Noting that the Board had already changed its policies for the 2005-2006 school year, the District Court ruled, "In their current form, the written policies are consistent with *Tinker* and its progeny. Following the high court's directive, this Court is not inclined to adjudge the constitutionality of policies no longer in effect." (*Id.* at 7; JA 672).

Later in the opinion, the District Court dismissed Plaintiffs' claim for nominal damages on the ground that Plaintiffs had failed to offer adequate proof on the issue:

> To date, Plaintiffs have failed to substantiate their claim for damages. As Defendants point out, even in response to a direct interrogatory, Plaintiffs were unable to specify the measure and amount of their alleged damages. Notably, in their dispositive motion and reply in support of the same, Plaintiffs refer only to "nominal damages." However, even their request for nominal damages remains unsupported by any factual allegations.

(*Id.* at 14-15; JA 679-80 (citations omitted)).

The District Court went on to state, "The only possible basis the Court can discern for any award of damages to Plaintiffs is the limited period of time during which the Board's written policies which [sic] were constitutionally suspect. Yet, again, Plaintiffs have made no specific plea." (*Id.* at 15; JA 680).

SUMMARY OF ARGUMENT

The District Court erred in refusing to adjudicate the constitutionality of the Board's 2004-2005 anti-harassment policies. Plaintiffs adequately demonstrated that they suffered actual harm by presenting uncontested evidence that they refrained from speaking due to the Board's anti-harassment policies. By seeking nominal, as opposed to compensatory, damages, Plaintiffs were required only to demonstrate that their constitutional rights were violated. They were under no obligation to offer independent evidence with respect to an amount of damage that they suffered. Therefore, even though Plaintiffs' claims for injunctive and declaratory relief were rendered moot due to the change in the Board's policies, their remaining claim for nominal damages presented an ongoing "case or controversy" requiring resolution by the District Court. Accordingly, the District Court's decision not to rule on the old policies' constitutionality, whether done as a matter of prudence or based on the belief that Plaintiffs had not satisfied their burden of proof, was improper.

On the merits, the Board's 2004-2005 anti-harassment policies restricted more speech than permitted by *Tinker v. Des Moines* Independent Community School District, 393 U.S. 503 (1969), and were therefore unconstitutionally overbroad. While "[t]here is no constitutional right to be a bully," *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002), and even

though the Board has the right to discipline students when their conduct creates a material and substantial disruption to the learning environment or invades the rights of others, *Tinker*, 393 U.S. at 509, 511, the Board's 2004-2005 anti-harassment policies went too far when they proscribed speech that might be "insulting" or "stigmatizing" to another student. Similarly, the Board's training video improperly told students that they risked discipline for engaging in speech protected by the First Amendment. On account of such overbreadth – and not any of the other reasons offered by Plaintiffs – the Board's 2004-2005 anti-harassment policies ran afoul of the Constitution. Accordingly, the District Court should have granted Plaintiffs' and Intervenors' motions for summary judgment with respect to that issue.

STANDARD OF REVIEW

Because there were no material facts in dispute, the District Court decided the issues presented in this case on cross motions for summary judgment as a matter of law. Accordingly, this Court reviews the District Court's ruling *de novo*. *See Neinast v. Board of Tr. of Columbus Metro. Library*, 346 F.3d 585, 590 (6th Cir. 2003).

ARGUMENT

I. BECAUSE PLAINTIFFS PROPERLY PRESENTED A CLAIM FOR NOMINAL DAMAGES, THE DISTRICT COURT ERRED IN AVOIDING THE QUESTION OF WHETHER THE BOARD'S 2004-2005 ANTI-HARASSMENT POLICIES WERE UNCONSTITUTIONAL.

Because the 2004-2005 anti-harassment policies had been replaced by policies that were consistent with *Tinker*, the District Court stated that it was "not inclined to adjudge the constitutionality of policies no longer in effect." (R-64, Opinion at 7; JA 672). While the District Court was correct that the Supreme Court has advised lower courts to avoid "unnecessary adjudication of constitutional issues," (*id.* at 6; JA 671) (citing *United States v. National Treas. Employees Union*, 513 U.S. 454, 478 (1995) ("*NTEU*")), this was not a case where that option was available. The "*Ashwander* principle," discussed in *NTEU*, instructs lower courts to resolve matters on statutory grounds rather than constitutional grounds whenever possible so as to avoid reaching constitutional questions that are not critical to the disposition of the case. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). But in this case, there was no statutory alternative to which the District Court could look. Rather, this case squarely presented the question of whether the Board's 2004-2005 anti-harassment policies proscribed more speech than constitutionally

permissible. Accordingly, this was not a case where the constitutional issues could or should have been avoided.

What may have been motivating the District Court's analysis was a concern that this litigation no longer presented a live "case or controversy," as required by Article III, with respect to the constitutionality of the 2004-2005 policies. Yet, even though the revision of the Board's anti-harassment policies rendered Plaintiffs' claims for injunctive and declaratory relief moot, Plaintiffs' claim for nominal damages still presented a live controversy requiring the District Court's attention.

However the District Court's analysis is characterized (whether in terms of the "case or controversy" requirement or by reference to standing and mootness principles), the fact remains that Plaintiffs presented a viable constitutional claim of harm for which they sought redress, and were therefore entitled to an adjudication of their claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (outlining three requirements of Article III standing: (1) injury in fact; (2) causation; and (3) redressability). Specifically, on summary judgment, Plaintiffs offered unconstested affidavit testimony from both Plaintiff Timothy Morrison II, and his mother, Mary Morrison, demonstrating that Timothy refrained from speaking out of fear that his speech might trigger discipline due to the school's restrictions on speech that might be deemed insulting or stigmatizing. (R-57,

Notice of Filing Affidavit of Timothy Morrison, in Support of Plaintiffs' Response to the Cross Motion for Summary Judgment by the Board of Education of Boyd County, Kentucky and the Intervenors, filed on January 9, 2006, at ¶ 6; JA 625 ("I have refrained from conveying my views on homosexuality to my classmates because the School District's speech policies prohibit me from doing so."); R-50, Plaintiffs' SJ Motion, Exh. H (Affidavit of Mary Morrison), ¶ 22; JA 561 ("Timothy has refrained from conveying his views on homosexuality to his classmates because the School District policies restricting speech prohibit him from doing so.")). For this reason, the District Court's suggestion that Plaintiffs did not adequately allege that they had suffered any legally cognizable harm, (R-64, Opinion at 15; JA 680 ("[E]ven [Plaintiffs'] request for nominal damages remains unsupported by any factual allegations.")), is clearly erroneously in light of the record in this case.[11]

Likewise, to the extent that its analysis rested on its belief that Plaintiffs failed to substantiate with sufficient proof the amount of harm that they suffered as a result of the unconstitutional policies, the District Court also erred. (R-64,

[11] Similarly, the District Court's statement that Plaintiffs failed to make a "specific plea" for nominal damages for the period when the unconstitutional anti-harassment policies were in effect (R-64, Opinion at 15; JA 680), cannot be reconciled with Plaintiffs' Complaint, which contained a specific request for nominal damages. (R-1, Complaint at 13-14; JA 33-34 ("Prayer for Relief: . . . (d) Grant to Plaintiffs an award of actual and nominal damages in an amount deemed appropriate by this Court")).

Opinion at 14-15; JA 679-80). The option of seeking nominal damages ensures that violations of constitutional rights do not go unpunished simply because tangible and quantifiable harms did not result. For this reason, nominal damages, as distinct from actual damages, require no proof of injury.

As the Supreme Court explained in *Carey v. Piphus*,

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed.

435 U.S. 247, 266 (1978) (emphasis added). On numerous occasions since *Carey*, the Supreme Court has reiterated that nominal damages "are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986).[12]

This Court has consistently applied *Carey* and its progeny in cases involving First Amendment claims. For example, in *Murray v. Board of Trustees, University of Louisville,* 659 F.2d 77 (6th Cir. 1981), this Court remanded a student newspaper editor's First Amendment claim for an assessment of whether nominal

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[12] While many of the post-*Carey* cases involve denials of procedural due process, *see, e.g., Farrar v. Hobby*, 506 U.S. 103 (1992), the Court has made clear that its holding in *Carey* extends to substantive rights as well. *See Stachura*, 477 U.S. at 309 (1986) (noting that *Carey* "does not establish a two-tiered system of constitutional rights," and clarifying that nominal damages are appropriate vehicles for vindicating any manner of constitutional violation).

damages and attorneys fees were warranted, notwithstanding the student's failure to present proof sufficient to justify recovery of actual damages. *Id.* at 79. *See also Fehribach v. City of Troy*, 412 F. Supp. 2d 639, 642-44 (E.D. Mich. 2006) (discussing the Sixth Circuit's application of *Carey* and *Farrar* in *Murray* and more recent cases).

Other Circuits have joined this Court in holding that the repeal of an unconstitutional policy does not render a case moot even where the only relief sought is nominal damages for constitutional violations that occurred in the past. *See, e.g., Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1526-27 (10th Cir. 1992) (First Amendment claim for nominal damages over university's initial refusal to show controversial film for content-based reasons still viable even after university allowed film to be shown and changed its policy for approval of films); *Yniguez v. State*, 975 F.2d 646, 647 (9th Cir. 1992) ("Although the plaintiff may no longer be affected by the English only provision, that does not render her action moot. The plaintiff's constitutional claims may entitle her to an award of nominal damages."); *see also Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001) ("[F]or suits alleging constitutional violations under 42 U.S.C. § 1983, it is enough that the parties merely request nominal damages [to avoid

mootness.]").[13] For this reason, the District Court erred in ruling that Plaintiffs' claim for nominal damages was insufficient to warrant an adjudication of their constitutional claim.

As the foregoing discussion demonstrates, the District Court's conclusion that it was not necessary or prudent to rule on the constitutionality of the Board's 2004-2005 anti-harassment policies was incorrect as a matter of law. Accordingly, this Court could remand this case to the District Court for an assessment in the first instance of whether the Board's 2004-2005 anti-harassment policies were unconstitutional. As this issue presents a pure question of law, however, Intervenors respectfully submit that, in the interest of judicial economy, this Court should address the merits issue avoided by the District Court below, and, for the reasons provided in Section II, *infra*, remand with instructions that the District Court (1) declare that the anti-harassment policies in effect for the 2004-2005 school year were unconstitutionally overbroad in violation of *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), and (2) award Plaintiffs nominal damages.

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[13] While some jurists have noted a divergence among the Circuits on the issue of whether a claim for nominal damages is sufficient to satisfy Article III's case or controversy requirement, *see, e.g., Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1268-69 (10th Cir. 2004) (McConnell, J., concurring) (outlining the different views that prevail in various Circuits), the law in this Circuit is both well-established and well-recognized. *Id.* at 1268 ("The Sixth and Ninth Circuits, like ours, squarely hold that a claim for nominal damages is sufficient to render a case justiciable.") (citing, *inter alia*, *Murray*, 659 F.2d at 79).

II. THE BOARD'S ANTI-HARASSMENT POLICIES IN FORCE FOR THE 2004-2005 SCHOOL YEAR WERE UNCONSTITUTIONAL.

Although schools may implement policies and practices designed to preserve order and to ensure that all students have the ability to learn in a safe and supportive environment, there are constitutional limits on how far schools may go in restricting student speech. *Tinker*, 393 U.S. at 506 (noting that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"). Because the Board's 2004-2005 anti-harassment policies prohibited not only speech that caused substantial disruption or invaded the rights of other students but also speech that had the "the effect of insulting or stigmatizing an individual," the Board violated the First Amendment. The Board also ran afoul of the Constitution by telling students in the Fall 2004 training video that they were not permitted to engage in constitutionally protected speech.

Because the Board's 2004-2005 anti-harassment policies were unconstitutionally overbroad, this Court need not reach the other theories offered by Plaintiffs in support of the relief they seek. Should the Court decide to address these other theories, however, it should rule that they are either superfluous or without merit. First, the Court should reject Plaintiffs' characterization of the policies as viewpoint discriminatory. While the policies were certainly content-based (*i.e.*, the content of the speech determined whether a student would be punished), they did not discriminate on the basis of viewpoint, as will be explained

below. Second, the Court should also clarify that Plaintiffs' claim sounds in the First Amendment, rather than the Equal Protection Clause, because the Board's 2004-2005 anti-harassment policies subjected students to discipline based on the content of their speech, rather than their identity as speakers. Third, the Court should ground its holding in the Free Speech Clause rather than the Free Exercise Clause because the Board's 2004-2005 anti-harassment policies penalized or chilled speech regardless of whether the speech was religiously motivated. Finally, the Court should dismiss Plaintiffs' argument that the terms "insulting" and "stigmatizing," as appeared in the anti-harassment policies, were unconstitutionally vague, as the flaw with these terms was not a lack of clarity but rather the amount of constitutionally protected speech that these terms covered.

But rather than reaching out to decide these other constitutional questions, the Court should simply apply *Tinker* and rule that the 2004-2005 harassment policies were unconstitutionally overbroad.

A. Frameworks for Analyzing Speech Restrictions in Public Schools.

The Supreme Court has offered three paradigms for assessing the constitutionality of regulations on speech in the school context. The proper analytical framework hinges on the identity of the speaker and the degree of association between the speaker and the school.

1. Government Speech. Generally speaking, when the government is the speaker, it may choose what it wants to say. The most common examples of government speech in this context are schools' curricular choices. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."); *Edwards v. California Univ. of Penn.*, 156 F.3d 488, 491 (3d Cir. 1998) (the First Amendment "does not place restrictions on a public [school's] ability to control its curriculum," because the government is the speaker). The only constitutional limits on what schools can teach are found in independent constitutional limitations on government action, such as the Establishment Clause or the Equal Protection Clause.

2. School-Sponsored Speech. "Expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" constitutes "school-sponsored speech," thus triggering the analysis delineated in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988). School-sponsored speech most often arises in the context of school assemblies or school-sponsored student publications or productions.

Although school officials do not have the same level of discretion with respect to regulating school-sponsored speech as they do with respect to their curricular choices (*i.e.*, government speech), educators "need not tolerate student speech that is inconsistent with its basic educational mission." *Id.* at 266 (internal quotations omitted). On the contrary, schools may exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.[14]

3. Non-School-Sponsored Student Speech. Finally, when students engage in private non-curricular expression at school, such as hallway conversation, they are entitled to the full protection of *Tinker*. Under the *Tinker* analysis, a school may restrict student speech only where the school has a specific and significant fear of disruption of the educational environment or intrusion upon the rights of others. 393 U.S. at 508. An "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* As the Court explained,

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word

[14] As the *Hazelwood* Court explained, schools may regulate school-sponsored speech to ensure (1) "that participants learn whatever lessons the activity is designed to teach;" (2) "that readers or listeners are not exposed to material that may be inappropriate for their level of maturity;" and (3) "that the views of the individual speaker are not erroneously attributed to the school." 484 U.S. at 271.

> spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. at 508-09 (internal citation omitted).

A school may not single out speech for disfavored treatment simply because it disagrees with the viewpoint expressed by the student. But when something about the speech other than its viewpoint becomes disruptive or invasive of the rights of others, schools have the constitutional authority to act. "Students cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school." *Sypniewski*, 307 F.3d at 264.

When the prerequisites of *Tinker* have been satisfied, a school may take steps to preserve the educational environment or protect the rights of other students without violating the Constitution. A school may likewise require students to conduct themselves in a civil and respectful manner. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646 (1999) ("[T]he nature of the State's power over public schoolchildren is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. On more than one occasion, this Court has recognized the importance of school officials' comprehensive authority . . . , consistent with fundamental constitutional safeguards, to prescribe

and control conduct in the schools.") (citing, *inter alia*, *Tinker*); *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("Indeed, the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of the schools.'") (citing *Tinker*). In fact, a school has a constitutional obligation to provide an environment where all students have an equal opportunity to access public education. *See, e.g., Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137-38 (9th Cir. 2003) (holding that clearly established law requires schools to protect all students from peer harassment, regardless of sexual orientation); *Nabozny v. Podlesny*, 92 F.3d 446, 453-58 (7th Cir. 1996) (accord). Accordingly, a school need not wait until disorder actually occurs or the rights of others have been invaded in order to act. *Melton v. Young*, 465 F.2d 1332, 1335 (6th Cir. 1972) ("Surely those charged with providing a place and atmosphere for educating young Americans should not have to fashion their disciplinary rules only after good order has been at least once demolished.") (internal quotation and citation omitted).

What a school may not do, however, is restrict speech simply because others might disagree with the speaker's message. *Tinker*, 393 U.S. at 509 (a "mere

desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is an insufficient justification for restriction on student speech).

4. Facial Challenges to Speech-Restrictive Policies – Overbreadth and Vagueness. Like other forms of government regulation, school disciplinary policies that limit speech may be struck down as overbroad if they reach a substantial amount of expression that is protected by the Constitution. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) (a law "is unconstitutional on its face if it prohibits a substantial amount of protected expression") (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)); *Sypniewski*, 307 F.3d at 259 (accord). Recognizing that invalidating a statute as overbroad is "strong medicine," courts apply this doctrine "sparingly and only as a last resort" when no "limiting construction has been or could be placed on the challenged statute." *Broadrick*, 413 U.S. at 613; *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) ("Before declaring [a school policy] unconstitutional, however, we must first determine whether it is susceptible to a reasonable limiting construction: 'the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'") (quoting *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 144 (3d Cir. 1991)).

In the school setting, however, questions of overbreadth and vagueness are incorporated into the *Tinker* analysis. *See Sypniewski*, 307 F.3d at 259-60 ("*Tinker* acknowledges what common sense tells us: a much broader "plainly legitimate" area of speech can be regulated at school than outside school."); *Saxe,* 240 F.3d at 215 (relying on *Tinker* when determining whether school speech regulations were unconstitutionally overbroad). Therefore, although courts are more willing to tolerate some restrictions on speech in school (as opposed to speech restrictions imposed on the general public), a school disciplinary policy that proscribes more speech than allowed by *Tinker* is by definition constitutionally overbroad. *See, e.g., Rivera v. East Otero Sch. Dist.*, 721 F. Supp. 1189, 1197 (D. Colo. 1989) ("Courts routinely strike down school prohibitions on speech [as overbroad] where there is no express requirement that the speech be disruptive, and hence unprotected under *Tinker*.") (listing cases).

Likewise, schools must draft any policies regulating student speech with sufficient specificity so as to give students adequate notice as to what speech will subject them to punishment. *Sypniewski*, 307 F.3d at 266 ("[W]ithout 'fair notice' of [a] regulation's reach, . . . [students will] 'steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'") (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). Therefore, even though a policy is not unconstitutionally vague simply because its terms are not susceptible to an

authoritative definition, *U.S. Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 578-79 (1973), a school disciplinary code must nevertheless be drafted in a way that requires students to conform their conduct to a "comprehensible normative standard." *Sypniewski*, 307 F.3d at 266 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).

B. The Board's 2004-2005 Anti-Harassment Policies Proscribed Constitutionally Protected Speech and Therefore Violated the First Amendment.

Restrictions on non-school-sponsored student speech are governed by *Tinker*. Under the *Tinker* standard, schools may not prohibit students' speech just because other potential listeners might react negatively. *See, e.g., Saxe*, 240 F.3d at 217 ("[I]t is certainly not enough that the speech is merely offensive to some listener."); *Doe v. University of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (school may not restrict speech "simply because it was found to be offensive, even gravely so, by large numbers of people"). Although a school may require students to conduct themselves in a civil and respectful manner, *see Davis*, 526 U.S. at 646; *Fraser*, 478 U.S. at 683, it may not restrict speech simply because some might disagree with the speaker's message. This important distinction is the key to any constitutional harassment policy.

By restricting non-school-sponsored student speech that might "insult" or "stigmatize" another student, the Board's 2004-2005 anti-harassment policies

prohibited more speech than *Tinker* allows.[15] Even when a student's views may insult another, the student nevertheless retains the right to express his opinion so long as he does not interfere with the rights of other students or cause substantial or material disruption.

Any attempt by the Board to avoid liability by linking the challenged anti-harassment policies to other Board policies that were consistent with *Tinker* should be rejected, particularly in light of the audience involved. Students are likely to rely exclusively upon their student handbooks (or, in this case, the student Codes of Conduct and Planners) when determining whether they will engage in certain behavior, rather than seeking guidance regarding school policies that may be contained in other documents. Therefore, even though the BCHS Student Code of Conduct and the BCMS Planner explicitly referred readers to Board Policy 09-42811, which was more compatible with *Tinker* in that it regulated only harassing speech that was "sufficiently severe, pervasive, or objectively offensive that it

[15] At times, courts have used the term "insulting" to describe the subset of speech known as "fighting words," which do not receive First Amendment protection. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace."). Even assuming that the Board intended to use "insulting" in this limited way, the average high school or middle school student would not have known that the term "insulting" had anything other than its ordinary meaning, and might well have been chilled from expressing his or her views.

adversely affect[ed] a student's education or create[d] a hostile or abusive educational environment," telling students to check a cross-reference to a different board policy does not cure the constitutional defects in the provision contained in the student handbook.[16]

With respect to the Fall 2004 training video, by reiterating the restrictions on speech contained in the 2004-2005 Board's anti-harassment policies, the video conveyed to students that engaging in constitutionally protected speech might subject them to punishment. (R-50, Plaintiffs' SJ Motion, Exh. C, at 31; Exh. D, at 24; JA 511, 538) Any student hearing these instructions would have reasonable cause for concern that their speech might lead to disciplinary action being taken against them, and would therefore have refrained from engaging in constitutionally protected expression. Because of the chilling effect of these statements in the video, the Board violated the First Amendment rights of Plaintiffs and the other students at BCHS and BCMS.

The video also stated that students do not have "permission" to express their views about the ways in which students may be different. (*Id.*, Exh. C at 29, Exh. D at 22; JA 509, 536) By telling students that they were forbidden from saying

[16] While Intervenors did not take the position that Board Policy 09.42811 was necessarily unconstitutional as written, they, along with Plaintiffs, proposed revisions to Policy 09-42811, as well as the BCHS Code of Conduct and the BCMS Planner, to ensure maximum consistency with *Tinker*. The Board adopted these revisions in August 2005. (R-63, Notice of Filing of Board Policy and School Codes of Conduct, filed February 15, 2006; JA 629-65).

certain things, particularly without any explanation of *Tinker*'s protection of speech that was neither disruptive nor invasive of the rights of others, these instructions in the video violated the students' First Amendment rights.[17]

The Board has since amended its anti-harassment policies to rectify the constitutional defects identified by Plaintiffs and Intervenors, and has since discontinued its use of the Fall 2004 training video. Nevertheless, Plaintiffs and Intervenors were entitled to summary judgment on their claim that the Board's 2004-2005 anti-harassment policies and the related statements in Fall 2004 training video, were incompatible with *Tinker* and therefore violated the First Amendment.

C. The Board's 2004-2005 Anti-Harassment Policies Were Unconstitutional Not Due to Any Viewpoint Discrimination in the Policies, But Rather Because They Were Overbroad in Violation of *Tinker*.

Rather than focusing on the overbreadth of the Board's 2004-2005 anti-harassment policies, Plaintiffs characterize them as viewpoint discriminatory.

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[17] The video also suggested that students not engage in constitutionally protected speech by telling them that they were not "required" to share their opposing views. (R-50, Plaintiffs' SJ Motion, Exh. C, at 30; Exh. D, at 22; JA 510, 536) Schools can and certainly should encourage students to treat each other with respect, and, as part of general civility training, a school can tell students that it is not polite or appropriate to express any and every thought that one might have about another person. Rather than coming off as advisory, however, these statements about what students were or were not "required" to do likely sounded directive in light of the video's prior instructions about what students were and were not "permitted" to say. Therefore, even though schools can, for the most part, instruct students about how to conduct themselves in a polite and civil manner, in the context of this video, these statements also were likely to chill constitutionally protected speech.

Specifically, Plaintiffs claim that the policies restricted only anti-gay speech, but left pro-gay speech immune from punishment. This argument falters at every step. First of all, by emphasizing content/viewpoint discrimination as opposed to *Tinker*, Plaintiffs misstate the analysis that applies to restrictions on expression in the school setting. Second, and perhaps more importantly, Plaintiffs' description of the Board's policy as discriminatory on the basis of viewpoint is completely inconsistent with what the policy actually says. Finally, the viewpoint discrimination cases offered by Plaintiffs in support of this theory are inapposite. For all of these reasons, the Court should reject this line of argument and rest its conclusion on *Tinker* instead.

1. Restrictions on Speech in the School Setting Are Examined Using *Tinker*, Rather Than First Amendment Tests Developed for Other Contexts.

As an analytical matter, the fact that a school policy may subject a student to discipline based on the content of their speech is subsidiary to the question of whether the school can justify the restriction on speech under the *Tinker* standard. This is because the *Tinker* standard reflects the fact that, in some circumstances, some restrictions on speech that would be wholly impermissible when applied in other settings may be appropriate in the school setting.

For example, in *Saxe*, the Third Circuit considered a constitutional challenge to a school policy that prohibited harassment "based on one's actual or perceived

race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics." 240 F.3d at 215. Even though the policy was clearly a content-based restriction on speech, the court recognized that *Tinker* – which is, at its core, a form of overbreadth analysis – provided the proper framework for analyzing the policy's constitutionality. *Id.* at 212-17.

Likewise, in *Sypniewski*, the challenged anti-harassment policy explicitly singled out speech regarding race. Notwithstanding the fact that the school's racial harassment policy was "indisputably a content-based restriction on expression, and in other contexts, may well be found unconstitutional under *R.A.V.* [*v. City of St. Paul*, 505 U.S. 377 (1992)]," the Third Circuit reiterated that "the public school setting is fundamentally different from other contexts." *Id.* at 267. Because of the unique attributes of the school setting, "*Tinker* and its progeny provide the principal mode of analysis in this area." *Id.* at 268.

For this reason, Plaintiffs' suggestion that content-based restrictions on speech (which includes school harassment policies) should be treated as presumptively unconstitutional, Pl. Open. Br. at 31 (citing *Simon and Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 123-26 (1991) (Kennedy, J., concurring)), simply cannot be reconciled with *Tinker* and its progeny.

2. The Board's 2004-2005 Anti-Harassment Policies Did Not Discriminate Among Viewpoints, But Rather Prohibited All "Insulting" or "Stigmatizing" Speech.

The Board's 2004-2005 anti-harassment policies restricted speech that had the effect of insulting or stigmatizing another student. The policies made no distinction on the basis of how the students were insulted or stigmatized – all stigmatizing or insulting speech, whether anti-gay, anti-heterosexual or anti-homophobe, was barred under the policies. Therefore, while it is true that anti-gay statements that caused insult could have been punished pursuant to the policies, pro-gay, anti-straight or anti-homophobe statements that insulted or stigmatized someone (presumably someone who was anti-gay) could also have been punished. For example, a gay student could have decided to target a straight student with "pro-gay" statements – "gay people are smart[er]," "gay people are [more] creative," "gay people are [more] handsome/beautiful," – that could have resulted in the targeted student feeling insulted or stigmatized due to the insinuation that heterosexual people do not share these qualities. Similarly, a gay student could have targeted a straight student with anti-straight comments – "straight people have no sense of style," "straight people can't dance," "straight people are just breeders" – that might also have been insulting or stigmatizing. Finally, this policy prohibited students from making comments to people like Timothy Morrison such as "you're ignorant" or "you're a hater" because they would be insulting or

stigmatizing to students who believe that homosexuality is wrong. Although it may be difficult to imagine such scenarios in Boyd County, with its well-documented history of harassment against LGBT students there, these examples demonstrate that the problem with the Board's policies was overbreadth and not viewpoint discrimination.

With respect to the training video, Plaintiffs insist that the video told students that they could not tell others that they believed homosexuality was "wrong." *See, e.g.,* Pl. Open. Br. at 9-10. But the transcript reveals that the training video never states that speech opposing homosexuality is prohibited by the anti-harassment policies. Rather, the relevant text from the transcript of the training video states as follows:

> You're going to find people that you believe are absolutely wrong. You're going to think what are they thinking? That, that is so wrong, its obvious to everybody, but not to them. Because they believe you are wrong. You can't avoid meeting people that you believe are wrong. But here is the kicker, just because you believe, just because you don't like them, just because you disagree with them, just because you believe they are wrong, whole heartedly, absolutely, they are wrong. Just because you believe that does not give you permission to say anything about it. It doesn't require that you do anything. You just respect, you just exist, you continue, you leave it alone. There is not permission for you to point it out to them. They probably know that you disagree. Most people know that not everybody believes what they believe. Most people know that not everybody is like them. All of us know that on some levels, not everybody likes us. We all know that. It's not something that we need to have pointed out to us. And it's not something that you are required to point out to other people.

(R-50, Plaintiffs' SJ Motion, Exh. C at 29-30, Exh. D at 22; JA 509-10, 536) While a student's homosexuality may be one way in which he or she is "different" and may be something about that student that a classmate believes is "wrong," this speech restriction did not even identify, let alone single out, anti-gay speech for punishment. Rather, the video simply stated that a student should not point out something that is "wrong" about another student no matter what it is that the student thinks is "wrong."

In other words, as the District Court pointed out, this instruction is neutral with respect to viewpoint.[18] (R-64, Opinion at 8; JA 673) ("Yet, the Court, having reviewed the training materials for both the Middle School and High School sessions, finds them to be viewpoint neutral. Absent from both versions of the training is favorable treatment for any particular viewpoint or elevation of one opinion over the other."). The fact that some of the things that Plaintiffs would like to say (*i.e.*, gay students, who are "different" from them, are "wrong" to be gay) might have fallen within the sweep of the policies does not make the policies viewpoint-discriminatory. *See, e.g., Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994) (holding that an injunction prohibiting abortion protestors from picketing outside a clinic was not viewpoint discriminatory because "the fact that

[18] As the District Court noted, there is no evidence that this policy was actually applied against Plaintiff Timothy Morrison or any other student in a discriminatory manner. (R-64, Opinion at 8; JA 673).

the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based"). Indeed, it merely highlights their overbreadth.

Therefore, while Plaintiffs are correct in their conclusion that the Board's 2004-2005 harassment policies were constitutionally flawed, their reasoning involving viewpoint discrimination is incorrect. The Board's policies ran afoul of *Tinker* because they restrict more speech than constitutionally permissible or, in other words, because they are overbroad.

3. As None of the Cases Offered by Plaintiffs Involved a Facial Challenge to a Viewpoint-Neutral Policy, None of Them Support Plaintiffs' Viewpoint Discrimination Argument in This Case.

Plaintiffs offer a litany of cases to bolster their argument that the Board has engaged in unconstitutional viewpoint discrimination. Other than the fact that these cases also take place in a school setting, however, they have no bearing on the legal issue presented to the Court by this case.

Castorina v. Madison County School Board, 246 F.3d 536 (6th Cir. 2001), far from being "directly on point," Pl. Open. Br. at 28, bears little resemblance to this case. Plaintiffs seek to rely on *Castorina* because it discusses viewpoint discrimination by a public school. However, that part of *Castorina* is irrelevant because there is no evidence of viewpoint discrimination in this case at all.

This case involves a facial challenge to viewpoint-neutral anti-harassment policies that chilled student speech because of their overbreadth, but were never applied to censor any student speech. (R-64, Opinion at 8; JA 673).[19] By contrast, *Castorina* involved students' claim that a neutral policy had been applied in a viewpoint discriminatory manner against their speech (Confederate flag t-shirts), but not other forms of arguably racist speech (Malcolm X t-shirts). Instead of presenting evidence that a facially neutral policy was applied in a viewpoint discriminatory manner, as in *Castorina*, Plaintiffs here go after the policy itself on the ground that its mere existence has chilled students into refraining from expressing their views. Since the challenged policy is viewpoint neutral and there is no evidence that the facially neutral policies were applied to students in a viewpoint discriminatory manner, *Castorina* does not help Plaintiffs at all.[20]

Likewise, *Hansen v. Ann Arbor Public Schools,* 293 F. Supp. 2d 780 (E.D. Mich. 2003), also relied upon by Plaintiffs, offers little of value in the context of this case. In *Hansen*, as part of a Diversity Week program, the school's Gay

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[19] *See also* discussion *supra* Section II.C.2.

[20] For the same reasons that *Castorina* is inapposite, the other as-applied cases offered by Plaintiffs, *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001) (finding that school's censorship of student's "Straight Pride" shirt not justified under *Tinker*), and *Barber v. Dearborn Publ. Schs.*, 286 F. Supp. 2d 847 (E.D. Mich. 2003) (finding that school's censorship of student's "George Bush: International Terrorist" shirt not justified under *Tinker*), likewise do nothing to bolster their claim that the challenged anti-harassment policies discriminated on the basis of viewpoint.

Straight Alliance decided to put together a panel of adult clergymembers from the community who were supportive of LGBT people to come and speak on a panel about "Religion and Sexuality." When a Catholic student asked that a Catholic priest be included on the panel, the faculty advisor for the GSA refused. At first, the school decided that it would simply cancel the panel to avoid any controversy, but then it decided to go ahead with the panel without any Catholic clergymembers. In a conciliatory gesture to the Catholic student, the school officials offered her the opportunity to speak at the assembly, but then attempted to censor comments from her speech that were deemed denigrating to LGBT students.

The District Court in *Hansen* ruled that the public school's actions violated *Hazelwood* because censoring one student's unpopular viewpoint was not only unrelated to the objective of promoting diversity, which was the ostensible pedagogical goal of the assembly, but was in fact antithetical to that goal.[21] *Id.* at

[21] As part of its analysis, the *Hansen* Court found that, although neither *Hazelwood* nor any Sixth Circuit decision explicitly held as much, the reasoning of *Hazelwood* suggested that, while a school may make content-based decisions with respect to school-sponsored speech, it could not discriminate on the basis of viewpoint. 293 F. Supp. 2d at 797-800. In reaching this conclusion, the *Hansen* court relied on cases from other circuits involving school-sponsored speech, including *Searcey v. Harris*, 888 F.2d 1314, 1319 (11th Cir. 1989), another case cited by Plaintiffs in support of their viewpoint discrimination argument. For the reasons noted above, however, the question of whether a school may take viewpoint into account when regulating school-sponsored speech is not presented

801-02. Likewise, the Court noted that the school utterly failed to demonstrate how any of the other pedagogical goals were furthered by excluding Hansen's viewpoint from the assembly. *Id.* at 800 ("[I]n explaining how each of these [pedagogical] goals were furthered by restricting Betsy's speech, it is not educational theory or practice that Defendants rely upon, but rather it is their specific disapproval of the message that Betsy would have conveyed that underlies their decision.").

In this case, unlike *Hansen*, the Board's policy does not single out anti-gay viewpoints for disfavored treatment. Rather, the Board has promulgated a policy aimed at eliminating all harassment, regardless of the perspective of the student engaging in the speech. As noted above, just as students are prohibited from harassing other students because they are gay, students are similarly prohibited from harassing their fellow students because they are heterosexual, or because they hold anti-gay beliefs. But by prohibiting speech that merely insults or stigmatizes another student, in addition to speech that materially interferes with the rights of other students or substantially disrupts the learning environment (*e.g.*, threats and intimidation), the policy goes further than *Tinker* allows. That is a problem of overbreadth, not viewpoint discrimination.

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by this case. Rather, this case involves non-school sponsored speech of students and, with respect to the training video, government speech.

Finally, the cases involving the right of students to form religious groups at school and meet on the same terms as other non-religious student groups, *see, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 116 (2001), *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002), and *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003), have no bearing on this case other than the fact that the First Amendment principles discussed in those cases (and codified in the Equal Access Act, 20 U.S.C. § 4071, et seq.) were precisely the principles that Intervenors sought to vindicate in their litigation against the Board when they were forbidden from forming a Gay Straight Alliance at Boyd County High School. *Boyd County High Sch. Gay Straight Alliance v. Board of Educ.*, 258 F. Supp. 2d 667, 670-71 & n.1 (E.D. Ky. 2003). There is absolutely no evidence in the record to suggest that religious students at BCHS or BCMS have been denied the opportunity to meet and share their views with each other or otherwise singled out for disfavored treatment by the Board.[22] This case simply does not involve discrimination against those who believe, for religious or other reasons, that homosexuality is wrong. This case is about an anti-harassment policy that was so poorly drafted that it swept up a significant amount of constitutionally protected

[22] In fact, there is evidence that religious students in Boyd County have been given ample opportunity to meet and associate. *See Boyd County High Sch. Gay Straight Alliance*, 258 F. Supp. 2d at 685-86 (describing how BCHS officials allowed the Bible Club to continue to meet even after it had ostensibly shut down all non-curricular clubs).

speech along with the speech that *Tinker* allows a school to proscribe. The fact that Plaintiffs wish to articulate views that would be deemed insulting and stigmatizing to LGBT students, and thus may have triggered discipline under the Board's overbroad policy, does not transform a viewpoint-neutral policy into a viewpoint-discriminatory one.

For all of these reasons, the Court should ground any First Amendment ruling in favor of Plaintiffs with respect to the Board's 2004-2005 anti-harassment policies in the overbreadth doctrine as articulated in *Tinker*.

D. Resolution of Plaintiffs' First Amendment Claim Disposes of Their Equal Protection Claim.

Plaintiffs' Equal Protection claim rests on their belief that they are being singled out on the basis of their expression, which implicates the exercise of the fundamental right of free speech. In this case, however, the First Amendment is the appropriate vehicle for addressing Plaintiffs' claims.

Where similarly-situated groups are denied access to a government forum based on their viewpoint, some courts have framed their analysis in terms of both the Equal Protection Clause and the Free Speech Clause. *See, e.g., Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *Hansen*, 293 F. Supp. 2d at 807. This case, however, does not involve unequal access to a government forum. Rather, it involves overbroad restrictions on speech that are imposed on all

students in a public school setting. And in cases of this nature, courts generally treat equal protection claims as free speech claims.

For example, in *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358 (10th Cir. 2000), the Tenth Circuit considered the argument of a middle school student that his school was discriminating against him based upon his desire to express certain beliefs with which the school disagreed. *Id.* at 1365. The court held:

> The district court properly noted that the question of whether a legitimate government interest supports the school district's content-based restriction is essentially an inquiry into whether the restriction violates T.W.'s First Amendment free speech right. Thus T.W.'s equal protection claim is more properly considered together with his First Amendment challenge.

Id. (citations omitted).

Accordingly, because the First Amendment provides the appropriate vehicle for considering Plaintiffs' claims, the Court should either decline to rule on Plaintiffs' claim under the Equal Protection Clause, or dismiss the claim due to Plaintiffs' failure to demonstrate that they were denied access to a government forum based on their particular viewpoint. *See also supra* Section II.C (discussion of Plaintiffs' viewpoint discrimination claim).

E. A Determination That the Board Violated Plaintiffs' Free Speech Rights Resolves Plaintiffs' Speech-Based Free Exercise Claim.

In the proceedings before the District Court, Plaintiffs styled their First Amendment claim as a Free Exercise claim as well. (R-1, Compl. ¶ 76; JA 32 ("[Defendant's] policies . . . burden the Plaintiffs' right to speak about their personal religious beliefs."); *id.* at ¶ 77; JA 32 ("Defendant discriminates against religious persons because they condition access to an important government benefit upon students self-censoring any speech that may be considered insulting or stigmatizing, or that states homosexuality is wrong.").

Plaintiffs do not pursue this theory on appeal. However, in an abundance of caution, Intervenors note that the fact that some of the restricted speech may be religious speech does not change the analysis. Although a school may not restrict speech <u>because</u> of its religious content, a school retains the right under *Tinker* to restrict speech <u>despite</u> its religious content. Specifically, a school may intervene where one student repeatedly engages in speech that is harassing, regardless of what the speaker's motivation may be. *See, e.g., Sypniewski*, 307 F.3d at 264 ("Students cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school."). It makes no difference whether one student harasses another by calling him a "sinner" or "smelly." It matters only that the student is engaged in harassment. Even assuming, for example, that religious students who believe that homosexuality is wrong feel a religious compulson to

engage in unwelcome speech targeted at gay classmates, a school does not violate the Free Exercise Clause when it neutrally regulates speech that interferes with the rights of other students. *Compare Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 882-83 (1990) (a religiously neutral law that incidentally burdens a person's free exercise rights does not violate the Free Exercise Clause so long as the law has a legitimate purpose) *with Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-34 (1993) (law penalizing only ritualistic animal sacrifices and not other acts of animal cruelty was neither religiously-neutral because "it discriminate[d] against religiously-motivated conduct" nor generally-applicable because it "prohibit[ed] conduct because it is undertaken for religious reasons").

All speakers, religious or otherwise, were entitled to relief from the unconstitutional speech restriction. A ruling based on Plaintiffs' free speech claim would fully resolve this issue for all students while providing Plaintiffs with the relief they seek.

F. Any Attempt to Limit the Meaning of "Insulting" and "Stigmatizing" to Remedy the Overbreadth Concern Would Only Result in Making the Policies Unconstitutionally Vague.

Finally, Plaintiffs argue that the Board's anti-harassment policies were unconstitutionally vague. Assuming that the Board intended for the terms "insulting" and "stigmatizing" to have their traditional meaning, the reach of the

harassment policies would be fairly obvious to most middle and high school students, who are perhaps uniquely familiar with the kinds of statements that can insult and stigmatize their peers. Even though the policies would have given students adequate notice of the kinds of speech that could trigger discipline, the policies were nevertheless constitutionally flawed because they proscribed more speech than constitutionally permissible, thus running afoul of *Tinker*.

If the Board suggests that the terms "insulting" and "stigmatizing" were intended to mean something more specific – namely "insulting / stigmatizing in that it was severe enough to interfere with the rights of another" – then the policies would suffer from a different, but related constitutional defect – vagueness. Unless the terms "insulting" and "stigmatizing" were used in the traditional way, students would have no basis for knowing that only a particular subset of "insulting" and "stigmatizing" speech was actually proscribed by the policy, thus making it impossible for students to conform their conduct to a "comprehensible normative standard." *Sypniewski*, 307 F.3d at 266 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).

There is no basis for assuming that the terms "insulting" and "stigmatizing" meant anything other than what reasonable people would understand those words to mean. Accordingly, while the 2004-2005 harassment policies were not unconstitutionally vague due to their use of the terms "insulting" and

"stigmatizing," in doing so, the policies restricted more speech than *Tinker* permits, and therefore, were unconstitutional.

CONCLUSION

For all of the foregoing reasons, Intervenors ask this Court to remand this case to the District Court with instructions (1) to declare that the anti-harassment policies in effect for the 2004-2005 school year were unconstitutionally overbroad in violation of *Tinker* and (2) to award Plaintiffs nominal damages.[23]

Respectfully submitted,

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Dated: April 13, 2007

[23] Any question regarding the entitlement of Plaintiffs to attorneys' fees is a matter that should be left to the District Court in the first instance. *See Farrar*, 506 U.S. at 114 ("Although the 'technical nature' of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988."); *id.* at 120-22 (O'Connor, J., concurring) (outlining factors to be taken into account when determining whether attorneys' fees are justified under § 1988).

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), I certify the foregoing Intervenors-Appellants' Final Brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,068 words, as calculated by Microsoft Word, exclusive of the Corporate Disclosure Statement, Table of Contents, Table of Authorities, Request for Oral Argument, and Certificate of Compliance.

Dated: April 13, 2007

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Sharon M. McGowan

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she mailed two copies of the foregoing brief via first class mail this 13th day of April, 2007, to the following:

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DESIGNATION OF APPENDIX CONTENTS

Pursuant to Local Rule 30, Intervenors-Appellants hereby designate the following documents to be included in the Joint Appendix in addition to those documents previously designated by Plaintiffs-Appellants:

17. R-26, Intervenor-Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, filed on April 28, 2005, which contains the following exhibits:

    Exhibit A -- Consent Decree in *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County, Ky.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003).

    Exhibit B -- Boyd County School District Policy/Procedure Manual, Policy No. 09.42811 (superseded in August 2005).

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