UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
Asheville Division
Civil Case No. 1:25-cv-37 -MR-WCM

M.K., a minor, by and through her father and next friend Earl Kratzer,

Plaintiff,

v.

STEPHEN FISHER, et al.,

Defendants.

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

The public school officials in this case have prohibited Plaintiff—a seventeen-year-old high school junior—from speaking with her peers about how LGBTQ+ people have contributed to American society. That censorship violates Plaintiff's rights under the First Amendment and Equal Access Act. Plaintiff now seeks a preliminary injunction to halt Defendants' conduct while this case proceeds.

Plaintiff attends Shelby High School. She is the president and founding member of the student-run Activism Club ("the Club"), which meets to discuss current events and other topics not covered by the official curriculum. Student participation in the Club is voluntary. It receives no school funding, teachers provide no

instruction, and members receive no grades or academic credit. Since its creation, the Club has discussed topics including the war in Gaza, suicide prevention, the Black Lives Matter movement, and breast cancer awareness.

Until recently, the school had not sought to prohibit these discussions, at most requiring parental permission for some subjects. But last spring, Plaintiff wanted to share with the Club a Jeopardy-style quiz game highlighting LGBTQ+ people who have made significant contributions to American society. The quiz game consists of a text-only PowerPoint presentation that asks students to identify people like Harvey Milk, Ellen DeGeneres, and George Takei, as well as pieces of popular media featuring LGBTQ+ people.

This speech is protected by the First Amendment, but Defendants forbade it. They did not do so because they feared "substantial disruption of or material interference with school activities[.]" *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969). Instead, Defendants have tried to justify their conduct by asserting that the Activism Club requires "additional oversight" because it occurs during the school day; that the quiz game is "indecent" because it contains one reference to bisexuality and a song that mentions cigarettes; and that the quiz game encourages students to violate school policies. (Ex. C, Defendants' Response to Plaintiff's Demand Letter, at 1, 2.)

Each assertion is meritless. The Activism Club is not part of the official curriculum that Defendants would have more authority to regulate, and the First Amendment protects student speech whether it occurs "in the cafeteria, or on the playing field, or on the campus during the authorized hours[.]" *Tinker*, 393 U.S. at 512–513. References to cigarettes and sexual orientation cannot transform protected speech into something "patently offensive," "sexually explicit," and "unrelated to any political viewpoint." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684–85 (1986). And these references cannot plausibly be read to encourage violating school policies—an assertion that, even if true, would not by itself justify censorship under the First Amendment.

Defendants are also violating the Equal Access Act. When a public school creates a "limited open forum," it cannot "discriminat[e] against students who wish to conduct a meeting within that forum on the basis of the 'religious, political, philosophical, or other content of the speech at such meetings.'" *Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 235 (1990) (quoting 20 U.S.C. §§ 4071(a) and (b)). Here, Defendants have violated the Act by maintaining a free period at school where students can meet to discuss virtually anything they wish, from the Bible to board games, but *not* the political and artistic contributions of LGBTQ+ people.

For these reasons and as discussed below, a preliminary injunction is appropriate.

FACTS

I. Plaintiff created the Activism Club so that students can discuss important topics not covered by the official curriculum.

M.K. is a 17-year-old high school junior at Shelby High School, a public school in Cleveland County, North Carolina. (Ex. A, M.K. Decl. ¶¶ 1–2.) M.K. founded the Activism Club during her freshman year. She wanted to create a space for students to discuss issues of public interest that are not covered in the official curriculum. (*Id.* ¶ 6.) M.K. is currently the Club's president. (*Id.* ¶ 5.)

Under school district policy, the Activism Club is a "Student Initiated, Non-curriculum-Related Student Group."[1] The Club meets monthly at the school during the daily "flex period," which occurs during the regular school day from 10:45 am to 11:15 am. (*Id.* ¶¶ 11–12.) Students may use this time as they wish; participation in the Club is not required. (*Id.* ¶ 11.) Other groups that meet during the flex period include Art Club, Bible Club, Dungeons and Dragons Club, Crochet Club, Spanish Club, Board Game Club, Black Student Union, Interact Club, and more. (*Id.* ¶ 13.)

[1] *Student-Initiated, Noncurriculum-Related Student Groups Regulation*, Cleveland County Board of Education Policy Manual 3620-R, https://go.boarddocs.com/nc/ccs/Board.nsf/goto?open&id=CGG45Y09F4C0.

The Activism Club receives no funding from the school, and members receive no grades or academic credit for their participation. (*Id.* ¶¶ 14, 15.) Haley Pond, a counselor at the school, is the Club's staff advisor. (*Id.* ¶ 16.) Ms. Pond takes attendance and helps to maintain order at Club meetings, but she does not provide instruction or participate in Club activities. (*Id.* ¶ 17.) Ms. Pond spends most of her time during Club meetings attending to her own work. (*Id.*)

Since the Club's founding, it has held discussion and activities on a wide variety of topics including the war in Gaza, the Black Lives Matter movement, suicide prevention, Women's History Month, breast cancer awareness, and others. (*Id.* ¶ 7.) None of these activities have disrupted school activities. (*Id.* ¶ 8.) For some topics that school officials considered "sensitive," like the war in Gaza, Club members had to obtain parental permission to participate. (*Id.* ¶ 9.) Defendants, however, never sought to fully prohibit the Activism Club—or, to Plaintiff's knowledge, *any* student club—from discussing anything. (*See id.* ¶ 29.) Until now.

II. Defendants forbid Plaintiff from sharing the quiz game but give shifting, inconsistent reasons why.

In April 2024, Plaintiff proposed that the Club play a quiz game titled "JEOPARDY! LGBTQ+ Representation." (*Id.* ¶ 18; *id.* Attach. 1 at 1.) The quiz game is a text-only PowerPoint presentation with fact-based questions asking students to identify LGBTQ+ individuals including Harvey Milk and Ellen DeGeneres, and popular media featuring LGBTQ+ people such as *Queer Eye* and *Heartstopper*. (*Id.*, Attach.

1 at 16, 24, 26, 44.) Plaintiff used a free, online template to create the quiz game, but wrote the questions and answers herself. (*Id.* ¶ 21.)

Plaintiff recognizes that LGBTQ+ people have faced great adversity in this country, and she hoped the quiz game would highlight some of the meaningful contributions that LGBTQ+ people have made to American society, including public service, sports, and the arts. (*Id.* ¶¶ 19, 20.) All content in the presentation is factually accurate to the best of Plaintiff's knowledge. (*Id.* ¶ 18.) It contains no depictions of sex, violence, or illegal drug use.

Ms. Pond agreed that the game was a good idea. (*Id.* ¶ 22.) She then checked with Shelby High School Principal Eli Wortman about whether the Activism Club could play the game. (*Id.* ¶ 23.). On April 15, 2024, Ms. Pond informed Plaintiff that Mr. Wortman did not think it was a good idea to play the game without parental permission slips, and so the game was postponed for the time being. (*Id.* ¶¶ 23, 24.)

That summer, Plaintiff sent Ms. Pond a schedule for Activism Club meetings and again proposed the quiz game for the club's October meeting. (*Id.* ¶ 25.) On August 7, 2024, Ms. Pond told M.K. that she had forwarded the proposed schedule to Mr. Wortman and that some of the "sensitive topics" may require permission slips. (*Id.* ¶ 26.)

On October 31, 2024, Ms. Pond informed M.K. that she and the Activism Club would not be allowed to play the quiz game. (*Id.* ¶ 27.) Ms. Pond stated that

she spoke with Sandy Hamrick, the Cleveland County School Board liaison, who had spoken with Defendant Fisher. Ms. Pond further stated that Defendant Fisher was concerned "around the club activities taking place during the school day and how that relates to the new Parents Bill of Rights law." (*Id.* ¶ 4; *id.* Attach. 4 at 1.) That state law prohibits instruction on sexuality, sexual activity, and gender identity, but applies only to kindergarten through fourth grade. N.C. Gen. Stat. § 115C–76.55.

Later that day, Earl Kratzer, M.K.'s father, emailed Defendant Fisher asking him to explain the decision. (Ex. B, Kratzer Decl. ¶ 5.). Defendant Fisher responded in a letter the next week. (*Id.*, Attach. 1.) He stated that the Board had not relied on the Parents Bill of Rights to justify prohibiting the quiz game, but they had instead relied on two Board policies: "Selection of Instructional Materials,"[2] and "Distribution and Display of Non-School Materials."[3] (*Id.*)

The letter did not state how either policy was applied. Nor did it identify any educational concerns with the game, any fear of disruption of school activity that the game might cause, or any reason the material might be considered indecent or obscene.

---

[2] *Selection of Instructional Materials*, Cleveland County Board of Education Policy Manual 3200, https://go.boarddocs.com/nc/ccs/Board.nsf/goto?open&id=CGFRFR6DD303#.

[3] *Distribution and Display of Non-School Material*, Cleveland County Board of Education Policy Manual 5210, https://go.boarddocs.com/nc/ccs/Board.nsf/goto?open&id=CHPKA650E0B0.

Mr. Kratzer found this response confusing. In addition to the lack of any explanation of how Defendants applied the two policies, the policies appear contradictory—instructional materials cannot also qualify as non-school materials, and non-school materials cannot qualify as instructional materials.[4] (*Id.* ¶ 8.)

On December 4, 2024, Plaintiff's counsel sent Defendants a letter demanding that they reverse their decision prohibiting the game because it was violating Plaintiff's rights under the First Amendment and the Equal Access Act. On January 20, 2025, Defendants' counsel responded to Plaintiffs' letter stating that they would not allow M.K. and the Activism Club to play the game.

The letter states that "additional administrative oversight occurs and is necessary to ensure the educational environment is not disrupted," but does not claim that the quiz game had caused any disruption or was likely to. (Defs Resp. at 1.). Defendants offered only the following details to justify their decision:

> In this instance, it was determined that the suggested game was indecent based on community standards, inappropriate for display considering the age of students, and encouraged the violation of school regulations. Specifically, the game includes questions about an individual "expressing her bisexuality" and quoting song lyrics such as "long nights, daydreams sugar and smoke rights, I've been a fool but strawberries and cigarettes".

(*Id*. at 2.)

[4] The policy provides: "Non-school material includes any publication or other written information that is not a school-sponsored or curriculum-related publication or material." *Id.*, § E(3).

Plaintiff and her father are not aware of any other student club being completely prohibited from holding a discussion or activity in this manner. (M.K. Decl. ¶ 29; Kratzer Decl. ¶ 9.)

LEGAL STANDARDS

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). The district court "may assess the relative strength and persuasiveness of the evidence presented by the parties, and is not required to resolve factual disputes in favor of the non-moving party." *Norris v. City of Asheville*, No. 1:23-CV-00103-MR-WCM, 2024 WL 1261206, at *2 (W.D.N.C. Mar. 25, 2024) (citations and quotation marks omitted).

ARGUMENT

I. Plaintiff will likely succeed on the merits of her claims.

Plaintiff wishes to speak with her fellow Club members about how LGBTQ+ people have contributed to American society. The First Amendment protects that speech, and the few exceptions recognized by the Supreme Court do not apply. Therefore, Plaintiff will likely prevail on her claims that Defendants have imposed unconstitutional prior restraint and content discrimination.

Plaintiff will also likely prevail on her claim under the Equal Access Act. Defendants maintain a "limited open forum" by permitting student groups to hold meetings during the flex period and discuss virtually anything they wish. But Defendants are prohibiting Plaintiff and her fellow Club members from holding a meeting specifically because of the "political, philosophical, or other content of the speech at" that meeting. 20 U.S.C. § 4071(a).

A. Defendants are violating the First Amendment by prohibiting speech that does not threaten to significantly disrupt school activities.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley,* 408 U.S. 92, 95 (1972). The Supreme Court has long held, "Any system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). So do content-based restrictions that the government imposes on "particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

Public school students also enjoy these protections, and not just during "the classroom hours. When [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on

controversial subjects . . . .” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

School officials, however, may regulate student speech if it “would substantially interfere with the work of the school or impinge upon the rights of other students.” *Id.* at 509. But this standard is demanding. *Tinker* held that school officials could not prohibit students from wearing anti-war armbands merely “to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id*. Nor did it matter that the armbands might have *some* negative impact on the school environment. *See id.* at 523–24 (Black, J., dissenting); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 929–30 (3d Cir. 2011) (en banc) (observing that the arm bands in *Tinker* were “an ostentatious reminder of the highly emotional and controversial subject of the Vietnam war” that could distract students from their work).

By contrast, the Fourth Circuit more recently held that school officials could bar a student from wearing a shirt showing the Confederate flag. *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426 (4th Cir. 2013). That school district had a long history of racial tension, including instances where controversy over the Confederate flag had disrupted school activities. *Id.* at 430–433. The Fourth Circuit held that, unlike in *Tinker*, there was no First Amendment violation because of “ample

evidence from which the school officials could reasonably forecast" significant disruptions of school operations. *Id.* at 438.

Here, Plaintiff wishes to engage in speech that celebrates the accomplishments of people belonging to historically disfavored minorities. (*See* M.K. Decl. ¶¶ 18, 19.) That kind of speech lies at "the core of what the First Amendment is designed to protect." *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quotations marks omitted). Numerous courts have expressly held that student speech on LGBTQ+ issues is protected. *See, e.g.*, *Young v. Giles Cnty. Bd. of Educ.*, 181 F. Supp. 3d 459, 464 (M.D. Tenn. 2015) ("Student expression on LGBT issues is speech on a purely political topic, which falls clearly within the ambit of the First Amendment's protection."); *Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cnty., Fla.*, 567 F. Supp. 2d 1359, 1361, 1369–70 (N.D. Fla. 2008) (citing cases and holding that speech advocating for "the acceptance of and fair treatment" of gay people was protected).

Defendants have imposed a prior restraint on this speech—they have "forbidd[en] certain communications . . . in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4–14 (1984)); *see Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 124 (D. Mass. 2003) (holding that school imposed prior restraint by prohibiting distribution of literature at school).

Defendants have also engaged in content discrimination by "singl[ing] out specific subject matter for differential treatment[.]" *Reed*, 576 U.S. at 156. Defendants have allowed the Activism Club to discuss every other proposed topic since its founding—including topics that referenced violence, death, and political controversy—and permitted other clubs to discuss virtually any other topic they wish, from religion to fantasy roleplaying games. (*See* M.K. Decl. ¶¶ 7, 13.) Only now when the speech concerns LGBTQ+ people have Defendants intervened. They would not even allow Plaintiff and her peers to discuss the topic after obtaining their parents' permission.[5]

Defendants cannot carry their burden under *Tinker*. The quiz game's subject matter has not caused any disruption, and Defendants have not provided any reason to think that a substantial disruption will occur. In fact, the Activism Club has addressed extremely controversial and emotionally charged subjects like the war in Gaza without incident. (*See id.* ¶¶ 7, 8.)

In response to Plaintiff's demand letter, Defendants' counsel wrote that "additional administrative oversight occurs and is necessary to ensure the educational environment is not disrupted." (Defs. Resp. at 1.) But Defendants may censor student

[5] These kinds of claims do not require a public forum analysis. *See Slotterback By & Through Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 290 (E.D. Pa. 1991) (explaining that forum analysis is not required in claims involving students' "personal expression during school hours in a place where the students were entitled to be" (italics omitted)).

speech only if they can prove "a specific and significant fear of disruption" to school activity, "not just some remote apprehension of disturbance." *Newsom ex rel. Newsom v. Albemarle Country School Bd.*, 354 F.3d 249, 255 (4th Cir. 2003) (quotations marks omitted). Defendants cannot do that here. Their general concern, completely untethered to the specific facts of this case, cannot justify their censorship of Plaintiff's speech.

B. No other First Amendment exceptions apply.

The Supreme Court has identified three other scenarios where public school officials have greater authority to regulate student speech: (1) when the speech is "vulgar and offensive"; (2) when the school "lends its name and resources to the dissemination of student expression" such that "students, parents, and members of the public might reasonably perceive that student expression to bear the imprimatur of the school"; and (3) when student speech "can plausibly be interpreted as promoting illegal drugs . . . ." *Hardwick*, 711 F.3d at 435 (cleaned up).

Defendants appeared to invoke these exceptions in response to Plaintiff's demand letter. Defendants wrote that the Activism Club "occurs within the instructional day" and therefore requires "additional administrative oversight," and that the quiz game "was indecent based on community standards, inappropriate for display considering the age of students, and encouraged the violation of school regulations. Specifically, the game includes questions about an individual 'expressing her

bisexuality' and quoting song lyrics such as 'long nights, daydreams sugar and smoke rights, I've been a fool but strawberries and cigarettes.'" (Defs. Resp. at 1, 2.) None of this can justify Defendants' actions.

i. The quiz game is not obscene or indecent.

School officials may limit student speech that is obscene or vulgar. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). In *Fraser*, the Court held that school officials could punish a student for delivering "a sexually explicit monologue directed towards an unsuspecting audience of teenage students" that was "plainly offensive to both teachers and students" and "unrelated to any political viewpoint." *Id.* at 685. The Court relied on precedent limiting minors' access to pornography and shielding minors from patently vulgar speech. *See id.* at 684–85; *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 732 (1978) (government could censor radio broadcast that "depicted sexual and excretory activities in a patently offensive manner").

That is a high standard. Courts applying it have acknowledged that not every reference by students to sex, violence, or substance use will qualify as obscene or vulgar. *See, e.g.*, *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 320 (3d Cir. 2013) (en banc) (holding that students' breast cancer awareness bracelets that used the word "boobies" were not vulgar); *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 329 (2d Cir. 2006) (holding that "images of a martini glass, a bottle and

glass, a man drinking from a bottle, and lines of cocaine" on a student's shirt criticizing the president were not vulgar).

Here, the quiz game contains nothing but fact-based questions concerning LGBTQ+ politicians, performers, artists, and athletes, and media involving LGBTQ+ characters or actors. It has no swear words, no depictions of sex acts or violence, and no references to illegal drug use. And highlighting the accomplishments of politically disfavored minorities is clearly connected to a political viewpoint.

But in response to Plaintiff's demand letter, Defendants took issue with a song lyric that mentions cigarettes and a reference to Lady Gaga using music to "express[] her bisexuality." (Defs. Resp. at 2.) The quiz game further explains that "[h]er anthem 'Born This Way' resonated with many in the LGBTQ+ community." (M.K. Decl., Attach. A at 13.). Defendants called this "indecent" and therefore subject to censorship under the First Amendment. (Defs. Resp. at 2.)

Defendants seem to think that discussion of sexual orientation—or at least sexual orientation other than heterosexuality—is inherently indecent. That is wrong. "Student expression on LGBT issues is speech on a purely political topic, which falls clearly within the ambit of the First Amendment's protection." *Young*, 181 F. Supp. 3d at 464; *see also Gillman*, 567 F. Supp. 2d at 1370 (advocacy for gay rights was "not vulgar, lewd, obscene, plainly offensive, or violent, but . . . pure, political, and

express[ing] tolerance" for "a marginalized group"); *Gonzalez Through Gonzalez v. Sch. Bd. of Okeechobee Cnty.*, 571 F. Supp. 2d 1257, 1269 (S.D. Fla. 2008) (holding that students' wish to "discuss matters pertinent to the challenges" of not being straight was protected speech). Simply acknowledging one's sexual orientation—especially in the context of celebrating the accomplishments of LGBTQ+ people—is protected speech that cannot qualify as "patently offensive," "sexually explicit," and "unrelated to any political viewpoint." *Fraser*, 478 U.S. at 684–85. Nor can a single reference to cigarettes.

What's more, until now, Defendants never expressed concern with the reference to cigarettes, the question about Lady Gaga, or any of the other people referenced in the quiz game who have publicly acknowledged their sexual orientation. Only in response to threatened litigation—and after giving shifting, inconsistent explanations for their conduct—have Defendants offered this implausible theory.[6]

In any case, Defendants' discomfort with the quiz game's subject matter is apparent. They have never attempted to ban the Club's discussion of other subjects even when they involved violence, death, or politically controversial subjects. (*See* M.K. Decl. ¶¶ 7–9.) The "mere desire to avoid the discomfort and unpleasantness"

[6] It is also worth noting that countless popular artists have expressed their sexuality through music. When The Temptations sang *My Girl*, when Etta James sang *At Last*, and when Johnny Cash sang *I Walk the Line*, they were singing about romantic love—i.e., expressing their sexuality. Defendants would presumably not have a problem with students discussing these artists.

that Defendants may associate with Plaintiff's speech cannot justify its censorship under the First Amendment. *Tinker*, 393 U.S. at 509.

ii. The quiz game is not school-sponsored speech.

In *Hazelwood School District v. Kuhlmeier*, the Supreme Court held that school officials had more authority to regulate student speech that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" and "may fairly be characterized as part of the school curriculum[.]" 484 U.S. 260, 271 (1988). The Court further held that a student newspaper was one such activity because it was school-funded, school staff exercised significant control over its content, and students worked on the paper as part of a journalism course for which they received academic credit. *Id.* at 268–69.

Under this framework, schools may regulate school-sponsored speech so long as it is "reasonably related to legitimate pedagogical concerns." *Id.* at 273. *See, e.g.*, *Robertson v. Anderson Mill Elementary Sch.,* 989 F.3d 282, 289 (4th Cir. 2021). But when student speech lacks connections to the official curriculum, *Tinker*'s protections apply.

For example, in *Westfield High School L.I.F.E. Club*, a school prohibited students from distributing religious literature on campus during non-instructional time. The court held that the literature distribution was "an exercise of wholly private speech that merely happened to have occurred on school grounds and does not

constitute school-sponsored speech." 249 F. Supp. 2d at 120. The court explained: "The school does not fund the Club; the Club's activities are not directly related to any subject taught in any course that the school offers; the school does not require any student to participate in the group; the school does not give Club members academic credit for participation . . . ." *Id.* at 118. Simply because the school allowed the meetings to occur on campus and "provided an adult sponsor who acts merely as a monitor and does not actively or substantively participate in any of the Club's activities . . . does not mean that the LIFE Club can 'fairly be characterized as part of the school curriculum.'" *Id.* at 117 (quoting *Hazelwood,* 484 U.S. at 271).

The same is true here. The Activism Club is not part of the official curriculum—indeed, Plaintiff founded the Club as a place where students could discuss topics *not* covered by the official curriculum. Club members receive no grades or academic credit. Participation in the Club is entirely voluntary. A school employee monitors Club meetings but provides no instruction. (M.K. Decl. ¶¶ 6, 14–17.) Under Defendants' own policies, the Activism Club is a "Student-Initiated, Noncurricular-Related Student Group."

Defendants have also stated a concern for age appropriateness. (Defs. Resp. at 2.) But that concern could justify censorship only if the speech is school-sponsored. *See Robertson*, 989 F.3d at 289. And even if it were, Plaintiff and her peers are in high school, not kindergarten. If Defendants believe that these students are

mature enough to discuss war, cancer, and suicide (M.K. Decl. ¶ 7), surely they can also handle the idea of cigarettes and a person not being straight.

iii. The quiz game does not promote illegal drug use.

"[S]chool officials can regulate student speech that can plausibly be interpreted as promoting illegal drugs because of 'the dangers of illegal drug use.'" *Hardwick*, 711 F.3d at 435 (quoting *Morse*, 551 U.S. at 410). It is unclear if Defendants have invoked this exception. Either way, it cannot apply because the quiz game does not even mention illegal drugs, let alone encourage their use.

Defendants mentioned a concern with the quiz game "encourag[ing] the violation of school regulations." (Defs. Resp. at 2.) Upon reviewing the quiz game, however, that view is simply implausible, and Defendants tellingly offered no specifics. Moreover, this concern alone cannot justify student censorship unless one of the Supreme Court's exceptions discussed above applies.

C. Defendants are violating the Equal Access Act by prohibiting a student meeting because of its subject matter.

The Equal Access Act provides that public schools maintaining "a limited open forum" cannot "deny equal access or . . . discriminate against any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a).

A school maintains a "limited open forum" if it provides an "opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." § 4071(b). A "noncurriculum related student group" means "any student group that does not *directly* relate to the body of courses offered by the school." *Bd. Of Educ. Of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 239 (1990). A student group directly relates to a school's curriculum if the group's subject matter "is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit." *Id*. at 239–40. A "meeting" includes "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." 20 U.S.C. § 4072(3). And "non-instructional time" is "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." § 4072(4).

Mergens involved a school district that allowed a chess club, scuba club, and peer advocates club to hold meetings at school, but not a religious organization. 496 U.S. at 245. The Court held that those groups were noncurricular, rejecting the argument that "'curriculum related' means anything remotely related to abstract educational goals[.]" *Id.* at 244. The Court further held that excluding the religious group violated the Act because the school had imposed a content-based restriction on what

groups were allowed to meet. *Id.* at 234; *see also Franklin Central Gay/Straight Alliance v. Franklin Twp. Cmty. Sch. Corp.*, No. IP01-1518 C-M/S, 2002 WL 32097530, at *17 (S.D. Ind. Aug. 30, 2002) (holding that prohibiting Gay Straight Alliance from meeting during designated club time violated the Act).

Here, Defendants have created an open forum by maintaining a flex period during which student clubs can meet on school grounds to discuss virtually anything they wish. Some clubs, like the French Club, may be related to the official curriculum. *See Mergens*, 496 U.S. at 240. But the Activism Club, like the Bible Club and the Dungeons and Dragons Club, is not. Plaintiff founded the Activism Club specifically to cover subjects *not* covered by the official curriculum, participation in the Club is not required, and members receive no grades or academic credit. (M.K. Decl. ¶ 7, 11, 14, 15.).

Plaintiff wishes to hold a meeting during the flex period where the Club will play the quiz game. Defendants have forbidden that meeting expressly because of the " political, philosophical, or other content" to be discussed. 20 U.S.C. § 4071(a). This conduct violates the Act and should be enjoined.

II. The other preliminary injunction factors favor Plaintiff.

Without preliminary relief, Plaintiff will suffer irreparable harm. "[I]t is well established that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Legend Night Club v. Miller*,

637 F.3d 291, 302 (4th Cir. 2011) (second brackets original) (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion)).

The Court must also "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). Here, Plaintiff faces ongoing irreparable harm while Defendants have no legitimate interest in maintaining an unlawful prohibition of student speech. And "upholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002).

III. The Court should waive the bond requirement or require minimal bond.

Federal Rule of Civil Procedure 65(c) provides that "a court may issue a preliminary injunction . . . only if the movant gives security," but "the district court retains the discretion to set the bond amount as it sees fit or waive the security requirement." *Pashby v. Delia*, 709 F.3d 307, 331–32 (4th Cir. 2013). The security requirement ensures that an enjoined party is compensated for harm it may suffer because of an improper injunction. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999).

Here, waiving the bond requirement is appropriate because Defendants face no risk of harm from complying with an injunction that preserves Plaintiff's rights under the First Amendment and Equal Access Act. In the alternative, Plaintiff

respectfully asks that the Court only require a nominal bond. *See Hoechst*, 174 F.3d at 421 n.3

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a preliminary injunction should be granted.

Respectfully submitted, this 20th day of February, 2025.

ACLU OF NORTH CAROLINA LEGAL FOUNDATION

/s/Daniel K. Siegel
Ivy A. Johnson
N.C. Bar No. 52228
Daniel K. Siegel
N.C. Bar. No. 46397
P.O. Box 28004
Raleigh, NC 27611
T: (919) 532-3681
ijohnson@acluofnc.org
dsiegel@acluofnc.org

ROBINSON, BRADSHAW & HINSON, P.A.

Charles E. Johnson
N.C. Bar No. 9890
600 S. Tryon St., Suite 2300
Charlotte, NC 28202
T: (704) 377-2536
cejohnson@robinsonbradshaw.com

CERTIFICATE OF SERVICE

I certify that on February 20, 2025, I filed the foregoing on the Court's ECF system and sent a copy via email to Leigh Sink, counsel for the Cleveland County Board of Education, addressed to lsink@sinkmediations.com.

/s/Daniel K. Siegel
Daniel K. Siegel

Counsel for Plaintiff

CERTIFICATE OF COMPLIANCE

Pursuant to the Court's standing order on the use of artificial intelligence, Docket No. 3:24-mc-104, I certify that no artificial intelligence was employed in the research for the preparation of the foregoing document except for such artificial intelligence embedded in Westlaw. I further certify that every statement and citation to authority in the foregoing document has been checked by an attorney in this case or a paralegal working at their direction as to the accuracy of the proposition for which it is offered and the citation to authority provided.

/s/Daniel K. Siegel
Daniel K. Siegel

Counsel for Plaintiff