**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO,**
**WESTERN DIVISION**

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| **MAVERICK COUCH**, a minor, by and through his Mother and Next Friend, **TONYA COUCH,** | ) | **Case No.** |
| | ) | **Judge** |
| | ) | **Magistrate Judge** |
| Plaintiff, | ) | |
| *v.* | ) | |
| **WAYNE LOCAL SCHOOL DISTRICT,** a political subdivision of the State of Ohio, and **RANDY GEBHARDT**, in his individual and official capacity as Principal of Waynesville High School, | ) | |
| Defendants. | ) | |

**MEMORANDUM IN SUPPORT OF APPLICATION FOR**
**A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION**

Maverick Couch, a minor, by and through his mother and next friend, Tonya Couch, ("Plaintiff") and through undersigned counsel, submits this memorandum in support of Plaintiff's Application For A Temporary Restraining Order And A Preliminary Injunction.

## INTRODUCTION

This case involves an ongoing and unlawful violation of a high school student's right to freedom of expression. Last April, the plaintiff student, Maverick Couch ("Maverick"), wore a T-shirt to school bearing the message "Jesus Is Not A Homophobe" (the "T-shirt"). Maverick chose to wear the T-shirt on the annual "Day of Silence," a national, student-led event held annually that is designed to bring attention to the harms associated with bullying and harassment

directed at lesbian, gay, bisexual and transgender ("LGBT") students. Unfortunately, Maverick's attempt to express solidarity with the nation's LGBT students on the Day of Silence and to support the goals of that event was thwarted by his school's principal, Mr. Randy Gebhardt, who ordered Maverick to remove the T-shirt. Since that day, Principal Gebhardt has repeatedly stated to Maverick that he is not permitted to wear the T-shirt and that he will be suspended from school if he does so. Principal Gebhardt's position was confirmed by the Wayne Local School District (the "District"), who stated through its attorney that Maverick would be violating the District's policy against messages that express ideas that the District deems "sexual" in nature, which are categorically forbidden under threat of suspension.

Plaintiff asks this Court for a temporary restraining order and a preliminary injunction because Principal Gebhardt's actions and threats, which have been approved by the Wayne Local School District, constitute an ongoing violation of Maverick's First Amendment rights that has caused, and continues to cause, irreparable harm. Preliminary relief is particularly appropriate because the 2012 Day of Silence – scheduled to take place on April 20, 2012 – is fast approaching. Every day leading up to and including the National Day of Silence that Maverick is prohibited from wearing his "Jesus Is Not A Homophobe" T-shirt prevents his participating in an important debate of public significance and concern. The First Amendment protects Maverick's right to express his support for – and solidarity with – the nation's LGBT students and their allies in promoting tolerance and opposing violence and bullying.

## STATEMENT OF FACTS

On or around April 15, 2011, Maverick wore the T-shirt to school. (Verified Complaint ("Compl."), ¶7.) The T-shirt is white with the message "Jesus Is Not A Homophobe" in black

letters. *Id.* The T-shirt also includes a symbol consisting of two intersecting arcs. This symbol, which is sometimes referred to as an Ichthys (the Greek word for "fish"), is now known colloquially as the "sign of the fish" or the "Jesus fish." *Id.* During the early days of Christianity, when Christians were often persecuted by the Romans, the "Jesus fish" was used as a secret symbol to mark Christian meeting places. *Id.* On Maverick's T-shirt, the interior of the Jesus fish is shaded in the colors of the rainbow. *Id.* Rainbow colors are often used to denote identification with, and/or support for, the LGBT community. *Id.*

Maverick's decision to wear the T-shirt stemmed, in part, from his desire to participate in the national "Day of Silence." (Compl., ¶8.) The Day of Silence is a student-led national event, held annually, that brings attention to anti-LGBT name-calling, bullying and harassment in schools. *Id.* Students from middle school to college wear T-shirt and other messages of support and often take a vow of silence in an effort to encourage schools and classmates to address the problem of anti-LGBT behavior by illustrating the silencing effect of bullying and harassment on LGBT students and those perceived to be LGBT. *Id.* Although Maverick's school, Waynesville High School, does not have a student group that was planning any Day of Silence activities, he wanted to show his support for the activities taking place in other schools across the country by wearing his T-shirt to Waynesville High School. *Id.*

During the morning of the day that Maverick wore his T-shirt to school, he was summoned to Principal Gebhardt's office. (Compl., ¶9.) Although Maverick's wearing of the T-shirt had not caused a disruption of or interference with school activities, Principal Gebhardt told Maverick to remove the T-shirt or to turn it inside out. *Id.* Maverick complied with Principal Gebhardt's directive by turning the T-shirt inside out. *Id.*

On the next school day (after the intervening one-week spring break), Maverick again wore his T-shirt to school. (Compl., ¶10.) Once again, his T-shirt did not cause disruption of or interference with school activities, but he was nonetheless summoned to the Principal's office. *Id.* Principal Gebhardt ordered Maverick to remove the T-shirt or face suspension from school. *Id.* Maverick asked Principal Gebhardt to contact Maverick's mother. After Ms. Couch arrived at school, Principal Gebhardt repeated his position that Maverick would be suspended from school if he did not remove the T-shirt. *Id.* Maverick removed his T-shirt and returned to class. *Id.*

On the two days that Maverick wore the T-shirt, Principal Gebhardt provided two different explanations as to why the T-shirt was unacceptable. (Compl., ¶11.) On one occasion, Principal Gebhardt told Maverick that the T-shirt was "disrupting the educational process." *Id.* On the other occasion, Principal Gebhardt told him that the T-shirt "had to do with religion" and that "religion and state have to be separate." *Id.*

At the beginning of the 2011-2012 school year, after Maverick had educated himself about the law governing students' rights to express themselves at school, he again spoke to Principal Gebhardt and asserted his right to wear the T-shirt to school. (Compl., ¶12.) Principal Gebhardt told Maverick that Maverick would not be permitted to wear the T-shirt to school because others in the school might find it offensive. *Id.* Principal Gebhardt also warned Maverick that he would be suspended from school if he wore the T-shirt again. *Id.*

On January 24, 2012, Maverick had a letter sent to Principal Gebhardt about students' rights to free speech and expression and why the law does not permit Waynesville High School

to deny Maverick the opportunity to wear his T-shirt to school. (Compl., ¶13.) A true and correct copy of the letter that was sent to Principal Gebhardt is attached as Exhibit A.

On February 24, 2012, the Wayne Local School District Board of Education (the "School Board"), through its attorney, responded to the January 24 letter. (Compl., ¶15.) At that time, the School Board articulated its policy with respect to Maverick's T-shirt:

> It is the position of Wayne Local School District Board of Education that the message communicated by the student's T-shirt was sexual in nature and therefore indecent and inappropriate in a school setting. Wayne Local School District Board of Education had the right to limit clothing with sexual slogans, especially in light what was then a highly charged atmosphere, in order to protect its students and enhance the educational environment. Consequently, the high school principal was well within the bounds of his authority to request that the student remove his T-shirt and refrain from wearing the T-shirt in the future.

A true and correct copy of the February 24 letter is attached as Exhibit B.

## ARGUMENT

As discussed below, an analysis of the four-factor test governing the issuance of preliminary injunctions demonstrates that Maverick is entitled to preliminary injunctive relief during the pendency of these proceedings. The immediacy of the upcoming 2012 Day of Silence – scheduled for April 20, 1012 – suggests that the Court should issue an immediate order temporarily restraining the Defendants from interfering with Maverick's First Amendment rights of speech and expression until such time as this Court can consider Plaintiff's application for a preliminary injunction.

### I. MAVERICK IS ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF.

The four factors that courts consider when deciding whether to issue a preliminary injunction all in favor of issuing a preliminary injunction in this case. The four factors are:

(1) whether the movant has a strong likelihood of success on the merits;

(2) whether the movant would suffer irreparable harm without the injunction;

(3) whether issuance of the injunction would cause substantial harm to others;

(4) whether the public interest would be served by the issuance of the injunction.

*Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001); *see also Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 851 (E.D. Mich. 2003). No single one of these four factors is a prerequisite to the issuance of an injunction – rather, courts balance all four factors in their analysis. *Barber*, 286 F. Supp. 2d at 851, *citing Neveux v. Webcraft Tech., Inc.*, 921 F. Supp. 1568, 1570-71 (E.D. Mich. 1996)(*citing Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995)).

The primary purpose of a preliminary injunction is to maintain the status quo until a final decision on the merits can be reached. *Barber*, 286 F. Supp. 2d at 851, *citing Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). In cases like this one, in which a school has interfered with a student's freedom of expression, the status quo that should be maintained is the right of the student to express himself as it existed before the school chose to interfere with that right. *Barber*, 286 F. Supp. 2d at 860, *citing Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001)("[T]he Court's decision to grant injunctive relief serves to reinstate the *status quo* as of [the date the clothing was banned] . . . .")

As discussed in detail below, all four factors weigh in favor of this Court providing Maverick with preliminary injunctive relief. As a result, Plaintiff respectfully requests that this Court issue an order enjoining Defendants from further interfering with Maverick's right to wear

the "Jesus Is Not A Homophobe" T-shirt to school so that Maverick can wear the T-shirt on the upcoming Day of Silence and on other days leading up to that national event.

### A. Maverick Has A Strong Likelihood Of Success On The Merits.

Maverick has a very strong likelihood of succeeding on his First Amendment claim. Undeniably, Maverick's T-shirt is "speech" covered by the First Amendment because it contains a particularized message that expresses a certain viewpoint. *See, e.g., Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 539 (6th Cir. 2001)(reversing a district court decision that T-shirts displaying two Confederate Flags and the message "Southern Thunder" did not qualify as "speech"); *see also Nixon v. Northern Local Sch. Dist. Bd. of Ed.*, 383 F. Supp. 2d 965 (S.D. Ohio 2005)(holding that the wearing of a T-shirt bearing the messages "Homosexuality is a sin!," "Islam is a lie!," and "Abortion is murder!" "clearly constitutes expression under the First Amendment.").

It is equally clear that the Defendants, in their pre-litigation communications, have utterly failed to identify any legitimate reason for restricting Maverick's First Amendment rights. The question of whether a school can forbid the expressive messages on a student's clothing is answered by applying the legal principles articulated more than forty years ago by the United States Supreme Court in *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969). In *Tinker*, the Supreme Court struck down as unconstitutional a school policy banning the wearing of black armbands as a symbol of protest against the Vietnam War. In reaching this decision, the Court recognized that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at *506.* Recognizing that students First Amendment rights extend to the school environment, the Court held that schools can only restrict student speech that would "materially and substantially interfere with the requirements of appropriate

discipline in the operation of the school." *Id.* at 509. The Court also cautioned that school officials' fear of material and substantial interference must be based on something identifiable in the school setting because "undifferentiated fear or apprehension of disturbance is not enough to overcome the rights to freedom of expression." *Id.* at 508.

Numerous courts have applied the *Tinker* standard in cases involving student T-shirts and have issued preliminary injunctions when there is an absence of evidence that the T-shirt would cause material and substantial interference with the school's ability to maintain discipline in the school. *See, e.g., Nixon*, 383 F. Supp. 2d at 973-4. (granting preliminary and permanent injunction to student who was prohibited from wearing a T-shirt bearing anti-gay, anti-Islam and anti-abortion messages); *Nuxoll v. Indian Prairie Sch. Dist. 204*, 523 F.3d 668 (7th Cir. 2008)(overturning the denial of a preliminary injunction requested by a student who was prohibited from wearing a T-shirt bearing the message "Be Happy, Not Gay"); *Dibble v. Fillmore Cent. Sch. Dist.*, No. 05-CV-0336(E), 2005 U.S. Dist. LEXIS 33871, (W.D.N.Y. Sept. 6, 2005)(issuing a preliminary injunction preventing school from banning "Abortion Is Homicide" T-shirt); *Barber*, 286 F. Supp. 2d at 847 (issuing an injunction protecting student's right to wear a T-shirt displaying a photograph of President George W. Bush with the caption "International Terrorist"); *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001)(granting preliminary injunction on behalf of student prevented from wearing T-shirt with the message "Straight Pride"). In each of these cases, the courts concluded that the student was entitled to a preliminary injunction because the *Tinker* standard indicated that they had a strong likelihood of prevailing on their claims. *See also Castorina*, 246 F.3d at 540-41 (6th Cir. 2001) (concluding, in a different procedural posture, that *Tinker* applies to student T-shirt cases and reversing summary

judgment in favor of school district that prohibited student from wearing a shirt bearing the image of the Confederate flag).

In this case, application of the *Tinker* standard demonstrates that Maverick will almost certainly prevail on his First Amendment claim because there is no evidence at all that his T-shirt did cause, or would cause, a material and substantial disturbance in the school. Indeed, on the two occasions that he attempted to wear the T-shirt to school, there was no disruption at all. Nevertheless, Principal Gebhardt ordered him to remove the T-shirt or face suspension. Such interference with Maverick's freedom of expression is inconsistent with the controlling legal test articulated in *Tinker* because Principal Gebhardt took action against Maverick without any reasonable basis for believing that Maverick's T-shirt would cause a material and substantial disturbance.

Perhaps more telling of the weakness in the District's position is that in its February 24 letter, the School Board abandoned any suggestion of material and substantial disturbance, instead suggesting that the *Tinker* standard does not apply here because Maverick's T-shirt is "sexual in nature and therefore indecent." This argument can and should be summarily rejected by this Court as both factually unsupportable and inconsistent with existing precedent. According to the School Board, this case is governed not by *Tinker*, but by the Supreme Court's decision in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). In *Fraser*, the Court upheld the right of a school to discipline a student for making an "offensively lewd and indecent speech" consisting of numerous sexual innuendos during an assembly in which the student was nominating a classmate for a student government position. Rather than apply the *Tinker* standard, the Court held that when speech is lewd, vulgar and "offensive," school administrators

can regulate such speech in the interest of "teaching students the boundaries of socially appropriate behavior."

The scope of the *Fraser* opinion was clarified by the Supreme Court when it held that a school can proscribe speech that could reasonably be viewed as promoting illegal drug use. *Morse v. Frederick*, 551 U.S. 393 (2007) (concluding that a school district had the right to discipline a student for displaying a banner with the message "Bong Hits For Jesus" at a school event). In *Morse*, the Court explicitly stated that a school's right to restrict speech did not include the right to curtail any and all speech that someone might deem "offensive:"

> Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. We think that stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

*Morse*, 551 U.S. at 409. Thus, when viewed together, *Fraser* and *Morse* stand for the proposition that a school's ability to limit speech is expanded outside of the boundaries set by *Tinker* only when the speech is lewd or vulgar (*Fraser*) and/or promoting illegal drug use (*Morse*).

This case is clearly governed by *Tinker* and not by *Fraser* or *Morse*. As reflected in the cases referenced above, when a T-shirt communicates a message about a possibly unpopular or controversial position regarding a social or political issue – e.g., opposition to the Vietnam War, opposition to President Bush's support for a war in Iraq, opposition to abortion rights and/or opposition or support for LGBT rights – courts have uniformly applied the *Tinker* standard. *See, generally Nixon* ("Homosexuality is a sin!"); *Nuxoll* ("Be Happy, Not Gay"), *Dibble* ("Abortion Is Murder"), *Barber* (George Bush is an "International Terrorist"), *Chambers* ("Straight Pride")

and *Castorina* (confederate flag as a symbol of Southern pride). Courts have only opted to apply the *Fraser* standard in cases where the T-shirt at issue communicates its message using sexual innuendo and/or references to illegal drug use, neither of which Maverick's T-shirt involved. *See, e.g., Pyle v. South Hadley Sch. Comm.*, 824 F. Supp. 7 (D. Mass. 1993)(upholding school's decision to prohibit T-shirts stating "Coed Naked Band; Do It To The Rhythm" and "See Dick Drink. See Dick Drive. See Dick Die. Don't Be A Dick"); *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000)(upholding a school's decision to ban Marilyn Manson T-shirts because the performer's alleged use of drugs and alleged promotion of drug use was inconsistent with the school's educational mission).

Maverick's T-shirt falls unambiguously on the side of the cases governed by *Tinker*. "Jesus Is Not A Homophobe" is a message of acceptance. It is a message that urges tolerance of differences, respect for diversity, and opposition to bullying of LGBT students, especially when justified by religious ideology. This is the very interchange of ideas the First Amendment, at its core, is intended to encourage and protect:

> The reason for the First Amendment's ban on official censorship is because in a free society we rely on the "marketplace of ideas." . . . Though the state education system has the awesome responsibility of inculcating moral and political values, that does not permit educators to act as "thought police" inhibiting all discussion that is not approved by, and in accord with the official position of, the state.
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> The Board Members may be uncomfortable about students discussing sexual orientation and how all students need to accept each other, whether gay or straight. As in *Tinker*, however, when the school administration was uncomfortable with students wearing symbols of protest against the Vietnam War, Defendants can not censor the students' speech to avoid discussions on campus that cause them discomfort or represent an unpopular viewpoint.

*Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1141 and 1149 (C.D. Cal. 2000)(court issued a preliminary injunction compelling a school district to recognize a Gay-Straight Alliance club at a public high school). Consistent with these important First Amendment principles, Defendants cannot be permitted to censor Maverick just because they are uncomfortable with his message that all students should be accepted, regardless of their sexual orientation.

Furthermore, Maverick's message cannot credibly be viewed as "sexual in nature," "indecent," or "lewd."[1] Nor does it advocate illegal drug use. Thus, neither *Fraser* nor *Morse* apply. Therefore, the School Board and Principal Gebhardt can only prevent Maverick from wearing the T-shirt if it were to cause a material and substantial disruption at school. Because there is no evidence that there is any risk at all of such a disruption, Maverick has a strong likelihood of success in this case and the first prong of the four-part preliminary injunction test weighs heavily in favor of issuing an injunction that will allow him to wear the T-shirt on the days leading up to and including the annual Day of Silence.

### B. Maverick Has Suffered, And Will Continue To Suffer, Irreparable Harm Without Injunctive Relief.

The second prong of the test – whether the movant would suffer irreparable harm without injunctive relief – also supports entry of a temporary injunction. The loss of First Amendment rights, even for a short amount of time, is presumed to constitute irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Courts routinely find this general principle applicable in cases

[1] In *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1074-77 (D. Nev. 2001), the United States District Court for the District of Nevada rejected the notion that a student's decision to express his sexual orientation in a variety of ways, including wearing buttons that displayed the messages "We Are Everywhere" and "Out," was vulgar, lewd or offensive speech governed by *Fraser*. The court noted: "In *Tinker*, the Supreme Court clearly established that students in public schools have the right to freedom of speech and expression. This is a broad right that would encompass the right of a high school student to express his sexuality. *Id.* at 1076.

involving the rights of students to wear expressive T-shirts to school. *See, e.g., Nixon*, 383 F. Supp. 2d at 974; *Barber*, 286 F. Supp. 2d at 858; *Chambers*, 145 F. Supp. 2d at 1072; *Dibble*, 2005 U.S. Dist. LEXIS 33871 at 3.

In this case, the District has repressed and chilled Maverick's First Amendment rights for almost a year. Furthermore, the Day of Silence – a day on which it is particularly important to Maverick to wear his T-shirt – occurs only once a year and it is fast approaching. If the Defendants are not prohibited from interfering with Maverick's right to wear his T-shirt on the days leading up to and on April 20, 2012, Maverick's ongoing injury will only be exacerbated. Thus, preliminary injunctive relief is particularly important in this matter.

**C. A Preliminary Injunction Would Not Cause Substantial Harm To Others.**

The third prong of the test – whether a preliminary injunction would cause substantial harm to others – clearly weighs in favor of issuing an injunction. Defendants have not and cannot identify any way in which their interests (or the interests of anyone else) would be harmed if Maverick is permitted to wear his T-shirt to school. *See, e.g., Nixon*, 383 F. Supp. 2d at 974-75 ("Defendants will not suffer any harm if they are enjoined from enforcing an unconstitutional policy . . . .").

**D. A Preliminary Injunction Would Serve The Public Interest.**

The final prong of the test – the public interest – also strongly supports granting preliminary injunctive relief. Because the abridgement of First Amendment rights constitutes irreparable harm, courts routinely conclude that issuing injunctions to protect those rights serves the public interest. Indeed, "protection of constitutional rights, and particularly First Amendment rights, is always in the public interest." *Nixon*, 383 F. Supp. 2d at 975 (citing *Gannett Co., Inc.*

*v. DePasquale*, 443 U.S. 368, 383 (1979), and *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)*; see also Barber*, 286 F. Supp. 2d at 859-60 and *Chambers*, 145 F. Supp. 2d at 1073.

## II. THE COURT SHOULD GRANT AN IMMEDIATE ORDER TEMPORARILY RESTRAINING THE DEFENDANTS FROM PREVENTING MAVERICK FROM WEARING HIS T-SHIRT UNTIL AN EVIDENTIARY HEARING ON THE PRIMINARY INJUNCTION CAN BE SET.

Rule 65(b) authorizes the Court to issue an immediate temporary order restraining Defendants from interfering with Maverick's First Amendment rights of speech and expression until such time, not to exceed fourteen days (14), as the Application for Preliminary Injunction can be heard. Because the school deems the message conveyed by Maverick's T-shirt offensive, the District has made clear that Maverick will immediately be suspended from school if he wears it. Whether viewed as a speech-chilling threat or an impermissible prior restraint, the effect of the District's policy and conduct is to silence Maverick's voice on a debate of great social significance and public concern. Speech-chilling threats and prior restraints on expressive conduct are the serious and intolerable infringements on First Amendment rights. Every day Maverick is prevented from speaking, he is harmed irreparably. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Because the District threatens Maverick with immediate and irreversible sanction merely because he communicates a particular message of which the District disapproves, the Defendants should be temporarily enjoined until the Court can hear Plaintiff's Application for Preliminary Injunction.

## CONCLUSION

For all the foregoing reasons, Plaintiff respectfully asks this Court to enter an order temporarily restraining and preliminarily enjoining Defendants from interfering with Maverick Couch's right to wear the "Jesus Is Not A Homophobe" T-shirt to school.

Respectfully submitted,

/s/ Lisa T. Meeks

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**Certificate of Service**

I certify that, on April 3, 2012, a copy of this MEMORANDUM IN SUPPORT OF APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION was sent by ordinary U.S. Mail and electronic email to:

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