UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

O.J., a minor, by and through his father, M.J.,

Plaintiff,

v.

CHAPPAQUA CENTRAL SCHOOL DISTRICT, CHAPPAQUA CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, DR. CHRISTINE ACKERMAN, Superintendent of Chappaqua Central School District, in her individual capacity, and DR. SANDRA SEPE, Principal of Horace Greeley High School, in her individual capacity,

Defendants.

No. 24 Civ. 2830

Hon. Nelson S. Roman

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION OF THE SCHOOL DISTRICT'S HATE SPEECH POLICY

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INTRODUCTION

In public schools in America, the First Amendment protects the right of students to express their views on even the most divisive issues of their time. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 n.4, 513–14 (1969). But when Chappaqua Central School District students speak, they risk punishment under a sprawling and unintelligible Hate Speech Policy that is unconstitutionally overbroad, vague, and viewpoint discriminatory.

The Hate Speech Policy does little—if anything—beyond prohibiting protected speech. It does not concern harassing speech that impacts the ability of other students to learn. The School District has separate policies prohibiting harassment. Nor does the Hate Speech Policy target bullying, intimidation, or threats. There are separate policies for all of that as well. Rather, under the Hate Speech Policy's broad and blurry boundaries, students risk punishment whenever an administrator decides their speech *might* offend someone. And that violates the First Amendment's "bedrock principle" that, even in public schools, "speech may not be suppressed simply because it expresses ideas that are 'offensive or disagreeable.'" *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 205 (2021) (Alito, J., concurring) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

Plaintiff O.J., an LGBTQ teenager who is passionate about civil rights, learned the hard way just how far the Hate Speech Policy reaches. O.J.'s principal suspended him after learning he had freestyled rap lyrics at a friend's house after school, on grounds that using the words "twinks" and "faggot" was prohibited "hate speech." O.J. protested that his off-campus lyrics were not hateful or directed at anyone at

school, that he was trying to reclaim the word "faggot" (a term that students at school had used against him because of his LGBTQ identity), and that "twinks" is not even a slur. None of it made a difference. Administrators told him that context "doesn't matter" when determining what constitutes "hate speech" and that no victim is required. Now in his senior year, O.J. continues to censor his speech about his identity out of fear administrators might again construe his words as "hate speech."

The First Amendment bars sweeping, vague, and viewpoint-driven regulations of student expression like the School District's Hate Speech Policy. Because O.J. is likely to succeed on the merits of each of his independent facial challenges to the Hate Speech Policy, which continues to chill his speech and that of his fellow students, this Court should enjoin the School District from enforcing the policy.

STATEMENT OF FACTS

The School District's Hate Speech Policy Punishes Speech That Is Not Harassing, Bullying, Threatening, or Disruptive.

Chappaqua Central School District's Student Code of Conduct contains provisions prohibiting bullying, cyberbullying, discrimination, intimidation, threats, and harassment, including harassment based on identity characteristics. *See* Ex. A (Policy 5030, Student Code of Conduct), at 6, 7, 10. In several other separate policies, the School District elaborates on its harassment, bullying, and discrimination standards and procedures. *See* Ex. C (Policy 5080, Title IX Sexual Harassment for Students); Ex. D (Policy 5052, Harassment, Bullying and Discrimination Prevention and Intervention Policy). This lawsuit challenges none of those policies.

Rather, it challenges the School District's Hate Speech Policy, a separate provision in the Student Code of Conduct. *See* Ex. A, at 7. The Hate Speech Policy prohibits students from speaking "about" any person or group when the speech (a) "demeans" based on a list of eleven enumerated identity characteristics or "other protected status," or (b) has the "foreseeable effect of exposing" a person or group to "threats, shame, humiliation, persecution or ostracism." *Id.* The Hate Speech Policy provides in full:

> **Hate Speech** – Making a slur or statement or drawing (through any means) a symbol about any individual or identifiable group of individuals which demeans him/her/them because of his/her/their race, color, national origin, ancestry, sex, gender (including expression), gender identity, sexual orientation, disability, age, religion or other protected status, or a perception or belief about race (including traits historically associated with race, such as hair texture and protective hairstyles), color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (including gender identity, gender expression, and transgender status), sexual orientation, disability, age, religion or other protected status and/or which has the foreseeable effect of exposing such person or group to threats, shame, humiliation, persecution or ostracism. Whether spoken, written, in notebooks, on walls, or on a computer or mobile device, etc., incidents of this type are unprotected speech and will not be tolerated. Hate speech may or may not rise to the level of a crime.

Id.; *see also* Ex. B (Attachment to Student Code of Conduct), at 3 (providing disciplinary options for "Hate Speech" ranging up to expulsion even for K-5 students).

The policy does not require that the speech be employed hatefully or that anyone interpret it as such. *See* Ex. A, at 7. According to School District administrators, that sort of context "doesn't matter." Verified Compl. ¶ 119. The Hate Speech Policy also does not require any victim, *see* Ex. A, at 7; *see also* Verified Compl. ¶ 121 (School District administrator confirming no victim is required), nor does it

require any disruption to the work of the school or harm to the educational opportunities of any student. *See* Ex. A, at 7. And the School District employs it not only against on-campus speech but even against speech occurring off campus on a student's own time. Verified Compl. ¶ 119.

The School District Suspended O.J., an LGBTQ Teen, Under the Hate Speech Policy for Referring to His Sexual Orientation in a Rap Song Recorded Off Campus.

On a Friday evening in the fall of O.J.'s sophomore year of high school, he went to his friend J.M.'s house to hang out. Verified Compl. ¶ 34. In J.M.'s room, O.J. and J.M. tried out J.M.'s new microphone and recorded freestyle rap lyrics. *Id.* ¶¶ 36, 38. O.J. improvised lyrics mimicking the style of "meme rap," a subgenre of hip-hop music that employs sophomoric humor and deliberately transgressive content. *Id.* ¶¶ 36–37.

O.J.'s freestyled lyrics referenced *Dahmer*, a popular television series about the notorious serial killer. *Id.* ¶¶ 40–41. In his satirical and deliberately provocative lyrics, O.J. rapped that he and Jeffrey Dahmer would "split a bottle of beer" and "fuck a couple of twinks." *Id.* ¶ 43.[1] O.J.'s lyrics also included the nonsensical lines: "Faggot, fart, balls. Faggot, fart, balls." *Id.* O.J. did not direct the word "faggot" at anyone or otherwise denigrate members of the LGBTQ community. *Id.* ¶¶ 46–47. Instead, he intended to "reclaim" the term: to redeploy the word other students had used against him, as a member of the LGBTQ community, to take the sting out of it. *Id.* His lyrics said nothing about his school or anyone in his school community. *Id.* ¶¶ 43, 45.

[1] The Cambridge Dictionary defines "twink" as "a gay man who is young, slim, and looks like a boy." *Id.* ¶¶ 48–49.

Ten days later, Sandra Sepe, his high school principal, learned about the song from two anonymous reports submitted through the School District's website. *Id.* ¶¶ 6, 65, 68. She decided O.J.'s use of the terms "twinks" and "faggot" in his lyrics constituted "hate speech" and, in consultation with Superintendent Christine Ackerman, suspended him. *Id.* ¶¶ 90, 115–20, 124, 136. In response, O.J. explained that his classmates had denigrated *him* as a "faggot" because of his LGBTQ identity, and he questioned his suspension based on saying the word in the nonsensical line "Faggot, fart, balls." *See, e.g.*, *id.* ¶ 112; *see also id.* ¶ 43. O.J. also explained that "twink" is not a derogatory term. *Id.* ¶ 116. Administrators responded that, when it comes to defining "hate speech," the context and lack of any victim "doesn't matter." *Id.* ¶¶ 119–21.

The song caused no disruption at school. *See id.* ¶¶ 5–6, 147, 183–84. No classroom time was devoted to the song, and apart from the two anonymous alerts, only one student complained about the song to administrators in the weeks after O.J. recorded his lyrics. *Id.* ¶¶ 147, 183–84. Principal Sepe and Superintendent Ackerman suspended O.J. under the School District's Hate Speech Policy anyway, *id.* ¶¶ 87, 90, 128, 136, and he served a three-day suspension, *id.* ¶¶ 96, 128, 164.

The Hate Speech Policy is Chilling O.J.'s Speech, Necessitating a Preliminary Injunction.

O.J. now fears expressing himself as an LGBTQ teen because administrators could again punish him under the Hate Speech Policy. Verified Compl. ¶¶ 161–63, 203. Now in his senior year of high school, O.J. censors his own speech about his sexuality out of fear that administrators may again construe his words out of context

and consider them hateful. *Id.* ¶ 161. He also refrains from expressing himself artistically for fear of administrators further branding him as someone who engages in "hate speech." *Id.* ¶¶ 163, 203.

In April 2024, O.J. filed his verified complaint alleging violations of his First and Fourteenth Amendment rights against the School District and the School Board, as well as Superintendent Ackerman and Principal Sepe in their individual capacities. *Id.* ¶¶ 172–248. O.J. seeks damages, a declaration that the Student Code of Conduct's Hate Speech Policy is unconstitutional, and an injunction expunging the suspension from O.J.'s educational record and prohibiting enforcement of the Hate Speech Policy. *Id.*

In May 2024, O.J. moved for a preliminary injunction requiring the School District to expunge the suspension from his academic record before he applied to colleges later in the year, the relief most urgently needed at that time. Docs. 28, 29. In July 2024, after the parties privately reached a resolution making the preliminary injunction motion addressing his suspension no longer necessary, the parties jointly moved to withdraw it. Doc. 47; *see also* Doc. 48.

The parties have attempted but failed to reach a mutually acceptable means of addressing the Hate Speech Policy's ongoing violation of O.J.'s rights. Indeed, earlier this month, the School Board introduced for public consideration a proposed "First Amendment" policy that does not rescind or even amend the Hate Speech Policy in the Student Code of Conduct, instead affirming that "Hate speech" is "not protected" at Chappaqua Central School District. Ex. E (Proposed Policy 2080, First

Amendment Policy), at 1. Despite O.J.'s lawsuit, the School Board has shown even more resolve to censor anything it considers "hate speech."

O.J. now files this preliminary injunction motion seeking to enjoin enforcement of the Hate Speech Policy while this litigation proceeds.

ARGUMENT

O.J. is entitled to a preliminary injunction against the School District enforcing the Hate Speech Policy because he can demonstrate (1) likelihood of success on the merits of each of his three independent facial challenges to it, (2) irreparable loss of his First Amendment rights absent injunctive relief, and (3) that the public interest favors enjoining the enforcement of an unconstitutional policy. *See Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020) (ordering preliminary injunction in a First Amendment case). In First Amendment cases, "likelihood of success on the merits is the dominant, if not the dispositive, factor." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488–49 (2d Cir. 2013) (reversing district court's denial of preliminary injunction in First Amendment case). And O.J. is likely to prevail on the merits because the Hate Speech Policy violates the First Amendment on its face for three independent reasons.

First, the policy is overbroad, prohibiting a substantial amount of speech that is not disruptive, harassing, or otherwise falling within any exception to the First Amendment. Second, the policy is unconstitutionally vague because, given its expansive scope and ambiguous terms, it leaves students to merely guess what words, phrases, or arguments administrators will later decide might "demean" or "shame" virtually anyone based on almost any identity characteristic. Third, the policy

unconstitutionally discriminates based on viewpoint because it applies asymmetrically to opposing viewpoints on the same issue, permitting speech on one side of the issue while punishing speech on the other.

Because O.J. is likely to succeed on the merits of his facial challenge, and the remaining preliminary-injunction factors favor O.J., this Court should grant O.J.'s motion and preliminarily prohibit enforcement of the Hate Speech Policy.

I. O.J. Is Likely to Prevail on the Merits Because the Hate Speech Policy Violates the First Amendment as Overbroad, Vague, and Viewpoint Discriminatory.

A. The Hate Speech Policy is unconstitutionally overbroad.

This Court should enjoin the Hate Speech Policy because it suppresses a substantial amount of protected speech compared to its minimal constitutional applications. Courts are more apt to strike down overbroad policies implicating First Amendment rights because when a policy is "written so broadly that [it] may inhibit the constitutionally protected speech of third parties," its "very existence will inhibit free expression." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798–99 (1984). In a First Amendment case, a law is overbroad on its face when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted); *accord Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024), as is the case with the Hate Speech Policy here.

1. The Hate Speech Policy, lacking requirements that the speech harasses a victim or disrupts school, chills a wide swathe of protected expression.

Under the first step in overbreadth analysis—determining what speech the challenged regulation covers, *Stevens*, 559 U.S. at 474—the Hate Speech Policy's reach is expansive. It enables school administrators to censor a host of protected speech, from expression of religious views to artistic expression to political debate, based on an administrator's subjective feelings about what is offensive.

The policy prohibits any speech that administrators conclude *might* offend someone or some group—either because the speech "demeans" someone or some group, or because the speech has the "foreseeable effect" of "exposing" them to feelings like "shame" or "humiliation"—based not only on a lengthy list of identity characteristics but also the catch-all "other protected status." Ex. A, at 7. The policy lacks any requirement that the speech target any actual victim, or even that any victim hear or see the speech. *See id.* According to the administrators who suspended O.J. under the policy, no victim is required, and context "doesn't matter." Verified Compl. ¶¶ 119–21. For several reasons, this policy is far broader than the First Amendment permits.

For one, the Hate Speech Policy lacks the limiting features of policies that, consistent with the First Amendment, public schools employ to regulate identity-based harassment. The Supreme Court has interpreted the student-on-student harassment standard, which federal law applies to K-12 schools, to only cover speech that is "so severe, pervasive, and objectively offensive that it denies its victims equal access to education." *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526

U.S. 629, 652 (1999). In narrowly construing what constitutes harassment, the majority opinion in *Davis* was mindful of the dissent's concern that overly broad harassment policies may run afoul of the First Amendment. *See id.* at 651–52; *see also id.* at 667 (Kennedy, J., dissenting). Yet the Hate Speech Policy lacks any requirement of an actual victim, objectively offensive conduct, or a detrimental effect on a victim's education. That means the Hate Speech Policy extends to all manner of non-harassing, constitutionally protected speech that simply offends someone, which makes it overly broad. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216–17 (3d Cir. 2001) (Alito, J.) (striking down as overly broad a university's harassment policy in part because, without any requirement of severity or pervasiveness, "it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone").

Second, the Hate Speech Policy fails to require that the speech "substantially disrupt" classwork or cause school administrators to reasonably forecast a substantial disruption, the standard that the Supreme Court generally requires schools to meet to regulate student speech. *Tinker*, 393 U.S. at 513–14.[2] The policy's text does not

[2] *Tinker* also allows for regulation of speech that is an "invasion of the rights of others." *Tinker*, 393 U.S. at 513. The invasion-of-rights standard might encompass "severe bullying or harassment targeting particular individuals" or "threats aimed at teachers or other students." *Mahanoy*, 594 U.S. at 188. But that standard has no application here, because the Hate Speech Policy is not confined to severe bullying, harassment, or threats, categories of conduct and speech that are specifically addressed in other School District policies. Beyond the *Tinker* standards, the Supreme Court has permitted schools to regulate only three specific categories of student speech: speech that promotes illicit drug use, bears the imprimatur of the school, or is sexually explicit. *Mahanoy*, 594 U.S. at 187–88 (citing, respectively, *Morse v. Frederick*, 551 U.S. 393, 409 (2007), *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988), and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)). The Hate Speech Policy is not confined to any of these categories. The analysis here thus focuses on *Tinker*'s "substantial disruption" standard, which

limit its application to substantially disruptive speech, and the School District applies it regardless of any context suggesting substantial disruption. In O.J.'s case, for example—even though he spoke at a friend's house after school, his speech was not hateful or directed at anyone at school, and the school identified no victim—administrators told O.J. that the context of the speech "doesn't matter." Verified Compl. ¶¶ 119–21. By failing to require substantial disruption or a context that makes substantial disruption foreseeable, the Hate Speech Policy sweeps in far too much protected expression. *See Saxe*, 240 F.3d at 217 (striking down harassment policy that reached speech posing no "realistic threat of substantial disruption").

Third, as detailed below in the discussion of vagueness, *see infra* Section I.B, the Hate Speech Policy suffers from undefined terms and a lack of narrowing guardrails to prevent administrators from arbitrarily applying it. These omissions exacerbate the breadth of the policy, making its boundaries rest almost entirely on the subjective views of school administrators.

Without these limitations, the School District can punish students for all manner of nondisruptive, non-harassing speech. Consider the following:

- A Jewish student in art class paints a scene from a concentration camp, meant to highlight the horrors of the Holocaust. The painting depicts a Nazi soldier wearing a uniform bearing a swastika. That student has run afoul of the text of the Hate Speech Policy by drawing a "symbol" that "demeans" Jews.

applies to all other K-12 student speech. *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 325–26 (2d Cir. 2006).

- At lunch, an atheist and a Christian respectfully debate whether God exists (which, says the atheist, is illogical) and whether nonbelievers will be denied rewards in the afterlife (they will, says the Christian). Either viewpoint might "demean" or subject to "ostracism" based on religious belief.
- In a discussion of slavery in history class, a student makes a point about the role of white Americans in perpetuating that system. Such an argument might have the "foreseeable effect" of inducing some white students to feel "shame" based on race.
- A student of Vietnamese descent writes a poem featuring an anti-Asian slur that had been used against her, attempting to reclaim the typically derogatory term. Context doesn't matter under the Hate Speech Policy, so administrators might conclude the student has used a term that "demeans" based on national origin.

These examples—and there are countless more—demonstrate how broadly the Hate Speech Policy reaches in prohibiting protected speech simply because it might be controversial. The First Amendment protects the right of students to weigh in on the "major controvers[ies]" of the day, including issues that arouse intense passion on both sides. *Tinker*, 393 U.S. at 510 n.4 (quoting the district court). Consider the facts of *Tinker*. In the 1960s, few issues were as divisive as the Vietnam War, which prompted fiery debate, the burning of draft cards, and other protests across the country. *Id.* (citing the district court). Even in that context, the Supreme Court held

that the First Amendment protected junior high school student Mary Beth Tinker's right to peacefully express her opposition to the Vietnam War at school. *Id.* at 514.

Now consider a student at Chappaqua Central School District with something to say about the attacks of October 7 and the ensuing war between Israel and Hamas, a topic that has prompted considerable public debate and controversy over the past year. Under the Hate Speech Policy, the student would reasonably fear weighing in on one side or the other—or saying much of anything about it—because administrators might construe her comments as having the "foreseeable effect" of exposing a group to "ostracism" or "shame" based on ancestry, ethnic group, national origin, race, religion, or "other protected status." Ex. A, at 7. And even holding her tongue at school may not be enough to evade punishment if she expresses her views outside of school. Notwithstanding the Supreme Court's admonition that school administrators are "rarely" justified in assuming the parental authority to punish students' off-campus speech, *Mahanoy*, 594 U.S. at 189, the School District applies the Hate Speech Policy even when a student speaks off campus on her own time. Verified Compl. ¶ 119. The Hate Speech Policy chills the rights of this generation of students learning to engage with the issues of their time.

2. The Hate Speech Policy's unconstitutional applications are substantial relative to any constitutional applications.

Having demonstrated that the Hate Speech Policy reaches a wide range of speech the First Amendment squarely protects, the next step in the overbreadth analysis is to ask whether the policy's constitutional applications "far outnumber" its unconstitutional applications. *Stevens*, 559 U.S. at 481; *see also Coll. Republicans at*

S.F. State Univ. v. Reed, 523 F. Supp. 2d 1005, 1013–14 (N.D. Cal. 2007) (conceptualizing the inquiry as whether the sphere of all applications, constitutional or unconstitutional, is substantially larger than the sphere of only constitutional applications). The Hate Speech Policy lacks any constitutionally permissible purpose, let alone enough constitutional applications to save it.

To start, the Hate Speech Policy does not target the harassing or otherwise disruptive conduct schools may prohibit consistent with the First Amendment. The School District has separate policies prohibiting harassment, bullying, cyberbullying, intimidation, and threats, none of which this lawsuit challenges. *See, e.g.*, Ex. A, at 10 (prohibiting threats that cause "a reasonable expectation of fear of serious physical injury"); Ex. C, at 2 (prohibiting sex-based harassment that is so "severe, pervasive, and objectively offensive" that it interferes with the victim's educational opportunities); Ex. D, at 2 (prohibiting other bullying and harassing conduct that has "the effect of unreasonably and substantially interfering with a student's educational performance"). Viewed against the backdrop of these other policies, the Hate Speech Policy operates solely to prohibit speech that simply might offend someone. That is not a permissible reason to censor speech at school. A "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or an "undifferentiated fear or apprehension of disturbance," are not enough to overcome the First Amendment rights of students. *Tinker*, 393 U.S. at 508–09.

Nor is "hate speech" an exception to the First Amendment. The categories of speech unprotected by the First Amendment—such as obscenity, defamation, true

threats, fraud, and incitement—are "well-defined" and "narrowly limited." *Stevens*, 559 U.S. at 468–69 (citations omitted). "Hate speech," however defined, is not one of those exceptions. *Volokh v. James*, 656 F.Supp.3d 431, 445 (S.D.N.Y. 2023) (enjoining enforcement of law regulating "hate speech" on overbreadth grounds), *appeal argued*, No. 23-356 (2d Cir. Feb. 16, 2024). To the contrary, "the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate." *Matal v. Tam*, 582 U.S. 218, 246 (2017) (citation and internal quotation marks omitted) (holding First Amendment protects Asian-American rock band The Slants' right to trademark their name, an ethnic slur the band sought to reclaim). So even setting aside that the Hate Speech Policy prohibits all manner of non-hateful speech, the School District cannot find constitutional applications for its policy in a non-existent "hate speech" exception to the First Amendment.

Without enough constitutional applications to "far outnumber" the applications that violate the First Amendment, *Stevens*, 559 U.S. at 481, the Hate Speech Policy is unconstitutionally overbroad.

B. The Hate Speech Policy is unconstitutionally vague.

The Hate Speech Policy is also unconstitutionally vague because between its ambiguous terms, sprawling scope, and lack of narrowing guardrails preventing arbitrary enforcement, students can only guess at what will land them in the principal's office. A vague regulation may violate due process for two independent reasons, both of which apply here: when the regulation either "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory

enforcement." *Cunney v. Bd. of Trs. of Grand View*, 660 F.3d 612, 621 (2d Cir. 2011) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

When a public "school policy reaches speech protected by the First Amendment, the vagueness doctrine demands a greater degree of specificity than in other contexts," *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 668 (8th Cir. 2023) (cleaned up); *see also Smith v. Goguen*, 415 U.S. 566, 573 (1974), because vague laws affecting speech chill expression by leading citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked," *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (cleaned up). It is true that, in public schools, "disciplinary rules need not be as detailed as a criminal code." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986). But when policies affecting speech lack sufficient clarity to give students reasonable notice or prevent administrators from arbitrarily enforcing them, courts hold them void for vagueness. *See, e.g.*, *Parents Defending Educ.*, 83 F.4th at 668–69 (holding vagueness challenge likely to succeed where school policy mandated that students "respect" other students' gender identity but failed to define "respect"); *Stephenson v. Davenport Cmty. Sch. Dist.,* 110 F.3d 1303, 1309 (8th Cir. 1997) (holding school regulation banning "gang related" attire was unconstitutionally vague in failing to define "gang").

Here, the School District's Hate Speech Policy is unconstitutionally vague for two reasons. First, it does not give students a reasonable opportunity to understand what it requires. *See Cunney*, 660 F.3d at 621. Given the policy's undefined terms and the breadth of its list of identity characteristics, students cannot reasonably discern

what might "demean" based on any one of numerous identity features (or the undefined catch-all "other protected status") or have the "foreseeable effect" of exposing a group to "threats, shame, humiliation, persecution or ostracism." Ex. A, at 7; *see Volokh*, 656 F. Supp. 3d at 445–46 (concluding that lack of definitions for terms like "vilify" and "humiliate" exacerbated chilling effect of "Hateful Conduct Law"); *see also Reno v. ACLU*, 521 U.S. 844, 870–74 (1997) (holding "vague contours of the coverage of the statute," enacted to protect minors from "indecent" and "patently offensive" communications, violated First Amendment); *Flores v. Bennett*, No. 22-16762, 2023 WL 4946605, at *2 (9th Cir. Aug. 3, 2023) (affirming preliminary injunction of university policy prohibiting "inappropriate" or "offensive" speech on vagueness grounds). To the extent this policy prohibits any speech that might offend someone, the "Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe*, 240 F.3d at 215 (citing, e.g., *Tinker*, 393 U.S. at 509). If the School District intends to prohibit a narrower band of speech, the policy fails to make those boundaries clear.

Second, the Hate Speech Policy is unconstitutionally vague because its breadth and lack of defined terms authorize School District administrators to arbitrarily and discriminatorily enforce it. *See Cunney*, 660 F.3d at 621. This danger is especially acute in the public-school setting because scandal-adverse administrators will err on the side of suppressing controversial speech. *Cf. Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1051 (2d Cir. 1979) (documenting the incentives for

even the well-meaning public-school administrator to err on the side of suppressing too much student speech, because the administrator's "association with the school itself and his understandable desire to preserve institutional decorum give him a vested interest in suppressing controversy").

In O.J.'s case, for example, School District administrators insisted that using the word "twink" constituted "hate speech." But "twink" is not a slur—it is a term to describe slim and boyish-looking LGBTQ men—and O.J. did not use it in a context to suggest otherwise. Verified Compl. ¶¶ 48–49. Not only could O.J. not predict from the policy text that it prohibited him from saying "twink" in any context, but to this day the School District has failed to articulate any rationale for its conclusion that "twink" is a forbidden word under the policy. Are analogous terms that straight people commonly use to describe body type (e.g., "hunk," "buff," "slim," or "curvy") also prohibited? What other terms reside on this secret list of forbidden vocabulary? Without meaningful guidance in the policy's text, school administrators "are left to determine on an ad hoc and subjective basis what speech is . . . subject to discipline, and what speech is acceptable." *Parents Defending Educ.*, 83 F.4th at 669. In other words, the policy has no guardrails preventing administrators from simply punishing student speech they find distasteful.

C. The Hate Speech Policy unconstitutionally discriminates based on viewpoint.

The Hate Speech Policy is unconstitutional for the additional reason that its asymmetric application, permitting the expression of views on one side of an issue but not on the other, constitutes viewpoint discrimination. Government regulation of

speech based on its content—as opposed to a content-neutral time, place, or manner restriction—is "presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). When government regulation targets not only the content of speech but also discriminates against "particular views taken by speakers on a subject," the "violation of the First Amendment is all the more blatant." *Id.*

The Hate Speech Policy is viewpoint discriminatory because it permits favorable speech on certain issues while prohibiting critical speech on the same issues. For example, a student could argue that a particular religious tenet is valid or that a particular religion played a positive role in history. But a student expressing the opposite points of view might "demean" adherents of the religion or subject them to "shame" or "ostracism." Ex. A, at 7. This is the exact asymmetry that the Supreme Court held constituted viewpoint discrimination in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). There, the Court struck down a statute prohibiting cross burning when one should know it "arouses anger, alarm, or resentment" in others "on the basis of race, color, creed, religion or gender." *Id.* at 380. The Court observed that, under this statute, one could hold up a sign criticizing "anti-Catholic bigots" but not a sign criticizing "papists." *Id.* at 391–92. This asymmetric treatment of different viewpoints on religion—which allowed "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"—was viewpoint discrimination, making the statute unconstitutional. *Id.* at 392, 396; *see also Iancu v. Brunetti*, 588 U.S. 388, 395 (2019) (in striking down statute prohibiting offensive trademarks,

noting asymmetrical application to unpopular versus popular viewpoints on topics like religion and terrorism).

Policies that aim to prevent the expression of offensive viewpoints, as the Hate Speech Policy does, are also viewpoint discriminatory because "[g]iving offense is a viewpoint." *Matal*, 582 U.S. at 220. And a "bedrock principle" underlying the First Amendment is that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 413–414, 413 n.9; *accord Mahanoy*, 594 U.S. at 205–06 (Alito, J., concurring) (applying principle to student speech). That remains true even if those offensive words are believed (correctly or not) to denigrate a person or group. *See Matal*, 582 U.S. at 228, 233, 243, 247 (striking down a prohibition on trademarks that "disparage the members of a racial or ethnic group" as facially invalid viewpoint discrimination). This principle applies to the Hate Speech Policy, too, because the "Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe*, 240 F.3d at 215 (citing, e.g., *Tinker*, 393 U.S. at 509).

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As the Hate Speech Policy violates the Constitution on three separate bases—overbreadth, vagueness, and viewpoint discrimination—O.J. is likely to succeed on the merits, which is the dominant, if not dispositive, factor for granting a preliminary injunction. *N.Y. Progress*, 733 F.3d at 488.

II. O.J.'s Loss of First Amendment Rights Constitutes Ongoing Irreparable Harm.

Having shown likely success on his First Amendment claims, O.J. will suffer irreparable harm absent injunctive relief because "deprivation of First Amendment rights is an irreparable harm." *Agudath*, 983 F.3d at 637 (holding, in a First Amendment case, that no further showing of irreparable harm is required). A "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Bronx Household of Faith v. Bd. of Educ. of City of New York*, 331 F.3d 342, 350 (2d Cir. 2003) (holding presumption of irreparable harm applies to cases where a regulation limits speech). Notably, despite O.J.'s lawsuit, the School Board earlier this month introduced for consideration proposed Policy 2080, a "First Amendment" policy that does not rescind or even amend the Hate Speech Policy challenged here, but rather would affirm "Hate speech" is "not protected" in the Chappaqua Central School District. Ex. E, at 1. Moreover, O.J. is actively self-censoring his expression, including about his LGBTQ identity, to avoid the potential for further punishment under the Hate Speech Policy. Verified Compl. ¶¶ 160–61, 166–67, 203. O.J.'s irreparable harm is thus both presumed and actual because his constitutional rights have been and continue to be violated. *Agudath*, 983 F.3d at 637.

III. The Balance of Harms Favors a Preliminary Injunction.

The balance of harms also favors O.J. In assessing this factor, the Court assesses the interests of the public and the relative harms to each party. *Hartford Courant Co. v. Carroll*, 986 F.3d 211, 224 (2d Cir. 2021). To start, "securing First

Amendment rights is in the public interest." *N.Y. Progress*, 733 F.3d at 488. And as discussed, the School District's unconstitutional policy continues to inhibit O.J. in expressing himself (and likely his fellow students). The School District, on the other hand, "does not have an interest in the enforcement of an unconstitutional law." *Id.* (*quoting ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003)). Because the Hate Speech Policy violates the First Amendment, the balance of harms tips decidedly in O.J.'s favor.

IV. The Court Should Waive the Bond Requirement.

The Court should not require that O.J. post a bond. First, Federal Rule of Procedure 65(c) only requires that a preliminary-injunction movant post security in an amount "the court considers proper" to cover damages of a party found to be wrongfully enjoined. Fed. R. Civ. P. 65(c). Without proof of likely harm to the enjoined party, the rule requires no bond. *Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir. 1974). As discussed, rescinding the Hate Speech Policy does not interfere with the School District's ability to protect students from bullying, threats, or harassment, as separate policies prohibit those behaviors. Second, bond requirements should be waived when the litigation is "in the public interest." *Pharm. Soc'y of State of N.Y., Inc. v. N.Y. State Dep't of Soc. Servs.*, 50 F.3d 1168, 1174 (2d Cir. 1995). Because advancing First Amendment rights is in the public interest, *N.Y. Progress*, 733 F.3d at 488, this Court should not require O.J. to post a bond.

CONCLUSION

The First Amendment protects the right of O.J. and other students at Chappaqua Central School District to speak on the issues of the day without risking

arbitrary punishment under a sprawling speech code. O.J. respectfully requests that this Court grant his motion for a preliminary injunction prohibiting the School District from enforcing the Hate Speech Policy pending a final judgment.

Respectfully submitted,

Dated: October 29, 2024

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