IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

M.C. through her mother and next friend, ERIN CHUDLEY; S.W. through her mother and next friend HELEN WHISLER; and G.A. through her mother and next friend DEBORAH ALTENHOFEN Plaintiffs, v. SHAWNEE MISSION UNIFIED SCHOOL DISTRICT No. 512 (a/k/a the "SHAWNEE MISSION SCHOOL DISTRICT") and KENNETH SOUTHWICK, in his individual and official capacity as Interim Superintendent of Shawnee Mission School District. Defendants.	)	Case No. 2:18-cv-02283

PLAINTIFFS' RESPONSE IN OPPOSITION
TO DEFENDANTS' JOINT MOTION TO DISMISS

This case concerns the fundamental right of high-school and middle-school students to exercise their First Amendment rights to free speech and press on campus, in the face of censorship by Defendants Shawnee Mission School District ("School District," "SMDS" or "District") and its then-superintendent, Kenneth Southwick. On April 20, 2018, the anniversary of the Columbine Massacre, Plaintiffs participated in a nationwide walkout that the students intended primarily as a means of advocating for gun-violence reforms. Defendants, however, tolerated students assembling on campus only on the condition that they not discuss guns, gun reform, or anything related to the Second Amendment – and that they instead use only the

School District's own generic, scripted euphemisms such as "school safety." These speech restrictions were not motivated by any reasonable apprehension that the already-assembled students would cause a disruption by uttering words such as "gun" or "school shootings," but rather by the District's own admitted desire to avoid controversy. When students, including Plaintiffs, refused to comply with Defendants' suppressive conditions, they were threatened, reprimanded, aggressively prohibited from documenting the demonstration, and in the case of M.C., ejected from campus. These totalitarian-style censorship tactics were implemented pursuant to an official policy and violated Plaintiffs' clearly established First Amendment rights. Any reasonable Superintendent would have known that the contents of students' own political speech on campus is protected by the First Amendment and cannot be censored merely to avoid controversy or discomfort.

In their Joint Motion to Dismiss (Doc. 8) and Memorandum in Support (Doc. 9), Defendants now attempt a head-spinning U-turn in their position regarding the student protests, by claiming that – despite the District's repeated disclaimers at the time of the protests that the District did not sanction or endorse the protests or the contents of students' expected remarks – the protests in fact *constituted the District's own speech* and should therefore be analyzed under the standard of *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260 (1988), which gives school districts more latitude in censoring speech such as yearbooks or newspapers that can be seen as school-sponsored. For the reasons set out below, Defendants' motion should be denied on these grounds because Plaintiffs more than plausibly allege that the remarks were students' own sentiments and could not reasonably be construed as speech bearing the imprimatur of the school district. Even if the *Hazelwood* standard were to apply, moreover, Plaintiffs would still state a

claim for relief because, as alleged in the Complaint, there is no legitimate pedagogical reason for censoring the contents of student speeches.

Defendants' motion to dismiss ignores the substantial body of law – including cases from the Tenth Circuit – establishing *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969) as the applicable analytical framework for First Amendment claims involving student speech. Defendants also ask the court to construe the allegations in the complaint in the light most favorable to them and baselessly infer facts about Defendants' claimed public perception of the walkouts, contrary to the applicable standard on a Motion to Dismiss. Finally, with regard to Count III of the Complaint, Defendants misconstrue the purpose and meaning of the Kansas Student Publications Act ("Act") by incorrectly suggesting that the purpose of the Act was to immunize school districts from liability, not protect student journalists' free-press and free-speech rights, and that the Act offers no potential redress for school district's violations of the Act. The Court should deny Defendants' motion as to Plaintiffs' claims for First Amendment Violation (Count I), Municipal Liability under 42 U.S.C. § 1983 (Count II), and violation of the Kansas Student Publications Act (Count III).

STATEMENT OF FACTS

Plaintiffs' complaint includes the following allegations: Teenagers across the country created a national movement to protest gun violence in schools after seventeen students were killed during a school shooting in Parkland, Florida. Compl. (Doc. 1) at ¶ 26. The national movement announced a day of action on April 20, 2018, the anniversary of the Columbine High School Massacre. *Id.* ¶ 27. Students across the country, including Plaintiffs, organized and planned to participate in a national walkout to demand reforms that would reduce the prevalence of gun deaths and school shootings. *Id.* ¶¶ 26-28. Student organizers at SMSD schools informed

building administrators of their walkout plans well in advance of April 20, 2018. *Id.* ¶ 29. SMSD Students timed the protest in coordination with the national movement's protest plans. *Id.* ¶ 27. Once Defendants learned about the walkouts, they communicated to parents and students that the District played no role in sponsoring the event. *Id.* ¶¶ 31, 36.

In or around the week before the walkouts, unbeknownst to students, the District apparently promulgated an official policy directing building administrators to ban students from discussing guns, gun control, and school shootings – the very subjects that student organizers intended to discuss. *Id.* ¶¶ 33-37. Despite directing administrators to intervene in the walkouts, Defendants failed to provide administrators with training or guidance on how to respond without infringing on students' rights notwithstanding the obvious risks of constitutional violations. *Id.* ¶¶ 7, 30. Moreover, Defendants failed to adopt a policy protecting students' First Amendment rights. *Id.* ¶ 7. Building administrators at Shawnee Mission North High School told students shortly before the protests that they could not discuss gun rights and reform. *Id.* ¶ 46. Hocker Grove Middle School administrators did not communicate the speech restrictions to students in advance of the walkout. *See id.* ¶¶ 32, 39.

On April 20, 2018, at 10:00 a.m., students at Shawnee Mission North exited the school and assembled at a designated location on school grounds. *Id.* ¶ 46. Students who spoke during the scheduled event initially complied with the School District's censorship directives. *Id.* ¶ 46. At the end of the event, a group of students remained outside and held a separate protest to discuss the subjects the school would not allow them to speak about during the just-concluded event. *Id.* ¶ 47. During this time, then-Assistant Principal Brock Wenciker seized two cameras, including Plaintiff S.W.'s school issued camera (which she was attempting to use to document the protests pursuant to her role on the school's journalism staff), and singled out journalism

students, directing them to leave the protests. *Id*. ¶¶ 48-50. At Hocker Grove, then-Assistant Principal Alisha Gripp employed a variety of tactics to censor students from discussing gun violence including confiscating a student's script, threatening students with discipline if they did not end speeches or edit out references to gun violence, and pushing students inside the building when they continued to discuss guns and gun reform. *Id.* ¶¶ 38-43.

After the walkouts, Defendants issued generic apologies but refused to acknowledge their actions violated students' rights. *Id*. ¶ 54. Instead, Defendants used what they publicly touted as an "investigation" as an opportunity to interrogate students and retroactively justify their actions. *Id*. ¶¶ 57, 62-66.

QUESTION PRESENTED

The issue before the Court is whether Plaintiffs have plausibly stated claims for relief under their Count I (Unlawful Violation of First Amendment Rights/Prior Restraint and Retaliation); Count II (Municipal Liability under 42 U.S.C. § 1983) and Count III (Violation of Kansas Student Publications Act). To survive a motion to dismiss based on Fed. R. Civ. P. 12(b)(6), a complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To state a plausible claim for relief, plaintiffs are not required to make "a showing of probability that a defendant has acted unlawfully." *Yeasin v. Durham*, 224 F. Supp. 3d 1194, 1197 (D. Kan. 2016). Instead, a plaintiff must merely plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Contrary to Defendants' contentions, Plaintiffs have stated First Amendment and state law claims based on Defendants' censorship actions and pled sufficient facts to establish municipal liability under Section 1983. Taking all well-pleaded facts as true, and drawing all inferences in

favor of the Plaintiffs, as is required at this stage, this Court should deny Defendants' motion and permit Plaintiffs to proceed with their claims. Should the Court conclude otherwise as to any of the Counts, Plaintiffs respectfully request the opportunity to file an Amended Complaint.

ARGUMENT AND AUTHORITIES

I. PLAINTIFFS CLEARLY STATE PLAUSIBLE CLAIMS UNDER THE FIRST AMENDMENT.

a. Defendants Violated Plaintiffs' First Amendment Speech Rights by Banning Students From Discussing Guns and Gun Control in Order to Avoid Controversy.

Plaintiffs have more than plausibly alleged, in the detailed allegations of their Complaint, that Defendants' multi-site policy prohibiting students from discussing school shootings, their causes, and proposed reforms, violates the established First Amendment principle that "school officials cannot suppress 'expressions of feelings with which they do not wish to contend.'" *Tinker v. Des Moines Independent Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969) (citation omitted). In *Tinker*, the U.S. Supreme Court held that public schools may constitutionally prohibit student speech only if it would cause "substantial disruption of or material interference with school activities." *Id.* at 514. The Court pointedly noted that the "substantial disruption" standard applied to student speech outside of the confines of classroom discussions, and courts across the country have consistently adopted the standard to analyze restrictions for on-campus protests. *Id.*; *see Hatcher v. Desoto County Sch. Dist. Bd. of Ed.*, 939 F. Supp. 2d 1232, 1239 (M.D. Fla. 2013) (striking down District ban on school campus protests under *Tinker*), *aff'd,* 570 Fed. Appx. 874, 877 (11th Cir. 2014); *Shamloo v. Mississippi State Bd. of Trustees*, 620 F.2d 516, 522 (5th Cir. 1980) (analyzing whether Iranian students' protests "involved material and substantial interference with the requirement of appropriate discipline in the operation of an educational institution"); *University of Utah Students against Apartheid v. Peterson*, 649 F.

Supp. 1200, 1208 (D. Utah 1986) (holding students had right to demonstrate on campus absent disruption); *Hyshaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 946 (D. Kan. 1987) (applying *Tinker* standard in holding that student-athlete boycott of practice to protest mistreatment did not create a material disruption).

The U.S. Supreme Court has carved out only three exceptions to the *Tinker* rule. Without requiring a showing of a likelihood of "substantial disruption," schools may nonetheless regulate (1) in-school student speech that is offensively lewd and indecent, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); (2) student speech that is school-sponsored or that bears the imprimatur of the school, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); and (3) student speech reasonably perceived to advocate illegal drug use, *Morse v. Frederick*, 551 U.S. 393 (2007). Defendants' censorship falls into none of these categories, but Defendants nonetheless seek to avoid the applicability of the *Tinker* standard by now claiming their conduct is governed by the *Hazelwood* exception – *i.e.,* that the protests actually constituted school-sponsored speech. Defendants essentially argue that because Plaintiffs' speech occurred on campus, it reasonably bore the imprimatur of the school. This position grossly misapprehends both *Tinker* and *Hazelwood*, lacks factual support, and would convert the expressive activities of students at virtually all group and club events into school-sponsored speech.

i. The Complaint plausibly alleges that Plaintiffs Engaged in Private Student Speech When They Participated in the Walkout. Accordingly, *Tinker* supplies the Applicable Standard.

In *Hazelwood*, the Court created a narrow exception to *Tinker* for student speech that "the school affirmatively promotes" or "that students, parents, or members of the public might *reasonably* perceive to bear the imprimatur of the school." 484 U.S. at 271 (emphasis added). In particular, the Court held that school officials could exercise editorial control over the style and

content of articles in a newspaper that was funded and printed by the school district, as long as their restrictions related to legitimate pedagogical concerns. Reinforcing its holding in *Tinker* that students maintain their right to expression "on campus during authorized hours," 393 U.S. at 512, the Court distinguished student expression that happens to occur on campus, such as the protests at issue in this matter, from activities that "may fairly be characterized as part of the school curriculum." *Hazelwood*, 484 U.S. at 271.

Contrary to Defendants' arguments in the Memorandum in Support of the Motion to Dismiss, speech does not reasonably bear the imprimatur of the school merely because it takes place on campus and officials allow students to participate in the expressive activity. *See, e.g., Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219 (10th Cir. 2009) ("[C]ertain expressive activities may be closely tied to a school, yet not school-sponsored speech bearing the school's imprimatur"), *citing Fleming v. Jefferson Co. Sch. Dist. R-1*, 298 F.3d 918, 920-21, 924 (10th Cir. 2002); *East High Gay/Straight Alliance v. BOE*, 81 F. Supp. 2d 1166, 1194-95 (D. Utah 1999) ("[A]llowing a student group to meet on school premises during non-instructional time does not equate with publishing a school newspaper or producing a school play as part of the school's language arts curriculum, and does not affirmatively promote particular student speech."). In *Fleming*, the Tenth Circuit held that student-decorated tiles incorporated into a memorial art installation bore the imprimatur of the school because the tiles would be permanently integrated into the school environment and the project was conceived, funded, and organized by the District. 298 F.3d at 924. In so holding, the Tenth Circuit took care to distinguish the tile project from other on-campus activities "where the school did not call the meetings, invite the participants, set the agenda, approve the funding, or supervise the meetings." 298 F.3d at 930.

More generally, courts have declined to apply *Hazelwood* to speech that occurs during activities initiated by student groups or clubs. *See, e.g., Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 117-118 (D. Mass. 2003) (student club distribution of candy canes with religious messages did not bear the imprimatur of the school even though the club had a faculty sponsor, used school resources and facilities, and was sanctioned as an official student club by the principal); *L.W. v. Knox County Bd. of Educ.*, No. 3:05-CV-274, 2006 U.S. Dist. LEXIS 76354 at *14 (E.D. Tenn. Sept. 6, 2006) (student-organized, student-led Bible readings were not school-sponsored even though students used school property, held meetings during school hours, and were monitored by teachers); *East High Gay/Straight Alliance*, 81 F. Supp. 2d at 1195 ("Students, parents, and members of the public likely will not perceive student club and group activities as being a *school* function, or as 'bearing the imprimatur of the school.'") (emphasis in original). Similarly, the Tenth Circuit elected to apply the *Tinker* standard to a student group's anti-abortion evangelizing even though the school regularly permitted the group to assemble and engage in organized distributions of religious materials on school property. *See Taylor v. Roswell Independent Sch. Dist.*, 713 F.3d 25, 36 (10th Cir. 2013).

The April 20th walkouts at issue in this matter possess none of the indicia of school sponsorship identified by the Tenth Circuit, and are analogous to the student-organized activities deemed private speech in *Taylor* and the cases involving student groups in other circuits. Unlike in *Fleming*, students, not faculty or District staff, organized the walkouts. Compl. (Doc. 1) ¶¶ 2, 26-27, 29, 31. Plaintiffs expect the evidence will show that students, not faculty, selected the speakers, purchased materials for their signs, promoted the event, set the agenda for the program, and recruited participants. Defendant argues that the walkout speeches were school-sponsored because "the demonstrations occurred during school (curricular) hours," "the demonstrations

occurred on school property," "students were allowed to attend," and "the demonstrations were supervised by District personnel." *See* Memo. in Support of Defs.' Mot. to Dismiss (Doc. 9) at 7. Each of the facts Defendants cited also could be said for student speech from the school cases involving extracurricular activities that the Tenth Circuit distinguished in *Fleming*. Virtually every student club or group has events during school hours, uses school property, has permission from the school for its members to attend, and is monitored by a faculty member. However, speech and discussion at each of these meetings cannot reasonably be perceived as bearing the imprimatur of the school. Defendants would certainly not argue that Shawnee Mission North's Fellowship of Christian Athletes club is school-sponsored, nor would they censor Shawnee Mission East's Gay Student Alliance from organizing a counter-demonstration to the Westboro Baptist Church picket in order to avoid the impression that they are taking a position on LGBTQI rights.[1]

Contrary to the Defendants' assertions, building administrators did not determine the beginning and end times for the events. Shawnee Mission students coordinated the walkout with students from nearly 3,000 other schools across the country. Compl. (Doc. 1) ¶¶ 26-27. While student organizers advised building administrators about the proposed duration of their rallies, District employees did not originate or participate in planning the students' originally intended program. *Id.* ¶¶ 29, 31. It seems unlikely and implausible that administrators would have "determined" that the walkout programs should last for seventeen minutes, one minute for each victim of the Parkland shooting. *Id.* ¶ 38. Moreover, Defendants' argument that administrator Gripp's aggressive dispersion tactics are evidence of school sponsorship is puzzling. Defs.' Mot.

[1] Annabelle Cook, *Westboro Baptist Church to Protest at East on Friday*, Shawnee Mission East Harbinger (January 18, 2018), *available* at https://smeharbinger.net/westboro-baptist-church-to-protest-at-east-on-friday/ (last visited August 31, 2018).

to Dismiss at 7, fn.3. By Defendants' logic, the People's Liberation Army organized the Tiananmen Square protests.

Notwithstanding the fact that Defendants clearly did not organize, initiate, or promote the walkouts – and went to great lengths to distance themselves from the students' planned expressions – Defendants now baldly assert that "there is no question that students, parents, and members of the public" would reasonably attribute speeches to the school. Defs.' Memo. in Support of Mot. to Dismiss (Doc. 9) at p. 8. As a matter of law, a school district cannot censor students due to the mere possibility that members of the public will incorrectly ascribe the speech to the school. *Hedges v. Wauconda Comm. Unit. Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993) ("[The School District] proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship… Public belief that the government is partial does not permit the government to become partial. Students therefore may hand out literature even if the recipients would misunderstand its provenance. The school's proper response is to educate the audience rather than squelch the speaker."); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) (declining to apply *Hazelwood* in harassment speech regulation case even though Defendant argued some community members could conceivably confuse certain "harassment" speech as bearing the imprimatur of the school). Moreover, the assessment of whether a reasonable student, parent, or member of the community would perceive speech as bearing the imprimatur of the school does not occur in a social and cultural vacuum. *See, e.g., V.A. v. San Pasqual Valley Unified Sch. Dist.*, No. 17-cv-02471-BAS-AGS, 2017 U.S. Dist. LEXIS 210400 at **14-16 (S.D. Cal. 2017) (rejecting *Hazelwood* standard for student-athlete protests during

national anthem because kneeling was an expression "easily interpreted as his own" in light of the Colin Kaepernick protests).

As detailed in the complaint, Defendants undertook substantial efforts to educate students, parents, and members of the public that the walkouts were not endorsed by the District. The District communicated clearly to students and parents that the event was not sponsored by the school. Compl. (Doc. 1) ¶ 31. Students, parents, and members of the community could not have reasonably inferred District endorsement of the walkouts *even if* Defendants had not released multiple public communications stating as much, as Plaintiffs believe the evidence will show. As alleged in the complaint, Plaintiffs' speech was part of a student-led, national movement. *Id.* ¶¶ 26-27. No person would reasonably assume that the District was involved in organizing student participation in a national protest, particularly in light of the attention the student movement had received. Plaintiffs have more than sufficiently pled facts to support their contention that the walkouts were student speech, not the schools' own speech, and that *Tinker* is therefore the applicable standard. The Complaint at the very least contains ample support for the finding that the speech suppressed at the walkouts was the students' own speech.

Even if the Court were to somehow conclude that Plaintiffs have failed to plausibly allege that the speech at issue was student speech, and not the school's own speech, thereby implicating the *Hazelwood* standard, the Motion to Dismiss should still be denied. That is because, even under the *Hazelwood* standard, Plaintiffs have plausibly alleged that Defendants' desire to avoid controversy is not a legitimate pedagogical interest. Compl. (Doc. 1) at ¶ 71. Defendants rely on *Fleming* to support their argument that nothing more than the "desire to avoid controversy" gave them constitutional license to censor students. *See* Doc. 9 at p. 9. However, Defendant fails to acknowledge that the Tenth Circuit premised its decision on the fact that the speech at issue was

permanently affixed to walls and ubiquitous throughout the school building. In particular, the court noted that the school had a legitimate pedagogical interest in preventing "the walls from becoming a situs for religious debate, *which would be disruptive to the learning environment*" and analogized the facts to two other cases where students would be a "captive audience" to the contested speech. 298 F.3d at 933 (emphasis added). In *Fleming*, the court only held that avoiding controversy was a legitimate pedagogical interest to the extent that the school-sponsored speech was unavoidable by students and thus created a high potential for "*disruptive religious debate*" on the school's wall. *Id.* (emphasis added). The facts alleged by Plaintiffs plausibly show that Defendants' unadorned desire to avoid controversy – by forbidding students from speaking the words "gun," "school shootings," or similar terms – is not a legitimate pedagogical concern, absent additional facts that the supposedly controversial language was unavoidable to students and, in and of itself, created a risk of disruption. Here, the walkout speeches were limited to less than a twenty-minute period, located in a specific, avoidable site on campus, and students were not required to attend them. The discrete nature of the speech that was intended for these events, even if it could somehow be deemed school-sponsored, did not risk disruption any more than did the district's scripted, sanctioned euphemisms such as "school safety," even if the students' intended message was potentially controversial.

ii. Defendants Censored Students to Avoid Controversy, Not Because They Forecast a Substantial Disruption by Students' Use of the Censored Phrases.

Defendants maintain, as a fallback position, that the District's censorship "would still be permissible under the *Tinker* standard." Memo. in Support of Mot. To Dismiss (Doc. 9) at p. 4 fn 2. Under *Tinker*, however, the School District bears the burden of proving that prior restraints on student speech were necessary to prevent substantial disruption or material interference with

school activities. *Tinker*, 393 U.S. at 509; *West v. Derby High School*, 206 F.3d 1358, 1366-67 (10th Cir. 2006). Defendants publicly stated and have reiterated in their motion that SMSD banned political speech in order to avoid association with a controversial topic. Compl. at ¶ 34-36; Defs.' Memo. in Support of Mot. to Dismiss (Doc. 9) at pp. 8-9. Plaintiffs have plausibly alleged the lack of any reasonable basis for Defendants to conclude that any disruption, disturbance, or disorder would result specifically from the speech the District intended to censor – that is, the students' act of speaking the banned terms such as "guns" or "gun violence" – once the (otherwise tolerated) protests had begun. Defendants have fallen far short of demonstrating that Plaintiffs' allegations do not plausibly state a claim for relief under either the *Tinker* or *Hazelwood* standards. Accordingly, the Court should deny Defendants' motion to dismiss with respect to the fundamental issue of whether Plaintiffs have stated a plausible First Amendment free-speech violation under Count I.

b. Defendants' dismissive discussion of who owned the camera confiscated from Plaintiff S.W. overlooks the First Amendment protection for student journalists' newsgathering activities.

In footnote 1 of their Memorandum in Support, Defendants make a dismissive reference to the portions of Plaintiffs' complaint that allege violations of law based on Wenciker's confiscation of Plaintiff S.W.'s school issued camera during the protests at Shawnee Mission North. Defendants state they are "unaware of any case law… which confers upon a student journalist any First Amendment interest or entitlement to possession or use of a district-owned camera." Doc. 9 at p. 4, fn1. This argument entirely misses the point of Plaintiffs' allegations: regardless of what possessory rights or property interest Plaintiff S.W. had in the camera, the District's actions in allowing the camera to be confiscated were intentionally geared toward preventing and restraining S.W. from engaging in protected First Amendment activity – that is,

performing her duties as a student journalist and peaceably documenting what was obviously a significant community event where a crowd of students had gathered.

Numerous courts including the U.S. Court of Appeals for the Tenth Circuit have concluded that First Amendment protections for the work of journalists extend to amateur and student journalists, not only full-time, working journalists. *See, e.g., Silkwood v. Kerr-McGee,* 563 F.2d 433, 437 (10th Cir. 1977) (extending reporter's privilege, an extension of First Amendment free-press protection, to a non-salaried news reporter); *Blum v. Schlegel*, 150 F.R.D. 42, 45 (W.D. N.Y. 1995) (holding that law-student reporter was entitled to invoke journalist's privilege under First Amendment because "whether a person is a professional journalist is irrelevant. The question is how the person asserting the privilege intended to use the information gathered"); *Hussain v. Springer,* 494 F.3d 108, 121 (2d Cir. 2007) (student media outlets entitled to strong First Amendment protection); *Sisley v. Seattle Sch. Dist. No. 1*, 171 Wn. App. 227, 234, 286 P.3d 974, 978 (Wash. App. W.D. 2012) (applying First Amendment standard to defamation claim based on high-school newspaper publication).

Further, "[I]f the role of the press in a democratic society is to have any value, all journalists – including student journalists – must be allowed to publish viewpoints contrary to those of state authorities without intervention or censorship by the authorities themselves. Without protection, the freedoms of speech and press are meaningless and the press becomes a mere channel for official thought." *Dean v. Utica Cmty Schs.,* 345 F. Supp. 2d 799, 804 (E.D. Mich. 2004) (holding that school violated high-school journalist's right to free speech and press by censoring article solely out of desire to avoid controversy about allegations of harmful fumes at bus stop). In short, First Amendment protections for student journalists, including the rights to both free speech and free press, would be eviscerated if permission to use otherwise-available

equipment or facilities owned by the school were conditioned upon students refraining from documenting controversies whenever directed to do so by a district employee.

Plaintiffs have plausibly alleged that, by singling out, and taking retaliatory action against, student journalists out of all of the students who had assembled for the protest, the District's actions not only directly interfered with S.W.'s protected newsgathering activities, but also retaliated against her, chilled her exercise of her rights to speech and press, and chilled other students' ability to engage in such protected conduct in the future.[2] *See, e.g.,* Compl. at ¶¶ 6, 78, 93. For this additional reason, Defendants' Motion to Dismiss should be denied.

II. IN COUNT II, PLAINTIFFS HAVE STATED A CLAIM FOR "MUNICIPAL LIABILITY" AGAINST THE DISTRICT.

A municipal entity such as Defendant SMSD is liable under § 1983 when its official policy or custom is "the moving force" behind a constitutional violation. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). An official policy or custom can derive from action or inaction by a municipality including its failure to train, supervise, or adopt policies to prevent its employees from committing constitutional violations. *Bryson v. City of Oklahoma*, 627 F.3d 784, 788 (10th Cir. 2010). Thus, a Plaintiff properly states a "deliberate indifference" claim when she alleges that a municipal employee violated her constitutional rights as a result of inadequate training or guidance. *City of Canton*, 489 U.S. at 389 (holding deliberately indifferent training may give rise to §1983 liability where a direct causal link between governing body's decision and the constitutional deprivation exists); *Ware v. Unified School District No. 492*, 902 F.2d 815,

[2] If nothing else, the employee's actions in confiscating the camera violated the Kansas Student Publications Act, which codifies that "[t]he liberty of the press in student publications shall be protected" and that although school employees may regulate the "number, length, frequency, distribution and format of student publications," material (such as the photos S.W. was peaceably attempting to take) "shall not be suppressed solely because it involves political or controversial subject matter." *See* Section IV *infra.*

819-20 (10th Cir. 1990) (plaintiff sufficiently alleged municipal liability based on school board's deliberate indifference where it failed to intervene in superintendent's alleged retaliatory firing). Municipalities are also liable where unconstitutional acts stem from its adoption or implementation of a formal municipal policy. *Dodds v. Richardson*, 614 F.3d 1185, 1202 (10th Cir. 2010) (explaining that liability premised on "a municipal person's adoption and implementation of a policy…does not implicate *respondeat superior*").

Plaintiffs have clearly premised Defendant SMSD's liability on the municipality's evident content-based censorship policy or custom. At no point in the complaint do Plaintiffs claim that SMSD is vicariously liable solely on the basis of Southwick's actions. Instead, Plaintiffs expressly allege that Defendant SMSD violated their First Amendment rights by failing to "properly train employees or implement a policy protecting students' First Amendment rights." Compl. ¶ 7. Plaintiffs also allege that District Defendant directly caused their First Amendment rights to be violated by implementing a formal policy or custom censoring students from discussing gun rights. *Id.*¶ 7. Plaintiffs cite Defendant SMSD's policies throughout the complaint and explicitly assert that these practices, as implemented by authorized policymakers at multiple school sites, are a cause of their injuries. *Id*. ¶¶ 7, 29-33, 72-74, 77-80.

The Complaint contains ample factual allegations supporting the inference that SMSD was deliberately indifferent to Plaintiffs' First Amendment rights by failing to train school officials. Specifically, Plaintiffs allege that the District was on notice that the walkouts would occur, that the potential for a First Amendment violation was obvious, and that the District failed to provide training to officials on how to avoid violating students' rights. *Id*. ¶¶ 29-33, 64. Moreover, Plaintiffs' complaint cites the recorded May 6, 2018 school board meeting during which board members acknowledged that they are aware of the pattern of similar First

Amendment rights violations that occurred when administrators were left to their own devices. *Id*. ¶ 62, fn 2. Plaintiffs also allege sufficient facts to support an inference that SMSD's failure to adopt a policy on content neutrality amounted to deliberate indifference toward Plaintiffs' constitutional rights. *Id*. ¶¶ 7, 29-30. Finally, Plaintiffs clearly allege that Defendant District formally adopted a policy directing administrators to engage in content-based censorship. *Id*. ¶¶ 7, 33-37, 74, 77-78, 88. At this stage, Plaintiffs have sufficiently stated a claim of municipal liability pursuant to a formal policy or deliberately indifferent practice.

III. PLAINTIFFS HAVE ALLEGED SUFIFICENT FACTS TO STATE AN "INDIVIDUAL CAPACITY" CLAIM AGAINST DEFENDANT SOUTHWICK.

a. Plaintiffs Clearly Premised Southwick's Liability on His Failure to Supervise Building Administrators and His Ratification of their Unconstitutional Conduct.

A supervisory defendant is liable in his individual capacity where he acts with deliberate indifference to plaintiff's constitutional rights and "[his] personal participation, his exercise of control or direction, or his failure to supervise" cause the alleged violation. *Dodds v. Richardson*, 614 F.3d 1185, 1211 (10th Cir. 2010) (citation omitted). A government official is liable for his supervisory shortcomings if he knew or should have known that his subordinate would likely engage in unconstitutional conduct yet took no steps to prevent it. *Lankford v. City of Hobart*, 73 F.3d 283, 287 (10th Cir. 1996). Similarly, supervisory liability is applicable where the defendant ratifies his subordinate's unconstitutional conduct or acquiesces to the unlawful treatment of the plaintiff. *Barnes v. St. Francis Cmty. Servs.*, No. 16-1281-EFM-GLR, 2017 U.S. Dist. LEXIS 95234 at **13-14 (D.Kan. June 21, 2017) (denying motion to dismiss where plaintiff made cursory allegations that an unnamed supervisory employee ratified her discriminatory treatment); *Fleetwood v. Werholtz*, No. 10-2480-RDR, 2011 U.S. Dist. LEXIS 78338 at **15-17 (D. Kan.

July 19, 2011) (holding plaintiff plausibly pled facts to support supervisory liability by alleging that defendants "reacted mildly and inconsistently to" reports of unlawful conduct).

Contrary to Defendants' claim that Plaintiffs have premised Southwick's liability on the District's policy, the complaint expressly alleges that Southwick is individually liable on the basis of his deliberate indifference to building administrators' violations. Plaintiffs' complaint alleges Southwick failed to supervise building administrators through his endorsement and ratification of their conduct. Compl. ¶¶ 5-6, 54-66, 80. First, Plaintiffs allege Southwick was aware of the potential risks for constitutional violations prior to the walkout yet made no effort to provide adequate training or guidance. *Id*. ¶ 30. Further, Plaintiffs' complaint alleges that Southwick ratified and perpetuated Plaintiffs' constitutional violations by failing to take proper remedial actions after he received complaints about Gripp and Wenciker's conduct. After Southwick learned about the building administrators' actions, he tried to retroactively justify them rather than undertake meaningful steps to remedy the harm and prevent future violations. *Id*. ¶¶ 57-59, 62-66. Indeed, Plaintiffs allege Southwick's ratification of Gripp and Wenciker's unconstitutional conduct has had a chilling effect and constitutes an ongoing violation. *Id*. ¶ 66.

Moreover, Plaintiffs' complaint clearly alleges that Southwick personally participated in censoring students through his post-walkout conduct, which effectively constituted a threat of similar sanctions if students engaged in protected speech activity in the future. *Id*. ¶¶ 57-66. Government officials violate the First Amendment when they make veiled or indirect threats that a speaker will face consequences and reprisals if they engage in protected expressive conduct. *See, e.g., Dirks v. Bd. of County Commissioners*, No. 15-CV-7997-JAR, 2016 U.S. Dist. LEXIS 68510 at **21-25 (D. Kan. May 24, 2016); *Backpage.com LLC v. Dart*, 807 F.3d 229, 230-231 (7th Cir. 2015) (holding that a government official violates the First Amendment when he

informs a speaker that her conduct is not protected and could be subject to future sanctions in an attempt to suppress speech). By telling S.W., G.A., and the general public that administrators were within their rights to silence students from speaking on political topics, exclude student journalists from attending events open to other students, and confiscate their cameras, Southwick imposed a threat that similar suppression would visit future constitutionally protected expression. Altogether, Plaintiffs' allegations provide ample support for an inference that Southwick is personally liable under a theory supervisory liability.[3]

b. Southwick is not entitled to qualified immunity.

Qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory rights of which a reasonable person would have known," *Gonzales v. Duran,* 590 F.3d 855 (10th Cir. 2009). It is a "clear and fair warning" standard which protects "all but the plainly incompetent or those who knowingly violate the law," but does not require "a case directly on point" for a right to be clearly established. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017). A qualified-immunity determination analyzes (1) what actually happened; (2) whether plaintiff has asserted a violation of a constitutional or statutory right; (3) whether the right was clearly established; and (4) whether an objectively reasonable defendant would have understood the conduct to violate the clearly established right. *Gonzales,* 590 F.3d at 859.

Plaintiffs' individual claims against Southwick are based on his violation of the First Amendment, and plaintiffs therefore clearly assert a violation of a statutory right. The salient question, wherefore, is whether "a reasonable official would understand that what he is doing

[3]Defendants argue that a suit against Defendant Southwick in his official capacity is redundant. In the interests of narrowing the issues before the Court, Plaintiffs are agreeable to seeking leave to amend the complaint and remove claims against Southwick in his official capacity.

violates" the Plaintiff's clearly established constitutional rights. *Yeasin v. Durham*, 224 F. Supp. 3d 1194, 1201 (D. Kan. 2016) (*citing Panagoulakos v. Yazzie*, 741 F.3d 1194 (10th Cir. 2013). An official can be on notice that his conduct is unconstitutional even in factually novel circumstances. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015).

Plaintiffs have plausibly alleged facts showing that Southwick had fair notice that he was violating Plaintiffs' First Amendment rights when he enforced the District's ban on preventing students from speaking about gun reform. Despite Defendants' claim that they have been unable to locate a factually similar case, clearly established Circuit precedent put Defendants including Defendant Southwick on fair notice that *Tinker* is the applicable standard for school tolerated student speech. *See* Section I *supra.* Further, *Tinker* and progeny clearly delineate the point at which school officials may censor student speech. No reasonable Superintendent would have believed that the walkouts bore the imprimatur of the school. Given the District's repeated public assurances that the walkouts were not supported by the school, it is factually unreasonable for Defendant to claim there was a risk that anyone would believe student speeches were school-sponsored.

Moreover, Tenth Circuit case law should have put Defendant Southwick on notice that the contents of otherwise-tolerated student demonstrations can only be censored if the speech in which students are attempting to engage poses a substantial risk of disruption. In *Taylor v. Roswell Indep. Sch. Dist.*, the Tenth Circuit explicitly declined to apply *Hazelwood* to school restrictions on a student group's anti-abortion speech. In *Taylor*, school officials regularly permitted the student group to use the school lobby to distribute fliers and passively monitored the group while it engaged in its expressive conduct. 713 F.3d 25, 36 (10th Cir. 2013).

Notwithstanding the group's permissive use of school property, the court found that no one would reasonably believe that their speech bore the imprimatur of the school. *Id.* (*citing Morse v. Frederick*, 551 U.S. 393, 405-06 (2007)). Instead, the Tenth Circuit held that the *Tinker* standard applied.

In an attempt to avoid the clear applicability of *Tinker*, Southwick argues that school speech jurisprudence is simply too complex for a Superintendent to know when speech bears the school's imprimatur. In support of his argument, Southwick cites *Hazelwood* and *Fleming*, two cases with no factual or contextual resemblance to the case at bar. Memo. in Support of Mot. to Dismiss (Doc. 9) at 10. In *Hazelwood,* the Court upheld the right of the school district to exercise editorial control over content in the school newspaper. 484 U.S. at 273. In *Fleming*, the Tenth Circuit permitted content-based restrictions on tiles that would be permanently affixed to the schools. 298 F.3d at 931. In both cases, the school sought to regulate speech in a forum that was conceived by the school, organized by the school, funded by the school, promoted by the school, and closely supervised by school officials. Neither *Hazelwood* nor *Fleming* is applicable and Defendant cannot avoid liability through willful obliviousness.

No reasonable Superintendent, under the facts alleged in the complaint, could have believed that he had the right to enforce a content-based speech ban for the sole purpose of avoiding controversy. It has been clearly established for nearly fifty years that school officials cannot ban students from engaging in political speech on campus absent a credible threat of material or substantial disruption. *Tinker*, 393 at 509; *Williams v. Eaton*, 443 F.2d 422, 430 (10th Cir. 1972). In particular, the Tenth Circuit has held that on-campus demonstrators have a "clearly established right to engage in protest so long as no material disruption occurs." *See, e.g., PeTA*, 298 F.3d at 1207. As supported by the detailed and well-pleaded allegations of Plaintiffs'

Complaint, *Tinker* and progeny plausibly put Defendant on notice that students cannot be prohibited from engaging in political speech out of a concern to avoid controversy. For this reason, the Motion to Dismiss should be denied to the extent it argues that Defendant Southwick cannot be held personally liable.

IV. PLAINTIFFS HAVE PLAUSIBLY ALLEGED A VIOLATION OF THE KANSAS STUDENT PUBLICATIONS ACT

In sections 5 and 6 of their memorandum, Defendants assert that Plaintiffs' Count III alleging violation of the Kansas Student Publication Act, K.S.A. 72-7209 *et seq.*, should be dismissed because, (a) they allege, there is no private right of action under the statute, and because (b) the allegations of the complaint fail to plausibly allege a violation of the Act. The Motion to Dismiss should be denied as to these points, not only because the Act by its express terms, legislative intent, and legislative history implies an individual right of action, but also because regardless of whether the Act creates a right of action under a tort theory, Plaintiffs have set forth a sufficient basis for a declaratory judgment regarding whether Defendants' apparent policy and practice of suppressing students' newsgathering – based solely on a desire to avoid controversy – violates Kansas law.

a. Plaintiffs may seek relief under the Kansas Student Publications Act because the Act was intended to protect student journalists' rights and not, as Defendants argue, to immunize school districts from liability.

In determining whether an individual right of action exists under a state statute, a federal court should examine that state's public policy and apply the test used in the state for ascertaining whether such a right exists. *See Simon v. Taylor,* No. 12-0096-JB/WDS, 2013 U.S. Dist. LEXIS 156747 (D. N.M. Sept. 26, 2013) (rejecting Defendants' argument, in Rule 12(b)(6) Motion to Dismiss, that Plaintiffs lacked a private right of action under New Mexico Horse

Racing Act based in part on conclusion that "it is the public policy of new Mexico to ensure that horse racing is conducted fairly and honestly, and to protect the participants of racing.") Absent a controlling state-court decision, a federal court must attempt to predict how the state's highest court would decide the issue. *See Wade v. EMCASCO Ins. Co.,* 483 F.3d 657, 666 (10th Cir. 2007).

As noted by Defendants, in examining whether a statute creates an individual right of action, Kansas courts examine (a) whether the statute was designed to protect a specific group of people; and (b) whether a private cause of action was intended. *Nichols v. Kansas Political Action Comm.,* 270 Kan. 37 (2000). Defendants properly concede that the first part of the test is 'likely met in this case," *i.e.,* that the statute was designed to protect student journalists, given that the statute expressly provides that "The liberty of the press in student publications shall be protected." Memo. in Support of Mot. to Dismiss (Doc. 9) at 16-17.

In puzzling fashion, however, Defendants then assert that no legislative intent to provide an actual remedy for student journalists can be inferred because, based on additional provisions of the Act, the "primary purpose" of the Act, as divined by Defendants, is not to provide for freedom of the student press, but "to immunize school districts and their employees from liability stemming from student publications, and instead shift civil and criminal liability for such publications to the students themselves." *Id.* at 18. In other words, Defendants first acknowledge that the Act was designed to protect student journalists and the "liberty of the press in student publications," and then claim in the next breath that the act was actually intended primarily to benefit *parties such as Defendants,* by "immunizing" them from liability and "shift[ing]"

liability to students.[4] In their own, self-serving summary of the Act's provisions, Defendants assert that the act "encourages" protection of liberty of the press in student publications, rather than mandating it. *Id.* at 17.

Defendants are incorrect in asserting that the Student Publications Act "did not *create* a new or unique right" *id.* at 18, (emphasis in original), and their motion should be denied accordingly. By suggesting that the Student Publications Act merely codified "pre-existing rights" under the First Amendment, Defendants mischaracterize or overlook the well-documented, cause-and-effect relationship between the *Hazelwood* decision – the case on which so much of Defendants' defense of this matter is based – and the Student Publications Act, which came about specifically as a way to provide Kansas student journalists with protection above and beyond what the U.S. Supreme Court provided for in *Hazelwood,* and to limit *Hazelwood's* impact in Kansas.[5] Defendants assert that "references to free press for student publications" in

[4] By providing that "No school district, member of the board or education or employee thereof, shall be held responsible in any civil or criminal action for any publication or other expression of matter by students in the exercise of rights under this act," but rather, clarifying that students who have attained the age of majority shall be held liable to the extent allowed by law, the Act does not "shift" any liability onto students, but rather undercuts the rationale for the *Hazelwood* decision by clarifying that the contents of student publications are the students' own words and not a reflection of school-district policy. These same provisions invalidate any argument by the District that preventing student journalists from documenting the protests would be permissible under the rationale of *Hazelwood.*

[5] In addition to Kansas, twelve other states adopted statutes to protect students in the wake of the *Hazelwood* decision: Arkansas (Ark. Code Ann. § 6-18-1203); Colorado (Colo. Rev. Stat. Ann. § 22-1-120); Illinois (Ill. Stat. § 105 80/10); Iowa (Iowa Code Ann. § 280.22); Massachusetts (MGL Ch. 71 § 82;) Maryland (MD Code, Educ. § 7-121); Nevada (Nev. Rev. Stat. § 388.077); North Dakota (North Dakota Civil Code § 15-10-55); Oregon (Or. Rev. Stat. Ann. § 336.477); Rhode Island (Rhode Island Stat. Ann. § 16-109-3); Vermont (16 Vermont Stat. Ann. §§ 1623, 180); and Washington (Wash. Stat. Ann. § 28A.600.0001). Every court that has reviewed one of the Student Publication Act's sister statutes, including the Tenth Circuit, has held that the purpose was to empower student journalist to vindicate their rights under a pre-*Hazelwood* standard. *See Corder v. Lewis Palmer Sch. Dist. No.* 38, 566 F.3d 1219, 1236 (10th Cir. 2009)("It appears [the Colorado statute] was passed by the Colorado legislature in the wake of *Hazelwood* and the concern regarding its impact on student newspapers."); *Lange v. Diercks*,

the Act "stems [sic] from the pre-existing rights established in the First Amendment," *id.,* while overlooking that prior to the Act becoming law in Kansas, *Hazelwood* had in fact eroded, or at least threatened to erode, students' free-press rights as previously interpreted under *Tinker*, by giving school districts broadened authority to regulate and censor any content that could potentially be deemed to be "school sponsored." The fact that some language based on the *Tinker* standard, referring to speech that "creates a material or substantial disruption," is incorporated into the Act does not mean that this Act was merely a continuation of the *Tinker* standard, as Defendants assert. The Act did not merely "incorporate[] pre-existing First Amendment case law to define the contours of the Act." *Id.* at 18. It provided that under Kansas law, student journalists' rights would in fact exceed the First-Amendment baseline set by the U.S. Supreme Court in *Hazelwood,* and would be restored to a pre-*Hazelwood* status, including guaranteeing that student journalists would not have material suppressed solely because of its controversial nature -- the exact type of censorship that Defendants now claim to be permissible. The anti-censorship purpose of this act reflects and vindicates the public policy of Kansas that "the liberty of the press *shall be inviolate*," as enshrined in the Kansas Constitution Bill of Rights, Section 11 (emphasis added).

Finally, by asserting that there is not "any legislative history supporting" the notion of an individual right of action, Defendants ignore or overlook an extremely detailed legislative history demonstrating that the primary and specific purpose of the action was not, as Defendants assert,

---

No. 11-0191, 2011 WL 5515152, at *9; (Iowa Ct. App. 2011) ("When the United States Supreme Court identified a constitutional distinction between 'educators' ability to silence a student's personal expression' (like that in Tinker) and 'educators' authority over school- sponsored publications' (like that in Hazelwood), our legislature stepped in to pass section 280.22, supplementing Iowa students' right to free expression within the schoolhouse gates." (internal citations omitted)).

to "shift" liability to students and protect administrators from liability, but rather to protect student journalists' rights following the *Hazelwood* decision. *See, e.g.:*

- Minutes of the House Committee on Education, Jan. 29, 1992, Ex. A, S.B. 62 Legislative History Excerpts, at p. 2 (documenting statements from Rep. Gary Blumenthal that the bill "sends a strong message to Kansas students that the constitutional rights that protect every facet of their lives also protects them in their student publications" and from Rep. Steve Wiard that the bill "gives the high school students the opportunity to exercise the Bill of Rights, the foundation of our democracy, and validates the trust we have in their making responsible decision[s].");

- Testimony of Gordon Risk of the ACLU of Kansas before Senate Education Committee, Feb. 7, 1991, *id.* at p. 12 (stating that ACLU welcomed "the efforts of the legislature to undo the damage of *Hazelwood,*" which he stated "gave high school principals essentially unlimited power to censor what they don't like in 'school-sponsored expressive activities'");[6]

- Testimony of Sen. Lana Oleen before Senate Education Committee, Feb. 7, 1991, *id.* at p.4 (stating that "It is most important that students' coverage of material not be suppressed solely because it involves political or controversial subject matter.");

- Testimony of Billie Hainsey, copy editor of *The TrailBlazer* at Council Grove High School, before Senate Education Committee, Feb. 7, 1991, *id.* at p. 5, stating that "We would like to see all public high school students have the rights that we enjoy… We think this bill is important because we want all student journalists in Kansas to have some of the experiences that freedom of expression has given us.";

- Testimony of Denise Neil before Senate Education Committee, Feb. 7, 1991, *id.* at p. 9, stating that "Students can't be informed if they can't be educated. They can't form opinions without open communication. We are students. But we are students learning to be journalists in a free press. And we are writing for students learning to be decision makers, legislators and independent citizens. Censorship is not doing them any favors. It is not protecting them. It is, if anything, hindering them";

- Testimony of John Karpinski, editor-in-chief of *The Northwest Passage* at Shawnee Mission Northwest High School before Senate Education Committee, Feb. 7, 1991, *id.* at p. 11, stating that "Freedom of the press, even where censorship does not currently occur, does not exist in its truest form in public high schools in the state of Kansas. Where there is no censorship, students live in fear of incurring it by printing information which is critical of administrative actions or the actions of student organizations. Prior to [*Hazelwood*], dedicated student writers had the opportunity to

[6] ACLU actually opposed the bill as written because it allowed the district to suppress expression that "encourages conduct which constitutes a ground or grounds for the suspension or expulsion of students," which Mr. Risk stated would potentially encompass "any article or editorial that objects to current school policy."

> learn and practice freedom of expression under the guidance of qualified advisers. Now, school administration is free to wield censorial power whenever they see fit.")

This sampling of legislative history (which Plaintiffs have attempted to briefly summarize but which is best developed further at summary judgment or at trial) shows that the Legislature would not have enacted this statute to reverse the impact of the *Hazelwood* decision and protect students' rights if it had intended that there would be no remedy for students, whether under a tort theory or an action for declaratory relief. At a minimum, Plaintiffs have set forth allegations plausibly showing that the Student Publications Act was intended to protect and vindicate students' rights to engage in newsgathering and student-journalism activities without the fear of having their work squelched solely because of its controversial nature. Were it otherwise, students would have rights under Kansas law with no corresponding remedy. *See Marbourg v. Smith,* 11 Kan. 554, 564 (1898) ("It is an old maxim that there can be no legal right without a remedy."); c*f. Dumler v. Kan. Dep't of Revenue,* 302 Kan. 420, 428 ("We decline to find that the legislature intended to create a right without a remedy" on the "fundamental subject matter" of a person's right to counsel). For this reason, Defendants' Motion to Dismiss should be denied with regard to point 5.

Even if the Court were to construe the Student Publications Act as not plausibly providing for a "private right of action" by students, the Court could nonetheless provide at minimum for declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a). For a Plaintiff seeking a declaratory judgment in federal court, "What is required is an actual case or controversy, not a private right of action." *Menominee Indian Tribe of Wis. v. DEA*, 190 F. Supp. 3d 843, 849 (E. D. Wis. 2016). Here, students have alleged that the District's actions, in sanctioning and approving of the confiscation of a student journalist's camera solely for documenting a controversial topic, and in allowing student journalists to be singled out for

removal from the April 20 protests, not only directly restrained at least one student journalists from doing her work, but also created an ongoing "chilling effect" with repercussions for student journalists including Plaintiffs. Compl. ¶¶ 92-93. As such, there exists an actual controversy providing grounds for declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. 2201(a), which provides that "[i]n a case of actual controversy within its jurisdiction… any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

To state a claim for a declaratory judgment, a Plaintiff must allege a "substantial controversy … of sufficient immediacy and reality" to satisfying the terms of the Act and the requirement of an actual "case or controversy" within the meaning of Article III of the U.S. Constitution. *E.g., Neonatal Prod. Grp. v. Shields,* No. 13-CV-2601-DDC-KGS, 2014 U.S. Dist. LEXIS 165937 (D. Kan. Nov. 26, 2014). The Court must then consider whether a declaration of rights, under the circumstances, would serve to clarify or settle legal relations in issue, and whether it would terminate or afford relief from the uncertainty giving rise to the proceeding. "If an affirmative answer can be had to both questions, the trial court should hear the case; if not, it should decline to do so." *State Farm Fire & Cas. Co. v. Mhoon,* 31 F.3d 979 (10th Cir. 1994). Under an expanded formulation of this inquiry, Courts should weigh (1) whether a declaratory action would settle the controversy; (2) whether it would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to *res judicata"*; (4) whether use of a declaratory action would increase friction between federal and state courts and improperly

encroach upon state jurisdiction; or (5) whether there is an alternative remedy which is better or more effective. *Id.*

Under the original two-part formulation described in *Mhoon,* a declaratory judgment should be entered in this action because Plaintiffs have alleged substantial, immediate controversy regarding whether the rights of S.W. and other students under the Kansas Student Publications Act have been violated and continue to be violated by the District's apparent position that it is entitled to confiscate student journalists' tools, or single them out for removal from a student gathering, out of a desire to suppress controversial material, notwithstanding the Act's provisions. A declaration of Plaintiffs' rights would undoubtedly clarify legal relations and provide students from uncertainty regarding the District's claimed legality of its policies, past actions and potential future actions directed at student journalists. There is, further, no basis to conclude that the additional factors discussed in *Mhoon* weigh against entry of a declaratory judgment, given that there is no "race to *res judicata*," no apparent reported Kansas case construing the statute that might potentially cause "friction" between state and federal courts, and (especially if the Court concludes no private right of action exists), no alternative remedy that is more effective. For this reason, in the event the Court somehow concludes that there is no implied right of action under the Act, the Court should nonetheless allow Plaintiffs to pursue their requested declaratory relief under the Act.

b. <u>The factual allegations of the Complaint are sufficient to plausibly state a claim for a violation of the Student Publications Act.</u>

Finally, despite Defendants' cursory argument at Section 6 of their Memorandum that Defendants' conduct did not violate the Kansas Publications Act, Doc. 9 at pp. 18-20, Plaintiffs have clearly alleged that the confiscation of Plaintiff S.W.'s camera was an attempt to suppress material "solely because of the political or controversial subject matter" she was attempting to

document, in violation of the Act, and that this action not only constituted a prior restraint as to S.W. but also chilled the newsgathering activities of other students. *See* Doc. 1 at ¶¶ 6, 78, 93. Defendants flatly assert that because the Act allows the "format" of student publications to be regulated, the statute allows Defendants to "limit Plaintiffs' use of a camera." Memo. in Support of Mot. to Dismiss (Do. 9) at p. 19. Defendants do not explain how singling out and confiscating the camera of a student based solely on her attempt to engage in protected free-press activity, or directing student journalists to leave an event, amounts to regulation of the "format" of a student publication, nor do they explain what role an assistant principal tasked with ousting student journalists from a protest properly plays in shaping District's student-journalism curriculum. Defendants engage in semantics to emphasize that Plaintiffs describe the confiscation as an "attempt" to suppress material, which, they assert, cannot possibly be a violation of the act. *Id.* Defendants overlook, however, that the very basis of Plaintiffs' claim under the Student Publications Act is that the confiscation of the camera amounted to suppression of S.W.'s photography solely because it involved "political or controversial subject matter," which the Act expressly prohibits regardless of whether it occurs during the editing process or during students' attempts at newsgathering. For these reasons, the Motion should be denied as to Defendants' point 6.

CONCLUSION

Plaintiffs have more than plausibly stated claims for relief under their Counts I through III in light of the detailed allegations of the Complaint, the applicable legal standards, and the additional facts to be developed in discovery. Plaintiffs respectfully request that the Court deny Defendants' motion, except as it relates to the claims against Defendant Southwick in his official capacity, and order such other and further relief as the Court deems just and proper. In the event that the Court concludes that Plaintiffs have failed to state a claim as to any Count, Plaintiffs

respectfully request leave to file an Amended Complaint within a reasonable time frame following the Court's ruling.

Respectfully submitted,

By: *s/ J. Eric Weslander*
J. Eric Weslander, Sup. Ct. No. 24549
STEVENS & BRAND, LLP
P.O. Box 189
900 Massachusetts Street
Lawrence, KS 66044
Phone: (785) 843-0811
Fax: (785) 843-0341
Email: eweslander@stevensbrand.com

Lauren Bonds, Sup. Ct. No. 27807
ACLU Foundation of Kansas
6701 W 64th Street, Suite 210
Phone: (913) 490-4114
Fax: (913) 490-4119
Email: lbonds@aclukansas.org

COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, a true and accurate copy of the foregoing Response in Opposition to Defendants' Joint Motion to Dismiss was filed via the Court's ECF system, accomplishing service through a Notice of Electronic Filing for all parties of record.

s/ J. Eric Weslander

An attorney for Plaintiffs