IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JANELLE WOLFE, ON BEHALF OF HER MINOR DAUGHTER, SLOANE WOLFE, Plaintiffs, v. TWIN VALLEY SCHOOL DISTRICT, Defendant.	**Civil Action No.: __________** Hon. [Judge]

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Students at Twin Valley High School have tried for three years to secure official school recognition of a student group, "Retire the Raider," focused on cultural competency and addressing Native American cultural appropriation—including through advocating for replacement of the District's mascot and logo, a stereotypical indigenous American figure—and education of students and community members about indigenous culture. Plaintiff Sloane Wolfe and her older sister, Arden Wolfe, who has since graduated, have led the effort for "Retire the Raider" to receive the same benefits as other officially recognized noncurriculum-related student groups, which include the Awakening religious club, an esports club, and a ski club. The Twin Valley School District ("District"), however, has repeatedly refused to accord the group official recognition based on its disagreement with the group's views, specifically the group's belief that the Raider mascot is offensive to indigenous people. The District's purported basis for its refusal—Retire the Raider's inability to secure a faculty advisor—is a post-hoc justification intended to mask the District's viewpoint discrimination.

Conditioning official recognition on a faculty advisor is also impermissible under the federal Equal Access Act, which expressly limits the involvement of school staff in student clubs to avoid religious entanglement. The District's refusal to officially recognize Retire the Raider violates the rights of Sloane—and all other District students who wish to attend meetings of Retire the Raider—under both the Equal Access Act and the First Amendment to the United States Constitution. Accordingly, Plaintiffs respectfully ask this Court to enjoin the District from engaging in this unconstitutional obstruction and order it to provide official recognition to Retire the Raider along with the same access to school facilities and other benefits that other noncurriculum-related student clubs in the District enjoy.

FACTUAL BACKGROUND[1]

Along with other Twin Valley High School students, Sloane Wolfe and her older sister Arden Wolfe have spent more than three years advocating for the replacement of the District's mascot, the Raider, because of their belief that the mascot appropriates the image of an indigenous person as a symbol for a mostly non-indigenous school district and stereotypically associates indigenous culture with violence. Verified Complaint ¶¶ 22-23. They have spoken about their concerns at dozens of school board meetings and created a student group, "Retire the Raider," to advocate for replacing the mascot, discuss issues related to cultural competency, and engage in community education about indigenous culture. *Id.* ¶¶ 2, 35-37.

The District, however, has repeatedly obstructed their attempts to raise awareness about the mascot issue. *Id.* ¶¶ 50-53. Most glaringly, the District has repeatedly discouraged District staff from serving as advisors to "Retire the Raider" on the one hand, *id.* ¶¶ 70-71, while refusing

[1] The relevant facts are recited, at length, in Plaintiffs' Verified Complaint (ECF No. 1) and are incorporated herein as if fully set forth at length.

to provide official recognition to the group because it does not have a faculty advisor, on the other, *id.* ¶ 72. As a result, "Retire the Raider" is unable to access the same benefits accorded to other noncurriculum-related student clubs at Twin Valley High School, which include, *inter alia*, the ability to hold regular meetings at school, including during "flex" time, which is part of the school day; the ability to post flyers in the same manner as officially recognized student clubs; inclusion on the Twin Valley High School Student Activities page on the District's website, which lists and links to information about other non-curriculum-related clubs; inclusion on the list of clubs in the community surveys provided to parents and students; and access to certain financial benefits, including a school-managed student activity account and Twin Valley Community Education grants. *Id.* ¶ 73. Officially recognized noncurriculum-related student groups that *do* have access to these benefits include The Awakening, a Christian club; an esports video-game club; a leadership experience and opportunity (LEO) club; Mini-Thon, which raises money for pediatric cancer; Sips of the Valley, a hot beverage and discussion club; and Ski Club. *Id.* ¶¶ 5-6.

Plaintiffs and their counsel have repeatedly advocated with the District to recognize Retire the Raider and provide it with access to the same benefits as other noncurriculum-related student groups. *Id.* ¶¶ 74-76. The District has responded by assigning an administrator to supervise up to four meetings per school year and by allowing Retire the Raider to post flyers on a smaller, less prominent wall near the entrance of the school. *Id.* ¶¶ 60-61, 78. In the meantime, Retire the Raider has tried to find a willing faculty advisor, but has been unable to recruit one. *Id.* ¶¶ 70-71, 81-85. As a result, Retire the Raider is unable to access many of the benefits available to officially recognized student clubs. *Id.* ¶¶ 73.

ARGUMENT

The Court should grant the requested preliminary injunctive relief because Sloane has established each of the following: (1) A "reasonable likelihood" of success on the merits; (2) a

likelihood of "irreparable harm" absent the relief sought; (3) the harm resulting to Sloane by denying preliminary injunctive relief outweighs the harm that would result to District if preliminary injunctive relief were granted; and (4) granting preliminary injunctive relief would serve the public interest.[2]

I. Sloane Is Likely to Succeed on the Merits Because the District's Refusal to Officially Recognize Retire the Raider as a Student Club Violates Her Rights Under the Equal Access Act and First Amendment

The Equal Access Act ("EAA")[3] requires public secondary schools to provide access to school facilities and benefits on equal terms to all noncurriculum-related student-initiated groups. Once a school provides access to one noncurriculum-related student-initiated group, it creates a limited public forum for all such groups and any efforts to restrict a particular group's access to the forum are limited by both the Equal Access Act and First Amendment.

By providing access to school facilities and benefits to a variety of noncurriculum-related student-initiated groups, the District has created a limited public forum and cannot restrict access on the basis of the content or viewpoint of the group's message or unreasonably limit access to the forum. Yet that is precisely what the District has done to the Retire the Raider. It has imposed a condition on access to the forum—the requirement that student groups secure a faculty advisor—that is not permissible under the Equal Access Act. The advisor requirement also violates the First Amendment by conditioning access to the forum on the willingness of a government employee to serve as the student club's advisor, and it creates a significant risk, manifested here, that school districts will deter their employees from serving as advisors for student clubs that espouse unpopular, controversial, or minority viewpoints. The District's refusal to provide official

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[2] *See Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir. 2002).

[3] 20 U.S.C. § 4071.

recognition to Retire the Raider violates the Equal Access Act and the First Amendment and should be enjoined.

a. The Equal Access Act Requires The District to Officially Recognize "Retire the Raider" as a Noncurriculum-Related Student Group

i. The Equal Access Act

The EAA provides that:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[4]

Under the EAA, a school creates a "limited open forum" whenever "such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[5] Accordingly, if a public secondary school allows a single noncurriculum-related student group to meet, "the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time."[6] As the U.S. Supreme Court has noted, "Congress[] inten[ded] to provide a low threshold for triggering the Act's requirements."[7]

In *Mergens*, the Supreme Court evaluated the statutory text and legislative history of the EAA to determine what constituted a "noncurriculum related student group." The Supreme Court held that if one or more of the following factors are not met, the student group is noncurriculum-related: "[(1)] if the subject matter of the group is actually taught, or will soon be taught, in a

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[4] 20 U.S.C. § 4071(a).

[5] 20 U.S.C. § 4071(b).

[6] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 236 (1990).

[7] *Id*. at 240.

regularly offered course; [(2)] if the subject matter of the group concerns the body of courses as a whole; [(3)] if participation in the group is required for a particular course; [(4)] or if participation in the group results in academic credit."[8] The school district ultimately bears the burden of showing that a group is related to the curriculum.[9] The Court owes a school district no deference as it attempts to make this showing.[10]

The EAA has an expansive mandate. This begins with the definition of "meeting," which is defined to include "those activities of student groups which are . . . not directly related to the school curriculum."[11] Stated differently, the EAA is not just concerned with when or how a school permits noncurricular groups to meet; it is also concerned with the terms on which a school or school district recognizes noncurricular groups and the activities it allows those groups to engage in. This encompasses access to school resources or enjoyment of privileges offered to student groups.[12]

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[8] *Mergens*, 496 U.S. at 239-40.

[9] *Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1252 (3d Cir. 1993) ("The burden of showing that a group is directly related to the curriculum rests on the school district.") (citing *Mergens*, 496 U.S. at 240).

[10] *Mergens*, 496 U.S. at 240 ("[S]uch determinations would be subject to factual findings well within the competence of trial courts to make."); *see also id*. at 245 ("Complete deference to the school district would render the Act meaningless because school boards could circumvent the Act's requirements simply by asserting that all student groups are curriculum related.") (quotation omitted).

[11] *Id.* at 237–38 (emphasis omitted) (quoting 20 U.S.C.A. § 4072(3)) ("Congress' use of the phrase 'directly related' implies that student groups directly related to the subject matter of courses offered by the school do not fall within the 'noncurriculum related' category and would therefore be considered 'curriculum related.'").

[12] *Id.* at 247 ("Although the school apparently permits respondents to meet informally after school, respondents seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair . . . . [W]e hold that [the school's] denial of [the students'] request to form a Christian club denies them 'equal access' under the Act.").

The EAA's prohibition on differential treatment is equally expansive. The act prohibits schools from "deny[ing] equal access," or "[denying] a fair opportunity to," or otherwise "discriminat[ing] against" a noncurricular group.[13] When the prohibition on differential treatment is read in tandem with the definition of meeting, once a school provides resources to one noncurricular group, or permits it to engage in certain activities, or enjoy certain privileges, it must do so for all noncurricular groups. For example, where a school permits one noncurricular group to use its public address system, bulletin boards, or website, it must permit all other noncurricular groups to do likewise.[14]

ii. The District's Refusal to Officially Recognize Retire the Raider Violates the EAA

By allowing noncurriculum-related student groups to meet during noninstructional time, the District has created a limited open forum under the EAA. A survey of the Twin Valley High School website shows several noncurriculum related student groups recognized by the District. For instance, there is the E-Sports Club,[15] the Awakening Club,[16] the Leadership Experience &

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[13] 20 U.S.C. § 4071(a).

[14] *Mergens*, 496 U.S at 247 (holding school district's refusal to grant religious club official recognition as club violated EAA because official recognition carried "with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair.")

[15] *Student Activities*, TWIN VALLEY HIGH SCHOOL, https://sites.google.com/tvsd.info/tvhs-activities/esports ("E-Sports is a new student-led club designed for anyone interested in competitive video gaming. The goals of E-Sports club are to provide team-building and leadership opportunities for students, all while training to participate in video game competitions.").

[16] *Student Activities*, TWIN VALLEY HIGH SCHOOL, https://sites.google.com/tvsd.info/tvhs-activities/awakening. (The Awakening Club focuses on "Christ-centered community at [Twin Valley High School]" and includes a weekly bible study.) Courts have previously found clubs related to religious studies are noncurriculum related. *See generally*, *Pope*, 12 F.3d at 1254.

Opportunity (the "LEO" club), which focuses on student leadership and community building,[17] Ski Club,[18] and the Senior Class, which organizes activities for the Twin Valley High School Senior Class.[19]

Each of these groups is recognized as an official student club by Twin Valley High School. As an official student club, each of these organizations can, among other things, hold meetings during the school day during Twin Valley High School's "flex" time, advertise club meetings and activities in a central location at Twin Valley High School, be listed on the student activities page on the District's website, and access a student activity account to raise and manage funds. Verified Complaint ¶¶ 55–64. These benefits are not offered to student groups that the District does not officially recognize as a student club.

Once the District grants these rights and privileges to one noncurriculum-related student group, the EAA requires it to extend them to all noncurriculum-related student groups regardless of the content or viewpoint of the group's speech.[20] The District, however has repeatedly denied

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[17] *Student Activities*, TWIN VALLEY HIGH SCHOOL, https://sites.google.com/tvsd.info/tvhs-activities/leo-club. Courts have found similar groups to be noncurriculum related. *See Pope*, 12 F.3d at 1252 (community service group is not curriculum-related for purposes of EAA).

[18] *Student Activities*, TWIN VALLEY HIGH SCHOOL,https://sites.google.com/tvsd.info/tvhs-activities/ski-club?authuser=0 . Courts have found ski clubs to be noncurriculum-related for purposes of EAA. *See Garnett By & Through Smith v. Renton Sch. Dist. No. 403*, 987 F.2d 641, 643 (9th Cir. 1993).

[19]*Student Activities*, TWIN VALLEY HIGH SCHOOL, https://sites.google.com/tvsd.info/tvhs-activities/senior-class. A student group that organized activities has been found to be a noncurriculum group. *See Straights & Gays for Equal. v. Osseo Area Sch.-Dist. No. 279*, 540 F.3d 911, 915 (8th Cir. 2008) (finding spirit council to be noncurriculum related group); *Boyd County High School Gay Straight Alliance v. Board of Educ. of Boyd County*, 258 F.Supp.2d 667 (junior and senior executive councils were noncurriculum-related student groups for purposes of Equal Access Act).

[20] *Mergens*, 496 U.S at 236 ("Thus, even if a public secondary school allows only one "noncurriculum related student group" to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time.")

these benefits to Retire the Raider. At the outset, the District has denied Retire the Raider the opportunity to hold regular meetings at school, instead providing that it can meet only quarterly under the principal's supervision. Verified Complaint ¶ 78. And it has specifically denied Retire the Raider the opportunity to meet during "flex periods," a time when student groups frequently meet during the school day.

Retire the Raider also does not have access to the advertising privileges of other clubs. Retire the Raider cannot advertise its meetings or activities in the same area of the school as other noncurriculum-related student groups. *Id.* ¶¶ 60-61, 73. Nor is the club listed on the Twin Valley High School website, where all officially recognized student clubs are listed with a description of the club and a link to a google form for individuals interested in learning more about the club's activities. *Id.* ¶ 73.

Retire the Raider also loses out on certain financial benefits that other groups enjoy. Retire the Raider does not have access to a student activity account to raise and manage funds and is ineligible for a Twin Valley Community Education grant. *Id.* Denying Retire the Raider access to these benefits while providing them to other noncurriculum-related student clubs violates the EAA.

iii. The District Cannot Require Retire the Raider to Have a Faculty Advisor

The District's purported justification for denying Retire the Raider equal access—its failure to recruit a "willing" faculty advisor—is inconsistent with the plain language of the EAA and gives government officials unfettered discretion over access to the forum, which is likely to lead to discrimination against student groups on the basis of the religious, political, philosophical, or other content of the speech in violation of the EAA.

First, the EAA was enacted with the express intent of protecting the ability of student-initiated religious clubs to meet at school on the same terms as other student clubs.[21] Because it is aimed at religious clubs, its sponsors were careful to avoid entangling public schools in religious activities.[22] To prevent such entanglement, the EAA "prohibits school 'sponsorship' of any religious meetings, § 4071(c)(2), which means that school officials may not promote, lead, or participate in any such meeting, § 4072(2)."[23] The EAA's sponsors expected teachers to follow school rules requiring them "simply to act only as safety monitors at such meetings, safeguarding school property and assuring the well-being of the students."[24]

The U.S. Supreme Court squarely addressed the faculty advisor issue in *Mergens*, holding that a school district's policy requiring student clubs to have a faculty sponsor did not justify the district's refusal to recognize a religious club.[25] Although the Court considered the risk of religious entanglement that could result from a faculty member serving as a sponsor for a religious club, the EAA directed that the solution was to exempt the club from the faculty sponsor requirement, not to deny the club official recognition.[26] Indeed, the EAA only permits school districts to assign a teacher, administrator, or other school employee to a meeting of a religious club "for custodial

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[21] *Mergens*, 496 U.S. at 239.

[22] S. REP. No. 98-357, at 40 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2348, 2386.

[23] *Mergens*, 496 U.S. at 253 (citing 20 U.C.S.A. §§4071-4072).

[24] S. REP. No. 98-357, at 9 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2348, 2355; *see also id.* at 2386 ("teachers serve only in a capacity that the Constitution will allow, in a custodial function to assure order, safety and health").

[25] *Mergens*, 496 U.S. at 232-33.

[26] *Id.* at 253.

purposes … to ensure order and good behavior," to avoid these Establishment Clause entanglement concerns.[27]

If religious clubs cannot be denied recognition for lack of a faculty advisor, then no club should be held to that requirement. Although Retire the Raider is not a religious club, it is entitled to the same treatment under the EAA as a religious club. The District is free to assign a teacher, administrator, or other school employee to a meeting of Retire the Raider for custodial purposes if it believes such supervision is necessary, but it cannot require a club to have a faculty advisor for the purpose of managing the club's finances or responding to emails on behalf of the club.[28]

Making student groups responsible for recruiting a faculty advisor in order to achieve official recognition also violates the EAA's nondiscrimination requirement. It disadvantages clubs espousing controversial, minority, or unpopular viewpoints. Not only is the pool of faculty members willing to advise a club espousing such views smaller than that willing to advise a club espousing majoritarian views, but faculty members may fear retaliation from the district if they volunteer to advise clubs that, like Retire the Raider, take stances contrary to the school district's position on an issue. Indeed, recent events demonstrate that teachers reasonably fear discipline for voicing opinions contrary to those of their districts.[29]

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[27] *Id.*

[28] *See Sease v. Sch. Dist. of Philadelphia*, 811 F. Supp. 183 (E.D. Pa. 1993) (holding that high school gospel choir's activities were religious and thus, having school employee as its sponsor and participant violated Equal Access Act).

[29] *See e.g.*, Alec Johnson, *The Waukesha teacher who criticized the school district's 'Rainbowland' ban has been fired*, Milwaukee Journal Sentinel (Jul. 12, 2023), https://www.jsonline.com/story/news/education/2023/07/12/hearing-determines-fate-of-waukesha-teacher-who-criticized-rainbowland-ban/70392673007/; Nikolas Lanum, *North Carolina professor claims he was fired for criticizing critical race theory, files suit*, New York Post (Dec. 22, 2022) https://nypost.com/2022/12/22/dr-david-phillips-sues-ncgs-claims-he-was-fired-for-criticizing-critical-race-theory/; Chris Ullery, *Central Bucks LGBTQ students, allies protest over teacher suspension, removal of Pride flags and bullying*, Bucks County Courier Times (May 11, 2022) https://www.phillyburbs.com/story/news/education/2022/05/11/central-bucks-

The Wolfe sisters' experience illustrates the difficulty clubs expressing minority viewpoints face in recruiting faculty advisors. Their attempts to identify a willing faculty advisor were repeatedly obstructed by Principal Clements and other school officials who opposed the club's viewpoint. For example, a member of the high school faculty initially volunteered to serve as an advisor to the club in 2020, but then changed their mind, informing the sisters that "Mr. Clements told me that he doesn't want staff involved in the initiative." Verified Complaint ¶ 70. Other members of the faculty have declined to serve as the advisor because they were told by a supervisor to not get involved with Retire the Raider. *Id.* ¶ 71. District officials' actions have chilled faculty and staff from being willing to serve as an advisor to the club. These officials' efforts to prevent Retire the Raider from meeting the District's threshold requirement to be officially recognized as a student club constitute content and viewpoint discrimination in violation of the EAA.[30]

But even if school administrators did not actively obstruct Retire the Raider's efforts to recruit a faculty advisor, the advisor requirement would still create a significant risk of viewpoint discrimination. In other contexts, courts have held that conditioning access to a limited public forum on a government employee's support for or approval of the speaker's views is unconstitutional due to the unfettered discretion it affords government officials.[31] And the U.S.

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[30] *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination.").

[31] *See Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6th Cir. 2010) (requirement that organization secure sponsor to hold event inside City Hall was unreasonable and "placed the plaintiffs' request at the mercy of the unfettered discretion of those officials authorized to grant access"); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1073 (4th Cir. 2006) (policy giving school administrators discretion to waive fee for access to forum created risk of viewpoint discrimination).

Supreme Court has held that requiring majoritarian approval for use of a limited public forum is antithetical to the doctrine of viewpoint neutrality.[32]

In lieu of requiring student groups to recruit a "willing" faculty advisor, the school could appoint staff or administrators to serve as faculty advisors for student groups unable to obtain advisors on their own. Indeed, Principal Clements stepped in to "chaperone" the Retire the Raider meetings when the club was unable to find an advisor. Verified Complaint ¶¶ 78, 80. But he refused to serve as a faculty advisor, whose duties include supervising club meetings on a regular basis, approving flyers for posting on a school bulletin board, and screening email contacts. The District has provided no explanation for why Principal Clements could not serve these functions or why a faculty advisor is even necessary to these functions. In the absence of any explanation, and considering the comments Principal Clements made to the faculty member the Wolfe sisters initially recruited to serve as their club's advisor, the only conclusion to be drawn is that he did not want the club to have equal access to those benefits because he disagreed with the club's viewpoint on the school mascot controversy.

b. The District's Refusal to Recognize Retire the Raider as a Student Club Is Impermissibly Based on the Club's Controversial Viewpoint[33]

Viewpoint-based regulation is always "impermissible in any forum."[34] As the Third Circuit has explained, because "[v]iewpoint discrimination is anathema to free expression . . . if

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[32] *See e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent.").

[33] Because the District's refusal to officially recognize Retire the Raider violates the Equal Access Act, the Court need not decide whether it also violates the First Amendment. *See Mergens*, 496 U.S. at 247.

[34] *See Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 436 (3d Cir. 2019); *see also Mazo v. New Jersey Sec'y of State*, 54 F.4th 124, 149 (3d Cir. 2022) ("Because

the government allows speech on a certain subject, it must accept all viewpoints on the subject . . . even those that it disfavors or that are unpopular."[35]

A fundamental principle of constitutional law is that viewpoint discrimination is the antithesis of free expression. Accordingly, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[36] This constitutional ban on viewpoint discrimination is no less obligatory where a governmental actor seeks to deny access to a limited public forum—*i.e.*, a forum "reserv[ed] . . . for certain groups or for the discussion of certain topics."[37]—based on a group's viewpoint.[38]

This fundamental principle is equally applicable to students in a school setting. The case law confirms that where schools establish limited public forums by permitting even one

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regulation of particular views is especially offensive to the First Amendment, viewpoint discrimination is generally not permitted under any circumstances.").

[35] *Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny County*, 653 F.3d 290, 296 (3d Cir. 2011) (internal citations omitted).

[36] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citation omitted).

[37] *Id.* at 829.

[38] *Id.* at 829-30; *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993). Where a speaker fulfills the requirements for access to a limited public forum, the governmental actor bears the "heavy" burden of proving that denial of access is not viewpoint discriminatory. *Healy v. James*, 408 U.S. 169, 184 (1972). To satisfy its burden, the governmental actor may not point to the fact that some may find the speaker's viewpoint disagreeable: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citations omitted); *see also Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 296 (3d Cir. 2011) ("Viewpoint discrimination is anathema to free expression and is impermissible in both public and nonpublic fora. So if the government allows speech on a certain subject, it must accept all viewpoints on the subject, even those that it disfavors or that are unpopular.") (internal citations omitted).

noncurricular group to meet, the First Amendment protects students from viewpoint discrimination in the exercise of their rights under the EAA to form other non-curricular groups.[39]

Under the EAA, when a school allows noncurriculum-related student clubs to use school facilities for meetings, posting flyers, and advertising their clubs, it creates a limited public forum and cannot deny access to student groups based on their viewpoints.[40] The District's policy that clubs must recruit a "willing" faculty advisor to be officially recognized as a student club is inherently viewpoint discriminatory. The policy gives preferential treatment to groups that are voluntarily supported by the District's faculty members and denies access to student groups that fail to garner such support. It also bars student groups like Retire the Raider that are unable to recruit a faculty advisor due to their viewpoint from participating in the forum.

The District's stated basis for refusing to recognize Retire the Raider as a student club is also pretextual. District officials instructed faculty not to serve as advisors to the club. Accordingly, even if the "willing" faculty advisor requirement were not inherently viewpoint discriminatory, denying Retire the Raider access to the forum based on its inability to comply with this requirement would be viewpoint discriminatory given school officials' efforts to prevent Retire the Raider from meeting the faculty advisor requirement.[41] By discouraging faculty members from serving as the advisor to Retire the Raider, the District effectively blocked Retire the Raider from enjoying the same privileges and benefits that are available to other school clubs.

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[39]*Donovan* v. *Punxsutawney Area School Bd.*, 336 F.3d 211 (3d Cir. 2003) (Bible club); *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002) (Bible club); *see also Healy*, 408 U.S. 169 (advocacy group).

[40] *Mergens*, 496 U.S at 236.

[41] *See PLYV*, 653 F.3d at 297 ("[T]he recitation of a nondiscriminatory rationale" for suppressing certain speech "is not sufficient standing alone because it could be a cover-up for unlawful discrimination.").

Because the District's actions are motivated by a disagreement with Retire the Raider's message, the District is discriminating based on viewpoint and therefore violating students' rights to free expression. The advisor policy on its face violates the EAA and First Amendment by conditioning official recognition of student clubs on the willingness of a District employee to be actively involved as an advisor for a particular club. The actions by District officials to hinder the Wolfe sisters' efforts to recruit a faculty advisor demonstrate how the policy can be manipulated to exclude clubs with viewpoints school officials oppose. Sloane is thus likely to succeed on the merits of her claim that the District's refusal to provide Retire the Raider with equal access to school facilities violates the EAA and First Amendment.

II. Defendants' Refusal to Recognize the Retire the Raider Club Is Causing Irreparable Injury to Sloane

Sloane will be irreparably harmed if she is not permitted to exercise her First Amendment right to express her viewpoint regarding the insensitivity of the Twin Valley High School logo and mascot.[42] Courts have also held that the deprivation of the statutory rights guaranteed by the EAA is an irreparable injury: "The [EAA] protects free speech rights . . . . [T]he Act protects expressive liberties, and we therefore take guidance from the Supreme Court's oft-quoted statement that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[43]

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[42] *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997) (where plaintiffs are likely to prevail on merits on violation of constitutional rights (here voting and association) "it clearly follows that denying them preliminary injunctive relief will cause them to be irreparably injured"); *Beattie v. Line Mountain Sch. Dist.*, 992 F. Supp. 2d 384, 396 (M.D. Pa. 2014) ("Deprivation of a constitutional right alone constitutes irreparable harm as a matter of law, and no further showing of irreparable harm is necessary"); *Musser's Inc. v. United States*, No. 10-4355, 2011 WL 4467784, at *8 (E.D. Pa. Sept. 26, 2011) (noting that "[d]eprivation of a constitutional right has been recognized [by the Third Circuit] as irreparable harm").

[43] *Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.3d 839, 872 (2d Cir. 1996) (quotations omitted); *see also Boyd Cnty. High Sch. Gay Straight All. v. Bd. of Educ.*, 258 F. Supp. 2d 667,

In this case, Sloane is not suffering merely threatened injury; she is suffering actual irreparable injury. Courts addressing EAA claims have recognized that the "high-school setting creates harms aside from the damage to the [student group's] First Amendment rights."[44] In the absence of expedited injunctive relief, students may graduate before the litigation is concluded, thereby robbing them of the opportunity to lead or be involved in a club in high school.[45] Indeed, Arden, Sloane's sister and the founder of the Retire the Raider club, graduated from Twin Valley High School in 2022 without ever receiving official recognition for the club. Verified Complaint ¶¶ 32-33. "Monetary compensation or declaratory relief awarded months or years from now is unlikely to repair the damage of missed opportunities for [the Plaintiff] to fully participate in the high school experience."[46] Every day that the District refuses to allow Retire the Raider the privileges and benefits of official club status deprives Sloane of the opportunity to exercise her right to free speech.

III. Balancing of the Factors under the Preliminary Injunction Standard Weighs in Favor of the Requested Relief

As explained above, the deprivation of the constitutional right to free expression is an especially acute injury. The constitutional scope to the ongoing injury in this case tips the balance in favor of granting Sloane preliminary injunctive relief.

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692 (E.D. Ky. 2003); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1149 (C.D. Cal. 2000). !

[44] *Bible Club v. Placentia-Yorba Linda School Dist.*, 573 F. Supp. 2d 1291, 1300 (C.D. Cal 2008).

[45] *Id.* (issuing preliminary injunction directing school district to grant Bible Club access to school facilities); *ALIVE v. Farmington Pub. Sch.*, No. 07-12116, 2007 WL 2572023, *5–6 (E.D. Mich. 2007) (same); *Colin*, 83 F. Supp. 2d at 1151 (issuing preliminary injunction requiring school board to recognize gay-straight alliance club).

[46] *Bible Club*, 573 F.Supp.2d at 1300.

The balance is tipped even further because the requested relief would cause the District no harm at all. It would not compel the District to do anything beyond the three functions for which it has said an advisor is necessary: locking up District facilities after meetings, managing inquiries made via the school's website about the club, and managing the club's money and spending. The District can appoint an administrator or staff member to perform these functions. Given the significant educational value of extracurricular activities, the requested relief would allow the District to provide a more optimal educational environment for its students.[47]

The public interest strongly favors granting Sloane's motion. "In the absence of legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights."[48] Sloane wishes for official recognition of the Retire the Raider club so that students can meet to discuss issues related to cultural competency and work to educate students and community members about indigenous culture. As Retire the Raider will work to address potential racial sensitivities at Twin Valley High School, the group will serve the public's interest in combating discrimination.[49]

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant the requested preliminary injunctive relief.

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[47] *See Bible Club*, 573 F. Supp. 2d at 1302 (noting that non-curricular clubs augment schools' educational missions by "offer[ing] students a new perspective through which to interpret the curriculum as well as a reason to be involved in school past the last class bell rings").

[48] *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997); *see also Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 178 (quoting same).

[49] *Cf.*, *Colin*, 83 F. Supp. 2d at 1151 ("Since the Gay-Straight Alliance seeks to end discrimination on the basis of sexual orientation, a preliminary injunction requiring the Board to recognize the club would be consistent with state public policy and in the public interest.").

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s/ Richart T. Ting
Richard T. Ting (PA No. 200438)

/s/ Sara J. Rose
Sara J. Rose (PA No. 204936)
ACLU OF PENNSYLVANIA
PO Box 23058
Pittsburgh, PA 15222
(412) 681-7736
rting@aclupa.org
srose@aclupa.org

/s/ Michael E. Neminski
Michael E. Neminski (PA No. 333172)
BAKER & HOSTETLER LLP
1735 Market Street
Suite 3300
Philadelphia, PA 19103-7501
(215) 568-3100
mneminski@bakerlaw.com

Attorneys for Plaintiffs