IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 10-0109

RENEE GRIFFITH Plaintiff and Appellant, and BUTTE SCHOOL DISTRICT NO. 1, CHARLES UGGETTI AND JOHN METZ, Defendants and Appellees.	)))))))))

ORIGINALLY ON APPEAL FROM THE
MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY
THE HONORABLE GREGORY R. TODD

PLAINTIFF AND APPELLANT'S BRIEF

Attorney for Plaintiff/Appellant

William J. O'Connor II
O'Connor & O'Connor, P.C.
208 North Broadway, Suite 412
Billings, Montana 59101
406-252-7127
406-252-7059 (fax)
Bill@lawmt.us

Participating Attorney for
THE RUTHERFORD INSTITUTE
Attorney for the Appellant

Attorneys for Defendants/Appellees

Debra A. Silk,
Tony C. Koenig
Montana School Boards Association
863 Great Northern Blvd., Suite 301
Helena, Montana 59601
406-442-2180
406-442-2194 (fax)
dsilk@mtsba.org
tkoenig@mtsba.org

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ISSUES PRESENTED FOR REVIEW

I. Did the District Court err in ruling that the claims of the Plaintiff-Appellant for violations of her state and federal constitutional rights to free speech and freedom of religion were barred by the provision of the Montanan Human Rights Act making relief under the Act the exclusive remedy for discrimination covered by the Act?

II. Should summary judgment be entered in favor of the Plaintiff-Appellant on her claims that the Defendants-Appellees violated her rights to free speech and free exercise of religion when they forbade her from making a valedictory speech containing brief and non-proselytizing references to religion?

STATEMENT OF THE CASE

This case is an action for relief for deprivations of rights secured by the United States and Montana Constitutions and for violations of rights provided by state and federal civil rights statutes. The Plaintiff-Appellant, Renee Griffith (hereafter "Griffith"), filed her Complaint in the Montana Thirteenth Judicial District Court, Yellowstone County, on April 16, 2009, against Defendants-Appellees Butte School District No. 1 (hereafter "the District"), Charles Uggetti (hereafter "Uggetti"), and John Metz (hereafter "Metz"). The Complaint alleged claims on behalf of Griffith (1) for a violation of the Montana Human Rights Act, Mont. Code Ann. §§ 49-2-101, et seq.; (2) for violation of rights under Mont. Code Ann. §§ 49-3-101, et seq.[1]; (3) for violation of rights under Mont. Const. Art. II, §

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1 Griffith abandoned her claim under the Government Code of Fair Practices Act in the District Court, and this claim is not at issue in this appeal.

5; (4) for violation of Griffith's rights under Mont. Const. Art. II, § 7; (5) under 42 U.S.C. § 1983 for a deprivation of Griffith's rights under U.S. Const. amend. 1; and (6) under 42 U.S.C. § 1983 for a deprivation of Griffith's right to equal protection under U.S. Const. amend. 14. The parties filed cross-motions for summary judgment with supporting briefs. On July 14, 2009, the District Court entered an Order granting the Defendants' motion for summary judgment as to all of Griffith's claims. Griffith timely filed her notice of appeal.

STATEMENT OF FACTS

Griffith attended Butte High School, Butte School District No.1, and was a senior during the 2007-2008 school year. She was scheduled to graduate in May 2008 (Griffith Aff. ¶ 1). Along with several other classmates, she achieved the distinction of being a valedictorian of her class by attaining a 4.0 grade point average.

When Metz informed Griffith and the other students that they were co-valedictorians, he told them that by virtue of their accomplishments they were allowed the opportunity to speak at the May 29, 2008 graduation ceremony. This was in accord with District policy which provides that "[t]he school administration may invite graduating students to participate in high school graduation exercises according to academic class standing or class officer status." (Butte School Dist. Policy 2333). Griffith was one of the valedictorians who stated a desire to speak at

graduation (Griffith Aff. ¶ 3). Griffith knew that the Butte High School had a policy, custom and practice of allowing valedictorians of each graduating class to give a speech, address, or remarks at their graduation ceremony. This policy, custom and practice was common knowledge in the community, and was confirmed for Griffith by her experience with a cousin, who had been a Butte High School valedictorian, and at the 2007 graduation ceremony (Griffith Aff. ¶ 4).

When the valedictorians were informed that they could speak at graduation, they were told that the remarks had to be appropriate, in good taste and grammar, and should be relevant to the closing of our high school years, but the actual style of speech and the topic itself was left to each writer (Griffith Aff. ¶ 6). Because of time constraints and the number of valedictorians, Griffith was asked to give her remarks in conjunction with another valedictorian, Ethan Keeler. They decided to prepare a speech in which they would speak alternately using the theme of what we learned during our time in school (Griffith Aff., Exhibit A).

Among the remarks Griffith wrote and intended to give was the following passage:

> I learned to persevere these past four years, even through failure or discouragement, when I had to stand for my convictions. I can say that my regrets are few and far between. I didn't let fear keep me from sharing Christ and His Joy with those around me. I learned to impart hope, to encourage people to treat each day as a gift. I learned not to be known for my grades or for what I did during school, but for being committed to my faith and morals and being someone who lived with a purpose from God with a passionate love for Him.

(Griffith Aff. ¶ 10). Griffith believed that she was compelled by her religious beliefs that she must recognize and acknowledge the role of God and Christ in her life; she could not accurately convey her high school experience without mentioning the reason behind her accomplishments (Griffith Aff. ¶ 11).

Prior to the graduation ceremony, Griffith and Ethan met with a speech coach, Stephen Riordan, who the school had asked to assist student. On May 21, 2008, he informed Griffith that she could not include the religious references to "Christ" and "God" in her speech because there was a state law forbidding these religious references (Griffith Aff. ¶ 13). Two days later, Griffith again met with Riordan, who told Griffith that although he had no objection to her giving the remarks as written, including the religious references, he had been told by District Superintendent Uggetti that religious references could not be included in any speech given at graduation (Griffith Aff. ¶ 14).

On May 27, 2008, Griffith and her father met with Uggetti. At that meeting, Uggetti showed the Griffiths copies of School District policies and told them that religious references would not be allowed in student speeches at graduation. At that time, the School District had in place a policy respecting graduation ceremonies which recognized the free speech rights of graduations speakers and affirmatively disclaimed any endorsement by the School or the District of the content of speeches. The policy provided that it was to be printed in graduation

programs that presentations constitute the "private expression" of participants and that the School Board "does not endorse religion[.]" (Butte School Dist. Policy 2333; Appendix 2).

On May 28, 2008, Uggetti summoned Griffith to his office and informed her that it was Butte High School's policy not to allow any reference to religion in graduation speeches, and that she should remove the religious references in her speech. He proposed changes to her remarks and told Griffith she should make the changes to avoid any potential controversy. Uggetti proposed that Griffith change what she wrote as follows:

> I learned to persevere these past four years, even through failure or discouragement, when I had to stand for my convictions. I can say that my regrets are few and far between. I didn't let fear keep me from sharing **my faith** with those around me. I learned to impart hope, to encourage people to treat each day as a gift. I learned not to be known for my grades or for what I did during school, but for being committed to my faith and morals and being someone who lived with a purpose, a purpose derived from my faith and based on a love of **mankind.**

(Griffith Aff. ¶ 16, Exhibit B). Uggetti stated that although he was ultimately in charge of all that goes on in the school district, he would forward Griffith's decision about revising the content of my speech to Butte High School Principal John Metz, a Defendant-Appellee herein, and let him have the final say.

Griffith chose not to change what she had written because she did not believe she could speak to the important things she learned in school without acknowledging Christ and God, and informed Uggetti of this fact. Uggetti stated

he would relate her decision to Metz and that Metz would most likely not allow Griffith to speak at graduation unless she removed the religious references (Griffith Aff. ¶ 19).

At graduation practice, when the time came for the valedictorians to practice their speeches, Metz called Griffith and Ethan Keeler aside. Metz told them Uggetti had already informed him of the situation and told Griffith she must either change her speech in accordance with Uggetti's recommendations, make other changes removing the religious references, or not speak. Metz said that in order for her to be allowed to speak, it was mandatory that Griffith change the portion of her speech containing religious references (Griffith Aff. ¶ 20). Griffith responded that she would not change the speech and asserted that she had a legal right to give the remarks she composed. Metz said that regardless of that, he would not let her speak unless Griffith took out the religious references (Griffith Aff. ¶ 21).

When the valedictory addresses were given at the May 29, 2009 graduation ceremony, Ethan Keeler was permitted to speak with another partner. Griffith was not permitted to speak because she would not modify her speech (Griffith Aff. ¶ 22).

As required by District Policy, the printed program for the graduation ceremony contained the disclaimer that the presentation of participants in

graduation does not necessarily reflect any official position of the District and is the private expression of the participants (Plaintiff's Reply Brief, Ex. 2 p. 12).

On July 23, 2008, Griffith filed a charge of discrimination with the Montana Human Rights Bureau. The charge alleged that the District, Uggetti and Metz had discriminated against Griffith on the basis of creed or religion in violation of Mont. Code § 49-2-307. On January 20, 2009, the Bureau issued a notice dismissing the complaint, which was accompanied by the report of a Bureau investigator (Notice of Dismissal, ¶ 8). The Bureau's dismissal order found no reasonable cause for the complaint, finding that the allegations of the complaint were not supported by a preponderance of the evidence. The investigator's report first recommended dismissal of the charges against Uggetti and Metz because the state anti-discrimination statute only applies to governmental agencies, not individuals. The investigator proceeded to the discrimination charge, but made clear that any claim regarding the free speech rights of Griffith were not being considered because the Bureau "has no authority to investigate free speech violations and this report does not address that issue." Final Investigative Report, p.4. The investigator's report concluded that no discrimination occurred because the District applied a rule forbidding any and all religious references be removed from student graduation remarks even-handedly.

Griffith filed her action in District Court, and included claims based upon a deprivation of her constitutional rights to free speech which were excluded from consideration by the Bureau. On cross-motions for summary judgment, the District Court granted the motion of the District, Uggetti and Metz and denied Griffith's motion. As to Griffith's claims in Counts III and IV of the Complaint that she was deprived of her rights to free exercise of religion and free speech under Mont. Const. Art. II, §§ 5 and 7, the District Court ruled that the claims were barred by the "exclusive remedy" provision of the Montana Human Rights Act ("MHRA"), Mont. Code Ann. § 49-2-512(1). It held that the "gravamen" of Griffith's complaint on these claims under the state constitution constituted discrimination in education, and so the exclusive remedy for those claims was under the MHRA and it could not entertain claims under different provisions of the law (District Court Order, Page 5).

It also held that the claims under federal law in Counts V and VI of the Complaint, alleging deprivations of Griffith's constitutional rights to free speech and equal protection were barred by the "exclusive remedy" provision of Mont. Code Ann. § 49-2-512(1). Despite recognizing that there is a presumption that state courts must enforce federal laws and remedies, including 42 U.S.C. § 1983, the District Court ruled that § 49-2-512(1) is a "neutral jurisdictional rule" that applies equally to all types of claims where the underlying allegations would

constitute unlawful discrimination. As such, the "exclusive remedy" provision also operated to bar Griffith's claims for relief under federal law (District Court Order, page 8).

The District Court then decided that the Defendants' actions in preventing Griffith from giving the remarks at her graduation that she wrote and desired to express did not violate the Establishment Clause or constitute unlawful discrimination under Mont. Code Ann. § 49-2-301(1). It held that the District's policy of "not permitting expression of personal religious views in student speeches during the graduation ceremony provided a reasonable basis for the Defendants to insist that Griffith and all speakers refrain form expressing their personal religious beliefs during the graduation ceremony." (District Court Order, page 13). The District Court held that this policy was applied evenly to all students and intended to maintain neutrality toward religion, so its application to forbid Griffith from including brief references to her Christian faith in her remarks did not constitute discrimination and did not violate the Establishment Clause (District Court Order, pp. 12, 13).

Finally, the District Court ended its Order with a significant quote from "The King James Bible." It is not clear if this quote was to augment its legal reasoning, demonstrate the court's attitude of some division of rights or was meant as humor.

However it was designed, it was perceived by Griffith and her family as demeaning to her and her beliefs.

STANDARD OF REVIEW

The District Court granted the Defendants' motion for summary judgment as to each of Griffith's claims and denied Griffith's summary judgment motion on those claims. This Court conducts *de novo* review of summary judgment orders, performing the same analysis as does a district court pursuant to Mont. R. Civ. Pro. 56. *Cole v. Valley Ice Garden, LLC*, 2005 MT 115, 327 Mont. 99, 113 P.3d 275.

SUMMARY OF THE ARGUMENT

The District Court erred in holding that Griffith's claims under the state and federal constitution were barred by the exclusive remedy provision of Mont. Code § 49-2-512(1). The gravamen of claims for violation of ones fundamental right to free speech, free exercise of religion and equal protection of the law is not the same as claims for unlawful discrimination under the MHRA. MHRA claims involve intentional, status-based adverse action, while the constitutional claims at issue here are based upon an unwarranted interference with the rights to free speech and free exercise of religion. Moreover, the District Court's dismissal of Griffith's claims under 42 U.S.C. § 1983 violates the Supremacy Clause by denying Griffith a state court forum for federal law claims.

Because these constitutional claims must be reinstated, this Court should also proceed to resolve Griffith's summary judgment motion on those claims. Griffith is entitled to judgment on her free speech claims because the censorship of her speech was based upon viewpoint and was not justified by reasonable, much less a compelling, interest. Griffith's right to freely exercise her religion also was violated because she was denied the benefit and privilege of giving her address at graduation because of religiously-inspired conduct. Finally, Griffith's right to equal protection of the law was violated because she was discriminated against on the basis of the viewpoint of her speech.

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPLYING THE "EXCLUSIVE REMEDY" PROVISION OF THE MHRA TO DISMISS THE CAUSES OF ACTION UNDER THE FEDERAL AND STATE CONSTITUTIONS.

The District Court dismissed all of Griffith's claims, Counts III through VI, which asserted violations and deprivations of her constitutional rights.[2] It relied upon the following provision of Mont. Code Ann. § 49-2-512(1) as a basis for barring these claims:

> (1) The provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of chapter 3 or this chapter, including acts that may otherwise also constitute a violation of the

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2 The District Court did consider one aspect of Griffith's claim under Count VI of the Complaint, but held that the Defendants did not violate the Establishment Clause in forbidding Griffith from giving her chosen remarks.

> discrimination provisions of Article II, section 4, of the Montana constitution or 49-1-102. A claim or request for relief based upon the acts may not be entertained by a district court other than by the procedures specified in this chapter.

Applying this Court's decision in *Saucier v. McDonald's Restaurants of Montana, Inc.*, 2008 MT 63, 342 Mont. 29, 179 P.3d 481, the District Court concluded that the "gravamen" of Griffith's claims to deprivations of her constitutional rights to free speech, freedom of religion and equal protection of the law were the same as a claim for discrimination in education made under Mont. Code § 49-2-307(1) and Griffith's sole remedy for these deprivations was under the procedure set forth in the MHRA (District Court Order, p. 9).

A. None of Griffith's Constitutional Claims Constitute "Discrimination" Covered by the MHRA and None of Those Claims Are Barred by the Exclusive Remedy Provision of the MHRA.

As held in *Saucier*, ¶ 39, "the MHRA establishes procedures and remedies, separate from tort law, for legal redress *of conduct which falls within the definition of unlawful discrimination.*" (Emphasis added). Thus, the *Saucier* decision held that tort claims based upon sexual contact with an employee fell outside the MHRA's definition of discrimination and were not barred by § 49-2-512(1).

The Montana Human Right Division itself recognized that Griffith's claims for violation of her rights to free speech and freely exercise her religion were not within its competence under the MHRA. The Division's investigator made clear that any claim regarding the free speech rights of Griffith were not being

considered because the Division "has no authority to investigate free speech violations and this report does not address that issue." (Final Investigative Report, p. 4.)

The foundation for this finding is found in the legislation itself. Freedom from discrimination is a statutory right, and this Court has specifically declined to hold that discrimination is a fundamental right in Montana. *Romero v. J&J Tire* (1989), 238 Mont. 146, 150-51, 777 P.2d 292, 295. However, freedom of speech and freedom of religion under the First Amendment to the Constitution of the United States and Mont. Const. Article II, §§ 5 and 7 are fundamental rights. *Small v. McRae* (1982), 200 Mont. 497, 651 P.2d 982. Accordingly, access to the court, as limited by the District Court below, was in error.

The District Court's ruling was based upon its finding that "the same set of facts form the basis for each of" Griffith's causes of action under the state and federal constitutions and are the basis for her MHRA discrimination claim. (District Court Order p.7) But *Saucier* recognized that when the Division concluded that there was no discrimination under the MHRA, but there were causes of action not sounding in discrimination, the other causes of action are not barred. *Saucier*, ¶ 73. In the instant case, the Division found that Griffith's claim did not sound in discrimination, but was "a free speech violation" over which it had no jurisdiction. The fact that there may be facts in common, as there were in

Saucier, does not bar the causes of action available to vindicate fundamental rights.

The District Court's reasoning is contrary to the logic of the *Saucier* case. The District Court based its decision on the fact that the fundamental rights under the Federal and State Constitutions are "more properly characterized as discrimination of religion and speech claims." District Court Order, p. 7. This is contrary to the findings by the investigator for the Division who found that the claims sounded in freedom of speech and religion, not discrimination. The fact that this incident took place with the government actors being school administrators does not lessen the right. Students do not lose their fundamental rights upon entering a public educational setting. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). This case, to paraphrase *Saucier*, goes beyond any reasonable conception of discrimination and falls outside even the Division's own definition of discrimination and into more fundamental rights.

It is not procedural allegations that determine "gravamen". Instead, "the gravamen depends on the nature of the alleged conduct, and not upon the technical format of the complaint or procedural aspects of the case." *Saucier*, ¶ 57. Where the grounds for a claim are different from the grounds underlying the kind of discrimination forbidden by the MHRA, the claim is not barred. "[A] contrary

conclusion under such circumstances would result in a denial of any procedure or remedy[.]" *Saucier*, ¶ 76. In this case, the gravamen of the claims in Counts III through VI is that the Defendants engaged in unconstitutional censorship of speech and prevented Griffith from exercising her constitutional right to freely exercise her religion.

The nature of the alleged conduct sounds more as a constitutional tort than discrimination. The interest at stake with respect to Griffith's constitutional claims for deprivation of her right to free speech and free religion is government suppression of the exercise of fundamental rights. The United States Supreme Court has characterized claims under 42 U.S.C. § 1983 for deprivations of constitutional rights as "constitutional torts." *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986). This Court similarly recognized that a claim for relief based upon deprivations of rights under the Montana Constitution is analogous to a tort action to enforce and ensure the effectiveness of the provision of the state constitution at issue. *Dorwart v. Caraway*, 2002 MT 240, ¶ 44, 312 Mont. 1, 15, 58 P.3d 128, 136.

The District Court's holding that because a claim is filed before the Division, the plaintiff is barred from pursuing other legal claims not sounding in discrimination is without basis in the legislation, history or case law. Nowhere is it evident that simply because a claimant may have, out of caution or mistake, sought

relief under the MHRA, the legislature intended that the claimant be barred from pursuing other claims to which she is entitled. *Saucier* holds the opposite. *Saucier*, ¶¶ 57, 74-76.

More to the point, the interest protected by the "tort" actions under the constitutional provisions at issue here are wholly distinct from the interests protected by the anti-discrimination provisions of the MHRA. "Discrimination" covered by the MHRA's education provision constitutes disparate treatment of a person in the terms of conditions of an educational institution where the treatment is based upon the race, creed, religion, sex, marital status, color, age, physical disability, or national origin of that person. This anti-discrimination provision reflects the public policy against treating people less favorably because of their status, considerations which are irrelevant to the provision of the benefits of the educational institution.

By distinction, the free speech and free religion provisions of the federal and state constitutions protect citizens in the exercise of freedoms that are deemed fundamental to individual liberty. The First Amendment and Mont. Const. Art. II, § 7, discussed in more detail *infra*, protect the rights of citizens to free speech and free expression. "A fundamental purpose of the First Amendment is to foreclose governmental control or manipulation of the sentiments uttered to the public. With only carefully calibrated exceptions, "the First Amendment means that government

has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Main Road v. Aytch*, 522 F.2d 1080, 1087 (3d Cir. 1975) (quoting *Police Dept. of Chicago v. Mosely*, 408 U.S. 92, 95 (1972)). Similarly, the purpose of the constitutional protection to free exercise of religion embodied in the First Amendment and Mont. Const. Art. II, § 5 is to to "foreclose state interference with the practice of religious faiths[.]" *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982).

The guarantees of free speech and free exercise of religion apply regardless of whether the government decision infringing on the right are based on the particular status of the aggrieved individual. Whereas action intentionally based upon protected status, i.e., race, sex, or color, is a requirement for a discrimination claim under the MHRA, such status-based action is not required for a claim grounded on a deprivation of the constitutional rights to free speech or free exercise of religion. The gravamen of a claim based upon those rights is the restriction of the right itself. Thus, the gravamen of Griffith's claims for deprivations of her state and federal constitutional rights are not the same as a claim for discrimination under the MHRA, and the District Court erred in holding that those claims (Counts III through VI of the Complaint) were barred by the exclusive remedy provision of Mont. Code Ann. § 49-2-512(1).

B. Application of the Exclusive Remedy Provision of the MHRA to Bar Claims Brought Under 42 U.S.C. § 1983 Violates the Supremacy Clause of the United States Constitution.

Even apart from the misapplication of the "gravamen" test, the District Court erred in applying Mont. Code Ann. § 49-2-512(1) to dismiss Griffith's claims under 42 U.S.C. § 1983 for deprivations of her rights protected by the United States Constitution set forth in Counts V and VI of the Complaint. First, the history of § 49-2-512(1) strongly indicates that does not apply to bar federal law causes of action. That section was a response to the decision in *Drinkwalter v. Shipton* (1987), 225 Mont. 380, 732 P.2d 1335, which held that a plaintiff alleging workplace discrimination could bypass the procedural and administrative requirements put forth by the MHRA simply by basing their workplace discrimination on the Montana State Constitution rather than provisions of MHRA. The legislature quickly responded by passing an amendment to the MHRA that added an exclusive remedy provision. The following rationale was given by the crafter of that amendment:

> On February 23, 1987, the Montana Supreme Court decided the case of *Drinkwalter v. Shipton.* Under the holding of that case, persons alleging acts that violate the discrimination provisions of the Human Rights Act and the Governmental Code of Fair Practices need no longer vindicate their rights under the provisions of these acts. Rather, they are allowed to completely bypass the administrative procedures set up by statute and go directly to court alleging tort theories of recovery grounded on the individual dignities clause of the constitution. This amendment would make clear that the statutory

> procedures for discrimination are exclusive remedies and cannot be bypassed.

Harrison v. Chance (1990), 244 Mont 215, 219-20, 797 P.2d 200, 202-03.

Thus, the "exclusive remedy" amendment was intended to apply only to additional state law claims and that it was not intended to impact on federal claims. Given the timing of the amendment and the statement on the rationale by its writer, it is fair to say that the amendment was a response to *Drinkwalter*. In *Drinkwalter*, plaintiff brought no federal claims and used alternate avenues of litigation to circumvent the administrative and procedural steps established in the MHRA. The situation presented in this case does not resemble the end-run at issue in *Drinkwalter*; Griffith filed a claim with the Montana Human Rights Bureau, allowed the administrative process to play itself out, obtained a right-to-sue letter, and has brought additional claims based on specific federal statutes and the U.S. Constitution as well as the Montana constitutional provision not dealing with "the individual dignity clause of the (Montana) Constitution." As Griffith did not bypass the provisions of the MHRA, it is clear that her ability to file additional federal claims is not limited by the intended reach of the exclusive remedy provision.

Second, the Supremacy Clause of U.S. Const. Art. 6, makes federal law "the supreme law of the land" and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. *Howlett v. Rose*,

496 U.S. 356, 367 (1990). Thus, "'[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.'" *Martinez v. State of Cal.*, 444 U.S. 277, 284 n. 8 (1980) (quoting *Hampton v. Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974)).

Additionally, "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983. A plaintiff, for example, may bring a § 1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the State's Constitution or statutes, and despite the fact that there are common-law remedies for trespass and conversion." *Zinermon v. Burch*, 494 U.S. 113, 124-125 (1990). The combined effect of these principles is that, contrary to the holding below, a state may not immunize state actors from § 1983 liability by providing an overlapping or complementary remedy. A plaintiff who is deprived of a federal constitutional right under color of state law is entitled to seek relief under 42 U.S.C. § 1983, and state courts are obligated to enforce that federal law. *Howlett*, 496 U.S. at 367.

The District Court avoided the requirements of the Supremacy Clause by citing to the decision in *Haywood v. Drown*, 129 S. Ct. 2108 (2009). In *Haywood*, the court considered whether a New York statute divesting state courts of jurisdiction over actions for damages against corrections officers applied to divest a state court of jurisdiction over a § 1983 action against a corrections officer. In holding that New York courts *could not* refuse to entertain § 1983 claims against corrections officers, the Court stressed that "state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law." 129 S. Ct. at 2114. The Court went on to write as follows:

> So strong is the presumption of concurrency that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction, . . .; and second, "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts," . . . . Focusing on the latter circumstance, we have emphasized that only a neutral jurisdictional rule will be deemed a "valid excuse" for departing from the default assumption that "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."

Id. (Citations omitted).

This case does not fall within the "narrow circumstances" in which a state law may be applied to prevent a state court of general jurisdiction from entertaining § 1983 claims. In *Haywood*, 129 S. Ct. at 2114 (quoting *Howlett*, 496 U.S. at 371), the Court ruled that "a State cannot employ a jurisdictional rule 'to

dissociate [itself] from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.'"[3] *Haywood* went on to hold that although New York had a policy that corrections officers not be burdened with suits for damages arising from their employment, "[t]he State's policy, whatever its merits, is contrary to Congress' judgment that *all* persons who violate federal rights while acting under color of state law shall be liable for damages." *Haywood*, 129 S. Ct. at 2115 (Emphasis in original).

Applying § 49-2-512(1) to bar Griffith's § 1983 claims would do violence to this principle. The decision of the District Court is that the implicit policy embodied in § 49-2-512(1) means that persons who allege facts that *might* fall within the ambit of the MHRA's definition of discrimination may only seek relief under that law and not under federal law. This is contrary to "Congress' judgment that *all* persons who violate federal rights while acting under color of state law shall be liable for damages." *Haywood*, 129 S. Ct. at 2115 (Emphasis in original.)

Moreover, the Supreme Court rejected the same reasoning employed by the District Court here to support its determination that application of the "exclusive remedy" provision of § 49-2-512(1) would involve a "neutral state rule." The District Court reasoned that because § 49-2-512(1) bars all kinds of actions, state

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3 The Plaintiff does not concede that § 49-2-512(1) and the "exclusive remedy" provision therein establishes a jurisdictional rule.

or federal, arising from MHRA-covered discrimination, it is neutral. The *Haywood* decision rejected this reasoning as follows:

> A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear. As we made clear in *Howlett*, "[t]he fact that a rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." 496 U.S., at 381. Ensuring equality of treatment is thus the beginning, not the end, of the Supremacy Clause analysis.

129 S. Ct. at 2116. Section 49-2-512(1) does not reflect an even-handed concern over subject-matter jurisdiction because it allows state courts to determine only *state law* discrimination claims, but would disallow state courts from hearing *federal law* fundamental rights claims.

The cases cited in *Haywood,* where it has been held that the burden of showing a "neutral rule" was met, involve rules wholly distinguishable from § 49-2-512(1). In two instances, rules denying state court jurisdiction over federal claims were based on the fact that one or both parties to the litigation were not residents of the state where the claim was brought. *Douglas v. New York, N.H. & H.R. Co.,* 279 U.S. 377 (1929); *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950). In another cited case, the Supreme Court allowed a state court to not hear a federal claim because the events that served the basis for the claim occurred outside of the state court's territorial jurisdiction. *Herb v. Pitcairn*, 324 U.S. 117 (1945). And in *Johnson v. Fankell,* 520 U.S. 911 (1997), the Supreme

Court upheld a state appeals court ruling that denial of a motion for summary judgment on a federal claim was not appealable under a state rule that applied uniformly to to appeals of summary judgment rulings in all types of cases.

Each one of the above situations is distinguishable from the rule relied upon to dismiss Griffith's federal claims. They involved broad rules which addressed the general administration of the courts as applied to all types of cases brought before the state's courts. It is this kind of "neutral rule" the Supreme Court had in mind when it indicated that some federal claims could be barred. The MHRA bar, however, as interpreted by the District Court, applies to specific types of suits which involve fundamental, federally-created rights.

The District Court's ruling on Griffith's § 1983 claims is wholly inconsistent with the mandates of the Supremacy Clause. As the Supreme Court wrote in *Haywood*, 129 S. Ct. at 2117, "having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy." Similarly, Montana having opened its courts to discrimination claims, is not at liberty to close those doors to analogous federal claims brought under § 1983. The decision below that that Counts V and VI of the complaint are barred must be reversed as contrary to the Supremacy Clause.

II. JUDGMENT SHOULD BE ENTERED IN FAVOR OF GRIFFITH ON HER CLAIMS FOR DEPRIVATION OF HER CONSTITUTIONAL RIGHTS.

Because the District Court's ruling on the applicability of § 49-2-512(1) must be reversed, this Court should also proceed to consider the materials of record and rule on the parties' competing summary judgment motions. For the reasons set forth below, Griffith is entitled to entry of judgment in her favor on each of the claims incorrectly dismissed by the District Court.

A. The Defendants Deprived Griffith of Her Rights Under the First Amendment's Free Speech Clause.

Count V of the Complaint asserts that the Defendants' refusal to allow Griffith to speak violated her rights under the free speech clause of the First Amendment to the United States Constitution, which is applicable to state actors. *Denke v. Shoemaker*, 2008 MT 418, ¶ 47, 347 Mont. 322, 338, 198 P.3d 284, 296. Relief is sought under 42 U.S.C. § 1983, which provides that a person who is deprived of a constitutional right by a person acting under color of state law is entitled to seek relief against the person(s) causing the deprivation. "Two elements are necessary to establish a cause of action under [§ 1983]: (1) the conduct complained of was engaged under color of state law, and (2) the conduct subjected the plaintiffs to the deprivation of rights, privileges, and immunities secured by the Constitution of the United States." *Brekke v. Volcker*, 652 F. Supp. 651, 654 (D. Mont. 1987).

There can be little doubt that the first element is satisfied here. The Defendants are a public school entity created and exercising powers granted by the State of Montana and two employees of the School District acting in the course and scope of their employment. The actions complained of unquestionably were engaged in under color of state law. *Clark by and through Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982).

The undisputed facts also demonstrate that the actions of the Defendants deprived Griffith of her right to free speech guaranteed by the First Amendment. Because Griffith sought to engage in expression on government property at an event organized by a governmental entity, her First Amendment rights depend upon the type of forum that existed in this case. *DiLoreto v. Downey Unif. Sch. Dist. Bd. of Ed.*, 196 F.3d 958 (9th Cir. 1999). "Forum analysis has traditionally divided government property into three categories: public fora, designated public fora, and nonpublic fora. . . . Once the forum is identified, we determine whether restrictions on speech are justified by the requisite standard." *Faith Center Church Evangelical Ministries v. Glover*, 480 F.3d 891, 907 (9th Cir. 2007).

In *Glover*, 480 F.3d at 908, the Court also recognized that Supreme Court decisions have identified another category – the "limited public forum" – to describe a nonpublic forum that the government intentionally has opened to certain groups or for the discussion of certain topics. *Accord: DiLoreto*, 196 F.3d at 965

(citing *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995)). "A limited public forum is a sub-category of the designated public forum, where the government opens a nonpublic forum but reserves access to it for only certain groups or categories of speech. *Hopper v. City of Pasco*, 241 F.3d 1067, 1074-75 (9th Cir. 2001). In a limited public forum, courts will uphold restrictions on speech only if the restrictions are viewpoint neutral and reasonable. *Glover*, 480 F.3d at 908, n. 8. Restrictions imposed on speech in a limited public forum must not be based upon the viewpoint of the speaker. *DiLoreto*, 195 F.3d at 965.

The nature of a forum depends upon the precise facts and circumstances of the case. A court must look to the policies and practices of a governmental entity to determine the nature of the forum, as well as the nature of the property and its compatibility with expressive activity. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). "The 'policy' and 'practice' inquiries are intimately linked in the sense that an abstract policy statement purporting to restrict access to a forum is not enough. What matters is what the government actually does – specifically, whether it consistently enforces the restrictions on use of the forum that it adopted." *Hopper*, 241 F.3d at 1075.

The facts of this case demonstrate that the Butte High School graduation ceremony was a limited public forum in that it had been opened to individual

expression by valedictorians. Griffith was told that she was to be allowed to give remarks at the graduation ceremony because she was one of several class valedictorians (Griffith Aff. ¶ 3). She has personal knowledge that it has been the practice of Butte High School and the District to allow class valedictorians to address the audience at graduation (Griffith Aff. ¶ 4). The school and District's practice was to give the valedictorians themselves the task of composing the remarks they desired to give.

By policy and practice, the graduation ceremony was a limited public forum because it opened the ceremony for expression by a limited group, *i.e.*, valedictorians of the graduating class. In *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1230-31 (D. Wash. 2007), *aff'd*, 580 F.3d 1087 (9th Cir. 2009), *cert. denied*, 2010 WL 1006063 (Sup. Ct. March 22, 2010), the court held that, for summary judgment purposes, there was sufficient evidence showing that a school had created a limited public forum for student expression at a high school graduation ceremony where it had a custom or policy of allowing wind ensemble students to choose a piece from their repertoire to play at graduation.[4] Similarly, valedictorians such as Griffith were granted access to the Butte High School graduation ceremony in order to engage in expression. The school and School

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4 In his dissent from the denial of certiorari in the *Nurre* case, Justice Alito also recognized that a limited public forum had been created for student expression at the graduation ceremony. *Nurre*, 2010 WL 1006063, at *2.

District policies, customs and practices show that a nonpublic forum, *i.e.*, the graduation ceremony, was made available to valedictorians in order to engage in personal expression.

As a valedictorian of Butte High School's Class of 2008, Griffith had a right and/or privilege under the First Amendment to address the audience in words of her choosing. The school could regulate her speech in this limited public forum only if (1) the limitation was not based upon the viewpoint of the speech and (2) the restriction was and reasonable in light of the purpose served by the forum. *DiLoreto*, 196 F.3d at 965.

The restrictions imposed by the Defendants upon Griffith which required that she change "Christ and His joy" to "my faith" and "from God with a passionate love for Him" to "a purpose derived from my faith and based on a love of mankind" deprived Griffith of her First Amendment right because the restrictions were based upon viewpoint. The Supreme Court has consistently held that censorship based on the religious character of speech is properly classified as viewpoint discrimination.[5] In *Lamb's Chapel v. Center Moriches Union Free*

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5 Although the Supreme Court uses the term "discrimination" to describe this form of censorship, it is clearly not discrimination covered by the MHRA. "Viewpoint discrimination is thus an egregious form of content discrimination. The 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." *Rosenberger*, 515 U.S. at 829. As discussed above, this form of censorship is not the kind of status-based discrimination covered by the MHRA.

School District, 508 U.S. 384 (1993), the Court held that a school district could not permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious perspective. *Id.* at 393. Similarly, in *Rosenberger*, 515 U.S. at 831, the Court held unconstitutional a university's refusal to fund a student publication because it addressed issues from a religious perspective. The Court explained: "Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." Finally, in *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), the Court found viewpoint discrimination where a public school permitted nonreligious groups to meet on school property after school but prohibited a Christian club from doing so. *Id.* at 107-09. The Court held that exclusion of a religious group amounted to impermissible viewpoint discrimination where the group sought only "to address a subject otherwise permitted under the [school district's policy], the teaching of morals and character, from a religious standpoint." *Id.* at 109. These cases stand for the proposition that if the government permits the discussion of a topic from a secular perspective, it may not shut out speech that discusses that same topic from a religious perspective. *See Nurre*, 580 F.3d at 1095, n. 6.

Griffith was the victim of viewpoint discrimination because she sought to address the subject of her speech topic, *i.e.*, what she learned in school, from her viewpoint which was a religious viewpoint. Viewpoint discrimination violates the First Amendment even in a limited public forum. *DiLoreto*, 196 F.3d at 598. The Defendants limited and closed off the forum to Griffith because of the viewpoint of her speech, and in doing so deprived Griffith of her constitutional right to free speech.

Although the District Court did not address the free speech claims, it indicated in its discussion of the Establishment Clause claim that the censorship was, in any event, justified because of the decision in *Cole v. Oroville Union High School*, 228 F.3d 1092 (9th Cir. 2000). In *Cole*, the court held that school officials did not violate the First Amendment by forbidding a high school valedictorian from delivering a proselytizing religiously-themed speech at a graduation ceremony. The essential grounds for the *Cole* decision was the court's conclusion that (1) in light of the school's control over the ceremony, allowing the proselytizing speech would have constituted government endorsement of religion, and (2) allowing the proselytizing speech would have coerced those in attendance to participate in a religious exercise. *Id.* at 1103-04.

Neither of the grounds underlying the *Cole* decision apply here. First, the District has made clear through a promulgated policy, reiterated in the printed

graduation program distributed at Griffith's graduation, that it does not endorse the speech given at graduation ceremonies and specifically that it "does not endorse religion[.]" Thus, Griffith's speech would have been wholly private speech which, far from being prohibited by the Establishment Clause, is affirmatively protected by the First Amendment. *See Board of Educ. of Westside Community Schools v. Mergens By and Through Mergens*, 496 U.S. 226, 250 (1990) ("there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."). Second, Griffith's speech was not proselytizing; it merely stated her thoughts and feelings concerning the importance of Christ and God in her life and, unlike the speech at issue in *Cole*, did not seek to covert listeners. As such, it would not have required listeners to engage in a religious exercise and so was not subject to censorship on that basis.

Each of the Defendants is liable under 42 U.S.C. § 1983 for causing this deprivation because the Answer admits that Uggetti and Metz told Griffith she must change her speech to remove the religious references (Ans. ¶ 7). Additionally, the Answer admits that Defendants Metz and Uggetti acted as

representatives of Butte School District No. 1 and that in requiring changes to Griffith's speech they were acting "pursuant to the policies and procedures of the Butte School District governing graduation speeches." (Ans. ¶ 7). Because the Answer admits that the viewpoint-based censorship of Griffith was pursuant to the policies of the School District, the School District also is liable for the deprivation. *Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004).

B. The Defendants Deprived Griffith of Her Right to Free Speech As Guaranteed by Mont. Const. Art. II, § 7.

Griffith also is entitled to summary judgment on Count IV of her Complaint alleging that the Defendants violated the guarantee that "[n]o law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty." Mont. Const. Art. II, § 7. In *Denke*, ¶ 47, this Court held as follows:

> "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819, 828 (1995). Nor may government, in the realm of private speech or expression, favor one speaker over another. *Rosenberger,* 515 U.S. at 828. Indeed, viewpoint discrimination is "an egregious form of content discrimination," and the 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." *Rosenberger,* 515 U.S. at 829. These well-settled principles are mandated not only by the First Amendment to the United States Constitution, but also by Article II, Section 7 of the Montana Constitution.

This Court went on to hold that when a government entity opens a forum to address a subject, it may not discriminate on the basis of viewpoint. *Denke*, ¶ 48. Because Art. II, § 7 of the Montana Constitution provides no less protection to speech than does the First Amendment, the viewpoint discrimination described *supra* must be found to violate Griffith's rights under the state constitution. Montana cases also recognize that provisions of our State constitution may, in appropriate cases, be construed differently and more broadly than cognate provisions of the United States Constitution. Indeed it is submitted that the Mont. Const. Art. II, § 7 provides greater protections in the context presented by this case. *See Dorwart*, ¶ 84 (Nelson, J., concurring) (the greater guarantees of individual rights afforded by the Montana Constitution may be neither bounded nor frustrated by federal court decisions).

In *Dorwart*, this Court established that an individual deprived of rights granted by the Montana Constitution has a cause of action for money damages against those persons who cause the deprivation. Because Mont. Const. Art. II, § 7 is part of Montana's Declaration of Rights and is self-executing, Griffith has a cause of action for damages against the Defendants in this case. *Dorwart*, ¶¶ 39 (citing *Shields v. Gerhart*, 163 Vt. 219, 658 A.2d 924, 934 (1995)). For the reasons set forth above, each of the Defendants is liable to Griffith on that claim.

C. The Defendants Deprived Griffith of Her Federal and State Constitutional Rights to Free Exercise of Religion.

As pointed out in Griffith's affidavit, when she was composing the remarks she would give at her graduation she felt compelled to mention Christ and God in those remarks because "I cannot accurately convey my high school experience without mentioning the reason behind my successes, my actions, and my purpose in life." Thus, Griffith felt compelled by her religious beliefs and faith to include recognition of God and Christ in her remarks. As such, her chosen remarks constituted an exercise of her religious beliefs that is protected by the First Amendment's Free Exercise Clause and Mont. Const. Art. II, § 5.

Government action which unduly burdens an individual's religious practices impermissibly infringes upon the individual's rights under the First Amendment and Art. II, § 5. "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 717-18 (1981). *Accord Valley Christian School v. Montana High School Ass'n*, 2004 MT 41, ¶ 7, 320 Mont. 81, 84, 86 P.3d 554, 556 (recognizing that denial of student opportunity to participate in interscholastic sports programs constitutes a substantial burden on religion for purposes of state and federal free exercise of religion clauses).

The actions of the Defendants here unquestionably placed substantial pressure on Griffith to abandon her religious beliefs, which she recognized as the source of her achievements. The free exercise clauses forbid government actors from prohibiting persons from engaging in religiously-inspired conduct unless there is a compelling justification for its actions. *Valley Christian School*, ¶ 12 (citing *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 450-51 (1985)).

Indeed, there is no justification for prohibiting such a passing reference to a personal belief. Mont. Code Ann. § 20-7-133 requires of every school, grades Kindergarten through 12th grade, that "the pledge of allegiance to the flag of the United States of America must be recited" at the beginning of the first class and the recitation must be conducted by the teacher or "a faculty member or person designated by the principal." The reference therein to God, is significantly less of a personal viewpoint than was the reference Griffith would make, and is not simply permitted by the schools, but mandated.

The Defendants offered no compelling interest for its directive that Griffith change her speech to remove her personal, religiously-inspired references to God and Christ. Therefore, Griffith is entitled to the entry of judgment in her favor on Counts IV and V of the Complaint.

D. The Defendants Deprived Griffith of Her Rights Under the Equal Protection Clause of U.S. Const. Amend. 14.

Count VI of the Complaint alleges that Griffith was deprived of her right to equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution. The essential guarantee of the Equal Protection Clause is that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). If it is shown that similarly-situated persons received disparate treatment and if that disparate treatment invades a "fundamental right" such as speech or religious freedom, the rigorous "strict scrutiny" standard governs. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). "Strict scrutiny" requires that the person who engages in disparate treatment affecting a fundamental right show that the action was justified by a compelling governmental interest and that the action was narrowly tailored to serve that interest. *City of Cleburne*, 473 U.S. at 440; *Hansen v. Ann Arbor Public Schs.*, 293 F. Supp. 2d 780, 806 (E.D. Mich. 2003).

Not only was Griffith the victim of disparate treatment, that treatment was intentionally based upon her exercise of First Amendment rights. In this case, the admitted reason for denying Griffith the opportunity afforded other Butte High School valedictorians in her graduating class was the religious viewpoint of the remarks she composed. Thus, there is no doubt that this case involves the kind of intentional discrimination on the basis of the exercise of First Amendment rights that gives rise to an equal protection claim. *See Wayte v. United States*, 470 U.S.

598, 608 (1985) (selectivity in enforcement of rules is subject to restraints of the Equal Protection Clause; the decision to enforce cannot deliberately be based upon an unjustifiable standard such as race, religion or the exercise of constitutionally protected rights). In *Hansen*, 293 F. Supp. 2d at 807, the court held that a school's exclusion of a student speaker from a panel discussion on diversity deprived the student of equal protection of the law because the denial was based upon the viewpoint the student intended to bring to the discussion:

> As shown above, Defendants in this case discriminated against Betsy Hansen on the basis of both message and religion, denying her the right to deliver her message while at the same time affording the [Gay/Straight Alliance] the right to deliver its own religious message. Such discrimination is violative of the Equal Protection Clause.

For the same reason, the decision denying Griffith the opportunity to give her remarks was discrimination that deprived her of her right to equal protection of the law.

The decision in *Seidman v. Paradise Valley Unified Sch. Dist. No. 69*, 327 F. Supp. 2d 1098 (D. Ariz. 2004), is instructive in this case. School officials there had established a fundraiser that allowed parents to purchase tiles with individualized messages that would be affixed and displayed within an elementary school building. However, the school refused to accept tiles with messages such as "God Bless Our School," "God Bless America," and "In God We Trust." The plaintiffs raised, *inter alia*, an equal protection challenge to the exclusion of their

chosen message. In granting the plaintiffs summary judgment on this claim, the court held that "once a forum is opened up for speaking on a particular topic, a school cannot prohibit others from speaking on the basis that what they intend to say has been spoken from a religious perspective." *Seidman*, 327 F. Supp. 2d at 1115. It then held as follows:

> While the Defendants have asserted a compelling interest, the Court cannot say that the policy at issue was "narrowly tailored to [its] legitimate objectives." *Police Dep't of Chicago*, 408 U.S. at 101. Because the Defendants' policy provided no guidance as to what type of speech was appropriate for the forum, the exclusions in this case were based entirely on the religious content of the expression. The selective restriction that was imposed in this case was far broader than was essential to the furtherance of the stated government objective.

Id.

The same principles apply here. The remarks of Griffith, subjected to censorship by the Defendants, were chosen because of their religious content. Therefore, the ban on Griffith's remarks solely because of their religious content violated her right to equal protection of the law and she is entitled to entry of judgment in his favor on her equal protection claim.

CONCLUSION

For the reasons set forth above, Griffith respectfully requests that the District Court's Order granting the Defendants'-Appellants' motion for summary judgment

be reversed and that this Court enter judgment in favor of Griffith on all her claims.

Respectfully submitted,

William J. O'Connor II
O'CONNOR & O'CONNOR, P.C.
208 North Broadway, Suite 412
Billings, MT 59101
(406) 252-7127
Fax: (406) 252-7059
bill@lawmt.com

Participating Attorney for
THE RUTHERFORD INSTITUTE
Attorney for the Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2003, and the word count is 9,549 excluding the matters set forth in Rule 11(d) of the Montana Rules of Appellate Procedure.

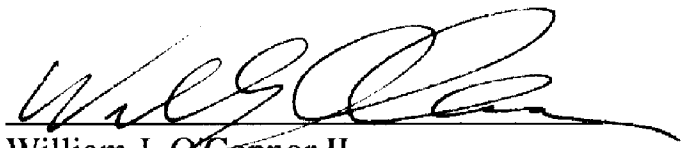
William J. O'Connor II
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff-Appellant's Brief was served on this 11 day of June 2010 upon the following:

Debra A. Silk
Tony C. Koenig
Montana School Boards Association
863 Great Northern Blvd., Suite 301
Helena, MT 59601

Elizabeth L. Griffing
ACLU of Montana
P.O. Box 9138
Missoula, MT 59802



William J. O'Connor II
Attorney for Appellant