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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

V.A.,

Plaintiff,

v.

SAN PASQUAL VALLEY
UNIFIED SCHOOL DISTRICT, *et*
al.,

Defendants.

Case No. 17-cv-02471-BAS-AGS
**ORDER GRANTING MOTION
FOR PRELIMINARY
INJUNCTION**
[ECF No. 3]

Presently before the Court is Plaintiff V.A.’s Motion for Preliminary Injunction to enjoin Defendants San Pasqual Valley Unified School District, Board of Trustees of the San Pasqual Valley Unified School District, Monica Montague, Bernadine Swift Arrow, Rebecca Ramirez, Sally Ann Decorse, Lisa Aguerro, Rauna Fox, and Darrell Pechtl (collectively, “Defendants”). (ECF No. 3.) Previously, on December 12, 2017, the Court granted Plaintiff’s request for a temporary restraining order (“TRO”). (ECF No. 6.) On December 19, 2017, the Court held a hearing on the motion for preliminary injunction. After considering the parties’ arguments raised at

1 the hearing, and good cause appearing, the Court extended the TRO until the Court
2 resolved this motion for preliminary injunction. *See* Fed. R. Civ. Pro. 65(b)(2)
3 (permitting a court to extend a TRO for good cause). For the reasons stated below,
4 the Court **GRANTS** Plaintiff’s motion for a preliminary injunction.

5 6 **I. BACKGROUND**

7 **a. Introduction and October 6, 2017 Incident**

8 Plaintiff is a high school senior at San Pasqual Valley High School (“School”),
9 who played or plays on the School’s varsity football and basketball teams. (V.A.
10 Decl. ¶¶ 2, 5.) The School is a public school in the San Pasqual Valley Unified School
11 District (“District”) and located in Winterhaven, CA. (Verdin Decl. ¶ 2.) During the
12 recent 2017 football season, Plaintiff began to silently kneel during the National
13 Anthem. (V.A. Decl. ¶¶ 7, 9, 15.) Plaintiff’s decision to kneel was aimed at
14 expressing his “personal feelings and concern about racial injustice in our country.”
15 (*Id.* ¶ 8.) He stated that he wanted to provide a reminder that “racial injustice in our
16 country” exists, “which we must not tolerate.” (*Id.*) For the upcoming basketball
17 season and other sport seasons, Plaintiff intends to kneel during the National Anthem
18 when it is played. (*Id.* ¶ 32.)

19 At a home football game on September 29, 2017, Plaintiff kneeled during the
20 National Anthem, and did so peacefully and without incident. (V.A. Decl. ¶¶ 11-12.)
21 The following week, at an away game played in Mayer, AZ, Plaintiff kneeled again
22 during the National Anthem, and again did so peacefully. (*Id.* ¶ 16.) However, after
23 the game was played, a few students from Mayer High School approached some of
24 the School’s students, made racial slurs, threatened to force Plaintiff to stand, and
25 sprayed a water bottle at the School’s students, getting one cheerleader wet. (Adina
26 A. Decl. ¶¶ 16-18, 21.) In reaction to this incident, the School’s principal, Defendant
27 Darrell Pechtl, spoke with Plaintiff’s mother, and he expressed that he thought
28

1 Plaintiff's actions could be seen as "disrespectful" to the other school. (Pechtl Decl.
2 ¶ 5; *see also* Adina A. Decl. ¶ 25.)

3
4 **b. District's Initial Rules**

5 Following the October 6, 2017 football game, the District's superintendent,
6 Defendant Rauna Fox, states that she received feedback from community members,
7 parents, and staff regarding how the District would address the Mayer High School
8 students' behavior. (Fox Decl. ¶ 4.) She also received concerns regarding how the
9 District would "ensure safety to staff and students" at the next football game. (*Id.*)
10 The following actions then occurred:

11 (1) On October 11, 2017, Defendant Fox issued a memorandum to the
12 District's coaching staff ("Initial Rules"), which stated:

13 Students and coaches shall stand and remove hats/helmets
14 and remain standing during the playing or singing of the
15 National Anthem. Kneeling, sitting or similar forms of
16 political protest are not permitted during athletic events at
any home or away games. Violations may result in removal
from the team and subsequent teams during the school year.

17 (Fox Decl. ¶ 6, Ex. 1; *see* V.A. Decl. at Ex. 1; Adina A. Decl. at Ex. 1.) Although
18 Defendant Fox says these rules were meant to be "temporary," the memorandum
19 stated that "[t]hese rules shall remain in effect until further notice, pending adoption
20 of a Board Policy on this subject." (Fox Decl. ¶ 18, Ex. 1; *see also* V.A. Decl. at Ex.
21 1; Adina A. Decl. at Ex. 1.)

22 (2) The October 11, 2017 memorandum required all District coaches to hold a
23 student-athlete meeting prior to their next game where the coaches would "explain
24 and implement" the Initial Rules. (Fox Decl. at Ex. 1.) The student-athletes were
25 required to sign an attendance sheet stating that they attended the meeting, or if they
26 refused to sign, the coaches were instructed to write "refused to sign" by that
27 student's name. (*Id.*)

28

1 (3) Plaintiff attended a meeting of the football team, led by the athletic director,
2 on October 11, 2017 to discuss the new policy. (V.A. Decl. ¶¶ 24-26.) Plaintiff also
3 signed the attendance sheet and was given a copy of the October 11, 2017
4 memorandum. (V.A. Decl. ¶¶ 25-26.)

5 (4) On October 12, 2017, Defendant Fox disseminated the Initial Rules in a
6 letter to all of the District’s students’ parents, guardians, and caregivers. (Fox Decl.
7 ¶ 8, Ex. 2.) This letter was also distributed at the School to all students. (V.A. Decl.
8 ¶ 27.)

9 (5) The October 12, 2017 letter contained the same Initial Rules as in the
10 October 11, 2017 memorandum, and again stated that “[t]hese rules shall remain in
11 effect until further notice, pending adoption of a Board Policy on this subject.” (Fox
12 Decl. at Ex. 2; Verdin Decl. at Ex. 1.)

13 (6) The October 12, 2017 letter appears on the front page of the District’s
14 website under the “News” Section. (Verdin Decl. ¶ 3.) No other letter, memorandum,
15 announcement, or other type of “news” appears on the District’s website relating to
16 the Initial Rules.

17 (7) Defendant Fox states that she “abandoned” the Initial Rules in lieu of
18 dispensing with the playing of the National Anthem on October 12, 2017. However,
19 Defendant Fox also states that she believed the “temporary rules [or the Initial Rules]
20 were . . . in effect until the Board had a chance to consider adopting a formal policy”
21 on November 28, 2017. (Fox Decl. ¶ 10.) Defendant Fox also does not provide by
22 what method or procedure the Initial Rules were abandoned upon the District’s Board
23 of Trustees’ (“Board”) consideration of the Initial Rules.

24 (8) Nothing appears on the District’s website stating the Initial Rules were
25 abandoned.

26 (9) No letter or memorandum retracting the Initial Rules was sent to the
27 District’s coaching staff, students, or students’ parents, guardians, or caregivers.
28

1 (10) No meeting was required or held to explain to the student-athletes that the
2 Initial Rules were abandoned or no longer enforced. The student-athletes were not
3 required to sign any form or other sheet stating that they were informed of the Initial
4 Rules' abandonment or non-enforcement.

5 (11) On November 28, 2017, believing the Initial Rules were in effect, Plaintiff
6 attended an away basketball game where the National Anthem was played before the
7 game. Plaintiff left the basketball court when the National Anthem began playing,
8 and waited outside. (V.A. Decl. ¶ 35.)

9 (12) At the November 28, 2017 Board meeting, the Board voted to table a
10 policy relating to the Initial Rules, but no policy was adopted nor were the Initial
11 Rules discussed or revoked. On December 12, 2017, the Board did not discuss either
12 policy at their meeting.

13 Thus, without clear evidence showing otherwise, it appears that the Initial
14 Rules continue to be in effect and enforceable at this time. (See Fox Decl. at Ex. 1
15 (stating that the Initial Rules "shall remain in effect until further notice, pending
16 adoption of a Board Policy on this subject").)

17
18 **c. District's Draft Policy**

19 Following the October 11, 2017 memorandum and October 12, 2017 letter, the
20 Board asked Defendants' counsel, who also serves as the District's general counsel,
21 to draft a facilities use policy to "exclude[] any type of political activism or
22 protesting" ("Draft Policy"). (Thurbon Decl. ¶ 5.) The Draft Policy states, in short:

23
24 Students and staff members participating in extracurricular
25 programs and interscholastic activities may not engage in
26 political activism [including but not limited to kneeling,
27 sitting, or other forms of political protest during the playing
28 or singing of the National Anthem] during the time reserved
for such events. Students or staff members engaging in
political activities including peaceful political protest during
the time reserved for these events are subject to removal
from the event and facility and may be denied participation

1 in future extracurricular activities and interscholastic
2 athletic competitions, events and practices.

3 (*Id.* at Ex. 1.) The Draft Policy remains a draft and has not been adopted as District
4 policy. (*See* Fox Decl. ¶¶ 14-15, Ex. 4.) At the preliminary injunction hearing,
5 Defendants’ counsel stated that he has created other drafts of this policy and
6 suggested that this version of the Draft Policy is no longer current.

7 While the Initial Rules were not addressed at the Board meeting on November
8 28, 2017, the Draft Policy was discussed. (Fox Decl. at Ex. 4). At this meeting, many
9 community members raised questions and concerns about adopting the Draft Policy.
10 The Board neither adopted nor rejected the Draft Policy, but instead voted to table
11 the Draft Policy “for potential consideration at a future board meeting.” (*Id.* (tabling
12 the Draft Policy “until next month”); Thurbon Decl. ¶ 7.)

13 At the next Board meeting, on December 12, 2017, the Board did not adopt,
14 reject, or discuss the Draft Policy, though the Draft Policy was placed on the
15 meeting’s agenda. (Thurbon Decl. ¶ 7.) The Draft Policy currently is “an item that
16 might subsequently be added to an agenda at some point in the future.” (*Id.*)
17 Defendants’ counsel has not been asked to proceed with work on the Draft Policy,
18 but he was asked to review and provide feedback from research on and evaluation of
19 questions raised by the public. (*Id.*)

20
21 **d. Playing of the National Anthem**

22 To avoid facing the issue of kneeling during the National Anthem all together,
23 Defendant Fox recommended that the School not play the National Anthem at the
24 final football game on October 12, 2017. (Fox Decl. ¶ 10.) As a result, the National
25 Anthem was not played at that game. (*Id.* ¶ 11.) Defendant Fox states that the District
26 does not play the National Anthem at home basketball games. (Fox Decl. ¶ 10.)
27 However, at the preliminary injunction hearing, Defendants’ counsel stated that the
28 District has no control over whether the National Anthem is played at away

1 basketball games. As stated above, the National Anthem was played at the November
 2 28, 2017 basketball game. (V.A. Decl. ¶¶ 35-37.) Additionally, Plaintiff’s counsel
 3 stated at the preliminary injunction hearing that the National Anthem was also played
 4 at the December 12, 2017 basketball game.

5 It is also unclear whether the National Anthem is played at other sports games,
 6 such as baseball games or track meets. (See V.A. Decl. ¶ 6 (stating Plaintiff also plans
 7 to participate in baseball and track).) Plaintiff intends to kneel during the National
 8 Anthem when it is played. (*Id.* ¶ 32.)

9 10 **II. DISCUSSION**

11 **1. Legal Standard for Preliminary Injunction**

12 A plaintiff seeking a preliminary injunction must establish: (1) “that he is
 13 likely to succeed on the merits,” (2) “that he is likely to suffer irreparable harm in the
 14 absence of preliminary relief,” (3) “that the balance of equities tips in his favor,” and
 15 (4) “that an injunction is in the public interest.” *Am. Trucking Ass’ns Inc. v. City of*
 16 *Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Nat. Res.*
 17 *Defense Council, Inc.*, 555 U.S. 7, 21 (2008)). “[C]ase law clearly favors granting
 18 preliminary injunctions to a plaintiff . . . who is likely to succeed on the merits of his
 19 First Amendment claim.” *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th
 20 Cir. 2009).

21 22 **2. Likelihood of Success on the Merits**

23 The Court finds that Plaintiff is likely to succeed on the merits because, under
 24 *Tinker*, a school cannot limit a student’s right to free speech if it is unlikely to
 25 substantially disrupt the school’s activities or learning or interfere with other
 26 students’ rights. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503,
 27 513-14 (1969); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642
 28 (1943) (“[T]he action of the local authorities in compelling the flag salute and pledge

1 transcends constitutional limitations on their power and invades the sphere of
2 intellect and spirit which it is the purpose of the First Amendment to our Constitution
3 to reserve from all official control.”).

4 Though schools may regulate students’ speech in some limited circumstances,
5 public school students do not “shed their constitutional rights to freedom of speech
6 or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 506. In other words,
7 students “cannot be punished merely for expressing their personal views on the
8 school premises—whether ‘in the cafeteria, or on the playing field, or on the campus
9 during the authorized hours.’” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267
10 (1988) (quoting *Tinker*, 393 U.S. at 512-13). Courts have a long (and unequivocal)
11 history of siding with students over schools when faced with similar restrictions,
12 finding that schools cannot force students into patriotic expression under the threat
13 of retaliation. *See, e.g., Barnette*, 319 U.S. at 642; *Holloman ex rel. Holloman v.*
14 *Harland*, 370 F.3d 1252, 1268-69 (11th Cir. 2008); *Sherman v. Cmty. Consol. Sch.*
15 *Dist. 21*, 980 F.2d 437, 442 (7th Cir. 1992); *Lipp v. Morris*, 579 F.2d 834, 836 (3d
16 Cir. 1978); *Goetz v. Ansell*, 477 F.2d 636, 637-39 (2d Cir. 1973).

17
18 **a. Kneeling is Speech**

19 It is well settled that certain actions, though not spoken, are considered speech
20 and protected by the First Amendment. *See Barnette*, 319 U.S. at 633 (“Symbolism
21 is a primitive but effective way of communicating ideas.”) This is especially true
22 when these actions involve other patriotic acts. *Id.* at 632 (“There is no doubt that, in
23 connection with the pledges, the flag salute is a form of utterance.”).

24 The Court finds that Plaintiff’s kneeling during the National Anthem is speech.
25 This action is closely linked to the similar, well-known protests performed
26 throughout the country, started by former National Football League quarterback
27 Colin Kaepernick. (*See* ECF No. 3 at 8 n.1.) It is clear to the Court that by kneeling,
28 rather than standing, during the playing or singing of the National Anthem Plaintiff

1 is expressing a similar protest to “racial injustice in our country.” (V.A. Decl. ¶¶ 7-
2 8.) Plaintiff also states that he intended to express this opinion. (*Id.*)

3
4 **b. Legal Standard Under *Tinker* Applies**

5 “The schoolroom prepares children for citizenship, and the proper exercise of
6 the First Amendment is a hallmark of citizenship in our country.” *Chandler v.*
7 *McMinnville Sch. Dist.*, 978 F.2d 524, 527 (9th Cir. 1992). But this practice of
8 citizenship is not without its limitations. While schools prepare students for adult
9 experiences, a school is not required to ensure a full adult experience while on
10 campus, especially if such experiences would interfere with the school’s “basic
11 educational mission.” *See id.* (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685
12 (1986)). Thus, courts have found that “the determination of what manner of speech
13 in the classroom or in school assembly is inappropriate properly rests with the school
14 board,” rather than with the judiciary. *Fraser*, 478 U.S. at 683. Because school
15 officials have a better sense than courts of how to best monitor this speech, a school
16 can permissibly regulate three categories of speech with varying standards:

- 17
18 (1) vulgar, lewd, obscene and plainly offensive speech is
governed by *Bethel School District v. Fraser*, 478 U.S. 675
19 ... (1986);
20 (2) school-sponsored speech is governed by
Hazelwood; and
21 (3) speech that falls into neither of these categories is
governed by *Tinker*.

22 *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 765 (9th Cir. 2006).

23 It is clear that Plaintiff’s actions are not “vulgar, lewd, obscene, [or] plainly
24 offensive” speech, nor is Plaintiff’s silent kneeling during the National Anthem at a
25 sports game “school-sponsored speech.”¹ *Cf. Fraser*, 478 U.S. at 682 (finding a

26
27 ¹ At the preliminary injunction hearing, Defendants’ counsel seemed to suggest that
28 the standard in *Hazelwood* applies. For the reasons explained in this Order, while the
Court does not dispute that schools can regulate some student speech, the policy at
issue does not relate to school-sponsored speech, and rather *Tinker*’s standard

1 speech at an official school assembly containing an “elaborate, graphic, and explicit
2 sexual metaphor” was offensive speech); *Hazelwood*, 484 U.S. at 272-73 (holding
3 that a school newspaper produced in a journalism class taught by a faculty member
4 during regular class hours and where the students received grades was school-
5 sponsored speech). Instead, Plaintiff’s quiet protest at an extracurricular activity falls
6 within the speech governed by *Tinker*. See, e.g., *Pinard*, 467 F.3d at 765 (applying
7 the standard in *Tinker* to a petition that members of the basketball team wrote
8 criticizing their coach); *Chandler*, 978 F.2d at 527 (applying *Tinker* when students
9 expressed support for a teachers’ strike by wearing buttons); see also *Hazelwood*,
10 484 U.S. at 271 (distinguishing between “a student’s personal expression that
11 happens to occur on the school premises” and an “educators’ authority over school-
12 sponsored [activities] that students, parents, and members of the public might
13 reasonably perceive to bear the imprimatur of the school”). A school has less of an
14 interest (and receives less deference) when restricting a student’s speech that
15 expresses the student’s personal opinion, rather than when the student’s opinion is
16 blended in and interpreted as being that of the school’s. Cf. *Chandler*, 978 F.2d at
17 529 (citing to *Hazelwood*, 484 U.S. at 271, 273) (“[F]ederal courts are to defer to a
18 school’s decision . . . to ‘disassociate itself’ from speech that a reasonable person
19 would view as bearing the imprimatur of the school.”).

20 Here, even though his actions occur during a school sanctioned activity,
21 Plaintiff’s kneeling during the National Anthem is easily interpreted and
22 distinguished as his own expression, and not that bearing the school’s imprimatur.
23 *Tinker*, 393 U.S. at 508-09 (finding similarly that students wearing black armbands
24 during school hours did not constitute school-sponsored speech); *Chandler*, 978 F.2d
25 at 530 (“The buttons [worn by students] expressed the personal opinion of the
26 students wearing them, and they were displayed in a manner commonly used to

27 _____
28 applies. Based on the record, the distinction of a “public” verses “non-public” forum
is not at issue here.

1 convey silently an idea, message, or political opinion to the community.”). By
2 silently kneeling on the sideline, Plaintiff’s protest to racial injustice sends a personal
3 message to the community that is akin to an individual student’s display of a button
4 or an armband during school hours. The expression is easily interpreted as his own,
5 rather than the school’s, much like Colin Kaepernick’s expression is interpreted as
6 his own, and not imputed to the San Francisco 49ers. Moreover, Plaintiff’s kneeling
7 in protest during the National Anthem expresses an opinion that is opposed to the
8 school’s decision to play the National Anthem with the expectation that students will
9 stand. *See Chandler*, 978 F.2d at 530 (stating that students’ “scab” buttons could
10 easily be seen as “diametrically opposed” to the school district’s decision to hire
11 temporary teachers during a strike). The record shows that any reasonable person
12 would interpret Plaintiff’s expression as being separate and apart from the School’s
13 opinion. Accordingly, the Court analyzes the Initial Rules under *Tinker*.

14
15 **c. No “Likelihood of Substantial Disruption” or Interference
with Other Students’ Rights**

16 In *Tinker*, the Supreme Court found that a school can regulate students’ speech
17 if the school shows “facts which might reasonably have led school authorities to
18 forecast substantial disruption of or material interference with school activities” or
19 interference “with the rights of other students to be secure and to be let alone.” 393
20 U.S. at 512-14. Even so, the Supreme Court found that students wearing black
21 armbands to protest the Vietnam War “was a silent, passive expression of opinion,
22 unaccompanied by any disorder or disturbance” that “neither interrupted school
23 activities nor sought to intrude in the school affairs or the lives of others.” *Id.* at 508,
24 514 (“Any word spoken, in class, in the lunchroom, or on the campus, that deviates
25 from the views of another person may start an argument or cause a disturbance. But
26 our Constitution says we must take this risk”). Thus, the First Amendment
27 protected the students’ expression and prohibited school officials from regulating this
28 form of expression. *Compare id.*, and *Chandler*, 978 F.2d at 530 (rejecting school’s

1 argument that students wearing buttons that said “scab” to express their support of a
2 teachers’ strike were inherently disruptive), *with Taylor v. Boswell Indep. Sch.*
3 *Dist.*, 713 F.3d 25, 35 (10th Cir. 2013) (holding school officials could regulate
4 students’ free speech rights to prevent them from distributing rubber fetus dolls after
5 a distribution of 2,500 dolls resulted in various “doll-related disruptions”).

6 Plaintiff’s silent kneeling during the National Anthem is not likely to cause a
7 “substantial disruption of or material interference with school activities” or interfere
8 with other students’ safety.² *Tinker*, 393 U.S. at 514. When Plaintiff first knelt, he
9 did so peacefully and without incident. (V.A. Decl. ¶ 12.) Plaintiff also knelt
10 peacefully at the second football game. (*Id.* ¶ 16.) It was only hours following
11 Plaintiff’s protest, and after the football game, that students from a different school
12 made racial slurs and threw water at a few of the School’s students. (Adina A. Decl.
13 ¶¶ 14-16, 18, 21.) Even so, this incident does not rise to a “substantial disruption of
14 or material interference with school activities,” nor does it interfere with the students’
15 safety. *Tinker*, 393 U.S. at 508 (finding that “a few students made hostile remarks to
16 the children wearing armbands, but there were no threats or acts of violence on school
17 premises”). The football game was played as scheduled and, while the Court does not
18 minimize the impact of racial slurs and threats, the threats were minimal and did not
19 lead to any physical violence. (*See* Adina A. Decl. ¶¶ 14-22.) The students’ threats
20 were to “force” Plaintiff to stand, and the only action taken was water being tossed
21 from a water bottle, getting one student wet. (*Id.*) The School’s principal confirmed
22 that there was no evidence of a fight during or after the game. (Pechtl Decl. ¶ 4.)
23 Additionally, the likelihood of this incident happening again is reduced because the
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26 ² This interpretation is bolstered by looking at the Draft Policy which states that
27 “[s]tudents or staff members engaging in political activities *including peaceful*
28 *political protest* during the time reserved for these events are subject to” discipline.
(Thurbon Decl. at Ex. 1 (emphasis added).) It appears the intent of the Initial Rules
is to include peaceful protests whether or not they result in disturbances.

1 School requested that Mayer High School be removed from its upcoming football
2 schedule.

3 The Court finds that, when applying *Tinker*, Plaintiff is likely to succeed on
4 the merits because the Initial Rules, as well as the proposed Draft Policy, are aimed
5 at regulating students' speech that is unlikely to cause a substantial disruption of or
6 material interference with school activities or interfere with other students' rights.

7 8 **3. Irreparable Harm**

9 "[T]he loss of First Amendment freedoms, for even minimal periods of time,
10 unquestionably constitutes irreparable injury." *Associated Press v. Otter*, 682 F.3d
11 821, 826 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Thus,
12 a "colorable First Amendment claim is irreparable injury sufficient to merit the grant
13 of [preliminary injunctive] relief." *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014).
14 Additionally, a "request for injunctive relief remains live only so long as there is
15 some present harm left to enjoin." *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853,
16 864 (9th Cir. 2017) (quoting *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1502
17 (D.C. Cir. 1995)). In other words, a request for injunctive relief is not moot if the
18 conduct alleged to have caused the irreparable harm is "reasonably expected to
19 recur." *See Ruiz v. Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998).

20 The Court finds that both the Initial Rules currently in effect and the Draft
21 Policy currently being considered by the District would cause Plaintiff irreparable
22 harm. Defendants make three arguments to refute this. First, they state that the Initial
23 Rules were never enforced or were abandoned. Second, they argue that the Draft
24 Policy is not enforceable and will never be adopted. Third, they claim that the
25 National Anthem will not be played during basketball games. The Court is
26 unpersuaded by these arguments.

27 First, the record does not support Defendants' argument that Defendant Fox
28 abandoned the Initial Rules. (ECF No. 8 at 13). The record is void of any evidence,

1 other than Defendant Fox’s own contradictory statements, that she abandoned this
2 policy on October 12, 2017. The Initial Rules state that the rules “remain in effect
3 *until further notice, pending adoption* of a Board Policy on this subject.” (Fox Decl.
4 at Ex. 1 (emphasis added); *see also* V.A. Decl. at Ex. 1; Adina A. Decl. at Ex. 1.) No
5 notice was ever given, nor did the Board adopt a different Board policy. No letter
6 announcing the abandonment of this policy was sent to the staff, students, or students’
7 caregivers, guardians, or parents. No meeting was held to tell the students that the
8 Initial Rules were abandoned, nor were the student-athletes required to sign a sheet
9 stating that they were told the rules were abandoned. No notice was posted on the
10 District’s website, nor was the letter announcing the policy removed from the
11 District’s website. Moreover, Plaintiff and another student clearly believed the policy
12 was in effect on November 28, 2017 because they both left the basketball court while
13 the National Anthem played before the start of the basketball game. (V.A. Decl. ¶¶
14 35-36.)

15 At the preliminary injunction hearing, Defendants’ counsel stated that the
16 Initial Rules were abandoned and not in effect as of October 12, 2017, but he was
17 also unable to point to any piece of evidence confirming this statement.³ Additionally,
18 Defendants’ counsel’s October 28, 2017 letter seems to suggest the contrary. (*See*
19 *Verdin Decl. at Ex. 4.*) Moreover, at no point over the last two months did Defendants
20 or Defendants’ counsel communicate to Plaintiff or Plaintiff’s counsel that the Initial
21 Rules were abandoned. Defendants’ counsel had multiple chances to provide this
22 information in response to Plaintiff’s counsel’s letters from October 12, October 19,
23 November 20, and December 7. (*Verdin Decl. at Exs. 2, 3, 5, 6* (requesting the
24

25 ³ While the Court considers Defendants’ counsel’s statements as an officer of the
26 court, it cannot accept these statements as fact when the evidence presented in this
27 case shows the contrary. *See Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d
28 865, 869 (“Argument by counsel serves only to elucidate the legal principles and
their application to the facts at hand; it cannot create the factual predicate.”).

1 District rescind or retract its previous memorandum and provide notice of this
2 action.) Instead, at the preliminary injunction hearing, Plaintiff’s counsel stated that
3 they only first learned that the Initial Rules were “abandoned” on December 18, 2017
4 when Defendants filed their opposition to Plaintiff’s motion for preliminary
5 injunction.

6 Additionally, the Board failed to adopt a policy that would supersede the Initial
7 Rules. Defendants argue that the Board’s declining to adopt the Draft Policy
8 “effectively vacated” the Initial Rules (ECF No. 8 at 13), but again, Defendants fail
9 to provide support to substantiate this procedure. With Plaintiff’s First Amendment
10 rights at issue, the Court is unwilling to accept “effectively vacating” the Initial Rules
11 over actually vacating the policy. Without a clear record stating that the Initial Rules
12 are no longer in effect, the Court finds that Plaintiff will be irreparably harmed by its
13 enforcement.

14 Second, Defendants argue that the Board will never adopt the Draft Policy, but
15 again, the record does not support this finding. Nowhere in the record do Defendants
16 state that the Draft Policy has been rejected or that it will never be considered by the
17 Board. At the preliminary injunction hearing, Defendants’ counsel represented that
18 the Board does not plan to adopt this or any version of the Draft Policy in the next
19 six months. However, counsel could not point to any evidence on the record to
20 support this representation. Instead, the record shows that the Board only “declined
21 to adopt” the Draft Policy at the two most recent Board meetings and that the Draft
22 Policy remains as an item on the Board’s agenda “for potential consideration.”
23 (Thurbon Decl. ¶ 7 (stating that the Board “tabled [the Draft Policy] for potential
24 consideration at a future board meeting” and that it remains “an item that might be
25 added to an agenda at some point in the future”).) It also appears that the Board is
26 continuing to consider the Draft Policy because it continues to accept and evaluate
27 the public’s questions and opinions regarding the Draft Policy. (*Id.*) Nothing is
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1 preventing the Board from calling a special meeting (as it did in November) and
2 adopting the Draft Policy.

3 Third, Defendants state repeatedly that the National Anthem is not played at
4 home basketball games, but do not guarantee that the National Anthem will not be
5 played at away basketball games. In fact, Plaintiff stated that the National Anthem
6 was played during an away basketball game on November 28, 2017 (V.A. Decl. ¶¶
7 35-37), and Plaintiff’s counsel stated at the preliminary injunction hearing that it was
8 played at the December 12, 2017 basketball game. While the National Anthem may
9 not be played at the District’s home games, this statement does not cover all the
10 basketball games that Plaintiff may attend nor does it apply to the upcoming sports
11 seasons or graduation. The Initial Rules apply explicitly to “any home or away
12 games” (Adina A. Decl. at Ex. 1), and the Draft Policy would apply to all
13 extracurricular activities, potentially including graduation. (Fox. Decl. ¶ 10 (stating
14 that the National Anthem is played during graduation).)

15 The Court finds that Plaintiff is likely to suffer irreparable harm without
16 injunctive relief because the Initial Rules are currently in force, the Draft Policy is
17 under consideration, and one or both of the policies may be enforced, which would
18 violate Plaintiff’s First Amendment rights.

19 20 **4. Balance of Equities and Public Interest**

21 The balance of equities and public interest tip in Plaintiff’s favor. By
22 Defendants’ own argument, they face no risk of harm because the District does not
23 anticipate playing the National Anthem at District-hosted basketball games. On the
24 other hand, Plaintiff faces a great risk of harm to his First Amendment rights if his
25 rights are infringed at even one sporting event.

26 Finally, the Ninth Circuit “consistently recognize[s] the significant public
27 interest in upholding free speech principles.” *Klein*, 584 F.3d at 1208 (finding
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1 “balance of equities and the public interest thus tip sharply in favor of enjoining”).
2 The Court likewise finds that this public interest is present here.

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4 **5. Bond**

5 As it did in the TRO, the Court dispenses the requirement for a bond at this
6 time because it does not appear that the preliminary injunction is likely to harm
7 Defendants. *See Gorbach v. Reno*, 219 F.3d 1087, 1092 (9th Cir. 2000) (finding no
8 evidence that defendants would suffer damages from a preliminary injunction); *IBiz,*
9 *LLC v. City of Hayward*, 962 F. Supp. 2d 1159, 1171 (N.D. Cal. 2013) (holding that
10 no bond is required when considering First Amendment claims). Additionally,
11 Defendants have not objected to this determination nor have they argued that they
12 will be harmed.

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14 **III. CONCLUSION**

15 For the reasons stated below, the Court **GRANTS** Plaintiff’s motion for a
16 preliminary injunction.

17 Accordingly, the Court **ENJOINS** Defendants, serving in their official
18 capacities, as well as Defendants’ officers, agents, servants, employees, and
19 attorneys, from enforcing the District’s Initial Rules and/or temporary requirements
20 on National Anthem political protests as stated in its October 11, 2017 memorandum
21 and October 12, 2017 letter from Superintendent Rauna Fox; the District’s Draft
22 Policy (BP 1330.2), currently titled “Use of Facilities or Grounds for Political
23 Activities”; or any other similar policy that would:

- 24 (a) restrict Plaintiff’s or other students from kneeling or sitting
25 during the playing or singing of the National Anthem at
26 extracurricular events, including athletic events; or
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(b) require any action from Plaintiff or other students during the playing or singing of the National Anthem at extracurricular events, including athletic events;

effective immediately until this matter is resolved by this Court.

Additionally, the Court **ORDERS** Plaintiff to serve Defendants with this Order as soon as practical, but **no later than 12:00 p.m. on Friday, December 22, 2017.**

IT IS SO ORDERED.

DATED: December 21, 2017


Hon. Cynthia Bashant
United States District Judge