IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

DESIREE SHELTON, SARAH LINDSTROM;

Plaintiffs,

vs.

ANOKA-HENNEPIN SCHOOL DISTRICT; CHAMPLIN PARK HIGH SCHOOL;DENNIS CARLSON, in his official capacity as the Superintendent of Anoka-Hennepin School District; MICHAEL GEORGE, in his official capacity as the Principal of Champlin Park High School;

Defendants.

CIVIL ACTION
File No. _____

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

INTRODUCTION

Plaintiffs Desiree Shelton and Sarah Lindstrom are seniors at Champlin Park High School ("CPHS"). They are both lesbians, and are dating each other. The student body at CPHS elected both Plaintiffs to the "Royalty Court" of the school's annual winter formal dance. Traditionally, CPHS promotes the dance by holding a school-wide assembly the week before the dance, during which the 24 members of the court pair off and walk in a processional. This year's assembly is scheduled for Monday, January 31, 2011 at 1:27 p.m.

On Thursday, January 27, 2011, the Defendants informed the Plaintiffs of their intent to cancel the planned processional portion of the assembly rather than allowing the

Plaintiffs to participate as a same-sex couple.[1] The Defendants' cancellation or alteration of the processional in order to suppress the Plaintiffs' peaceful expression of their identity and their affection for one another—through the simple act of walking together at a school assembly—violates clear, long-standing First Amendment principles, and also constitutes unlawful discrimination against the Plaintiffs based on their sexual orientation. The Defendants' actions also convey the harmful and discriminatory message that school administrators believe the Plaintiffs' relationship and those of other lesbian, gay, bisexual and questioning students are less worthy of respect and recognition than the relationships of their heterosexual peers. The Plaintiffs respectfully ask this Court to grant a temporary restraining order or other appropriate injunctive relief to protect their constitutional and statutory rights under the United States Constitution, the Minnesota Constitution, and the Minnesota Human Rights Act.

FACTS

Plaintiffs Desiree Shelton and Sarah Lindstrom identify as lesbians and are dating each other. They are open about their sexual orientation, and school administrators and many of their fellow students know they are lesbians. They are seniors at CPHS, which is part of the Anoka-Hennepin School District. Both were selected by their peers as "royalty" for CPHS's Snow Days winter formal dance. As is tradition, CPHS has planned a school-wide assembly on Monday, January 31, 2011 to promote the dance. The Snow

[1] Based on a telephone conversation with school-district attorney Paul H. Cady on Friday, January 28, 2011, it appears that the Defendants are still considering other alternatives to the traditional processional—for example, having the Royalty Court enter the assembly in a single-file line. Any alternative to the traditional processional, however, constitutes a violation of the Plaintiffs' constitutional and statutory rights, and the analysis remains the same.

Days assembly is an annual event, and has historically included a "processional" in which the members of the Snow Days court enter the assembly walking in pairs. This year's assembly is scheduled to take approximately one hour. The procession has always been a highlight of the assembly.

In the past, when a boy and a girl in a relationship were both selected for the court, CPHS allowed those students, upon request, to walk in the processional with their significant other. Here, the Plaintiffs asked to walk together—in order to make a statement about their relationship and their sexual orientation. They informed school officials that two of their male friends on the court also have agreed to walk together, so no student would have to walk alone. The Defendants, however, determined that the Plaintiffs could not walk together, solely because they are of the same sex. Defendant Michael George—the principal of CPHS—and Assistant Principal Matthew Mattson both told the Plaintiffs that school officials did not want them to walk together because traditionally only boy-girl couples had walked in the processional and it would make some other students uncomfortable to see two women walking together as a couple. (*See* Shelton Aff. ¶¶ 16-17.) When the Plaintiffs continued to protest, CPHS responded on Thursday, January 27, 2011 first by announcing a plan to have the members of the Royalty Court enter the assembly in a single-file line, and later by announcing the decision to cancel the traditional processional part of the assembly entirely.

ARGUMENT

Desiree and Sarah are entitled to a temporary restraining order ("TRO") barring the Defendants from canceling the processional portion of the Snow Days assembly (or

otherwise altering the traditional processional) and from denying the Plaintiffs the opportunity to walk together in the processional as opposite-sex couples have done in the past. This Court should grant the Plaintiffs immediate injunctive relief prohibiting the Defendants from interfering with the Plaintiffs' constitutional and statutory rights. The facts and law weigh heavily in the Plaintiffs' favor on all four of the relevant factors: Desiree and Sarah are likely to succeed on the merits of their claims; they will suffer irreparable harm absent the restraining order; the balance of harms favors Plaintiffs; and the public interest favors Plaintiffs. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

I. APPLICABLE LEGAL STANDARD

To obtain a TRO, the moving party must demonstrate four elements: "(1) a likelihood of success on the merits; (2) that the movant will suffer irreparable harm absent the restraining order; (3) that the balance of harms favors the movant; and (4) that the public interest favors the movant." *Vital Images, Inc. v. Martel*, No. 07-4195, 2007 U.S. Dist. LEXIS 77869 at *6 (D. Minn. Oct. 19, 2007) (*citing Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)). No one factor is determinative. Instead, each factor "must be balanced to determine whether they tilt toward or away from granting injunctive relief." *Id.* (*citing West Publ'g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986)). The moving party has the burden of proving the listed factors. *Id.* Here, a balancing of the factors weighs heavily in favor of granting the limited injunctive relief sought.

II. ALL FOUR FACTORS WEIGH HEAVILY IN PLAINTIFFS' FAVOR.

A. Plaintiffs Are Likely to Prevail on the Merits of Their Claims.

The Plaintiffs have alleged violations of their constitutional and statutory rights under the First and Fourteenth Amendments to the United States Constitution, the Minnesota Constitution, and the Minnesota Human Rights Act. As described below, the Plaintiffs are likely to prevail on the merits of each of these claims.

1. FIRST AMENDMENT TO THE U.S. CONSTITUTION

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. The First Amendment protects a broad range of expression, including the "expression of one's identity and affiliation to unique social groups." *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 441 (5th Cir. 2001). "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the U.S. Supreme Court has] asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

Federal courts in numerous decisions have held that expression relating to a student's sexual orientation or support for LGBT rights is protected under the First Amendment. *See, e.g., Straights & Gays for Equality (SAGE) v. Osseo Area Schs. – Dist. No. 279*, 471 F.3d 908, 913 (8th Cir. 2006) (right to form student club for LGBT students and allies was "expressive libert[y]"); *McMillen v. Itawamba County Sch. Dist.*, 702 F.

Supp. 2d 699, 705 (N.D. Miss. 2010) (right of lesbian student to take a same-sex date to the prom and wear a tuxedo); *Gillman v. Sch. Bd. for Holmes County, Fla.*, 567 F. Supp. 2d 1359, 1375 (N.D. Fla. 2008) (right to wear buttons supportive of LGBT classmates); *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1076 (D. Nev. 2001) (right to express gay sexual orientation openly at school).

Desiree and Sarah seek to participate in the processional together as a couple in order to express their identity as lesbians and their commitment to one another. They hope to make a statement about gender roles and serve as positive role models for other LGBT students. This is precisely the type of expression that federal courts have repeatedly held is squarely protected by the First Amendment.

The First Amendment's protections apply with equal force to expressive statements made at school as to those made in any other setting. It has been clearly established for more than forty years that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969); *see also Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 759-60 (8th Cir. 2008) (citing *Tinker*). Indeed, the U.S. Supreme Court has recognized that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

This case bears a striking similarity to a case decided by a federal court in Mississippi just last year, *McMillen v. Itawamba County School District*. In that case, an openly lesbian high-school senior sought permission to bring a same-sex date to the

senior prom and to wear a tuxedo. 702 F. Supp. 2d at 701. The school initially informed her that the two girls could not attend prom together as a couple or slow dance together, because it could "push people's buttons." *Id.* The school also told her that all girls must wear dresses. *Id.* Upon receiving a letter from the ACLU informing the district that these policies were unlawful, the district elected to cancel the prom altogether. *Id.* The court held that the student's effort to "communicate a message by wearing a tuxedo and to express her identity through attending prom with a same-sex date" was "the type of speech that falls squarely within the purview of the First Amendment," *id.* at 705, and concluded that the district had violated her First Amendment rights under "the clearly established case law." *Id.* at 704. The court also concluded that she had shown a substantial threat of irreparable injury and the harm to the student would "clearly outweigh" the burden that an injunction might cause the district. *Id.* at 705.[2]

Defendant George has told Desiree and Sarah that the school objects to their expression because some students and parents might be "uncomfortable" with the appearance of a same-sex couple. That is not a legitimate basis upon which to limit student speech. Schools may not limit student speech based on "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" or their "urgent wish to avoid the controversy which might result from the expression." *Tinker*, 393 U.S. at 509, 510. Rather, schools may only limit student speech under the

[2] The court declined to order a preliminary injunction in that case only because the district assured the court that a privately sponsored prom would go forward at which all students, including Constance, would be welcome. *Id.* at 705. When in fact the private prom excluded Constance, the ACLU sued again, and district agreed to a settlement. *See* ACLU Press Release, *Victory for Constance McMillen!* (July 20, 2010), at http://www.aclu.org/blog/lgbt-rights/victory-constance-mcmillen.

narrow circumstances when they can show that "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Id.*; *Lowry*, 540 F.3d at 760 (school could not punish students for "non-disruptive protest of a government policy"); *see also, e.g.*, *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 739 (school district could ban clothing featuring Confederate flag where officials "could reasonably 'forecast' a 'substantial disruption' based on a specific and recent history of racially charged violent incidents that were directly connected to the expression at issue). Defendants here cannot meet this heavy burden, as there is no evidence that permitting Desiree and Sarah simply to walk in the processional—the role for which their peers selected them—would cause a substantial and material disruption in school discipline. The school cannot prohibit their peaceful expressive conduct.

The relevance of the potential for disruption when a student brings a same-sex date to a school dance was analyzed in *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980). In that case, both the plaintiff and another gay student had in fact been the target of violence from other students because they publicly expressed their sexual orientation. *Id.* at 383-84. While the court noted that the principal had apparently acted out of a sincere belief that prohibiting the plaintiff from attending prom with another boy was necessary to protect the plaintiff's safety, it nevertheless held that the school could not attempt to protect him by "stifl[ing his] free expression." *See id.* at 388. To permit such actions even in the name of safety or good order "would completely subvert free speech in the schools by granting other students a 'heckler's veto.'" *Id.* at 387. The court ultimately granted the

plaintiff's request for a preliminary injunction against the district. *Id.* at 389. The Defendants here have stated their intention to suppress the Plaintiffs' expression precisely in order to grant other students the "heckler's veto" that has been rejected in *Tinker*, *Fricke*, and numerous other cases. Such concerns simply are not a legitimate basis to restrict peaceful student expression that does not involve profanity or other inappropriate conduct.

In this case, Desiree and Sarah specifically asked to walk together in the processional in order to make a statement about their relationship and their sexual orientation. *See Johnson*, 491 U.S. at 404; *McMillen*, 702 F. Supp. 2d at 705. By suddenly canceling the planned processional four days before the assembly (or otherwise altering the traditional processional to prevent the Plaintiffs from participating as a couple), the Defendants seek to stifle the Plaintiffs' freedom of expression simply to cater to the sensibilities of those students who do not approve of same-sex couples and to avoid controversy. This is not permitted under the First Amendment.

2. EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION

Plaintiffs are also likely to succeed on their claims under the Equal Protection Clause of the United States Constitution. That clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The concept of "equal protection" requires, simply, "that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (Equal Protection Clause is "essentially a direction that all persons similarly situated should be

treated alike"). At a minimum, that means that government officials may not single out individuals for disfavored treatment based solely on their membership in an unpopular group. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Under the Equal Protection Clause, strict scrutiny applies to government actions that disadvantage a minority group, like gays and lesbians, that has experienced a "'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Mass. Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973)). Government action that discriminates on the basis of sexual orientation therefore bears all the hallmarks of legislative classifications that traditionally have been subjected to strict equal protection scrutiny. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (concluding that "strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation"). Under that strict standard, government action is presumptively unconstitutional unless it is "'narrowly tailored' to achieve a 'compelling' government interest." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). The school's arbitrary action in this case cannot meet that demanding standard.

In the circumstances of this case, the Court may readily conclude that plaintiffs are likely to prevail on their equal protection claim ever without determining whether heightened scrutiny applies. Regardless of the level of scrutiny, discrimination against a particular group is unlawful under the Equal Protection Clause unless the government action in question "bear[s] a rational relationship to a legitimate governmental purpose."

Romer v. Evans, 517 U.S. 620, 635 (1996). The United States Supreme Court has held that mere prejudice against an unpopular group, such as gays and lesbians, cannot itself constitute a legitimate governmental purpose. *See id.*; *Moreno*, 413 U.S. at 534; *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring). Deference to community members' disapproval of a particular class of citizens is equally invalid as a governmental purpose. Laws adopted for the improper purpose of giving effect to private prejudice are so offensive to equal protection that they likewise violate the Equal Protection Clause no matter the standard of review that otherwise might apply to the classification at issue.

For example, in *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Supreme Court struck down a lower court order granting sole custody to a father because his ex-wife, a white woman, was in a new relationship with a black man, which the lower court found would be damaging for the child because of the likely negative reactions of third parties. *Id.* at 434. Because the family court's decision was based on an impermissible consideration—private racial bias—analysis of the governmental interest and its connection to the classification, even under the strict scrutiny usually applied to race classifications, was unnecessary. The government's action was simply invalid. *Id.* at 433-34. This rule applies equally to classifications that would otherwise receive lesser scrutiny. *See Kelo v. City of New London*, 545 U.S. 469, 490-91 (2005) (Kennedy, J., concurring) ("a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with

only incidental or pretextual public justifications"). *See also Cleburne*, 473 U.S. at 446-47, 448-49; *Moreno*, 413 U.S. at 533-36.

In this case, the school has threatened to prohibit Desiree and Sarah from walking together in the processional solely because the two girls are lesbians and in a same-sex relationship. The principal told them that the school was concerned about the reactions of their fellow students, some of whom disapprove of gays and lesbians. That is not a valid governmental purpose under any formulation of the Equal Protection Clause. Such actions violate the Equal Protection Clause "in the most literal sense" and are presumptively invalid. *Romer*, 527 U.S. at 633.

3. EQUAL PROTECTION PROVISION OF THE MINNESOTA CONSTITUTION

Plaintiffs' claims are similarly likely to succeed under the equal protection provision of the Minnesota Constitution. *See* Minn. Const. art. I, § 2. That provision is independent of its federal counterpart, and provides even stronger protection against discrimination. *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991) ("[I]n interpreting our state equal protection clause, 'we are not bound by federal court interpretation of the federal equal protection clause.'") (quoting *AFSCME Councils 6, 14, 65 & 96 v. Sundquist*, 338 N.W.2d 560, 580 (Minn. 1983) (Yetka, J., dissenting)). In particular, the Minnesota Supreme Court has adopted a version of the rational basis test that is even more demanding than the ordinary federal standard. Under that standard, termed "the Minnesota rational basis analysis," courts are "unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires. Instead, we have required a reasonable connection between the actual, and not just the theoretical, effect of

the challenged classification and the statutory goals." *Id.* at 889.; *see also Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66, 74 & n.15 (Minn. 2000). For the reasons discussed in the previous section, the school's decision to cancel the processional solely because it anticipated that some community members would disapprove of Desiree and Sarah's sexual orientation cannot satisfy that standard.

4. MINNESOTA HUMAN RIGHTS ACT

The Minnesota Human Rights Act (MHRA) prohibits discrimination in access to any educational institution based on a variety of enumerated characteristics including sex and sexual orientation. Minn. Stat. § 363A.13. *See Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1093 (D. Minn. 2000). Desiree and Sarah have been elected to the Royalty Court by their peers and seek to participate in the processional on an equal basis with heterosexual couples who have participated in years past. The Defendants proposed actions would deny them the right to participate as a couple, simply because Desiree and Sarah are lesbians in a same-sex couple. The Defendants' actions blatantly discriminate against the Plaintiffs on the basis of their sex and sexual orientation in violation of the MHRA.

B. The Plaintiffs Will Suffer Irreparable Harm in the Absence of Injunctive Relief

In the absence of injunctive relief, the Plaintiffs will suffer an irreparable violation of their constitutional and statutory rights. When a violation of constitutionally protected rights is at stake, no further showing of irreparable injury is required. *See Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 744-45 (2d Cir. 2000); *Associated Gen.*

Contractors of Cal., Inc. v. Coal. for Economic Equity, 950 F.2d 1401, 1410 (9th Cir. 1991). The presumption of irreparable injury is particularly strong in cases involving infringement of First Amendment rights. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for purposes of preliminary injunctive relief. *Elrod v. Burns,* 427 US 347, 373 (1976).

As seniors, Desiree and Sarah will never have the opportunity again of being honored by their high school classmates as a same-sex couple in the Snow Days processional. If Defendants succeed in canceling the processional or otherwise prohibiting Plaintiffs from participating as a couple, Plaintiffs and the entire student body will understand that turn of events to mean that same-sex couples are not afforded the same dignity and rights as other students at CPHS, which would be a serious harm to Plaintiffs. Moreover, if the procession is cancelled or altered by requiring the members of the Royalty Court to proceed single file rather than in pairs, some students may blame Desiree and Sarah for this unprecedented and disfavored change from tradition.

C. The Balance of Harms Weighs in Favor of Granting Injunctive Relief to Plaintiffs

In contrast, if the court grants the requested relief, Defendants will not suffer any harm. Desiree and Sarah will simply be permitted to participate in the processional together as prom royalty just as their opposite-sex predecessors have done. The requested injunction would do nothing more than require the processional to transpire as had been the Defendants' plan, and assure that Desiree and Sarah are given an opportunity to promenade together as a couple.

Desiree and Sarah's classmates elected them to the Royalty Court with knowledge that they are a same-sex couple. There is no evidence that Desiree and Sarah will not be well received by their classmates attending the assembly. If Defendants are concerned about possible disruption, an injunction will not limit their ability to fairly apply rules of conduct to punish any students who display disruptive behavior. Indeed, to the extent needed, it is the school's duty to provide meaningful security measures in protection of Desiree and Sarah's First Amendment right to expressive conduct. *See, e.g.*, *Fricke*, 491 F. Supp. at 388 (where disruption may occur in response to expressive conduct and it may be tempered through meaningful security measures, the school has a duty to provide such measures, and may not instead permit a "heckler's veto" of protected expressive conduct). Therefore, the balance of harms favors providing injunctive relief. *See McIntire v. Bethel Sch. Indep. Sch. Dist. No. 3*, 804 F. Supp. 1415, 1429 (W.D. Okla. 1992) ("[T]he threatened injury to Plaintiffs—impairment and penalization of the exercise of their First Amendment rights—outweighs whatever damage, if any, the proposed injunction may cause Defendants.").

D. The Public Interest Supports Injunctive Relief.

Injunctive relief to stop the Defendants from canceling or otherwise altering the planned royalty processional simply because a same-sex couple plans to participate will serve the public interest. Protecting constitutional rights is "always in the public interest." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 752 (8th Cir. 2008) (citing *Phelps-Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir. 2007)); *see also Terminiello v. City of Chi.*, 337 U.S.1, 4 (1937) ("The right to speak freely and to promote diversity of

ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) ("[T]he public interest favors protecting core First Amendment freedoms."). As discussed above, issuing injunctive relief is necessary to protect the Plaintiffs' constitutional rights to freedom of expression and equal protection; therefore, granting the injunction is in the public interest.

Nowhere is the "vigilant protection of constitutional freedoms" more important than in the public schools. *Tinker*, 393 U.S. at 512 ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"). Here, in the absence of an injunction, the Defendants will neutralize the Plaintiffs' constitutionally protected expression intended to communicate that LGBT individuals and couples are due similar privileges and dignity as heterosexual individuals and couples. The Defendants' disagreement with that viewpoint does not diminish the public value of protecting Desiree and Sarah's constitutional right to convey that message. Such a message—core to the speakers' identity—is due the greatest protection. The public interest weighs heavily in favor of granting the requested injunction.

III. THE COURT SHOULD NOT REQUIRE THE PLAINTIFFS TO POST A BOND.

Here, no costs or damages can be incurred or suffered by the Defendants—even if they are ultimately "wrongfully enjoined or restrained." The Plaintiffs seek only to enjoin the Defendants from canceling a much-anticipated school tradition and from denying a

same-sex couple the opportunity to walk together in the processional as opposite-sex couples have done in the past. The assembly itself is only scheduled to last one hour, and the processional—which traditionally involves six pairs of students walking across the gymnasium floor—represents just a fraction of that time. Moreover, the Defendants simply cannot be harmed by an injunction that requires them to proceed with the planned processional at an annual assembly. Therefore, no bond should be required.

CONCLUSION

The Defendants have publicly stated their intention to violate the Plaintiffs' constitutional and statutory rights on Monday, January 31, 2011. Because each of the four *Dataphase* factors weighs in the Plaintiffs' favor, the Plaintiffs are entitled to a TRO barring the Defendants from canceling (or otherwise altering) the traditional processional portion of the Snow Days assembly and requiring that the Defendants permit Desiree and Sarah the opportunity to walk together in the processional, just as opposite-sex couples have done in the past.

Dated: January 28, 2011

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