No. _____

# In the Supreme Court of the United States

BRADLEY JOHNSON,
*Petitioner*,
v.
POWAY UNIFIED SCHOOL DISTRICT, et al.,
*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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January 19, 2012

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## QUESTIONS PRESENTED

This case presents the question of whether public school officials violate the United States Constitution by censoring a teacher's personal, non-curricular speech in a forum created by the school district for such speech based on the teacher's viewpoint.

At issue are two banners that Petitioner, a high school math teacher, displayed in his classroom for more than 25 years without complaint. The banners contain the following slogans: "In God We Trust," "One Nation Under God," "God Bless America," "God Shed His Grace On Thee," and "All Men Are Created Equal, They Are Endowed By Their Creator." In 2007, school officials ordered Petitioner to remove the banners because they conveyed a "Judeo-Christian" viewpoint.

1. Whether *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006), should apply in a case challenging a viewpoint restriction on a public school teacher's personal, non-curricular speech expressed in a limited public forum created by the school district.

2. Whether school officials violated the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment by restricting Petitioner's personal, non-curricular speech expressed in a limited public forum created by the school district based on Petitioner's viewpoint.

## PARTIES TO THE PROCEEDING

The Petitioner is Bradley Johnson (hereinafter referred to as "Petitioner").

The Respondents are the Poway Unified School District; Jeff Mangum, Linda Vanderveen, Andrew Patapow, Todd Gutschow, and Penny Ranftle, all individually and in his or her official capacity as a Member of the Board of Education for the Poway Unified School District; Dr. Donald Phillips, individually and in his official capacity as Superintendent of the Poway Unified School District; William R. Chiment, individually and in his official capacity as Assistant Superintendent of the Poway Unified School District; and Dawn Kastner, individually and in her official capacity as Principal, Westview High School, Poway Unified School District (hereinafter collectively referred to as "School District" or "Respondents").

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## JURISDICTION

The judgment of the court of appeals was entered on September 13, 2011. App. 43a-44a. A petition for rehearing and suggestion for rehearing *en banc* was denied on October 21, 2011. App. 102a-103a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment to the United States Constitution provides, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

## STATEMENT

Pursuant to a longstanding School District policy of permitting teachers to express personal, non-curricular messages through the display of banners,

posters, flags, and other items and for more than 25 of those years, Petitioner, a high school math teacher, displayed in his classroom, without complaint, two such banners. The banners contain well-known, historic, and patriotic slogans, including "In God We Trust," "One Nation Under God," "God Bless America," "God Shed His Grace On Thee," and "All Men Are Created Equal, They Are Endowed By Their Creator." *See* App. 46a-47a (photographs of banners).

In 2007, Respondents ordered Petitioner to remove the banners because they allegedly conveyed an impermissible "Judeo-Christian" viewpoint.

In its opinion, the Ninth Circuit framed the issue on appeal as follows:

> We consider whether a public school district infringes the First Amendment liberties of one of its teachers when it orders him not to use his public position as a pulpit from which to preach his own views on the role of God in our Nation's history to the captive students in his mathematics classroom.[1]

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[1] Contrary to the panel's view, Petitioner never used "his public position as a pulpit" to "preach" to the students. Respondent William Chiment confirmed that fact, testifying on behalf of the School District as follows:

> Q: Anyone ever make any complaints that you're aware of that [Petitioner] would proselytize students impermissibly?
>
> A: No.

*See also* App. 87a ("The [Petitioner's] banners are not patently evangelical. They do not contain scripture from any holy text. There is no proselytizing language."). Indeed, in a footnote, the district court made the following relevant observation:

App. 4a.

The district court, which held that the School District did violate Petitioner's constitutional rights, framed the issue differently:

> May a school district censor a high school teacher's expression because it refers to Judeo-Christian views while allowing other teachers to express views on a number of controversial subjects, including religion and anti-religion?

App. 51a.

For the past 30 plus years, the School District had in place a policy of permitting teachers to display in their classrooms various non-curricular messages and other items that reflect the individual teacher's personality, opinions, viewpoints, and values regarding a wide range of interests and subject matter. Consequently, for the past 30 plus years, the classroom walls have served and continue to serve as a forum for the expression of such opinions and viewpoints. As the district court concluded based on the undisputed record evidence:

> [Respondents] have a long-standing policy of permitting its teachers to express ideas on their

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> Ironically, while teachers in the Poway Unified School District encourage students to celebrate diversity and value thinking for one's self, [Respondents] apparently fear their students are incapable of dealing with diverse viewpoints that include God's place in American history and culture.

App. 58a, n.1.

> classroom walls. [Respondents'] policy grants its teachers discretion and control over the messages displayed on their classroom walls. [Respondents'] policy permits teachers to display on their classroom walls messages and other items that reflect the teacher's personality, opinions, and values, as well as political and social concerns. [Respondents'] policy permits teacher speech so long as the wall display does not materially disrupt school work or cause substantial disorder or interference in the classroom. As a result of the [Respondents'] long-standing policy, a teacher's classroom walls serve as a limited public forum for a teacher to convey non-curriculum messages.

App. 70a-71a.

The panel acknowledged this factual finding, stating, "[W]e agree with the district court that no genuine issue of material fact remains present in this case," but disagreed with the application of a forum analysis in favor of a "*Pickering*-based inquiry." App. 43a.

Pursuant to this long-standing policy, teachers have displayed and continue to display in their classrooms non-curricular, personal materials such as posters of rock bands and musicians; a poster of the controversial, anti-religion song *Imagine*, written by John Lennon; posters of various professional athletes and professional sports teams; family photographs; non-student artwork; posters and other items, such as bumper stickers, decals, and buttons, promoting and advocating a viewpoint on controversial social and

political issues such as gay rights, global warming and the environment, animal research, anti-war/peace,[2] the military, zero population growth, and others. The School District allows teachers to display Tibetan prayer flags, which contain an image of Buddha.[3] These prayer flags are considered sacred, religious items by those who practice Buddhism. Teachers are permitted to display posters of famous religious leaders, such as Gandhi (Hindu), the Dali Lama (Buddhist), and the controversial Malcolm X (the Nation of Islam/Islam); and items of particular political parties or candidates, including a campaign poster of candidate Obama, a *Newsweek* magazine cover of the candidates Obama and Biden; a poster of the "Libertarian Party"; and the Gadsden flag with the political slogan, "Don't Tread on Me." *See* App. 55a-59a. All of these expressive items were displayed as of April 2009, which is more than two years after Respondents ordered Petitioner to remove his banners. And as Respondents acknowledged in their filings below, "[R]eligion is not a category of items prohibited from classroom walls."

For approximately 25 years, Petitioner continuously displayed, without a single objection or complaint, his patriotic banners. Petitioner had the banners made to order by a private company, and he purchased them with his own funds.

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[2] One example is a bumper sticker stating, "How many Iraqi children did we kill today?" App. 58a.

[3] One teacher's Buddhist prayer flag display stretches approximately 35 to 40 feet across her classroom. App. 56a.

Petitioner's banners contain phrases and slogans central to our Nation's history and heritage, and they reflect the foundations of our Nation. The banners do not contain quotes or passages from Sacred Scripture or any other religious text.

The classrooms in which Petitioner's banners were displayed were assigned to him. As a matter of policy, teachers are given discretion and control over the various non-curricular messages displayed on their classroom walls. No teacher is permitted to display materials or messages on Petitioner's classroom walls without his permission, and the School District does not direct the teachers' non-curricular displays; it is up to the individual teacher. As Respondents acknowledge, the School District does not endorse or promote the non-curricular messages displayed by the teachers.[4] Consequently, the

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[4] Respondent Chiment testified as follows:

> Q: You would agree, though, too, that these -- the posters that the teachers put up, the noncurriculum ones that might express their own personal interest, whether it be sports or it might be . . . environmental issues like the ones we saw --
>
> A: Yes.
>
> Q: -- that those [non-curricular displays] don't necessarily mean that the School District is endorsing those particular views or opinions? Isn't that true?
>
> A: Yes, that's true.

Mr. John Collins, Deputy Superintendent at the time, testified as follows:

> Q: * * * So just because a teacher may actually post something of a personal interest to them [on the classroom wall], that doesn't necessarily mean that it's

teachers' displays do not constitute government speech.

Petitioner's banners were not displayed pursuant to any of his official duties as a teacher. He did not use his banners during any classroom session or period of instruction. They were not discussed or studied. They caused no material disruption or disorder in his classroom or anywhere else in the school. And they did not interfere with his teaching.[5]

In January 2007, Respondents ordered Petitioner to take down his banners because they allegedly conveyed an impermissible "Judeo/Christian" viewpoint.

## REASONS FOR GRANTING THE PETITION

The question of how to address teacher speech cases continues to confound the lower courts. The two vastly different approaches taken by the district court and the Ninth Circuit in this case serve to illustrate the point. Indeed, the Ninth Circuit, the Fourth Circuit, and the Sixth Circuit have each adopted differing approaches to resolving such cases. As a consequence, there is no uniform application of First

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the School District endorsing or promoting that teacher's particular interest. Isn't that fair to say?
A: That is.
*See also* App. 59a, 64a, 78a.

[5] Deputy Superintendent Collins acknowledged that Petitioner's banners "were not part of the curriculum" and that "[t]he banners have not prevented [Petitioner] from providing math instruction and fulfilling his responsibilities." *See also* App. 55a.

Amendment principles for teacher speech cases, warranting review by this Court.

This petition, therefore, presents a question of exceptional importance regarding the proper application of First Amendment principles in the public school context, particularly where the record demonstrates that the School District created a forum for the personal, non-curricular speech of its teachers. Upon close inspection, the panel's decision conflicts with this Court's precedent, which requires the application of a forum analysis under the facts presented. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). Indeed, a forum analysis is the only way to properly safeguard important First Amendment freedoms when the government has chosen to create a forum for its employees to speak.

Thus, based on the panel's ruling, which is now the controlling law of the Ninth Circuit, the School District possesses the plenary authority to make viewpoint-based restrictions on the personal, non-curricular speech of its teachers. For example, school officials now have the authority to permit teachers to adorn their classroom walls with campaign posters promoting their favorite Democrat candidates for office (or view on their favorite political or social issue), while simultaneously prohibiting any teacher from posting political campaign posters promoting a Republican candidate (or the contrary view of the permitted political or social issue). However, as this Court stated in *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in

politics, nationalism, religion, or other matters of opinion." *Id.* at 642. In direct contravention, Respondents now have the judicially-sanctioned authority to prescribe what "shall be orthodox" in matters of opinion by permitting teachers to express personal, non-curricular messages that promote certain favored ideologies, religions, and partisan viewpoints on controversial political and social issues, while censoring certain disfavored viewpoints, such as Petitioner's "Judeo-Christian" viewpoint. As a result, that "fixed star" in our constitutional constellation has been obscured and an official orthodoxy prescribed.

There is no dispute that Petitioner's constitutional rights are clearly implicated by Respondents' speech restriction. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 44 (1983) ("There is no question that constitutional interests are implicated by denying [appellee] use of the interschool mail system."). And in light of the record, these rights only have meaning if the reviewing court conducts a forum analysis.

The Ninth Circuit, however, eschewed a forum analysis in favor of applying an approach that follows *Pickering* and *Garcetti*. But this approach fails to account for the First Amendment issues at stake because Petitioner is seeking to use government property (his classroom walls) for non-curricular, personal expression pursuant to a longstanding School District policy of permitting teachers to use this forum for such speech. Indeed, this Court "has adopted a

forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius*, 473 U.S. at 800. Consequently, to determine the extent of Petitioner's free speech rights on School District property, the reviewing court must engage in a First Amendment forum analysis. *See Perry Educ. Ass'n*, 460 U.S. at 44.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, this Court held that a state university, which made its facilities generally available for the activities of registered student groups (similar to this case, the university's facilities were not open to the general public), may not close its facilities to a student group based on the content of the group's speech. *Id*. at 264-65, 267, n.5. This Court stated, "Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed *an obligation to justify its discriminations and exclusions under applicable constitutional norms . . . even if it was not required to create the forum in the first place*." *Id*. at 267-68 (emphasis added).

Consequently, once the government has opened a limited forum, it must respect the lawful boundaries it has itself set.[6] One such "boundary" is that the

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[6] Certainly, if Respondents wanted to remove all personal expressive items from the classroom walls, thereby closing the forum to all personal, non-curricular speech, they could do so. Thus, Respondents are not required to surrender control over to the teachers. However, once Respondents create this forum, they

government may not discriminate against speech on the basis of its viewpoint. *Cornelius*, 473 U.S. at 806.

Here, pursuant to a long-standing policy, the School District created a limited public forum that is open for use by teachers, including Petitioner, to express a variety of messages, including personal, non-curricular messages. Pursuant to this policy, teachers displayed and continue to display on their classroom walls messages that reflect the individual teacher's personality, opinions, and values with regard to a wide range of subject matter, including controversial social and political concerns. Thus, a forum analysis is the proper approach to take. And based on this analysis, Respondents' viewpoint-based restriction cannot survive constitutional scrutiny.

Viewpoint discrimination is prohibited in all forums because it is an egregious form of content discrimination. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). If certain speech falls within an acceptable subject matter otherwise included in the forum, the government may not exclude it from the forum based on the viewpoint of the speaker. Thus, viewpoint discrimination occurs when the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject," as in this case. *Cornelius*, 473 U.S. at 806.

Because Respondents singled out Petitioner's speech based on his viewpoint, Respondents' speech

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cannot pick and choose based on viewpoint which messages are acceptable and which are not.

restriction cannot survive constitutional scrutiny. *Rosenberger*, 515 U.S. at 819; *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107-08 (2001).

Here, the Ninth Circuit rejected a forum analysis and applied the "balancing test" set forth in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). However, the panel never reached the point of balancing the respective parties' interests because it held, based on the second step of a five-part test set forth in *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009)—a step expressly derived from *Garcetti v. Ceballos*, 547 U.S. 410 (2006)—that Petitioner was speaking on behalf of the government as part of his official duties, thus ending any further inquiry. App. 23a-33a. As the panel concluded, "Because the speech at issue owes its existence to Johnson's position as a teacher, Poway acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire." App. 32a-33a (citing *Garcetti*, 547 U.S. 421-22). But *Pickering* and *Garcetti* are inapplicable here because these cases do not address a situation in which the government opened a forum for certain expressive activity (personal, non-curricular messages) by certain speakers (teachers), but then prohibited a qualified speaker from expressing an appropriate message in the forum based on his viewpoint.

Indeed, the panel acknowledged the fact that Petitioner's speech was not part of the curriculum or curricular in nature, *see* App. 25a, n.13, and expressly declined to "apply" what it described as "the curricular

speech doctrine," citing to *Lee v. York Cnty. Sch. Divs.*, 484 F.3d 687, 697 (4th Cir. 2007), *see* App. 23a, n.11.[7]

Moreover, upon reviewing the "content, form, and context" of Petitioner's speech, "as revealed by the whole record," pursuant to *Connick v. Myers*, 461 U.S. 138, 147-48 (1983), the Ninth Circuit concluded that the speech addressed a matter that was "unquestionably of inherent public concern." App. 20a-23a.

As this Court noted in *Connick*, when an employee's speech addresses a matter of public concern, the courts must closely scrutinize the reasons for suppressing the speech. *Id*. at 146 (observing that because "Myer's questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge"). This is so because "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick*, 461 U.S. at 145 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886. 913 (1982) & *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

Thus, the Ninth Circuit held that the government, in the form of school officials, has plenary authority over the speech of its teachers, including the authority to make viewpoint-based restrictions on that speech in a forum in which teachers are permitted to express

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[7] Similarly, the panel rejected the contention that *Garcetti*'s "academic freedom" exception applied to inquiries involving the speech of primary and secondary school teachers. App. 23a, n. 12.

personal, non-curricular opinions and viewpoints on a host of controversial political and social issues. This holding undermines fundamental First Amendment principles.

Moreover, the Ninth Circuit's approach conflicts with the approach taken by the Fourth Circuit in *Lee v. York Cnty. Sch. Divs.*, 484 F.3d 687 (4th Cir. 2007). In *Lee*, the Fourth Circuit refused to apply *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and instead applied *Pickering* in light of circuit precedent. As the Fourth Circuit stated, "The Supreme Court in *Garcetti* held that 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.' . . . The Court explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching." *Lee*, 484 F.3d at 694, n.11 (quoting and citing *Garcetti*, 547 U.S. at 701, 703) (citations omitted). The Fourth Circuit ultimately held that school officials did not violate the First Amendment because the teacher's "classroom postings do not constitute speech concerning a public matter, because they were of a curricular nature." *Id*. at 694. Thus, the Fourth Circuit holds as a matter of law that teacher speech that is "curricular in nature" is not speech that is "concerning a public matter." Therefore, school officials could restrict the speech without running afoul of the First Amendment.

In so ruling, however, the Fourth Circuit noted that if the teacher's speech was not curriculum related—that is, if it was personal and non-curricular as in the case of Petitioner's speech—then school officials could

not restrict the speech unless it "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school." *Id*. at 694, n.10 (quoting *Tinker*, 393 U.S. at 509).

In *Evans-Marshall v. Bd. of Educ*., 624 F.3d 332 (6th Cir. 2010), the Sixth Circuit adopted yet another approach to teacher speech cases, ultimately concluding along the lines similar to the Ninth Circuit. In *Evans-Marshall,* the plaintiff's contract was not renewed because she sought to teach as part of her assigned classroom instruction curricula material to which the school board objected. The Sixth Circuit ruled in favor of the school board, holding that "the First Amendment does not extend to the *in-class curricular speech* of teachers." *Id*. at 334 (emphasis added). In so ruling, the Sixth Circuit found that the teacher's "curricular speech" met the threshold requirement under *Connick v. Myers*, 461 U.S. 138 (1983), in that it touched upon a "matter of public concern." *Evans-Marshall,* 624 F.3d at 338-39. And upon applying the balancing test of *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), the court concluded that the teacher's interest in her "curricular speech" outweighed the school board's interest in promoting the efficiency of the public services it performs. *Evans-Marshall*, 624 F.3d at 339. The court ultimately concluded, however, that the school board should prevail because under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the teacher's "curricular speech" was made pursuant to her official duties *because she was teaching the curriculum*. *Evans-Marshall*, 624 F.3d at 340-41.

In sum, in the Ninth Circuit, school officials are permitted to impose a viewpoint-based restriction on

the personal, non-curricular speech of Petitioner even though his speech addressed a matter of public concern and it was made pursuant to a School District policy of permitting teachers to display in their classrooms various non-curricular messages that reflect the individual teacher's personality, opinions, viewpoints, and values regarding a wide range of interests and subject matter, including controversial social and political issues. In the Fourth Circuit, a teacher's curricular-related speech does not address a matter of public concern as a matter of law. Therefore, school officials have plenary authority to regulate this category of speech. However, a teacher's non-curricular speech, such as Petitioner's speech at issue here, is subject to the *Tinker* standard in that it cannot be restricted unless the government can show that it has caused or threatens to cause a material disruption in the school. In the Sixth Circuit, a teacher's speech may address a matter of public concern and the balancing of interests under *Pickering* may weigh in favor of protecting the speech. However, this analysis does not matter when the speech is curricular in nature because such speech is made pursuant to a teacher's official duties and may therefore be regulated however school officials deem appropriate under *Garcetti*.

In the final analysis, the Ninth Circuit should have conducted a forum analysis based on this Court's precedent and the overarching importance of preserving First Amendment liberties. Moreover, there is a clear lack of uniformity in the lower federal courts as to the application of *Pickering*, *Connick*, and *Garcetti* in the context of addressing whether a teacher's speech is constitutionally protected.

Consequently, review by this Court is appropriate. *See* Sup. Ct. R. 10(a) & (c).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

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# APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 10-55445 D.C. No. 3:07-cv-00783-BEN-WVG**

**[Filed September 13, 2011]**

BRADLEY R. JOHNSON,
*Plaintiff-Appellee,*

v.

POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM, individually and in his official capacity as a Member of the Board of Education for the Poway Unified School District; LINDA VANDERVEEN, individually and in her official capacity as a Member of the Board of Education for the Poway Unified School District; ANDREW PATAPOW, individually and in his official capacity as a Member of the Board of Education for the Poway Unified School District; TODD GUTSCHOW, individually and in his official capacity as a Member of the Board of Education for the Poway Unified School District; PENNY

RANFTLE, individually and in her official capacity as a Member of the Board of Education for the Poway Unified School District; DONALD A. PHILLIPS, individually and in his official capacity as Superintendent of the Poway Unified School District; DAWN KASTNER, individually and in her official capacity as Principal, Westview High School, Poway Unified School District; WILLIAM R. CHIMENT, individually and in his official capacity as Assistant Superintendent of the Poway Unified School District,
*Defendants-Appellants.*

OPINION

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Argued and Submitted
May 5, 2011—Pasadena, California

Filed September 13, 2011

Before: Barry G. Silverman, Richard C. Tallman,
and Richard R. Clifton, Circuit Judges.

Opinion by Judge Tallman

## COUNSEL

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Francisco M. Negron, Jr., National School Boards Association, Alexandria, Virginia, and Thomas E.M. Hutton, Patterson Buchanan Fobes Leitch & Kalzer, Inc., P.S., Seattle, Washington, for Amicus Curiae National School Boards Association and California School Boards Association in Support of defendants-appellants Request for Reversal.

Ayesha N. Khan, Michael A. Blank, Americans United for Separation of Church and State, Washington, D.C., for Amicus Curiae Americans United for Separation of Church and State in Support of appellants.

David Blair-Loy, ACLU Foundation of San Diego and Imperial Counties, San Diego, California, for Amicus Curiae American Civil Liberties Union of San Diego and Imperial Counties in Support of plaintiff-appellee and Affirmance with Modification of Judgment.

Steven W. Fitschen, The National Legal Foundation, Virginia Beach, Virginia, for Amici Curiae Christian Educators Association International and WallBuilders,

Inc., in Support of plaintiff-appellee Urging Affirmance.

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**OPINION**

TALLMAN, Circuit Judge:

We consider whether a public school district infringes the First Amendment liberties of one of its teachers when it orders him not to use his public position as a pulpit from which to preach his own views on the role of God in our Nation's history to the captive students in his mathematics classroom. The answer is clear: it does not.

When Bradley Johnson, a high school calculus teacher, goes to work and performs the duties he is paid to perform, he speaks not as an individual, but as a public employee, and the school district is free to "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). Just as the Constitution would not protect Johnson were he to decide that he no longer wished to teach math at all, preferring to discuss Shakespeare rather than Newton, it does not permit him to speak as freely at work in his role as a teacher about his views on God, our Nation's history, or God's role in our Nation's history as he might on a sidewalk, in a park, at his dinner table, or in countless other locations.

Because we further conclude that the school district did not violate Johnson's rights under either the Establishment or Equal Protection clauses of the

United States Constitution, as applied by the Fourteenth Amendment,[1] we reverse the district court's award of summary judgment to Johnson and remand with instructions to enter summary judgment in favor of the Poway Unified School District and its officials on all federal and state claims.[2]

## I

Bradley Johnson has spent more than 30 years teaching math to the students of the Poway Unified School District of San Diego County, California. In

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[1] The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment provides, in relevant detail:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"The term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995).

[2] We resolve these state law claims against Johnson and reverse the district court in a separate memorandum disposition filed concurrently with this opinion.

August 2003, he moved to the newly opened Westview High School to teach calculus and algebra. He teaches there still and is the faculty sponsor of the school's student Christian club.

In late 2006, a fellow teacher at Westview set this action in motion when he questioned Dawn Kastner, the newly hired principal of Westview, about two large banners prominently displayed in Johnson's classroom. Kastner, who had also heard about Johnson's banners from a student and another teacher, went to Johnson's classroom to see the banners for herself. What she found surprised her. In Johnson's classroom, two large banners, each about seven-feet wide and two-feet tall, hung on the wall. *See* Appendix. One had red, white, and blue stripes and stated in large block type: "IN GOD WE TRUST"; "ONE NATION UNDER GOD"; "GOD BLESS AMERICA"; and, "GOD SHED HIS GRACE ON THEE."[3] The other stated: "All men are created equal, they are endowed by their CREATOR." On that banner, the word "creator" occupied its own line, and each letter of "creator" was capitalized and nearly double the size of the other text.

Kastner recalled being overwhelmed by the size of the banners. She remembered walking into Johnson's class "and going, 'Wow, these are really big.' " She was more concerned, though, about the message. "It was a math class," she later explained. "There were a lot of phrases that individually or in context were not

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[3] Each of these phrases appears in official and historical texts. For example, "In God We Trust" is the official motto of the United States, and "One Nation Under God" is a line from the Pledge of Allegiance.

problematic at all. But because they were taken out of context and very large, they became a promotion of a particular viewpoint"—a religious viewpoint "that might make students who didn't share that viewpoint uncomfortable." The "common thread in all of those were the words 'God, Creator.' Those were all sort of pulled out of the context of their original [meaning] — and the signs were, like, 10 feet, 7 feet, something like that. There were two very large signs."

Unsure as to what she should do, Kastner called Melavel Robertson, one of Poway's assistant superintendents. She described the banners to Robertson and told her that "some people [had] mention[ed] that they don't know why these signs are allowed in the classroom, and I just saw what they're talking about." At Robertson's request, she had pictures taken of Johnson's banners and sent to Robertson, who forwarded them to Bill Chiment, the assistant superintendent tasked with "legal issues."

While waiting for further direction from the superintendent's office, Kastner met with Johnson to talk about his banners. She told him that she felt the signs might inappropriately emphasize the words "God" and "Creator" and suggested that his displays might be more appropriate if the passages were each displayed in the context of the historical artifact or document from which they were pulled. "We talked about the possibility of putting the entire thing up in context so if a phrase was from the Declaration [of Independence], put the entire Declaration up." Also, "we talked about taking a smaller version of that and having smaller — smaller expressions of his personal beliefs around his desk area."

Kastner asked Johnson to consider how a student of a different faith might feel if they walked into his classroom and saw his banners. "[T]hey may feel like, 'Wow, I'm not welcome,' or 'I'm not gonna fit in this classroom.' And they may feel bad. And I can't imagine that that would ever be your intent." Johnson was not convinced. According to Kastner, he told her, "Dawn, sometimes that's necessary," and refused to either remove his banners or display the more contextual versions the school offered to provide.[4] He explained that he had displayed the banners in some form or another since 1982, that they simply contained patriotic phrases, and that he considered it his "right to have them up."

After the meeting with Johnson, Kastner spoke with Chiment and informed him of their discussion. Eventually, the full school board approved the decision to order Johnson to remove the banners. On January 19, 2007, Chiment phoned Johnson and told him that he would need to remove his banners. Four days later, Chiment followed up his phone call with a letter directing Johnson to review Poway Unified School District Administrative Procedure 3.11.2, "The Teaching of Controversial Issues," as well as California Education Code § 51511.[5] He told Johnson to pay

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[4] For example, the school offered to provide, and did provide, Johnson with a large poster of a quarter that displayed the phrase "In God We Trust" in context.

[5] That section provides:

> Nothing in this code shall be construed to prevent, or exclude from the public schools, references to religion or references to or the use of religious literature, dance,

particular care to Poway's requirement that teachers "[f]ollow the requirements on prohibited instruction as contained in the California Education Code" and "[d]istinguish between teaching and advocating, and refrain from using classroom teacher influence to promote partisan or sectarian viewpoints."

Chiment explained that the "prominent display of these brief and narrow selections of text from documents and songs without the benefit of any context and of a motto, all of which include the word 'God' or 'Creator' has the effect of using your influence as a teacher to promote a sectarian viewpoint." He added that these uses also constituted "aid to a particular religious sect, creed, or sectarian purpose" because they were "not incidental or illustrative of matters properly included in your course of study as a teacher of mathematics."

Johnson complied with the district's order and removed his banners. Shortly thereafter, he filed suit in federal court, alleging that Poway had violated his rights under the First and Fourteenth amendments of the United States Constitution, and article I, sections 2 and 4, of the California Constitution. He sought declaratory and injunctive relief.

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music, theatre, and visual arts or other things having a religious significance when such references or uses do not constitute instruction in religious principles or aid to any religious sect, church, creed, or sectarian purpose and when such references or uses are incidental to or illustrative of matters properly included in the course of study.

After the lawsuit was filed, Johnson conducted site inspections at all four high schools in the school district. He identified and photographed a lengthy list of items he believed displayed sectarian viewpoints, including Tibetan prayer flags; a John Lennon poster with "Imagine" lyrics; a Mahatma Gandhi poster; a poster of Gandhi's "7 Social Sins"; a Dalai Lama poster; a poster that says, "The hottest places in hell are reserved for those who in times of great moral crisis, maintain their neutrality"; and a poster of Malcolm X.[6] Both parties also deposed school officials, including Kastner and Chiment, and some teachers, including Johnson. In his deposition, Johnson initially maintained that his banners were purely patriotic with no religious purpose. When pressed, however, he stated:

> My purpose was to celebrate our national heritage of — and the national motto saying the Pledge of Allegiance. I know that there's — you know, is it God or is it — or is there no God. If that's the choice, then this is espousing God as opposed to no God, I'll say that, but not any particular God.

He later added, in regard to his selections, "I'm not intending to highlight or promote any of that kind of religious background because I don't know what it was. I'm trying to highlight the religious heritage and nature of our nation, that we have that as a foundation."

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[6] We identify only those materials that could possibly be construed as religious. The remaining displays are ultimately immaterial to our inquiry.

On August 14, 2009, cross-motions for summary judgment were filed. On February 25, 2010, the district court granted Johnson summary judgment on each of his claims. It concluded that Poway had created a limited public forum for teacher speech in its classrooms and had impermissibly limited Johnson's speech based upon his viewpoint. It granted Johnson declaratory relief and ordered Poway not to interfere with Johnson's future display. It also found that the school officials were not entitled to qualified immunity and ordered each to pay nominal damages. Johnson later moved for attorney's fees in the amount of $240,563.15. That motion has been stayed pending the outcome of Poway's timely appeal.

## II

We have jurisdiction under 28 U.S.C. § 1291, and we review de novo the district court's grant of summary judgment to "determine, viewing the evidence in the light most favorable to the nonmoving party and drawing all justifiable inferences in its favor, whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 772 (9th Cir. 2002). Because the parties filed cross-motions for summary judgment, we consider each party's evidence to evaluate whether summary judgment was appropriate. *Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001).

## III

We consider the district court's determination that Poway violated Johnson's rights under the Free

Speech and Establishment clauses of the First Amendment, as well as his equal protection rights under the Fourteenth Amendment.

**A**

We address first whether the district court erred in holding that Poway violated Johnson's federal free speech rights when it ordered that he no longer display his banners in his classroom.

In undertaking this inquiry, we consider whether the court erred in applying a pure forum-based analysis rather than the *Pickering*-based inquiry crafted by the Supreme Court to measure the constitutionality of the government's curtailment of government-employee speech. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568 (1968) ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."). Because we hold that *Pickering*'s employee-speech analysis controls, we further consider whether Poway's actions ran afoul of the sequential five-step *Pickering*-based test we adopted in *Eng v. Cooley*, 552 F.3d 1062, 1070-72 (9th Cir. 2009). As we can conceive of no basis for concluding that Johnson's speech was protected, we reverse the district court's award of summary judgment on this issue and remand with instructions to enter judgment in favor of Poway.

**1**

**[1]** To some degree, we can understand the district court's mistake. An analysis of the government's regulation of speech ordinarily hinges on the context, or forum, in which the speech takes place. *See, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983). Under that traditional rubric, the government's power is at its least when speech takes place in a public forum, is greater when it is regulating speech in a limited public forum, and is at its greatest when regulating speech in a non-public forum. *Id.*

**[2]** However, the Supreme Court has held that where the government acts as both sovereign *and employer*, this general forum-based analysis does not apply. *Pickering*, 391 U.S. at 568; *accord Garcetti v. Ceballos*, 547 U.S. 410, 417-19 (2006); *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 80 (2004) ("[A] governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public."). Instead, the Court applies a distinct *Pickering*-based analysis that "reconcile[s] the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission." *Roe*, 543 U.S. at 82.

As initially described in *Pickering*, this analysis required only that courts balance " 'the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Eng*, 552 F.3d at 1070 (alteration in original) (quoting

*Pickering*, 391 U.S. at 568). Since *Pickering*, however, the test has evolved. *See, e.g.*, *Ceballos*, 547 U.S. at 423-24, 426 (speech must not be made pursuant to duties as employee); *Roe*, 543 U.S. at 82-83 ("speech must touch on a matter of 'public concern' " (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977) (causation). We have distilled this evolution into a "sequential five-step" inquiry:

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff 's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

*Eng*, 552 F.3d at 1070. Notably, "because these are sequential steps," a plaintiff 's failure to satisfy a single one "necessarily concludes our inquiry." *Huppert v. City of Pittsburg*, 574 F.3d 696, 703 (9th Cir. 2009).

Despite *Pickering* and its progeny, the district court concluded that "the *Pickering* balancing test for government employee speech is the wrong test to apply" to measure the legality of Poway's actions. *Johnson v. Poway Unified Sch. Dist.*, No. 3:07-cv-783-BEN-WVG, 2010 WL 768856, at *8 (S.D. Cal. Feb. 25, 2010). It rested this conclusion on a single fact—that Johnson's speech occurred *in school*, noting " '[i]t can hardly be argued that either students *or teachers* shed

their constitutional rights to freedom of speech or expression at the schoolhouse gate.' " *Id.* at *7 (alteration in original) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (emphasis added)). On appeal, Johnson urges us to follow suit. We decline his invitation.

**[3]** Contrary to Johnson's belief and the district court's determination, no justifiable cause exists for refusing to apply our *Pickering*-based analysis to Johnson's claim. *See Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) (applying *Pickering*) ("Casting these red herrings aside, we look instead to applicable doctrine, which is found in the case law governing employee speech in the workplace."); *see also Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 649-50 (9th Cir. 2006) (rejecting an employee's contention that a "stricter test" than our *Pickering*-based analysis should apply when the underlying speech is religious); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1016 (9th Cir. 2000).[7] First, our "school speech" precedent in no way suggests that *Pickering* does not control in cases of in-school teacher speech. Not one of those cases relied upon by the district court applied a *Pickering*-based analysis because not one involved a

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[7] Johnson argues that *Downs* is immaterial to a *Pickering*-based inquiry. We disagree. *Downs* recognized that the threshold inquiry in employee-speech cases is whether the citizen or the government was speaking. *Downs*, 228 F.3d at 1011-12 ("Rather than focusing on what members of the public might perceive Downs's speech to be, in this case we find it more helpful to focus on who actually was responsible for the speech . . . ."). Six years later, the Court did the same in *Ceballos*. 547 U.S. at 421. Because we now undertake that very inquiry under step two of *Eng*, *see* 552 F.3d at 1070, *Downs* is not only relevant, it largely controls.

government employee—a fact that renders *Pickering*'s absence not only unsurprising, but necessary. *Compare Johnson*, 2010 WL 768856, at *8 (citing cases), *with Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (student journalists); *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 648-49 (9th Cir. 2008) (student Bible club), *overruled on other grounds by L.A. Cnty., Cal. v. Humphries*, 131 S. Ct. 447 (2010); *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007) (student); *and Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1048-50 (9th Cir. 2003) (per curiam) (religious non-profit corporation).

*Pickering* and *Tinker* are not mutually exclusive concepts. *Tinker*, 393 U.S. at 506 ("First Amendment rights, *applied in light of the special characteristics of the school environment*, are available to teachers and students." (emphasis added)). The very basis for undertaking a *Pickering*-based analysis of teacher speech, whether in-class or out, is the Court's recognition that teachers do not "relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Pickering*, 391 U.S. at 568. That much should be evident from the test itself, which requires that we "balance between *the interests of the teacher*, as a citizen, . . . and the interest of the State." *Id.* (emphasis added); *accord Ceballos*, 547 U.S. at 418 (noting that absent a First Amendment right there can be no First Amendment claim).

Thus, to do as Johnson suggests would require us to ignore that *Pickering* itself concerned a school district's attempt to curtail the out-of-school speech of a high school teacher. 391 U.S. at 564, 568. It would

require us to forget the very rationale undergirding the Court's creation of the *Pickering* doctrine: that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom," or else "there would be little chance for the efficient provision of public services." *Ceballos*, 547 U.S. at 418 (citing *Connick*, 461 U.S. at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter.")). It would require that we somehow conclude that a teacher's in-school speech warrants greater protection than his or her out-of-school speech—a proposition directly at odds with the common understanding of *Pickering* and its progeny. *Id.* at 423-24 (explaining that "public statements" made "outside the course of performing . . . official duties" engender the greatest "First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government"); *see Downs*, 228 F.3d at 1016.

Moreover, addressing similar claims in similar contexts, we have refused to unnecessarily narrow *Pickering*'s application. *Berry*, 447 F.3d at 649 (declining to apply a forum-based analysis to evaluate the government's curtailment of an employee's religious speech "because [the forum analysis] does not take into consideration the employer's interests that led the Supreme Court to adopt the *Pickering* balancing test in the first place."); *id.* at 650 ("Here, Mr. Berry contends that his speech is protected under the First Amendment as religious speech, rather than as comments upon matters of public concern. Nonetheless, we conclude that the *Pickering* balancing approach applies regardless of the reason an employee

believes his or her speech is constitutionally protected."); *Tucker*, 97 F.3d at 1210.

So too have our sister circuits. When addressing claims concerning in-school teacher speech, each has applied *Pickering* to measure the constitutionality of the government's conduct. *E.g.*, *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 340 (6th Cir. 2010); *Borden v. Sch. Dist. of East Brunswick*, 523 F.3d 153, 171 (3d Cir. 2008) (holding under *Pickering*-based analysis that school could prohibit faculty participation in student-initiated prayer); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007) (holding under a *Pickering*-based analysis that a school board did not infringe the rights of a teacher when it ordered him to remove religious material from a classroom bulletin board); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479-80 (7th Cir. 2007) (applying *Pickering*-based test and holding that "the [F]irst [A]mendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system"). We see no reason to depart from their company.

**[4]** In sum, we think it plain that the appropriate guide for measuring the legality of the government's curtailment of employee speech in the workplace, including that of teachers, would be that Supreme Court "case law governing employee speech in the workplace." *See Tucker*, 97 F.3d at 1210 (citing *Pickering*); *see also Downs*, 228 F.3d at 1012, 1015. The

district court erred by declining to apply the controlling *Pickering*-based analysis.

**2**

Having identified the *Pickering*-based approach as the appropriate standard by which to measure Poway's conduct, we apply our five-step *Pickering*-based analysis to determine whether Poway violated Johnson's federal free speech rights when it ordered that he remove his banners from his classroom.[8]

Applying that standard, we conclude that there is no legitimate question as to whether the school violated Johnson's rights—it did not. *Downs*, 228 F.3d at 1016; *see Evans-Marshall*, 624 F.3d at 340; *Mayer*, 474 F.3d at 479-80; *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998) ("[A]lthough a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected, her in-class conduct is not." (citation and internal quotation marks omitted)); *see also Borden*, 523 F.3d at 171; *Lee*, 484 F.3d at 700. Though we do not lightly conclude that Johnson surpasses *Eng*-step one, "(1) whether the plaintiff spoke on a matter of public concern," 552 F.3d at 1070, we recognize that our hesitation is driven not by the nature of the speech itself but by the "in-school"

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[8] Ordinarily, we would remand the matter to allow the district court to first pass on the issue. However, because the record fails to establish any genuine issues of material fact that would preclude us from resolving the legal questions presented under our *Eng* analysis, and because the parties briefed and argued the issue, we are adequately informed and think it expedient to resolve the matter. *See Thomas v. Or. Fruit Prods. Co.*, 228 F.3d 991, 995 (9th Cir. 2000).

setting and opportunity for that speech. These concerns underlie our inquiry under *Eng*-step two, "(2) whether the plaintiff spoke as a private citizen or public employee," *id.* at 1071 (relying on *Ceballos*, 547 U.S. at 423-24), and lead us to conclude that Johnson spoke as an employee, not as a citizen. Accordingly, we climb no further. *Huppert*, 574 F.3d at 703 ("[F]ailure to meet one [step] necessarily concludes our inquiry.").

**a**

**[5]** Under *Eng*, Johnson must first demonstrate that his banners "touched upon a matter of public concern." *Connick*, 461 U.S. at 149; *Eng*, 552 F.3d at 1070.

This inquiry "is one of law, not fact." *Connick*, 461 U.S. at 148 n.7. And our aim, at least in theory, is simple: to determine whether the content of the employee's speech is sufficiently important to the public that its curtailment "warrant[s] judicial review." *Berry*, 447 F.3d at 649; *accord Roe*, 543 U.S. at 82-83.

To put theory into practice, we undertake a "generalized analysis of the nature of the speech." *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709 (9th Cir. 2009); *see Weeks v. Bayer*, 246 F.3d 1231, 1234 (9th Cir. 2001) (declining to adopt "rigid multi-part tests that would shoehorn communication into ill-fitting categories"). Under that analysis, we consider generally "the content, form, and context of a given statement, as revealed by the whole record," *id.* (quoting *Connick*, 461 U.S. at 147-48), to ascertain whether speech "fairly can be said to relate to 'any matter of political, social, or other concern to the

community,' " *Huppert*, 574 F.3d at 703 (quoting *Connick*, 461 U.S. at 147-48).

Of the three concerns, content is king. *Desrochers*, 572 F.3d at 710. It is "the greatest single factor in the *Connick* inquiry," *id.*, and our primary concern. *See, e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414-16 (1979).[9] Form and context only truly inform our legal inquiry in those "close" cases where "the subject matter of a statement is only marginally related to issues of public concern." *Desrochers*, 572 F.3d at 710 *(quoting Johnson v. Multnomah Cnty., Or.*, 48 F.3d 420, 425 (9th Cir. 1995)). In those cases, "the fact that [a statement] was made because of a grudge or other private interest or to co-workers rather than to the press may lead the court to conclude that the statement does not substantially involve a matter of public concern." *Id.* (quoting *Multnomah Cnty.*, 48 F.3d at 425).

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[9] In *Rankin*, for example, the Court concluded that the private form of an employee's speech—that the employee had spoken to a co-worker during work hours in an informal and private manner—could not negate the inherently public character of her political speech. 483 U.S. at 386-87; *accord Roe*, 543 U.S. at 84 ("[C]ertain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be subject to *Pickering* balancing" regardless of the manner in which they were conveyed. (discussing *Rankin*)). Similarly, in *Givhan*, the Court rejected the assertion that Mrs. Givhan, a public high school teacher, had forfeited her First Amendment interest in her speech protesting "racial discrimination—a matter inherently of public concern," *Connick*, 461 U.S. at 148 n.8—simply because she "arrange[d] to communicate privately with h[er] employer rather than to spread h[er] views before the public." 439 U.S. at 414-16.

**[6]** In the present case, our crowning of content is dispositive. *Desrochers*, 572 F.3d at 710; *see Rankin*, 483 U.S. at 386-87. Though Johnson maintains that his banners express purely patriotic sentiments—that they concern "well-known historical, patriotic phrases and slogans central to our Nation's history"—it seems as plain to us as it was to school officials that Johnson's banners concern religion. As Johnson conceded at his deposition, "[T]his is discussing God as opposed to no God . . . . I'm trying to highlight the religious heritage and nature of our nation, that we have that as a foundation." Moreover, his after-the-fact statements merely reinforce the obvious. One would need to be remarkably unperceptive to see the statements "IN GOD WE TRUST," "ONE NATION UNDER GOD," "GOD BLESS AMERICA," "GOD SHED HIS GRACE ON THEE," and "All men are created equal, they are endowed by their CREATOR," *as organized and displayed by Johnson* and not understand them to convey a religious message.[10] *See* Appendix.

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[10] To be clear, we do not hold that these phrases necessarily equate to speech concerning religion in and of themselves. *See, e.g.*, *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1019-20 (9th Cir. 2010) (holding that the phrase, "under God," did not render the Pledge of Allegiance unconstitutional because "[w]e must examine the Pledge as a whole" to take account of context). Organized differently, such as in the context of their historical significance, these terms may well lack any overt religious import, *id.*—a reality Poway itself recognized when it offered to provide Johnson substitute posters. However, the bare fact that Johnson pulled each phrase from a non-religious historical text does not categorically preclude us from concluding that he used these otherwise innocuous phrases to convey a religious message. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S. Ct. 1125, 1136 (2009). And it is *his* organization and *his* selected emphasis on the words "God" and "Creator" that drive our

**[7]** Because speech concerning religion is unquestionably of inherent public concern, *Tucker*, 97 F.3d at 1212-13; *see Connick*, 461 U.S. at 144 ("[I]t [i]s already 'too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.' " (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963))), our inquiry under *Eng* step one is concluded, and we climb to the second step of *Eng*.[11]

**b**

**[8]** The second *Eng* step requires Johnson to show that he "spoke as a private citizen," not as a "public employee." *Eng*, 552 F.3d at 1070-71.[12]

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conclusion that the banners concerned religion. *See Connick*, 461 U.S. at 148 n.7.

[11] We decline Poway's invitation to apply the curricular speech doctrine in this case. *See generally Lee*, 484 F.3d at 697 (explaining that the threshold inquiry for "curricular speech" is whether the speech "constitute[s] school-sponsored expression bearing the imprimatur of the school"). As we will explain shortly in greater detail, this "is not a case involving the risk that a private individual's private speech might simply 'bear the imprimatur' of the school or be perceived by outside individuals as 'school-sponsored.' " *Downs*, 228 F.3d at 1011. "Instead, we face an example of the government opening up its own mouth" to speak through the mouthpiece of one of its employees—a categorically different situation because, as *Downs* explains, we "review [a school's] actions through a viewpoint neutrality microscope" in imprimatur cases, *id.* at 1012, but not " 'when the State is the speaker,' " *id.* at 1013 (quoting *Rosenberger*, 515 U.S. at 833).

[12] We reject the contention that *Eng* step two, which is derived from *Ceballos*, does not apply to inquiries regarding teacher speech. As the Sixth Circuit recognized in *Evans-Marshall*,

Two inquiries are necessary to resolve this mixed question of law and fact. *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). First, a factual determination must be made as to the "scope and content of a plaintiff's job responsibilities." *Eng*, 552 F.3d at 1071. In undertaking this inquiry, courts are not to rely mechanically on formal or written job descriptions, which "often bear little resemblance to the duties an employee actually is expected to perform." *Ceballos*, 547 U.S. at 424-25. "The proper inquiry is a practical one." *Id*. at 424.

Second, the "ultimate constitutional significance" of those facts must be determined as a matter of law. *Eng*, 552 F.3d at 1071 (citations and internal quotation marks omitted). If Johnson spoke as any ordinary citizen might, then our inquiry continues. *Ceballos*, 547 U.S. at 419. But if Johnson's speech "owes its existence" to his position as a teacher, then Johnson spoke as a public employee, not as a citizen, and our inquiry is at an end. *Id.* at 421-22 (The First Amendment "does not invest [government employees] with a right to perform their jobs however they see fit."); *Evans-Marshall*, 624 F.3d at 340 (concluding that when teacher speaks as a government employee "the school board that hires that speech . . . can surely 'regulate the content of what is or is not expressed' " (quoting *Rosenberger*, 515 U.S. at 833 (The government retains the power to "regulate the content of what is or is not expressed when it is the speaker or

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*Ceballos*'s "academic freedom" carve-out, 547 U.S. at 425, applied to teachers at "public colleges and universities," *id.* at 438 (Souter, J., dissenting), not primary and secondary school teachers. 624 F.3d at 342-44; *see Edwards v. Aguillard*, 482 U.S. 578, 584 n.5 (1987).

when it enlists private entities to convey its own message."))); *see Downs*, 228 F.3d at 1013 ("Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist.").

Our factual issue is not in dispute. Johnson does not hold a unique or exotic government position. As found by the district court, he is a math teacher who performs the ordinary duties of a math teacher. *Johnson*, 2010 WL 768856, at *2. In addition, Johnson did not make his speech while performing a function not squarely within the scope of his position.[13] He was not running errands for the school in a car adorned with sectarian bumper stickers or praying with people sheltering in the school after an earthquake. "Rather, Johnson hung his banners pursuant to a long-standing Poway Unified School District policy, practice, and custom," *id.*, of permitting teachers to decorate their classrooms subject to specific limitations and the satisfaction of the principal or a District administrator.

**[9]** More importantly, we recognize that "[e]xpression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary." *Mayer*, 474 F.3d at 479; *Evans-Marshall*, 624

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[13] We acknowledge that the district court determined that the banners were not part of Johnson's curriculum. This finding is irrelevant, however, to the question of whether Johnson spoke as a citizen or as an employee. *Downs*, 228 F.3d at 1015 ("Whether or not the bulletin boards by themselves may be characterized as part of the school district's 'curriculum' is unimportant, because curriculum is only one outlet of a school district's expression of its policy."); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522-23 (9th Cir. 1994).

F.3d at 340. Thus, *as a practical matter*, we think it beyond possibility for fairminded dispute that the "scope and content of [Johnson's] job responsibilities" did not include speaking to his class in his classroom during class hours. *Cf. Ceballos*, 547 U.S. at 424.

**[10]** We consider next our legal inquiry: whether Johnson's speech owes its existence to his position, or whether he spoke just as any non-employee citizen could have. The answer is clear; he spoke as an employee. *Downs*, 228 F.3d at 1015; *see also Peloza*, 37 F.3d at 522-23. Certainly, Johnson did not act as a citizen when he went to school and taught class, took attendance, supervised students, or regulated their comings-and-goings; he acted as a teacher—a government employee. *Cf. Ceballos*, 547 U.S. at 422 ("Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. . . . When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee."). Similarly, Johnson did not act as an ordinary citizen when "espousing God as opposed to no God" in his classroom. *Peloza*, 37 F.3d at 522-23; *Mayer*, 474 F.3d at 479-80 ("The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials."); *see Lee*, 484 F.3d at 695.

As we recognized in *Peloza*,[14] teachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction. *Peloza*, 37 F.3d at 522; *see Downs*, 228 F.3d at 1015. Rather, because of the position of trust and authority they hold and the impressionable young minds with which they interact, teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official.[15] *Peloza*, 37 F.3d at 522; *Tucker*, 97 F.3d at 1210, 1212-13 ("A teacher appears to speak for the state when he or she teaches; therefore, the department may permissibly restrict such religious advocacy.")[16]; *see Aguillard*, 482 U.S. at

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[14] We are not persuaded by the district court's attempt to distinguish *Peloza*. Though it is true that *Peloza* only barred religious speech during "instructional time," *Johnson*, 2010 WL 768856, at *16, the court accepted the school district's expansive definition of "instructional time," i.e., "any time students are required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students' departure after the instructional day." *Peloza*, 37 F.3d at 522. The setting for Johnson's speech fell well within that expansive definition.

[15] We emphasize that teachers may still speak as government employees if fewer than all three conditions are met.

[16] In *Tucker*, we concluded that the California Department of Education had impermissibly curtailed the First Amendment rights of one of its computer analysts, an employee with "no educational function whatsoever" or any interaction with the public, when it precluded him from discussing his religious beliefs at work. 97 F.3d at 1208, 1212-13. We concluded, however, that the result of our *Pickering*-based analysis would have been wholly

584 ("The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."); *Downs*, 228 F.3d at 1015; *see also Berry*, 447 F.3d at 651-52 (discussing displays in public areas of government offices).

**[11]** An ordinary citizen could not have walked into Johnson's classroom and decorated the walls as he or she saw fit, anymore than an ordinary citizen could demand that students remain in their seats and listen to whatever idiosyncratic perspective or sectarian viewpoints he or she wished to share. *See Peloza*, 37 F.3d at 522-23; *Mayer*, 474 F.3d at 479-80; *Lee*, 484 F.3d at 695. Unlike Pickering, who wrote a letter to his local newspaper as any citizen might, 391 U.S. at 564, or Givhan, who met with her school's principal, a fellow employee who willingly "opened his office door to" her speech, 439 U.S. at 415, Johnson took advantage of his position to press his particular views upon the impressionable and "captive" minds before him. *See Aguillard*, 482 U.S. at 583-84; *Tucker*, 97 F.3d at 1203.

Finally, as *Downs* demonstrates, we need not reach a different conclusion simply because Poway allows its teachers some freedom in decorating their classrooms. 228 F.3d at 1011-12. *In Downs*, high school teachers and other staff members created a bulletin board in a

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different had the department's decision "applied to teachers acting in their role as teachers, or to department employees addressing the public in their official capacities." *Id.* at 1213; *see Berry*, 447 F.3d at 650, 652.

school hallway on which staff could post, pursuant to a school board policy, materials related to "Gay and Lesbian Awareness Month." *Id.* at 1006. Like Poway's policy for classroom decoration, "[m]aterials did not need approval before posting on the Gay and Lesbian Awareness bulletin boards, but were subject to the oversight of the school principal, who had ultimate authority within the school over the content of the boards." *Id.* Also like Poway's policy, the school policy at issue in *Downs* permitted only faculty and staff to post materials, but allowed "[m]aterials . . . cover[ing] a wide range of topics" to be posted. *Id.*

Dissatisfied with the materials being posted by his coworkers, Downs decided to counteract their message by hanging a competing bulletin board on which he posted his own anti-homosexual materials. *Id.* at 1006-07. After his coworkers complained, the school district ordered that he remove his board and materials. *Id.* at 1007. Like Johnson, Downs sued. *Id.* at 1008.

**[12]** On appeal, we quickly cast aside Downs's contention, echoed by Johnson today, that the school had created a limited public forum either by allowing teachers to post materials of their choosing or by not "strictly policing" those materials posted and had thus relinquished its right to restrict the viewpoints

expressed.[17] *Id.* at 1011-12; *Tucker*, 97 F.3d at 1209.[18] We concluded that it would be better "to focus on who actually was responsible for the speech on Leichman High's . . . bulletin boards": the government. *Downs*, 228 F.3d at 1011-12.

> Only school faculty and staff had access to post materials on these boards. While these faculty and staff members may have received materials from outside organizations, the faculty and staff members alone posted material on the bulletin boards, and at all times their postings were subject to the oversight of the

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[17] This contention is also repudiated by the fact that Johnson and his coworkers are all employees of the school and therefore not members of the "public." *Perry*, 460 U.S. at 47 (rejecting the argument that a limited-public forum had been created because the school had not "opened its mail system for indiscriminate use by the general public" but rather had permitted only entities "affiliated with the schools" to use the system).

[18] In *Tucker*, the Court flatly rejected the contention that a public forum could be created through mere inaction:

> In *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 802 . . . (1985), the Court stated, "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by *intentionally* opening a nontraditional forum for public discourse." (emphasis added). Assuming that Tucker and his coworkers talked about whatever they wanted to at work (before the passage of the challenged order), and that they posted all sorts of materials on the walls, that still would not show that the government had intentionally opened up the workplace for public discourse.

97 F.3d at 1209.

> school principals. Although much, if not all, of what Downs posted appeared on the bulletin board directly across the hall from his assigned classroom, the proximity of the board to his classroom detracts in no way from the conclusion that the bulletin board, like all others in Leichman High's halls, were the property and responsibility of Leichman High and LAUSD. That Leichman High's principals do not spend the majority of their days roaming the school's halls strictly policing—or, in Downs's point of view, censoring—the school's bulletin boards does not weaken our conclusion that there is no genuine issue of material fact concerning whether [the principals] had the authority to enforce and give voice to school district and school board policy. Inaction does not necessarily demonstrate a lack of ability or authority to act.
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> * * *
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> We do not face an example of the government opening up a forum for either unlimited or limited public discussion. Instead, we face an example of the government opening up its own mouth . . . .

*Id.* at 1011-12. Accordingly, the board could " 'take legitimate and appropriate steps to ensure that its message [wa]s neither garbled nor distorted' by its individual messengers," including ordering Downs to curtail his speech. *Id*. at 1011, 1013 (quoting *Rosenberger*, 515 U.S. at 833 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.")).

We see no reason why the logic of *Downs* should not apply in the present case.[19] Johnson spoke as an employee, not as a citizen.

**[13]** In sum, nothing in our holding today prevents Johnson from himself propounding his *own opinion* on "the religious heritage and nature of our nation" or how "God places prominently in our Nation's history." "Subject to any applicable forum analysis, he may [generally] do so on the sidewalks, in the parks, through the chat-rooms, at his dinner table, and in countless other locations." *Id*. at 1016 (citing *Rust v. Sullivan*, 500 U.S. 191, 198 (1991)). "He may not do so, however, when he is speaking as the government, unless the government allows him to be its voice." *Id.*; *see Pleasant Grove*, 129 S. Ct. at 1131 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). Because the speech at issue owes its existence to Johnson's position as a teacher, Poway acted well within constitutional limits in ordering

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[19] We again disagree with the district court's treatment of our controlling case law. Not all the materials posted on the bulletin boards in *Downs* "were supplied by the school district," and Downs did not post his materials on boards provided and erected by the school. 228 F.3d at 1006, 1011 ("Downs created his own bulletin board"). *Contra Johnson*, 2010 WL 768856, at *17.

Moreover, even if true, these forced distinctions are immaterial. So long as it is still the school's walls being adorned and the school's charges being indoctrinated, the school acts well within its power. *Berry*, 447 F.3d at 651 ("[T]he government 'has a greater interest in controlling what materials are posted on its property than it does in controlling the speech of the people who work for it.' " (quoting *Tucker*, 97 F.3d at 1214)); *Peloza*, 37 F.3d at 522; *Lee*, 484 F.3d at 695.

Johnson not to speak in a manner it did not desire. *Ceballos*, 547 U.S. at 421-22; *Downs*, 228 F.3d *at 1013 (citing Rosenberger*, 515 U.S. at 833); *Peloza*, 37 F.3d at 522-23.

**B**

If the displays at issue in this case did not concern religion, our identification of the speech as the government's would end our inquiry. *Ceballos*, 547 U.S. at 421-22. As we have discussed, the Free Speech Clause "has no application" to government speech, *Pleasant Grove,* 129 S. Ct. at 1131, and, as we will discuss, individuals like Johnson have no personal interest in government speech on which to base an equal protection claim, *Downs*, 228 F.3d at 1017; *see Ceballos*, 547 U.S. at 421-22. In regard to those claims, the bare fact that the speech belongs to the government is dispositive.

The same cannot be said for the Establishment Clause, however. That Clause *does* apply to government speech. *E.g.*, *Pleasant Grove*, 129 S. Ct. at 1131-32 (noting that the "involvement of public officials in advocacy may be limited by law, regulation, or practice," including the Establishment Clause). And thus the government could run afoul of the Clause either through its speech, *id.*, or, as argued by Johnson, through its act to curtail its speech—in this case, the display of the banners,[20] *see Vasquez v. L.A.*

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[20] To be clear, Johnson and amici err in asserting that Poway could only curtail Johnson's display if the banners violated the Establishment Clause. In fact, the opposite is true. Poway may freely curtail its own speech unless *that curtailment* runs afoul of the Establishment Clause.

*Cnty.*, 487 F.3d 1246, 1247-48, 1254-58 (9th Cir. 2007) (evaluating whether the removal of a cross from the Los Angeles County seal "conveyed a state-sponsored message of hostility toward Christians" in contravention of the Establishment Clause). In short, as Johnson complains, that Poway's "policy, practice, and/or custom, of prohibiting [the] banners," while permitting other displays,[21] "conveys an impermissible, government-sponsored message of disapproval of and hostility toward the Christian religion . . . and our Nation's Judeo-Christian heritage."[22]

The district court found that the government had done just that; it ruled that Poway had violated the Establishment Clause by endorsing "Buddhist, Hindu, and anti-religious speech . . . while silencing the Judeo-Christian speech of Johnson." *Johnson*, 2010 WL 768856, at *19. We review that conclusion de novo, *Vasquez*, 487 F.3d at 1254, and believe the claim involves two distinct but related contentions. First, that Poway evidenced a hostility toward Judeo-Christianity in curtailing the display of the banners, and second, that it displayed a hostility toward Judeo-

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[21] To recap, we refer to the Tibetan prayer flags; a John Lennon poster with "Imagine" lyrics; a Mahatma Gandhi poster; a poster of Gandhi's "7 Social Sins"; a Dalai Lama poster; a poster that says, "The hottest places in hell are reserved for those who in times of great moral crisis, maintain their neutrality"; and a poster of Malcolm X.

[22] We think it worthwhile to note the inherent inconsistency of Johnson's claims. If Johnson's speech does not contain some religious import, then we would be hard-pressed to see how the cessation of that speech evidences a "hostility toward the Christian religion."

Christianity and an endorsement of other religious beliefs via its presentation of the "other displays."

**[14]** We start with the basics. The Establishment Clause does not wholly preclude the government from referencing religion. *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1534 (9th Cir. 1985) ("Not all mention of religion is prohibited in public schools."); *see also Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) ("[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."). Not only would such a drastic and draconian requirement raise substantial difficulties as to what might be left to talk about, but, as the district court took great pains to point out, it would require that we ignore much of our own history and that of the world in general.[23] *Cf. Grove*, 753 F.2d at 1534 (noting *Stone*).

**[15]** Rather, what the Clause requires is "governmental neutrality"—"neutrality between religion and religion, and between religion and nonreligion." *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)) (other citations omitted). It requires that the government "not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or

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[23] For instance, one could not discuss Egyptian pyramids, Greek philosophers, the Crusades, or the Mayflower if even incidental or colloquial references to objects or individuals of religious significance were constitutionally taboo.

proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (plurality opinion); *see Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). In essence, the Clause serves not as a closed door, but as a judicious chaperone; it permits a certain degree of impartial and friendly dialogue, but is swift to step in once that dialogue turns *stigmatic* or *coercive*. *Tex. Monthly*, 489 U.S. at 9; *Trunk v. City of San Diego*, 629 F.3d 1099, 1109 (9th Cir. 2011); *see McCreary Cnty.,* 545 U.S. at 876 ("'The constitutional obligation of "neutrality" . . . is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.' " (quoting *Sherbert*, 374 U.S. at 422 (Harlan, J., dissenting), with approval)).

**[16]** To determine whether the government has strayed too far from the straight course, we continue to apply the three-factor test set forth in *Lemon.* "Under *Lemon*, a government act is consistent with the Establishment Clause if it: (1) has a secular purpose; (2) has a principal or primary effect that neither advances nor disapproves of religion; and (3) does not foster excessive governmental entanglement with religion." *Vasquez*, 487 F.3d at 1255 (citing *Lemon*, 403 U.S. at 612-13); *accord McCreary Cnty.*, 545 U.S. at 859, 875. We have noted, however, that "[i]n recent years, the Supreme Court essentially has collapsed these last two prongs to ask 'whether the challenged governmental practice has the effect of endorsing religion.' " *Trunk*, 629 F.3d at 1106 (quoting *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1043 (9th Cir. 2007) (reviewing cases)). We also note that these factors are not to be applied in a vacuum. *Pleasant*

*Grove*, 129 S. Ct. at 1136. Context is critical when evaluating the government's conduct. *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 598 (1989) ("Under the Court's holding in *Lynch*, the effect of a crèche display turns on its setting. Here, unlike in *Lynch*, nothing in the context of the display detracts from the crèche's religious message."); *accord Trunk*, 629 F.3d at 1102; *Grove*, 753 F.2d at 1534.

**[17]** Applying *Lemon* to the undisputed facts before us, we find no violation. First, Poway did not contravene the Clause when it ordered that Johnson's banners be removed. "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Aguillard*, 482 U.S. at 583-84 ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."). For that reason, "[w]e have made it clear that '[g]overnmental actions taken to avoid potential Establishment Clause violations have a valid secular purpose under *Lemon*.'" *Nurre v. Whitehead*, 580 F.3d 1087, 1096 (9th Cir. 2009) (quoting *Vasquez*, 487 F.3d at 1255), *cert. denied* 130 S. Ct. 1937 (2010); *Peloza*, 37 F.3d at 522.

**[18]** Moreover, action taken to "avoid conflict with the Establishment Clause" and maintain the very neutrality the Clause requires neither has a primary effect of advancing or inhibiting religion nor excessively entangles government with religion. *Nurre*, 580 F.3d at 1097-98; *Vasquez*, 487 F.3d at 1257-58; *see*

*Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225-26 (1963) (rejecting the contention that the absence of religion equates to "affirmatively opposing or showing hostility to religion"). Notably, as in *Nurre* and *Vasquez*, we do not, and need not, "adjudge the constitutionality of the" display in question in order to resolve the government's ability to curtail that bit of its own speech. *Vasquez*, 487 F.3d at 1257; *accord Nurre*, 580 F.3d at 1097-98. It is enough to note that our precedent and that of our sister circuits demonstrate that the government's ongoing display of the banners would raise at least the possibility of an Establishment Clause claim.[24] *Cf. Tucker*, 97 F.3d at 1213; *Lee*, 484 F.3d at 695; *see Berry*, 447 F.3d at 650-51. Poway was entitled to summary judgment on this aspect of Johnson's claim.

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[24] We would not be the first to recognize the difficult position government offices often find themselves in when trying to "run the gauntlet" between not being sued under the Establishment Clause for speaking in a manner some might perceive as unconstitutionally "pro-religious" and not being sued under the very same Clause for ceasing that speech—an action that, as this case demonstrates, may be equally offensive to others. *See, e.g.*, *Nurre*, 580 F.3d at 1097; *cf. Berry*, 447 F.3d at 650. As our precedent demonstrates, government action—especially the curtailment of its own speech—taken on account of an honest interest in ensuring neutrality generally passes constitutional muster. *Nurre*, 580 F.3d at 1097-98; *Vasquez*, 487 F.3d at 1255-57. However, we also recognize that this is not always the case. *See Widmar v. Vincent*, 454 U.S. 263, 270-71 (1981) (applying *Lemon* to conclude that a university's refusal to allow religious groups access to its facilities was not justified by its fear of an Establishment Clause issue because no tenable Clause issue would exist).

In evaluating the constitutionality of the other displays, we think the court neglected its own admonishment that government speech " '[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.' " *Johnson*, 2010 WL 768856, at *6 (alteration in original) (quoting *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (plurality opinion)). Admittedly, Gandhi, the Dalai Lama, and Malcolm X each have some religious connotation. However, as the district court noted, simple connotation does not run afoul of *Lemon*. *Van Orden*, 545 U.S. at 691-92. The same is true of the other posters. *See Pleasant Grove*, 129 S. Ct. at 1135 (describing John Lennon's song "Imagine" in its discussion of speech that may have different meanings to different people); *Grove*, 753 F.2d at 1534 (discussing The *Learning Tree*). Each would be violative only if used to endorse or inhibit religion, and nothing in the record suggests such use here.

The Tibetan prayer flags are no different. Though some amici suggest that the flags are so recognizably religious that their use "as an instrument of religion cannot be gainsaid," *Schempp*, 374 U.S. at 224 (discussing the Bible); *see Stone*, 449 U.S. at 41 (Bible and Ten Commandments), the record contains only evidence to the contrary. Lori Brickley, the science teacher who provided the flags, testified that she had no idea as to whether the flags had any particular or significant religious import, only that she had been told they represented "the basic elements" Tibetan people believe "necessary for their life." She also noted that though one of the flags contains a small picture of Buddha not one of her students had ever identified the flags as religious.

Furthermore, Brickley testified that the flags were neither hung nor used for any religious purpose. She explained that she uses the flags as part of her discussion of fossils found on and near Mount Everest because the flags are authentic—bought in Nepal near Mount Everest—and are typically purchased by climbers to put "at the top of Mount Everest when they reach the peak." She described how she typically shows a video of scientists taking cores samples on Everest and uses the flags to further stimulate the interest of her students. She said that the flags "represent climbing a mountain" and accomplishing "an amazing goal."

Limited to these facts, we would not think that an objective observer could conclude that the flags were displayed for a religious purpose. *McCreary Cnty.*, 545 U.S. at 862 ("The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the . . . official act." (citations and internal quotation marks omitted)); *id.* at 859 (noting the rarity of finding a religious purpose). Rather, the undisputed evidence supports a common-sense conclusion that the flags are intended to stimulate scientific interest, not religious pressure (or even permissible religious discussion). *Id.* at 863; *cf. Stone*, 449 U.S. at 42.

**[19]** Of course, because the speech is the government's, Brickley's purpose is not dispositive. *Pleasant Grove*, 129 S. Ct. at 1136 ("Contrary to respondent's apparent belief, it frequently is not possible to identify a single 'message' that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be

quite different from those of either its creator or its donor."). Poway's policy prohibiting sectarian and religious displays only further supports a conclusion of secular purpose. *McCreary Cnty.*, 545 U.S. at 863 ("[T]he government's action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government's action.").

In regard to "endorsement"—*Lemon* factors two and three —the evidence again suggests the absence of a violation. Though the flags may very well represent the Buddhist faith, their use by Poway has nothing to do with their religious connotation. Instead, the evidence in this case demonstrates that the district uses the flags to stimulate interest in science and scientific discovery without any mention of religion. Thus, while the flags might themselves contain "religious content," *Van Orden*, 545 U.S. at 690, the primary effect of the school's use was entirely secular and fostered no entanglement with religion. *Cf. Lemon*, 403 U.S. at 612-13. Unlike in *Allegheny*, the "context of the display" here sufficiently "detracts" from any religious message the flags might otherwise convey. *See* 492 U.S. at 598. Any residual religious effect was therefore anodyne, not stigmatic. *Trunk*, 629 F.3d at 1109 ("By 'endorsement,' we are not concerned with all forms of government approval of religion—many of which are anodyne—but rather those acts that send the stigmatic message to nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . . .' " (alteration in original) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000)) (citation and internal quotation marks omitted)).

**[20]** Because neither Poway's removal of Johnson's banners nor its display of other materials violated the Clause, the district court should have granted summary judgment to Poway, not Johnson. We reverse the court's judgment as to Johnson's Establishment Clause claim and remand with instructions that it enter summary judgment in favor of Poway.

## C

Finally, we reach Poway's claim that the district court erred in granting Johnson summary judgment on his claim that the district court denied him equal protection of the law when it ordered that he remove his banners but continued to permit the display of other posters and materials that Johnson believes exhibit sectarian viewpoints. We again agree with Poway that the court erred.

Our resolution of Johnson's freedom of speech and Establishment Clause claims leaves little room for discussion. All the speech of which Johnson complains belongs to the government, and the government has the right to "speak for itself." *Pleasant Grove*, 129 S. Ct. at 1131 (citation and internal quotation marks omitted). When it does, "it is entitled to say what it wishes," *Rosenberger*, 515 U.S. at 833, "and to select the views that it wants to express." *Pleasant Grove*, 129 S. Ct. at 1131 (citing *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view . . . .")).

**[21]** Because Johnson had no individual right to speak for the government, he could not have suffered an equal protection violation. *Downs*, 228 F.3d at 1017

("Because we determine that Downs has no First Amendment right to speak for the government, his equal protection claim based upon the deprivation of this asserted right also fails to withstand summary judgment."); *see Ceballos*, 547 U.S. at 421-22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

**[22]** We reverse and remand to the district court with instructions to enter judgment in favor of Poway on this issue.

## IV

In conclusion, we agree with the district court that no genuine issue of material fact remains in the present case. However, the district court made a critical error when it determined that Poway had created a limited public forum for teacher speech and evaluated Poway's actions under a traditional forum-based analysis rather than the controlling *Pickering*-based inquiry. Applying the correct legal principles to the undisputed facts before us, we conclude that Poway was entitled to judgment as a matter of law on each of the claims raised by Johnson.

We thus reverse and remand with instructions that the district court vacate its grant of injunctive and declaratory relief, as well as its award of damages, and

enter summary judgment in favor of Poway and its officials on all claims. Johnson shall bear all costs. Fed. R. App. P. 39(a)(3).

**REVERSED and REMANDED with instructions.**

# APPENDIX


In God We Trust
One Nation Under God
God Bless America
God Shed His Grace On Thee


All Men Are Created Equal
They Are Endowed By Their
CREATOR

## APPENDIX B

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 10-55445**
**D.C. No. 3:07-cv-00783-BEN-WVG**

**[Filed September 13, 2011]**

| | |
|---|---|
| BRADLEY R. JOHNSON, | ) |
| | ) |
| Plaintiff - Appellee, | ) |
| | ) |
| v. | ) |
| | ) |
| POWAY UNIFIED SCHOOL DISTRICT; et al., | ) |
| | ) |
| Defendants - Appellants. | ) |
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MEMORANDUM[*]

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted May 5, 2011
Pasadena, California

Before: SILVERMAN, TALLMAN, and CLIFTON, Circuit Judges.

Poway Unified School District and its officials appeal the district court's award of summary judgment in Bradley Johnson's favor on claims arising under the California Constitution, article I, sections 2 and 4.[1] We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

Poway did not violate Johnson's rights under the liberty of speech clause of the California Constitution by ordering that he curtail his in-class employee speech. *San Leandro Teachers Ass'n v. Governing Bd. of the San Leandro Unified Sch. Dist.*, 209 P.3d 73, 87 (Cal. 2009).

Because Poway's conduct satisfies *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), it also did not violate either the establishment clause or the no preference clause of the California Constitution under the circumstances before us. *East Bay Asian Local Dev. Corp. v. State of Cal.*, 13 P.3d 1122, 1138 (Cal. 2000) ("We do not believe, however, that the protection against the establishment of religion embedded in the California Constitution creates broader protections than those of the First Amendment."); *id*. at 1139

[1] We reverse the district court's award of summary judgment to Johnson on his federal claims in a published opinion filed concurrently with this disposition. The relevant facts underlying all of the issues on appeal are found there.

("Having concluded above that an exemption from a landmark preservation law satisfies all prongs of the *Lemon* test, it follows that the exemption is neither a governmental preference for or discrimination against religion.").

We reverse and remand with instructions that the district court vacate its grant of injunctive and declaratory relief and award of damages and enter summary judgment in favor of Poway and its officials on all claims. Johnson shall bear all costs. Fed. R. App. P. 39(a)(3).

**REVERSED and REMANDED with instructions.**

## APPENDIX C

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

**CASE NO. 07cv783 BEN (NLS)**

**[Filed February 25, 2010]**

BRADLEY JOHNSON,

Plaintiff,

vs.

POWAY UNIFIED SCHOOL DISTRICT, et al.,

Defendants.

**DECISION GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT and DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

May a school district censor a high school teacher's expression because it refers to Judeo-Christian views while allowing other teachers to express views on a number of controversial subjects, including religion and anti-religion? On undisputed evidence, this Court holds that it may not.

Courts should not quickly intervene in the daily operation of schools and school systems, for that task is committed primarily to local school boards. However, in the proper case, federal courts "have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). "'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). Because it has been clear for over 90 years that teachers do not lose their constitutional rights inside the schoolhouse gate, and that government may not squelch one viewpoint while favoring another, the Poway Unified School District violated Plaintiff's rights when it insisted that Plaintiff remove his two classroom banners.

Public schools play an important role educating and guiding our youth through the marketplace of ideas and instilling national values. One method used by the Poway Unified School District to accomplish this task is to permit students to be exposed to the rich diversity of backgrounds and opinions held by high school faculty. In this way, the school district goes beyond the cramped view of selecting curriculum and hiring teacher speech to simply deliver the approved content of scholastic orthodoxy. By opening classroom walls to the non-disruptive expression of all its teachers, the district provides students with a healthy exposure to the diverse ideas and opinions of its individual teachers. Fostering diversity, however, does not mean bleaching out historical religious expression or mainstream morality. By squelching only Johnson's patriotic and religious classroom banners, while

permitting other diverse religious and anti-religious classroom displays, the school district does a disservice to the students of Westview High School and the federal and state constitutions do not permit this one-sided censorship.

The case is before the Court on cross-motions for summary judgment. The Plaintiff is a high school math teacher, Bradley Johnson. Johnson's Amended Complaint seeks summary judgment on his claims under the First Amendment of the U.S. Constitution and under Article I, Sections 2 and 4 of the California Constitution. He seeks a court order requiring the school district to permit re-hanging of the banners. He does not seek money damages (other than nominal damages). The Defendants are the Poway Unified School District, the Principal of Westview High School (where Johnson teaches), the Superintendent and Assistant Superintendent, and the members of the district board of education. The individual Defendants are sued in their official and individual capacities.

For the reasons that follow, summary judgment is granted in favor of Plaintiff and against the several Defendants.

## I. MOTION FOR SUMMARY JUDGMENT STANDARD

The legal standards to be applied to a motion for summary judgment are well known. Summary judgment is appropriate where the record demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986);

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Farrakhan v. Gregoire*, 590 F.3d 989, 1003-04 (9th Cir. 2010).

## II. FACTS

The facts are largely undisputed.

Johnson is employed as a public high school math teacher. He has taught math to students in the Poway Unified School District for 30 years and is he is a well-respected teacher. He currently is teaching at Westview High School, a school within the Poway Unified School District. Defendant Poway Unified School District is a public school entity established pursuant to California law. Defendant Kastner is the Principal of Westview High School. Defendants Phillips and Chiment are the Superintendent and Assistant Superintendent, respectively, of the Poway Unified School District. The remaining Defendants, Mangum, Vanderveen, Patapow, Gutschow, and Ranftle, are members of the Board of Education for the Poway Unified School District.

At Westview High School, Johnson is assigned a particular classroom for his math classes. He uses the same classroom for extra-curricular and non-curricular activities. Over the last two decades, Johnson has continuously hung banners on the wall of his assigned classrooms. Johnson purchased and displayed the banners using his own money. Throughout the many years that the banners hung on the wall of Johnson's assigned classroom, there were no objections to the presence or messages of the banners from students, parents, or school administrators – until January 23, 2007. *See* Exhibit D, Defendants' Exhibit List in Support of Motion for Summary Judgment (hereinafter

"Defs' Ex. List") (letter from school district to Johnson regarding reasons for removal of banners).

Each banner is approximately seven feet wide and two feet tall. The banners have no pictures or symbols but are striped in red, white, and blue and set forth famous national phrases. One banner contains the following four phrases: "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace On Thee." This banner has hung in Johnson's assigned classrooms for 25 years.

The second banner quotes from the Declaration of Independence, "All Men Are Created Equal, They Are Endowed By Their Creator." "Creator" is in all uppercase letters. This banner has hung in Johnson's classroom for 17 years. The banners occupy wall space with numerous photographs of nature scenes, national parks, and posters of calculus solutions.

It is undisputed that Johnson did not hang the banners as part of the curriculum he teaches, nor did he use the banners during any classroom sessions or periods of instruction. Rather, Johnson hung his banners pursuant to a long-standing Poway Unified School District policy, practice, and custom of permitting teachers to display personal messages on their classroom walls.

For at least the three decades Johnson has taught, Poway Unified School District has maintained a policy, practice, and custom of giving teachers discretion and control over the messages displayed on their assigned classroom walls. Teachers are permitted to display in their classrooms various messages and items that reflect the individual teacher's personality, opinions,

and values, as well as messages relating to matters of political, social, and religious concerns so long as these displays do not materially disrupt school work or cause substantial disorder or interference in the classroom. Because of this policy, practice, and custom, teachers have used their classroom walls as an expressive vehicle to convey non-curriculum related messages.

Other teachers at the four high schools in the Poway Unified School District, including Westview High School, display in their classrooms non-educational and non-curricular messages such as:

-a 35 to 40-foot long string of Tibetan prayer flags with writings in Sanskrit and images of Buddha. Ex. 24-26, Plaintiff's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment (hereinafter "Ex. __, PUMF"); Dep. of Brickley at 87:8-18, Ex. 5, PUMF.

-a large poster of John Lennon and the lyrics to the song "Imagine":

> Imagine *there's no Heaven*, It's easy if you try
> *No hell below us, Above us only sky*
> Imagine all the people, Living for today
> Imagine there's no countries, It isn't hard to do
> Nothing to kill or die for, *And no religion, too*
> Imagine all the people, Living life in peace
> You may say that I'm a dreamer, But I'm not the only one
> I hope that someday you'll join us, And the world will be as one...

Ex. 24, PUMF (emphasis added).

-a poster of Hindu leader, Mahatma Gandhi. Ex. 47, PUMF.

-a poster of Hindu leader, Mahatma Gandhi's "7 Social Sins":

> Politics without principle
> Wealth without work
> Commerce without morality
> Pleasure without conscience
> Education without character
> Science without humanity
> Worship without sacrifice. Ex. 48, PUMF.

-a poster of Buddhist leader, the Dali Lama. Ex. 49, PUMF.

-a poster that says: "The hottest places in hell are reserved for those who in times of great moral crisis, maintain their neutrality." Ex. 151, PUMF.

-posters of Muslim minister, Malcolm X. Ex. 50-51, PUMF.

-a Greenpeace poster that says: "Stop Global Warming." Ex. 64, PUMF.

-posters of rock bands Nirvana, Bruce Springsteen, and the Beatles. Ex. 52-56, PUMF.

-posters of professional athletes and sports teams. Ex. 74-80, PUMF.

-a poster of the movie "Monty Python's Quest for the Holy Grail." Ex. 86, PUMF.

-"Day of Silence" posters. Ex. 15, PUMF.

-bumper stickers that say: "Equal Rights Are Not Special Rights," "Dare to Think for Yourself," and "Celebrate Diversity."[1] Ex. 16, PUMF.

-a Libertarian Party poster. Ex. 35, PUMF.

-a poster with a large peace sign and the word "peace" in several languages. Ex. 37, PUMF.

-a mock American flag with a peace sign replacing the 50 stars and appearing to be six feet wide and four feet tall. Ex. 39, PUMF.

-an anti-war poster that asks: "How many Iraqi children did we kill today?" Ex. 41, PUMF.

-a pro-defense poster of a Navy aircraft carrier that says: "Life, Liberty and the Pursuit of All Who Threaten it" and appearing to be seven feet wide and four feet tall. Ex. 42, PUMF.

-posters of civil rights advocate Martin Luther King, Jr. Ex. 45 & 47, PUMF.

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[1] Ironically, while teachers in the Poway Unified School District encourage students to celebrate diversity and value thinking for one's self, Defendants apparently fear their students are incapable of dealing with diverse viewpoints that include God's place in American history and culture.

-a large poster that says: "Zero Population Growth." Ex. 152, PUMF.

-a large poster of an American flag with the motto: "United We Stand." Ex. 57, PUMF.

-a large poster of an American flag that says: "...life, liberty, and the pursuit of happiness." Ex. 58, PUMF.

-flags with the historical political motto: "Don't tread on me." Ex. 62 & 63, PUMF.

-non-student artwork. Ex. 81, PUMF.

-life-sized cartoon characters. Ex. 89 & 93, PUMF.

-photographs and inspirational sayings. Ex. 69-73, PUMF.

Teachers control the messages conveyed by their classroom displays. Johnson's banners have caused no disruption or interference in his classroom or elsewhere in the school. Likewise, the banners have not interfered with the basic educational mission of the school district.

In fact, over the years Johnson has taught in the Poway Unified School District, Johnson received no complaints about the banners from the many individuals who have been inside his classroom including: seven different principals, numerous school board members, superintendents, and assistant superintendents, over 4,000 students and several thousand parents of students.

Sometime in the fall of 2006, another math teacher, who may have disagreed with Johnson over pedagogy, asked Westview High School Principal Kastner why the banners were permitted. Kastner took time considering the matter and sought direction from district administrators. Assistant Superintendent Chiment was assigned the task of investigating the banners and reporting to the school board. The full school board approved the decision to order Johnson to remove his classroom banners. Chiment testified that none of the individual phrases on the banners would be a problem, rather it was the combined influence that "over-emphasized" God. Chiment also testified that the problem was that the phrases were taken out of their original contexts. Chiment directed that a full copy of the Declaration of Independence and pictures of U.S. coins be delivered to Johnson so that Johnson could place them on the wall instead of his banners. Johnson declined. Johnson offered to post for display the full texts from which each of the banner phrases came, around the banners. Chiment disapproved. Dep. of Chiment at 134:24 to 135:6, Ex. E, and Dep. of Johnson at 128:7 to 133:21, Ex. F, Defs' Ex. List.

On January 23, 2007, Kastner ordered Johnson to remove the banners, telling Johnson the banners were impermissible because they conveyed a Judeo-Christian viewpoint. Dep. of Kastner at 137:13-21, Ex. 4, PUMF; Dep. of Chiment at 278:10-13, Ex. 3, PUMF. Defendants singled out Johnson for discriminatory treatment because of the viewpoint of his message. Deputy Superintendent, Dr. John P. Collins, testified about the policy permitting high school teachers to display personal messages. Dep. of Collins, Ex. 2, PUMF. Collins stated that neither the display of Tibetan prayer flags nor the display of the lyrics of

Lennon's "Imagine" appeared to violate the Poway Unified School District's policy on posting controversial issues. *Id.* at 90:1 to 95:25. Posters of the Dalai Lama, Mahatma Ghandi, and Ghandi's "Seven Deadly Sins" are also permissible under the policy. Dep. of Chiment at 205:11 to 208:7, Ex. 3, PUMF. Defendants did not claim that Johnson's banners caused disruption or disorder in the school, or that they interfered with the curriculum. Dep. of Chiment at 49:23 to 51:14 & 276:12-25, Ex. 3, PUMF; Dep. of Kastner at 85:2 to 86:11, Ex. 4, PUMF.

Johnson wants to display the banners in his classroom; however, Defendants have prohibited him from doing so. Had Johnson not complied with Defendants' order to remove the banners, Johnson would have suffered adverse employment consequences. Johnson continues to teach his assigned mathematics curriculum.

## III. ANALYSIS

"The classroom is peculiarly the marketplace of ideas. 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." *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 512 (1969).

Johnson asserts six claims for relief seeking declaratory and injunctive relief as well as nominal damages. Three of the claims rest on federal constitutional rights; three rest on similar state constitutional rights.

## A. THE FREE SPEECH CLAIMS

Johnson moves for summary judgment on his First Claim for Relief, that the Defendants violated his First Amendment free speech rights protected by the United States Constitution. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. Similarly, Johnson's Fourth Claim for Relief is that Defendants violated his free speech rights protected by the California Constitution. Article 1, Section 2(a) of the California Constitution reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. 1, § 2.

Before discussing these contentions it is worth noting that Johnson's two banners clearly constitute speech. *Hill v. Colorado*, 530 F.3d 703, 715 (2000) (sign displays are protected by the First Amendment). Moreover, there is no dispute that Johnson's speech has been squelched by the Defendants in that Johnson was ordered to remove the banners and that Johnson has complied with that directive. Defendants agree that public school teachers have First Amendment rights and that the banners constitute speech for purposes of the First Amendment. On the other hand, Defendants do not agree about when or where a high school teacher may exercise his or her First Amendment rights.

**1. The Constitution Permits Latitude in Recognizing Religion**

That God places prominently in our Nation's history does not create an Establishment Clause violation requiring curettage and disinfectant for Johnson's public high school classroom walls. It is a matter of historical fact that our institutions and government actors have in past and present times given place to a supreme God. "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). As the Supreme Court has acknowledged, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (quoting *Lynch v. Donnelly,* 465 U.S. 668, 674 (1984)).

The incidental government advancement of religion is permissible. Government speech "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. 690. "Our precedents plainly contemplate that on occasion some advancement of religion will result from government action." *Lynch,* 465 U.S. at 683 (American history is replete with official invocation of Divine guidance in pronouncements of Founding Fathers and government leaders). "It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 35-36 (O'Connor, J., concurring). The

Constitution "permits government some latitude in recognizing and accommodating the central role religion plays in our society . . . . Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious." *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring and dissenting).

In the case at bar, according to the undisputed evidence presented, the Poway Unified School District ran afoul of the First Amendment. One justification was that the district feared violating the Establishment Clause. The fear was not justified. There is no realistic danger that an observer would think that the Poway Unified School District was endorsing a particular religion or a particular church or creed by permitting Johnson's personal patriotic banners to remain on his classroom wall. Any perceived endorsement of a single religion is dispelled by the fact that other teachers are also permitted to display other religious messages and anti-religious messages on classroom walls.

*Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), is applicable here: "[w]e have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded...there would have been no realistic danger that the community would think that the [school] District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental."

**2. Public School Teacher Speech**

Public school teachers are unique speakers.[2] Teachers are hired for their expertise and ability to speak and convey knowledge to their students. Yet, not all of their time during the school day involves delivering curriculum. And sometimes, while delivering curriculum, they express opinions that are personal and not as speech transmitted from the government. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court leaves open the question whether a government employee-speech paradigm applies to teaching, noting, "[w]e need not . . . decide

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[2] "To regard teachers – in our entire educational system, from the primary grades to the university – as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government."
*Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring).

whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." 547 U.S. at 425. It may be that the selection of school curriculum is government speech. *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003, 1016 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001). But to assert that because Johnson was a teacher, he had no First Amendment protections in his classroom for his own speech would ignore a half-century of other Supreme Court precedent.

**a. *Teachers Maintain Free Speech Rights at School***

In 1969, the Supreme Court observed: "[i]t can hardly be argued that either students *or teachers* shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." *Tinker* 393 U.S. at 506 (emphasis added). In the forty years since *Tinker*, the Supreme Court has neither diminished the force of *Tinker's* observation, nor in any other way cabined the First Amendment speech of public school teachers. In fact, the Court recently reaffirmed *Tinker*'s pronouncement. *See Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("In *Tinker*, this Court made clear that 'First Amendment rights applied in light of the special characteristics of the school environment' are available *to teachers* and students.") (emphasis added).

**b. *Student Speech Has Required Some Restrictions***

The Court has permitted limits on student speech. For example, it is permissible to restrict student

speech that "materially and substantially interfere[s]" with the requirements of appropriate discipline. *Tinker,* 393 U.S. at 509. Student speech has been proscribed where it consists of an "elaborate, graphic, and explicit sexual metaphor." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 678 (1986). It may be banned where it "incite[s] to imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969). Student speech that promotes illegal drug use may be silenced. *Morse*, 551 U.S. at 410. And student speech in an official school newspaper may be regulated, so long as it is regulated on viewpoint neutral terms. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

**c. *Teachers Enjoy Greater Freedom of Speech***

However, the speech silenced by Defendants in this case is speech by Johnson, a teacher. In the school setting there is a qualitative lop-sided difference between the two classes of speakers (students vs. teachers). *Bethel School Dist.*, 478 U.S. at 682 ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."); *Morse*, 551 U.S. at 410-11 (Thomas, J., concurring) (describing history of American education where teachers had wide discretion to make rules and ensure student silence). Four decades ago, the Supreme Court brushed aside the thought that teachers lose free speech rights. "It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees." *Epperson*, 393 U.S. at 107 (citation omitted) (holding public school teacher

maintained First Amendment right to communicate in the classroom his disagreement with state's required curriculum on evolution). "[W]e do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom." *Tinker*, 393 U.S. at 513.

The decisions upon which Defendants rely do not undercut *Tinker*'s robust observation that teachers do not forfeit their constitutional free speech rights while at school. Since Johnson retains First Amendment speech rights as a public school teacher, a First Amendment forum analysis is the next step.

**3. First Amendment Forum Analysis**

To determine the extent that free speech rights may be exercised on government property at Westview High School, this Court engages in a First Amendment forum analysis. *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008) ("The first step in assessing a First Amendment claim relating to private speech on government property is to identify the nature of the forum."). "The Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Hills v. Scottsdale Unified School Dist. No. 48*, 329 F.3d 1044, 1048 (9th Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004) (To analyze First Amendment free speech claim, courts first

consider what type of forum the school District has created).

Contrary to Defendants' assertions, the *Pickering* balancing test for government employee speech is the wrong test to apply in the present context.[3] Applying a balancing test departs from the First Amendment forum analysis described in *Hazelwood* and typically applied by the Ninth Circuit in school speech cases. *See e.g.*, *Truth v. Kent School Dist.*, 542 F.3d 634, 648-49 (9th Cir. 2008) (applying forum analysis), *cert. denied*, 129 S. Ct. 2889 (2009); *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 882 (2007) (applying forum analysis); *Hills*, 329 F.3d at 1048-50 (applying forum analysis); *but see Downs*, 228 F.3d at 1009-11 (declining to apply forum analysis because curricular speech at issue belonged to the school district).

**a. *Three Forum Categories***

"Forum analysis has traditionally divided government property into three categories: public fora, designated public fora, and nonpublic fora." *Flint*, 488 F.3d at 830 (citation omitted). "Once the forum is identified, we determine whether restrictions on speech are justified by the requisite standard." *Id.* "On one end of the fora spectrum lies the traditional public forum, 'places which by long tradition . . . have been devoted to assembly and debate.' Next on the spectrum

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[3] *See also Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring) ("To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit.").

is the so-called designated public forum, which exists 'when the government intentionally dedicates its property to expressive conduct.'" *Id.* (citations omitted). In a public or designated public forum, restrictions on speech are subject to strict scrutiny. *Id.*

"At the opposite end of the fora spectrum is the non-public forum. The non-public forum is 'any public property that is not by tradition or designation a forum for public communication.'" *Id.* (citations omitted). In a non-public forum government restrictions are subjected to less-exacting judicial scrutiny. There, a government may restrict free speech if it acts reasonably and does not suppress expression merely because public officials oppose one speaker's view. *Id.* (citations omitted).

**b. *The Classroom Walls of Poway's Westview High School Constitute a Limited Public Forum for Faculty Speech***

To determine the type of forum applicable to Johnson's classroom wall, the nature of the government property involved must be examined. Judging from the undisputed facts presented, Johnson's classroom walls constitute what is best described as a *limited public forum* (a sub-category of a designated public forum) because the Poway Unified School District has intentionally opened its high schools to expressive conduct by its faculty on non-curricular subjects. *Flint*, 488 F.3d at 831. "[A] government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove*, 129 S. Ct. at 1132. This conclusion is based upon undisputed facts that Defendants have a long-standing policy of

permitting its teachers to express ideas on their classroom walls. Defendants' policy grants its teachers discretion and control over the messages displayed on their classroom walls. Defendants' policy permits teachers to display on their classroom walls messages and other items that reflect the teacher's personality, opinions, and values, as well as political and social concerns. Defendants' policy permits teacher speech so long as the wall display does not materially disrupt school work or cause substantial disorder or interference in the classroom. As a result of the Defendants' long-standing policy, a teacher's classroom walls serve as a limited public forum for a teacher to convey non-curriculum messages.

#### c. *Speech Restrictions Must be Viewpoint Neutral*

When a forum for speech is created, such as at Poway's Westview High School, government regulation of speech must be viewpoint neutral. "[O]nce a government has opened a limited forum, it must respect the lawful boundaries it has itself set." *Flint*, 488 F.3d at 831 (quoting *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1993)). A school district "may not exclude speech where its distinction is not reasonable in light of the purposes served by the forum, nor may the government discriminate against speech on the basis of its viewpoint." *Id.* (citations omitted); *see also Pleasant Grove*, 129 S. Ct. at 1132 ("In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral"). Viewpoint neutrality requires that a school administration not favor one speaker's message over another. When "government has excluded perspectives

on a subject matter otherwise permitted by the forum," the government is discriminating on the basis of viewpoint. *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 912 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 143 (2007).

Here, the Poway Unified School District opened a *limited public forum* in which its teachers were permitted to exercise free speech. According to Deputy Superintendent, John P. Collins, teachers are allowed to express themselves through the posting of banners and posters and flags and other items on the classroom walls. Dep. of Collins at 38-40, Ex. 2, PUMF. By designing, buying, hanging, and maintaining the two banners, Johnson was engaged in First Amendment expression – speech otherwise permitted by the district policy. When Defendant Westview High School Principal Kastner ordered Johnson to remove the banners, she and the school district were silencing speech. When Principal Kastner ordered Johnson to remove the banners "because they conveyed a Judeo-Christian viewpoint," Kastner was impermissibly squelching speech based upon the viewpoint of the speaker. The undisputed facts show that Kastner's decision was not made pursuant to a content-neutral reason nor within the boundaries the school district had set for itself in opening the forum. If certain speech "fall[s] within an acceptable subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker." *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003), *cert. denied*, 541 U.S. 1043 (2004). The Supreme Court has been clear that viewpoint discrimination occurs when the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise

includible subject." *Cornelius*, 473 U.S. at 806. Judge Fletcher distills *Cornelius* as recognizing that, "where the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 971 (9th Cir. 2002).

Teachers other than Johnson have been permitted to use the classroom wall forum to speak on a wide variety of secular and religious topics. Topics permitted on classroom walls have included religious speech from a Buddhist viewpoint in the form of Tibetan prayer flags with writings in Sanskrit and an image of Buddha. Other permitted religious speech includes the Hindu viewpoint in the form of posters of Gandhi and the Hindu "seven social sins." Anti-religious speech is also permitted on classroom walls in the form of a poster with lyrics of John Lennon's song "Imagine" ("Imagine there's no Heaven, it's easy if you try, no hell below us, above us only sky...nothing to kill or die for, and no religion, too...."). Pro-war and anti-war topics have been permitted on classroom walls. Nationalistic and global messages find room on walls. Other patriotic posters remain in place. Some of the speech in the form of posters are small. Many of the posters are large. The display of Tibetan prayer flags spans the 35-40 foot width of a classroom. Faculty speech is not confined to a particular physical space such as on a bulletin board or file cabinet.

**d. *Johnson's Speech Was Squelched Because of its Viewpoint***

Only Johnson's speech has been singled out for suppression because of its message. "In cases where restriction to the forum is based solely on the group's religious viewpoint, the restriction is invalid." *Truth*, 542 F.3d at 650. School Principal Kastner told Johnson the banners had to be removed because they conveyed a "Judeo-Christian viewpoint." School District Assistant Superintendent Chiment followed up Kastner's order with a letter explaining that the banners had to be removed from the classroom because they conveyed "a particular sectarian viewpoint." Deputy Superintendent Collins testified that Chiment's decision and letter to Johnson were discussed with the school district Superintendent at a school district cabinet meeting and that all school officials in attendance agreed with the decision. Dep. of Collins at 58:3 - 59:3, Ex. 2, PUMF.

The banners communicate the existence of God in our nation's history and culture. The banners communicate fundamental national historical messages. They celebrate important shared American historical experiences. One banner contains an excerpt from the Declaration of Independence, this Nation's most cherished symbol of liberty, observing: "All men are created equal, they are endowed by their Creator" with unalienable rights. Another banner repeats the official motto adopted by the Congress of the United States: "In God We Trust." The phrase, "God Bless America," is often spoken by Presidents of the United States, as was the case recently on January 27, 2010 where President Barack H. Obama concluded his State of the Nation address with "God bless you, and God

Bless America." "God Bless America" is also a well known popular American song title of the twentieth century, written by Irving Berlin and performed most famously by Kate Smith. It is routinely sung by sports fans during the seventh inning stretch at New York Yankees baseball games since the attacks of September 11, 2001. *See also, Seidman v. Paradise Valley Unified School Dist.*, 327 F. Supp. 2d 1098, 1112 (D. Ariz. 2004) ("The phrase 'God Bless America,' has historic and patriotic significance."). "God shed His grace on thee" comes from the popular patriotic song and century-old poem by Katharine Lee Bates: "America, the Beautiful," a piece most recently sung at the Super Bowl football game on February 7, 2010. The phrase, "One Nation Under God," is part of the Pledge of Allegiance. The Pledge is recited every morning in the Poway Unified School District. Dep. of Collins at 28:8 - 16, Ex. 2, PUMF.

Each phrase, by itself, is an acceptable message for Johnson's classroom, according to Principal Kastner. In fact, each individual phrase was not only permitted as a message, each individual phrase was an encouraged message, in the Principal's view. Kastner testified in her deposition that: "[t]he issue was never these phrases in isolation, and these phrases were all not only permitted but encouraged....It's taking them out of context that was the issue." Dep. of Kastner at page 91:7-11, Ex. N, Defendants' Supplemental Exhibits in Support of Opposition to Plaintiff's Motion for Summary Judgment.

Whether correctly understood as simply historic and patriotic expressions[4] or non-proselytizing religious sayings, Defendants acted based upon their perception that the message conveyed a Judeo-Christian viewpoint. By squelching Johnson's patriotic and religious viewpoint while permitting speech promoting Buddhist, Hindu, and anti-religious viewpoints, Defendants clearly abridged Johnson's constitutional free speech rights. "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint.).

In this sense, Johnson's case is similar to the decisions of *Rosenberger*, *Lamb's Chapel*, and *Good News Club v. Milford Central School*, 533 U.S. 98, 107-08 (2001). Each case involved viewpoint discrimination in a limited public forum. In *Rosenberger*, the Supreme

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[4] While invalidating a state-prescribed official prayer for students, the Supreme Court saw no First Amendment problem with requiring public school children to recite the Declaration of Independence with its references to God or sing anthems which include professions of faith in a Supreme Being -- describing recitations as "patriotic or ceremonial occasions." *See Engel v. Vitale*, 370 U.S. 421, 435 n. 21 (1962) ("There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Diety or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions....").

Court found that by excluding funding to a student religious group solely because the religious group promoted a particular religious perspective, the university was discriminating in a limited public forum on the basis of that group's viewpoint. *Rosenberger*, 515 U.S. at 829-37. In *Lamb's Chapel*, a group desired to speak at a school facility on the issue of child rearing from a religious perspective. The school district denied access to the school rooms for religious purposes. The Supreme Court unanimously held that the school district discriminated on the basis of viewpoint, and that the school district should have permitted speech from a religious perspective on a subject permitted by the forum. *Lamb's Chapel*, 508 U.S. at 393. Similarly, in *Good News Club*, the Supreme Court found viewpoint discrimination where a public school excluded a Christian club from meeting on the school's grounds while at the same time permitting non-religious groups to meet. *Good News Club*, 533 U.S. at 107-09. The Christian club simply sought to address a subject otherwise permitted in the limited public forum *Id.* at 109. In *Faith Center*, the Ninth Circuit reviewed these cases and drew a line between speech from a religious perspective (which was constitutionally protected in each of the limited public forums) and pure religious worship (which exceeded the boundaries of the forums). *Faith Center*, 480 F.3d at 913.

Whether described as speech from a religious perspective or speech about American history and culture, through display of his classroom banners, Johnson was exercising his free speech rights on subjects that were otherwise permitted in the limited public forum created by Defendants. "Clearly, the prohibition of expression of one particular opinion, at

least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Tinker*, 393 U.S. at 511. Consequently, Johnson has proved a clear ongoing violation of his First Amendment free speech and free exercise rights. *See, e.g., Truth*, 542 F.3d at 650 (observing that in a public high school limited public forum "where restriction to the forum is based solely on . . . religious viewpoint, the restriction is invalid.").

**4. Fear of Future Establishment Clause Entanglement**

In the case at bar, according to the undisputed evidence presented, the Poway Unified School District ran afoul of the First Amendment. One justification was that the district feared violating the Establishment Clause. The fear was not justified. There is no realistic danger that an observer would think the Poway Unified School District was endorsing a particular religion or a particular church or creed by permitting Johnson's personal patriotic banners to remain on his classroom wall. Any perceived endorsement of a single religion is dispelled by the fact that other teachers are also permitted to display other religious messages and anti-religious messages on classroom walls. "*Widmar v. Vincent*, *Board of Education v. Mergens*, and *Lamb's Chapel*, all reject arguments that, in order to avoid the appearance of sponsorship, a school may restrict religious speech." *Hedges v. Wauconda Cmty. Utd. School Dist. No. 118*, 9 F.3d 1295, 1298 (7th Cir. 1993) (citations omitted).

Defendants then posit that the cumulative effect of the references to God on the banners might be seen as

the school advancing one religion. Defendants argument is both speculative and imprecise. The messages on Johnson's banners do not describe or advance any particular religion. The banners do not quote from the Christian Bible, or books of other particular religions such as the Jewish Torah, the Islamic Koran, the Latter Day Saints Book of Mormon, the Buddhist Diamond Sutra, or the Hindu Bhagavad-Gita. To argue that the banners advance an encompassing undifferentiated religion with God as the figurehead makes sense only in a citizenry where there are only two beliefs: one acknowledging God; one denying God. Such is not the case. *See Arizona Life Coalition*, 515 F.3d at 971 (It is an "insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas.") (quoting *Rosenberger*, 515 U.S. at 831).

Through the Establishment Clause lens, the banners do not evangelistically advocate for the existence of God. Instead, they highlight historic and patriotic themes that in themselves have acknowledged God's existence. *Elk Grove*, 542 U.S. at 34 (O'Connor, J., concurring) ("It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today."); *Aronow v. U.S.*, 432 F.2d 242, 243 (9th Cir. 1970) ("It is quite obvious that the national motto and the slogan on coinage and currency 'In God We Trust' has nothing whatsoever to

do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise."). One teacher's banners that direct attention to the multiple places God may be found in our country's history, does not evidence an Establishment Clause violation. Consequently, the Defendants' explanation and justification for removing Plaintiff's speech for fear of violating the Establishment Clause is unconvincing – especially among the cacophony of other First Amendment speech which remains in the high school classrooms.[5]

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[5] Our diversity is one of our strengths. It is laudable that the Defendants have created a forum for faculty speech. Our high school students are well served by encouraging them to enter the marketplace of ideas and become wise consumers. A democratic society must "of course, include tolerance of divergent political and religious views." *Bethel School Dist.,* 478 U.S. at 681. One way a school district can be confident that it is not endorsing religion is to permit speech and then educate students about the dangers of restricting speech. The Seventh Circuit noted:

> What means do schools have at their disposal to fulfil this obligation? The principal method is for administrators to avoid endorsing religious views by their own words or deeds; a prudent administrator also might disclaim endorsement of private views expressed in the schools. This combination discharges the school's obligation to be neutral toward religious sentiment. Just as a school may remain politically neutral by reminding pupils and parents that it does not adopt the views of students who wear political buttons in the halls or public officials who tout their party's achievements in the auditorium, so a school may remain religiously neutral by reminding pupils and parents that it does not adopt the views of students who pass out religious literature before school. It must refrain from promoting the distribution of such literature but can remain neutral by treating religious

*Cf. Hills*, 329 F.3d at 1053 (school district failed to demonstrate that the Establishment Clause would be violated). Ultimately, "the school district here can dispel any 'mistaken inference of endorsement' by making it clear to students that . . . private speech is not the speech of the school." *Prince v. Jacoby*, 303 F.3d 1074, 1094 (9th Cir. 2002) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) (plurality opinion) (school's fear of endorsing private religious speech is largely self-imposed because school has control over impressions its gives to secondary school students).

**5. *Pickering* or *Tinker* – Government Speech or Individual Speech?**

Defendants adopt the alternate argument that Johnson gave up his free speech rights by virtue of his employment as a public high school teacher. The argument is at odds with *Epperson, Tinker* and *Morse*. Nevertheless, Defendants argue that Johnson's free speech rights may be abridged because he is a government employee, and because a teacher is also a government employee, a government speech test from *Pickering v. Bd. of Educ.,* 391 U.S. 563 (1968), should

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speech the same way it treats political speech. *Wauconda Cmty. Utd. School Dist.*, 9 F.3d at 1299.

The Ninth Circuit agrees. "We agree with the Seventh Circuit that the desirable approach is not for schools to throw up their hands because of the possible misconception about endorsement of religion, but that instead it is 'far better to teach students about the first amendment, about the difference between private and public action, about why we tolerate divergent views. The school's proper response is to educate the audience rather than squelch the speaker.'" *Hills*, 329 F.3d at 1055 (quoting *Wauconda Cmty. Utd. School Dist.*, 9 F.3d at 1299).

be used rather than *Tinker's* First Amendment forum analysis. It is true that the Free Speech Clause does not apply to the government's own speech. *Pleasant Grove*, 129 S. Ct. at 1131. Where a government employee is speaking while doing his or her government job, it is sometimes characterized as the government's own speech. *Garcetti*, 547 U.S. 410. But not all speech by a government employee is government speech. A government employee may be engaged in his or her own private speech while on government property. Consequently, while "government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property." *Pleasant Grove*, 129 S. Ct. at 1132. Thus, "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech." *Id.*

Defendants argue that the balancing test from *Pickering* should be applied, and if applied, would leave Johnson's speech unprotected by the First Amendment. *Pickering* addressed a public school teacher's speech that criticized his government employer. In that situation, the Court sought to balance the employee's interests as a citizen against the government interest as employer in promoting efficiency of providing governmental services. It is significant that, in the end, *Pickering* reinforces the understanding that a teacher's speech enjoys constitutional protection. *Pickering*, 391 U.S. at 568 ("To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in

connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court."). All of the decisions of the Supreme Court touching on the subject acknowledge a teacher's right to engage in protected speech. No Supreme court decision holds to the contrary. Therefore, Defendants' position that the *Pickering* balancing test applies and justifies silencing Johnson's speech, finds no traction in Supreme Court case law.

#### a. *Even Pickering Balancing Tips in Favor of Plaintiff's Banners*

##### i. The Ninth Circuit *Nicholson* Case

Though Defendants do not cite it, the Ninth Circuit did look to *Pickering* in a teacher's wrongful discharge suit. *See Nicholson v. Bd. of Educ. Torrance Unified School Dist.*, 682 F.2d 858 (9th Cir. 1982). In that case, Nicholson was hired as a probationary high school journalism teacher. The probationary period was filled with disputes with the administration over articles published in the school newspaper, failures to comply with record-keeping requirements, and instances where he permitted students to violate school rules. The school did not rehire Nicholson and he sued. *Id.* at 861-62. Nicholson claimed that he was not rehired because of his exercise of free speech rights. In that context, the court of appeals looked to *Pickering*, writing, "[t]he question whether a school teacher's speech is constitutionally protected expression requires balancing. *Id.* at 865 (quoting *Pickering*, 391 U.S. at 568). The court of appeals focused on three factors drawn from *Pickering*. One factor was whether the speech affected the teacher's working relationships

with the school board and his immediate superiors. *Id.* A second factor was whether the teacher's expression "impeded the teacher's proper performance of his daily duties in the classroom." *Id.* The third factor looked at whether the teacher's expression "interfered with the regular operation of the school generally." *Id.*

Johnson's banners easily pass this three-factor test. Concerning the first factor, there is no evidence that working relationships with the school board or the principal deteriorated. In fact, testimony indicated that his superiors were favorably impressed with the professional manner in which Johnson responded to administration concerns over the banners. *See* Chiment Letter dated Jan. 23, 2007, Ex. D, Defs' Ex. List ("Let me first say that I am pleased with the professional manner in which you are dealing with these directions.") The second factor asks about the performance of daily duties in the classroom. Here the evidence clearly demonstrates that the banners had no effect on the performance of Johnson's daily duties in the classroom. In fact, Johnson has been held in high regard for his performance of daily duties teaching math while his banners were displayed. The final factor looks at whether the speech in question interfered with the regular operation of the school generally. Again, there was no evidence offered to suggest the banners negatively affected the regular operation of the schools where Johnson taught. To the contrary, the undisputed evidence demonstrated that the school administration had no issue with the display of Johnson's banners for two decades. Thus, even applying the *Pickering* test, as understood by *Nicholson*, the Court would find Johnson's banner display to be constitutionally protected.

### ii. The Ninth Circuit *Berry* Case

Defendants also assert that *Berry v. Dept. of Social Servs.,* 447 F.3d 642 (9th Cir. 2006), provides the better roadmap. *Berry* is not a teacher case. *Berry* dealt with a worker who would speak with unemployed citizens making the transition out of welfare. At issue was an agency restriction on discussing religion with citizens served by the agency and displaying religious items in worker cubicles. *Id.* at 646. Mr. Berry desired to speak with citizens at the agency, to share his faith and pray. *Id.* The court applied a modified *Pickering* balancing test. *Berry* balanced the employee's right to engage in First Amendment religious speech against the government employer's need to avoid a violation of the Establishment Clause. *Id.* at 650-51. In that speech context, the Ninth Circuit found that the balance tipped in the government agency's favor. The potential for an Establishment Clause issue was greater there, than here, as the employee in *Berry*, unlike Johnson, said he would share his faith and pray with agency customers. *Id.* In contrast, the classroom banners do not contain Johnson's own prayers or a statement of his own religious faith. Nor does the record indicate that Johnson prays with students during class time.

*Berry* also addressed the government-employer's right to restrict the employee's right to decorate his cubicle with religious items. Mr. Berry wanted to display a Bible and a "Happy Birthday Jesus" sign at his cubicle. Relying on its earlier decision in *Tucker v. California Dept. of Educ.*, 97 F.3d 1204 (9th Cir. 1996), *Berry* again found the balance tipped in favor of the agency and its ban on religious decorations. 447 F.3d at 651-52.

### iii. The Ninth Circuit *Tucker* Case

In contrast to *Berry*, in *Tucker* the Ninth Circuit used a forum analysis, rather than a balancing test, in analyzing a First Amendment challenge to a complete ban on the display of religious materials. The issue involved the display of religious messages on the walls of the offices and employee cubicles at the California state department of education. *Tucker*, 97 F.3d at 1214-15. *Tucker* struck down the government ban on displays. As Judge Reinhardt said, "[w]e conclude that it is not reasonable to allow employees to post materials around the office on all sorts of subjects, and forbid only the posting of religious information and materials." *Id.* at 1215. The prohibition was an impermissible restriction on speech because "its sole target" was religious speech. *Id.* Even otherwise reasonable restrictions on speech in a non-public forum must be viewpoint neutral. *Id.*

In language equally applicable to the classrooms of Westview High School, *Tucker* observed, "[r]easonable persons are not likely to consider all of the information posted on bulletin boards or walls in government buildings to be government-sponsored or endorsed. Certainly a total ban on posting religious information of any kind is an unreasonable means of obviating such a concern." *Id.*

In the case at hand, the ban on Johnson's banners is an unreasonable restriction on constitutionally protected teacher speech because, as was the case in *Tucker*, the school district ban is not viewpoint neutral. Principal Kastner did not ban all teacher classroom wall displays. Kastner did not ban only religious displays – a restriction that by itself would be

suspect under *Tucker*. Instead, Kastner banned Johnson's banner display because of its particular religious perspective. At the same time, Kastner permitted on other classroom walls: (1) the 35-40 foot long Tibetan prayer flag display and its representation of Buddha; (2) the Gandhi seven social sins poster; and (3) the Lennon "Imagine" anti-religious song poster. These types of viewpoint and content-based restrictions on First Amendment speech do not pass even minimal Constitutional screening.

### iv. The Ninth Circuit *Peloza* Case

Defendants argue that a public school district may prevent a teacher from engaging in evangelical speech on a school campus if necessary to avoid an Establishment Clause violation, relying on *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994). The argument does not apply to the facts here. Unlike in *Peloza*, there is no evidence Johnson was evangelizing during instructional time. *Peloza* recognized a permissible limit on free speech where a school district directed a teacher "to refrain from any attempt to convert students to Christianity or initiating conversations about [his] religious beliefs during instructional time." *Peloza*, 37 F.3d at 522. The *Peloza* context is significantly different than the silent display of banners context. The difference is further amplified by the milieu of teacher expression on classroom walls found in Johnson's school. The Plaintiff's banners are not patently evangelical. They do not contain scripture from any holy text. There is no proselytizing language. Although the word "God" appears several times, it is in its historically employed context. In view of the much different context, *Peloza*

sheds little light for the First Amendment issues at play here.

**b. *Johnson's Speech is Not Curricular***

Defendants also argue that Johnson's classroom wall banners are curricular speech. From this Defendants argue that if the banners are curricular speech, then the Poway Unified School District has absolute control over the curriculum and may dictate the content of what its teachers may or may not speak. Any support for this argument would come from the Ninth Circuit decision in *Downs*. But *Downs* also arises from a much different context. In that case, a school district decided to set up bulletin boards in its schools upon which to post materials with the aim of "Educating for Diversity." 228 F.3d at 1012. The bulletin boards were supplied by the school district and erected in the school hallways. The materials to be posted on the bulletin boards were supplied by the school district, and because the school district had final authority over the content of the boards, all speech that occurred on the bulletin boards belonged to the school board and the school district. *Downs* involved only government speech in a nonpublic forum. *Id.* at 1013. "We do not face an example of the government opening up a forum for either unlimited or limited public discussion. Instead, we face an example of the government opening up its own mouth." *Id.* at 1012. In that particular context, *Downs* held that a teacher's free speech rights did not extend to postings on the diversity bulletin boards. *Id.* at 1014.

That is a different case than the one presented here. Unlike the teacher in *Downs*, Johnson supplied the banners – not the school district. Johnson selected

the content of the banners – not the school district. Johnson hung the banners inside his assigned classroom. The Poway Unified School District created a *limited public forum* for teacher expression. Johnson was expressing his ideas in that forum in a manner that remarkably brought no complaints from students or parents or other teachers and school administrators for two decades. This was not a case of the school district electing to speak for itself on a topic as part of its selected curriculum. *Downs* is inapposite.

To sum up, it is axiomatic that the school district may not regulate speech based on the message it conveys. *Rosenberger*, 515 U.S. at 828 (citations omitted). From this principle follows the precept that for private speech or expression, government regulation may not favor one speaker over another. *Id.* Where there has been discrimination against private speech because of its message, it is presumed to be unconstitutional. *Id.* In cases where a school targets the particular views taken by a speaker on a subject, the First Amendment violation is all the more blatant. *Id.* at 829. "Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* These principles forbid a school district from exercising viewpoint discrimination, even when the limited public forum is one of its own creation. *Id.* Here, the Poway Unified School District engaged in viewpoint discrimination when it required Johnson to remove his banners, and thus violated his First Amendment free speech rights.

In conclusion, there being no genuine issues of material fact, Plaintiff is entitled to summary judgment on his First Claim for Relief under the

federal First Amendment to the United States Constitution.

Johnson's Fourth Claim for Relief under the California Constitution is likewise determined by First Amendment jurisprudence. Therefore, Plaintiff's motion for summary judgment on the Fourth Claim for Relief is also granted. *San Leandro Teachers Ass'n v. Governing Bd. of the San Leandro Unified School Dist.*, 46 Cal. 4th 822 (Cal. 2009) (applying both federal First Amendment analysis to interpret state's liberty of speech clause in public school speech forum, and alternatively observing that protections granted by California's Constitution are broader).

## B. THE ESTABLISHMENT CLAUSE CLAIMS

Johnson's Second and Sixth Claims for relief assert Defendants violated the Establishment Clause of the First Amendment and the California Constitution. Johnson's claim is simple: by squelching his classroom banners because they conveyed a Judeo-Christian viewpoint, while at the same time permitting the classroom displays of other teachers about Buddhist and Hindu religions, Defendants are using the weight of government to prefer other religions while expressing hostility toward his own religion. This, of course, the Establishment Clause forbids.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Likewise, silencing religious speech while permitting speech that is anti-religious (*i.e.*, the lyrics to Lennon's "Imagine") also violates the Establishment Clause. *School Dist. of Abington Twp.,*

*v. Schempp*, 374 U.S. 203, 225 (1963) ("We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'").

Defendants suggest that they were maintaining religious neutrality. The undisputed facts paint a different picture. To recap, other teachers are permitted to display Buddhist messages and an image of Buddha, large Tibetan prayer flags displays, Hindu messages, and anti-religious messages. Such speech is obviously religious. At the same time, Johnson's banners, with their Judeo-Christian viewpoint, are no longer permitted. The undisputed evidence demonstrates an absence of government neutrality: disfavor towards Johnson's Judeo-Christian viewpoint and favor toward other religious viewpoints and viewpoints hostile towards religion.

The given reason was the sectarian viewpoint expressed by Johnson's banners. At oral argument, counsel for defendants offered different explanations for ordering the banners to be taken down. It was argued that it was the large size of the banners that is the problem. Yet, there are other large displays on classroom walls. The Tibetan prayer flags reach 35-40 feet across another classroom. It was then argued that it is the repetitive inclusion of the word "God" in the phrases on the banners that might make an Islamic student uncomfortable. Principal Kastner said that she asked Johnson, "[i]f an Islamic student walks into your classroom and sees all of these phrases…they may feel like, Wow, I'm not welcome, or, I'm not gonna fit in this classroom. And they may feel bad." Dep. of Kastner at 44:4-11, Ex. F, Defs' Ex. List.

Of course, student comfort is not a Constitutional test. "After all, much political and religious speech might be perceived as offensive to some." *Morse,* 551 U.S. at 409. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. More to the point, an imaginary Islamic student[6] is not entitled to a heckler's veto on a teacher's passive, popular or unpopular expression about God's place in the history of the United States. *See Morse*, 551 U.S. at 402-404 (a school's desire to avoid controversy, which might result from unpopular viewpoints is not enough to justify banning, "silent, passive expression of opinion, unaccompanied by any disorder or disturbance.").

Even if the Defendants were applying some sort of student-discomfort test, they would have to apply the test equally. Yet, school district administrators did not ask, for example, whether a Muslim student might feel uncomfortable sitting in a classroom with the anti-religious lyrics from "Imagine"[7] on a classroom wall poster. Did the principal ask whether a Jewish or Christian student might feel uncomfortable sitting under a string of Tibetan prayer flags inscribed with Sanskrit and an image of Buddha? The undisputed evidence supports a finding of unconstitutional

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[6] There was no actual complaint from an Islamic student or any other student.

[7] See *Pleasant Grove*, 129 S. Ct. at 1135 & n.2.

selective protectionism: "protecting" students from Johnson's "Judeo-Christian" viewpoint while tolerating, if not endorsing, other religious and anti-religious viewpoints.

It was also argued that no district administrator noticed Johnson's banners until 2006-07. Yet, the undisputed evidence is that Johnson's banners were large and on display in his classrooms for two decades. The assertion is patently untenable.

Finally, defense counsel argued that the Tibetan *prayer* flags are just "decorative." They are not a religious display because the Sanskrit was not translated, the image of Buddha was small, and Buddhism is not a religion but a philosophy of life. The argument is a transparent pretext. For example, the U.S. State Department estimates that in China alone there are more than 100 million Buddhists, making Buddhism one of the largest organized religions.[8] The image of Buddha may be small, but it is a recognizable religious image, nonetheless. Finally, the fact that a student may not know how to translate from Sanskrit to English, does not change the inferential religious significance of the *prayer* flags.

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[8] U.S. Department of State, International Religion Freedom Report 2006, China, available at www.state.gov/g/drl/rls/irf/2006/71338.htm last viewed on February 25, 2010.

The teacher with the Tibetan *prayer* flag display said that she did not "have any idea" what the Sanskrit writing meant, but admitted that she would not be surprised to learn that the *prayer* flags contain sacred text and prayers of Buddhists. Dep. of Brickley at 89:4 to 90:20, Ex. J, Defs' Ex. List.

As the Ninth Circuit explained in another public school setting where the Establishment Clause was violated, "[t]he message of an open-forum policy is one of neutrality." *Ceniceros v. Bd. of Trustees of the San Diego Unified School Dist.*, 106 F.3d 878, 882 (9th Cir. 1997). "[D]iscriminating against religious groups would demonstrate hostility, not neutrality, toward religion." *Id.*; *County of Allegheny*, 492 U.S. at 593 (Establishment Clause inquiry is whether the government "conveys or attempts to convey a message that religion or a particular religious belief is favored or preferred."). Here, Johnson has successfully proven an Establishment Clause claim by demonstrating that Defendants are not neutral toward teachers' religious displays. Defendants' endorsement of Buddhist, Hindu, and anti-religious speech by some teachers while silencing the Judeo-Christian speech of Johnson, violates the Establishment Clause.

Therefore, Plaintiff's motion for summary judgment is granted on the Second Claim for Relief for violation of the federal Establishment Clause of the United States Constitution. Because Johnson's Sixth Claim for Relief under the California Constitution is determined by federal First Amendment jurisprudence, Plaintiff's motion for summary judgment on the Sixth Claim for Relief is also granted. *Paulson v. Abdelnour*, 145 Cal. App. 4th 400, 420 (2006) ("The construction given by California courts to the establishment clause of article I, section 4, is guided by decisions of the United States Supreme Court.").

**C. THE STATE "NO PREFERENCE" CLAUSE CLAIM**

Johnson's Fifth Claim for Relief asserts a claim solely under the California Constitution's No Preference Clause. The No Preference Clause reads: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." Cal. Const. art. I, § 4. "The California courts have interpreted the no preference clause to require that not only may a governmental body not prefer one religion over another, it also may not appear to be acting preferentially." *Tucker*, 97 F.3d at 1214 (citations omitted). While, the California Supreme Court has not definitively construed the reach of the clause, (*see Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 788 (9th Cir. 2008), *reh'g en banc denied*, 551 F.3d 891 (2008)), since Johnson has adequately demonstrated through undisputed facts that Defendants acted in a way that either prefers, or appears to prefer, Buddhist, Hindu, and anti-religious viewpoints over Johnson's Judeo-Christian viewpoint, he has successfully proven the claimed violation of California's No Preference Clause. Thus, Plaintiff's motion for summary judgment on the Fifth Claim for Relief is granted.

**D. THE EQUAL PROTECTION CLAUSE CLAIM**

Johnson's remaining claim for relief is the Third Claim asserting a violation of the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court teaches that "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications

offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). In *Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972), the Court explains:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

As to the Third Claim for Relief, there are no genuine issues of material fact. Plaintiff has proven his claim that Defendants violated his rights under the Equal Protection Clause. Defendants opened up a forum for teacher expression. Having maintained the forum for decades, Defendants violated Johnson's rights when they acted to prohibit his speech and order his banners removed based on the content and viewpoint of what he was expressing – while at the same time permitting other teacher speech from a variety of other viewpoints to continue unfettered.

Thus, on the Equal Protection claim, Plaintiff is entitled to summary judgment.

**E. QUALIFIED IMMUNITY**

The individual Defendants argue that they are entitled to qualified immunity. A school official is entitled to qualified immunity where clearly established law does not show that the action taken violates federal Constitutional rights. *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009). "To be established clearly, however, there is no need that the very action in question [has] previously been held unlawful." *Id.* (citation omitted). In fact, "the easiest cases don't even arise." *Id.* (citation omitted). School officials "can still be on notice that their conduct violates established law in novel factual circumstances." *Id.* (citation omitted). The task is determining whether the preexisting law provided the defendants with "fair warning" that their conduct was unlawful. *Hope v. Pelzer*, 536 U.S. 730, 740 (2002).

In this case, the law has been clearly established since *Tinker* that school teachers enjoy First Amendment rights inside the schoolhouse gates. *Morse*, 551 U.S. at 396. It is also clearly established law that where free speech is permitted, the government may not discriminate based on the speaker's viewpoint. *Rosenberger*, 515 U.S. at 828-29 (citations omitted); *see also Citizens United v. Fed. Election Comm'n*, No. 08-205, __ U.S. __, 2010 WL 183856, *19 (Jan. 21, 2010) ("[T]he First Amendment stands against attempts to disfavor certain subjects or viewpoints."). Finally, as Justice Souter wrote, it is clearly established that in matters of religion, "the First Amendment mandates government neutrality

between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (citations omitted).

The school district and its administration apparently acted in conformity with these established principles for two decades. When Defendants suddenly changed course in 2007, a course they continue on today, they did so in violation of clearly established federal and state constitutional law and with fair warning that their conduct was unlawful. The individual Defendants are not entitled to qualified immunity from suit.

## IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Because the undisputed material facts demonstrate that Plaintiff is entitled to judgment of each of his claims for relief, Defendants' cross-motion for summary judgment is denied.

## V. CONCLUSION

Plaintiff's motion for summary judgment is granted as to all claims for relief; Defendants' motion for summary judgment is denied as to all claims for relief. Plaintiff is entitled to a declaration that Defendants have violated Plaintiff's individual rights protected by the First and Fourteenth Amendments to the United States Constitution, and Article I, §§ 2 and 4 of the California Constitution.

Plaintiff is entitled to nominal damages in the amount of $10 per individual Defendant. Plaintiff is

entitled to an award of reasonable attorney's fees and costs .

Defendants are ordered to permit Johnson to immediately re-display, in his assigned classroom, the two banners at issue in this case.

DATED: February 25, 2010

/s/ Roger T. Benitez
Hon. Roger T. Benitez
United States District Judge

## APPENDIX D

AO 450 Judgment in a Civil Case

**United States District Court**
**SOUTHERN DISTRICT OF CALIFORNIA**

**CASE NUMBER: 07-cv-00783-BEN (WVG)**

**[Filed February 26, 2010]**

| | |
|---|---|
| Bradley Johnson | ) |
| | ) |
| V. | ) |
| | ) |
| Poway Unified School District, | ) |
| Jeff Mangum, Linda Vanderveen, | ) |
| Andrew Patapow, Todd Gutschow, | ) |
| Penny Ranftle, Dr Donald A Phillips, | ) |
| Dawn Kastner, William R Chiment | ) |
| | ) |

**JUDGMENT IN A CIVIL CASE**

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

ORDER granting Plaintiff's Motion for Summary Judgment; denying Defendants' Motion for Summary Judgment: Plaintiff is entitled to a declaration that Defendants have violated Plaintiffs individual rights, entitled to nominal damages in the amount of $10 per individual Defendant, and an award of reasonable attorneys fees and costs. Defendants are ordered to permit Johnson to immediately re-display, in his assigned classroom, the two banners.

February 26, 2010 — Date

W. Samuel Hamrick, Jr. — Clerk

s/ A. Wooden
(By) Deputy Clerk

ENTERED ON February 26, 2010

## APPENDIX E

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 10-55445**
**D.C. No. 3:07-cv-00783-BEN-WVG**
**Southern District of California,**
**San Diego**

**[Filed October 21, 2011]**

| | |
|---|---|
| BRADLEY R. JOHNSON, | ) |
| | ) |
| Plaintiff - Appellee, | ) |
| | ) |
| v. | ) |
| | ) |
| POWAY UNIFIED SCHOOL DISTRICT; et al., | ) |
| | ) |
| Defendants - Appellants. | ) |
| | ) |

ORDER

Before: SILVERMAN, TALLMAN, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

**CERTIFICATE OF COMPLIANCE**

No. _____

BRADLEY JOHNSON,

*Petitioner*,

v.

POWAY UNIFIED SCHOOL DISTRICT, et al.,

*Respondents.*

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 3,872 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 19, 2012.

Sarah R. Miller
Becker Gallagher Legal Publishing, Inc.
8790 Governor's Hill Drive, Suite 102
Cincinnati, OH 45249
(800) 890-5001

Sworn to and subscribed before me by said Affiant on the date designated below.

Date: _____

_____
Notary Public

[seal]

## CERTIFICATE OF SERVICE

I, Sarah R. Miller, hereby certify that 40 copies of the foregoing Petition for Writ of Certiorari of *Bradley Johnson v. Poway Unified School District, et al.*, were sent via Next Day Service to The U.S. Supreme Court, and 3 copies were sent Next Day Service to the following parties listed below, this 19th day of January, 2012:

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All parties required to be served have been served.

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is executed on January 19, 2012.

_____

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Subscribed and sworn to before me by the said Affiant on the date below designated.

Date: _____

_____
Notary Public

[seal]