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BRADLEY JOHNSON, Plaintiff, v. 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 A. 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, Defendants.

CASE NO. 07cv783 BEN (NLS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. Ct. Motions 212047; 2009 U.S. Dist. Ct. Motions LEXIS 75416

September 28, 2009

Motion for Summary Judgment

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JUDGES: Hon. Roger T. Benitez

TITLE: Plaintiff's Memorandum Of Points And Authorities In Opposition To Defendants' Motion For Summary Judgment

TEXT: INTRODUCTION

In *West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943),* the U.S. Supreme Court stated, "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* (emphasis added). In direct contravention, Defendants seek 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* [*2] viewpoints, such as Plaintiff's allegedly "Christian" viewpoint. As a result of Defendants' speech restriction, that "fixed star" in our constitutional constellation has been obscured and an official orthodoxy prescribed.

In the final analysis, accepting Defendants' tendentious view of the law and facts of this case would require this court to disregard fundamental principles of constitutional law. This court previously rejected Defendants' legal arguments in its order denying their motion to dismiss (Doc. No. 25), and should similarly reject those arguments here.

STANDARD OF REVIEW

Rule 56 provides that a motion for summary judgment should be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing Defendants' motion, this court must view the evidence, all facts, and inferences that may be drawn from the facts in the light most favorable to Plaintiff. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).*

STATEMENT OF FACTS [*3]

Plaintiff is currently a public school math teacher at Westview High School in the Poway Unified School District (hereinafter "School District"). He has taught math in the School District for more than 30 years. During these 30 plus years, he has taught at 3 different high schools in the district, including Mt. Carmel High School (1977 to 1989), Rancho Bernardo High School (1990 to 2002), and now Westview High School (2003 to present). (SOMF at PP 1-4). n1 Plaintiff has a strong reputation as a teacher; he continues to be one of the highest rated math teachers at Westview High School. (SOMF at P 19).

n1 "SOMF" refers to Plaintiff's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment and associated exhibits, which were previously filed in this matter and can be found at Doc. Nos. 43 through 54. In order to avoid unnecessary and costly duplication, Plaintiff has not re-filed those numerous exhibits here, but instead relies on the "the pleadings, the discovery and disclosure materials on file" in this opposition. Fed. R. Civ. P. 56(c).

[*4]

The School District *believes* that public schools play an important role educating and guiding our youth through the marketplace of ideas and instilling national values. One method the School District uses to accomplish this task is to permit students to be exposed to the rich diversity of backgrounds and opinions held by its high school faculty. n2 (SOMF at PP 63, 64).

n2 For example, the School District permits its teachers to participate in the "day of silence"-a pro-gay rights activity-on School District property with the students so long as the teacher's participation does not disrupt the teaching of his or her classes. (SOMF at P 65).

Accordingly, for the past 30 plus years, the School District has adopted a policy, practice, and/or custom of permitting teachers to display in their classrooms various non-curricular messages and other items that reflect the individual teacher's personality, opinions, and values regarding a wide range of interests and subject matter. Consequently, for the past 30 [*5] plus years, the classroom walls have served and continue to serve as a forum for

teachers to convey personal, non-curricular messages on subjects that interest them. (SOMF at PP 35-50).

Pursuant to this long-standing School District policy, practice, and/or custom, teachers have displayed and continue to display in their classrooms such non-curricular materials as posters of rock bands and musicians; a poster of the controversial 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 social and political issues such as gay rights, global warming, animal research, the environment, anti-war/peace, the military, and others. (SOMF at PP 36-39, 42-50).

Pursuant to this policy, practice, and/or custom, the School District has allowed teachers to display Tibetan prayer flags, which are considered sacred items by those who practice the religion of Buddhism. n3 Teachers have also displayed and continue to display nature pictures; inspirational messages on posters and banners; patriotic [*6] messages on posters, banners, and flags; movie posters; 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 and/or candidates, including a campaign poster of candidate Obama, a *Newsweek* magazine cover of the candidates Obama and Biden; and a poster of the "Libertarian Party." (SOMF at PP 36-39, 42-50, 53-54). The School District admits that these displayed items express a personal message on behalf of the individual teacher and not on behalf of the School District. (SOMF at PP 55, 56, 62).

n3 Buddhists believe that these flags impart a spiritual blessing upon those in the presence of the flags. (SOMF at P 53).

Permissible subject matter for this forum for teacher speech include, *inter alia,* the foundations of our Nation, patriotic messages, inspirational messages, historical messages, and slogans that are praiseworthy of our Nation. (SOMF at P 37). And, as Defendants [*7] admit in their statement of undisputed facts, "[R]eligion is not a category of items prohibited from classroom walls." (Doc. No. 55).

Pursuant to this School District policy, practice, and/or custom, for approximately 25 years Plaintiff continuously displayed, without any objections from the School District or its administrators, on his classroom walls various patriotic banners that reflect the history and heritage of our Nation. Plaintiff had the banners made to order by a private company and purchased them with his own personal funds. The banners do not belong to the School District; they are Plaintiff's personal items. (SOMF at PP 20-23).

Plaintiff's banners contain well-known historical, patriotic 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. (SOMF at PP 68-88).

The classrooms in which Plaintiff's banners were displayed were assigned to him. His current classroom in Westview High School is his classroom for homeroom and academic classes. He also uses his classroom for non-curricular and extra-curricular activities. [*8] (SOMF at P 25). As a matter of School District policy, practice, and/or custom, teachers are given discretion and control over the various non-curricular messages displayed on their classroom walls. For example, no teacher is permitted to display materials or messages on Plaintiff'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. (SOMF at PP 32-34).

Plaintiff's banners contain the following well-known historical, patriotic phrases: "In God We Trust," the official motto of the United States; "One Nation Under God," the 1954 amendment to the Pledge of Allegiance; "God Bless America," a patriotic song; "God Shed His Grace On Thee," a line from "America the Beautiful," a patriotic song; and

"All Men Are Created Equal, They Are Endowed By Their Creator," an excerpt from the preamble to the Declaration of Independence. n4 (SOMF at PP 68-88). Consequently, the subject matter of Plaintiff's speech was permissible in this forum. (SOMF at PP 37, 103, 104).

n4 Defendants' claim that the historic phrases and slogans quoted by Plaintiff were out of "context" is nonsense. (Defs.' Mem. at 7). First, as Defendants acknowledge, the quoted phrases and slogans are well known; there is no need for any *extra* "context." (SOMF at P 74). Second, Defendants do not impose this "context" requirement on other teacher speech, including speech that selectively quotes from the very same historic documents quoted by Plaintiff. (SOMF at P 38). And third, Plaintiff was willing to display the additional historic "context" documents provided by Defendants alongside his banners, *but Defendants refused,* demonstrating that their argument was mere pretext. (Johnson Decl. at P 3 at Ex. 1).

[*9]

Plaintiff'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. They did not interfere with his teaching. And they were not expressing a message on behalf of the School District. (SOMF at PP 26-27, 60-63, 90, 98).

Plaintiff's long-standing practice of displaying his banners came to an abrupt end when in January, 2007, Defendants ordered Plaintiff to take them down. n5 Defendants directed Plaintiff to remove his banners because they believed that the banners were promoting a "Christian" or "Judeo/Christian" viewpoint. On behalf of the School District, Defendant William Chiment, Assistant Superintendent at the time, n6 sent a letter to Plaintiff explaining the order to remove the banners. In the letter, Defendant Chiment stated that Plaintiff's banners conveyed an impermissible "sectarian viewpoint" and, more specifically, "a particular sectarian viewpoint." The "particular sectarian viewpoint" noted in the letter was referring to the viewpoint [*10] of "those religious groups who refer to a supreme being as God," such as Christians. Defendant Dawn Kastner, Plaintiff's principal at Westview High School, believed that Plaintiff's banners were impermissible because they expressed a "Christian" viewpoint. (SOMF at PP 91-96, 100). Meanwhile, Defendants had no objection to a science teacher displaying a ***40-foot string*** of Tibetan prayer flags, which are sacred items that promote the Buddhist religion. (SOMF at PP 53, 54). Defendants acknowledge that these prayer flags ***"are non-curricular personal items in nature"*** (Defs.' Mem. at 19), similar to Plaintiff's banners.

n5 Prior to the School District's order to remove the banners in 2007, the School District received no complaints about the banners from students, teachers, parents, or School Board members. The only complaint to the School District came from Defendant Kastner in the fall of 2006, and this complaint resulted in the removal of the banners. (SOMF at P 29).
n6 Defendant Chiment's present title is "Associate Superintendent." (*See* SOMF at P 13).

[*11]

At the time Defendants directed Plaintiff to remove his banners, they had no evidence that the banners caused any material disruption or disorder in the School District. Defendants' removal of Plaintiff's banners was not curriculum related; Plaintiff was teaching and continues to teach his assigned mathematics curriculum. Defendants singled out Plaintiff for disfavored treatment because of the viewpoint expressed by his message. (SOMF at PP 98-100, 102, 105). And the decision to order Plaintiff to remove his banners was approved by all Defendants, including the Superintendent and the School Board. (SOMF at PP 5-18, 97).

Plaintiff wants to display his banners in his classroom; however, Defendants have prohibited him from doing so. Had Plaintiff not complied with Defendants' order to remove his banners, Plaintiff would have been subject to some form of disciplinary action for insubordination. (SOMF at PP 101, 106).

ARGUMENT

I. Defendants Violated Plaintiff's First Amendment Right to Freedom of Speech.

A. Defendants' Arguments "Shed" Plaintiff of His Constitutional Rights.

While Defendants claim that they do "not disagree that public school teachers have First [*12] Amendment rights" (Defs.' Mem. at 8), their arguments suggest otherwise. It is without dispute that Defendants created a forum for personal, non-curricular teacher speech. However, Defendants now seek to avoid this inconvenient fact (and controlling law) so as to keep this forum open for favored opinions and viewpoints, while retaining the power to censor viewpoints they dislike. From a legal (and educational) perspective, Defendants arguments are troubling.

As an initial matter, there is no dispute that:

(1) Plaintiff, a public school teacher, does not "shed [his] constitutional rights to freedom of speech or expression at the school house gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)* ("First Amendment rights . . . are available to teachers and students."); *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."); *Perry Educ. Ass'n v. Perry Local Educators, 460 U.S. 37, 44 (1983)* ("The First Amendment's guarantee of free speech [*13] applies to teacher's mailboxes as surely as it does elsewhere within the school . . . ."));

(2) Plaintiff's banners constitute speech. *See Hill v. Colorado, 530 U.S. 703, 715 (2000)* ("[S]ign displays . . . are protected by the First Amendment"); *United States v. Grace, 461 U.S. 171, 176-77 (1983)* (demonstrating with signs and banners constitutes speech under the First Amendment); *Brown v. California Dep't of Transp., 321 F.3d 1217 (9th Cir. 2003)* (enjoining policy restricting the display of signs or banners on highway overpass fences under the First Amendment);

(3) Defendants created a forum for teachers to express personal, non-curricular messages;

(4) Displaying banners, such as Plaintiff's banners, is a form of expression that is permitted in the forum;

(5) Plaintiff's banners, which were displayed without objection for 25 years, did not disrupt the classroom nor materially interfere with the basic educational mission of the School District. *See Tinker, 393 U.S. at 513* (holding that the "special characteristics of the school environment" permit restrictions on speech only so long as the speech "materially and [*14] substantially disrupt[s] the work and discipline of the school"); *Grayned v. City of Rockford, 408 U.S. 104 (1972)* (same); and

(6) Plaintiff's constitutional rights are implicated by Defendants' speech restriction. n7 *See Perry Educ. Ass'n, 460 U.S. at 44* ("There is no question that constitutional interests are implicated by denying [appellee] use of the interschool mail system."); *Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967)* ("[T]he theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.").

n7 The challenged speech restriction, whether based on the (mis)application of School District policy or not (*see* Defs.' Mem. at 14), is a choice attributable to the government, thereby triggering constitutional protection. *See Lee v. Weisman, 505 U.S. 577, 587 (1992)* (holding that a school official's decision to permit a member of the

clergy to give an invocation and benediction at the school's graduation ceremony was "a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur").

[*15]

In sum, Defendants' request that this court eschew a forum analysis in favor of a "balancing" test in which Defendants have their fingers on the scale effectively strips Plaintiff of his fundamental rights and undermines the values protected by the First Amendment.

B. Defendants Created a Forum for Plaintiff's Speech.

There is no escaping the fact that this is a forum analysis case-not a *Pickering* balancing case-because Plaintiff is seeking to use government property (his classroom walls) for non-curricular, personal expression pursuant to a longstanding School District policy, practice, and/or custom of permitting teachers to use this forum for such speech. A practice that the School District does not deny. n8

n8 There are some recognizable limits that the courts have upheld in a school setting. For example, the School District could prohibit speech that promotes illegal drug use (or underage alcohol consumption, for that matter (*see* Defs.' Mem. at 3 (prohibiting a picture of a family drinking alcohol heavily)), *see Morse, 551 U.S. at 408-09;* that "materially and substantially disrupt[s] the work and discipline of the school," *Tinker, 393 U.S. at 513,* such as items prohibited by an anti-harassment policy; or that is sexually suggestive, *Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986).* Under Supreme Court precedent, the School District could also restrict speech that "incite[s] to imminent lawless action." *Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).* None of these limitations apply to Plaintiff's patriotic expression.

[*16]

The U.S. Supreme Court, no less, "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 Defense & Educ. Fund, 473 U.S. 788, 800 (1985)* (emphasis added); *see Flint v. Dennison, 488 F.3d 816, 828-30, n.9 (9th Cir. 2007)* (conducting a forum analysis in a case seeking review of a public school speech restriction); *Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1048 (9th Cir. 2003)* ("To analyze his [First Amendment free speech] claim, we must first consider what type of forum the [School] District has created.").

Consequently, contrary to Defendants' assertion, to determine the extent of Plaintiff's free speech rights on School District property, the court must engage in a First Amendment forum analysis. *Arizona Life Coal., Inc. v. Stanton, 515 F.3d 956, 968 (9th Cir. 2008)* ("The first step in assessing a First Amendment claim relating to private speech on government property is to identify the nature [*17] of the forum.") (internal quotations omitted); *see also Perry Educ. Ass'n, 460 U.S. at 44* (applying a forum analysis in a case involving a public school speech restriction and noting that "[t]he First Amendment's guarantee of free speech applies . . . within the school and on sidewalks outside") (internal citation omitted).

Oddly, Defendants rely heavily on *Berry v. Department of Soc. Serv., 447 F.3d 642 (9th Cir. 2006),* to argue that the *Pickering* balancing test should apply to the facts of this case. However, in *Berry* the Ninth Circuit applied a *forum analysis* to determine the constitutionality of the government's restriction on the use of its facilities for the plaintiff's speech (as opposed to the *Pickering* balancing test the court applied to evaluate the restriction of plaintiff's speech when counseling clients of the department). Defendants mistakenly seek to dismiss the application of a forum analysis by erroneously concluding that Plaintiff "does not contend that the District is restricting use of school facilities, so the

forum analysis does not apply here." (Defs.' Mem. at 10, n.3). To the contrary, this is exactly what [*18] Plaintiff is asserting: Defendants have opened the use of its facilities for teachers to express personal, non-curricular messages, but are now denying Plaintiff access to this forum based on his viewpoint. In their argument Defendants acknowledge, albeit unwittingly, the illegitimacy of their claims.

Thus, it would be error to accept Defendants' invitation to ignore controlling law, which compels a forum analysis under the facts of this case. *See Flint, 488 F.3d at 828-30, n.9* (noting that it is error to not conduct a forum analysis and further noting that the U.S. Supreme Court has reinforced "the conclusion that we must analyze [the public school speech restriction at issue] within the confines of traditional forum analysis"). In *Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988),* for example, the Supreme Court applied its forum analysis in the context of a public high school. The Court specifically noted that school facilities-such as the classroom walls in this case-could be deemed "public forums" for First Amendment purposes if school authorities "by policy or by practice" opened those facilities for use "by some segment of the [*19] public, such as student organizations"-or, as here, teachers. *Id. See Perry Educ. Ass'n, 460 U.S. at 37* (applying a forum analysis to determine the constitutionality of a speech restriction applied to the interschool mail system and teacher mailboxes in a public school district).

"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 is the so-called designated public forum, which exists '[w]hen the government intentionally dedicates its property to expressive conduct.'" *Id.* (citations omitted). As the Supreme Court stated, "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion [*20] of certain subjects." *Cornelius, 473 U.S. at 802* (emphasis added). In a traditional or designated public forum, restrictions on speech are subject to strict scrutiny. *Flint, 488 F.3d at 830.*

In *Widmar v. Vincent, 454 U.S. 263 (1981),* for example, the 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.* The 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). The Court considered the forum to be a designated public forum, applied strict scrutiny, and struck down the regulation. *Id. at 270 & 277.* [*21]

In this case, the School District created a forum generally open "for use by certain speakers," thereby creating a forum for "non-curricular personal" speech of its teachers. And because Defendants singled out Plaintiff's expression for exclusion from this forum based not only on its content (which is fatal), but its viewpoint (which is doubly fatal), this court should apply strict scrutiny and strike down the challenged restriction.

Nonetheless, "[a]t the opposite end of the fora spectrum is the non-public forum. The non-public forum is '[a]ny public property that is not by tradition or designation a forum for public communication.'" *Flint, 488 F.3d at 830* (citations omitted). In a nonpublic 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 the speaker's view. *Id.* (citations omitted).

The Ninth Circuit also recognizes a "limited public forum" as a subcategory of the designated public forum. *See id. at 830-31.* A "limited public forum" is "a type of nonpublic forum that the [*22] government has intentionally opened to certain groups or to certain topics." *Id. at 831.* "Once a government has opened a limited forum, it must respect the lawful boundaries it has itself set." n9 *Id. at 831* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S.*

819, 829 (1995)) (internal quotations and punctuation omitted). Accordingly, in a limited public forum "the government may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may the government discriminate against speech on the basis of its viewpoint." *Flint, 488 F.3d at 831* (citations and quotations omitted).

n9 Certainly, if Defendants wanted to take the draconian step of removing all personal expressive items from the classroom walls, thereby closing the forum to all speech, it could do so. But once it has created this forum, it cannot pick and choose based on the viewpoint of the speaker which messages are acceptable and which are not.

[*23]

Here, the undisputed evidence shows that pursuant to a long-standing policy, practice, and/or custom, the School District created, at a minimum, a "limited public forum" that is open for use by teachers, including Plaintiff, to express a variety of messages, including personal, non-curricular messages. Pursuant to this policy, practice, and/or custom, 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 social and political concerns. Permissible subject matter include, *inter alia,* patriotic messages, historical messages, inspirational messages, religious messages, and messages regarding the foundations of our Nation. Pursuant to this policy, practice, and/or custom, teachers have discretion and control over the messages they wish to convey in this forum.

C. Defendants' Viewpoint Restriction Violates the First Amendment.

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))*. [*24] Pursuant to controlling case law, 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).* 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.*

Because Defendants singled out Plaintiff's speech based on his viewpoint, Defendants' speech restriction cannot survive constitutional scrutiny. (*See also* Doc. No. 25 (Order Denying Mot. to Dismiss) at 13-14 (citing *Rosenberger, 515 U.S. at 819; Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107-08 (2001); Faith Center Church Evangelistic Ministries v. Glover, 480 F.3d 891 (9th Cir. 2007); Truth v. Kent Sch. Dist., 524 F.3d 957, 973(9th Cir. 2008)* (observing that in a public high school limited public forum [*25] "where restriction to the forum is based solely on . . . religious viewpoint, the restriction is invalid")).

Indeed, "[r]estrictions on free expression in a nonpublic forum are constitutional only if the distinctions drawn are (1) 'reasonable in light of the purpose served by the forum,' and (2) 'viewpoint neutral.'" *Brown v. California Dep't of Transp., 321 F.3d 1217, 1222 (9th Cir. 2003)* (quoting *Cornelius, 473 U.S. at 806); Perry, 460 U.S. at 46* (stating that speech restrictions in a nonpublic forum must be reasonable and viewpoint neutral)).

As noted previously, Defendants' speech restriction fails the viewpoint neutrality prong, and is thus unconstitutional for that reason alone. n10 Nonetheless, it also fails the "reasonableness" prong.

n10 The Ninth Circuit has also "incorporated 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases . . . ." *Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1010 (9th Cir.*

2000) (citing *Planned Parenthood v. Clark County Sch. Dist., 941 F.2d 817, 828 n. 19, 829-30 (9th Cir. 1991)).

[*26]

The "reasonableness" prong "focuses on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated." *Brown, 321 F.3d at 1222* (internal quotations and citation omitted). Here, Plaintiff's speech did not disrupt school work, nor did it cause material disorder or interference in the classroom. And Defendants' order to remove the banners was not curriculum related; Plaintiff's banners were not displayed as part of his official duties as a teacher nor were they part of his math curriculum, which he continues to teach today. The banners have never prevented Plaintiff from teaching his math curriculum, nor have they limited him in any way in the teaching of his classes. In fact, Plaintiff was and continues to be one of the highest rated math teachers at Westview High School.

In sum, Defendants cannot readily allow personal posters of rock bands and sports teams, personal posters promoting a particular viewpoint on controversial political issues such as gay rights or global warming, large (35 to 40 feet) displays of sacred Tibetan prayer flags, and the host of other displays and viewpoints permitted, but then prohibit Plaintiff's [*27] patriotic banners, which were displayed without objection for 25 years, without running afoul of the First Amendment. Whether the classroom walls are a "designated public forum," a "limited public forum," or a "nonpublic forum" it makes little difference. Defendants' viewpoint-based restriction on Plaintiff's speech violates the First Amendment.

II. *Pickering/Berry/Garcetti* Do Not Justify Defendants' Speech Restriction.

Defendants improperly eschew any forum analysis in favor of applying the "balancing test" set forth in *Pickering v. Board of Educ., 391 U.S. 563 (1968), Berry v. Department of Soc. Serv., 447 F.3d 642 (9th Cir. 2006),* and *Garcetti v. Ceballos, 547 U.S. 410 (2006).* n11 Not only is this error, as noted previously, but these cases are inapplicable here because none of them address a situation in which the government has opened a forum for certain expressive activity, but then prohibits a speaker from expressing an appropriate message in the same forum based on his viewpoint. Indeed, the Ninth Circuit did not rely on the *Pickering* balancing test to reach its conclusion in *Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1010 (9th Cir. 2000),* [*28] a teacher speech case. n12

n11 The *Pickering* test essentially seeks to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick v. Myers, 461 U.S. 138, 140 (1983)* (quoting *Pickering, 391 U.S. at 568).*

n12 While distinguishable on its facts, *Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000),* demonstrates the constitutional violation in this case. *Downs* upheld a school district's restriction on a teacher's ability to change the viewpoint expressed by the school district on its "Gay and Lesbian Awareness" bulletin boards. In *Downs,* the Ninth Circuit held that the bulletin boards in question were nonpublic forums and that the speech in question was government speech made pursuant to a specific school district policy related to the "Gay and Lesbian Awareness Month." The court stated, "We do not face an example of the government opening up a forum for either unlimited or limited public discussion," and explicitly found that "[t]he bulletin boards served as an expressive vehicle for the school board's policy of 'Educating for Diversity.'" *Id. at 1012.* Accordingly, the court held that the speech was government speech; therefore, viewpoint neutrality did not apply. *Id.* In this case, there is no dispute that the speech at issue is Plaintiff's speech, so viewpoint neutrality does apply.

[*29]

Similarly, as noted previously, Defendants' reliance on *Berry v. Department of Soc. Serv., 447 F.3d 642 (9th Cir. 2006),* is misplaced. Indeed, Defendants improperly criticize *this* court for relying on forum analysis cases that they

claim do not involve "a public employer's limitation on an *employee's* speech." (Defs.' Mem. at 9). However, *Berry,* which is an "employee speech" case, did use a forum analysis when deciding whether or not the employer's restriction on the use of its facilities for the *employee's* speech violated the First Amendment. *Id. at 652-54.* n13 Because this case involves the restriction on Plaintiff's use of government facilities for his personal, non-curricular speech, *Berry* confirms that a forum analysis is proper.

n13 The Ninth Circuit applied the *Pickering* balancing test "to the Department's restriction on Mr. Berry's speech with clients." *Berry, 447 F.3d at 652-54.* And with scant analysis, the court upheld the restriction on the plaintiff's "Happy Birthday Jesus" sign and the display of his Bible in the cubicle that he uses to counsel clients, claiming "that the Department's restrictions on the display of religious items are reasonable under the *Pickering* balancing test." *Id. at 651.* Consequently, the court treated the displays *as an extension of the plaintiff's speech with the Department's clients.*

Unlike the present case, in *Berry* there was no evidence or argument that the government created a forum for the cubicle displays. And the court considered the restriction to be one based on *subject matter,* not viewpoint. In this case, *Plaintiff's speech was personal, non-curricular speech.* His banners were displayed pursuant to a long-standing policy, practice, and/or custom of allowing teachers to express personal, non-curricular messages on their classroom walls-*a forum opened by Defendants for this purpose.* The banners were not displayed pursuant to any of his official duties as a teacher. He did not use them during any classroom session or period of instruction. They were not discussed or studied in any of his classes. They caused no material disruption or disorder in the school. They did not interfere with the teaching of his classes. They were not expressing a message on behalf of the School District. And Defendants' restriction was viewpoint based. (SOMF at PP 26-27, 60-63, 90, 98). Neither *Pickering* nor *Berry* apply to these facts.

[*30]

Moreover, in its latest application of the *Pickering* test, the Supreme Court in *Garcetti* expressly stated that its analysis did not apply in a school setting. *Garcetti, 547 U.S. at 425; Lee v. York County Sch. Divs., 484 F.3d 687, 694 n.10 (4th Cir. 2007)* (refusing to apply *Garcetti* in a case involving teacher speech and instead applying *Pickering* in light of circuit precedent and noting that if the teacher's speech was not curriculum related, then school officials could not regulate it unless it "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school") (quoting *Tinker, 393 U.S. at 509).*

Nevertheless, even if this court were to apply a *Pickering* balancing test to the facts of this case, Defendants' speech restriction would still violate the First Amendment. The *only* justification offered by Defendants for the restriction is that they believe the Establishment Clause requires it. This claim does not survive even modest scrutiny. Indeed, Defendants assert that the Constitution requires them to ban Plaintiff's personal *patriotic* speech, which [*31] Plaintiff expressed without complaint for 25 years, n14 because of its viewpoint, while a science teacher's Buddhist speech is acceptable. n15 This assertion is untenable and should be rejected. *See, e.g., Widmar, 454 U.S. at 273* (rejecting Establishment Clause "defense" for speech restriction); *Rosenberger, 515 U.S. at 841-42* (rejecting Establishment Clause "defense" for speech restriction); *Tucker v. California Dep't of Educ., 97 F.3d 1204, 1212-13 (9th Cir. 1996)* (rejecting Establishment Clause "defense" for employee speech restriction). As discussed more fully in Section III below, Defendants' speech restriction, which disfavors Christianity, but favors Buddhism, *violates* the Establishment Clause.

n14 *See Van Orden v. Perry, 545 U.S. 677, 699, 702 (2005)* (Breyer, J., concurring) (finding the fact that the Ten Commandments monument was on display for 40 years without complaint "suggest[s] more strongly than

can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument" as promoting religion).

[*32]

n15 Defendants make the outlandish claim that Plaintiff's patriotic messages serve no valid secular purpose and are therefore impermissible, but the 40-foot display of *sacred* Tibetan prayer flags by a science teacher in her classroom are permissible because they "have the secular purpose of motivating her students to achieve lofty goals, like mountain climbers trying to reach Everest's summit." (Defs.' Mem. at 20). Why is it that Plaintiff's banners do not motivate students to be patriotic and to love their country?

At the end of the day, Defendants are not interested in balancing any interests or closely analyzing the significant First Amendment interests at stake. They simply-and incorrectly-label Plaintiff's speech as "religious" and then erroneously conclude that the First Amendment (Free Speech Clause) not only allows their viewpoint restriction, but it (Establishment Clause) requires it. *But see Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990)* (O'Connor, J.) (noting the "crucial difference between *government* speech endorsing religion, which the Establishment [*33] Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect"). However, simply claiming that the Establishment Clause requires this speech restriction does not make it so. Indeed, it is time for the courts to put an end to this reflexive (and thinly veiled hostility toward Christianity) response by government officials to anything that is remotely related to (the Christian) religion. Defendants' reliance on this shopworn excuse to ban the display of Plaintiff's well-known, historic patriotic phrases is patently incorrect. n16 In fact, the School District itself could use some education regarding the First Amendment. As the Ninth Circuit stated in *Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1055 (9th Cir. 2003),* "We agree with the Seventh Circuit that the desirable approach is not for schools to throw up their hands because of the possible misconceptions 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 [*34] the audience rather than squelch the speaker.'" (quoting *Hedges v. Wauconda Cmty. United Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993))* (internal punctuation omitted).

n16 Consider this rhetorical question: could a school district justify a practice of firing (or refusing to hire) Christian teachers based on the simple claim by school officials that this employment practice was necessary *in their view* to prevent an Establishment Clause violation?

III. Defendants' Restriction Violates the Establishment Clause.

As an initial matter, Defendants incorrectly frame the Establishment Clause issue as follows: "Johnson contends that Defendants have violated the Establishment Clause of both the United States and California constitutions by attempting to coerce him to change his religious belief." (Defs.' Mem. at 16). Similarly, Defendants' anemic evaluation of Plaintiff's claim demonstrates a misapprehension of the material facts and relevant law; a misapprehension that evidently [*35] guided their illicit decision to ban Plaintiff's speech in the first instance.

In 1952, the United States Supreme Court acknowledged the following historical reality: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson, 343 U.S. 306, 313 (1952).* From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life. Examples of this historical acknowledgment include Executive Orders recognizing religiously grounded National Holidays, such as Christmas and Thanksgiving, Congress directing the President to proclaim a National Day of

Prayer each year, and the printing on our currency of the national motto, "In God We Trust." As the United States Supreme Court acknowledged in *Lynch v. Donnelly, 465 U.S. 668, 677-78 (1984):*

> One cannot look at even this brief resume [of historical examples of public religious expression] without finding that our history is pervaded by expressions of religious beliefs. . . . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility [*36] toward none. Through this accommodation, as Justice Douglas observed, governmental action has "follow[ed] the best of our traditions" and "respect[ed] the religious nature of our people." (quoting *Zorach, 343 U.S. at 314).*

Recognition of the role of God in our Nation's history and heritage is consistently reflected in Supreme Court decisions. The Court has acknowledged, for example, that religion has been closely identified with our history and government, and that the history of man is inseparable from the history of religion. Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound. As Justice O'Connor observed, "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." *Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35-36 (2004)* (O'Connor, J., concurring).

Efforts to suppress this recognition and historical acknowledgment are the antithesis of the value of religious tolerance that underlies the United States and California Constitutions. And the classroom [*37] is peculiarly the "marketplace of ideas." As a result, the First Amendment does not tolerate governmental policies, practices, and/or customs that cast a pall of orthodoxy over the classroom, such as Defendants' restriction, which prohibits Plaintiff from displaying his banners based on the "particular sectarian viewpoint" conveyed by his message.

A. Defendants' Restriction Disfavors Religion.

Throughout its decisions, the Supreme Court has consistently described the Establishment Clause as forbidding not only state action motivated by a desire to promote or "advance" religion, *see, e.g., County of Allegheny v. A.C.L.U., 492 U.S. 573, 592 (1989),* but also actions that tend to "disapprove" of, "inhibit," or evince "hostility" toward religion. *See Edwards v. Aguillard, 482 U.S. 578, 585 (1987); Lynch, 465 U.S. at 673; Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973).*

As the Supreme Court noted in *Epperson v. Arkansas, 393 U.S. 97, 104 (1968),* "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. [*38] " Indeed, even *subtle departures* from neutrality are prohibited. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).*

In *School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963),* the Court stated, "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." *Id. at 225* (internal quotations and citation omitted). As Justice Breyer stated in his concurrence in *Van Orden v. Perry, 545 U.S. 677, 699 (2005),* "[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *See also Church of the Lukumi Babalu Aye, Inc., 508 U.S. at 532* ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official [*39] purpose to disapprove of a particular religion or of religion in general.").

Thus, a restriction that disfavors "religion in general"-or worse, one that disfavors "a *particular* sectarian viewpoint," such as the restriction at issue here-violates the neutrality mandated by the Establishment Clause.

B. Defendants' Restriction Disfavors a Particular Religion.

In addition to mandating neutrality toward religion in general, the First Amendment also forbids hostility aimed at a specific faith (Christianity), particularly while favoring another (Buddhism). "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); see also County of Allegheny, 492 U.S. at 608-09* (requiring "'strict scrutiny' of practices suggesting 'a denominational preference'"); *Church of the Lukumi Babalu Aye, Inc, 508 U.S. at 532* ("[The Establishment Clause] forbids an official purpose to disapprove of a particular religion."); *Epperson, 393 U.S. at 103-04* (stating that the government "may not be hostile to any religion"); [*40] *Lynch, 465 U.S. at 673* ("[The Constitution] forbids hostility toward any" religion.).

Remarkably, even though Plaintiff's speech expressed messages that had historical significance and did not contain religious text, Defendants censored the speech because they claimed that the banners conveyed an impermissible "Christian" viewpoint (while permitting Buddhist *prayer* flags, no less). Leaving aside the inaccuracy of that claim, n17 Defendants violated the Establishment Clause by singling out Plaintiff's speech for disfavored treatment because they believed it conveyed "a particular sectarian viewpoint."

n17 Plaintiff's banners contain historical, patriotic phrases and slogans central to our Nation's history and heritage; the banners do not contain passages from Sacred Scripture or other religious texts. *See, e.g., Lynch, 465 U.S. at 677-78; Elk Grove Unified Sch. Dist., 542 U.S. at 35-36* (O'Connor, J., concurring).

C. Defendants' Speech Restriction [*41] **Violates *Lemon* and Its Modifications.**

Defendants' speech restriction, which disfavored "a particular sectarian viewpoint," violates the Establishment Clause as to its purpose and effect. And it creates an impermissible entanglement. *See Lemon v. Kurtzman, 403 U.S. 602 (1971).*

1. The Purpose and Effect of Defendants' Restriction.

"The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid." *See Lynch, 465 U.S. at 690* (O'Connor J., concurring).

"While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards, 482 U.S. at 586-87.* The secular purpose requirement "reminds government that when it acts it should do so without endorsing [or disapproving of] a particular religious belief or practice . . . ." *Wallace v. Jaffree, 472 U.S. 38, 75-76 (1985).* [*42] And "[t]he eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act." *McCreary County v. A.C.L.U., 545 U.S. 844, 862 (2005)* (internal quotations omitted).

In this case, Defendants' stated purpose for their official act of removing Plaintiff's banners was to prohibit speech that, in their view, conveyed a "particular sectarian viewpoint," that being a "Christian" viewpoint. This purpose is not compelled by the Establishment Clause; rather, it is prohibited by it.

The "effect" of Defendants' restriction, irrespective of Defendants' alleged "purpose" for enforcing it, conveys a message of disapproval of religion (and the Christian religion in particular) in violation of the Establishment Clause. *See Lynch, 465 U.S. at 690* (O'Connor J., concurring) ("The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."). As the Supreme Court explained, when evaluating the effect of government action [*43] under the Establishment Clause, courts must

ascertain whether the challenged action is *"sufficiently likely to be perceived"* as a disapproval of religion. *County of Allegheny, 492 U.S. at 597* (citations omitted) (emphasis added); *Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 307, n.21 (2000)* ("[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions."). The clear effect of the speech restriction is to show disapproval of religion in violation of the Establishment Clause.

2. Defendants' Restriction Fosters an Excessive Entanglement.

The third prong of the *Lemon* test asks whether the restriction at issue excessively entangles government with religion. *Lemon, 403 U.S. at 612-13.* In *Widmar v. Vincent,* the Supreme Court explained: "[T]he University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.' Initially, the University would need to determine which words and activities fall within 'religious worship and religious teaching.' This alone [*44] could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *Widmar, 454 U.S. at 272 n.11.* (internal quotations and citations omitted). Accordingly, Defendants' attempt to exclude speech expressing a "Christian" or "Judeo/Christian" viewpoint (while permitting "Buddhist" speech) creates "excessive entanglement" in violation of the Establishment Clause.

IV. Defendants Violated the California Constitution.

A. State Free Speech Claim.

Article 1, section 2 of the California Constitution generally provides broader protection for the exercise of free speech rights than the First Amendment. *Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899 (1979).* However, federal law is typically followed for free speech claims arising in a school setting. *See California Teachers Ass'n v. Governing Bd. of San Diego Unified Sch. Dist., 45 Cal. App. 4th 1383, 1391 (1996)* ("[W]e find the federal authorities which discuss First Amendment principles in the fairly unique context of school regulation of curricular activities accurately weigh the competing interests of school administrators, [*45] teachers and students."). Thus, for the reasons stated with regard to the First Amendment, Defendants have similarly violated the California Constitution.

B. California Establishment Clause and No Preference Clause Violations.

1. California Establishment Clause.

The California courts generally adopt the federal Establishment Clause analysis when considering cases under the California Constitution's similar provision. *See 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."). Accordingly, the previous analysis under the federal Establishment Clause demonstrates why Defendants' restriction also violates the California Constitution.

2. California No Preference Clause.

The Ninth Circuit has interpreted the California No Preference Clause "to stand for the proposition that not only may a government body not prefer one religion over another, it may not *appear* to be acting preferentially." *Ellis v. City of La Mesa, 990 F.2d 1518, 1524 (9th Cir. 1993)* (citation and quotations [*46] omitted). In this case, it is evident that Defendants' restriction, which singled out "Christian" or "Judeo/Christian" speech for disfavored treatment while permitting speech conveying other religious views, violates California's No Preference Clause.

V. Defendants' Viewpoint Restriction Violates the Equal Protection Clause.

Defendants misapprehend the nature of Plaintiff's equal protection claim. The relevant principle of law was articulated in *Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972).* In *Mosley,* the Court struck down a city ordinance that prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a

labor dispute. The Court stated, "[U]nder 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." *See also Carey v. Brown, 447 U.S. 455, 461-62 (1980)*. Here, Defendants opened up a forum for teacher expression. Having maintained this forum for many decades, Defendants violated Plaintiff's [*47] rights when they prohibited his speech based on the viewpoint of his message, while permitting other teachers to continue their speech in the same forum unfettered.

VI. The Individual Defendants Do Not Enjoy Qualified Immunity.

"When government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.'" *Anderson v. Creighton, 483 U.S. 635, 638 (1987)* (citation omitted). In *Harlow v. Fitzgerald, 457 U.S. 800 (1982),* the Supreme Court held that government officials are protected from personal liability for civil damages only so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id. at 818.* "This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson, 483 U.S. at 640* (citation omitted); *Osolinski v. Kane, 92 F.3d 934, 936 (9th Cir. 1996)* ("Absent [*48] binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established. We also evaluate the likelihood that this circuit or the Supreme Court would have reached the same result."); *Mendoza v. Block, 27 F.3d 1357, 1361 (9th Cir. 1994)* ("[W]hen 'the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.") (citation omitted).

Plaintiff's right to engage in his speech free from viewpoint discrimination was clearly established. Consequently, the individual defendants do not enjoy qualified immunity, and Plaintiff is entitled to nominal damages as a matter of law. *See Carey v. Piphus, 435 U.S. 247, 266-67 (1978); Floyd v. Laws, 929 F.2d 1390 (9th Cir. 1991).*

CONCLUSION

For the foregoing reasons and for those stated in Plaintiff's motion for summary judgment (Doc. No. 43), Plaintiff respectfully requests [*49] that this court deny Defendants' motion.

Respectfully submitted,

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PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 7.1, Plaintiff Bradley Johnson hereby responds to Defendants' Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment (Doc. No. 55). In this response, "SOMF" refers to Plaintiff's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment and associated exhibits, which were previously filed in this matter (Doc Nos. 43 through 54).

1. Bradley Johnson is a high school mathematics teacher, currently teaching at Westview High School, which is

operated by the Poway Unified School District [hereinafter "School District"].

Response: Plaintiff does not dispute these facts. (*See* SOMF at PP 1-4).

2. Johnson is a Christian, and has taught with the District for 30 years.

Response: Plaintiff does not dispute these facts. (*See* SOMF at P 1).

3. Johnson is [*50] currently the adviser for the Christian club at Westview, and has held that role since 2005.

Response: Plaintiff does not dispute these facts.

4. Johnson was previously a Christian club advisor at schools where he taught previously.

Response: Plaintiff does not dispute these facts.

5. Johnson prominently displayed two banners in his classroom during Fall, 2006. Both banners were 7 feet long by 2 feet wide, and were "displayed in a non-obstructive manner."

Response: Plaintiff does not dispute these facts; however, he objects to Defendants' characterization that the banners were "prominently" displayed. True and accurate photographs of Plaintiff's banners and how they were displayed can be found at SOMF PP 20, 68, 70, 72-74 and the corresponding attached exhibits, specifically Exhibit B to Johnson's declaration at Exhibit 1. Moreover, Plaintiff displayed his banners not just during the Fall of 2006; he had continuously displayed his banners in the School District for approximately 25 years. (*See* SOMF at PP 20, 21, 68-72).

6. The first banner had red, white and blue stripes, and was emblazoned with the following messages in large block letters: [*51] "IN GOD WE TRUST"; "ONE NATION UNDER GOD"; "GOD BLESS AMERICA"; and "GOD SHED HIS GRACE ON THEE."

Response: Plaintiff does not dispute these facts; however, he objects to Defendants' characterization of how the message was displayed. *See* response to P 5 above.

7. The phrase "In God We Trust" is the official motto of the United States.

Response: Plaintiff does not dispute this fact. (*See* SOMF at PP 79-81).

8. The phrase "One Nation Under God" may be found in the Pledge of Allegiance.

Response: Plaintiff does not dispute the fact that the phrase "One Nation Under God" is in the Pledge of Allegiance, which is recited daily in the School District. (*See* SOMF at PP 82, 83).

9. The phrase "God Bless America" is a reference to the song of the same title written by Irving Berlin in the early 20th Century.

Response: Plaintiff does not dispute these facts, and notes that the song, "God Bless America," is not a religious song; it is a well-known patriotic song. Additionally, this phrase is commonly used in speeches by the President of the United States. (*See* SOMF at PP 85, 86).

10. The phrase "God Shed His Grace On Thee" is a [*52] reference from the song, "America the Beautiful."

Response: Plaintiff does not dispute this fact, and notes that the song, "America the Beautiful," is not a religious song; it is a well-known patriotic song. (*See* SOMF at P 88).

11. Mr. Johnson has had the striped banner with four phrases or one like it hanging in his classroom since 1982.

Response: Plaintiff does not dispute these facts. (*See* SOMF at PP 70, 71).

12. The second banner reads in large font: "All Men Are Created Equal, They Are Endowed By Their CREATOR." This phrase is a misquote from the preamble to the Declaration of Independence, which states, in part: "We hold these truths to be self-evident, that **all men are created equal, *that* they are endowed by their Creator** with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

Response: Plaintiff does not dispute the fact that this phrase is a quote from the Declaration of Independence. However, Defendants' claim that it is a "misquote" is incorrect-the quote reads on the banner as follows: first line, "All Men Are Created Equal"; second line, "They Are Endowed By Their"; and third [*53] line, "Creator." Thus, the word "that" was purposefully left out between the first and second printed lines because it makes the quote read more easily. (*See* SOMF at PP 38, 72, 84).

13. The word "Creator" on the "Declaration" banner is in ALL CAPS typeface about twice the size of the other words on the banner, which are in Initial Caps; the word "CREATOR" also occupies its own line of text.

Response: Plaintiff generally disputes Defendants' characterization of the banner and refers the court to the photographs of the banner for an accurate depiction of how the banner looks. *See* response to P 5 above. Moreover, this banner was displayed separate from the other banner, and it was displayed amongst numerous pictures depicting nature scenes. (*See* SOMF at P 72).

14. Johnson designed the layout of the "Declaration" banner so that the word "CREATOR" would be larger so that he could highlight that there was a supreme being who provided men with the rights described in the preamble to the Declaration of Independence.

Response: Plaintiff disputes Defendants' characterization of the purpose for the layout of the banner and asserts that he was highlighting what [*54] our *Founding Fathers* said in this historical document, which serves as a founding document for our Nation. (*See* SOMF at P 84; Johnson Dep. at 103, Ex. F to Defs.' Mot. (Doc. No. 55)).

15. Johnson had his "Declaration" banner made in 1989, and has displayed it thereafter in his classroom.

Response: Plaintiff does not dispute these facts. (*See* SOMF at P 72).

16. Johnson explained that the purpose of the two banners is for "celebrat[ing] our national heritage," "highlight[ing] the religious heritage and nature of our nation that we have as a foundation" and "espousing God as opposed to no God . . . but not any particular God."

Response: Plaintiff disputes this characterization of Plaintiff's purpose for the banners in that it is misleading. In his deposition, Plaintiff clearly stated, "These are historical patriotic expressions and mottos, *and I'm highlighting that.* The people who wrote them had a - some religious background. I don't know what it was, and 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, [*55] that we have that as a foundation." (Johnson Dep. at 103, Ex. F to Defs.' Mot. (Doc. No. 55)) (emphasis added). Regarding the "espousing God as opposed to no God . . . but not any particular God," it is evident in his deposition that Plaintiff is pointing out the obvious fact that in these historical phrases, and in particular, the phrase from the Pledge of Allegiance, there is reference to "God," as opposed to no reference of "God," and this reference is not to any particular "God," (*see* Johnson Dep. at 95, Ex. F to Defs.' Mot. (Doc. No. 55)), which would be unlike Lori Brickley's Tibetan prayer flags, which specifically reference Buddha (and display an image of this "supreme" being of Buddhism). The School District has no objection to the posting of these prayer flags. (*See* SOMF at PP 53, 54).

17. Both banners were located on walls in Johnson's classroom where they can be easily seen and read from where students sit in Johnson's classroom.

Response: Plaintiff does not dispute that his banners were posted on his classroom walls and that students, faculty, administrators, including principals and assistant principals, parents, and others who came into his classroom [*56] over the past 25 years could see them, along with all of the other items displayed on his walls. This is depicted in the photographs of Plaintiff's banners. *See* response to P 5 above. (*See* SOMF at PP 20, 29-31, 89).

18. Defendant William Chiment serves as the School's Associate Superintendent for Personnel Support Services, and has been in that position for ten years.

Response: Plaintiff does not dispute these facts. (*See* SOMF at 13-15).

19. According to Chiment, the District's informal practice is to permit teachers to decorate their classrooms with personal items such as posters, flags, or banners, within some limits.

Response: Plaintiff does not dispute the fact that the School District has created a forum for teacher speech. However, Plaintiff objects to its characterization as an "informal practice," since this has been the longstanding practice of the School District for at least 30 years. (*See* SOMF at PP 35-62).

20. But teachers' personal items cannot violate the School's anti-harassment policy.

Response: Plaintiff does not dispute the fact that the law permits the School District to limit certain subject matter of speech, [*57] and should speech "materially and substantially disrupt the work and discipline of the school" or "incite to imminent lawless action," it can be proscribed under the law.

21. Some of the other limits the School may also take into consideration are the size of the item, the age appropriateness of the particular item for the students in the classroom, and the potential relationship to the curriculum.

Response: Plaintiff generally disputes these facts. The School District imposes no size limits on the personal expressive items that teachers are permitted to display. Plaintiff acknowledges that if the size of a displayed item causes it to be obstructive, then size could be an appropriate basis for limiting the speech. However, Plaintiff's banners, as Defendants acknowledge, were displayed in a non-obstructive manner. Moreover, there were personal items that were permitted to be displayed that were significantly larger than Plaintiff's banners. And pursuant to School District policy, practice, and/or custom, teachers are permitted to display personal items that are unrelated to the curriculum. Here, Plaintiff's banners were similar in size (and even smaller) than other displays [*58] that were permitted; the banners were displayed in a non-obstructive manner; and they were non-curricular. *See* response to P 20 above. Plaintiff's facts are confirmed by the School District, and thus undisputed. (*See* SOMF at PP 35-62).

22. For example, teachers could exhibit family photographs, but photographs of a family drinking alcohol heavily would not be permitted by the School.

Response: Plaintiff does not dispute the fact that the law permits the School District to limit certain subject matter of speech, such as speech that promotes illegal drug use (or underage alcohol consumption). And should speech "materially and substantially disrupt the work and discipline of the school" or "incite to imminent lawless action," it can be proscribed under the law. Nonetheless, Plaintiff objects to this hypothetical situation as "fact" in this case. (*See, e.g.,* SOMF at P 42).

23. The School also has a formal written policy regarding the teaching of controversial issues, which governs what teachers can post on their classroom walls.

Response: Plaintiff does not dispute the fact that the School District has a policy governing the ***teaching*** of controversial [*59] issues; however, this policy, on its face, does not address the display of personal, non-curriculum related messages, and it is certainly not applied in an evenhanded manner since there are numerous "controversial" personal items (e.g., posters addressing global warming, gay rights, etc.) displayed by teachers that the School District

permits. By its own terms, the "controversial issues" policy addresses the ***"study or discussion"*** of issues that are ***"controversial."*** The policy defines a "controversial issue" as follows: "An issue is controversial when ***the question is debatable*** and ***when some of the proposed solutions conflict*** with the intellectual or emotional commitments of citizens to cherished interests, beliefs, or group loyalties." Consequently, this policy does not apply here: Plaintiff's banners do not meet the definition of a "controversial issue" in the first instance, and the banners were never part of any "study or discussion" in his classes. Indeed, the discriminatory way in which Defendants seek to apply this policy demonstrates that it was a mere pretext for banning personal viewpoints that school officials dislike. [*60] ***In sum, couching an official act in terms of a "policy" does not immunize the act from constitutional scrutiny.*** (*See* SOMF at PP 26, 27, 35-63, 90, 98, 99).

24. Poway Board Policy BP 3.11, provides, in part, that teachers must "exercise caution and discretion when deciding whether or not a particular issue is suitable for study or discussion in any particular class.["]

Response: Plaintiff does not dispute the fact that the board policy states what is represented here by Defendants. However, this policy does not apply because Plaintiff was not using his banners "for study or discussion in any particular class." *See* response to P 23 above.

25. Poway Board Policy 3.11 policy also "requires teachers to ensure that all sides of a controversial issue are impartially presented with adequate and appropriate factual information" and "[w]ithout promoting any partisan point of view."

Response: Plaintiff does not dispute the fact that the board policy states what is represented here by Defendants. However, this policy does not apply to Plaintiff's banners, and it is certainly not applied in an evenhanded manner since it is undisputed that Defendants permit [*61] numerous "controversial" personal items to be displayed in the classroom that do not "ensure that all sides of a controversial issue are impartially presented" and that do promote "partisan points of view." This court need look no further than Ms. Lori Brickley's science classroom to see that, if anything, Defendants are misusing the policy to silence viewpoints that they dislike in a forum the School District created for personal, non-curricular teacher speech. Indeed, the School District even permits Ms. Brickley to engage in a pro-gray demonstration ("day of silence") on school property during the school day alongside student participants. *See* response to P 23 above. (*See also* SOMF at P 65).

26. BP 3.11 has an attendant Administrative Procedure, entitled AP 3.11.2, that contains a section concerning the "Responsibilities of Teachers."

Response: Plaintiff does not dispute this fact. However, this procedure does not apply in this case and is thus not material. *See* responses to PP 23, 25 above.

27. Those responsibilities include "choos[ing] suitable and useful *instructional materials,"* "direct[ing] *class discussion* to cover all points of [*62] view, distinguish[ing] between teaching and advocating, and ***refrain[ing] from using classroom teacher influence to promote partisan or sectarian viewpoints."*** (Plaintiff's partial emphasis).

Response: Plaintiff does not dispute the fact that the School District procedure states what is represented here by Defendants. However, this procedure does not apply in this case and is thus not material. *See* responses to PP 23, 25 above.

28. A.P. 3.11.2 also has a section on the rights of students, and expressly gives students the "right to form and express individual opinions on controversial issues without jeopardizing relations with teachers or others."

Response: Plaintiff does not dispute the fact that the School District procedure states what is represented here by Defendants. However, this procedure does not apply in this case and is thus not material. *See* responses to PP 23, 25 above.

29. AP 3.11.2 also has a section entitled "The Selection of Issues." Within that section, the policy states that in general, "the decision as to whether a controversial issue should become a matter of school ***study*** should be based upon" ten listed criteria, [*63] including "1. It must contribute significantly to the ***objectives of the curriculum;*** . . . 6. The issue must involve alternate points of view which can be understood and defined by students; 7. The issue must be one about which information is present and available so ***alternatives*** can be discussed and evaluated on a factual and reasonable basis; . . . and 10. The issue must provide opportunity for critical thinking for the development of tolerance and the understanding of conflicting points of view, at the same time that it ***contributes to the prescribed course of study*** and the general ***educational program of the school."*** (Plaintiff's emphasis).

Response: Plaintiff does not dispute the fact that the School District procedure states what is represented here by Defendants. However, this procedure does not apply in this case and is thus not material. *See* responses to PP 23, 25 above.

30. Even non-curricular items are part of the learning environment and potentially advocating, and therefore such items (sic) subject to this written policy.

Response: Plaintiff disputes this fact, particularly insofar as Defendants seek to (mis)apply [*64] this policy to the personal, non-curricular items displayed by teachers in the forum created by the School District, such as Defendants application of this policy to silence Plaintiff's viewpoint on a permissible subject matter. *See* responses to PP 23, 25 above.

31. Sometimes the School receives complaints from parents about only one side of an issue being ***taught,*** and the School works with principals to ensure that teachers are ***teaching*** both sides of an issue. (Plaintiff's emphasis).

Response: Plaintiff does not dispute these facts. However, they are not material. Plaintiff does not use his banners when teaching any of his classes, as Defendants admit. (*See* SOMF at P 26, 27, 60-63, 90, 98).

32. In addition, it is Chiment's position that expression of religion within the District is proscribed by the law of the U.S. and State constitutions.

Response: Plaintiff does not dispute the fact that Defendant Chiment holds this opinion, which is contrary to clearly established constitutional law.

33. Chiment believes that the District's policies and procedures are consistent with the U.S. and State constitutions.

Response: Plaintiff [*65] does not dispute the fact that Defendant Chiment holds this opinion, which is incorrect. However, this opinion is not a fact, and it is not relevant. In this case, Defendant Chiment violated clearly established constitutional rights of which a reasonable person would have known.

34. Dawn Kastner serves as the Principal at Westview high School, and has been in that position since July 1, 2006.

Response: Plaintiff does not dispute these facts. (*See* SOMF at P 16).

35. Early in her tenure as principal (sometime in Fall 2006), Mr. Subbiah, a Westview teacher, raised a concern with Kastner about why Johnson was permitted to have those signs in his room; Kastner also heard about the banners from a student and another teacher. So Kastner went into Johnson's classroom and saw the banners for the first time.

Response: Plaintiff does not dispute the fact that this is what Defendant Kastner testified to in her deposition. However, it is not credible that Defendant Kastner, who was the assistant principal of Westview High School ***for an entire year prior to becoming principal,*** would on one hand say that the signs were so large that they are hard to miss, but [*66] on the other claim that she did not see them (or hear of them, including any complaints about them, as an administrator) until the Fall of 2006, an entire year later. (*See* SOMF at P 16; Kastner Dep. at 12, Ex. 4). Nonetheless,

this does not justify the viewpoint-based restriction on Plaintiff's speech, which did not "materially and substantially disrupt the work and discipline of the school." (*See* SOMF at P 31, 66, 98, 99).

36. Kastner was concerned that the banners were very large, and inappropriately ***promoted a viewpoint*** advocating God, as the phrases were pulled out of their original context. (Plaintiff's emphasis).

Response: Plaintiff does not dispute the fact that Defendant Kastner imposed a viewpoint-based restriction on Plaintiff's speech (claiming that Plaintiff's banners expressed a "Christian" viewpoint). Moreover, the School District does not require "full context," whatever that might mean, for the quotes displayed by teachers on their classroom walls. For example, the School District permitted the display of numerous personal items that contained only partial quotes *from the very documents that Plaintiff quoted.* In sum, Plaintiff does [*67] not dispute the fact that Defendant Kastner may have had "concerns"; however, these concerns were unfounded in light of the facts and controlling law. (*See* SOMF at PP 38, 92, 96).

37. Kastner met with Johnson to discuss his banner. Kastner told Johnson that taking the phrases concerning God and putting them together in large print out of context was moving away from a patriotic comment to promotion of his religious beliefs that might make some student uncomfortable.

Response: Plaintiff does not dispute the fact that Defendant Kastner met with him and informed him that his personal banners had to be removed because, according to Defendant Kastner, the banners promoted a "Christian" viewpoint. Plaintiff disputes the facts that his display of well-known historical and patriotic phrases and slogans were "out of context" and that they promote his Christian religion. (*See* SOMF at PP 68-88, 92, 96).

38. Kastner suggested to Johnson that an Islamic student walking into the classroom may feel bad, and feel like he or she would not fit in; Johnson replied something to the effect of "sometimes that's necessary."

Response: Plaintiff does not dispute the fact that [*68] Defendant Kastner suggested to him that an Islamic student might not like (or might be uncomfortable with) our national motto or some of the other patriotic slogans or historical phrases that were displayed. Plaintiff's response reflects the fact that you can't change this historic reality, nor is it proper to deny it.

39. Johnson explained to Kastner that he felt strongly that he needed the signs to stay up, that he had a right to have the banners up, and that he'd had them up for a long time.

Response: Plaintiff does not dispute these facts. (*See* SOMF at P 101).

40. Kastner suggested to Johnson that he put the phrases on the banners in context, such as posting the entire Declaration of Independence.

Response: Plaintiff does not dispute the fact that Defendant Kastner made this odd suggestion (students know the context of the quotes; there is no need for extra "context"). Moreover, Plaintiff responded by stating that he would have no problem with putting up alongside his banners a copy of the Declaration of Independence. Defendants rejected his suggestion. (*See* SOMF at P 78; *see also* Johnson Decl. at P 3 at Ex. 1, attached to this response).

41. [*69] Kastner also suggested to Johnson that he reduce the scale of the banners to "something small around the desk area."

Response: Plaintiff does not dispute the fact that Defendant Kastner was asking him to make his banners smaller, thus reducing his speech. However, the School District does not impose this speech restriction on any of the other teachers. Indeed, Defendants permit a 35 to 40-foot display of Tibetan prayer flags. (*See* SOMF at PP 41-50, 53, 54, 57).

42. Kastner contacted Melavel Robertson (Assistant Superintendent for Learning Support Services) for guidance on these "really big" signs.

Response: Plaintiff does not dispute the fact that Defendant Kastner contacted Ms. Robertson. However, Plaintiff does dispute Defendant Kastner's characterization of Plaintiff's banners as "really big." Moreover, this mischaracterization is not material since there are no size limits imposed on other teacher speech, and Plaintiff displayed his banners in a manner that was non-obstructive. *See* responses to PP 5, 21 above. (*See* SOMF at P 57).

43. Kastner's secretary took pictures of the banners and sent them to Robertson.

Response: Plaintiff does [*70] not dispute these facts.

44. Robertson was concerned with the size of the banners; she felt that students of different faiths may feel uncomfortable with a banner that large, and this was discussed amongst the School's cabinet-level administrators.

Response: Plaintiff does not dispute the fact that Ms. Robertson had concerns about Plaintiff's banners and the viewpoint expressed by them. However, her concerns about the size are irrelevant since the School District imposes no size restrictions on other teachers. Additionally, Defendants (including the "cabinet-level administrators") apparently had little "concern" about the 35 to 40-foot string of Tibetan prayer flags that are allowed to be displayed in Ms. Brickley's classroom, along with all of her partisan political messages on controversial issues such as global warming, gay rights, and zero population growth. (*See* SOMF at PP 53, 54, 57).

45. Robertson referred Kastner to speak with Mr. Chiment, as Chiment is the person within the School to deal with personnel concerns that might raise legal issues.

Response: Plaintiff does not dispute these facts.

46. Mr. Chiment spoke with Kastner and reviewed photographs [*71] of the banners in Mr. Johnson's classroom.

Response: Plaintiff does not dispute the fact that Defendants Chiment and Kastner reviewed photographs of Plaintiff's banners, and would add that Defendant Chiment never went into Plaintiff's classroom to view the banners in full context before ordering Plaintiff to remove them. (*See* Chiment Dep. at 32 at Ex. 3 to SOMF).

47. Ultimately, the decision to have Mr. Johnson remove his banners was made by Mr. Chiment.

Response: Plaintiff does not dispute this fact; however, this decision was approved and ratified by all Defendants, who remain liable for it. (*See* SOMF at PP 9, 12, 15, 18).

48. This decision was agreed to by the Superintendent's cabinet, which consists of Defendant Donald Philips (Superintendents) (sic), and the Deputy Superintendent, John Collins, Chiment, and the assistant superintendents.

Response: Plaintiff does not dispute these facts. (*See* SOMF at P 97).

49. Mr. Chiment asked Mr. Johnson by telephone to remove his banners on or about January 19, 2007.

Response: Plaintiff does not dispute this fact.

50. Mr. Chiment sent a letter to Johnson dated January 23, 2007, to [*72] confirm the decision to have Johnson remove his banners, and to provide the legal basis for the decision in writing.

Response: Plaintiff does not dispute the fact that Defendant Chiment sent the January 23, 2007 letter, which affirmed the undisputed fact that the School District was restricting Plaintiff's speech based on its viewpoint. Insofar as it was a "legal basis," Plaintiff disputes this opinion since the "legal basis" violates clearly established constitutional

rights of which a reasonable person would have known. (*See* SOMF at PP 93-95).

51. Referring to the two banners, the January 23 letter states that "[t]he 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 which include the word 'God' or 'Creator' has the effect of using your influence as a teacher to promote a sectarian viewpoint."

Response: Plaintiff does not dispute the fact that the letter states what Defendants represent here. (*See* SOMF at PP 93-95).

52. The January 23 letter expressly notes the prohibitions in California Education Code section 51511 and AR 3.11.2 as grounds for the School's [*73] position.

Response: Plaintiff does not dispute the fact that Defendants cited various policies in the January 23, 2007, letter as pretext/bases for their unconstitutional viewpoint-based restriction on Plaintiff's personal, non-curricular speech. *See* responses to PP 23, 25 above. (*See* SOMF at PP 93-95).

53. Chiment has explained that the reason Johnson was asked to remove his banners is because they violate District policy and procedure, consistent with the California and U.S. Constitutions and California Education Code. Specifically, the banners advocated a particular religious viewpoint over non-religion (atheism and agnosticsism), and they also advocated "God" over other religions that do not use the word "God" for a supreme being (such as Yahweh or Allah, for example).

Response: Plaintiff disputes these facts and legal conclusions couched as facts. Insofar as any policy, practice, or procedure of government is used as a basis for engaging in an official act or for making an official decision that violates fundamental principles of constitutional law, such as the act and decision of ordering Plaintiff to remove his banners based on the viewpoint of [*74] his speech, that official act or decision is unconstitutional, regardless of the self-serving "explanation" of the official responsible for the act or decision. (*See* SOMF at PP 93-95).

54. Although ***religion is not a category of items prohibited from classroom walls,*** the District may prohibit religious viewpoints where the teacher appears to be teaching or advocating a religious viewpoint separate from a curricular context. (Plaintiff's emphasis).

Response: Plaintiff does not dispute the assertion that "religion [albeit, certain religions] is not a category of items prohibited from classroom walls," particularly since Defendants permit speech in this forum that promotes the Buddhist religion. However, Plaintiff objects to this incomplete "fact" in that it is essentially an incorrect legal conclusion as it relates to this case. Plaintiff does not dispute the fact that the School District controls the curriculum in the district. However, when the School District creates a forum for personal, non-curricular speech, *as in this case,* and the speaker is addressing a permissible subject matter, *as in this case,* Defendants cannot restrict a particular viewpoint [*75] on a permissible subject matter because the viewpoint is considered religious (Christian) without running afoul of well-established principles of constitutional law. *See* responses to PP 23, 25 above.

55. Chiment further believed that these banners could be a distraction to a student that was upset with the particular theology of the banners. Mr. Johnson was provided with some suggested alternative posters to post on his walls in lieu of his banners.

Response: Plaintiff disputes the fact that his patriotic banners promote any "particular theology." Indeed, Defendant Chiment's comments are incorrect (and patently offensive) given the fact that he personally is aware of Tibetan prayer flags (and their religious nature), and he personally approves of the display of these sacred items by teachers (as personal, non-curricular speech) in the School District. Moreover, Plaintiff's banners caused no disruption in the School District. (*See* SOMF at PP 31, 66, 67, 98, 99).

56. Mr. Johnson was provided with some ***suggested*** alternate posters to post on his walls in lieu of his banners.

(Plaintiff's emphasis).

Response: Plaintiff does not refute this fact, [*76] which further demonstrates that teachers have discretion over their non-curricular displays in their classrooms. (*See* SOMF at PP 32-34).

57. Mr. Chiment had asked his staff to go to a teacher supply store and buy items that would place the statements of Mr. Johnson's banners in context.

Response: Plaintiff does not dispute the fact that Defendant Chiment asked his staff to purchase certain items. However, Plaintiff disputes the fact that there was any need to "place the statements of Mr. Johnson's banners in context," particularly since Defendants admit that the historic and patriotic phrases depicted on Plaintiff's banners were well known by the students. (*See* SOMF at PP 74, 78).

58. These suggested materials consisted of various posters depicting the entire text of the Declaration of Independence, displays of coinage containing the words "In God We Trust" and the text of the Pledge of Allegiance.

Response: Plaintiff does not dispute the fact that the School District purchased certain posters that contained some of the well-known historic phrases displayed on Plaintiff's banners. (*See* SOMF at PP 68, 74, 78, 83, 84).

59. Mr. Johnson received these [*77] materials, but declined to display materials up (sic) in lieu of his banners.

Response: Plaintiff does not dispute the fact that he received posters from Defendants and that Defendants said he could display them, if he "wish[ed]." Indeed, Plaintiff said that he would be willing to display these additional posters alongside his banners (for additional context), but Defendants refused. (*See* Johnson Decl. at P 3 at Ex. 1, attached to this response).

60. Poway teacher Lori Brickley has what apparently are known as "Tibetan prayer flags" displayed in her classroom.

Response: Plaintiff does not dispute the fact that Ms. Lori Brickley, a science teacher in the School District, has a very large (35 to 40 feet) display of Tibetan prayer flags, some of which contain images of Buddha. Plaintiff disputes Defendants "apparently" modifier, particularly since Ms. Brickley, and more importantly, Defendant Chiment, know exactly what these religious items are. (*See* SOMF at PP 53, 54).

61. Brickley's prayer flags are in a language, Sanskrit, that no person at the school (student or otherwise) has been able to read.

Response: Plaintiff does not dispute the [*78] fact that the *prayers* depicted on the flags are in Sanskrit. However, the image of Buddha contained on the flags makes it plain that these are religious objects of Buddhism, and Ms. Brickley explains to her students that they are in fact "prayer flags." Additionally, and perhaps more significantly, Defendant Chiment knew right away that these items were Tibetan prayer flags of the Buddhist religion; yet, he still allows them. (*See* SOMF at PP 53, 54). Moreover, a simple Google search of "Tibetan prayer flags," including a visit to the popular Wikipedia site at http://en.wikipedia.org/wiki/Prayer_flag, will inform any observer of the religious nature of these items (as if the name of them ("prayer flags") was not enough to demonstrate their religious nature).

62. The prayer flags are decorative in nature, and an interesting artifact in that they are sold at the bottom of Mount Everest and placed on top of the mountain when climbers reach the top, as Brickley informs her students who ask.

Response: Plaintiff disputes these facts as follows. The true nature of the Tibetan prayer flags is that they are sacred, religious objects that promote Buddhism. Ms. Brickley [*79] understands that; yet, she still displays them. Defendant Chiment understands that; yet, he still allows them to be displayed. Indeed, Plaintiff's banners were just as "decorative" and "interesting," particularly since the phrases and slogans are meaningful to our Nation's history and

heritage, unlike the Tibetan prayer flags. (*See* SOMF at PP 53, 54).

63. Brickley's personal belief is that religion does not belong in the classroom.

Response: Plaintiff contends that Ms. Brickley's personal belief is that the *Christian* religion does not belong in the classroom, particularly since she displays Buddhist religious symbols in *her* classroom. Moreover, Ms. Brickley (and Defendants) believes that promoting her personal views on controversial, partisan issues such as gay rights, global warming, zero population growth, and the environment are permissible in her classroom. Ms. Brickley believes that it is appropriate for her to criticize Fundamentalist Christians in her classroom. (Ms. Brickley displays a bumper sticker that says, "Hate is not a family value," which she uses to convey "the fact that 'family values' is a term that the conservative right[, which includes [*80] Fundamentalist Christians and Catholics,] has used to make people who have different sorts of families wrong.") (SOMF at P 42, Brickley Dep. at 114 at Ex. 5 to SOMF). Ms. Brickley generally believes that Christians, including Plaintiff, are "homophobic." (Brickley Dep. at 32-34, 121-22 at Ex. 2, attached to this response). Ms. Brickley thinks it is appropriate for a teacher to recite on school property her own pledge of allegiance, which states, "I pledge allegiance to our mother the earth, the sea, the land, the sky and obey her simple law, put back what you take away." (Brickley Dep. at 37-38 at Ex. 2, attached to this response). Ms. Brickley (and Defendants) believes that it is appropriate for her to publicly demonstrate (i.e., participate in the controversial "day of silence") along with the students on school property during the school day in support of gay rights. Consequently, Ms. Brickley (and Defendants) believes that it is entirely proper for her to use her position as a teacher in the school district to *actively* promote certain partisan political views on controversial issues so long as those views are the *favored* ones. (*See* SOMF at PP 39, 42, 45, 53, 54, 65). [*81]

64. Brickley says her flags have the purpose of motivating her students to achieve lofty goals, like mountain climbers trying to reach Everest's summit.

Response: Plaintiff does not dispute the fact that that is what Ms. Brickley said about her 35 to 40-foot display of Tibetan prayer flags. However, Ms. Brickley also acknowledges the fact that these "prayer flags" are considered sacred, religious items, which ultimately promote Buddhism. (*See* SOMF at PP 53, 54).

65. There is a small figure on some flags that appears to be Buddhist in nature, but that is unclear, and it is not prominent.

Response: Plaintiff does not dispute the fact that on some flags, which are approximately one foot by one foot in size and prominently displayed (35 to 40 foot display) in classrooms in the School District contain images of Buddha, and the record shows that these images are recognized as images of Buddha, a religious symbol. (*See* SOMF at PP 53, 54).

Respectfully submitted,

THOMAS MORE LAW CENTER

By: /s/ Robert J. Muise
Robert J. Muise, Esq. *
Admitted *pro hac vice*
Charles S. LiMandri, Esq.

Counsel for Plaintiff Bradley Johnson

CERTIFICATE [*82] **OF SERVICE**

STATE OF MICHIGAN, COUNTY OF WASHTENAW

Matter of: ***Johnson v. Poway Unified School District, et al.***

Case Number: **07 CV 00783 BEN (NLS)**

I am employed in the County of Washtenaw, State of Michigan. I am over the age of eighteen and not a party to the within action. My business address is Thomas More Law Center, 24 Frank Lloyd Wright Drive, P.O. Box 393, Ann Arbor, Michigan 48106.

On September 28, 2009, I served the following documents entitled: **Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, and Plaintiff's Response to Defendants' Statement of Undisputed Material Facts** with attached exhibits and this certificate of service on the parties in this action as follows: [see service list]

[**X**] (BY ELECTRONIC SERVICE) On the date executed below, I served the document(s) via CM/ECF described above on the designated recipients appearing on the service list through electronic transmission of said document(s). A certified receipt is issued to the filing party acknowledging receipt by CM/ECF's system. Once CM/ECF has served all designated recipients, proof of electronic service [*83] is returned to the filing party.

[] (BY MAIL) I caused true copies of said document(s) to be enclosed in a sealed envelope(s) with postage thereon fully prepaid and the envelope(s) to be placed in the United States Mail at Ann Arbor, Michigan. I am readily familiar with the practice of the Thomas More Law Center for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

[] (BY FACSIMILE) The above-referenced document(s) was transmitted by facsimile transmission to each recipient whose name and facsimile number appear on the service list. The transmission was reported as completed and without error. A true and correct copy of that transmission report is attached hereto and incorporated by reference.

[] (BY FEDERAL EXPRESS) I caused the above-described documents to be served on the interested parties noted on the service list by Federal Express.

[**X**] I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on September 28, 2009, at Ann [*84] Arbor, Michigan.

/s/ Robert J. Muise
Robert J. Muise

Counsel for Plaintiff Bradley Johnson

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[SEE EXHIBIT 1 IN ORIGINAL]

[SEE EXHIBIT 2 IN ORIGINAL]