IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No. 10-55445

BRADLEY R. JOHNSON
Plaintiff/Appellee,

v.

POWAY UNIFIED SCHOOL DISTRICT, et al.
Defendants/Appellants.

On Appeal from the United States District Court
Southern District of California - San Diego
Case No. 3:07-cv-00783-BEN-WVG
Honorable Roger T. Benitez, District Judge

APPELLANTS' REPLY BRIEF

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I. ARGUMENTS ON REPLY

A. The Main Cases Cited By Johnson Are Not On Point.

The cases that Johnson cites to argue that his speech was protected (*Tinker*, *Morse*, *Perry*, *Hill*, *Grace*, *Brown*, *Grayned*, *Keyishian*)[1] are not cases involving teacher-speech, and most of them are not even public employee cases. Appellee's Brief, pp. 22-23. And Johnson does not even cite to the primary Ninth Circuit case addressing the issue at bar — a public-school-teacher speaking in class about religion — which is *Peloza v. Capistrano Unified School District*, 37 F.3d 517 (1994).[2]

Moreover, all of the cases that Johnson cites for authority that the classroom is a public forum do not involve a public-school teachers speaking. See Appellee's Brief, pp. 23-30, citing *Pickering*, *Cornelius*, *Flint*, *Morse*, *Bethel*, *Brandenburg*,

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[1] *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Morse v. Frederick*, 551 U.S. 393 (2007); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37 (1983); *Hill v. Colorado*, 530 U.S. 703 (2000); *United States v. Grace*, 461 U.S. 171 (1983); *Brown v. California Dep't of Transp.*, 321 F.3d 1217 (9th Cir. 2003); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589 (1967).

[2] Curiously, the *Peloza* case is cited by the School literally on Page One of its Opening Brief, but is absolutely nowhere to be found in Johnson's brief. Instead, Johnson spends his efforts dancing around this critical case, which is not only discussed at length by Appellants, but also cited by amicus counsel in Johnson's support, the ACLU, for the proposition a school may regulate a teacher's speech to prevent violations of the Establishment Clause. (See amicus curiae brief of ACLU, p. 15.)

Hills, *Arizona Life*, *Berry*, *Perry*, *Hazelwood*, *Widmar*, *Rosenberger*, *New York Magazine*, *Planned Parenthood*, *United Food*.[3] This approach ignores the holding in *Peloza*, which held that the concern over an establishment clause violation justifies a school's limitation on a teacher's speech. If *Peloza* is followed, a classroom is not a public forum. No appellate case has yet held that public school classroom is a limited public forum.

Similarly, the majority of the cases he relies upon to make the argument that the restriction is viewpoint-based (*see* Appellee's Brief, pp. 31-33, *citing*, *Rosenberger*, *Cogswell*, *Lamb's Chapel*, *Good News*, *Faith Center*, *Truth*, *Brown*, *Cornelius*, *Perry*)[4] do not involve public-school teachers speaking in school. He does

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[3] *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007); *Morse*, *supra*, 551 U.S. 393; *Tinker*, *supra*, 393 U.S. 503; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1941); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044 (9th Cir. 2003); *Arizona Life Coal., Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008); *Berry v. Department of Soc. Serv.*, 447 F.3d 642 (9th Cir. 2006); *Perry*, *supra*, 460 U.S. 37; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123 (2d Cir. 1998); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998); *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985).

[4] *Rosenberger*, *supra*, 515 U.S. 819; *Cogswell v. City of Seattle*, 347 F.3d 809 (9th Cir. 2003); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S.

cite to *Downs*, which he denigrates as nonsensical, and at best misleading, in a footnote. Appellee's Brief, p. 32, fn. 36.

Finally, yet again, almost none of the government-speech cases Johnson relies upon involved a public-school teacher's classroom speech. See Appellee's Brief, pp. 33-41, citing *Pickering*, *Berry*, *Garcetti*, *Connick*, *Rosenberger*, *Van Orden*, *Mergens*, *Tucker*, *Hills*, *Mercer County, Hedges*.[5] Again, the exceptions are *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000) (*see,* Appellee's Brief, pp. 34-35) and *Lee v. York County Sch. Div.*, 484 F.3d 687 (4th Cir. 2007) (*see* Appellee's Brief, p. 37). With respect to *Lee*, he claims the case did not involve speech that was "personal and non-curricular." In fact, the speech in *Lee* was no less "personal and non-curricular" than Johnson's. The speech in *Lee* was unrelated to the teacher's subject, and the teacher did not refer to it in his teaching.

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384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007); *Truth v. Kent Sch. Dist.*, 524 F.3d 957 (9th Cir. 2008); *Brown*, *supra*, 321 F.3d 1217; *Cornelius*, *supra*, 473 U.S. 788; *Perry*, *supra*, 460 U.S. 37.

[5] *Pickering*, *supra*, 391 U.S. 563; *Berry*, *supra*, 447 F.3d 642 (9th Cir. 2006); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); *Rosenberger*, *supra*, 515 U.S. 819; *Van Orden v. Perry*, 545 U.S. 677 (2005); *Tucker v. California Dep't of Educ.*, 97 F.3d 1204 (9th Cir. 1996); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *A.C.L.U. v. Mercer County*, 432 F.3d 624 (6th Cir. 2005); *Hills*, *supra*, 329 F.3d 1044; *Hedges v. Wauconda Cmty. United Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993).

The court concluded that the speech was nonetheless subject to restriction. This understanding of what a school district can regulate - i.e., teacher's speech designed to impart messages to students - was endorsed by the Ninth Circuit in *Downs*, where the speech was likewise unrelated to the teacher's subject.

If Johnson's banners must be permitted, so must banners that say things contrary to the policies of the school district and the community. The School would not be permitted to remove a banner proclaiming the validity of Osama Bin Laden's jihad against the West. If a standard forum analysis applies here, as Johnson urges, then offensive displays would necessarily be permitted because the law is well established: mere "offense" is not a valid basis to exclude something from a limited public forum. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

B. The Forum Test Applies to "Protected" Speech, But Under *Eng*, Johnson's Speech is Not "Protected," So the Forum Analysis Is Not Appropriate.

Johnson's legal analysis of his First Amendment claim begins and ends with a forum analysis. To try to gain traction with his analysis, Johnson repeatedly cites to this Circuit's decision in *Flint v. Dennison*, 488 F.3d 816, 828-30 (9th Cir. 2007)

as the paradigm of how this case should be decided. But Johnson completely misses the pre-requisite determination necessary to reach a forum analysis: the speech must be speech "protected" by the First Amendment.

The *Flint* court, for example, first made the determination that a public college's restrictions on the campaign expenditures of students running for a student government office constituted protected speech. *Flint*, 488 F.3d at 829. It was only after that determination had been made that the *Flint* court turned to discussion of the various fora and whether they applied.

Specifically, *Flint* began its forum analysis by stating "[a]lthough the student campaign expenditures constitute speech protected by the First Amendment, '[e]ven protected speech is not equally permissible in all places and at all times.'" *Id.* at 829-830, emphasis added, quoting *Cornelius*, *supra*, 473 U.S. at 799.

Johnson's argument merely assumes that his speech is "protected speech," with no analysis other than in a vacuum. Johnson ignores an entire body of law designed to answer the question of whether a public employee's speech is "protected" in the employment context. That body of law begins with *Pickering* and was distilled by the Ninth Circuit in *Eng* to a series of factors, the first two of which are designed to make the determination of whether the public employee's speech is "protected" for First Amendment purposes. *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). The

first two factors are (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee. *Id.* If the speech is determined to be protected after evaluating those two prongs, then in retaliation cases, the court goes on to determine in the third factor "whether the plaintiff's *protected* speech was a substantial or motivating factor in the adverse employment action." *Id*., emphasis added. Without using the first two factors to determine whether the speech is "protected," the third prong would lack its bite.

Johnson's attempt to find support for a forum analysis in *Hazelwood*, *supra*, 484 U.S. 260, does not help him for several reasons: (1) *Hazelwood* dealt with student speech protected by the First Amendment; (2) it further dealt with "school sponsored" speech and (3) the *Hazelwood* court permitted schools to restrict the speech where the speech interferes with the mission of the school.

In *Hazelwood*, a principal removed — before publication — articles in a high school student newspaper addressing students' experiences with pregnancy and the impact of divorce on students at the school. Addressing the constitutionality of this action, as it had done previously, the Supreme Court acknowledged the competing interests of educational authority and student speech rights, but emphasized that "[a] school need not tolerate student speech that is inconsistent with its basic educational mission." *Id*. at 266 (citations and internal quotation marks omitted).

Under the Ninth Circuit's interpretation of *Hazelwood*, schools may limit speech that bears the imprimatur of the school when the speech may place the school on one side of a controversial issue: "A school's decision not to promote or sponsor speech that is unsuitable for immature audiences, or which might place it on one side of a controversial issue, is a judgment call which Hazelwood reposes in the discretion of school officials and which is afforded substantial deference. We therefore conclude that controlling the content of school-sponsored publications so as to maintain the appearance of neutrality on a controversial issue is within the reserved mission of the [] District." *Planned Parenthood v. Clark County School District*, 941 F.2d 817, 829 (9th Cir. 1991) (en banc), internal footnote omitted. The School meets this test.

First, there can be little debate that the banners in Johnson's classroom might be seen to bear the imprimatur of the school. Students have been in plain view of the banners as a captive audience for 25 years. The fact that the banners were hung inside the classroom leaves no doubt that others might view them as having the stamp of school approval, even if the speech is Johnson's speech. Johnson argues, however, that he did not use the banners in his classroom teachings. The School does not know what that means. Certainly when a 7 foot by 2 foot banner is hanging in direct sight of a captive audience of students, an idea is being imparted, and this communication

falls within the purview of Poway Board Policy 3.11. And if speech falls within the purview of a particular policy, then the public may assume that the School made a decision with respect to the speech under that policy.

Second, there is a legitimate pedagogical reason for the banners' removal: the School is ensuring that as an entity, it maintains its neutrality on a controversial issue and does not run afoul of the Establishment Clause.

Nevertheless, Johnson argues that any viewpoint-based restriction is unconstitutional. See Appellee's Brief, p. 31-33. But Johnson's arguments concerning "viewpoint neutrality" turn the notion of neutrality on its ear. Under Plaintiff's arguments, schools would have no right whatsoever to limit a viewpoint on a particular subject matter, even if the viewpoint subjected students to ideas of hatred and racism. If Plaintiff were correct, then a teacher could hang a banner in his or her classroom reading "Hitler had the right idea," or "Blacks, go back to Africa" and the school could do nothing to stop that viewpoint except to completely eliminate the hanging of all banners by all teachers. But that is what Plaintiff's reading of *Hazelwood* suggests. Defendants submit that Plaintiff's narrow interpretation is not in keeping with the *Hazelwood* court's declaration that a school may "disassociate itself ... from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature

audiences." *Hazelwood*, 484 U.S. at 271. And the Supreme Court recently set a precedent permitting school authorities to limit a particular viewpoint. *Morse v. Frederick*, 551 U.S. 393 (2007) [holding that a school may limit student speech advocating illegal drug use]. So even "viewpoint neutrality" is not so absolute as Johnson would have this Court believe.

Still, Johnson suggests that it is unfair to him that other issues be permitted by the school district to be on display, such as gay rights issues, for example. Johnson does not go into detail in his arguments as to what aspect of tolerance of civil rights invades his constitutional rights as a teacher. But to clarify, the School has an "affirmative obligation" under the California Education Code "to combat racism, sexism, and other forms of bias" including sexual orientation. Cal. Educ. Code, § 201, subd. (b) and § 220. "An arm of local government such as a school board may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and restrict the contrary speech of one of its representatives." *Downs*, supra, 228 F.3d 1003 at 1014. So Johnson's argument begs the question as to how tolerance material concerning sexual orientation posted in a classroom is violative of his First Amendment rights.

C. Even if The Forum Test Were to Apply, The School May Use the Establishment Clause as a Defense.

Even if this Court were to find that Johnson is correct that the *Eng* factors and balancing test does not apply, and that Johnson's classroom was a limited public forum under the *Hazelwood* analysis, the School would still be within its rights to remove the banners. The School may use the Establishment Clause as a defense in a forum analysis. Under that legal analysis, the School Defendants may prevail if they show that the banners constitute an Establishment Clause violation. This is because avoiding endorsement of religion is a constitutional mandate and therefore a compelling interest. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-13 (2001) (citing *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)).

In the public-schools context, the Ninth Circuit has held that schools may refuse to allow religious speech in a limited public forum where it is necessary to avoid an Establishment Clause violation. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000). In *Cole*, two students sued their school district, claiming that the district violated their freedom of speech by refusing to allow one to give a sectarian, proselytizing valedictory speech and the other to give a sectarian invocation at their graduation. *Cole*, 228 F.3d at 1095. The court, in deciding whether the individual school officials enjoyed qualified immunity, found that the students'

damage claims failed because the officials' actions were reasonably taken to avoid violating the Establishment Clause of the First Amendment. *Id.* In supporting its decision in favor of the school officials, the *Cole* court explained: "We conclude the District officials did not violate the students' freedom of speech. Even assuming the Oroville graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause under the principles applied in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), and *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). [Citations.]" *Cole*, 228 F.3d at 1101.

In cases decided after *Cole*, the Ninth Circuit has continued to endorse the concept that the government can distinguish and exclude proselytizing religious speech to preserve the purpose for a limited forum. See, e.g., *Prince v. Jacoby*, 303 F.3d 1074, 1086-87 (9th Cir. 2002) (finding that while student religious group must be given equal access to school's public address system to announce its activities, the group may be barred from doing so to "pray and proselytize"); and *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 980 (9th Cir. 2003) (prohibiting proselytizing in high school graduation speech).

In short, should this Court find that Johnson's speech is protected under the First Amendment, then the Court should still find that the School's right to protect itself from an Establishment Clause violation outweigh's Johnson's right to display the banners.

D. The School Has Not Taken Inconsistent Positions On What Constitutes "Curricular" Speech; The Legal Sense of the Term "Curricular" is Far Broader Than the Term's Vernacular Use by School Administrators.

Johnson points out that the School appears to have taken inconsistent positions with respect to what matters are "curricular" in nature. Appellee's Brief, p. 16. To that end, Johnson points to the deposition testimony of School administrators Collins and Chiment, who both stated in their depositions that the banners were not part of the curriculum. Appellee's Brief, p. 16, fn. 30.

But a review of that testimony indicates that when the School's administrators were talking about Johnson's banners not pertaining to the curriculum, they meant that the banners have nothing to do with "mathematics," the course of study taught by Johnson. Surely, no one would question that the phrases on the banners are not mathematical.

But there is a larger meaning to the word "curriculum", that is used in the legal sense. That is, any information imparted to the student from the teacher is

"curricular" in nature. *Lee*, supra, 484 F.3d 687, 694. Johnson says that he is trying to teach students about the role of religion in our nation's history. (3 ER 497, deposition pg. 103.) So, although not part of his *formal* math curriculum, it is still part of the broader curriculum taught to students during the school day. Accordingly, Johnson's banners are speech which is not of public concern under *Lee*, and therefore are not afforded First Amendment protections.

E. Johnson Failed to Demonstrate an Establishment Clause Violation.

Both Johnson and the ACLU contend that the string of flags in Lori Brickley's classroom are religious. What both Johnson and the ACLU ignore, however, is that the flags do not *advocate* for a particular religion.

Specifically, the appellate record does not contain any evidence that the flags referred to as "Tibetan prayer flags" had any religious message. Looking at the pictures of the flags is not sufficient to identify any religious reference. 2 ER 203,204. One flag depicts what appears to be the seated Buddha. 2 ER 205. The flags are "[a]bout a foot by a foot." (3 ER 405:87:17-18.) So the depicted Buddha is about one inch high, surrounded by Sanskrit text and other indecipherable pictures. This is not comparable in context to the seven foot long banners.

The teacher who put up the flags said she *guessed* that the figure was the Buddha but she was not sure. 3 ER 405:88:11-12. There is no testimony the flags

were religious. The teacher testified that she asked her students, who included speakers of many languages, what the flags say, but none of her students could tell her. 3 ER 405:88:22 - 406:89:2. She used the flags in her science curriculum to discuss climbing Mount Everest, placing the flags on the mountain, and the fossils that were found there, as part of a discussion of "the accomplishment of an amazing goal." 3 ER 406:89:20-22 ["In the context I just told you."]; 405:87:20 - 406:89:13[the context]. The amicus brief by the ACLU denigrates her purpose, but her purpose is the only evidence in the Record, and on that basis, is the only evidence in this motion for summary judgment on the use of those flags.

Similarly, there is no evidence of a religious purpose in the posing of the text of the Lennon song "Imagine." The record only contains a photo of the poster of John Lennon, with the text of the song in small type in the lower corner. 2 ER183:21. There is no evidence of the use of the poster or the classroom in which it was displayed. 2 ER 183. It could have been part of a unit on the Vietnam War, or related to a music class. It could have been part of a student display. There is simply no evidence who put up the poster or why. The Court has made it clear that — in the analysis of words violative of the establishment clause — the "context" of the language is "determinative." *Newdow v. Rio Linda Union School Dist.*, 597 F.3d 1007, 1019 (9th Cir. 2010). In this case Johnson did not submit evidence of the

context of the John Lennon poster, or the words of the song "Imagine" which appeared to be important in the District Court's decision. Absent the evidence of context, the determination that the song was religious was error.

F. Johnson's Banners Are Not "Ceremonial Deism" Which Would Constitute an Exception Under the Establishment Clause.

Throughout this case, Johnson has maintained that his banners do not violate the Establishment Clause, and therefore the School should not have an undifferentiated fear of a violation. Johnson's main argument in this regard is that the banners have phrases with historical and patriotic significance. For example, in this Court, as in the District Court, Johnson has supported his view with a quote from Justice O'Connor's concurrence in *Elk Grove Unified School Dist. v. Newdow*, where Justice O'Connor recognizes that "[i]t 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 School Dist. v. Newdow*, 542 U.S. 1, 35-36 (2004) (O'CONNOR J., concurring in the judgment) However, Johnson's use of this quote as a sword to attack the School's position ignores the context of that quote within the whole of Justice O'Connor's concurring opinion. It also ignores the fact that the Poway administration does not disagree with her. A closer examination of Justice O'Connor's concurrence and the School's

practices is warranted to dispel Johnson's arguments concerning this out-of-context quote.

In *Elk Grove*, Justice O'Connor confronted, head on, the issue of whether the phrase "one Nation under God" in the Pledge of Allegiance violates the Establishment Clause when recited at school. Using the "endorsement" test, O'Connor wrote that government endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 34, quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'CONNOR, J., concurring). O'Connor opined that the government does not endorse a particular religion when a reference to the divine is historical and adds an air of solemnity to a secular occasion. Such use then does not offend the Constitution. This is what she called "ceremonial deism." *Elk Grove*, 524 U.S. at 35-36 (O'CONNOR, J., concurring).

Justice O'Connor concluded that the recitation of the Pledge of Allegiance constituted such "ceremonial deism" because, in part, the words "under God" were not prominent (they are but 2 of 31 words in the Pledge) and the Pledge is a secular ritual (one can remove the words "under God" and the Pledge retains its power). *Id.* at 43. Justice O'Connor also noted that "the brevity of a reference to religion or

to God in a ceremonial exercise can be important for several reasons. First, it tends to confirm that the reference is being used to acknowledge religion or to solemnize an event rather than to endorse religion in any way. Second, it makes it easier for those participants who wish to 'opt out' of language they find offensive to do so without having to reject the ceremony entirely. And third, it tends to limit the ability of government to express a preference for one religious sect over another." *Id.* at 42. It is this minimal religious content that, in Justice O'Connor's mind, gives the pledge its ceremonial character. *Id.*

In Justice O'Connor's opinion, it was a "close question" as to whether the Pledge violates the Establishment clause (*Elk Grove*, 524 U.S. at 37), even though that clause is short and fleeting in the larger context of the Pledge. She felt a reasonable observer would not believe the government was endorsing religion by the phrase "under God" in the pledge. *Id.* at 43. Justice O'Connor noted, however, that "'one of the greatest dangers to the freedom of the individual to worship in his own way [lies] in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.'" *Id.* at 39, quoting *Engel v. Vitale*, 370 U.S. 421, 429 (1962). Accordingly, "only in the most extraordinary circumstances could actual worship or prayer be defended as ceremonial deism." *Elk Grove*, 542 U.S. at 40 (O'CONNOR, J., concurring).

O'Connor also warned that [a]ny statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309 (2000) ("[T]he use of an invocation to foster ... solemnity is impermissible when, in actuality, it constitutes [state-sponsored] prayer"). *Id.*, parallel citations omitted.

Here, Johnson's banners are not a form of "ceremonial deism" permitted by Justice O'Connor. Had Johnson posted the entire text of the Pledge of Allegiance on his wall, as the School suggested he do, then under O'Connor's analysis, there would not be a Constitutional violation. But Johnson instead cherry-picked the phrase "one Nation under God" and displayed it in large letters on a banner. Instead of the words "under God" making up 2 of 31 words in the Pledge, they now constitute 50% of the words in the phrase on his banner. Similarly, Johnson took a key phrase referencing God or Creator and put them up on his banners, eschewing the remainder of the texts from which the phrases came. The word God is used repeatedly on the banners, and this repetition is exactly what Justice O'Connor warned against. By doing so, the "ceremonial deism" was lost, and what remains is the advocacy of religion by using phrases which might not offend the Constitution if kept in context. If Justice

O'Connor thought that the Pledge itself was a close call as to whether it violated the Establishment Clause, then when the "God" phrases are removed and highlighted from their texts, as Johnson has done here, it is a close call no longer. Johnson's banners run afoul of the Establishment Clause, and it is not an "undifferentiated fear."

Moreover, the School's actions do not run contrary to what Justice O'Connor has said. The School gave Johnson the option to place his phrases in their context in posters of the actual historical documents and song lyrics. Johnson was not interested in displaying his hand-picked phrases in their ceremonial context, however.

But, says Johnson, the School permitted another teacher to display a series of flags with Sanskrit writing and a very small picture of a Buddha-like figure, and therefore Equal Protection has been violated. The ACLU agrees with Johnson (one of their few agreements). The reality is, however, that the tiny depiction of the figure in the larger context of the flags is nominal, in the same way that 2 out of 31 words in the text of the Pledge of Allegiance which refer to the devine is nominal, according to Justice O'Connor. Moreover, the flags do not advocate for a particular religion and are decorative in nature, whereas Johnson's banners advocate for the Judeo-Christian religion. Or at the very least, the banners advocate the a divine origin of the earth, given that the "Creator" banner was surrounded by pictures of nature. There are a lot of people who don't believe that a divine power created the earth, so what Johnson

is doing is advocating. In that context, the School did not violate the Equal Protection clause nor the Establishment Clause.

G. Although the Banners Were Displayed For A Long Time, The Court Should Be Wary of Assigning Constitutional Protections Based Upon Time.

Johnson also maintains that the fact that the banners were displayed for a long time on his walls mitigates against the School's right to remove them.

But "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice ... is not something to be lightly cast aside." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970).

Here, there are different students who enter Johnson's classroom every year. Such is the high-school cycle of admission and graduation. And unlike the monument cases, where a religious themed message is portrayed in a public square or outside a public building, Johnson's classroom is not open to the general public. Unless a student cares enough to complain, or an administrator notices that the banners might violate the Establishment Clause (as was the case here), there is no one else to challenge Johnson's actions.

Johnson's argument that he is an experienced and excellent teacher actually cuts against him in this regard. As a teacher with a good reputation, he is not going to be as closely scrutinized for his teaching practices as would a new or younger teacher. Accordingly, administrators, over time, will tend to spend less and less time in his classroom. And when the administrators *are* there, they are probably not looking around the room at his classroom displays, but are focusing on the lesson plan, whether students are engaged in learning, and whether math skills are being imparted from teacher to student. And after 25 years, even that evaluation undoubtedly becomes *pro forma*.

H. The Individual Defendants Are Entitled to Qualified Immunity.

Johnson begins his arguments by noting that the defense of "qualified immunity" does not apply to injunctive or declaratory relief. Johnson, however, sought and obtained nominal damages against the individual Defendants. So the qualified immunity discussion is at issue.

Contrary to the District Court's holding, the law is not clearly established in favor of teacher speech in the classroom, and in fact, the majority of the cases would point to a limitation on the teachers rights, and forbid school districts from displaying such a banner. Even if Johnson's banners are entitled to constitutional protection, the individual Defendants should be protected by qualified immunity because the law

governing teacher-speech on the subject of religion in the classroom is not so well developed that a reasonable person would know which rule applies.

The clear holding in *Peloza* would make any school administrator who was familiar with the case absolutely certain that he or she had an obligation to stop a teacher from advocating about religion during the school day. *Peloza* — taken alone — should have been sufficient basis for the District Court to rule in favor of qualified immunity.

School administrators should not need a law degree in order to carry out their duties. But without a law degree it would be difficult to evaluate the current cases or to balance between the right of the teacher to state his views in the classroom against the right of the students to be free of government assertions about religion. For example, the phrase "One Nation Under God" has been the subject of substantial disagreement among the members of this Court. And reasonable people watch the disagreements on the evening news. Just a couple of years before the events in this case, the Ninth Circuit ruled that the words, "One nation under God" in the Pledge of Allegiance were illegal in the classroom. *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2005). That event was widely reported in the news. A reasonable person could be excused for believing that the reference to "God" was the problem that the Ninth Circuit identified. The reversal of the decision was not as well reported,

because it was less sensational. After that event, another case was filed by Newdow, and subsequently the Ninth Circuit has ruled that the phrase "one nation under God" is not a problem, in the context of the entire Pledge of Allegiance. (*Newdow v. Rio Linda Union School Dist*., 597 F.3d 1007 (9th Cir. 2010)). Those two cases make it starkly clear that the law governing teacher-speech about God in the classroom is not well settled for the "reasonable person," and is currently a shifting issue subject to further change. If it is difficult for lawyers and Judges to determine the rules in each case, it is impossible for a school administrator.

It appears that it is the *context* of the phrase in the Pledge was a necessary part of the analysis. "When it comes to testing whether words and actions are violative of the Establishment Clause, context is determinative." *Newdow*, *supra*, at 1019. The decision seems to indicate that the phrase taken out of context would have been ruled to be improper. *Id.* at 1019, ftnt 9. A reasonable person could be excused for believing that placing the phrase "one nation under God" enlarged, on the wall of a classroom, would take the phrase out of context of the Pledge, and make it less than appropriate in the classroom. When placed on the wall — along with other phrases containing references to God — the context shifts, and the context becomes a message proclaiming the national endorsement of the Judeo-Christian religion. That

shift in context argues strongly that the law is not clearly established and the administrators could not have known the correct rule to apply.

As Justice Souter recently indicated in a concurrence, "there is no doubt that this case and its government speech claim has been litigated by the parties with one eye on the Establishment Clause [citation]. The interaction between the "government speech doctrine" and Establishment Clause principles has not, however, begun to be worked out." *Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125, 1138, 172 L.Ed. 2d 853 (2009).

There has been much dispute over religion in the schools, and the issues are not yet fully resolved, but the general rule is that public schools may not endorse religion. Prayer in public schools, even a nondenominational prayer, is an impermissible government endorsement of religion. *Engel v. Vitale*, *supra*, 82 S. Ct. 1261 (1962). Reading from the Bible over the intercom is unconstitutional. *Abington School District v. Schempp*, 374 U.S. 203 (1963). Posting the Ten Commandments on the wall in school is not permitted. *Stone v. Graham*, 449 U.S. 39 (1980). A state may not require even a moment of silence in school if the motivation for the statute was the encouragement of prayer. *Wallace v. Jaffree,* 472 U.S. 38, 105 S. Ct. 2479 (1985). It is unconstitutional for a school to bring clergy to perform a nondenominational prayer at graduation. *Lee v. Weisman*, 505 U.S. 577, 587, 112

S.Ct. 2649 (1992). The Court indicated concern that children would feel coerced by having a prayer recited at graduation that violated their beliefs. *Id*. at 587.

In the case at bar, the evidence is that the school Principal was concerned that a student might feel uncomfortable. ER 424:18-20; 506 p. 44:4-13. Her concern exactly paralleled the majority viewpoint in *Lee v. Weisman*, *supra*. Yet the District Court denied immunity and awarded damages against her personally.

Similarly, the established rule is that the state may not force students to recite the Pledge of Allegiance. *Barnette*, *supra*, 319 U.S. 624. Yet the District Court permitted Johnson to force the students in his class to read one of the critical phrases from that Pledge every day. There is certainly a distinction between being force to recite a pledge, and being force to read it, but that is not a significant distinction.

It is clear teaching religion in the schools is not permitted. *McCollum v. Board of Education Dist. 71*, 333 U.S. 203 (1948). The State may not ban the teaching of evolution, nor alter the course of study to promote a religious point of view. *Epperson v. Arkansas*, 393 U.S. 97 (1968). The State also may not require the teaching of creation science along with evolution. *Edwards v. Aquillard*, 482 U.S. 578 (1987).

It is our tradition and law, that parents decide what religion their children are taught. It is only the parents— not the schools or the school teacher — who hold the

right to select their own children's religion. *Wisconsin v. Yoder*, 406 U.S. 205, (1972). Teachers have some of the same rights as parents, but the remaining rights are reserved to the parents. *Veronia School District v. Acton,* 515 U.S. 646, 655-656 (1995). In this case, the District Court has placed Johnson in a superior position, with the same right to endorse a religious belief as the students' own parents.

The District Court's ruling treated teacher-speech different from government speech. If the District Court is correct, then teachers can pray in class, and the state cannot stop them. That does not seem consistent with the case law, but it is certainly not "clearly settled." Any school administrator should be forgiven for believing that the school district had a duty to stop the teacher from doing what the school clearly could not do: endorse religion.

Although the law on that issue is not yet clear, the cases are impliedly in favor of limiting teacher-speech in the same way that state-speech is limited regarding religions. If a school administrator read the most pertinent school cases, he or she would be justified in believing that the school had the right to limit the teachers speech in the classroom. The most relevant cases are *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477 (7th Cir. 2007), *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001), *Downs*, supra, 228 F.3d 1003, *Peloza*, supra, 37 F.3d 517, and *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990).

Consider a school administrator confronted by Johnson's banners, and familiar with the following rulings:

Nicholson v. Board of Educ. Torrance Unified School Dist., 682 F.2d 858, 682 (9th Cir. 1982) - A teacher ***could be fired*** for a dispute with the Principal over an article in the school newspaper;

Peloza, supra - A teacher ***could not*** teach creationism or call evolution a religion;

Tucker, supra - A computer specialist ***could*** put up documents about religion;

Downs, *supra* - A teacher ***could not*** post material on hallway bulletin board;

Berry, supra - A social worker ***could not*** display religious items in the workplace;

Roberts, supra - A teacher ***could not*** display the Bible and posters in the classroom;

Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991) - a college professor ***could not*** talk about his religious beliefs in class;

Berger v. Rensselaer Cent. School Corp., 982 F.2d 1160 (7th Cir. 1993) - a school ***could*** prohibit distribution of Bibles to fifth grade students;

Mayer, supra - a Teacher ***could not*** present personal views on war during class.

The relationship between religion and the state is difficult for Judges to determine. If appellate court judges cannot agree, then the law is not settled, and school administrators cannot be held to know what the law is. Should this Court affirm the District Court with respect to Johnson's claims against the School District, then it still should reverse with respect to qualified immunity and have summary judgment entered in favor of the individual Defendants.

II. CONCLUSION

Johnson chastises the School for not creating a true "marketplace" of ideas, which would in turn permit teachers to discuss the merits of various religions. Appellee's Brief, p. 42. Such a marketplace would be a dangerous game, where the majority of a particular religion could prosteletyze to the minority, and in such situation could foster an environment not of learning and collegiality, but of religious advocacy and castigation of the minority.

The unstated notion that leaps from the page in Johnson's brief is that evangelism in schools is appropriate, so long as it is draped in the American flag. But schools should not be turned into referendums on the proper religion for students. Instead, as the School's policy and practices indicate, the advocacy of a particular religion is prohibited.

The Court is respectfully requested to reverse the judgment on each of the motions for summary judgment, and instruct the trial court to deny Johnson's motion and grant the Defendants' motion.

Respectfully Submitted,

DATED: September 27, 2010

STUTZ ARTIANO SHINOFF & HOLTZ
A Professional Corporation

By: /s/ Paul V. Carelli, IV
PAUL V. CARELLI, IV
Attorneys for Defendants/Appellants Poway Unified School District; Jeff Mangum; Linda Vanderveen; Andrew Patapow; Todd Gutschow; Penny Ranftle; Dr. Donald A. Phillips; William R. Chiment; and Dawn Kastner

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits set forth at Fed. Rules App. Proc., Rule 32(a)(7)(B)(ii) as determined by the word processing program used to generate the brief. The brief's type size and type face comply with FRAP 32(a)(5) and (6).

In addition, the Appellants' Opening Brief's Certificate misstated that the brief fit within the limits of Circuit Rule 32-4. Instead, it should have stated that it complied with the length limits of Fed. Rules App. Proc., Rule 32(a)(7)(B)(i).

s/ Paul V. Carelli IV
PAUL V. CARELLI, IV
Attorney for Appellants

9th Circuit Case Number(s) 10-55445

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Re: *Johnson v. Poway Unified School District, et al.*
USDC Case No.: 07-CV-00783-BEN (LSP)

Dear Mr. LiMandri and Mr. Muise:

Please be advised that the U.S. Court of Appeals for the Ninth Circuit has telephonically granted the Appellants Poway Unified School District, et al., a 14-day extension of time to file the Appellants' Reply Brief. Accordingly, the Reply Brief will be due on September 27, 2010.

Should you have any questions or concerns about this or any other matter, please feel free to contact me at your earliest convenience.

Very truly yours,

STUTZ ARTIANO SHINOFF & HOLTZ
A Professional Corporation

Paul V. Carelli, IV

/rsr

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