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 75414

August 14, 2009

Motion for Summary Judgment

COUNSEL: [*1] Charles S. LiMandri, Esq. (California State Bar No. 110841), LAW OFFICES OF CHARLES S. LiMANDRI WEST COAST REGIONAL OFFICE OF THE THOMAS MORE LAW CENTER, Rancho Santa Fe, California, Robert J. Muise, Esq. * (Michigan State Bar No. P62849), THOMAS MORE LAW CENTER, Ann Arbor, Michigan, * Admitted pro hac vice, Counsel for Plaintiff.

JUDGES: Hon. Roger T. Benitez

TITLE: Plaintiff's Notice Of Motion And Motion For Summary Judgment

TEXT: TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **November 16, 2009,** at **10:30 a.m.,** or as soon thereafter as the matter may be heard in Courtroom 3, before the Honorable Roger T. Benitez, United States District Judge, Plaintiff Bradley Johnson, by and through his undersigned attorneys, will and hereby does move this Court pursuant to Fed. R. Civ. P. 56 for summary judgment in his favor as to all claims. Plaintiff contends that there is no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law.

In support of his motion, Plaintiff relies upon the pleadings and papers of record, as well as Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary [*2] Judgment, Plaintiffs' Statement of Undisputed Material Facts, and the declaration, depositions, and exhibits attached thereto.

WHEREFORE, Plaintiff respectfully asks this court to grant his motion, enter judgment in his favor as to all claims, and award him nominal damages for the past loss of his constitutional rights. Plaintiff also requests attorneys' fees and costs pursuant to *42 U.S.C. § 1988,* California Code of Civil Procedure § 1021.5, and other applicable law.

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

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

When deciding this motion, the court need not work off of a blank slate. In its decision denying the School District's motion to dismiss (Doc. No. 25), this court set forth the relevant and controlling case law that will ultimately decide this case. In light of this controlling law and the undisputed material facts uncovered during the course of discovery, Plaintiff [*3] Bradley Johnson contends that he is entitled to a judgment in his favor on all claims as a matter of law.

As this court noted previously, it is without question that public school teachers have constitutional rights, including the right to freedom of speech, and that California school officials, who are acting on behalf of the government, are restrained in their actions by the United States and California Constitutions. (Doc. No. 25). Indeed, it has been "the unmistakable holding" of the United States Supreme Court for decades that neither "students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).* Consequently, teachers, such as Plaintiff, do have rights, and when government officials violate those rights, they should be held accountable, as in this case.

STANDARD OF REVIEW

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)* [*4] (internal quotations omitted).

Federal Rule of Civil Procedure 56 provides that a motion for summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Rule 56 "standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).*

In the present case, there is no genuine issue of material fact and Plaintiff is entitled to judgment in his favor as to all claims as a matter of law.

STATEMENT OF FACTS

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 [*5] 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, which was filed along with this brief.

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 used by the School District to accomplish this task is to permit students to be exposed to the rich diversity of backgrounds and opinions held by high school faculty. n2 (SOMF at PP 63, 64).

n2 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).

[*6]

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 plus years, the classroom walls have served and continue to serve as a forum for teachers to convey 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 [*7] 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 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).

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 includes, *inter alia,* [*8] the foundations of our Nation, patriotic messages, inspirational messages, historical messages, and slogans that are praiseworthy of our Nation. (SOMF at P 37).

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 has also uses his classroom for non-curricular [*9] and extra-curricular activities. (SOMF at P 25).

It was and continues to be a matter of School District policy, practice, and/or custom that 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 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. (SOMF at PP 68-88). Consequently, the subject matter of Plaintiff's speech was permissible in this forum. (SOMF at PP 37, 103, 104).

Plaintiff's banners were not displayed pursuant to any of his official duties as a [*10] teacher. He did not use his banners during any classroom session or period of instruction. His banners caused no material disruption or disorder in his classroom or anywhere else in the school. His banners did not interfere with the teaching of his classes. And his banners 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 on or about January 23, 2007, Defendants ordered him to remove the banners. n4 Defendants directed Plaintiff to remove his banners because the School District 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, n5 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 of "those religious groups who refer to a supreme being as [*11] 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).

n4 Prior to the School District's decision to order Plaintiff to remove his 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 decision to remove the banners. (SOMF at P 29).

n5 Defendant Chiment's present title is "Associate Superintendent." (*See* SOMF at P 13).

At the time Defendants directed Plaintiff to remove his banners, they had no evidence that Plaintiff's 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 [*12] curriculum. Defendants singled out Plaintiff for disfavored treatment because of the viewpoint expressed by his message. (SOMF at PP 98-100, 102, 105).

The decision to order Plaintiff to remove his banners was approved by Defendants Chiment and Kastner, the Superintendent, Defendant Donald Phillips, 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. Public School Teachers Possess Constitutional Rights.

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker, 393 U.S. at 506* ("First Amendment rights . . . are available to teachers and students."); *Morse v. Frederick, 127 S.Ct. 2618, 2625 (2007)* ("In *Tinker,* this Court made clear that 'First [*13] 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 applies to teacher's mailboxes as surely as it does elsewhere within the school and on sidewalks outside.") (internal citation and punctuation omitted); *see also James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972)* (acknowledging teacher's First Amendment right to wear a black armband in protest of Vietnam War). Consequently, Plaintiff is afforded the protections of the United States and California Constitutions as a public school teacher. And it is without question that Plaintiff's constitutional rights are implicated by the School District's viewpoint-based restriction on his speech. *See Perry, 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, [*14] regardless of how unreasonable, has been uniformly rejected.").

The challenged restriction, which singled out Plaintiff's speech based on its viewpoint-specifically, because it expressed "a particular sectarian viewpoint" (i.e., Christian)-is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that Plaintiff's speech had to be banned. *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").

B. Plaintiff's Banners Are Speech.

It cannot be denied that 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 Transportation, 321 F.3d 1217 (9th Cir. 2003)* [*15] (enjoining policy restricting the display of signs or banners on highway overpass fences under the First Amendment). Moreover, Plaintiff's speech did not disrupt the classroom nor materially interfere with the basic educational mission of the School District. n6 And his banners were displayed in a forum for teacher speech created by the School District.

n6 The "special characteristics of the school environment" permit restrictions on speech only so long as the speech "materially and substantially disrupt[s] the work and discipline of the school." *Tinker, 393 U.S. at 513; see also Grayned v. City of Rockford, 408 U.S. 104 (1972)* (same). As the undisputed evidence shows, Plaintiff's banners did not substantially disrupt the work and discipline of the school. Indeed, his banners had been displayed without objection for 25 years.

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

To determine the extent of Plaintiff's free speech rights on School District property, [*16] 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 of the forum.") (internal quotations omitted).

"The [U.S. Supreme] Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for expressive purposes." *Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800 (1985); see Flint v. Dennison, 488 F.3d 816, 828-30, n.9 (9th Cir. 2007)* (noting that it is error to not conduct a forum analysis and further noting 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"); n7 *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 [*17] type of forum the [school] District has created.").

n7 In *Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988),* 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 public, such as student organizations"-or, as here, teachers. *Id.*

"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 [*18] 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 of certain subjects." *Cornelius, 473 U.S. at 802* (emphasis added).

In a public 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, 264-65 (1981),* for example, the Court was presented with "the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion." In deciding the question, the Court stated, "Through its policy of accommodating their meetings, the University has created a forum generally open for use [*19] by student groups. Having done so, the University has assumed an obligation to justify its discrimination and exclusions under applicable constitutional norms. . . [e]ven if it was not required to create the forum in the first place." n8 *Id. at 267-68.* Consequently, the Court considered the forum to be a designated public forum, and because the university singled out religious expression for exclusion from this forum (a content-based restriction), the Court applied strict scrutiny and struck down the challenged regulation. *Id. at 270 & 277* ("It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

n8 The facilities in question were not generally open to the public. *See, Widmar, 454 U.S. at 267, n.5* ("We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.").

[*20]

Arguably, in this case the School District created a forum generally open "for use by certain speakers" (i.e., teachers), thereby creating a designated public forum for this speech. 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 one 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 [*21] the 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, punctuation, 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. As the Supreme Court stated long ago in *West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943),* "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

[*22]

In the present case, 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 generally 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 and other items 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 includes, *inter alia,* patriotic messages, historical messages, inspirational 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.

D. Defendants' Viewpoint Restriction Violates the First Amendment.

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 [*23] forum based on the viewpoint of the speaker." *Cogswell v. City of Seattle, 347 F.3d 809, 815 (9th Cir. 2003).* And 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; see also Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 971 (9th Cir. 2002)* (acknowledging that "where the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint").

Accordingly, because Defendants singled out Plaintiff's speech in this forum based on its viewpoint, Defendants' speech restriction cannot survive constitutional scrutiny. As this court observed in its prior decision,

> In this sense, Johnson's case is similar to *Rosenberger, Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993)* and *Good News Club v. Milford Central School, 533 U.S. 98, 107-08 (2001).* Each case involved viewpoint discrimination in a limited public forum. In *Rosenberger,* [*24] the Supreme Court found that by excluding funding to a student religious group solely because the religious group promoted a particular religious perspective, the university was discriminating in a limited public forum on the basis of that group's viewpoint. *Rosenberger, 515 U.S. at 829-37.* In *Lamb's Chapel,* a group desired to speak at a school facility on the issue of child rearing from a religious perspective. The school district denied access to speakers from using the school rooms for religious purposes. The Supreme Court unanimously held that the school district discriminated on the basis of viewpoint, and that the school district should have permitted speech from a religious perspective on subject matter permitted by the forum. *Lamb's Chapel, 508 U.S. at 393.* Similarly, in *Good News Club,* the Supreme Court found viewpoint discrimination where a public school excluded a Christian club from meeting on the school's grounds while permitting nonreligious groups to meet. *Good News Club, 533 U.S. at 107-09.* The Christian club simply sought to address a subject otherwise permitted in the limited public forum. *Id. at 109.* [*25] In *Faith Center* [*Church Evangelistic Ministries v. Glover, 480 F.3d 891 (9th Cir. 2007)],* the Ninth Circuit reviewed these cases and drew a line between speech from a religious perspective (which was constitutionally protected in each of the limited public forums) and pure religious worship (which exceeded the boundaries of the forums). *Faith Center, 480 F.3d at 913.*
>
> Whether described as speech from a religious perspective or speech about American history and culture, through display of his classroom banners, Johnson was simply exercising his free speech rights on subjects that were otherwise permitted in the limited public forum created by Defendants and in a manner that did not cause substantial disorder in the classroom. Thus, Johnson has made out a clear claim for relief for an ongoing violation of his First Amendment free speech rights. *See, e.g.,* [*Truth v.] Kent School District, 524 F.3d [957,] 973* [9th Cir. 2008] (observing that in a public high school limited public forum "where restriction to the forum is based solely on . . . religious viewpoint, the restriction is invalid"). (Doc No. 25 at 13-14). [*26]

Indeed, speech restrictions in a *nonpublic* forum must be reasonable and viewpoint neutral. "Restrictions 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 Transportation, 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)).

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 [*27] prevented Plaintiff from teaching his math curriculum, nor have they limited him in any way in the teaching of his math curriculum. In fact, Plaintiff was and continues to be one of the highest rated math teachers at Westview High School.

In sum, there is no justification for allowing posters of rock bands, posters promoting a particular viewpoint on gay rights or global warming, displays of Tibetan prayer flags, and the host of other displays and viewpoints permitted, but prohibiting Plaintiff's banners. As a result, Defendants' speech restriction fails the first prong because it is unreasonable.

Defendants' speech restriction also fails the second prong because it was not "viewpoint neutral," as noted previously. n10

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)).*

[*28]

In the final analysis, 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. Defendants' Viewpoint Restriction Violates the Equal Protection Clause.

The principle of law at issue here 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 held as follows: "[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."

And in *Carey v. Brown, 447 U.S. 455, 461-62 (1980),* the Court stated that "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely [*29] tailored to serve substantial state interests, and the justification offered for any distinctions it draws must be carefully scrutinized."

Here, Defendants opened up a forum for teacher expression. Having maintained this forum for many decades, Defendants violated Plaintiff's rights when they prohibited his speech by ordering his banners removed based on the content and viewpoint of his message, while permitting other teachers to continue their speech in the same forum unfettered. Thus, Defendants violated the equal protection guarantee of the Fourteenth Amendment.

III. Defendants' Restriction Violates the Establishment Clause.

As the Supreme Court admonished in *Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 307, n.21 (2000),* "[T]he Constitution . . . requires that [courts] keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded and . . . guard against other different, yet equally important, constitutional injuries." One such way in which these "values" are eroded is by the government restricting speech simply because it allegedly conveys a "Christian" viewpoint, as in this case.

In 1952, the United States Supreme [*30] 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 toward none. Through this accommodation, as Justice Douglas observed, governmental action has "follow[ed] the best [*31] 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 in the judgment).

Efforts to suppress this recognition and historical acknowledgment, as demonstrated by Defendants' action here, are the antithesis of the value of religious tolerance that underlies the United States and California Constitutions.

The classroom is peculiarly the "marketplace of ideas." As a result, the [*32] 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)* ("disapprove"); *Lynch, 465 U.S. at 673* ("hostility"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973)* ("inhibi[t]").

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." Indeed, [*33] 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." (internal citations omitted).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993),* the Court stated the relevant principle of law applicable here: "In [*34] our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official 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 particular faith. "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* ("[W]e have expressly required 'strict scrutiny' of practices suggesting 'a denominational preference.'"); *Church of the Lukumi Babalu Aye, Inc, 508 U.S. at 532* (stating that the Establishment Clause "forbids an official purpose to disapprove of a particular religion"); *Epperson, 393 U.S. at 103-04* [*35] (stating that the government "may not be hostile to any religion"); *Lynch, 465 U.S. at 673* (stating that 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. Leaving aside the inaccuracy of that claim, n11 Defendants violated the Establishment Clause by singling out Plaintiff's speech because they believed it conveyed "a particular sectarian viewpoint."

n11 Indeed, 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 [*36] **Violates *Lemon* and Its Modifications.**

Defendants' speech restriction, which disfavored "a particular sectarian viewpoint" (i.e., a Christian 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)* (describing test for evaluating Establishment Clause claims).

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 the 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).

a. Purpose of Defendants' Restriction.

"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 [*37] 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).* 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 and citation 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 violates the Establishment Clause.

b. Effect of Defendants' Restriction.

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 [*38] whether, irrespective of the 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 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); *see also Santa Fe Indep. Sch. Dist., 530 U.S. at 307, n.21* ("[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.") (internal quotations and citations omitted). The clear effect of the School District's 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 [*39] 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 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 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. *See 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.

In *California Teachers Ass'n v. Governing Bd. of San Diego Unified Sch. Dist., 45 Cal. App.4th 1383 (1996),* [*40] for example, the California appellate court was asked to review a school district policy that prohibited all employees from wearing political buttons at worksites during work hours. The court held that under the California Constitution and the First Amendment as well the ban may be enforced in instructional settings but not in noninstructional settings. *Id. at 1392-93.* In its decision, the court relied upon U.S. Supreme Court precedent and noted, "[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, teachers and students." *Id. at 1391.*

Implicit in the court's reliance on federal authority is the conclusion that the California Constitution would similarly prohibit a speech restriction that was viewpoint based. *See San Leandro Teachers Ass'n v. Governing Bd. of the San Leandro Unified Sch. Dist., 154 Cal.App.4th 866 (2007)* (stating that regulations restricting speech in a nonpublic forum must be reasonable and viewpoint neutral). Thus, for the reasons stated with regard [*41] to Plaintiff's First Amendment claim, Defendants have similarly violated article 1, section 2 of 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 the challenged action at issue 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 omitted).

In this [*42] 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. Plaintiff Is Entitled to Nominal Damages and Attorney Fees and Costs.

In addition to declaratory and injunctive relief, Plaintiff is entitled to nominal damages for the past loss of his constitutional rights 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)* (holding that nominal damages must be awarded as a matter of law upon finding a constitutional violation).

As the prevailing party, Plaintiff is also entitled to an award of his attorney fees and costs pursuant to *42 U.S.C. § 1988,* California Code of Civil Procedure § 1021.5, and other applicable law. *See Hensley v. Eckerhart, 461 U.S. 424, 433, 435 (1983)* ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.").

CONCLUSION

Schools are places of learning, and this case presents a great opportunity [*43] for the students, faculty, and administrators of the School District to learn that when government officials violate a person's constitutional rights, they will be held accountable. *See Hills, 329 F.3d at 1055* ("We agree with the Seventh Circuit that the desirable approach is not for schools to throw up their hands because of the possible misconception about endorsement of religion, but that instead it is 'far better to teach students about the first amendment, about the difference between private and public action, about why we tolerate divergent views. The school's proper response is to educate the audience rather than squelch the speaker.'") (quoting *Hedges v. Wauconda Cmty. United Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993)* (internal punctuation omitted)).

As this court stated in its prior decision, Public schools play an important role educating and guiding our

> youth through the marketplace of ideas and instilling national values. One method used by the Poway Unified School District to accomplish this task is to permit students to be exposed to a rich diversity of backgrounds and opinions held by high school faculty. In this [*44] way, the school district goes beyond the cramped view of selecting curriculum and hiring teacher speech to simply deliver the approved content of scholastic orthodoxy. By opening classroom walls to the non-disruptive expression of all its teachers, the district provides students with a healthy exposure to the diverse ideas and opinions of its individual teachers, without necessarily endorsing or dictating adherence to the ideas expressed. By squelching only Johnson's patriotic expression, the school district does a disservice to the students of Westview High School and the federal and state constitutions do not permit such one-sided censorship. (Doc. No. 25 at 22-23).

For the foregoing reasons, Plaintiff respectfully requests that this court grant his motion for summary judgment as to all claims.

Respectfully submitted,

THOMAS MORE LAW CENTER

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Admitted *pro hac vice*
Charles S. LiMandri, Esq.

Counsel for Plaintiff Bradley Johnson

PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Rule 7.1(f)(1), the following statement of undisputed [*45] material facts ("SOMF") is submitted on behalf of Plaintiff Bradley Johnson in support of his motion for summary judgment.

1. Plaintiff Bradley Johnson (hereinafter "Plaintiff") is a public school teacher who has been teaching in Defendant Poway Unified School District (hereinafter "School District") for more than 30 years. (Johnson Decl. at P 3 at Ex. 1).

2. Plaintiff is a high school math teacher in the School District. (Johnson Decl. at P 3 at Ex. 1).

3. Plaintiff has taught math at Mt. Carmel High School, Rancho Bernardo High School, and Westview High School, which are all high schools within the School District. (Johnson Decl. at P 3 at Ex. 1).

4. Plaintiff presently teaches math at Westview High School and has been doing so since 2003. (Johnson Decl. at P 3 at Ex. 1).

5. Mr. John Collins, Deputy Superintendent for the School District, testified on behalf of the School District pursuant to Fed. R. Civ. P. 30(b)(6) as to certain matters set forth in the deposition notice. (Collins Dep. at 12, Dep. Exs. 1, 2 at Ex. 2).

6. Defendant William R. Chiment, Associate Superintendent for the School District, testified on behalf of the School District pursuant to Fed. R. Civ. P. 30(b)(6) [*46] as to certain matters set forth in the deposition notice. (Chiment Dep. at 16-17, Dep. Ex. 31 at Ex. 3).

7. Defendants Jeff Mangum, Linda Vanderveen, Andrew Patapow, Todd Gutschow, and Penny Ranftle were at all relevant times members of the Board of Education for the School District. (Compl. at PP 8-12 (Doc. No. 17); Answer at

2 (Doc. No. 26); Collins Dep. at 16 at Ex. 2).

8. The Board of Education for the School District is responsible for adopting the policies of the School District. (Compl. at P 8 (Doc. No. 17); Answer at 2 (Doc. No. 26)).

9. The Board of Education for the School District approved of the School District's decision to order Plaintiff to remove his banners. (Chiment Dep. at 138 at Ex. 3).

10. Defendant Dr. Donald A. Phillips was at all relevant times the Superintendent of the School District. (Compl. at P 13 (Doc. No. 17); Answer at 2 (Doc. No. 26); Collins Dep. at 17 at Ex. 2).

11. As the Superintendent of the School District, Defendant Phillips is partially responsible for creating and implementing the policies of the School District. (Compl. at P 13 (Doc. No. 17); Answer at 2 (Doc. No. 26)).

12. Defendant Phillips approved of the School District's decision [*47] to order Plaintiff to remove his banners. (Chiment Dep. at 137 at Ex. 3).

13. Defendant Chiment was at all relevant times Assistant/Associate Superintendent of the School District. (Compl. at P 14 (Doc. No. 17); Answer at 2 (Doc. No. 26); Chiment Dep. at 20 at Ex. 3).

14. As Assistant/Associate Superintendent, Defendant Chiment is partially responsible for creating and implementing the policies of the School District. (Compl. at P 14 (Doc. No. 17); Answer at 2 (Doc. No. 26)).

15. Defendant Chiment approved of the School District's decision to order Plaintiff to remove his banners. (Chiment Dep. at 30-31, 130, 132, 137, Dep. Ex. 6 at Ex. 3).

16. Defendant Dawn Kastner was at all relevant times the Principal of Westview High School, which is one of the high schools in the School District. (Compl. at P 15 (Doc. No. 17); Answer at 2 (Doc. No. 26); Kastner Dep. at 10-12 at Ex. 4).

17. As the Principal of Westview High School, Defendant Kastner is partially responsible for implementing the policies of the School District. (Compl. at P 15 (Doc. No. 17); Answer at 2 (Doc. No. 26)).

18. Defendant Kastner approved of the School District's decision to order Plaintiff to remove his banners. [*48] (Kastner Dep. at 101-02, 172 at Ex. 4).

19. Plaintiff has a strong reputation as a math teacher in the School District; he continues to be one of the highest rated math teachers at Westview High School. (Johnson Decl. at PP 4, 36; Chiment Dep. at 24-25 at Ex. 3; Kastner Dep. at 33 at Ex. 4).

20. For approximately 25 years, Plaintiff had continuously displayed on his classroom walls various banners that contained historical and patriotic phrases. (Johnson Decl. at PP 5, 17-21, Ex. B at Ex. 1).

21. During these 25 years, Plaintiff displayed his banners during the relevant time periods at Mt. Carmel High School, Rancho Bernardo High School, and Westview High School. (Johnson Decl. at PP 3, 5 at Ex. 1).

22. Plaintiff had the banners made to order by a private company and purchased them with his personal funds. (Johnson Decl. at P 5 at Ex. 1).

23. Plaintiff's banners do not belong to the School District; they are his personal items. (Johnson Decl. at PP 5, 33, 34, 37 at Ex. 1; Chiment Dep. at 34-36 at Ex. 3).

24. Teachers in the School District are permitted to display in their classrooms personal items that are not related to

the curriculum. (Johnson Decl. at PP 9-16, Exs. A, C at [*49] Ex. 1; Collins Dep. at 94 at Ex. 2).

25. The classrooms in which Plaintiff's banners were displayed over the years were assigned to Plaintiff; they were his classrooms for "homeroom" and academic classes. They were also the classrooms he used for non-curricular and extra-curricular activities. (Johnson Decl. at P 7 at Ex. 1).

26. Plaintiff's banners were not used as part of his math curriculum, they were not part of any aspect of his math curriculum, they were not used as part of any of his extracurricular activities, students were not studying Plaintiff's banners in his classes, and students were not discussing Plaintiff's banners in his classes. (Johnson Decl. at PP 16, 36 at Ex. 1; Chiment Dep. at 93-95 at Ex. 3).

27. Plaintiff's banners were not part of the curriculum. (Johnson Decl. at PP 16, 36 at Ex. 1; Collins Dep. at 94 at Ex. 2; Chiment Dep. at 93-95 at Ex. 3).

28. Prior to the School District's decision to order Plaintiff to remove his banners in 2007, neither the School District nor its administrators made any complaints to Plaintiff regarding his banners until Defendant Kastner complained in the Fall of 2006. (Johnson Decl. at PP 5, 33, 34, 37 at Ex. 1; Chiment Dep. [*50] at 34-36 at Ex. 3).

29. Prior to the School District's decision to order Plaintiff to remove his banners in 2007, the School District did not receive any complaints about Plaintiff's banners from students, faculty, teachers, parents, or School Board members until Defendant Kastner complained in the Fall of 2006. (Johnson Decl. at PP 5, 33, 34, 37 at Ex. 1; Chiment Dep. at 34-36 at Ex. 3).

30. During his first two years as a probationary teacher, Plaintiff was evaluated 3 times each year. As a tenured teacher, Plaintiff is evaluated twice a year, every other year by the School District. Typically, the evaluation is performed by an assistant principal. As part of the evaluation, the administrator observes Plaintiff teaching in his classroom and evaluates whether or not his teaching and his classroom comport with School District standards and policies. (Johnson Decl. at P 34 at Ex. 1).

31. None of Plaintiff's official evaluations over a 30 plus year period ever indicated that his banners were impermissible, nor did any of Plaintiff's evaluators ever inform him that his banners were impermissible or that they disrupted or detracted from Plaintiff's teaching or the students' learning [*51] in any way. (Johnson Decl. at P 34 at Ex. 1).

32. Plaintiff has discretion and control over the non-curricular messages he displays on his classroom walls. (Johnson Decl. at P 8 at Ex. 1; Collins Dep. at 42-43, 57 at Ex. 2; Chiment Dep. at 64-65, 91, 134, Dep. Ex. 6 at Ex. 3).

33. No other School District teacher is permitted to display materials on Plaintiff's classroom walls without Plaintiff's permission. (Johnson Decl. at P 8 at Ex. 1; Collins Dep. at 42-43, 57 at Ex. 2; Chiment Dep. at 64-65, 91, 134 at Ex. 3).

34. The School District does not direct the teachers' non-curricular displays; it is up to the individual teacher. (Johnson Decl. at P 8 at Ex. 1; Chiment Dep. at 134, Dep. Ex. 6 at Ex. 3).

35. Pursuant to School District policy, practice, and/or custom, teachers are permitted to display in their classrooms and on their classroom walls 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. (Johnson Decl. at PP 9, 11-15, Ex. A at Ex. 1; Collins Dep. at 38, 39, 41-42 at Ex. 2; Chiment Dep. at 57-58, 61-62, 82, 128-29, 273-74 (admitting, "In a limited [*52] way we open the walls [to expression by teachers]"); Kastner Dep. at 23-24, 67 at Ex. 4).

36. School District teachers are permitted to display non-curricular items in their classrooms that contain messages that express the personal views, interests, or opinions of the individual teacher regarding various patriotic, political,

social, historical, or other similar concerns. (Johnson Decl. at PP 9, 11-15, Ex. A at Ex. 1; Collins Dep. at 38, 39, 41-42 at Ex. 2; Chiment Dep. at 57-58, 61-62, 82, 128-29, 273-74 (admitting, "In a limited way we open the walls [to expression by teachers]"); Kastner Dep. at 23-24, 67 at Ex. 4).

37. Permissible subject matter for non-curricular teacher displays in the classrooms includes, *among others,* the following:

a. Foundations of our Nation;

b. Patriotic messages;

c. Inspirational messages;

d. Historical messages; and

e. Slogans that are praiseworthy of our Nation.

(Johnson Decl. at PP 11-15, 38 at Ex. 1; Collins Dep. at 38-40, 56, 155-56 at Ex. 2; Chiment Dep. at 45, 84-85, 135-36, 141, 215-17, Dep. Ex. 6 at Ex. 3; Kastner Dep. at 45 at Ex. 4).

38. The School District permits teachers to display non-curricular [*53] items that contain partial quotes from the Declaration of Independence. (Collins Dep. at 148-50 at Ex. 2; Chiment Dep. at 216-17 at Ex. 3; Kastner Dep. at 45 at Ex. 4).

39. The School District does not object to posters, banners, or other such displays by teachers that express certain non-curricular messages regarding the following subject matter:

a. Global warming (Chiment Dep. at 84, 223-24 at Ex. 3);

b. Gay rights (Collins Dep. at 79-82, 85-86, 88-89 at Ex. 2; Brickley Dep. at 58-64, 72-73, 112-19 at Ex. 5);

c. Environmental issues (Collins Dep. at 161-62 at Ex. 2; Chiment Dep. at 84, 224-27 at Ex. 3; Brickley Dep. at 109-10 at Ex. 5);

d. Historic religious leaders such as Gandhi, the Dali Lama, Martin Luther King, and Malcolm X (Collins Dep. at 150-51 at Ex. 2; Chiment Dep. at 85, 209 at Ex. 3);

e. Rock bands or musicians (Collins Dep. at 152-54 at Ex. 2; Chiment Dep. at 211-15 at Ex. 3);

f. Movies (Collins Dep. at 166-68 at Ex. 2; Chiment Dep. at 234-35 at Ex. 3);

g. Anti-war/anti-military/peace issues (Chiment Dep. at 195-96, 199, 201-02 at Ex. 3; Brickley Dep. at 84-86 at Ex. 5);

h. Pro-military issues (Chiment Dep. at 201 at Ex. 3); [*54] and

i. Sports (Collins Dep. at 162-63 at Ex. 2; Chiment Dep. at 230-31 at Ex. 3).

40. As a direct result of this School District policy, practice, and/or custom, the classroom walls serve as an expressive vehicle for teachers to convey non-curricular messages. (Johnson Decl. at P 9 at Ex. 1; Chiment Dep. at

273-74 at Ex. 3).

41. As a direct result of this School District policy, practice, and/or custom, the School District created a forum for non-curricular teacher speech. (Johnson Decl. at PP 9, 11-15 at Ex. 1; Collins Dep. at 38, 39, 41-42 at Ex. 2; Chiment Dep. at 57-58, 61-62, 82, 128-29, 273-74 (admitting, "In a limited way we open the walls [to expression by teachers]").

42. As a result of the School District's policy, practice, and/or custom of permitting teachers to display items, including personal, non-curricular items, in their classrooms, School District teachers have displayed and continue to display in their classrooms and on their classroom walls the following: n1

a. Posters promoting various rock bands and musicians, including *Nirvana,* Bruce Springsteen and the *E Street Band,* Bob Dylan, and *The Beatles* (Dep. Exs. 52, 53, 54, 55, 56); [*55]

b. A poster with the lyrics to the song *Imagine* by John Lennon (Dep. Ex. 20);

c. Posters promoting various professional athletes (Dep. Exs. 76, 80, 149);

d. Posters, flags, and banners promoting various professional sports teams (Dep. Exs. 74, 75, 77, 78, 79);

e. Tibetan (Buddhist) prayer flags, including a flag with the image of Buddha (Dep. Exs. 24, 25, 26, 148, 155);

f. Posters promoting movies, including a poster of *Monty Python's Quest for the Holy Grail,* and movie stars (Dep. Exs. 82, 83, 84, 85, 86, 94);

g. Posters advocating a position and viewpoint on environmental issues (Dep. Exs. 66, 67, 68, 159);

h. Posters advocating a position and viewpoint with regard to global warming ("Stop Global Warming") ("How Do You Like Your Environment? Regular or Extra Crispy") (Dep. Exs. 64, 158);

i. Poster advocating a position and viewpoint with regard to the issue of zero population growth (Dep. Ex. 152);

j. Displays advocating a position and viewpoint on gay rights issues, including the following:

i. "Stop Hate Crimes" poster created by the Human Rights Campaign (hereinafter "HRC" found at www.hrc.org), "the largest national [*56] lesbian, gay, bisexual and transgender civil rights organization" (Dep. Exs. 13, 14);

ii. Poster with the pro-gay HRC equal ("=") symbol (Dep. Ex. 14);

iii. Gay, Lesbian and Straight Education Network, (hereinafter "GLSEN" found at www.glsen.org) "Day of Silence" poster, which promotes the pro-gay day of silence that some students and teachers in the School District engage in (Dep. Ex. 15);

iv. Gay, lesbian, bi-sexual, transgendered ("LGBT") rainbow flag (Dep. Ex. 15);

v. Decals of the HRC "equal" symbol (Dep. Ex. 16);

vi. Bumper stickers with the pro-gay political slogan, "Equal Rights Are Not Special

Rights" (Dep. Ex. 16);

vii. Pro-gay "I am an ally" decals created by GLSEN (Dep. Ex. 16);

viii. Bumper stickers with the pro-gay slogan, "Celebrate Diversity," in rainbow colors (Dep. Ex. 16);

ix. Postings about pro-gay support groups and issues (Dep. Exs. 17, 18);

x. Pro-gay poster with the large caption, "Unfortunately, History Has Set the Record A Little Too Straight," which highlights the "National Coming Out Day, October 11th" (Dep. Exs. 19, 142);

xi. Bumper sticker for EQCA (Equality California), a gay rights organization that [*57] opposed Proposition 8 in California (Dep. Ex. 161; Brickley Dep. at 112-13 at Ex. 5);

xii. Bumper sticker that says, "Hate is not a family value," which the teacher posting it uses to convey "the fact that 'family values' is a term that the conservative right[, which includes Fundamentalist Christians and Catholics,] has used to make people who have different sorts of families wrong" (Dep. Ex. 161; Brickley Dep. at 114 at Ex. 5);

xiii. HRC poster (Dep. Ex. 161);

xiv. AIDS poster (Dep. Ex. 161); and

xv. Buttons expressing pro-gay slogans such as "Hate Free Zone," "Celebrate Diversity" (Dep. Ex. 137), "Ask Me Why I'm Silent," and a pink triangle with "Never Again" (Dep. Ex. 138; Brickley Dep. at 58-64 at Ex. 5).

k. Posters expressing patriotic messages, including a poster with an excerpt from the Declaration of Independence (. . . life, liberty and the pursuit of happiness") (Dep. Exs. 57, 58, 60; Johnson Decl. at P 15, Ex. C at Ex. 1);

l. Posters with inspirational messages (Dep. Exs. 69, 71, 72, 73; Johnson Decl. at P 15, Ex. C at Ex. 1);

m. Various flags, including the Gadsden flag with the political slogan, "Don't Tread on Me" (Dep. Exs. 59, [*58] 61, 62, 63);

n. Family photographs (Dep. Ex. 87);

o. Non-student artwork (Dep. Ex. 81);

p. Nature posters, pictures, and banners (Dep. Exs. 88, 95, 96);

q. Cartoon characters (Dep. Ex. 89);

r. Surfing poster (Dep. Ex. 90);

s. Photographs of male models (Dep. Ex. 91);

t. Homer Simpson model/statue (Dep. Ex. 93);

u. Poster advocating a position and viewpoint on the issue of animal research (Dep. Ex. 65);

v. Posters advocating a pro-military position and viewpoint (Dep. Exs. 42, 60), including one that consists of a large banner (approximately 5 feet high and 10 feet in length) with a photograph of an aircraft carrier and the following caption, which is an excerpt from the Declaration of Independence: "Life, Liberty and the Pursuit of All Who Threaten It" (Dep. Ex. 42);

w. Displays advocating an anti-military/anti-war position and viewpoint (Dep. Exs. 36, 38, 39, 40, 41, 43, 141), including the following:

i. Poster with a large peace symbol (Dep. Ex. 36);

ii. Display of a Lincoln penny with the inscription, "The War Is Coming. Are You Ready?" (Dep. Ex. 38);

iii. Mock flag of the United States with the peace symbol located [*59] in the field of blue (Dep. Ex. 39);

iv. Poster stating, "war is not healthy for children and other things" (Dep. Ex. 40);

v. Bumper sticker stating, "How many Iraqi children did we kill today?" (Dep. Ex. 41); and

vi. Poster stating, "Every Minute the World Spends $ 700,000 on War While 30 Children Die of Hunger & Inadequate Health Care" (Dep. Ex. 43);

x. Displays of particular political parties and/or candidates, including the following:

i. Campaign poster of candidate Obama (Dep. Ex. 40);

ii. *Newsweek* magazine cover of the candidates Obama and Biden (Dep. Ex. 33); and

iii. Poster of the "Libertarian Party" (Dep. Ex. 35);

y. Posters of religious leaders, including Gandhi (Hindu) and the Dali Lama (Buddhist) (Dep. Exs. 47, 49), and a posting of Gandhi's "7 Deadly Social Sins" (Dep. Ex. 48);

z. Posters of Malcolm X, the controversial Muslim leader of the Nation of Islam (Dep. Exs. 50, 51, 135);

aa. Posters of Martin Luther King, including a poster in which he quotes an excerpt from the Declaration of Independence ("I have a dream that one day this Nation will rise up and live out the true meaning of its creed, 'We hold these [*60] truths to be self-evident, that all men are created equal.'") (Dep. Exs. 44, 45); and

bb. Poster with various religious and political symbols and the saying, "The hottest places in hell are reserved for those who in times of great moral crisis maintain their neutrality." (Dep. Ex. 151).

n1 The photographs of the displayed items are marked as deposition exhibits, and they are attached to the Declaration of Bradley Johnson (Exhibit 1) as Exhibit A.

43. The lyrics to John Lennon's *Imagine,* which were posted on a classroom wall by a School District teacher, are as follows:

> Imagine there's no Heaven, It's easy if you try, No hell below us, Above us only sky, Imagine all the people, Living for today; Imagine there's no countries, It isn't hard to do, Nothing to kill or die for, And no religion too, Imagine all the people, Living life in peace; You may say that I'm a dreamer, But I'm not the only one, I hope someday you'll join us, And the world will be as one; Imagine no possessions, I wonder [*61] if you can, No need for greed or hunger, A brotherhood of man, Imagine all the people, Sharing all the world; You may say that I'm a dreamer, But I'm not the only one, I hope someday you'll join us, And the world will live as one. (Johnson Decl. at P 15, n.2, Ex. A, Dep. Ex. 20 at Ex. 1).

44. The School District does not object to the posting of the lyrics to John Lennon's *Imagine* by teachers in their classrooms. (Collins Dep. at 89-90 at Ex. 2; Chiment Dep. at 177-78 at Ex. 3).

45. The "National Coming Out Day, October 11th," which is depicted in a science teacher's poster (Dep. Ex. 142), is "a day when all gay people are supposed to come out of the closet and let people know they exist so that they will have a real live person to know who they are hating or not." (Brickley Dep. at 73 at Ex. 5).

46. The School District does not object to a poster promoting the "National Coming Out Day." (Collins Dep. at 188-89 at Ex. 2).

47. GLSEN is an activist group that promotes gay rights issues in education. (Brickley Dep. at 123 at Ex. 5).

48. HRC is a national organization that advocates and lobbies for gay rights. (Brickley Dep. at 114 at Ex. 5; *see also* Johnson Decl. at P [*62] 15, Ex. A, Dep. Ex. 13 at Ex. 1).

49. A symbol of HRC is a yellow equal sign on a dark blue background. (Brickley Dep. at 116 at Ex. 5; *see also* Johnson Decl. at P 15, Ex. A, Dep. Ex. 13 at Ex. 1).

50. Each of the items identified in paragraph 42 above was displayed as of April 2009, which is more than two years after Plaintiff was directed to remove his banners in January 2007. (Johnson Decl. at PP 12-15, Ex. A at Ex. 1).

51. The School District expects its administrators to walk through the classrooms and observe what is taking place in order to ensure that teachers are abiding by School District policy. (Collins Dep. at 146 at Ex. 2; Chiment Dep. at 66-67 at Ex. 3; Kastner Dep. at 15-17, 25 at Ex. 4).

52. It is the duty of School District administrators to observe what is taking place in their schools and to enforce School District policies. (Kastner Dep. at 28-29, 174; *see also* Chiment Dep. at 199 at Ex. 3).

53. The School District does not object to the display of Tibetan prayer flags-which Buddhists believe are sacred items that impart spiritual blessings-by teachers in their classrooms. (Collins Dep. at 94-95 at Ex. 2; Chiment Dep. at 180-81 at Ex. 3; Johnson Decl. [*63] at PP 11, 15, Ex. A, Dep. Exs. 24-26, 148, 155 at Ex. 1; *see also* Brickley Dep. at 90 at Ex. 5).

54. One display of Tibetan prayer flags by a School District science teacher stretches approximately 35 to 40 feet across the teacher's classroom. (Johnson Decl. at P 15, n.3 at Ex. 1; Brickley Dep. at 87 at Ex. 5).

55. The School District does not endorse or promote the non-curricular messages displayed by the teachers. (Johnson Decl. at PP 5, 16 at Ex. 1; Collins Dep. at 40-41 at Ex. 2; Chiment Dep. at 274, 279 at Ex. 3).

56. The teachers' displays do not constitute government speech. (Johnson Decl. at PP 5, 16 at Ex. 1; Collins Dep. at 40-41 at Ex. 2; Chiment Dep. at 274, 279 at Ex. 3).

57. There are no express size limitations for the teachers' non-curricular displays. (Collins Dep. at 42 at Ex. 2; Kastner Dep. at 71 at Ex. 4).

58. There are no express limits on the number of non-curricular items the teachers can display. (Collins Dep. at 42 at Ex. 2; Chiment Dep. at 76 at Ex. 3; Kastner Dep. at 70 at Ex. 4).

59. Plaintiff's banners were displayed pursuant to the longstanding School District policy, practice, and/or custom that created a forum for teacher speech. (Johnson [*64] Decl. at PP 9, 10, 16, Ex. B at Ex. 1).

60. Plaintiff's banners were not displayed pursuant to any of his official duties as a teacher. (Johnson Decl. at PP 16, 36 at Ex. 1).

61. Plaintiff did not use his banners during any classroom session or period of instruction. (Johnson Decl. at PP 16, 36 at Ex. 1; Collins Dep. at 94 at Ex. 2; Chiment Dep. at 93-95 at Ex. 3).

62. Plaintiff's banners were not expressing a message on behalf of the School District. (Johnson Decl. at PP 5, 16 at Ex. 1; *see also* Collins Dep. at 40-41 at Ex. 2; Chiment Dep. at 274, 279 at Ex. 3).

63. 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. (Chiment Dep. at 271-72 at Ex. 3).

64. One method used by the School District to accomplish the task identified in paragraph 63 above is to permit students to be exposed to the rich diversity of backgrounds and opinions held by high school faculty. (Chiment Dep. at 272 at Ex. 3).

65. The School District permits its teachers, including Ms. Lori Brickley, a science teacher who is a proponent of gay rights (Brickley Dep. at 43 at Ex. 5), to participate [*65] 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 interfere with or disrupt the teaching of his or her classes. (Collins Dep. at 124-26, 140 at Ex. 2).

66. Plaintiff's banners caused no material disruption or disorder in his classroom or anywhere else in the school. (Johnson Decl. at P 35 at Ex. 1; Collins Dep. at 36-37 at Ex. 2; Chiment Dep. at 49-51, 276 at Ex. 3; Kastner Dep. at 85-86 at Ex. 4).

67. Plaintiff's banners did not interfere with the teaching of his classes. (Johnson Decl. at P 35 at Ex. 1; Collins Dep. at 36, 125 at Ex. 2; Chiment Dep. at 276 at Ex. 3; Kastner Dep. at 85-86 at Ex. 4).

68. Plaintiff's banners contain the following historical 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. (Johnson Decl. at PP 17-32, Ex. B at Ex. [*66] 1).

69. Plaintiff displayed two such banners in his classrooms over the years, along with other items, including numerous photographs of nature scenes and national parks and several pictures of his family. (Johnson Decl. at P 18, Ex. B at Ex. 1).

70. Plaintiff's first banner, which is red, white, and blue, depicting the colors of our national flag, includes the phrases "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace On Thee." (Johnson Decl. at P 19, Ex. B at Ex. 1).

71. Plaintiff continuously displayed a paper version of this first banner for approximately 8 years, and he continuously displayed the present version, which is made of more durable material, for approximately 17 years. The present version is an exact replica of the paper version. Consequently, the message of this banner was displayed continuously for approximately 25 years. (Johnson Decl. at P 19 at Ex. 1).

72. Plaintiff's second banner includes the phrase "All Men Are Created Equal, They Are Endowed By Their Creator." This banner was continuously displayed for approximately 17 years. (Johnson Decl. at P 20, Ex. B at Ex. 1).

73. Each banner measures approximately 7 feet long [*67] by 2 feet wide and was continuously displayed in a non-obstructive manner. Plaintiff's banners do not contain any pictures or symbols. (Johnson Decl. at P 21, Ex. B at Ex. 1).

74. The phrases included in Plaintiff's banners are well-know patriotic phrases taken from secular historical sources, documents, or patriotic songs. (Johnson Decl. at PP 17, 22-32 at Ex. 1; Collins Dep. at 27-32 at Ex. 2; Chiment Dep. at 36-37, 40-43, 46 at Ex. 3).

75. Religious people founded this Nation; as a result, references to God are common in our songs, mottoes, and slogans. (Collins Dep. at 33-34 at Ex. 2; Chiment Dep. at 118-21 at Ex. 3; Kastner Dep. at 158-59 at Ex. 4).

76. The phrases included in Plaintiff's banners were not taken from any religious documents or religious texts. (Johnson Decl. at P 6, Ex. B at Ex. 1; Collins Dep. at 27-33 at Ex. 2).

77. Plaintiff's banners do not contain quotes or passages from Sacred Scripture or any other religious text. (Johnson Decl. at P 6, Ex. B at Ex. 1; *see also* Collins Dep. at 27-33 at Ex. 2).

78. The students in the School District would be familiar with the patriotic and historical phrases included in Plaintiff's banners. (Collins Dep. at 27-33 at [*68] Ex. 2).

79. "In God We Trust" is the official motto of the United States. (Johnson Decl. at P 22 at Ex. 1).

80. A law passed by Congress and signed by the President on July 30, 1956, approved a joint resolution of Congress that declared "In God we trust" the national motto of the United States. (Johnson Decl. at P 22 at Ex. 1).

81. "In God We Trust" appears above the Speaker's Chair in the United States House of Representatives and above the main door of the United States Senate chamber. (Johnson Decl. at P 24 at Ex. 1).

82. In 1942, Congress enacted the Pledge of Allegiance, which was amended in 1954 to officially include the phrase "under God." (Johnson Decl. at P 27 at Ex. 1).

83. Students in the School District recite the Pledge of Allegiance on a daily basis. (Johnson Decl. at P 27 at Ex. 1; Collins Dep. at 28 at Ex. 2).

84. The preamble to the Declaration of Independence states as follows: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence is our Nation's founding document. (Johnson [*69] Decl. at P 29 at Ex. 1).

85. "God Bless America" is an American patriotic song written by Irving Berlin in 1918 and later revised by him in 1938. (Johnson Decl. at P 30 at Ex. 1; Collins Dep. at 29-30 at Ex. 2; Chiment Dep. at 40 at Ex. 3).

86. "God Bless America" is a phrase that is also commonly used in speeches by the President of the United States. (Johnson Decl. at P 31 at Ex. 1; Collins Dep. at 30 at Ex. 2; Chiment Dep. at 40-41 at Ex. 3).

87. The song "God Bless America" is often played at public events, including at sporting events, such as the seventh inning stretch at Yankee Stadium, since the terrorist attacks of September 11, 2001. (Johnson Decl. at P 30 at Ex. 1).

88. "God Shed His Grace on Thee" is a verse from "America the Beautiful," an American patriotic song that is often played at public events. (Johnson Decl. at P 32 at Ex. 1; Collins Dep. at 30 at Ex. 2).

89. During his 30 plus years of teaching in the School District, Plaintiff has had 7 different school principals, numerous school board members, superintendents, assistant superintendents, over 4,000 students and several thousand parents in his classrooms where the banners were displayed. Prior to January [*70] 2007, Plaintiff had not received one complaint from any School District administrator, parent, or student about the banners. (Johnson Decl. at P 33 at Ex. 1).

90. Plaintiff's banners never prohibited or interfered with his ability to educate the students in his math class. (Johnson Decl. at P 36 at Ex. 1; Collins Dep. at 125 at Ex. 2).

91. Plaintiff's long-standing practice of displaying his banners came to an abrupt end when on or about January 23, 2007, Defendants ordered him to remove the banners. (Johnson Decl. at PP 37, 38 at Ex. 1; Chiment Dep. at 30, 130, Dep. Ex. 6, at Ex. 3; Kastner Dep. at 101-02, 172 at Ex. 4).

92. Defendants directed Plaintiff to remove his banners because the School District believed that the banners were promoting a "Christian" or "Judeo/Christian" viewpoint. (Johnson Decl. at P 37 at Ex. 1; Collins Dep. at 43-44 at Ex. 2; Chiment Dep. at 133 at Ex. 3; Kastner Dep. at 44-45, 101-02, 137 at Ex. 4).

93. Defendant Chiment, on behalf of the School District, sent a letter to Plaintiff regarding the School District's order directing Plaintiff to remove his banners. (Johnson Decl. at P 37 at Ex. 1; Chiment Dep. at 29, 30-31, 130, Dep. Ex. 6 at Ex. 3). [*71]

94. In the letter, which was dated January 23, 2007, Defendant Chiment claimed that Plaintiff's banners conveyed an impermissible "sectarian viewpoint" and, more specifically, "a particular sectarian viewpoint." (Johnson Decl. at P 37 at Ex. 1; Chiment Dep. at 133, Dep. Ex. 6 at Ex. 3).

95. The "sectarian viewpoint" noted in the letter was referring to "a particular religious viewpoint," which is the viewpoint of "those religious groups who refer to a supreme being as God," such as Christians. (Chiment Dep. at 133 at Ex. 3).

96. Defendant Kastner believed that Plaintiff's banners were impermissible because they expressed a "Christian" viewpoint. (Kastner Dep. at 101-02 at Ex. 4).

97. The decision to order Plaintiff to remove his banners was discussed and approved during one or more Superintendent Cabinet meetings in which the members of the cabinet were present and all approved of the decision. (Collins Dep. at 58-59 at Ex. 2)

98. Defendants did not inform Plaintiff that his banners caused a material disruption or substantial disorder in the school or that the banners interfered with the curriculum. (Johnson Decl. at P 39 at Ex. 1; Chiment Dep. at 130, 276, Dep. Ex. 6 at Ex. 3). [*72]

99. At the time they directed Plaintiff to remove his banners, Defendants had no evidence that Plaintiff's banners caused any material disruption or disorder in the School District. (Johnson Decl. at P 35 at Ex. 1; Collins Dep. at 36-37, 125 at Ex. 2; Chiment Dep. at 49-51, 276 at Ex. 3; Kastner Dep. at 85-86 at Ex. 4).

100. Defendants singled out Plaintiff for disfavored treatment because of the viewpoint expressed by his banners. (Johnson Decl. at PP 37-39 at Ex. 1; Collins Dep. at 43-44 at Ex. 2; Chiment Dep. at 133, 278, Dep. Ex. 6 at Ex. 3; Kastner Dep. at 44-45, 101-02, 137 at Ex. 4).

101. Plaintiff wants to display his banners in his classroom; however, Defendants have prohibited him from doing so. (Johnson Decl. at P 40 at Ex. 1; *see also* Chiment Dep. at 30, 130, Dep. Ex. 6 at Ex. 3; Kastner Dep. at 76 at Ex. 4).

102. Defendants have prohibited Plaintiff from displaying his banners in his classroom based on the viewpoint of Plaintiff's speech. (Johnson Decl. at PP 37-39 at Ex. 1; Collins Dep. at 43-44 at Ex. 2; Chiment Dep. at 133, 278, Dep. Ex. 6 at Ex. 3; Kastner Dep. at 44-45, 101-02, 137 at Ex. 4).

103. Pursuant to School District policy, practice, and/or custom, [*73] it is entirely proper for Plaintiff to display on his classroom walls non-curricular materials, including posters and banners, "about the foundation of our nation," that express patriotic or historical messages, or that express inspirational messages. (Johnson Decl. at PP 11-15, 38, Ex. C at Ex. 1; Collins Dep. at 38-40, 56, 155-56 at Ex. 2; Chiment Dep. at 45, 84-85, 135-36, 141, 215-17, Dep. Ex. 6 at Ex. 3; Kastner Dep. at 45 at Ex. 4).

104. The subject matter of Plaintiff's banners was permitted. (Johnson Decl. at PP 11-15, 38 at Ex. 1; Collins Dep. at 38-40, 56, 155-56 at Ex. 2; Chiment Dep. at 45, 84-85, 135-36, 141, 215-17, Dep. Ex. 6 at Ex. 3; Kastner Dep. at 45 at Ex. 4).

105. Defendants' removal of Plaintiff's banners was not curriculum related; Plaintiff was teaching and continues to teach his assigned mathematics curriculum. (Johnson Decl. at PP 16, 36 at Ex. 1; Collins Dep. at 94 at Ex. 2; Chiment Dep. at 93-95 at Ex. 3).

106. Had Plaintiff not complied with Defendants' order to remove his banners, Plaintiff would have been subject to some form of disciplinary action for insubordination. (Johnson Decl. at P 41 at Ex. 1; Collins Dep. at 59 at Ex. 2).

Respectfully [*74] 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 OF SERVICE

STATE OF MICHIGAN, COUNTY OF WASHTENAW

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 August 14, 2009, I served the following documents entitled: **Plaintiff's Notice of Motion and Motion for Summary Judgment, Plaintiff's Memorandum of Points and Authorities in support of Motion for Summary Judgment, Plaintiff's Statement of Undisputed Material Facts in support of Motion for Summary Judgment** 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 [*75] 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 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.

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

Executed on August 14, 2009, at Ann Arbor, Michigan.

/s/ Robert J. Muise
Robert J. Muise

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