BRADLEY JOHNSON, Plaintiff, vs. 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 75415

August 14, 2009

Motion for Summary Judgment

COUNSEL: [*1] STUTZ ARTIANO SHINOFF & HOLTZ, A Professional Corporation, Daniel R. Shinoff, Esq. (State Bar No. 99129), Jack M. Sleeth, Jr., Esq. (State Bar No. 108638), Paul V. Carelli IV, Esq. (State Bar No. 190773), San Diego, CA, Attorneys for Defendants, POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM LINDA VANDERVEEN; ANDREW PATAPOW; TODD GUTSCHOW; PENNY RANFTLE; DR. DONALD A. PHILLIPS; WILLIAM R. CHIMENT; and DAWN KASTNER, Exempt from filing fee - Government Code sections 6103 & 26857.

JUDGES: ICJ: Hon Roger T. Benitez

TITLE: Notice Of And Defendants' Motion For Summary Judgment [FRCP 56]

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

NOTICE IS HEREBY given that on November 16, 2009 at 10:30 a.m., or as soon thereafter as the matter may be heard in Courtroom 3of the U.S. District Court, Southern District of California, located at 940 Front Street, 4th Floor, San Diego, California, 92101; Defendants POWAY UNIFIED SCHOOL DISTRICT, JEFF MANGUM, LINDA

VANDERVEEN, PENNY RANFTLE, TODD GUTSCHOW, ANDY PATAPOW, DONALD A. PHILLIPS, WILLIAM R. CHIMENT and DAWN KASTNER will move this Court under Federal Rules of Civil Procedure, Rule 56 for an order granting summary judgment, [*2] or in the alternative, partial summary judgment, in favor of all Defendants.

The basis for the motion is that there is no genuine issue of material fact and that the facts show that Defendants did not violate Plaintiff's constitutional or statutory rights, and therefore judgment should be entered in Defendants' favor as a matter of law as to each of the six causes of action alleged in the Plaintiff's First Amended Complaint.

In the alternative, the Defendants move for partial summary judgment as to each of the six causes of action alleged in the Plaintiff's First Amended Complaint on the same grounds.

In addition, individual Defendants JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, TODD GUTSCHOW, ANDY PATAPOW, DONALD A. PHILLIPS, WILLIAM R. CHIMENT and DAWN KASTNER will move for judgment dismissing monetary damages on the basis of qualified immunity under the undisputed facts, and therefore have no monetary liability in this case as a matter of law.

The Motion will be based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Separate Statement of Facts, the Declarations of Steven Salvati, Tina McDowell, and Paul V. Carelli IV, the Exhibits in support [*3] of the motion, the pleadings, discovery, papers and records on file with the Court in the instant action, as well as other documents and evidence which may be presented at the hearing, or of which the Court may take judicial notice.

DATED: August 14, 2009

STUTZ ARTIANO SHINOFF & HOLTZ
A Professional Corporation

By: /s/ Paul V. Carelli, IV
Daniel R. Shinoff
Jack M. Sleeth, Jr.
Paul V. Carelli, IV
Attorneys for Defendants POWAY UNIFIED SCHOOL DISTRICT, JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, STEVE MCMILLAN, ANDY PATAPOW, DONALD PHILLIPS, WILLIAM CHIMENT, and DAWN KASTNER

POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [FRCP 56]

I. INTRODUCTION

Plaintiff Bradley Johnson is a math teacher at a local high school operated by Defendant Poway Unified School District ("School"). He prominently displayed two very large banners on the wall of his classroom. One banner had colored stripes like an American flag, and contained phrases in large block letters phrases reading: "'IN GOD WE TRUST"; "ONE NATION UNDER GOD"; "GOD BLESS AMERICA"; and "GOD SHED HIS GRACE ON THEE." The other banner had a white field, and read: [*4] "All Men Are Created Equal They Are Endowed By Their CREATOR" (the word "CREATOR" was in ALL CAPS in a font twice the size of the other words).

The School had Johnson remove the banners on grounds that the banners violated a school policy that limits the use

of religious messages in the classroom. The School also contends that the banners, as displayed, violate the Establishment Clause of the First Amendment, and California Education Code, and therefore is within its rights to have them removed. On the other hand, Johnson claims that the School's removal of the banners constitutes a violation of his free speech and religious rights under both the United States and California Constitutions. The parties are now submitting cross-motions for summary judgment.

Here, under Ninth Circuit law, Johnson's First Amendment right to display his banners is trumped by the School's right to avoid excessive entanglement with religion prohibited by the Establishment Clause. Recent case law explains that a teacher may violate the Establishment Clause with a single sentence directed at students. So school districts need to be concerned about their teachers' speech. Here, because Johnson's speech is [*5] that of an employee, and not a private citizen, and because the religious nature of his banners advance religion over non-religion and one particular religious sect over others in violation of the Establishment Clause, the School did not violate Johnson's constitutional or statutory rights by having the banners removed. Furthermore, the School gave Johnson the option of posting the phrases in the actual context, like a poster containing the text of the Declaration of Independence, a poster with the text from the Pledge of Allegiance, and so forth. Accordingly, the School's removal of the banners does not violate Johnson's rights, and thus the Defendants' motion should be granted.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Mr. Johnson and His Banners

Bradley Johnson is a high school mathematics teacher, currently teaching at Westview High School, which is operated by the Poway Unified School District. First Amended Complaint (FAC), Doc. #17, P 6; Exh. "F," Johnson Depo., pp. 13:23-14:1. He is a Christian, and has taught with the District for 30 years. Doc. #17, P6; Exh. "F." Johnson Depo., p. 11:8-20. Johnson is currently the adviser for the Christian club at Westview, [*6] and has held that role since 2005. Exh. "F," Johnson Depo. p. 27:3-11. He was previously an advisor at schools where he taught previously. Exh. "F," Johnson Depo., p. 19:7-13.

Johnson prominently displayed two banners in his classroom during Fall, 2006. Both banners were 7 feet long by 2 feet wide, and were "displayed in a non-obstructive manner." Doc. #17, P 28; See also Exhs. "A'" and "B."

The first banner had red, white, and blue stripes, and was emblazoned with the following messages in large block letters: "IN GOD WE TRUST"; "ONE NATION UNDER GOD"; "GOD BLESS AMERICA"; and "GOD SHED HIS GRACE ON THEE." Doc, #17, P26; Exhs. "A" and "B." The phrase "In God We Trust" is the official motto of the United States. Doc. # 17, PP 29-30. The phrase "One Nation Under God" may be found in the Pledge of Allegiance. Doc. #17, P 34. The phrase "God Bless America" is a reference to the song of the same title written by Irving Berlin in the early 20th Century. Doc. #17, P 37. The phrase "God Shed His Grace On Thee" is a reference from the song, "America the Beautiful." Doc. #17, P 38. Mr. Johnson has had this banner or one like it hanging in his classroom since 1982. Exh. "F" Johnson Depo., [*7] pp. 78:20-79:24.

The second banner reads in large font: "All Men Are Created Equal, They Are Endowed By Their CREATOR." Exhs. "A" and "B". This phrase is a misquote from the preamble to the Declaration of Independence, which states, in part: "We hold these truths to be self-evident, that **all men are created equal, *that* they are endowed by their Creator** with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." http://www.archives.gov/exhibits/charters/declaration_transcript.html, emphasis added. The word "Creator" is in ALLCAPS typeface about twice the size of the other words on the banner, which are in Initial Caps; the word "CREATOR" also occupies its own line of text. Exhs. "A" and "B."

Johnson designed the layout of this particular banner so that the word "CREATOR" would be larger so that he could highlight that there was a supreme being who provided men with the rights described in the preamble to the Declaration of Independence. Exh. "F," Johnson Depo., pp. 88:2-89:2. Johnson had his "Declaration" banner made in

1989, and has displayed it thereafter in his classroom. Exh. "F," Johnson Depo., p. 86:14-17. Doc #17, P27.

Johnson [*8] explained that the purpose of the two banners is for "celebrat[ing] our national heritage," "highlight[ing] the religious heritage and nature of our nation that we have as a foundation" and "espousing God as opposed to no God . . . but not any particular God." Exh. "F," Johnson Depo., pp. 95:15-24; 103:3-22. Both banners were located on walls in Johnson's classroom where they can be easily seen and read from where students sit in Johnson's classroom. Salvati Decl. P 3; Exhibit "B."

B. The Applicable School District Policies/Procedures.

Defendant William Chiment serves as the School's Associate Superintendent for Personnel Support Services, and has been in that position for ten years. Exh. "E," Chiment Depo, p. 20:5:16. According to Chiment, the District's informal practice is to permit teachers to decorate their classrooms with personal items such as posters, flags, or banners, within some limits. Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6. For example, teachers' personal items cannot violate the School's anti-harassment policy. Exh "E," Chiment Depo, pp. 58:4-21; 59:13-20. Some of the other limits the School may also take into consideration are the size of [*9] the item, the age appropriateness of the particular item for the students in the classroom, and the potential relationship to the curriculum. Exh. "E," Chiment Depo. pp. 77:8-78:3. For example, teachers could exhibit family photographs, but photographs of a family drinking alcohol heavily would not be permitted. Exh. "E," Chiment Depo., p.235:17-25.

The School also has a formal written policy regarding the teaching of controversial issues, which governs what teachers can post on their classroom walls. Exh. "E," Chiment Depo., p. 85:13-20. That formal policy, BP 3.11, provides, in part, that teachers must "exercise caution and discretion when deciding whether or not a particular issue is suitable for study or discussion in any particular class. Exh. "C." The policy also "requires teachers to ensure that all sides of a controversial issue are impartially presented with adequate and appropriate factual information" and "[w]ithout promoting any partisan point of view." Exh. "C."

This Policy has an attached Administrative Procedure, entitled AP 3.11.2, that contains a section concerning the "Responsibilities of Teachers." Exh. "D," pp. 13-15. Those responsibilities include "choos[ing] [*10] suitable and useful instructional materials," "direct[ing] class discussion to cover all points of view," distinguish[ing] between teaching and advocating, and ***refrain[ing] from using classroom teacher influence to promote partisan or sectarian viewpoints"*** Exh. "D," p. 14. AP 3.11.2 also has a section on the rights of students, and expressly gives students the "right to form and express individual opinions on controversial issues without jeopardizing relations with teachers or others." Exh. "D," p. 15. AP 3.11.2 also has a section entitled "The Selection of Issues." Within that section, the policy states that in general, "the decision as to whether a controversial issue should become a matter of school study should be based upon" ten listed criteria, including "1. It must contribute significantly to the objectives of the curriculum; . . . 6. The issue must involve alternate points of view which can be understood and defined by students; 7. The issue must be one about which information is present and available so alternatives can be discussed and evaluated on a factual and reasonable basis;. . . and 10. The issue must provide opportunity for critical thinking for the [*11] development of tolerance and the understanding of conflicting points of view, at the same time that it contributes to the prescribed course of study and the general educational program of the school." Exh. "D," p. 15.

Even non-curricular items are part of the learning environment and potentially advocating, and therefore such items subject to this written policy. Exh. "E," Chiment Depo. P 88:3-20; 90:1-24. Sometimes the School receives complaints from parents about only one side of an issue being taught, and the School works with principals to ensure that teachers are teaching both sides of an issue. Exh. "H," Robertson Depo., pp. 18:22-19:8.

In addition, it is Chiment's position that expression of religion within the District is proscribed by the law of the U.S. and State constitutions. Exh. "E" Chiment Depo., pp. 123:24-124:7. Chiment believes that the District's policies and procedures are consistent with the U.S. and State constitutions. Exh. "E", Chiment Depo., pp. 126:13-127:4.

C. The Banners Come To the Attention of School Administrators.

Dawn Kastner serves as the Principal at Westview High School, and has been in that position since July 1, 2006. Exh. "G," Kastner [*12] Depo, p. 12:6-15. Early in her tenure as principal (sometime in Fall 2006), Mr. Subbiah, a Westview teacher, raised a concern with Kastner about why Johnson was permitted to have those signs in his room; Kastner also heard about the banners from a student and another teacher. So Kastner went into Johnson's classroom and saw the banners for the first time. Exh. "G" Kastner Depo, p. 37:15-38:14; 54:22-55:3, Kastner was concerned that the banners were very large, and inappropriately promoted a viewpoint advocating God, as the phrases were pulled out of their original context. Exh "G," Kastner Depo., pp. 42:17-43:6.

Kastner met with Johnson to discuss his banners. Kastner told Johnson that taking the phrases concerning God and putting them together in large print out of context was moving away from a patriotic comment to promotion of his religious beliefs that might make some students uncomfortable. Exh. "G," Kastner Depo, pp. 75:3-17. During the discussion, Kastner suggested to Johnson that an Islamic student walking into the classroom may feel bad, and feel like he or she would not fit in; Johnson replied something to the effect of "sometimes that's necessary." Exh. "G," Kastner Depo. [*13] , pp. 43:7-44:15. Johnson further explained he felt strongly that he needed the signs to stay up, that he had a right to have the banners up, and that he'd had them up for a long time. Exh. "G," Kastner Depo., pp. 76:1-6. Kastner suggested that Johnson put the phrases on the banners in context, such as posting the entire Declaration of Independence. Exh. "G,", Kastner Depo., pp. 43:7-44:15. She also suggested reducing the scale of the banners to "something small around the desk area." Exh. "G," Kastner Depo., p. 78:15-18

Kastner contacted Melavel Robertson (Assistant Superintendent for Learning Support Services) for guidance on these "really big" signs. Exh. "G" Kastner Depo., pp. 39:19-40:2; Exh. "H" Robertson Depo., p. 15:2-4. Kastner's secretary took pictures of the banners and sent them to Robertson. Exh. "G," Kastner Depo, pp. 40:3-10; McDowell Decl., P 2; Exh. "A." Robertson was concerned with the size of the banners; she felt that students of different faiths may feel uncomfortable with a banner that large, and this was discussed amongst the School's cabinet-level administrators. Exh. "H," Robertson Depo., pp 30:13-20; 35:9-36-4. Robertson referred Kastner to speak with Mr. [*14] Chiment, as Chiment is the person within the School to deal with personnel concerns that might raise legal issues. Exh. "H," Robertson Depo., pp. 29:3-30:12.

D. Johnson Is Asked To Remove The Banners From His Classroom Walls.

Mr. Chiment spoke with Kastner and reviewed photographs of the banners in Mr. Johnson's classroom. Exh. "E," p. 32:7-20. Ultimately, the decision to have Mr. Johnson remove his banners was made by Mr. Chiment. Exh. "D." This decision Was agreed to by the Superintendent's cabinet, which consists of Defendant Donald Philips (Superintendents), and the Deputy Superintendent, John Collins, Chiment, and the assistant superintendents. Exh "I," Collins, depo., pp. 21:21-22:23.

Mr. Chiment asked Mr. Johnson by telephone to remove his banners on or about January 19, 2007. Exh. D; Exh "E," Chiment depo, p. 32:3-6. Mr. Chiment sent a letter to Johnson dated January 23, 2007, to confirm the decision to have Johnson remove his banners, and to provide the legal basis for the decision in writing. Exh. "D"; Exh "E," Chiment depo, p. 31:1-10. Referring to the two banners, the letter states that "[T]he prominent display of these brief and narrow selections of text [*15] from documents and songs without the benefit of any context and of a motto, all which include the word 'God' or 'Creator' has the effect of using your influence as a teacher to promote a sectarian viewpoint." Exh. "D." The letter expressly notes the prohibitions in California Education Code section 51511 and AR 3.11.2 as grounds for the School's position. Exh. "D."

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

Allah, for example). Exh "E," Chiment Depo, pp. 128:8-129:12; 133:14-134:2. Although religion is not a category of items prohibited from classroom walls, the District may prohibit religious viewpoints where the teacher appears to be teaching or advocating a religious viewpoint separate from a curricular context. Exh. "E," Chiment Depo, pp. 129:13-21. Chiment further believed [*16] that these banners could be a distraction to a student that was upset with the particular theology of the banners. Exh. "E," Chiment Depo., p 276:17-21.

Mr. Johnson was provided with some suggested alternative posters to post on his walls in lieu of his banners. Exh. "G," Kastner Depo., pp. 99:25-100:9." Mr. Chiment had asked his staff to go to a teacher supply store and buy items that would place the statements of Mr. Johnson's banners in context. Exh. "E," Chiment Depo, pp. 140:21-141:9. These suggested materials consisted of various posters depicting the entire text of the Declaration of Independence, displays of coinage containing the words "In God We Trust" and the text of the Pledge of Allegiance. Exh. "D." Mr. Johnson received these materials, but declined to display materials up in lieu of his banners. Exh. "K," Exh. "F," Johnson Depo., pp. 128:25-130:4.

E. Procedural Posture.

Based upon the facts alleged within it, the First Amended Complaint names six separate claims against the District and the individual defendants, comprised of the five School Board Members (Mangum, Vanderveen, Patapow, Gutschow, and Ranftle), District Superintendent Don Phillips, District Assistant [*17] Superintendent William Chiment, and Westview High Principal Dawn Kastner. Doc #17, pp. 3-4, 13-17.

The six claims are for: (1) Violation of Freedom of Speech under the First Amendment to the U.S. Constitution; (2) Violation of the Establishment Clause of the First Amendment to the U.S. Constitution; (3) Violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; (4) Violation of the Freedom of Speech under the California Constitution; (5) Violation of the No Preference Clause of the California Constitution; and (6) Violation of the Establishment Clause of the California Constitution. Doc. #17, pp. 13-17. The first three claims are brought under *42 U.S.C. section 1983.* In addition to the enumerated claims, Johnson also alleges that the Defendants' actions violate Education Code section 51511. Doc. #17, P 54.

Defendants moved to dismiss the FAC under Rule 12(b)(6), and the court denied the motion. Doc #25. In that motion, however, the Court was confined to an analysis of the four corners of the complaint, and could not review extrinsic evidence in making its determination. See *Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir. 1998).* [*18] That restriction does not apply to the parties' cross-motions for summary judgment. n1 Fed.R.Civ.P. 56(c).

n1 The Court must consider each cross-motion separately "on its own merits" to determine whether any genuine issue of material fact exists. *Fair Housing Council of Riverside County, Inc. v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir.2001).* When evaluating cross-motions for summary judgment, the court must analyze whether the record demonstrates the existence of genuine issues of material fact, both in cases where both parties assert that no material factual issues exist, as well as where the parties dispute the facts. See *Id. at 1136* (citing *Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 1037 & n. 5 (9th Cir.2000)).*

III. DISCUSSION

A. Plaintiff's First And Fourth Claims for Violation of Freedom of Speech Does Not State A Claim Because Johnson's Banners Violate the Establishment Clause, The California Education Code, and School Policy. [*19]

The Defendants do not disagree that public school teachers have First Amendment rights. See *Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506(1969).* But those rights may be limited by a public employer. The question, then, is what test this court should apply to determine whether teacher classroom speech generally, and Johnson's speech specifically, warrants First Amendment protection.

1. The Ninth Circuit uses a *Pickering-style* balancing test to decide whether a public employer may restrict employee speech, not a "forum analysis."

In ruling on the School's motion to dismiss, this Court ruled that the balancing test of *Pickering v. Bd. of Educ., 391 U.S. 563 (1968)* would not be useful in this case because the Ninth Circuit uses a "forum analysis" for school speech cases. Doc. #25, p. 6. n2 However, none of the cases cited by this Court in reaching that conclusion involved a public employer's limitation on an *employee's* speech. So those cases are distinguishable, and the Defendants respectfully disagree that forum analysis is applicable here.

n2 Citing *Truth v. Kent School District, 524 F.3d 957, 972 (9th Cir.2008)* (applying forum analysis); *Flint v. Dennison, 488 F.3d 816, 830 (9th Cir.2007)* (applying forum analysis); *Hills v. Scottsdale Unified School Dist. No. 48, 329 F.3d 1044, 1048-50 (9th Cir.2003)* (applying forum analysis); and *Downs, 228 F.3d at 1009-11* (declining to apply forum analysis where speech at issue belongs to the school district).

[*20]

Accordingly, the Defendants reiterate their prior argument that the balancing test of *Pickering* is proper here because the case involves the Defendants' limitation of Johnson's workplace speech as an employee.

The Supreme Court has reaffirmed the use of the *Pickering* balancing test "[t]o reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission." *City of San Diego v. Roe, 543 U.S. 77, 82 (2004).*

Moreover, the Ninth Circuit recently applied a "slight variation" of the *Pickering* balancing test to religious speech made by a public employee in the workplace. See *Berry v, Department of Social Services, 447 F.3d 642, 649-650 (9th Cir. 2006)* ["we adhere to our practice of applying a balancing test when confronted with constitutional challenges to restrictions On public employee speech in the workplace."]

In reaching its conclusion that the balancing test applicable, the *Berry* court noted that public employers "must run the gauntlet of either being sued for not respecting an employee's rights under the Free Exercise and Free Speech clauses [*21] of the First Amendment or being sued for violating the Establishment Clause of the First Amendment by appearing to endorse its employee's religious expression. The *Pickering* balancing test recognizes these important, but sometimes competing, concerns and allows a public employer to navigate a safe course." *Berry, 447 F.3d at 650.* The *Berry* court also applied the *Pickering* balancing test to the question of whether the public employee may be restricted from displaying of religious items in the workplace, despite the employee's contention that such restriction amounted to "viewpoint discrimination," as Johnson does here. See *Berry, 447 F.3d at 651.* n3

n3 Defendants note that with respect to the *Berry* court's analysis of whether the school conference could be used by public employees for a prayer meeting, the court used a forum analysis. *Berry, 447 F.3d at p. 651.* Johnson, however, does not contend that the District is restricting use of school facilities, so the forum analysis does not apply here.

[*22]

The Ninth Circuit's use of the *Pickering* balancing test in teacher speech cases is in accord with the Sixth and Seventh Circuits, which have also used the *Pickering* analysis in assessing the limitations of teacher speech rights. See *Cockrel v. Shelby County School Dist., 270 F.3d 1036,* (6th Cir. 2001); *Mayer v. Monroe County Community School Corp., 474 F.3d 477 (7th Cir. 2007).*

2. Public schools may limit their employees religious speech to avoid entanglement with the Establishment

Clause.

The "slight variation" of the *Pickering* test used by the *Berry* court balanced the teacher's right to speak against the public employer's mission to be free of Establishment Clause entanglement. *Berry, 447 F.3d at 650.*

This is consistent with Supreme Court jurisprudence, which "suggested in *Widmar v. Vincent, 454 U.S. 263, 271* [citations](1981), that the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment." *Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 394 (1993).* [*23] The Supreme Court, however, has noted that "'whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination' is an open one." *Hills v. Scottsdale Unified Sch. Dist, 329 F.3d 1044, 1053 n. 7 (9th Cir.2003)* (quoting *Good News Club, 533 U.S. at 113).*

The issue, however, is no longer open in the Ninth Circuit. The Ninth Circuit has "recognized that Establishment Clause concerns can justify speech restrictions 'in order to avoid the appearance of government sponsorship of religion.'" *Hills, 329 F.3d at 1053* (quoting *Lassonde v. Pleasanton Unified School Dist., 320 F.3d 979, 983-85 (9th Cir. 2003);* citing *Cole v. Oroville Union High School Dist., 228 F.3d 1092, 1103-05 (9th Cir. 2000),* and *Prince v. Jacoby, 303 F.3d 1074, 1082 (9th Cir.2002)).*

The Ninth Circuit has applied this doctrine to public schools' restriction of teacher religious speech. In a case concerning a high school teacher's challenge to a restriction barring him from discussing religion with students, the Ninth Circuit held that the school district's interest in avoiding [*24] an Establishment Clause violation trumped the teacher's right to talk to students about religion. *Peloza v. Capistrano Unified Sch. Dist, 37 F.3d 517, 522 (9th Cir.1994).* The *Peloza* approach was cited with approval in *Berry, 447 F.3d at 650.* Accordingly, the Ninth Circuit's *Pickering* balancing test is the most appropriate for this case.

In the alternative, the Defendants suggest it would also be appropriate to apply the gloss on the *Pickering* balancing test first discussed in *Garcetti v. Ceballos, 547 U.S. 410, 421-22 (2006).* Whether the *Garcetti* refinement to the balancing test is applicable to employee speech in schools is an open question in the Ninth Circuit. The Fourth Circuit has declined to apply *Garcetti,* but the Seventh Circuit has applied it. Contrast *Mayer, 474 F.3d 477 (7th Cir.2007)* (finding that *"Garcetti* applie[d] directly," based on Seventh Circuit precedent that held that public school students, who are a captive audience, should not be subjected to teachers' idiosyncratic perspectives; rather, elected school boards should make policies about teaching contentious issues) [*25] with *Lee v. York County Sch. Div., 484 F.3d 687, 695 n. 11* (4th Cir.), cert. denied, *128 S.Ct. 387 (2007)* (continuing to apply traditional *Pickering-Connick* approach, because the Supreme Court did not "explicitly . . . decide whether [the *Garcetti]* analysis would apply in the same manner to a case involving speech related to teaching").

3. The Defendants' concern, that Johnson's banners impermissibly entangle the School in an Establishment Clause violation, is legitimate.

Applying the facts to the Ninth Circuit's balancing test, the scales tip in favor of the School Defendants. The School asked Johnson to remove his banners from his classroom walls because the prominent display of the brief and narrow selections of text from national documents and songs without the benefit of any context, and which all include the word 'God' or 'Creator,' promotes a religious viewpoint. Specifically, the banners advocate a particular religious viewpoint over non-religion (atheism and agnosticsism), and they also advocate "God" over other religions that do not use the word "God" for a supreme being (such as Yahweh or Allah, for example). Exh "E," Chiment [*26] Depo, pp. 128:8 - 129:12; 133:14-134:2. The School further believes that these banners could be a distraction to a student that was upset with the particular theology of the banners. Exh. "E" Chiment Depo., p 276:17-21. The School's officials are not constitutional scholars, but these notions adequately encapsulate the legal conclusion that to display the banners to students during school time on school grounds would violate the Establishment Clause of the First Amendment.

As more fully explained below in the Defendants discussion of Johnson's Establishment Clause claim, *infra,* the test is that there is no violation under these circumstances: (1) the government's action must have a secular purpose; (2) its principal and primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster excessive government entanglement with religion. *Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).*

Here, Johnson's banners violate all three prongs of the *Lemon* test. First, the banners do not have a secular purpose. Johnson teaches math. The banners are not part of the curriculum. And by Johnson's own admission, the phrases on the banners were [*27] chosen not just to promote the nation's heritage, but also to espouse religion over non-religion. Exh. "F," p.103:3-22. This is evidenced by the use of the word CREATOR on the "Declaration" banner. The word "CREATOR" occupies its own line, is about twice as big as the other words on the banner, and is the only word in ALL CAPS, as if shouting to be noticed. Johnson said that the reason the word CREATOR is bigger is because he wanted to emphasize a supreme being's role in giving man his rights. This emphasis does not have a secular purpose.

Second, the principal and primary effect of the banners advance religion. Each of the five phrases, standing alone, might not run afoul of the First Amendment due to the historical implications of the phrases (a conclusion that School administrators acknowledge). See, e.g., *Aronow v. United States, 432 F.2d 242 (9th Cir.1970)* [national motto "In God We Trust" on currency does not violate Establishment Clause]. But when all of the phrases are joined together, they accumulatively *de-emphasize* the historical aspects of the speech, and instead *emphasize* the religious aspects of the speech. The secondary religious meaning behind [*28] each individual phrase becomes the primary meaning when strung together. In short, when viewed in their totality, the banners' message is less about Nation, and more about God. Thus, the primary effect is to advance the Christian religion.

Finally, Johnson's banners foster excessive government entanglement with religion. The Ninth Circuit has said it best with respect to Mr. Johnson: He "is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial." *Peloza, supra, 37 F.3d at 522.* "A teacher appears to speak for the state when he or she teaches; therefore, the department may permissibly restrict such religious advocacy." *Tucker v. California State Dept. of Educ., 97 F.3d 1204, 1213 (9th Cir. 1996),* citing *Peloza, 37 F.3d at 522.*

Here, Johnson's banners are both 7 feet by 2 feet with large typeface. [*29] Johnson's banners can be easily read by students in the classroom. See Exh. "B." Any student who does not agree with the notion that God is a supreme being or creator could be intimidated by Johnson's banners.

The School's concerns of excessive entanglement with respect to Johnson are particularly justified given that a single sentence uttered by a teacher directed at students during the school day may constitute an Establishment Clause violation. See *C.F. v. Capistrano Unified School Dist., 615 F.Supp.2d 1137, 1156* (C.D. Cal., 2009). In *C.F.,* the District Court found that a public high school teacher violated the Establishment Clause by telling his students of his unequivocal belief that creationism is "superstitious nonsense." *Id. at pp. 1146, 1149, 1156.*

If a one sentence *disparagement* of religion by a teacher violates the Establishment Clause, then the reverse must also be true: a one-sentence statement *favoring* a particular religious ideology also violates the Establishment Clause. And here, there is not just one phrase in Mr. Johnson's classroom, there are five. And worse, Johnson's speech is not "fleeting" like the speech in [*30] *C.F.* Rather, Johnson's speech was quite permanent, as evidenced by the fact that the banners were displayed for years. To permit Johnson to redisplay his banners in their entirety to a captive audience of students on a daily basis would violate the Establishment Clause of the First Amendment. Thus, the balancing test of *Pickering tips* in favor of restricting Johnson from displaying his banners in his classroom.

Alternatively, should this court decide that the *Garcetti* gloss on the *Pickering* balancing test applies, the scales tip even further in the School's favor. According to *Garcetti,* the focus should not be on the content of the speech, but on

the *role* the speaker occupied when the speech was made. *Id.* at 1960. Accordingly, *Garcetti* held that the First Amendment does not protect employees' "expressions made pursuant to their official duties." *Id.* Thus, Johnson's First Amendment protections are substantially outweighed because is only permitted to display items in the classroom because he is a teacher. So by extension, the messages on the banners were displayed as part of his official duties, as they impart information to students during the school [*31] day.

4. Johnson's banners also violate the School's policies.

An additional reason supporting the School's removal of the banners is that the display of the banners violates School Policy and Procedure. Under AP 3.11.2, teachers are expected to refrain from using classroom teacher influence to promote partisan or sectarian viewpoints." Exh. "C," p. 3 of 4. Students also have "the right to form and express individual opinions on controversial issues without jeopardizing relations with teachers or others" under the policies. The District is certainly within its rights to remove the banners to ensure that the students' rights to have an opinion on religion does not jeopardize their class standing should the students wish to make their opinions known.

5. Even using a *Hazelwood* forum analysis, the Defendants still should prevail.

Defendants do not think that Johnson's classroom is anon-public forum. But as a fallback position, even if this Court were to find that Johnson's classroom was a non-public forum under the *Hazelwood* n4 analysis, the School would still be within its rights to remove the banners.

n4 *Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)*

[*32]

The Ninth Circuit has recognized that in a "forum analysis" case, "Establishment Clause concerns can justify speech restrictions 'in order to avoid the appearance of government sponsorship of religion.'" *Hills, supra, 329 F.3d at 1053,* quoting *Lassonde, supra, 320 F.3d 979 at 983-85,* and citing *Cole, supra, 228 F.3d 1092, 1103-05.* Here, for the reasons explained above, the Defendants' concern with violating the Establishment Clause is a legitimate defense to Johnson's free speech claims.

Moreover, 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 [*33] 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 District 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. 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 District made a decision with respect to the speech under that policy.

Second, there is a legitimate pedagogical reason for the banners' removal: the District is ensuring that as an entity, it maintains its neutrality on a controversial issue and does not run afoul of the Establishment [*34] Clause. Plaintiff has made no argument as to why the District's concern regarding the Establishment Clause is not legitimate. Rather Plaintiff

states only that "[a]s the alleged facts bear out, Defendants did not have a legitimate pedagogical concern for prohibiting Plaintiff's speech." Yet the reason is perfectly legitimate. It continues to be a controversial issue across the country whether speech combining the notion of God plus our nation's heritage is appropriate in the classroom setting. See, e .g. *Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004).* The District has the discretion not to take sides on the issue.

6. The law is the same under the California constitution; the School may regulate teacher speech where the teacher is advocating a controversial viewpoint.

Turning to California law concerning free speech, "Article 1, section 2 of the California Constitution provides independent protection for free speech which in certain contexts exceeds the protection provided by the First Amendment to the United States Constitution." *California Teachers Assn. v. Governing Board, 45 Cal.App.4th 1383, 1391 (1996).* But in the context [*35] of the classroom activities of teachers, the state constitutional protection is identical to the federal protection: "We 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.*

So, like his First Amendment claim, Johnson's Fourth Claim for violation of free speech under the California constitution also fails. This conclusion is consistent with the *California Teachers Assn.* case, which concluded that "when public school teachers and administrators are teaching students, they act with the imprimatur of the school district which employs them and ultimately with the imprimatur of the state which compels students to attend their classes." *Id. at 1390.* Accordingly, the court held that with respect to teacher speech inside the classroom, "school authorities retain the power to dissociate themselves from political controversy by prohibiting their employees from engaging in political advocacy in instructional settings." *Id. at 1391.* Summary judgment should therefore be [*36] entered on this claim also.

B. Plaintiff's Second and Sixth Claims for Violation of The Establishment Clause Fail Because The District's Policies Do Not Establish Any Religion and Are Neutral.

Johnson contends that Defendants have violated the Establishment Clause of both the United States and California constitutions by attempting to coerce him to change his religious belief. There are three tests used in the context of a school by the U.S. Supreme Court to determine whether the Establishment Clause has been violated. *Santa Fe Independent School District v. Doe, 530 U.S. 290, 147 L.Ed.2d 295, 120 S.Ct. 2266 (2000).*

The *Lemon* test, discussed earlier, states that there is no violation under these circumstances: (1) the government's action must have a secular purpose; (2) its principal and primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster excessive government entanglement with religion. *Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).* This test is also used by the California appellate courts in analyzing Establishment Clause claims under state law. See *Catholic Charities of Sacramento, Inc. v. Superior Ct., 32 Cal.4th 527, 546 (Cal. 2004)* [*37] (cert. denied *125 S.Ct. 53).*

The "endorsement" test collapses the first two prongs of the Lemon test, and "captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or preferred.'" *County of Allegheny v. ACLU, 492 U.S. 573, 627 (1989)* (quoting *Wallace v. Jaffree, 472 U.S. 38, 69* (O'Connor, J. concurring in judgment)).

Finally, the coercion test states that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so." *Lee v. Weisman, 505 U.S. 577, 587 (1992).*

Here, the District's decision to have Johnson remove his banners from display in his classroom had a secular purpose. The Board Policies and Regulations require that teachers refrain from espousing a single viewpoint when teaching controversial issues, and that teachers be inclusive [*38] of various points of view. See Exhs. "C" and "D." Pursuant to the policies and regulation, District restricted the display of the banners because the messages on the banners were partisan and sectarian in nature. The purpose of the removal was so that one viewpoint would not be promoted over another, the opposite of what Johnson is claiming with respect to his Establishment Clause claim. Furthermore, there was no entanglement with religion here because the Defendants' actions do not deprive Johnson of providing his opinion concerning religion outside of the school gates, or forbidding him keeping the phrases on the banners in a desk drawer so that he can view them daily (or even a very small version not in plain view of the students), and because the goal of the Defendants was to not advance any one particular religion.

California also uses the *Lemon* test to determine whether a government act violates the Establishment Clause of Article I, section 4. See *DiLoreto v. Board of Education, 74 Cal.App.4th 267, 275-276 (1999).* So Defendants' actions do not violate the Establishment Clause of Article I, § 4 of California Constitution either.

In short, the actions [*39] of the school officials in this case were consistent with the requirements under the *Lemon* test and therefore Johnson's claims for violations of the Establishment Clauses of both the Federal and State Constitutions fail. Defendants are entitled to judgment on these claims.

C. Johnson's Third Claim for Violation of the Equal Protection Clause Fails Because There Are No Facts Indicating Johnson Was Treated Differently From Similarly-Situated Employees.

To establish a claim under the Equal Protection Clause, Johnson must show that Defendants' actions in following District policy resulted in the him receiving disparate treatment compared to other similarly-situated employees. See *City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985).* Equal protection claims require strict scrutiny if the legislation discriminates against a suspect class or impinges upon a fundamental right. *Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).* The Equal Protection Clause may give rise to a cause of action even if the plaintiff does not allege membership in a class or group. See *Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).* [*40] However, this type of equal protection challenge is evaluated under a rational-basis test to determine whether the legislation at issue is irrational or wholly arbitrary. *Conti v. City of Fremont, 919 F.2d 1385, 1389 (9th Cir.1990).* In equal protection claims brought by a "class of one," the plaintiff must allege that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923); Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty., 488 U.S. 336 (1989).*

Here, as previously explained, Defendants actions did not impinge on any fundamental right of Johnson. He is free to hold his own religious beliefs. But his First Amendment rights to display his banners are outweighed by the District's interest in preventing an Establishment Clause violation, and the banners, as they were displayed, violate the Establishment Clause.

The School is not trying to eradicate the notion of God or religion from its classroom, as Johnson has intimated in his complaint. Rather, the opposite is true. [*41] Johnson was provided materials by the School which contained some of the same phrases on his banner, but in their historical national context. To that end, that he could have pictures of coinage or money containing the phrase "In God We Trust." Exh. K." The School offered him the option of displaying a poster containing the text of the Declaration of Independence, which includes the words "creator" and "God." Exh. "K." The School had no problem with Johnson displaying the "Pledge of Allegiance" in its entirety, including the line "one nation under God." "Exh. K." He could also display all of the lyrics to the song "God Bless America." These items, if posted in their context, would alleviate any Establishment Clause entanglement. Johnson, however, refused to display these items in lieu of his banner. Exh. "F," Johnson Depo., pp. 128:25-130:4.

Johnson may contend in opposition to this motion that he is being treated differently than another Poway teacher, Lori Brickley, who has what apparently are known as "Tibetan prayer flags" displayed in her classroom. Exh. "J,"

Brickley Depo., pp. 86:18-87:18. Exh. "L,"; Exh. "I," Collins Depo., p. 95:14-18. The flags, like Johnson's banners, are [*42] non-curricular personal items in nature, but contrary to Johnson's contentions, Brickley and Johnson have not been treated differently.

Unlike Johnson's banners, Brickley's flags do not violate the Establishment clause because they have a secular purpose, do not advance religion over non-religion, and do not excessively entangle the District with the support of a particular religion. Brickley's prayer flags are in a language, Sanskrit, that no person at the school (student or otherwise) has been able to read. Exh. "J," Brickley Depo., pp. 88:17-89:6. The prayer flags are decorative in nature, and an interesting artifact in that they are sold at the bottom of Mount Everest and placed on top of the mountain when climbers reach the top, as Brickley informs her students who ask. Exh. "J," Brickley Depo., pp. 87:20- 90:6; Exh. "E," Brickley herself maintains that religion does not belong in the classroom (Exh. "J," p. 118:6-8), so she is hardly displaying the banners for the purpose of promoting a religion. The banners have the secular purpose of motivating her students to achieve lofty goals, like mountain climbers trying to reach Everest's summit. Exh. "J," Brickley Depo., p. 89:7-22. There [*43] is a small figure on some flags that appears to be Buddhist in nature, but it is not prominent (Exh. "L"). And like the words God and Creator in a full display of text from the Declaration of Independence (Exh. "K"), the religious significance is far lesser than the whole of what it represents.

If the alternative materials the School provided to Johnson (which he chose not to display) do not violate the Establishment Clause or School policy, then neither do the prayer flags in Brickley's classroom. Johnson is being treated the same with respect to display of speech touching on religion as any other teacher.

Finally, the District's policies have a legitimate state interest in ensuring that all points of view, and not one single viewpoint, is heard by the students in the classroom. The District felt that Johnson's banners did not comply with the District's policy of inclusion of all viewpoints, and had him remove the banners. The District's decision was therefore narrowly tailored to achieve an important government interest.

For the above reasons, Johnson's Equal Protection claim fails as a matter of law.

D. Johnson's Fifth Claim For Violation of the California's "No Preference" [*44] **Clause Fails Because The Defendants Did Not Show A Preference For Religion; Rather They Wanted To Keep Their Classrooms Religion-Neutral.**

California's No Preference Clause reads: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." Cal. Const. art. I, § 4. "California courts have interpreted the No Preference Clause to require that the government neither prefer one religion over another nor appear to act preferentially." *Brown v. Woodland Joint Unified School Dist, 27 F.3d 1373, 1384 (9th Cir. 1994),* citing *Sands v. Morongo Unif. Sch. Dist., 53 Cal.3d 863, 872-878 (1991),* cert. denied, *505 U.S. 1218 (1992).*

Here, there are no facts to suggest that the Defendants removed Johnson's banners with an eye to advancing one religion over another. On the contrary, the Defendants were concerned that Johnson himself was one trying to advance his religion over non-religion and over other religions by hanging his banners. The intent of the school was to maintain neutrality concerning religion. Hence, this claim should be dismissed as well.

E. The Damages Claim Against The Individual Defendants [*45] **Should Be Dismissed Due To Their Qualified Immunity.**

Johnson's FAC prays for nominal damages against the individual defendants in their individual capacities. Doc. #17, p. 17. The damages claim should be dismissed because the individual defendants enjoy qualified immunity.

Qualified immunity shields public employees who perform discretionary functions from liability for civil damages where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).* Qualified immunity shields them from civil damages liability as long as their actions could reasonably have been thought to be consistent with the rights they are alleged to have violated. *Anderson v. Creighton, 483 U.S. 635, 638 (1987).*

"When governmental officials assert the defense of qualified immunity to an action under *42 U.S.C. § 1983,* a court evaluating the defense must first determine whether the plaintiff has alleged the deprivation of a constitutional right and, if so, then determine 'whether the right was clearly established at the time of the [*46] alleged violation.'" *Cole v. Oroville Union High School Dist., 228 F.3d 1092, 1101 (9th Cir. 2000).*

Here, the Defendants' actions fell well within the policies and law provided by the School District, and so the Court should find that there was no unlawfulness with respect to the state laws and the School's policies under pre-existing law. *Anderson, supra, 483 U.S. at 640.* The current state of the law gave Defendants no reason to believe that their decision to remove materials from Johnson's classroom was unconstitutional, especially in light of the *Berry* and *Peloza* cases cited *infra.* Therefore, the individual defendants are entitled to qualified immunity against Johnson's damages claims in this case.

IV. CONCLUSION

Schools are places of learning, and Johnson is a teacher at a school. It is his job to impart wisdom to students. And he has certain First Amendment rights. But school districts also must navigate the difficult course between the Scylla of not respecting its employee's First Amendment rights and the Charybdis of violating the Establishment Clause of the First Amendment by appearing to endorse religion. See *Berry, supra, 447 F.3d at 645.* [*47] Here, the Defendants successfully navigated those waters. Johnson's banners unduly promote the Christian religion because the religious aspects of the banners overwhelm the national heritage implications. Johnson was offered alternative materials that would place the phrases on the banners in context, highlighting the national heritage aspects, and diminishing any Establishment Clause concerns, while not scrubbing religion from the classroom, as would be against School policy. This was the correct course of conduct. Accordingly, the motion should be granted.

DATED: August 14, 2009

STUTZ ARTIANO SHINOFF & HOLTZ
A Professional Corporation

By: /s/ Paul V. Carelli, IV
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SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [FRCP 56; Local Rule 7.1]

Defendants POWAY UNIFIED SCHOOL DISTRICT, JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, TODD GUTSCHOW, ANDY PATAPOW, DONALD A. PHILLIPS, [*48] WILLIAM R. CHIMENT and DAWN KASTNER hereby submit the following separate statement of undisputed facts in support of their Motion for Summary Judgment:

Defendants' Undisputed Material Facts	Evidentiary Support
Bradley Johnson is a high school mathematics teacher, currently teaching at Westview High School, which is operated by the Poway Unified School District.	First Amended Complaint (FAC), Doc. #17, P 6; Exh. "F," Johnson Depo., pp. 13:23-14:1.
Johnson is a Christian, and has taught with the District for 30 years.	FAC Doc. #17, P6; Exh. "F." Johnson Depo., p. 11:8-20.
Johnson is currently the adviser for the Christian club at Westview, and has held that role since 2005.	Exh. "F," Johnson Depo. p. 27:3-11.
Johnson was previously a Christian club advisor at schools where he taught previously.	Exh. "F," Johnson Depo., p. 19:7-13.
Johnson prominently displayed two banners in his classroom during Fall, 2006. Both banners were 7 feet long by 2 feet wide, and were "displayed in a non-obstructive manner."	FAC Doc. #17, P 28; See also Exhs. "A" and "B"
The first banner had red, white, and blue stripes, and was emblazoned with the following messages in large block letters: "IN GOD WE TRUST"; "ONE NATION UNDER GOD"; "GOD BLESS AMERICA"; and "GOD SHED HIS GRACE ON THEE."	FAC Doc. #17, P 26; Exhs. "A" and "B"
The phrase "In God We Trust" is the official motto of the United States.	FAC Doc. #17, PP 29-30.
The phrase "One Nation Under God" may be found in	FAC Doc. #17,

the Pledge of Allegiance.	P 34.
The phrase "God Bless America" is a reference to the song of the same title written by Irving Berlin in the early 20th Century.	FAC Doc. #17, P 37.
The phrase "God Shed His Grace On Thee" is a reference from the song, "America the Beautiful."	FAC Doc. #17, P 38.
Mr. Johnson has had the striped banner with four phrases or one like it hanging in his classroom since 1982.	Exh. "F" Johnson Depo., pp. 78:20-79:24.
The second banner reads in large font: "All Men Are Created Equal, They Are Endowed By Their CREATOR." This phrase is a misquote from the preamble to the Declaration of Independence, which states, in part: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."	Exhs. "A" and "B"; http://www.archives.gov/exhibits/charters/declaration_transcript.html, emphasis added.
The word "Creator" on the "Declaration" banner is in ALLCAPS typeface about twice the size of the other words on the banner, which are in Initial Caps; the word "CREATOR" also occupies its own line of text.	Exhs. "A" and "B."
Johnson designed the layout of the "Declaration" banner so that the word "CREATOR" would be larger so that he could highlight that there was a supreme being who provided men with the rights described in the preamble to the Declaration of Independence.	Exh. "F," Johnson Depo., pp. 88:2-89:2.
Johnson had his "Declaration" banner made in 1989, and has displayed it thereafter in his classroom.	Exh. "F," Johnson Depo., p. 86:14-17.

	Doc #17, P 27.
Johnson explained that the purpose of the two banners is for "celebrat[ing] our national heritage," "highlight[ing] the religious heritage and nature of our nation that we have as a foundation" and "espousing God as opposed to no God . . . but not any particular God."	Exh. "F," Johnson Depo., pp. 95:15-24; 103:3-22.
Both banners were located on walls in Johnson's classroom where they can be easily seen and read from where students sit in Johnson's classroom.	Salvati Decl. P 3; Exhibit "B".
Defendant William Chiment serves as the School's Associate Superintendent for Personnel Support Services, and has been in that position for ten years.	Exh. "E," Chiment Depo, p. 20:5:16.
According to Chiment, the District's informal practice is to permit teachers to decorate their classrooms with personal items such as posters, flags, or banners, within some limits.	Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.
But teachers' personal items cannot violate the School's anti-harassment policy.	Exh "E," Chiment Depo, pp. 58:4-21; 59:13-20.
Some of the other limits the School may also take into consideration are the size of the item, the age appropriateness of the particular item for the students in the classroom, and the potential relationship to the curriculum.	Exh. "E," Chiment Depo. pp. 77:8-78:3.
For example, teachers could exhibit family photographs, but photographs of a family drinking alcohol heavily would not be permitted by the School.	Exh. "E," Chiment Depo., p.235:17-25.
The School also has a formal written policy regarding	Exh. "E,"

the teaching of controversial issues, which governs what teachers can post on their classroom walls.	Chiment Depo., p. 85:13-20.
Poway Board Policy BP 3.11, provides, in part, that teachers must "exercise caution and discretion when deciding whether or not a particular issue is suitable for study or discussion in any particular class.	Exh. "C."
Poway Board Policy 3.11 policy also "requires teachers to ensure that all sides of a controversial issue are impartially presented with adequate and appropriate factual information" and "[w]ithout promoting any partisan point of view."	Exh. "C."
BP 3.11has an attendent Administrative Procedure, entitled AP 3.11.2, that contains a section concerning the "Responsibilities of Teachers."	Exh. "D," pp. 13-15.
Those responsibilities include "choos[ing] suitable and useful instructional materials," "direct[ing] class discussion to cover all points of view," distinguish[ing] between teaching and advocating, and refrain[ing] from using classroom teacher influence to promote partisan or sectarian viewpoints."	Exh. "D," p. 14.
AP 3.11.2 also has a section on the rights of students, and expressly gives students the "right to form and express individual opinions on controversial issues without jeopardizing relations with teachers or others."	Exh. "D," p. 15.
AP 3.11.2 also has a section entitled "The Selection of Issues." Within that section, the policy states that in general, "the decision as to whether a controversial issue should become a matter of school study should be based upon" ten listed criteria, including "1. It must contribute significantly to the objectives of the curriculum; . . . 6. The issue must involve alternate points of view which can be understood and defined	Exh. "D," p. 15.

by students; 7. The issue must be one about which information is present and available so alternatives can be discussed and evaluated on a factual and reasonable basis; . . . and 10. The issue must provide opportunity for critical thinking for the development of tolerance and the understanding of conflicting points of view, at the same time that it contributes to the prescribed course of study and the general educational program of the school."	
Even non-curricular items are part of the learning environment and potentially advocating, and therefore such items subject to this written policy.	Exh. "E," Chiment Depo. P 88:3-20; 90:1-24.
Sometimes the School receives complaints from parents about only one side of an issue being taught, and the School works with principals to ensure that teachers are teaching both sides of an issue.	Exh. "H," Robertson Depo., pp. 18:22-19:8.
In addition, it is Chiment's position that expression of religion within the District is proscribed by the law of the U.S. and State constitutions.	Exh. "E" Chiment Depo., pp. 123:24-124:7.
Chiment believes that the District's policies and procedures are consistent with the U.S. and State constitutions.	Exh. "E", Chiment Depo., pp. 126:13-127:4.
Dawn Kastner serves as the Principal at Westview High School, and has been in that position since July 1, 2006.	Exh. "G," Kastner Depo, p. 12:6-15.
Early in her tenure as principal (sometime in Fall 2006), Mr. Subbiah, a Westview teacher, raised a concern with Kastner about why Johnson was permitted to have those signs in his room; Kastner also	Exh. "G" Kastner Depo, p. 37:15-38:14; 54:22-55:3.

heard about the banners from a student and another teacher. So Kastner went into Johnson's classroom and saw the banners for the first time.	
Kastner was concerned that the banners were very large, and inappropriately promoted a viewpoint advocating God, as the phrases were pulled out of their original context.	Exh "G," Kastner Depo., pp. 42:17-43:6.
Kastner met with Johnson to discuss his banners. Kastner told Johnson that taking the phrases concerning God and putting them together in large print out of context was moving away from a patriotic comment to promotion of his religious beliefs that might make some students uncomfortable.	Exh. "G," Kastner Depo, pp. 75:3-17.
Kastner suggested to Johnson that an Islamic student walking into the classroom may feel bad, and feel like he or she would not fit in; Johnson replied something to the effect of "sometimes that's necessary."	Exh. "G," Kastner Depo., pp. 43:7-44:15.
Johnson explained to Kastner that he felt strongly that he needed the signs to stay up, that he had a right to have the banners up, and that he'd had them up for a long time.	Exh. "G," Kastner Depo., pp. 76:1-6.
Kastner suggested to Johnson that he put the phrases on the banners in context, such as posting the entire Declaration of Independence.	Exh. "G,", Kastner Depo., pp. 43:7-44:15.
Kastner also suggested to Johnson that he reduce the scale of the banners to "something small around the desk area."	Exh. "G," Kastner Depo., p. 78:15-18.
Kastner contacted Melavel Robertson (Assistant Superintendent for Learning Support Services) for guidance on these "really big" signs.	Exh. "G" Kastner Depo., pp. 39:19-40:2; Exh. "H"

	Robertson Depo., p. 15:2-4.
Kastner's secretary took pictures of the banners and sent them to Robertson.	Exh. "G," Kastner Depo, pp. 40:3-10; McDowell Decl., P 2; Exh. "A."
Robertson was concerned with the size of the banners; she felt that students of different faiths may feel uncomfortable with a banner that large, and this was discussed amongst the School's cabinet-level administrators.	Exh. "H," Robertson Depo., pp 30:13-20; 35:9-36-4.
Robertson referred Kastner to speak with Mr. Chiment, as Chiment is the person within the School to deal with personnel concerns that might raise legal issues.	Exh. "H," Robertson Depo., pp. 29:3-30:12.
Mr. Chiment spoke with Kastner and reviewed photographs of the banners in Mr. Johnson's classroom.	Exh. "E," Chiment Depo., p. 32:7-20.
Ultimately, the decision to have Mr. Johnson remove his banners was made by Mr. Chiment.	Exh. "D."
This decision was agreed to by the Superintendent's cabinet, which consists of Defendant Donald Philips (Superintendents), and the Deputy Superintendent, John Collins, Chiment, and the assistant superintendents.	Exh "I" Collins, depo., pp. 21:21-22:23.
Mr. Chiment asked Mr. Johnson by telephone to remove his banners on or about January 19, 2007.	Exh. D; Exh "E," Chiment depo, p. 32:3-6. "

Mr. Chiment sent a letter to Johnson dated January 23, 2007, to confirm the decision to have Johnson remove his banners, and to provide the legal basis for the decision in writing.	Exh. "D"; Exh "E" Chiment depo, p. 31:1-10.
Referring to the two banners, the January 23 letter states that "[t]he prominent display of these brief and narrow selections of text from documents and songs without the benefit of any context and of a motto, all which include the word 'God' or 'Creator' has the effect of using your influence as a teacher to promote a sectarian viewpoint."	Exh. "D."
The January 23 letter expressly notes the prohibitions in California Education Code section 51511 and AR 3.11.2 as grounds for the School's position.	Exh. "D.
Chiment has explained that the reason Johnson was asked to remove his banners is because they violate District policy and procedure, consistent with the California and U.S. Constitutions and California Education Code. Specifically, the banners advocated a particular religious viewpoint over non-religion (atheism and agnosticsism), and they also advocated "God" over other religions that do not use the word "God" for a supreme being (such as Yahweh or Allah, for example).	Exh "E," Chiment Depo, pp. 128:8 - 129:12; 133:14-134:2.
Although religion is not a category of items prohibited from classroom walls, the District may prohibit religious viewpoints where the teacher appears to be teaching or advocating a religious viewpoint separate from a curricular context.	Exh. "E," Chiment Depo, pp. 129:13-21.
Chiment further believed that these banners could be a distraction to a student that was upset with the particular theology of the banners.	Exh. "E," Chiment Depo., p 276:17-21.

Mr. Johnson was provided with some suggested alternative posters to post on his walls in lieu of his banners.	Exh. "G" Kastner Depo., pp. 99:25-100:9.
Mr. Chiment had asked his staff to go to a teacher supply store and buy items that would place the statements of Mr. Johnson's banners in context.	Exh. "E" Chiment Depo, pp. 140:21-141:9.
These suggested materials consisted of various posters depicting the entire text of the Declaration of Independence, displays of coinage containing the words "In God We Trust" and the text of the Pledge of Allegiance.	Exhs. "D" and "K."
Mr. Johnson received these materials, but declined to display materials up in lieu of his banners.	Exh. "K," Exh. "F" Johnson Depo., pp. 128:25-130:4.
Poway teacher Lori Brickley has what apparently are known as "Tibetan prayer flags" displayed in her classroom.	Exh. "J," Brickley Depo., pp. 86:18-87:18. Exh. "L,"; Exh. "I," Collins Depo., p. 95:14-18.
Brickley's prayer flags are in a language, Sanskrit, that no person at the school (student or otherwise) has been able to read.	Exh. "J," Brickley Depo., pp. 88:17-89:6.
The prayer flags are decorative in nature, and an interesting artifact in that they are sold at the bottom of Mount Everest and placed on top of the mountain	Exh. "J," Brickley Depo., pp. 87:20-90:6.

when climbers reach the top, as Brickley informs her students who ask.	
Brickley's personal belief is that religion does not belong in the classroom.	Exh. "J," p. 118:6-8
Brickley says her flags have the purpose of motivating her students to achieve lofty goals, like mountain climbers trying to reach Everest's summit.	Exh. "J," Brickley Depo., p. 89:7-22.
There is a small figure on some flags that appears to be Buddhist in nature, but that is unclear, and it is not prominent.	Exh. "L"

[*49]

DATED: August 14, 2009

STUTZ ARTIANO SHINOFF & HOLTZ
A Professional Corporation

By: /s/ Paul V. Carelli, IV
Daniel R. Shinoff
Jack M. Sleeth, Jr.
Paul V. Carelli, IV
Attorneys for Defendants POWAY UNIFIED SCHOOL DISTRICT, JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, STEVE MCMILLAN, ANDY PATAPOW, DONALD PHILLIPS, WILLIAM CHIMENT, and DAWN KASTNER

DECLARATION OF PAUL V. CARELLI IV IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [FRCP 56]

I, PAUL V. CARELLI, IV, hereby declare:

1. I am an attorney at law duly licensed to practice law in the State of California and am a member in the law firm of Stutz, Gallagher, Artiano, Shinoff & Holtz, A.P.C., attorneys of records for Defendants, POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM LINDA VANDERVEEN; ANDREW PATAPOW; TODD GUTSCHOW; PENNY RANFTLE; DR. DONALD A. PHILLIPS; WILLIAM R. CHIMENT; and DAWN KASTNER in the above-entitled San Diego Superior Court lawsuit. If called upon as a witness, I would competently testify to the following:

2. The exhibits attached to the Defendants' List of Exhibits in support of the Defendants Motion for Summary Judgment are true and correct copies of the originals as follows: [*50]

Exhibit "A" - Photographs of Johnson's banners taken by Tina McDowell;

Exhibit "B" - Photographs of Johnson's banners taken by Steven Salvati;

Exhibit "C" - Poway Unified School District Board Policy 3.11;

Exhibit "D" - Letter from William Chiment to Bradley Johnson dated January 23, 2007, attaching California Education Code section 51511 and Poway Unified School District Board Policy 3.11.2;

Exhibit "E" - Excerpts from the condensed certified Deposition of William Chiment taken on May 14, 2009;

Exhibit "F" - Excerpts from the condensed certified Deposition of Bradley Johnson taken on May 15, 2009;

Exhibit "G" - Excerpts from the condensed certified Deposition of Dawn Kastner taken on June 2, 2009;

Exhibit "H' - Excerpts from the condensed certified Deposition of Melavel Robertson taken on June 22, 2009;

Exhibit "I" - Excerpts from the condensed certified Deposition of John Collins (vol. 1) taken on May 12, 2009;

Exhibit "J" - Excerpts from the condensed certified Deposition of Lori Brickley taken on June 3, 2009;

Exhibit "K" - Photographs taken by Bradley Johnson of alternate materials provided to Johnson by the School for [*51] use in lieu of his banners the hearing. Exhibit "L" - Photographs of Tibetan Prayer Flags in Lori Brickley's classroom.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct to my personal knowledge.

This declaration is executed on the 14th day of August, 2009, at Temecula, California.

/s/ Paul V. Carelli IV

PAUL V. CARELLI, IV

DECLARATION OF SERVICE

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of San Diego in the office of a member of the bar of this court at whose direction the service was made. My business address is 2488 Historic Decatur Road, Suite 200, San Diego, CA92106-6113. On August 14, 2009, I served the following documents on Plaintiff's counsel:

(1) NOTICE OF AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [FRCP 56] (2) POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [FRCP 56] (3) SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [FRCP 56; Local Rule [*52] 7.1] (4) DEFENDANTS' EXHIBIT LIST IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [FRCP 56] (5) DECLARATION OF STEVEN SALVATI IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (6) DECLARATION OF TINA McDOWELL IN

SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (7) DECLARATION OF PAUL V. CARELLIIV IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [FRCP 56]

> [X] **BY ELECTRONIC SERVICE** On the date executed below, I served the document(s) via CM/ECF described above on designated recipients through electronic transmission of said documents, a certified receipt is issued to 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.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. [*53]

Executed on August 14, 2009, at San Diego, California.

/s/ [Signature]
Patricia S. Donnelly

[SEE EXHIBIT "A" IN ORIGINAL]

[SEE EXHIBIT "B" IN ORIGINAL]

[SEE EXHIBIT "C" IN ORIGINAL]

[SEE EXHIBIT "D" IN ORIGINAL]

[SEE EXHIBIT "E" IN ORIGINAL]

[SEE EXHIBIT "F" IN ORIGINAL]

[SEE EXHIBIT "G" IN ORIGINAL]

[SEE EXHIBIT "H" IN ORIGINAL]

[SEE EXHIBIT "I" IN ORIGINAL]

[SEE EXHIBIT "J" IN ORIGINAL]

[SEE EXHIBIT "K" IN ORIGINAL]

[SEE EXHIBIT "L" IN ORIGINAL]

[SEE DECLARATION OF STEVEN SALVATI IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMNET IN ORIGINAL]

[SEE DECLARATION OF TINA MCDOWELL IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN ORIGINAL]