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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 75417

September 28, 2009

Motion for Summary Judgment

VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: U.S. District Court: Motion(s); Pleading(s)

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JUDGES: ICJ: Hon Roger T. Benitez; MAG: Hon. Nita L. Stormes

TITLE: Defendants' Opposition To Plaintiff Bradley Johnson's Motion For Summary Judgment

TEXT: I. INTRODUCTION

This is not a "forum" analysis case, as Plaintiff Johnson would have this Court rule. Plaintiff is not a private citizen in the context of this case; rather, he is an employee of a public entity. That public entity, the School, may limit teacher speech when that speech runs afoul of the Establishment Clause.

Mr. Johnson specifically selected five phrases relating to God from songs and other patriotic/historical material. Johnson did not choose any phrases from this historical material that did *not* reference God or a Creator. The school gave him the option of putting those five phrases in historical/ [*2] practical context, such as posting the entire text of the Declaration of Independence, and Mr. Johnson refused. This refusal shows that Mr. Johnson is not interested in the *historical* aspect of the phrases, only the *religious* aspect of the phrases.

Had Mr. Johnson posted a single phrase from the "striped" banner, instead of all four, there would not be an issue; the School would have permitted the phrase to stand. But when all four phrases are viewed together, along with the "Creator" banner where the word "Creator" is highlighted, then the patriotic nature of the individual phrases is de-emphasized, and the religious nature of the phrases emphasized, changing the nature of the words from patriotic to devotional. If one phrase is permissible, then how many phrases concerning God does it take to cross the line from drawing a historical reference into an entanglement with religion violative of the Establishment Clause? Three? Ten? The Defendants suggest that the line is crossed when school administrators reasonably believe that there has been an entanglement that promotes one religion over another or over no religion. And here, the School administrators reasonably believed that [*3] the five phases in the classroom crossed the line.

On balance, the Defendants had every right to maintain their mission to be free from religious promotion in the school classroom. Mr. Johnson's free speech rights are outweighed by the School's rights to be free from an Establishment Clause violation.

II. FACTS

The Defendants' recitation of facts can be found in part II of its points and authorities in support of their motion for summary judgment. Doc. #55-2. The District objects on relevance grounds to the multitude of photographs of other classroom items submitted by Johnson. Those items are not germane as to whether Mr. Johnson's banners violate the Establishment Clause.

But the core facts are not in dispute: Mr. Johnson displayed two banners in his classroom on a continuous basis that could be read by his students. One was the "striped" banner and one was the "CREATOR" banner. Mr. Johnson was asked to remove the banners by the School, and he complied. The legal issue is whether the School was permitted to do so on grounds that the banners unconstitutionally promoted one religion over another and religion over non-religion.

III. DISCUSSION

A. Schools Have [*4] **The Authority To Control Conduct In Their Learning Environments, And Therefore Johnson's Free Speech Claims Fail.**

Plaintiff begins his points and authorities by quoting *Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969)* for the proposition that teachers do not shed their constitutional rights at the schoolhouse gates. Doc. #43-2, p. 1. But Plaintiff ignores the more compelling quote from *Tinker* that applies to this case: "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker, 393 U.S. 503, 506-07.*

To that end, "the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment...." *Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993)* (quoting *Widmar v. Vincent, 454 U.S. 263, 271 (1981))*. This principle applies in this case. The Defendants' interest in avoiding [*5] an Establishment Clause violation trumps Johnson's right to free speech.

1. The Forum Analysis Test Is Not Proper Here.

The Defendants do not disagree that Johnson's banners constitute "speech." The Defendants also 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 are not unlimited.

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. Johnson asserts that a traditional forum analysis is applicable, contending that this case involves the use of public property for expressive purposes. Doc. 43-2, pp. 8-9.

But Johnson misses the bigger picture by setting the parameters too broadly. This case is not about any member of the public speaking to students, or students speaking to students. Rather, this case is about a public employee's rights to speech vis-a-vis his public employer's right to protect its own legitimate interests in performing its mission of educating kids. And that type of balancing is exactly [*6] what is called for here, consistent with *Pickering v. Bd. of Educ., 391 U.S. 563 (1968).* The *Pickering* balancing test requires a court evaluating restraints on a public employee's speech to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *City of San Diego v. Roe, 543 U.S. 77, 82 (2004)* (quoting *Pickering, 391 U.S. at 568).*

2. 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. n1 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 [*7] respectfully disagree that forum analysis is applicable here.

> n1 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 v. Los Angeles Unified School Dist., 228 F.3d 1003, 1009-11 (9th Cir. 2000)* (declining to apply forum analysis where speech at issue belongs to the school district).

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.

3. The *Peloza* Case: Teachers May Not Evangelize In the Public-School Classroom.

Under Ninth Circuit jurisprudence, there is no question that a school district may prevent a teacher from speaking about [*8] religion on a school campus in an effort to avoid an Establishment Clause violation. *Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 522-523 (9th Cir.1994).* In *Peloza,* a teacher claimed, in part, that his free speech rights were violated by the school district where he taught, where the school district told the teacher that he was to refrain from evangelizing Christianity or initiating conversations about his religious beliefs. *Id. at 522.* The Ninth Circuit initially determined that the teacher's "ability to talk with students about religion during the school day is a restriction on his right of free speech." *Id.* However, the *Peloza* court found the school district's restriction on the teacher's speech to be permissible because the school district's right to be free from an Establishment Clause violation trumped the teacher's speech rights. *Id.*

In reaching this conclusion, the *Peloza* court stated that whether in the classroom or not during contract hours, the teacher "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 [*9] 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. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment." *Id.* To that end, the *Peloza* court cited with approval the case of *Roberts v. Madigan, 921 F.2d 1047, 1056-58 (10th Cir.1990)* (teacher could be prohibited from reading Bible during silent reading period, and from stocking two books on Christianity on shelves, because these things could leave students with the impression that Christianity was officially sanctioned), *cert. denied, 505 U.S. 1218, 112 S.Ct. 3025, 120 L.Ed.2d 896 (1992).*

4. The *Berry* Case: The *Pickering* balancing test applies to workplace speech and displays of public employees.

The *Peloza* court's approach to public employee religious speech was cited with approval in the later Ninth Circuit case of *Berry v. Department of Social Services, 447 F.3d 642, 650 (9th Cir. 2006).* [*10] The *Berry* case is also important because it utilized the dichotomy of the *Pickering* test on one hand, and the "forum analysis" test on the other hand, for two very different purposes. Specifically, the Ninth Circuit applied a slight variation of the *Pickering* test for employee workplace speech, whereas it applied a forum analysis test to determine the restriction on use of a public entity's physical space to hold prayer meetings.

In *Berry,* a county social services department employee sued his employer, alleging that the department's rules restricting him from discussing religion with clients, displaying religious items in his cubicle, and using a conference room for prayer meetings, violated his free speech and free exercise rights under the First Amendment, and violated Title VII. *Berry, 447 F.3d at 645.* The District Court granted summary judgment for the county department, and the employee appealed. The Ninth Circuit affirmed the judgment. *Id.*

a. *The free speech issues in* Berry *were decided under a Pickering balancing test.*

With respect to the free speech claims, the employee's primary duties were to assist unemployed and underemployed [*11] clients in their transition out of welfare programs. These duties frequently required the employee to conduct client interviews. The department told the employee that he could not talk about religion with clients and the agencies the employees contacted, but that he was permitted to talk about religion with his colleagues. *Berry, 447 F.3d at 646.* The employee also displayed a Spanish-language Bible on his desk, and hung a sign that read "Happy Birthday Jesus" on the wall of his cubicle. *Id. at 647.* The department told him to remove the Bible from view of clients, and to remove the word "Jesus" from the sign on his cubicle. *Id.*

The *Berry* court applied the *Pickering* balancing test to uphold the agency's rule forbidding employees to discuss religion with clients: "While it allowed employees to discuss religion among themselves, it avoided the shoals of the Establishment Clause by forbidding them from discussing religion with its clients." *Berry, 447 F.3d at 657;* see *Waters v. Churchill, 511 U.S. 661, 668 (1994)* [for a government employee's speech to be protected, "the speech must be on a matter of public [*12] concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees'") (citations omitted)].

The *Berry* court also applied the *Pickering* test to uphold the agency's rule restricting employees from prominently displaying religious items: "Similarly, the Department allowed employees to display religious items, except where their viewing by the Department's clients might imply endorsement thus evading the reef of the Establishment Clause." *Id.* "[T]he *Pickering* balancing approach applies regardless of the reason an employee believes his or her speech is constitutionally protected," whether as commentary on matters of public concern or whether the employee asserts First Amendment protections for religious speech. *Berry, 447 F.3d at 649-50.*

The *Berry* court's application of the balancing test cited as precedent the cases of *Peloza* (discussed above) and

Tucker v. State of Cal. Dept. of Educ., 97 F.3d 1204 (9th Cir. 1996). In *Tucker,* [*13] the public employer provided its employee (Tucker) with orders prohibiting him from discussing religion in the workplace and displaying religious items. Tucker contended on appeal that the orders must pass strict scrutiny "because the government has created a limited purpose public forum in its offices by allowing its employees both to discuss 'public questions when they assemble informally at their desks, drinking fountains, lunch rooms, copy machines, etc.' and to display written materials in and around their offices and cubicles." *Id. at 1209.*

The Ninth Circuit rejected that argument: "In *Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985),* the Court stated, '[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by *intentionally* opening a nontraditional forum for public discourse.' (emphasis added). Assuming that Tucker and his co-workers talked about whatever they wanted to at work (before the passage of the challenged order), and that they posted all sorts of materials on the walls, that still would not show that the government had intentionally [*14] opened up the workplace for public discourse." *Tucker, 97 F.3d at 1209.* The *Tucker* court instead reviewed a public employer's limitations on an employee's religious speech pursuant to the "applicable doctrine, which is found in the case law governing employee speech in the workplace." *Id. at 1209-10,* citing *Pickering.*

Consistent with *Berry,* this Court should utilize the variation on the *Pickering* balancing test, which the Ninth Circuit uses for speech by an employee in the workplace (regardless of whether the speech consists of words spoken aloud or a display of items constituting speech in the workplace). Johnson's banners were even more prominently displayed than the plaintiff in *Berry,* because Johnson's banners were not inside the wall of an office cubicle, but were in plain view in his classroom, where they could be seen by all of his students. Moreover, Johnson's banners were very large, and easily could be read from locations in the classroom where students would normally sit. Such speech must be balanced against Poway's right to protect its own interests in avoiding an Establishment clause violation.

b. *The forum analysis* [*15] *in* Berry *applied only to the use of a conference room for prayer meetings.*

The *Berry* case also shows when a forum analysis would be applicable - and shows that its use would not be suited to this case. In *Berry,* the employee organized a monthly employee prayer meeting that was to take place an unused conference room in the department's facility. The prayer meetings were voluntary and were held over lunch. *Berry, 447 F.3d at 646.* The department told M r. Berry that he could not use the conference room for these meetings, because use by a particular group of a "non-public" conference room at the facility would open up the room's use to all groups. *Id. at 647.*

For this particular complaint, the *Berry* court relied on a traditional forum analysis, rather than the *Pickering* balancing test, to resolve the constitutional issues associated with the use of work site premises for prayer meetings applying, *inter alia, Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788 (1985).* As the *Berry* court explained, the department's rules "did not prohibit its employees from holding prayer meetings in the common [*16] break room or outside," but closed one particular conference room "to employee social or religious meetings such as might convert the conference room into a public forum." *Berry, 447 F.3d at 657, 653* (finding from an analysis of the uses of the conference room it "remains a non-public forum," because "the only permitted use of the room that was not generally associated with the Department's administrative duties was for birthday parties and baby showers"). *Berry* concluded, applying forum analysis standards, those restrictions on the civil rights of its employees to exercise their religion using a government facility with circumscribed permitted uses "were reasonable, and the Department's reasons for imposing them outweigh any resulting curtailment of Mr. Berry's rights under the First Amendment of the United States Constitution ...." *Id.*

Here, Johnson is not interested in holding prayer meetings in unused non-public portions of Westview High School or the District Office. Nor does he seek to display his banners inside unused rooms for any portion of time. Simply said, Johnson's classroom is not a facility open to the public to hold meetings or speak during [*17] the school day. Rather, it is only Johnson who wishes to display the banners in his classroom to students and whoever else happens to be inside

the classroom. That is strictly employee speech, and therefore the *Pickering* balancing test is more suited to the analysis than the forum analysis applicable to use of public facilities.

5. Mr. Johnson's Banners Are Not "Private" Speech

Johnson also contends that his speech is "private" speech on public grounds, citing *Arizona Life Coal., Inc., v. Stanton, 515 F.3d 956, 968 (9th Cir 2008).* Doc. 43-2, p. 8. This characterization is in error.

The issue in *Arizona Life* was whether the State of Arizona violated an advocacy group's First Amendment right to free speech by arbitrarily denying the group's application for a special Arizona organization license plate that would portray its message "Choose Life." *Arizona Life, 515 F.3d at 960.* The case specifically dealt with the government regulation of private speech in a forum created by the government.

The case does not apply to Johnson's circumstances, because Johnson is not speaking as a private citizen, he is speaking as an employee of the [*18] Poway Unified School District. It is undisputed that Johnson is a math teacher. His job is to educate high school students. Had Johnson not been a teacher, then he would have no right to decorate a classroom. Under the School's policies and practices, *teachers,* not *others,* have the right to display items in their respective classrooms, within certain limits. Defs. Exh. "E," Doc. #55-4, pp. 15-17 (Chiment Depo, pp. 57:15-58:3; 65:2-6.) The fact that Johnson's banners were not used for a curricular purpose does not change the fact that they contain speech that can easily be viewed and understood by public school students and others, all of whom could attribute the slogans on the banners to ratification by the School District. Furthermore, if Johnson was not a teacher, then he would not be permitted to display anything in a Poway Unified classroom. In fact, under the California Education Code, if Johnson was not an employee or parent/guardian of a student, he would need permission just to visit a classroom during the school day. Cal. Educ. Code, § 32211, subd. (a). So this case is not about a private citizen speaking in the classroom, it is a about a school employee speaking [*19] to students and others on public school grounds. Accordingly, the forum test used in *Arizona Life* does not apply.

6. "Substantial Disruption" is Not The Test, As Johnson Suggests.

Johnson also contends that the Defendants cannot prohibit the banners because the banners did not "materially and substantially disrupt the work and discipline of the school." quoting *Tinker, supra, 393 U.S. at 513* and *Grayned v. City of Rockford, 408 U.S. 104 (1972).* Doc. #43-2, p. 8, fn. 6.

There are several problems with Johnson's assertion, not the least of which is that Johnson does not fully articulate the complete test from *Tinker.* Under *Tinker,* the actual test is that a student may exercise his right to freedom of expression unless the "conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork *or* ***involves substantial disorder or invasion of the rights of others*** ...." *Tinker, 393 U.S. at p. 513,* emphasis added. Johnson's points and authorities left out the last part about invading the rights of others.

Defendants [*20] think that the test in *Tinker* applies to students, not teacher employees. As Defendants have argued, the *Pickering* test is the test the Ninth Circuit applies in public employee cases like this one. The Ninth Circuit's use of *Pickering* does not conflict with *Tinker* because the Supreme Court has explained that based upon its reading of its prior precedent, the "substantial disruption" test set forth in *Tinker* is not absolute. *Morse v. Frederick, 551 U.S. 393, 405 (2007).*

But even if the *Tinker* test did apply to teachers, Johnson's speech would invade the School's right to maintain its mission without giving the appearance of endorsing its employee's religious expression in violation of the Establishment Clause. And thus, even under *Tinker,* the Defendants would have the right to remove the banners at issue.

7. Johnson's "Striped" and "Creator" banners cross the line from heralding the national heritage to promotion of Judeo-Christianity, and therefore entangle the School in religious advocation in violation of the

Establishment Clause.

Johnson appears to have taken the position that any speech taken from a national or historic origin, [*21] even if discussing God or religion, gets First Amendment protection, regardless of how the message is displayed. This is an overly broad view of the law, from the Defendants' perspective.

a. *The visual impact of the banners' configuration and text size must be taken into consideration.*

Johnson's position disregards the visual impact that speech displayed on banners or posters can have. For example, the words "In God We Trust" are the national motto, and that phrase does not violate the Establishment Clause when displayed on coins or currency. But what if that phrase was displayed in a classroom with the word "God" was emphasized and highlighted -wouldn't that be different? Take for example, a 2' by 7' banner that read:

In **GOD** we trust

The visual impact is immediate: the phrase in this example has been modified so that the emphasis is on the word "God." An objective viewer could easily conclude that the speaker is accentuating religious aspect of the phrase.

Similarly, Johnson's banners emphasize the religious aspects of historical speech in two ways: (1) on the striped banner, the word God is repeated in each slogan; and (2) in the Creator banner the [*22] word "Creator" is in ALL CAPS and twice the size of the other words in the slogan. This combination places religion over history/patriotism.

It is not a matter of whether the speech is curricular or non-curricular in nature. According to the Supreme Court, "the process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers - and indeed the older students - demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models." *Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)*. Furthermore, curriculum in schools includes speech and displays which the students, a captive audience, will be subjected to during the school day. See *Lee v. York County Sch. Div., 484 F.3d 687, 698 (4th Cir. 2007)* [explaining that religious material on classroom bulletin boards were curricular, as opposed to the teacher's own speech, because the material was "constantly present [*23] for review by students in a compulsory classroom setting. As a general proposition, students and parents are likely to regard a teacher's in-class speech as approved and supported by the school, as compared to a teacher's out-of-class statements."].

Johnson's motion paints the Defendants as biased against any religion and any religious words or thoughts. Johnson's characterization simply isn't true. For example, William Chiment, the District's Associate Superintendent for Personnel Services, testified at his deposition that a single poster with the words "God Bless America" as depicted in Exhibit "M" (Chiment Depo. Exhibit 97) would be permitted to be displayed by a teacher in a classroom: "I see it as patriotic, and the overall impact of it is not the repetition of the theme of God. The predominant theme is America. And it's one single banner." Exh. "M," pp. 244:16-245:6. This is a reasonable position for a school administrator to take: the administrator is looking at the totality of the item and making a determination based not just upon the words of the poster, but on the impact and context of the words.

b. *The slogans on the banners, viewed together, violate the Establishment* [*24] *Clause.*

Next, formally applying the facts to the Ninth Circuit's balancing test, the scales tip in favor of the School Defendants because, with respect to the Establishment Clause, Johnson's banners violate all three prongs of the *Lemon* test. *Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)*. 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 chosen not just to promote the nation's heritage, but also to espouse religion over non-religion. Defs.' 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 [*25] due to the historical implications of the phrases (a conclusion that School administrators acknowledge). 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 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. And the District provided with alternative material display that still contained religious historical and patriotic references, but in their original context. As Principal Kastner explained with respect to the provision of this alternative material as opposed to the individual phrases on Johnson's banners: "The issue was never these phrases in isolation, and these phrases were all not only permitted but encouraged. I - he has posters that include all of those phrases that can be put on those walls. It's taking them out of context that was the issue." Kastner Depo., Exh. "N," p. 142:25-143:11. This is a reasonable position taken by [*26] a principal who is sensitive to both sides of the issue. And where speech such as Johnson's is taken out of context to create a new meaning and presentation, this Court should defer to school authorities to make their determination of whether speech is permissible: "[T]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board, rather than with the federal courts." *Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 267 (1988)* (quoting *Bethel School District No. 403 v. Fraser, 478 U.S. 675, 683* (internal citation omitted).

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.* [*27] "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. Johnson's banners can be easily read by students in the classroom. Any student who does not agree with the notion that God is a supreme being or creator could be intimidated by Johnson's banners.

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)*. If this gloss is applied, 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 [*28] 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 day.

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

As a fallback position, in the event that this Court were to find that the *Berry/Pickering* balancing test does not apply, and that Johnson's classroom was a limited public forum under the *Hazelwood* analysis, the School would still be within its rights to remove the banners. Under that legal analysis, the Defendants may still prevail if they show that the banners constitute an Establishment Clause violation. This is because avoiding endorsement of religion is a constitutional mandate and therefore a compelling interest. *Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112-13*

(2001) (citing *Widmar v. Vincent, 454 U.S. 263, 271 (1981)).*

To that end, the Ninth Circuit has held that schools may refuse to allow religious speech in a limited public forum where it is necessary to avoid an Establishment [*29] Clause violation. *Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092 (9th Cir.2000)*. In *Cole,* two students sued their school district, claiming that the district violated their freedom of speech by refusing to allow one to give a sectarian, proselytizing valedictory speech and the other to give a sectarian invocation at their graduation. *Cole, 228 F.3d at 1095.* The court, in deciding whether the individual school officials enjoyed qualified immunity, found that the students' damage claims failed because the officials' actions were reasonably taken to avoid violating the Establishment Clause of the First Amendment. *Id.* In supporting its decision in favor of the school officials, the *Cole* court explained: "We conclude the District officials did not violate the students' freedom of speech. Even assuming the Oroville graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause under the principles applied in *Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000),* [*30] and *Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992)*. [Citiations.]" *Cole, 228 F.3d at 1101.*

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

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 [*31] *Hazelwood* reposes in the discretion of school officials and which is afforded substantial deference. We therefore conclude that controlling the content of school-sponsored publications so as to maintain the appearance of neutrality on a controversial issue is within the reserved mission of the [] District." *Planned Parenthood v. Clark County School District, 941 F.2d 817, 829 (9th Cir.1991)* (en banc), internal footnote omitted. Should this Court apply *Hazelwood* to teacher speech (rather than student speech), then 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 [*32] 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 Clause.

Finally, Johnson suggests that it is unfair to him that other issues be permitted by the school district to be on display, such as gay rights issues, for example. Johnson does not go into detail in his arguments as to what aspect of tolerance of civil rights invades his constitutional rights as a teacher. But to clarify, the School has an "affirmative obligation" under the California Education code "to combat racism, sexism, and other forms of bias" including sexual orientation. Cal. Educ. Code, § 201, subd. (b) and § 220. "An arm of local government - such as a school board - may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and restrict the contrary speech of one of its representatives." *Downs v. Los Angeles Unified School Dist.,*

228 F.3d 1003, 1014 (9th Cir. 2000). [*33] So it is unknown to Defendants how tolerance material posted in a classroom is violative of Johnson's First Amendment rights.

9. 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 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 [*34] 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.* Plaintiff's motion should be denied as to this state 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.

Ironically, while promoting religion himself, Johnson claims that it actually the Defendants that have violated the Establishment Clause of both the United States and California constitutions. Johnson's assertions are far afield.

There are three tests used in the context of a school by the U.S. Supreme Court to determine [*35] 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)* (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)* [*36] (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 District's Board Policies and Regulations require that teachers refrain from espousing a single viewpoint

when teaching controversial issues, and that teachers be inclusive of various points of view. See Defendants' Exhs. "C" and "D" in support of their Motion for Summary Judgment. Pursuant to the policies and regulation, District restricted the display of Johnson's 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, [*37] 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.

The Defendants' actions also do not violate the endorsement test. The Defendants' actions in having Johnson remove his banners was for the purpose of preventing favoritism or preference for one particular religion or religious belief. Similarly, with respect to the coercion test, the Defendants have attempted to remove the spectre of coercing students to adhere to a particular sectarian practice. Contrary to Johnson's contentions, the Defendants have tried to uphold the Establishment Clause, not violate it.

California state law 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 [*38] do not violate the Establishment Clause of Article I, § 4 of California Constitution either.

In short, the actions 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. Johnson's motion should be denied.

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 [*39] in a class or group. See *Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).* 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).*

Johnson argues based upon his position that the classroom is a forum that the District has opened for expression. Plaintiff's P&As, Doc. #43-2, p. 15. But, again, the test for public employees in the workplace is whether their speech constitutes a violation of the Establishment Clause such that the public employer may remove such speech to avoid a violation. The School had the right to remove Johnson's banners, and give him alternative [*40] material containing the slogans on the banners, but in their historical/national context. So to the extent that other teachers within the School have posters or other items on their walls, such facts are irrelevant to the analysis.

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. 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." Defs.' Exh. K (Doc. 55-5, Exh. pp. 78-80). The School offered Johnson the option of displaying a poster containing the text of the Declaration of Independence, which includes the words "creator" and "God." *Id.* The School [*41] had no problem with Johnson displaying the "Pledge of Allegiance" in its entirety, including the line "one nation under God." *Id.* 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. Defs.' Exh. "F," Doc. 55-4, pp. 47-48 (Johnson Depo., pp. 128:25-130:4).

Johnson's argues that Defendants violated the equal protection clause "when they ordered his banners removed based on the content and viewpoint of his speech, while permitting other teachers to continue their speech in the same forum unfettered." Doc. 43-2, p. 15. But Johnson ignores that all teachers are operating under the District policies and practices. The School's Administrative Procedure, AP 3.11.2, that contains a section concerning the "Responsibilities of Teachers." Defendants' Exh. "D," Doc. #55-4, pp. 13-15. Those responsibilities include refrain[ing] from using classroom teacher influence to promote partisan or sectarian viewpoints. So if the School believes that there are teachers promoting sectarian religious viewpoints, it [*42] may restrict that speech.

Johnson's separate statement of facts point to a teacher named Lori Brickley, who has what apparently are known as "Tibetan prayer flags" displayed in her classroom. The flags, like Johnson's banners, are personal items in nature, but 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. Plaintiff's Exh. 5, Doc. #54-4, pp. 224-225 (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. *Id.* Brickley Depo., pp. 87:20- 90:6; Defs. Exh. "E," Brickley herself maintains that religion does not belong in the classroom (Plaintiff's Exh. 5, Doc. #54-4, p. 228 (depo at 118:6-8)), so she [*43] 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. Plaintiff's Exh. 5, Doc. #54-4, p. 225 (Brickley Depo., p. 89:7-22). There is a small figure on some flags that appears to be Buddhist in nature, but it is not prominent (Defs. Exh. "L"). And like the words God and Creator in a full display of text from the Declaration of Independence (Defs. Exh. "K"), the religious significance is far lesser than the whole of what it represents.

If the alternative materials the School provided to Johns on (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.

Johnson also suggests in his separate statement of facts that there is a "controversial" poster of John Lennon in a classroom containing lyrics to the song "Imagine." See poster at Defs. Exh. "O." Johnson's contention that the song is "controversial" lacks foundation and should [*44] be ignored. Mr. Collins, the School's Deputy Superintendent, testified that he is Christian and was not aware of any controversy surrounding that song not did he find it offensive; he viewed the song to be about "tolerance." Plaintiff's Exh. "2," p. 126 (Collins Depo. p. 90:19-91:13). Furthermore, Johnson did not submit any evidence to show whether the poster was teacher speech (as opposed to a student project) or the context that the poster was presented. Without such evidence, Johnson cannot say that he was treated different from other teachers based on this poster.

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" Clause Fails Because The Defendants [*45] **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. Accordingly, Johnson's motion should be denied as to this claim also.

E. The Damages Claim Against The Individual Defendants Should [*46] **Be Denied Due To Their Qualified Immunity.**

Johnson also seeks nominal damages against the Individual Defendants by way of his motion. Doc. #43-2, p. 22. But Johnson is not entitled to damages claim because the Individual Defendants enjoy qualified immunity.

"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 alleged violation." *Cole v. Oroville Union High School Dist., 228 F.3d 1092, 1101 (9th Cir. 2000).* Here, there was no constitutional violation. But even if there was, 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

The School District provides services [*47] to students who hold many different beliefs and come from many different backgrounds. Respect for all of those different beliefs is at the core of the School District's purpose. While the School District tries to ensure that students will be exposed to different ideas and beliefs, and hopes they may grow and prosper by that exposure, the School must not pick any particular belief to endorse or to recommend. When a teacher - employed by the District - picks one particular belief to endorse and support, a part of the purpose of the School District is thwarted.

By law, the School District must not endorse any particular religious belief, or oppose any particular belief. A public school must be neutral. Obviously, a School District may only speak through its employees, and Mr. Johnson is one of those valued and respected employees who speaks for the District. If he is permitted to endorse one particular belief - by signs placed prominently in his classroom - the duty of the School District is breached.

If Mr. Johnson is permitted to keep his banners up in his classroom, then a Muslim teacher, or an atheist teacher, or a teacher of any other belief, has the same right to display banners [*48] promoting his belief. If that were to occur, then the improper entanglement of the school in religious issues would be unmistakable and impact on the District's purpose to respect the beliefs of all of its students would be impaired.

But the evidence is undisputed. The visual impact of these banners does not communicate patriotism, nor a

historical message. The visual impact of the banners communicates the teacher's Judeo-Christian belief. It is also undisputed that the School Administrators reasonably believed that the banners entangled the school in the endorsement of religious ideas.

Upon those undisputed facts, the Court should apply the Ninth Circuit rule - applicable to school teacher's speech in the classroom, as expressed in *Peloza* - and determine that the School District's restriction on the teacher's speech was permissible because the School District's right to be free from an Establishment Clause violation trumped the teacher's speech rights. Under that analysis the School District had a duty to ask Mr. Johnson to take down the banners to protect its neutrality on this controversial issue and to protect its students right to be free from government endorsement of Mr. [*49] Johnson's religious belief.

The Court is respectfully requested to deny Plaintiffs motion for summary judgment, and to grant the Defendants' motion for summary judgment.

DATED: September 28, 2009

Respectfully submitted,

STUTZ ARTIANO SHINOFF & HOLTZ
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DEFENDANTS' SUPPLEMENTAL EXHIBITS IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [FRCP 56]

Defendants hereby submit the following supplemental exhibits "M" through "O" in support of the Defendants' arguments in opposition to Plaintiff's motion for summary judgment. These exhibits are lettered and paginated as a continuance to the exhibits previously submitted by Defendants, and so start with Exhibit "M" page 85.

Exhibit "M": Poster reading "God Bless America" (p. 86) and additional excerpts from the certified Deposition [*50] of William Chiment taken on May 14, 2009 (p. 87-88)

Exhibit "N": Additional excerpts from the condensed certified Deposition of Dawn Kastner taken on June 2, 2009 (pp. 90-91)

Exhibit "O": Poster of John Lennon (deposition exhibit 97) (p. 93).

DATED: September 28, 2009

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SUPPLEMENTAL DECLARATION OF PAUL V. CARELLI IV IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S 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 Artiano Shinoff & Holtz, A.P.C., attorneys of record for Defendants, POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM LINDA VANDERVEEN; ANDREW PATAPOW; TODD GUTSCHOW; PENNY RANFTLE; DR. DONALD A. PHILLIPS; WILLIAM [*51] R. CHIMENT; and DAWN KASTNER in the above-entitled U.S. District Court lawsuit. If called upon as a witness, I would competently testify to the following:

2. The exhibits attached to the Defendants' Supplemental Exhibits in support of the Defendants' Opposition to Motion for Summary Judgment are true and correct copies of the originals as follows:

Exhibit "M": Poster reading "God Bless America" (p. 86) and additional excerpts from the certified Deposition of William Chiment taken on May 14, 2009 (p. 87-88)

Exhibit "N": Additional excerpts from the condensed certified Deposition of Dawn Kastner taken on June 2, 2009 (pp. 90-91)

Exhibit "O": Poster of John Lennon (deposition exhibit 97) (p. 93).

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 28th day of September, 2009, at Temecula, California.

/s/ Paul V. Carelli IV

PAUL V. CARELLI, IV

DEFENDANTS' RESPONSES AND OBJECTIONS TO PLAINTIFF'S SEPARATE STATEMENT OF FACTS

UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE SUPPORTING EVIDENCE AND
1. Plaintiff Bradley Johnson (hereinafter	1. Undisputed.

"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).	2. Undisputed.
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).	3. Undisputed.
4. Plaintiff presently teaches math at Westview High School and has been doing so since 2003. (Johnson Decl. at P 3 at Ex. 1).	4. Undisputed.
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).	5. Undisputed.
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) as to certain matters set forth in the deposition notice. (Chiment Dep. at 16-17, Dep. Ex. 31 at Ex. 3).	6. Undisputed.
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	7. Undisputed.

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)).	8. Undisputed.
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).	9. Undisputed.
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).	10. Undisputed.
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)).	11. Undisputed.
12. Defendant Phillips approved of the School District's decision to order Plaintiff to remove his banners. (Chiment Dep. at 137 at Ex. 3).	12. Undisputed
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).	13. Undisputed.
14. As Assistant/Associate Superintendent, Defendant Chiment is partially responsible for creating and implementing the policies of the	14. Undisputed.

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).

15. Undisputed.

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).

16. Undisputed.

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)).

17. Undisputed.

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

18. Objection: Mistates Kastner's testimony. Kastner testified that she agreed with the decision, not that she approved it. She did not make the decision to remove the banners. See Defendants' Exh. "D."

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).

19. Objection: Relevance. Without waiving the objection, the fact is undisputed.

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).	20. Objection: Vague and ambiguous as to which "various" banners Plaintiff is referring. Without waiving the objection, it is undisputed that Plaintiff has displayed a banner similar to the striped banner depicted in Exh. B, Exh. 1 for approximately 25 years.
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).	21. Objection: Vague and ambiguous as to which banners Plaintiff is referring, other than the "striped" banner. It is undisputed that the striped banner has been displayed for 25 years. Defs.' Exh. "F" Johnson Depo., pp. 78:20-79:24.
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).	22. Objection: Vague and ambiguous as to which banners Plaintiff is referring. To the extent that Plaintiff is referring to the two banners at issue in the First Amended Complaint, it is undisputed.
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).	23. Undisputed.

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 Ex. 1; Collins Dep. at 94 at Ex. 2).	24. Objection: Calls for legal conclusion with respect to "curriculum." Without waiving the objection, the fact is disputed to the extent that there are limits on what personal items teachers are permitted to display under the law, and by the District's own policies and practices. See Defs.' Exhs. "C"; "D," pp. 13-15, and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.
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).	25. Undisputed.
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).	26. Objection: Calls for legal conclusion as to what is the "Curriculum" and lacks foundation and calls for speculation that "students were not studying Plaintiff's banners in his classes, and students were not discussing Plaintiff's banners in his classes." Without waiving these

	objections, it is undisputed that the banners at issue in this case were not used to teach math, and they were not used as part of any of his extracurricular activities.
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).	27. Objection: Calls for legal conclusion.
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. at 34-36 at Ex. 3).	28. Undisputed.
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). room. Defs. Exh. "G" Kastner Depo, p. 37:15-38:14.	29. Disputed. Early in Kastner's tenure as principal at Westview High School(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
30. During his first two years as a probationary teacher, Plaintiff was evaluated 3 times each	30. Objection: Relevance, lacks foundation and calls

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).

for speculation.

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 in any way. (Johnson Decl. at P 34 at Ex. 1).

31. Undisputed.

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).

32. Objection: Calls for legal conclusion as to the term "curricular." Without waiving the objection, the fact is disputed to the extent that there are limits on what personal items teachers are permitted to display under the law, and by the District's own policies and practices. See Defs.' Exhs. "C"; "D," pp. 13-15, and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.

33. No other School District teacher is

33. Undisputed.

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).

34. Disputed to the extent that there are limits on what personal items teachers are permitted to display under the law, and by the District's own policies and practices. See Defs.' Exhs. "C"; "D," pp. 13-15, and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.

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 way we open the walls [to expression by teachers]"); Kastner Dep. at 23-24, 67 at Ex. 4).

35. Disputed to the extent that there are limits on what personal items teachers are permitted to display under the law, and by the District's own policies and practices. See Defs.' Exhs. "C"; "D," pp. 13-15, and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6..

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.

36. Disputed to the extent that there are limits on what personal items teachers are permitted to display under the law, and by the District's own

(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).

policies and practices. See Defs.' Exhs. "C"; "D," pp. 13-15, and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.

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).

37. Disputed to the extent that there are limits on what personal items teachers are permitted to display under the law, and by the District's own policies and practices. See Defs.' Exhs. "C"; "D," pp. 13-15, and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.

38. The School District permits teachers to display non-curricular 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).

38. Objection: Calls for legal conclusion as to the term "curricular." Without waiving the objection, disputed to the extent that there are limits on what personal items teachers are permitted to display under the law, and by the District's own policies and practices. See Defs.' Exhs. "C"; "D," pp. 13-15, and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.

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); and i. Sports (Collins Dep. at 162-63 at Ex. 2; Chiment Dep. at 230-31 at Ex. 3).	39. Objection: Calls for legal conclusion as to the term "curricular." Also these items are irrelevant, lack foundation, and are speculative as to their classroom use. Without waiving these objection, disputed to the extent that there are limits on what personal items teachers are permitted to display under the law, and by the District's own policies and practices. See Defs.' Exhs. "C"; "D," pp. 13-15, and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.
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	40. Objection: "Calls for legal conclusion." Without waiving the objection, disputed to the extent that there are limits on what personal items

Ex. 3).

teachers are permitted to display under the law, and by the District's own policies and practices. See Defs.' Exhs. "C"; "D," pp. 13-15, and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.

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]").

41. Objection: "Calls for legal conclusion." Without waiving the objection, disputed to the extent that there are limits on what personal items teachers are permitted to display under the law, and by the District's own policies and practices. See Defs.' Exhs. "C"; "D," pp. 13-15, and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.

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:
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);
b. A poster with the lyrics to the song

42. Objection: Calls for legal conclusion as to the term "curricular." Also these items are irrelevant, lack foundation, and are speculative as to their classroom use. Without waiving these objection, disputed to the extent that there are limits on what personal items teachers are permitted to display under the law, and

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 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"

by the District's own policies and practices. See Defs.' Exhs. "C"; "D," pp. 13-15, and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.

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 opposed Proposition 8 in California (Dep. Ex. 161; Brickley Dep. at 112-13 at Ex. 5);

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

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

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, 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 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 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).

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 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).

43. Objection: lacks foundation as to the nature of the lyrics; further lacks foundation that the lyrics were posted by a teacher.

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).

44. Objection: misstates evidence. Mr. Collins and Mr. Chiment did not object to the poster of John Lennon, and the words use in that context, which promote tolerance.

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

45. Objection: relevance. Without waiving the objection, undisputed.

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).	46. Objection: relevance. Without waiving the objection, undisputed.
47. GLSEN is an activist group that promotes gay rights issues in education. (Brickley Dep. at 123 at Ex. 5).	47. Objection: relevance. Without waiving the objection, undisputed.
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 15, Ex. A, Dep. Ex. 13 at Ex. 1).	48. Objection: relevance. Without waiving the objection, undisputed.
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).	49. Objection: relevance. Without waiving the objection, undisputed.
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. in the	50. Objection: Relevance, lacks foundation and calls for speculation as to the items' use in the classroom.
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).	51. Undisputed.
52. It is the duty of School District	52. Undisputed.

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. at PP 11, 15, Ex. A, Dep. Exs. 24-26, 148, 155 at Ex. 1; see also Brickley Dep. at 90 at Ex. 5).	53. Objection: Argumentative as a whole, and lacks foundation as to what Buddhists believe. Without waiving these objections, the District has not objected to the use of the flags by teacher Lori Brickley.
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).	54. Undisputed.
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).	55. Objection: calls for a legal conclusion as to the term "curricular" and as to whether the District endorses or promotes messages, and lacks foundation, and calls for speculation.
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).	56. Objection: calls for legal conclusion.
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	57. Objection: calls for legal conclusion as to the term "curricular."

Ex. 4).	Disputed to the extent that there is a physical limit for teacher displays such that classroom would be unsafe from fire or that sort of thing. Plaintiff's Exh. 3, p. 164 (Chiment Depo p. 76:6-22.)
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).	58. Objection: . Objection: calls for legal conclusion as to the term "curricular." Without waiving the objection, it is undisputed that there are no express limits to the items that can be displayed by a teacher in the classroom.
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 Decl. at PP 9, 10, 16, Ex. B at Ex. 1).	59. Objection: Calls for legal conclusion. Without waiving the objection, the District disputes that it created a forum, but it is undisputed that Plaintiff displayed the two banners at issue in the case.
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).	60. Objection: calls for legal conclusion and vague and ambiguous as to the term "official duties." Without waiving the objection, teachers are permitted to display items because they are teachers.

	Under the California Education Code, if Johnson was not an employee or parent/guardian of a student, he would need permission just to visit a classroom during the school day. Cal. Educ. Code, § 32211, subd. (a).
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).	61. Objection: Vague and ambiguous as to the word "use." Without waiving the objection, the banners were on display to students during the school day, and therefore speech was being made by Johnson continuously. 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".
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).	62. Objection: Calls for a legal conclusion. Without waiving the conclusion, the banners contained speech made by Johnson which carries the imprimatur of the School.
63. The School District believes that public schools play an important role educating and guiding our youth through the marketplace of	63. Undisputed.

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).

64. Undisputed.

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 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).

65. Objection: Relevance.

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).

66. Objection: Relevance.

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).

67. Objection: Relevance, lacks foundation and calls for speculation.

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

68. Undisputed.

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. 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).

69. Undisputed.

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).

70. Undisputed.

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).

71. Undisputed.

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).

72. Undisputed.

73. Each banner measures approximately 7 feet long 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).	73. Undisputed.
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).	74. Objection: Lacks foundation and calls for speculation as to who has such knowledge.
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).	75. Objection: Relevance. Without waiving the objection, undisputed.
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).	76. Undisputed.
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).	77. Undisputed.
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 Ex. 2).	78. Objection: Lacks foundation and calls for speculation.
79. "In God We Trust" is the official motto of the United States. (Johnson Decl. at P 22 at	79. Undisputed.

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).

80. Undisputed.

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).

81. Objection: Relevance and lacks foundation.

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).

82. Objection: Relevance and lacks foundation. Without waiving the objections, undisputed.

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).

83. Objection: Misstates testimony, lacks foundation. Although it is undisputed that the Pledge is recited in the school district as Mr. Collins testified, there is no evidence showing that each and every student recites the Pledge.

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 Decl. at P 29 at Ex. 1).

84. Undisputed.

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).	85. Undisputed.
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).	86. Undisputed.
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).	87. Objection: Relevance and lacks foundation. Without waiving the objection: Undisputed.
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).	88. Undisputed.
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 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).	89. Objection: Relevance. Without waiving the objection, it is undisputed.

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).	90. Undisputed.
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).	91. Objection: Argumentative. Without waiving the objection, it is undisputed that the District requested Johnson to remove the banners on or about January 23, 2007.
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).	92. Objection: Misstates evidence. Without waiving the objection, it is disputed. 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." See Defs.' Exh. "D." Mr. 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 agnosticism), 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). See Defs. Exh. "E," Chiment Depo, pp. 128:8 - 129:12; 133:14-134:2.
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).	93. Undisputed.
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).	94. Undisputed.
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	95. Undisputed.

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).

96. Objection: Relevance. Without waiving the objection, it is undisputed that Kastner agreed with Chiment's decision.

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).

97. Undisputed.

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).

98. Objection: Relevance. Without waiving the objection, it is undisputed.

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).

99. Objection: Relevance. Without waiving the objection, it is undisputed.

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

100. Objection: argumentative, and calls for legal conclusion. Without waiving the objection, the reasons for

Ex. 3; Kastner Dep. at 44-45, 101-02, 137 at Ex. 4).

the banners' removal were discussed in the January 23, 2007 letter from Chiment to Johnson, which 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." See Defs.' Exh. "D."

Mr. Chiment has 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). See Defs. Exh. "E," Chiment Depo, pp. 128:8 - 129:12; 133:14-134:2.
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).	101. Undisputed.
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).	102. Objection: Calls for legal conclusion and argumentative. Without waiving the objection, the reasons for the banners' prohibition were discussed in the January 23, 2007 letter from Chiment to Johnson, which 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." See Defs.' Exh. "D." Mr. Chiment has 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 agnosticism), 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). See Defs. Exh. "E," Chiment Depo, pp. 128:8 - 129:12; 133:14-134:2.

103. Pursuant to School District policy, practice, and/or custom, 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).

103. Objection: Calls for legal conclusion with respect to the term "non-curricular." Without waiving the objection, the fact is disputed to the extent that there are limits on what personal items teachers are permitted to display under the law, and by the District's own policies and practices. See Defs.' Exhs. "C"; "D," pp. 13-15,

and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.

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).

104. Objection: Vague and ambiguous as to what is meant by the term "subject matter." Without waiving the objection, the reasons for the banners' prohibition were discussed in the January 23, 2007 letter from Chiment to Johnson, which 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." See Defs.' Exh. "D."

Mr. Chiment has 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 agnosticism), 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). See Defs. Exh. "E," Chiment Depo, pp. 128:8 - 129:12; 133:14-134:2.
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).	105. Objection: Calls for legal conclusion as to the term "curriculum." Without waiving the objection, it is undisputed that Mr. Johnson continues to teach math for the Poway Unified School District.
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).	106. Objection: Lacks foundation and calls for speculation. Mr. Collins's response at the Exhibit cited by Plaintiff indicates that discipline may be given for insubordination and that Mr. Chiment would be responsible for making that decision.

[*52]

SUPPLEMENTAL FACTS SUBMITTED BY DEFENDANTS

(i) Mr. Chiment, the District's Associate Superintendent for Personnel Services,	(i) Exh. "M," poster of God Bless America (depo exhibit

testified at his deposition that a single poster with the words "God Bless America" as depicted in Exhibit "M" (Chiment Depo. Exhibit 97) would be permitted to be displayed by a teacher in a classroom: "I see it as patriotic, and the overall impact of it is not the repetition of the theme of God. The predominant theme is America. And it's one single banner."	97) at p. 86 of Defs.' Supp. Exhibits; and Exh. "M", pp. 87-88 (Chiment Depo., pp. 244:16-245:6).
(ii) The District provided Johnson with alternative material display that still contained religious historical and patriotic references, but in their original context. As Principal Kastner explained with respect to the provision of this alternative material as opposed to the individual phrases on Johnson's banners: "The issue was never these phrases in isolation, and these phrases were all not only permitted but encouraged. I - he has posters that include all of those phrases that can be put on those walls. It's taking them out of context that was the issue."	(ii) Exh. "N," of Defs. Supp. Exhibits, (Kastner Depo., pp. 142:25-143:11), referencing alternative materials at Defs.' Exh. "K."
(iii) With respect to poster of John Lennon, Mr. Collins, the School's Deputy Superintendent, testified that he is Christian and was not aware of any controversy surrounding the song "Imagine" by John Lennon nor did he find it offensive; he viewed the song to be about "tolerance." [*53]	(iii) Plaintiff's Exh. "2," p. 126 (Collins Depo. p. 90:19-91:13). Defs. Exh. "O," of Defs. Supp. Exhibits: poster of John Lennon referenced by Collins (depo exhibit 20).

DATED: September 28, 2009

STUTZ ARTIANO SHINOFF & HOLTZ
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DEFENDANTS' OBJECTIONS PLAINTIFF'S EVIDENCE [FRCP 56]

Defendants object to the following evidence submitted by Plaintiff in support of his motion for summary judgment:

DECLARATION OF BRADLEY JOHNSON

1. At paragraph 9, the word "curriculum" is vague and ambiguous and calls for a legal conclusion as to its scope.

2. Paragraph 10 lacks foundation and calls for speculation as to whether the banners interfered with student thought.

3. Paragraph 11, at p. 3, lines 17-18 lack foundation that the song "Imagine" is controversial.

4. The items described in Paragraph 11 are irrelevant, and the description lacks foundation and calls for speculation as to each item's use in the classroom, whether it was displayed by a teacher (as opposed [*54] to a student project) and how each item relates to the classroom.

5. Paragraphs 13 and 14 lack foundation and call for speculation.

6. Paragraph 15 is irrelevant with respect to what items are displayed in the classrooms.

7. Paragraph 16 calls for a legal conclusion and is argumentative.

8. Because Paragraph 23 is based upon information and belief, it lacks foundation and calls for speculation.

9. Because Paragraph 24 is based upon information and belief, it lacks foundation and calls for speculation.

10. Because Paragraph 25 is based upon information and belief, it lacks foundation and calls for speculation.

11. Because Paragraph 26 is based upon information and belief, it lacks foundation and calls for speculation.

12. Because Paragraph 27 is based upon information and belief, it lacks foundation and calls for speculation.

13. Because Paragraph 28 is based upon information and belief, it lacks foundation and calls for speculation.

14. Because Paragraph 30 is based upon information and belief, it lacks foundation and calls for speculation as to its entirety, and with particularity that the song is an "unofficial national anthem" and [*55] that the song has been sung at Yankee Stadium.

15. Because Paragraph 32 is based upon information and belief, it lacks foundation and calls for speculation.

16. As to the last sentence in paragraph 33, it lacks foundation and calls for speculation, and is argumentative.

17. Paragraph 35 lacks foundation and calls for speculation.

18. Paragraph 36, first sentence, calls for a legal conclusion.

19. Paragraph 37, first sentence is argumentative.

20. Paragraph 38 is argumentative and calls for a legal conclusion.

21. Paragraph 39 is objected to on relevance grounds, calls for legal conclusion, and argumentative.

22. Paragraph 41 lacks foundation and calls for speculation.

DATED: September 28, 2009

STUTZ ARTIANO SHINOFF & HOLTZ
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By: /s/ Paul V. Carelli, IV
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DECLARATION OF SERVICE

I am and [*56] 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 September 28, 2009, I served the following document(s):

1. DEFENDANTS' OPPOSITION TO PLAINTIFF BRADLEY JOHNSON'S MOTION FOR SUMMARY JUDGMENT;

2. DEFENDANTS' SUPPLEMENTAL EXHIBITS IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT 2.a. EXHIBITS M-O;

3. SUPPLEMENTAL DECLARATION OF PAUL V. CARELLI IV IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

4. DEFENDANTS' RESPONSES AND OBJECTIONS TO PLAINTIFF'S SEPARATE STATEMENT OF FACTS; and

5. DEFENDANTS' OBJECTIONS PLAINTIFF'S EVIDENCE

[X] **BY ELECTRONIC SERVICE** On the date executed below, I caused to be served the document(s) via CM/ECF described above on designated recipients through electronic transmission of said documents, a certified receipt [*57] 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.

[] **BY MAIL** by depositing in the United States Postal Service mail box at 2488 Historic Decatur Road, Suite 200, San Diego, California 92106, a true copy thereof in a sealed envelope with postage thereon fully prepaid and addressed as follows:

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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.

Executed on September 28, 2009, at San Diego, California.

/s/ Paul V. Carelli IV
Paul V. Carelli IV

[SEE EXHIBIT "M" IN ORIGINAL]

[SEE EXHIBIT "N" IN ORIGINAL]

[SEE EXHIBIT "O" IN ORIGINAL]