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BRADLEY JOHNSON, Plaintiff, vs. POWAY UNIFIED SCHOOL DISTRICT JEFF MANGUM; LINDA VANDERVEEN AN DR EW 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 75419

October 19, 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' Reply To Plaintiff's Opposition To Motion For Summary Judgment

TEXT: INTRODUCTION

The parties filed crossed-motions for summary judgment. There are some minor disagreements in the evaluation of the facts, but there are no material issues of fact in either motion. The significant issue is a single issue of law; which rule applies to these facts? The school teacher contends that his classroom is a "public forum" controlled by a particular line of cases. The School District contends this is employee-speech, controlled by a different line of cases. After the

correct legal rule is selected, the School District contends that it should prevail under either test. The banners displayed by this teacher [*2] in this math classroom were too explicitly "religious" to be permitted in the public schools under either test, and the local elected school board and its administration should have control over the dissemination of information in the classroom, particularly in regard to a subject like religion that could result in additional lawsuits against the School District.

The School District Administration believed that the banner's size, prominence in the classroom, and repetition of the word "God" and "Creator" were improper, but that the same concepts, contained in posters including some historical context and including some additional educational material, would have been acceptable. The School District offered to provide the teacher with the same phrases in posters, but he would not agree. The issue is whether the Constitution gives a teacher the absolute right to display large banners in the classroom on the subject of religion, or do the banners impermissibly entangle the School District in religion?

FACTS

Johnson identifies very few disputed issues of fact, and of those that are disputed, most are not "material." In several cases, Johnson does not dispute the fact but argues [*3] with the characterization by the School District. Johnson invites the Court to review the photos of the banners to determine their meaning. Doc. 56-2, Facts 13, 14, and 16. Johnson contends that the banners are patriotic expressions. But the only facts the banners have in common are their national historic nature and the references to "God" or the "Creator" in each, implying a national endorsement of the religious belief in God the Creator, rather than Buddha, or Allah, or some other religion, or no religion. The School District contends the banners entangled the School District in religion in violation of the Establishment Clause. But that is a dispute of law; not a dispute of material fact sufficient to overcome a motion for summary judgment. It is the central dispute of law that is the reason for the litigation. Do these banners - displayed in a public classroom, as they appeared, however one characterizes their appearance - impermissibly entangle the School District in religion?

This issue is an issue of law. "It stands to reason that if the question of whether a government activity communicates endorsement of religion is primarily a legal question, then the question of whether [*4] a government activity communicates disapproval of religion is also largely a legal question. *C.F. v. Capistrano Unified School Dist., 615 F.Supp.2d 1137, 1155 -1156* (C.D.Cal., 2009)

Johnson disputes the School District's statement that "non-curricular items are part of the learning environment and potentially advocating, therefore such items [sic] are subject to this written policy." Doc. 56-2, Fact 30. But this is really a dispute of law. Is it not true that *some* non-curricular items could be displayed by a teacher that would be impermissible? Is there no limit upon the personal display of a teacher in his classroom? The case law has placed limits on teacher displays in the classroom, which was the basis for the School District's Administrator's concern that these banners were impermissible.

In Facts 53 and 55 the School District referred to the Assistant Superintendent's reasons for asking Johnson to take down the banners. Johnson disputes the "facts" but without offering contrary evidence. He simply does not agree with the Administrator's reason, but the reasons identified were the reasons given by the Administrator in his deposition. Argument of counsel [*5] does not raise material dispute of fact.

Johnson disputes the statement that the "Tibetan Prayer Flags" on display were "decorative." Doc. 56-2, Fact 62. He contends that they are "sacred, religious items that promote Buddhism." But he does not offer any competent evidence that they are religious or sacred. There is no evidence that they promote any religion. The writing on the flags is in Sanskrit, an ancient language, that does not promote *anything* to English speakers. The Court is invited to view Exhibit "J" to determine whether the flags promote *any* idea, or are merely decorative. But this is not a dispute of fact, if for no other reason, than because Johnson offered no admissible evidence that the flags promote religion.

Finally, Johnson disputes the fact that teacher "Brickley's personal belief is that religion does not belong in the

classroom." But that fact is taken from her testimony. Johnson offers argument about some of her beliefs, which he contends are political and opposed to his ideas. She put up a bumper sticker that says "Hate is not a family value." She thinks some Christians are homophobic. She demonstrated with students in favor of gay rights. California [*6] law makes discrimination against a person because of sexual orientation illegal. Cal. Ed. Code § 220; Cal. Civ. Code § 51; Cal. Pen Code § 422.55. Brickley's beliefs are consistent with California law and not inconsistent with Christian doctrine. Hate is not a Christian value, either. Johnson's analysis of Brickley's beliefs does not raise a triable issue of material fact. If her support of controversial issues crosses the line, then the School District will be required to address that conduct with her. But the issue here is Johnson's banners, and whether those banners impermissibly entangle the School District with religion in violation of the Establishment Clause.

ARGUMENT

I. Right to Speech Must be Balanced Against the Risk of Entanglement with Religion.

A. The Forum Test Does Not Apply To These Facts.

Johnson asks the Court to use a forum analysis. The forum analysis does not apply to employee speech during working hours, but does apply to speech of private citizens using the employer's facilities. *Berry v. Department of Social Services ("Berry"), 447 F.3d 642, 650 (9th Cir. 2006). Berry* turned upon the use of that space during [*7] the employee's off-duty hours. This case addresses employee speech *during* working hours.

The issue is not the right of a *member of the public* speaking to students, or students speaking to students. Rather, this case addresses a public-school employer's right to protect its own legitimate interests in performing its mission of educating students balanced against a public-school teacher's rights to speech during his working hours with students. The School District's interest in avoiding an Establishment Clause violation must be balanced against Johnson's right to free speech. "[T]he 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, 394, 113 S.Ct. 2141, 2148, 124 L.Ed.2d 352 (1993)* quoting *Widmar v. Vincent, 454 U.S. 263, 271, 102 S.Ct. 269, 275, 70 L.Ed.2d 440 (1981).* The Supreme Court identified the balancing test for public employee's speech in *Pickering v. Bd. of Educ., 391 U.S. 563 (1968),* as the starting point [*8] for the analysis.

B. Ruling a Classroom Is a Limited Public Forum Will Disrupt the Educational Process

If the Court rules that this classroom is a public forum, then there is a substantial risk that some other people would have the right to address the students in that public forum. That would create an impossible condition for the School District, impeding the ability of the School District to accomplish its mission to provide an education to its students.

The Supreme Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. *Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 677 (1998).* Johnson contends that his classroom is in the second group, a forum created by government designation. "A public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.("Cornelius") 473 U.S. 788, 802 (1985).* If this classroom is a public forum, [*9] then the public at large, or at least certain speakers, must have access to use it. That would be harmful to the educational process.

It is undisputed that Johnson is the only teacher who is permitted to post material in that classroom: "No other teacher is permitted to display materials on Plaintiff's classroom walls without Plaintiff's permission." Doc. 43-3, Fact 33. Johnson's position is inconsistent with the notion of a *public* forum. He is an employee speaking during working hours. His position on this limited permission is inconsistent with the type of designation. If it is a limited public forum,

then, at the least, some other teachers would be permitted to display materials in his classroom. If some part of the public is not permitted to access the classroom, then it is not a public forum.

C. There Is No Evidence that the School District Intended a Public Forum

A designated public forum cannot be created accidently, or by implication. "Designated public fora . . . are created by purposeful governmental action. "The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional [*10] public forum for public discourse." *Cornelius, 473 U.S., at 802,* accord, *International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992)* (designated public forum is "property that the State has opened for expressive activity by part or all of the public"). Hence "the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius, 473 U.S., at 802.*

There is no evidence that the School District intended to create a public forum in its classrooms. Johnson describes it as a "policy, custom, or practice." Doc. 56, at 2:10-11; 16-17. There is a policy that governs the teaching of controversial subjects. That policy does not specifically create a public forum and does not show an intent to create a public forum. It controls and limits materials in the classroom, which includes materials posted on classroom walls. But nothing in that policy evidences any intent by the School District to open the classrooms as open forums.

The evidence from each of the school Administrators was that they believed [*11] that they had a duty to limit the materials posted on the walls of classrooms if the material violated the law. There is a limitation placed upon the personal items teachers may display under the law, and under the Policy and practice. Doc. 55-5, Defs.' Exhs. "C"; "D," pp. 13-15, and Exh. "E," Chiment Depo, pp. 57:15-58:3; 65:2-6.

D. No Court Has Yet Made a Classroom Into an Open Forum

Johnson has not identified any case that has held that a classroom is an open forum. The School District did not find one, either. His argument is simply to deny the application of the *Pickering-style* analysis, and to proceed with a forum analysis. Ninth Circuit authority favors the School District's approach.

School Districts hire teachers for their speech. The employer must be permitted to control that speech. "This is so in part because the school system does not "regulate" teachers' speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary." *Mayer v. Monroe County Community School Corp., 474 F.3d 477, 479 (7th Cir. 2007).* Similarly, it is not the rights of the teacher at issue [*12] here; it is the rights of the children. "Children who attend school because they must ought not be subject to teachers' idiosyncratic perspectives." *Id.* "But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers. At least the board's views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues." *Id. at 479-80.*

Several courts have considered arguments that a forum analysis should apply to the classroom, in several different contexts. No court has decided that a classroom is an open forum. "[I]n **classrooms,** during school hours, when curricular activities are supervised by teachers, the nonpublic nature of the school is preserved. Speech occurring during these activities may be regulated under standards different from those that would apply in public fora." *Busch v. Marple Newtown School Dist., 567 F.3d 89, 95 (3d. Cir.2009).* "Some places on the University's campus, such as the administration building, the president's office, or **classrooms** are not opened as fora for use by the student body or anyone [*13] else." *Bowman v. White, 444 F.3d 967, 997 (8th Cir. 2006).* "[T]he selection of textbooks by the state for use in public school **classrooms** is government speech, and is not subject to the forum analysis of Hazelwood or the viewpoint neutrality requirement. *Chiras v. Miller, 432 F.3d 606, 620 (5th Cir. 2005).* "[A]lthough Edwards has a right to advocate outside of the **classroom** for the use of certain curriculum materials, he does not have a right to use those materials in the classroom. *Edwards v. California University of Pennsylvania, 156 F.3d 488, 491 (3d Cir. 1998).*

In *Downs v. Los Angeles Unified School Dist. 228 F.3d 1003, 1005, 1013 (9th Cir 2000),* the Ninth Circuit

determined that a bulletin board, placed in a hallway, *outside of the classroom,* used by teachers, had not been made into open forum, or a limited forum, by the school district, and upheld limitations placed upon displays on that bulletin board. That ruling argues that the less public nature of the classroom is even less likely to qualify as a public forum.

E. "Substantial Disruption" is Not The Test.

Johnson also contends [*14] 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. But Johnson does not fully articulate the test from *Tinker.* Under *Tinker,* there are three conditions that permit limitations on speech, not just "disruption." The actual test is, 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. If a student felt coerced into reading the banners on a daily basis, then that student's rights were invaded, and the *Tinker* limitation does not apply.

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

In the event that this Court were to find that the *Berry/Pickering* balancing [*15] test does not apply, and that Johnson's classroom was a limited public forum under the *Hazelwood* analysis, the School District would still be within its rights to remove the banners. Under that analysis, the Defendants may still prevail if they show that the banners constitutes 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 Clause violation. *Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092 (9th Cir.2000).* "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 [*16] the principles applied in *Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000),* and *Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).* [Citiations.]" *Cole, 228 F.3d at 1101;* 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)

G. California Constitution Limits a Teacher Advocating a Controversial Viewpoint.

Johnson agrees that federal law governs California Establish Clause Analysis. So, like his First Amendment claim, Johnson's Claim for violation of free speech under the California Constitution also fails.

II. Under Equal Protection Johnson Was Not Treated Differently

Johnson returns to his forum analysis argument and applies that argument to the Equal Protection analysis. [*17] The School District continues to contend that the forum analysis cannot be applied to teacher speech during class time.

In equal protection claims brought by a "class of one," the plaintiff must show 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).* But the evidence shows that he was not intentionally treated differently. While he asserts that several documents posted in other classrooms are similar to his banners, the only display that is as large and as

prominent as his banners is the display of the "Tibetan Prayer Flags." But there is no evidence that the flags communicated any religious ideas. They appear to be decorative, and inscrutable, since they are written in Sanskrit, which no person at the school has been able to read. Exh. 5, Doc. #54-4, pp. 224-225 (Brickley Depo., pp. 88:17-89:6).

III. The Individual Defendants Should Be Granted Qualified Immunity.

Qualified immunity applies to [*18] protect a defendant when the Constitutional right "was not clearly established at the time of the alleged violation." *Cole v. Oroville Union High School Dist., 228 F.3d 1092, 1101 (9th Cir. 2000)*. These public school administrators cannot be expected to understand the details of Constitutional jurisprudence, and *can* reasonably be expected to have believed that the banners violated the Constitution.

This is a complicated case with logical arguments on both sides, in a legal arena where appellate justices frequently disagree. School Administrators have been carefully taught that advocating religion is not permitted in the classroom. All these school Administrators agreed that Johnson's banners looked like religious advocacy. They cannot reasonably have been expected to believe that these banners would be permitted by the Court.

CONCLUSION

The difficult factual issue in this case is the national slogans Johnson chose to display. Taken separately, and displayed more moderately, each line would be permissible. When combined and written large, with the repeated references to "God" along with the historical context of the phrases, the banners imply that the government [*19] endorses religion, and the particular religion that identifies the deity as "God" the "Creator" instead of "Buddha" or "Allah." From the point of view of the students, Johnson *is* the Government. So his banners teach students that the United States and the School District endorse the religion that identifies the deity as "God."

In *C.F. v. Capistrano Unified School Dist., 615 F.Supp.2d 1137, 1155 -1156* (C.D.Cal., 2009) the court determined that a science teacher could not make statements in class that were critical of religion. The court recognized that critical thinking was important in the classroom, but also saw that even a minor transgression would harm the rights of students. The Court quoted a passage limiting the support of religion. "[I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" *Id.* at quoting *School Dist. of Abington, 374 U.S. at 225 (1963);* see also *Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 36-37,* [*20] (2004) (O'Connor, J., concurring) (explaining that "[t]here are no de minimis violations of the Constitution"). In this case it is Johnson who is advocating religion with the appearance of government approval and the support of the School District. That is improper; the government must remain completely neutral on the issue of religion.

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

DATED: October 19, 2009

Respectfully submitted,

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DECLARATION OF SERVICE

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of San Diego in the office [*21] 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 October 19, 2009, I caused to be served the following document:

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

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

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I declare under penalty of perjury under the laws of the State of California that the foregoing is [*22] true and correct.

Executed on October 19, 2009, at San Diego, California.

/s/ Jack M. Sleeth Jr.
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