BRADLEY JOHNSON, Plaintiff, v. POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM, LINDA VANDERVEEN, ANDREW PATAPOW, TODD GUTSCHOW, and PENNY RANFTLE, all individually and in his or her official capacity as a Member of the Board of Education for the Poway Unified School District; DR. DONALD A. PHILLIPS, individually and in his official capacity as Superintendent of the Poway Unified School District; WILLIAM R. CHIMENT, individually and in his official capacity as Assistant Superintendent of the Poway Unified School District; and DAWN KASTNER, individually and in her official capacity as Principal, Westview High School, Poway Unified School District, Defendants.

CASE NO. 07cv783 BEN (NLS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. Ct. Motions 212047; 2009 U.S. Dist. Ct. Motions LEXIS 75418

October 19, 2009

Motion for Summary Judgment

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

JUDGES: Hon. Roger T. Benitez

TITLE: Plaintiff's Reply Memorandum In Support Of Motion For Summary Judgment

TEXT: Defendants' opposition invites this court to ignore the undisputed material facts and controlling law, to assume that certain inconvenient facts do not exist, and to accept their facile (and patently erroneous) conclusion that their undifferentiated fear of an Establishment Clause violation permits them to engage in viewpoint discrimination. By silencing Plaintiff's personal, non-curricular *patriotic* expression on account of Plaintiff's viewpoint, while approving the prominent display of personal, non-curricular *Buddhist religious items,* among other teacher displays, Defendants have violated clearly established constitutional rights.

In their opposition, Defendants complain that "[Plaintiff] misses the bigger picture by setting the parameters [*2] too broadly." (Defs.' Opp'n at 4). To the contrary, it is Defendants who miss the picture altogether. Accepting Defendants' arguments removes all "parameters"-including those that are required by the United States and California Constitutions-thereby effectively negating the constitutional rights of Plaintiff. Indeed, it is Defendants who have created the forum for the personal, non-curricular speech at issue here. If Defendants want to close the forum, they could. The fact that they refuse to do so and instead seek to retain the power to permit the expression of viewpoints they favor and censor those they do not is disturbing-and it is unconstitutional. n1 In the final analysis, Defendants are inviting this court to rewrite First Amendment law to allow government officials to discriminate based on a speaker's view. This court should decline the invitation.

n1 Defendant Chiment testified on behalf of the School District as follows: "You could make the argument that if the District were to say no one can put up anything up (sic) unless it's absolutely curriculum related and these [Plaintiff's banners] were up, then they would violate it. But our District has chosen - and that would be permissible, I think, for a School District to do so, *but our District has chosen not to do that,* to allow *noncurricular and personal* as well as curricular. And so when that decision's been made, *I think that these at least meet that test.* The test they don't meet is the advocacy of a particular sectarian *viewpoint.*" (Chiment Dep. at 128-29 at Ex. 3) (emphasis added).

[*3]

ARGUMENT

I. Defendants' Viewpoint-Based Restriction Is Unconstitutional.

A. Plaintiff's Banners Constitute Personal, Non-Curricular Speech.

There is no dispute that Plaintiff's banners constitute speech. And Defendants do not argue that Plaintiff's banners are "government speech," nor could they in light of the undisputed facts. n2 Defendants admit that Plaintiff's banners constitute "non-curricular personal" speech. n3 They admit that "Plaintiff's banners do not belong to the School District; they are his personal items." (Defs.' Resp. to Stmt. of Facts at P 23). And they admit that Plaintiff's banners "were not used to teach math[,] and they were not used as part of any of [Plaintiff's] extracurricular activities." n4 (Defs.' Resp. to Stmt. of Facts at P 26).

n2 At most, Defendants claim that "the banners contained speech made by [Plaintiff] which carries the imprimatur of the School." (Defs.' Resp. to Stmt. of Facts at P 62). This assertion, however, is flatly contradicted by their testimony. (*See* Pl.'s Stmt. of Facts at PP 55, 56, 62). Nonetheless, even accepting this claim, Defendants' viewpoint-based restriction cannot withstand constitutional scrutiny. *See Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1010 (9th Cir. 2000)* (stating that the Ninth Circuit has "incorporated 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases") (citing *Planned Parenthood v. Clark County Sch. Dist., 941 F.2d 817, 828 n. 19, 829-30 (9th Cir. 1991)).*

[*4]

n3 Defendants admit the following: "The [Tibetan prayer] flags, like Johnson's banners, are ***non-curricular personal items in nature.***" (Defs.' P & A in Supp. of Mot. for Summ. J. at 19) (Doc. No. 55) (emphasis added).
n4 Defendant Chiment testified on behalf of the School District as follows:

> Q: [D]o you have any information that [Plaintiff] actually used those in teaching his math class, those banners?
> A: I have no information that he used those banners in the teaching of his math class. * * *
> Q: Are you aware of those banner being part of any aspect of the math curriculum as far as you understand the math curriculum in the high schools at Poway School District?
> A: I do not believe they are. * * *
> Q: * * * Prior to . . . directing [Plaintiff] to remove those banners, *did you have any information that students were studying these banners or their slogans as part of [Plaintiff's] math classes?*
> A: *No.*
>
> Q: And, again, prior to . . . directing [Plaintiff] to remove those banners, did you have any information that the students were discussing any aspects of those slogans depicted in [Plaintiff's] banners during his math classes?
> A: No.
> Q: [Prior to directing Plaintiff to remove his banners], did you have any information that those banners were being used in any way for any extracurricular activities that [Plaintiff] might be involved with?
> A: No.
> Q: So was it your understanding in January of 2007 that those banners weren't part of the math curriculum for [Plaintiff]? * * *
> A: ***It was my understanding that these were not part of the math curriculum.***

(Chiment Dep. at 93-95 at Ex. 3) (emphasis added).

[*5]

Consequently, the restriction on Plaintiff's personal speech plainly implicates Plaintiff's constitutional rights. *Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)* ("First Amendment rights . . . are available to teachers and students."); *Morse v. Frederick, 551 U.S. 393, 403 (2007)* ("In *Tinker,* this Court made clear that 'First Amendment rights applied in light of the special characteristics of the school environment, are available to teachers and students.'"); *Perry Educ. Ass'n v. Perry Local Educators, 460 U.S. 37, 44 (1983)* ("The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school . . . . "); *see also id. at 44* ("[C]onstitutional interests are implicated by denying [appellee] use of the interschool mail system.").

B. A Forum Analysis Applies Because Defendants Created the Forum at Issue.

The overwhelming evidence demonstrates: (1) that Defendants created a forum for the personal, non-curricular speech of its teachers; (2) that this policy or practice has been in place for more than 30 years; (3) that the [*6] district's teachers express a wide array of personal, non-curricular messages in their classrooms as a result of this policy or practice, including messages addressing controversial social and political issues as well as religious messages; (4) and that Plaintiff's banners were displayed in this forum for approximately 25 years pursuant to this policy or practice without complaint. Consequently, this case does not involve some vague description or identification of a forum. *Compare Tucker v. State of Cal. Dep't of Educ., 97 F.3d 1204, 1209 (9th Cir. 1996)* (rejecting the creation of "a limited purpose public forum in [the defendant's] 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"). Rather, the School District has knowingly, purposefully, and intentionally opened the classroom walls for the personal, non-curricular speech of its teachers. *See Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800, 802 (1985)* (applying a forum analysis for restrictions [*7] on the use of government property for expressive purposes). Defendants cannot refute this evidence by simply closing their eyes and wishing it weren't so. Indeed, in their response to Plaintiff's undisputed statement of facts, Defendants "dispute" the creation of the forum only "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." (Defs.' Resp. to Stmt. of Facts at PP 35-42) (emphasis added). Thus, they do not deny the *existence* of the forum, n5 and Plaintiff does not deny that there is certain speech that can be restricted by government officials in this forum *under the law*. n6 The question remains, however, whether the application of the "District's own policies and practices"-their viewpoint-based restriction-in this case is unconstitutional. And the answer to that question based on controlling law is an unequivocal *yes*. Moreover, in order to analyze this question *under the facts of this case,* the court must engage in a forum analysis because the case involves the use of government property (classroom walls) for expressive purposes (Plaintiff's banners). [*8] *Cornelius, 473 U.S. at 802* (adopting "a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for [expressive] purposes"). Thus, in light of the forum created by Defendants for the personal, non-curricular speech of the district's teachers, what limitations does the law *permit* the government to make? Clearly, whether the forum is a public forum, a designated public forum, a limited public forum, or even a nonpublic forum, there is no disputing that the law does not permit government officials to make viewpoint-based restrictions. *See* Section C, below. As a result, Defendants' viewpoint-based restriction under the facts of this case is unconstitutional.

n5 Defendant Chiment testified on behalf of the School District as follows:

> Q: Sir, would you agree that the School District opens its classroom walls to certain expression by its teachers?
>
> A: In a limited way we open the walls, yes.
>
> Q: And that would be for messages that - and ideas that may not necessarily be curriculum related; is that right, sir?
>
> A: That's correct.

(Chiment Dep. at 273 at Ex. 3).

[*9]

n6 For example, the School District could prohibit speech that promotes illegal drug use or underage alcohol consumption, *see Morse, 551 U.S. at 408-09,* that "materially and substantially disrupt[s] the work and discipline of the school," *Tinker, 393 U.S. at 513,* or that is sexually suggestive, *Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986)*. The School District could also restrict speech that "incite[s] to imminent lawless action." *Brandenburg v. Ohio, 395 U.S. 444, 449 (1969)*. None of these constitutional limitations apply here.

C. Defendants' Viewpoint-Based Restriction Violates the First Amendment.

Defendants did not censor Plaintiff's speech because the banners "caused a material disruption or substantial disorder in the school or . . . interfered with the curriculum." (Defs.' Resp. to Stmt. of Facts at PP 98, 99). The decision to order Plaintiff to remove his banners was based on the "viewpoint" of the message expressed. (Defs.' Resp. to Stmt. of Facts at PP 93-96). Consequently, Defendants' [*10] speech restriction cannot withstand scrutiny under the United States or California Constitutions, which prohibit viewpoint discrimination even in nonpublic forums. *Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107-08 (2001); Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891 (9th Cir. 2007); Truth v. Kent Sch. Dist., 524 F.3d 957, 973 (9th Cir. 2008)* (observing that in a limited public forum "where restriction to the forum is based solely on . . . religious viewpoint, the restriction is invalid"); *Cogswell v. City of Seattle, 347 F.3d 809, 815 (9th Cir. 2003)* ("[If speech] fall[s] within an acceptable subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker."); *Brown v. California Dep't of Transp., 321 F.3d 1217, 1222 (9th Cir. 2003)* (stating that "[r]estrictions on free expression in a nonpublic forum [*11] are constitutional only if the distinctions drawn are . . . 'viewpoint neutral.'" (quoting *Cornelius, 473 U.S. at 806); Perry, 460 U.S. at 46* (stating that

speech restrictions in a nonpublic forum must be reasonable and viewpoint neutral); *California Teachers Ass'n v. Governing Bd. of San Diego Unified Sch. Dist., 45 Cal. App. 4th 1383, 1391 (1996)* (applying First Amendment principles to claims arising under California Constitution).

In sum, it is evident why Defendants want to avoid a forum analysis at all costs: the case law overwhelmingly demonstrates that their speech restriction is unconstitutional.

II. Undifferentiated Fear of an Establishment Clause Violation Does Not Justify Defendants' Viewpoint-Based Restriction of Plaintiff's Speech.

Defendants claim that their "interest in avoiding an Establishment Clause violation trump's [Plaintiff's] right to free speech." (Defs.' Opp'n at 3). This assertion cannot withstand even modest scrutiny. Indeed, the Supreme Court has made plain that the undifferentiated fear of an Establishment Clause violation does not justify a viewpoint-based restriction on speech. *Widmar v. Vincent, 454 U.S. 263, 273 (1981);* [*12] *Rosenberger, 515 U.S. at 841-42; see also Tucker v. California Dep't of Educ., 97 F.3d 1204, 1212-13 (9th Cir. 1996)* (rejecting Establishment Clause defense in "employee" speech case).

Moreover, the cases cited by Defendants, which Defendants acknowledge involve *proselytizing* and *prayer* in public schools, are not remotely analogous to the facts of this case. *See, e.g., Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994)* (restricting a teacher from evangelizing students about his Christian faith and beliefs); *Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092 (9th Cir. 2000)* (restricting a sectarian, proselytizing valedictory speech and a sectarian invocation at graduation); *Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002)* (restricting the use of the public address system for prayer and proselytizing); *Lassonde v. Pleasanton Unified Sch. Dist, 320 F.3d 979 (9th Cir. 2003)* (prohibiting proselytizing in high school graduation speech).

Here, there is no dispute as to the following facts:

. "Plaintiff's banners contain the following *historical* phrases: [*13] ***"In God We Trust,"*** the official motto of the United States; ***"One Nation Under God,"*** the 1954 amendment to the Pledge of Allegiance; ***"God Bless America,"*** a patriotic song; ***"God Shed His Grace On Thee,"*** a line from "America the Beautiful," a patriotic song; and ***"All Men Are Created Equal, They Are Endowed By Their Creator,"*** an excerpt from the preamble to the Declaration of Independence." (Defs.' Resp. to Stmt. of Facts at P 68) (emphasis added).

. "Religious people founded this Nation; as a result, references to God are common in our songs, mottoes, and slogans." (Defs.' Resp. to Stmt. of Facts at P 75).

. "The phrases included in Plaintiff's banners were not taken from any religious documents or religious texts." (Defs.' Resp. to Stmt. of Facts at P 76).

. "Plaintiff's banners do not contain quotes or passages from Sacred Scripture or any other religious text." (Defs.' Resp. to Stmt. of Facts at P 77).

. "'In God We Trust' is the official motto of the United States." (Defs.' Resp. to Stmt. of Facts at P 79).

. "In 1942, Congress enacted the Pledge of Allegiance, which was amended in 1954 to officially include the phrase 'under [*14] God.'" (Defs.' Resp. to Stmt. of Facts at P 80).

. "'God Bless America' is an American patriotic song written by Irving Berlin in 1918 and later revised by him in 1938." (Defs.' Resp. to Stmt. of Facts at P 85). .

. "'God Bless America' is a phrase that is also commonly used in speeches by the President of the United States." (Defs.' Resp. to Stmt. of Facts at P 86).

. "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." (Defs.' Resp. to Stmt. of Facts at P 87).

. "'God Shed His Grace on Thee' is a verse from 'America the Beautiful,' an American patriotic song that is often played at public events." (Defs.' Resp. to Stmt. of Facts at P 88).

. "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, [*15] or student about the banners." (Defs.' Resp. to Stmt. of Facts at P 89).

. "Plaintiff's banners never prohibited or interfered with his ability to educate the students in his math class." (Defs.' Resp. to Stmt. of Facts at P 90).

Moreover, Defendant Chiment testified on behalf of the School District as follows:

> Q: Have you had any information of any negative connotations or comments about [Plaintiff's] teaching ability?
> A: None.
> Q: How about anything from a personal perspective?
> A: None.
> Q: ***Anyone ever make any complaints that you're aware of that he would proselytize students impermissibly?***
> A: ***No.***

(Chiment Dep. at 25 at Ex. 3) (emphasis added).

Combine these facts along with the fact that Defendants permit a science teacher to erect in her classroom a 35 to 40 foot personal, non-curricular display of Buddhist ***prayer*** flags and it is overwhelmingly evident that Defendants' alleged fear of an Establishment Clause violation is baseless. Indeed, this evidence demonstrates that Defendants' feigned Establishment Clause concern is little more than a pretext for their viewpoint-based restriction of Plaintiff's speech.

III. A "Balancing [*16] Test" Does Not Weigh in Favor of Restricting Plaintiff's Speech.

Defendants eschew any forum analysis in favor of a "balancing test"-albeit, a test in which Defendants predetermine the outcome in their favor based on their tendentious view of the law and facts. While a "balancing test" is not the proper way to analyze the constitutional issues in this case, even the *fair* application of such a test demonstrates that Defendants violated Plaintiff's constitutional rights.

The balancing test that Defendants favor was described in *Pickering v. Board of Educ., 391 U.S. 563 (1968). See also Berry v. Department of Soc. Serv., 447 F.3d 642 (9th Cir. 2006).* This test requires "a balance between the interests of the teacher, 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." *Pickering, 391 U.S. at 568.* Thus, an analysis under this test requires a *true* balancing of interests, not one in which the government has a finger on its side of the scale, as Defendants' analysis does.

Consequently, what [*17] evidence is there to demonstrate that Plaintiff's speech harmed the School District's "interest . . . in promoting the efficiency of the public services it performs through its employees" that is sufficient to

trump Plaintiff's constitutional rights? The answer is simple: there is no such evidence. As Defendants admit, "Plaintiff's banners never prohibited or interfered with [Plaintiff's] ability to educate the students in his math class." (Defs.' Resp. to Stmt. of Facts at P 90). They admit that during the 30 plus years that Plaintiff has been officially evaluated, none of his "evaluators ever inform[ed] him that his banners were impermissible or that they disrupted or distracted from Plaintiff's teaching or the students' learning in any way." (Defs.' Resp. to Stmt. of Facts at P 31). They admit that "[d]uring 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[, and that p]rior to January 2007, Plaintiff had not received one complaint from any School [*18] District administrator, parent, or student about the banners." (Defs.' Resp. to Stmt. of Facts at P 89). And they admit that "[a]t the time they directed Plaintiff to remove his banners, [they] had no evidence that Plaintiff's banners caused any material disruption or disorder in the School District." (Defs.' Resp. to Stmt. of Facts at P 99). Thus, there is no evidence of harm to Defendants, let alone sufficient evidence to trump Plaintiff's constitutional rights. Moreover, Defendants admit that "[t]he School District believes that public schools play an important role educating and guiding our youth through the marketplace of ideas and instilling national values. [And o]ne method used by the School District to accomplish [this] task . . . is to permit students to be exposed to the rich diversity of backgrounds and opinions held by high school faculty." (Defs.' Resp. to Stmt. of Facts at PP 63, 64). Consequently, Plaintiff's banners actually "promot[e] the efficiency of the public services [the School District] performs through its employees." And as noted previously, Defendants' fear of an Establishment Clause violation is not plausible under the facts of this case. [*19]

In the final analysis, the balance weighs heavily in favor of protecting Plaintiff's speech.

CONCLUSION

Plaintiff respectfully requests that this court grant his motion for summary judgment.

Respectfully submitted,

THOMAS MORE LAW CENTER

By: /s/ Robert J. Muise
Robert J. Muise, Esq. *
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Counsel for Plaintiff Bradley Johnson

* Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I am employed in the County of Washtenaw, State of Michigan. I am over the age of eighteen and not a party to the within action. My business address is Thomas More Law Center, 24 Frank Lloyd Wright Drive, P.O. Box 393, Ann Arbor, Michigan 48106.

On October 19, 2009, I served the following documents entitled: **Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment** and this certificate of service on the parties in this action as follows: [see service list]

[**X**] (BY ELECTRONIC SERVICE) On the date executed below, I served the document(s) [*20] via CM/ECF described above on the designated recipients appearing on the service list through electronic transmission of said

document(s). A certified receipt is issued to the filing party acknowledging receipt by CM/ECF's system. Once CM/ECF has served all designated recipients, proof of electronic service is returned to the filing party.

[] (BY MAIL) I caused true copies of said document(s) to be enclosed in a sealed envelope(s) with postage thereon fully prepaid and the envelope(s) to be placed in the United States Mail at Ann Arbor, Michigan. I am readily familiar with the practice of the Thomas More Law Center for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

[] (BY FACSIMILE) The above-referenced document(s) was transmitted by facsimile transmission to each recipient whose name and facsimile number appear on the service list. The transmission was reported as completed and without error. A true and correct copy of that transmission report is attached hereto and incorporated by reference.

[] [*21] (BY FEDERAL EXPRESS) I caused the above-described documents to be served on the interested parties noted on the service list by Federal Express.

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

Executed on October 19, 2009, at Ann Arbor, Michigan.

/s/ Robert J. Muise
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