IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No. 10-55445

BRADLEY R. JOHNSON

Plaintiff/Appellee,

v.

POWAY UNIFIED SCHOOL DISTRICT, et al.

Defendants/Appellants.

On Appeal from the United States District Court
Southern District of California - San Diego
Case No. 3:07-cv-00783-BEN-WVG
Honorable Roger T. Benitez, District Judge

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

A math teacher at a public high school displayed two very large banners in his classroom. One banner had red, white, and blue stripes, with four phrases in large block letters: "IN GOD WE TRUST"; "ONE NATION UNDER GOD"; "GOD BLESS AMERICA"; and "GOD SHED HIS GRACE ON THEE." The other banner read: "All Men Are Created Equal They Are Endowed By Their CREATOR," with the word "CREATOR" in capital letters twice the size of the other words.

It is the unmistakable law in this Circuit that a school district does not violate a teacher's First Amendment rights by restricting the teacher from advocating religion to students during the school day. *Peloza v. Capistrano Unified School District*, 37 F.3d 517, 522 (1994). This is because schools have the right to avoid a violation of the Establishment Clause. *Id.*

The banners' phrases are both historical and religious. But the school district concluded that, displayed together, the religious message predominated and advocated. The school district offered the teacher alternative items to display, with the same phrases in context, such as the full text of the Declaration of Independence. The teacher refused this option. The school district instructed him to remove the banners. He complied, but sued the school and administrators for violation of his constitutional rights.

The District Court held that the removal of the banners violated the teacher's constitutional rights. For the first time, the Court also erroneously held that a school classroom is a limited public forum, even during school hours. Moreover, despite the holding in *Peloza*, the District Court denied the individuals' defense of "qualified immunity." The school defendants now appeal, and urge this Court to reverse and enter judgment in their favor.

Although a school may be a marketplace of ideas, when teachers speak to students during paid teaching time, they are extensions of the school, and the school has the right to restrict their speech. Here, since the banners were displayed permanently, the teacher was speaking to students as part of his official duties. Such speech should not be afforded First Amendment protections. Moreover, because the speech crossed the line from patriotism to religious advocacy, the school had the right to restrict the speech. The District Court erred in holding otherwise.

II. JURISDICTIONAL STATEMENT

A. The District Court's Jurisdiction.

Plaintiff Johnson filed suit against the Poway Unified School District and individual School Defendants[1] (collectively, "School"), alleging claims under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and the California Constitution. 2 ER 091. Accordingly, the District Court had jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331 and 1343, and had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a). The District Court had jurisdiction to grant equitable relief and nominal damages pursuant to 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. § 1983.

B. The Ninth Circuit's Jurisdiction.

The Ninth Circuit has jurisdiction to review the final judgment. The District Court filed an order under Federal Rules of Civil Procedure, Rule 56, granting summary judgment and disposing of all claims in Johnson's favor. 1 ER 001. A final judgment was entered in Johnson's favor on February 26, 2010. 4 ER 704. On March 25, 2010, the School Defendants timely filed a notice of appeal from the

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[1] The individual School defendants consist of five elected school board members (Jeff Mangum, Linda Vanderveen, Andrew Patapow, Todd Gutschow, and Penny Ranftle), District Superintendent Dr. Donald A. Phillips, Associate Superintendent for Personnel Support Services William R. Chiment, and Dawn Kastner, principal of Westview High School, where Johnson teaches. 2 ER 93-94.

judgment. 4 ER 705. Accordingly, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

III. ISSUES

1. Did the District Court err by holding that the School violated Johnson's First Amendment free speech rights?

Subissue 1(a): Is Johnson's speech curricular, and thus the School's speech, which would not be afforded First Amendment protections?

Subissue 1(b): Is Johnson's speech, made pursuant to his official duties as a government employee, precluded from First Amendment protection?

Subissue 1(c): Does the School's right to be free from an Establishment Clause violation outweigh Johnson's free-speech right under the Ninth Circuit's balancing test for government employee speech?

Subissue 1(d): Did the District Court err in deciding that the School's fear of an Establishment Clause violation was not justified?

2. Did the District Court err in holding that the public school classroom used by a teacher during school hours was a limited public forum?

3. Did the District Court err by holding that the School violated the Establishment Clause?

4. Did the District Court err by holding that the School violated the Equal Protection Clause?

5. Did the District Court err by holding that the School violated Johnson's state constitutional rights?

6. Did the District Court err in denying the School's motion for summary judgment while granting Johnson's?

7. Did the District Court err by denying qualified immunity to the individual School Defendants?

IV. STATEMENT OF THE CASE

A. The Pleadings.

Johnson's First Amended Complaint ("FAC") is the operating complaint, alleging six claims against all Defendants: (1) Violation of Freedom of Speech under the First Amendment to the U.S. Constitution; (2) Violation of the Establishment Clause of the First Amendment to the U.S. Constitution; (3) Violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; (4) Violation of the Freedom of Speech under the California Constitution;

(5) Violation of the No Preference Clause of the California Constitution; and (6) Violation of the Establishment Clause of the California Constitution. 2 ER 103-108. The first three claims are brought under 42 U.S.C. section 1983. 2 ER 103-105.

The FAC seeks the following remedies: (*a*) a declaration that Defendants have violated federal and state law; (*b*) an injunction to prevent Defendants from discriminating against the display of classroom messages with a Judeo-Christian viewpoint; (*c*) nominal damages against the individual Defendants; and (*d*) attorney fees and costs. 2 ER 107.

After the School Defendants unsuccessfully moved to dismiss the FAC under Rule 12(b)(6) [4 ER 750-751], they answered and denied the material allegations. 2 ER 109-112. The individual Defendants affirmatively alleged "qualified immunity." 2 ER 114.

B. The Parties' Cross-Motions for Summary Judgment Are Decided In Johnson's Favor.

Following discovery, the parties filed cross-motions for summary judgment. 2 ER 43; 3 ER 411. The District Court heard oral arguments of the parties on the cross-motions. 1 ER 33-90; see also RT. The District Court issued its decision on

February 25, 2010, granting Johnson's motion, and denying Defendants' motion. 1 ER 001-002.

As to the free speech claims under the First Amendment and California Constitution, the District Court first determined that the School had opened a "limited public forum" by permitting teachers to decorate their own classrooms, and thus the School was required to maintain viewpoint neutrality regarding the items posted on the classroom walls by teachers. 1 ER 014. The Court then held that the Defendants had discriminated against Johnson's banners because of their Christian viewpoint. 1 ER 016-018. The Court rejected the Defendants' argument that the banners, as presented, impermissibly violated the Establishment Clause. 1 ER 018-020. The Court also rejected Defendants' arguments that Johnson was speaking as a public employee and therefore his speech did not warrant First Amendment protections. 1 ER 021. The Court also found that the Ninth Circuit's *Pickering*-style balancing test advocated by Defendants did not aid Defendants' position. 1 ER 021-025. Finally, the Court rejected the Defendants' arguments that Johnson's banners should be construed as curricular speech, and therefore not protected by the First Amendment. 1 ER 25-26. The Court then concluded that Defendants violated the First Amendment and California Constitution. 1 ER 026.

The District Court also found in Johnson's favor as to his Establishment Clause claims under federal and state constitutions. 1 ER 029. The District Court rejected Defendants' argument that they were maintaining religious neutrality, finding that the Defendants permitted other displays concerning Buddhism, Hinduism, and anti-religious speech to remain in classrooms. 1 ER 027-029. With respect to Johnson's Equal Protection claim under the Fourteenth Amendment, and the California Constitution's "No Preference" clause, the Court found similarly. 1 ER 030-031.

The District Court also held that the individual Defendants were not entitled to defend on qualified immunity grounds. 1 ER 031. To that end, the Court found that the law in this area is "clearly established." 1 ER 031.

The District Court awarded declaratory relief, issued an injunction permitting Johnson to immediately re-display his banners, ordered the individual Defendants to pay nominal damages of ten dollars each, and determined that Johnson was entitled to recover his reasonable attorney fees and costs. 1 ER 032.

V. FACTS

A. Johnson's Banners Come To the Attention of School Principal, Dawn Kastner.

Defendant Dawn Kastner has been the Principal of Westview High School[2] since July 1, 2006. 3 ER 378. Early in Kastner's tenure as Westview principal (sometime in Fall 2006), she was approached by a Westview teacher, Mr. Subbiah, who asked Kastner why a fellow teacher, Bradley Johnson, was permitted to have certain banners on display in Johnson's classroom. 3 ER 504-505; 4 ER 587. Kastner had also heard about these banners from a student and another teacher, and she wondered what they were talking about. 3 ER 504-505; 4 ER 587.

Some background on Mr. Johnson: He teaches math (calculus, pre-calculus, and algebra) at Westview High School. 2 ER 093; 3 ER 490. He has taught with the District at various high schools for over 30 years. 2 ER 093; 3 ER 490-491. Johnson is Christian, and has served as the faculty adviser for the Christian Club at Westview HS since becoming a teacher there in 2005. 2 ER 093; 3 ER 493. He was previously an adviser at schools where he taught previously. 3 ER 492.

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[2] Westview High School is operated by Defendant Poway Unified School District. 4 ER 578.

Kastner visited Johnson's classroom at Westview and saw the two banners for the first time. 3 ER 505; 4 ER 587. Both banners in Johnson's classroom were prominently displayed in a non-obstructive manner. 2 ER 097. Kastner's first thought about them was, "Wow, these are really big." 3 ER 505.

B. Johnson's Banners.

Both banners are each seven feet wide by two feet tall. 2 ER 097; 3 ER 453-457. Both are located in places in Johnson's classroom where students can easily read them while in their seats. 3 ER 456-457; 3 ER 536.

One banner has red, white, and blue stripes, and has four phrases in large block letters, one over another: "IN GOD WE TRUST"; "ONE NATION UNDER GOD"; "GOD BLESS AMERICA"; and "GOD SHED HIS GRACE ON THEE." 2 ER 097; 3 ER 453-457. The phrase "In God We Trust" is the official motto of the United States. 2 ER 097. The phrase "One Nation Under God" is part of the U.S. Pledge of Allegiance. 2 ER 098-099. The phrase "God Bless America" refers to the song of the same title written by Irving Berlin in the early 20th Century. 2 ER 099. The phrase "God Shed His Grace On Thee" is a phrase from the song, "America the Beautiful." 2 ER 099.

The other banner reads, in large font: "All Men Are Created Equal, They Are Endowed By Their CREATOR." 3 ER 493-497. This phrase is reference to the

preamble to the Declaration of Independence, which states, in part: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." http://www.archives.gov/exhibits/charters/declaration_transcript.html (accessed on July 7, 2010). On the banner, the word "CREATOR"occupies its own line of text in "ALL CAPS" typeface about twice the size of the other words on the banner, which are in "Initial Caps" typeface. 3 ER 493-497. This banner was surrounded by photographs of nature, and was displayed on a separate wall from the "striped" banner. 4 ER 580. Johnson testified that he conceived and designed the layout of this particular banner so that the word "CREATOR" would be larger, in order to highlight his belief that a supreme being provided mankind with the rights described in the preamble to the Declaration of Independence. 3 ER 495.

Johnson testified in his deposition that the purpose of the two banners is for "celebrat[ing] our national heritage," "highlight[ing] the religious heritage and nature of our nation that we have as a foundation" and "espousing God as opposed to no God . . . but not any particular God." 3 ER 496; 497.

Johnson has had the "striped" banner or one like it hanging in his classroom since 1982. 3 ER 494-495. Johnson originally had a banner made out of paper

hanging in his classroom at Mount Carmel High School from 1982 through 1989. 3 ER 495. When Johnson transitioned to Rancho Bernardo High School in 1990, he had a more permanent banner made. 3 ER 494-495. As for the "CREATOR" banner, Johnson had it made in 1989, and displayed it thereafter in his classroom. 2 ER 097; 3 ER 495. Johnson moved to Westview High School in 2003. 3 ER 491. The School could not locate any administrators who could either confirm or deny that the banners have been displayed in Johnson's classroom for length of time Johnson says they have been displayed, so the duration has gone undisputed. Furthermore, there was no evidence presented that any administrator knew about the banners before Principal Kastner brought them to the administrators' attention during the 2006-2007 school year.

C. Kastner meets with Johnson.

When Kastner saw the banners, she was concerned that the banners were very large, and inappropriately promoted a viewpoint advocating God, as the phrases were pulled out of their original context. 3 ER 506. So Kastner met with Johnson soon thereafter to discuss his banners. Kastner told Johnson that taking the phrases concerning God and putting them together in large print out of context was moving away from a patriotic comment to promotion of his religious beliefs that might make some students uncomfortable. 3 ER 508. During the discussion, Kastner suggested

to Johnson that an Islamic student walking into the classroom may feel bad or like he or she would not fit in, but Johnson replied something to the effect of "sometimes that's necessary." 3 ER 506. Johnson told Kastner he felt strongly that he needed the signs to stay up, that he had a right to have the banners up, and that he'd had them up for a long time. 3 ER 508. Kastner suggested to Johnson that he put the banner phrases "in context," such as posting the entire Declaration of Independence. 3 ER 506; 4 ER 589. She also suggested reducing the scale of the banners to "something small around the desk area." 3 ER 508. Johnson did not agree. 3 ER 508.

Following her meeting with Johnson, Kastner was unsure how to proceed, so she contacted Melavel Robertson (Assistant Superintendent for Learning Support Services [3 ER 513]) for guidance on handling the situation. 3 ER 505. Kastner's secretary took pictures of the banners and sent them to Robertson. 3 ER 505, 538. Robertson was concerned about the size of the banners and felt that students of different faiths may feel uncomfortable with a banner that large. 3 ER 516-517.

D. The School's Policies, Procedures, and Practices re: Teacher Speech.

Robertson suggested that Kastner speak with William Chiment, because he is the School administrator who handles personnel concerns which might raise legal issues. 3 ER 515-516. Chiment has been the School's Associate Superintendent for

Personnel Support Services since 1999. 3 ER 471. Chiment spoke with Kastner and reviewed photographs of the banners in Johnson's classroom. 3 ER 472.

According to Chiment, the School's informal practice is to permit teachers to decorate their classrooms with personal items such as posters, flags, or banners, but there are limitations that apply at the School's discretion. 3 ER 473-475. For example, teachers' personal items cannot violate the School's anti-harassment policy. 3 ER 474. The School may also limit personal items by taking into consideration the size of the item, the age appropriateness of the particular item for the students in the classroom, the potential relationship to the curriculum, and the School's mission. 3 ER 476-477.

The School also has a formal written policy regarding the teaching of controversial issues, which also governs the items that teachers may display on their classroom walls. 3 ER 459, 478. This formal policy, BP 3.11, provides, in part, that teachers must "exercise caution and discretion when deciding whether or not a particular issue is suitable for study or discussion in any particular class." 3 ER 459. The policy also "requires teachers to ensure that all sides of a controversial issue are impartially presented with adequate and appropriate factual information" and "[w]ithout promoting any partisan point of view." 3 ER 459.

This Policy has an attached Administrative Procedure, entitled AP 3.11.2, containing a section entitled the "Responsibilities of Teachers." 3 ER 465. Those responsibilities include "choos[ing] suitable and useful instructional materials," "direct[ing] class discussion to cover all points of view," distinguish[ing] between teaching and advocating, and ***refrain[ing] from using classroom teacher influence to promote partisan or sectarian viewpoints***." 3 ER 465. This Administrative Procedure also has a section on the rights of students, and expressly gives students the "right to form and express individual opinions on controversial issues without jeopardizing relations with teachers or others." 3 ER 466. The Administrative Procedure also has a section entitled "The Selection of Issues." 3 ER 466. Within that section, the Procedure states that in general, "the decision as to whether a controversial issue should become a matter of school study should be based upon" ten listed criteria, including "1. It must contribute significantly to the objectives of the curriculum; . . . 6. The issue must involve alternate points of view which can be understood and defined by students; 7. The issue must be one about which information is present and available so alternatives can be discussed and evaluated on a factual and reasonable basis; . . . and 10. The issue must provide opportunity for critical thinking for the development of tolerance and the understanding of conflicting

points of view, at the same time that it contributes to the prescribed course of study and the general educational program of the school." 3 ER 466.

The School's position is that expression of religion within the District is proscribed by the law of the U.S. and State constitutions. 3 ER 481. The School contends that its policies and procedures are consistent with the U.S. and State constitutions. 3 ER 482. Even non-curricular items are part of the learning environment and potentially advocating, and therefore such items are subject to this written policy. 3 ER 479-480. Sometimes the School receives complaints from parents about only one side of an issue being taught, and the School works with principals to ensure that teachers are teaching both sides of an issue. 3 ER 514.

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

The issue involving Johnson's banners was discussed by the School's cabinet-level administrators after it came to their attention. 3 ER 516-517. Ultimately, Chiment made the decision to have Johnson remove his banners. 3 ER 461. This decision was agreed to by the Superintendent's cabinet (consisting of Superintendent and Defendant Donald Philips, the Deputy Superintendent, John Collins, Chiment, and the School's assistant superintendents). 3 ER 519, 521-522.

Mr. Chiment asked Mr. Johnson by telephone to remove his banners on or about January 19, 2007. 3 ER 461, 472. A few days after their telephone

conversation, Mr. Chiment sent a letter to Johnson to confirm the decision to have Johnson remove his banners, and to provide the legal basis for the decision in writing. 3 ER 461; 472. Referring to the two banners, the 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." 3 ER 461. The letter expressly notes the prohibitions in California Education Code section 51511 and AR 3.11.2 as grounds for the School's position. *Id.*

During his deposition, Chiment further explained that the reason Johnson was asked to remove his banners is because they violate District policy and procedures, which are consistent with the California and U.S. Constitutions and California Education Code. Specifically, Chiment stated that 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). 3 ER 468; 482-484. Although religion is not a category of items prohibited from classroom walls, the School may prohibit religious viewpoints where the teacher appears to be teaching or advocating a religious viewpoint separate from a curricular context. 3 ER 482. Chiment was

also concerned that Johnson's banners could be a distraction to a student who might be upset with the particular theology of the banners. 3 ER 487.

But School administrators did not try to scrub Johnson's classroom of religious references; rather, the administrators provided Johnson with some suggested alternative posters to post on his walls in lieu of his banners. 3 ER 461. Mr. Chiment even asked his staff to go to a teacher supply store and buy items that would place the statements of Mr. Johnson's banners in context. 3 ER 485. These suggested materials consisted of various posters depicting the entire text of the Declaration of Independence, displays of coinage containing the words "In God We Trust" and the text of the Pledge of Allegiance. 3 ER 461, and photographs of materials are at 3 ER 528-530. Principal Kastner took the materials out to Johnson's classroom. 3 ER 510. Johnson received the materials, but declined to display materials in his classroom in lieu of his banners. 3 ER 498-499.

F. Site Inspections During Discovery.

After the decision to remove the banners was made, and after the lawsuit was filed, Johnson conducted a site inspection of the School District classrooms at Mount Carmel High, Rancho Bernardo High, Westview High, and Poway High. 2 ER 183. Photographs of some of the items displayed in various classrooms during the site inspection were submitted to the District Court by Johnson in support of his motion

for summary judgment. These items make various references to pop culture, history, art, science, and current events; Johnson claims some of these items advocate for no religion or a particular religion. 2 ER 196-293.

VI. SUMMARY OF ARGUMENTS

The District Court erred by granting Johnson's motion for summary judgment and denying Defendants' motion for summary judgment. Johnson has no free speech rights to display his banners in his classroom. Johnson's banners consist of speech, perpetually broadcast to students during the school day, and this speech is made pursuant to Johnson's duties as a teacher. The banners, although tying into national and patriotic sentiment, have the primary message of advancing religion over non-religion and Judeo-Christian religion over others. The School therefore has the right to remove the banners to keep itself free from an Establishment Clause violation.

The School did not violate the Establishment Clause by directing removal of the banners, because the School's purpose in doing so was to prevent its own violation of the Establishment Clause, and this purpose is secular and compelling. The School also did not violate Johnson's equal protection rights. Although other material in other classrooms touch on religion, there is no evidence that this other material *advocates* in favor of religion or non-religion. Furthermore, there is no

evidence that the School knew of the other material at the time the decision was made with respect to Johnson's banners, and so there was no intent to discriminate. Also, the state law claims should have been adjudicated in Defendants' favor on the same grounds as the federal claims.

Finally, the District Court erred by finding that the individual Defendants were not entitled to qualified immunity. The current law is that teachers may not advocate religion during the school day, and the individual Defendants had a reasonable belief that Johnson's banners did just that. The District Court therefore erred in holding that well-settled law utilizes a forum-analysis for teacher speech in the classroom and that Defendants discriminated on the basis of viewpoint.

VII. ARGUMENTS

A. Standards of Review.

Each of the issues presented in this appeal are reviewed *de novo*. A district court's grant or denial of summary judgment is reviewed *de novo*. *Travelers Cas. & Sur. Co. of America v. Brennete*, 551 F3d 1132, 1137 (9th Cir. 2009) (order granting); *Padfield v. AIG Life Ins. Co.*, 290 F3d 1121, 1124 (9th Cir. 2002) (order denying). The appellate court evaluates each cross-motion for summary judgment separately, "giving the nonmoving party in each instance the benefit of all reasonable

inferences." *American Civil Liberties Union of Nev. v. City of Las Vegas*, 333 F3d 1092, 1097 (9th Cir. 2003).

Issues arising under the First Amendment are reviewed *de novo* even when the inquiry is essentially factual. *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007).

The question of whether an employee is speaking as a private citizen or public employee for purposes of the speech's protected status is a mixed question of fact and law. *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). However, the "ultimate constitutional significance of the facts as found" is a question of law. *Id.* at 1129-30. In this case, the material facts regarding Johnson's duties as a teacher are undisputed, and therefore a *de novo* standard is appropriate.

A defendant's assertion of "qualified immunity" presents a legal question, and is also reviewed *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). "A court engaging in review of a qualified immunity judgment should therefore use its full knowledge of its own and other relevant precedents." *Id.*, internal quotation omitted.

B. The School Did Not Violate Johnson's First Amendment Rights.

It has long been held that a public school teacher has certain First Amendment rights of freedom of speech or expression. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1009 (9th Cir.2000); *Tinker v. Des Moines Independent Community*

School District, 393 U.S. 503, 506 (1969) ["[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."]

But the free speech rights of public employees, including teachers, are not unlimited. Rather, these rights have been restricted by the Supreme Court as delineated under the tests established in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). See *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("*Garcetti*").

1. The Supreme Court's holdings on public employee speech have been distilled into a five-part test in the Ninth Circuit.

The Ninth Circuit has distilled the Supreme Court's public employee speech cases claiming retaliation under section 1983 into a five-part test. *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir.2009). The five-part *Eng* test is as follows: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech. *Id.*

One recent Ninth Circuit case questioned the sequential order of these queries, believing that it would be more appropriate to first determine whether the employee was speaking as a public or private citizen. *Huppert v. City of Pittsburg*, 574 F.3d 696, 702-703 (9th Cir. 2009). However, the *Huppert* court concluded that it was "bound by [Ninth Circuit] precedent to follow the test set forth in *Eng*." *Id.* at p. 703. The *Huppert* court then sequentially went through the questions "where applicable." *Id.*

Unlike *Eng* or *Huppert*, however, this case is not a true "retaliation" case because the School did not discipline or reprimand Johnson. Since there was no adverse employment action, the third and fifth questions in *Eng's* five-part test therefore do not apply under the circumstances.[3] Nevertheless, the remaining *Eng* factors are meant to determine a public employee's First Amendment rights. Accordingly, like the *Huppert* court, the School will sequentially address the *Eng* factors, "where applicable," in this non-retaliation case. If Johnson fails to meet any one factor, the inquiry ends. *Huppert*, *supra*, 574 F.3d at 703.

The School also notes that the District Court agreed with Johnson's argument that a forum analysis would be more appropriate under the circumstances than use of

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[3] Johnson has sought injunctive and declaratory relief (and attendant nominal damages) as to whether he may display his banners, and does not claim damages due to an alleged adverse employment action.

the *Pickering-Connick* analysis, although the District Court noted that even under a *Pickering* analysis, Johnson prevails. 1 ER 12-14, 21-23. Therefore, after discussing the *Eng* factors, the School will discuss why the trial court erred in applying a forum test under the circumstances.

2. Johnson's Banners Are Curricular Speech and Therefore Not A Matter of Public Concern.

The first inquiry under *Eng* is whether Johnson's banners touch on a matter of public concern. "Speech involves a matter of public concern when it fairly can be said to relate to any matter of political, social, or other concern to the community." *Huppert*, 574 F.3d at 703 (internal quotation marks and alterations omitted). "But speech that deals with individual personnel disputes and grievances and that would be of no relevance to the public's evaluation of the performance of governmental agencies' is generally not of public concern. [Citations.] Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. [Citations.]" *Eng*, *supra*, 552 F.3d at 1070 (internal quotations omitted).

a. *The weight of the Circuits holds that curricular speech is not afforded First Amendment protections.*

Here, the District Court rejected the School's contention that Johnson's banners are part of the curriculum. 1 ER 025. The School's contention is important because the weight of the other Circuits holds that a teacher speaking as part of the school's curriculum is *not* speaking on a matter of public concern, because the school sets the curriculum (not the teacher). See *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3rd Cir. 1990) [holding that teacher has no First Amendment right to employ classroom teaching methodology of choice]; *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir.1998) [holding that a teacher's selection of a school play constituted speech that did not implicate a matter of public concern, and thus was not protected by the First Amendment]; *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 795 (5th Cir. 1989) [(teacher's choice of supplemental reading list not constitutionally-protected speech]; *Webster v. New Lenox School Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990); but see *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1052 (6th Cir. 2001) [holding that curriculum lessons about the environmental benefits of industrial hemp, where not approved by school, touched on matters of public concern]. The Sixth Circuit is in the minority, but the value of the *Cockrel* case is questionable, because the teacher in *Cockrel* was plainly carrying

out public duties, thus implicating *Garcetti*. Therefore, if the case were to be decided today, the teacher would not likely prevail. Or, as put by the Seventh Circuit, *Cockrel* is "inconsistent with later authority and unpersuasive." *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477, 480 (7th Cir. 2007).

b. *The* Downs *case supports that teachers cannot teach what they want to high school students.*

Defendants could locate no case in the Ninth Circuit holding that a teacher's curricular speech does not touch on a matter of public concern. The case closest on point, as acknowledged by the District Court [1 ER 025], is *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000). In *Downs*, the Ninth Circuit held that where a school is a governmental speaker, a teacher has no First Amendment rights to present a message on campus contrary to the school's viewpoint. *Id.* at 1012-1013. There, as part of an "Education for Diversity" platform, a high school had bulletin boards on school grounds where staff could post displays celebrating tolerance for gays and lesbians. *Id.* at 1006. The school's administration had the ultimate say on what could be posted on the bulletin boards. *Id.* A teacher opposed to gay rights created a competing bulletin board across the hall from his classroom, containing writings with religious, anti-gay sentiments. *Id.* at 1006-1007. The school ordered the teacher's bulletin board taken down, and the teacher sued for violation

of his free speech and equal protection rights. *Id.* at 1007-1008. The Ninth Circuit affirmed the District Court's dismissal of the plaintiff's complaint, holding that the government, not the teacher, was the speaker, and where the government is speaking, it need not tolerate messages from its employees that are contrary to its viewpoint. *Id.* at 1012-1012.

Furthermore, pertinent to the discussion here concerning speech pertaining to a school's curriculum, the *Downs* court noted: "Whether or not the bulletin boards by themselves may be characterized as part of the school district's 'curriculum' is unimportant, because curriculum is only one outlet of a school district's expression of its policy. Nevertheless, our decision is consistent with cases holding that school teachers have no First Amendment right to influence curriculum as they so choose. [Citations]. *Downs*, *supra* 228 F.3d at 1016-1017. Thus, by its own terms, the *Downs* case is consistent with the cases in the other Circuits cited above.

Here, the facts are not much different. The School has the right to control what is placed in the classroom. Even though the School permits teachers to decorate their own classrooms, there are limits as to what the School permits by policy and by practice. So Johnson has the same rights as the teacher in *Downs*. The fact that Johnson's banners were displayed in a classroom rather than a hallway is of no matter; the classroom is an extension of the school hallway as in *Downs*. The

classroom is not Johnson's personal space, it is the space where he interacts with students and parents. Here, there is no dispute that Johnson was speaking to students through his banners. He is speaking on behalf of the government when educating students, and therefore his viewpoint may be limited.

c. ***The case most on point is a Fourth Circuit case holding that teacher postings in a classroom are curricular and not afforded First Amendment protections.***

A recent case from the Fourth Circuit is directly on point. *Lee v. York County Sch. Div.*, 484 F.3d 687 (4th Cir. 2007). In *Lee*, a Spanish teacher posted what the school deemed to be "overly religious" material on bulletin boards in his classroom. *Id.* at 689. These items included (1) a 2001 National Day of Prayer poster, featuring George Washington kneeling in prayer; (2) a news article entitled "The God Gap"; (3) a news article entitled "White House Staffers Gather for Bible Study"; (4) a news article detailing the missionary activities of a former Virginia high school student who had been killed when her plane was shot down in South America; and (5) a June 2001 Peninsula Rescue Mission newsletter, highlighting the missionary work of that student. *Id.* at 690. The school principal removed the teacher's items from his classroom, believing them to be violative of the Establishment Clause. *Id.* at

690-691. The teacher sued for violation of his First Amendment rights. The district court granted summary judgment in the school's favor.

The Fourth Circuit affirmed, holding that "under the *Pickering-Connick* balancing standard Lee's classroom postings do not constitute speech concerning a public matter, because they were of a curricular nature. Thus, Lee cannot use the First Amendment to justify his assertion that he is free to place his postings on the classroom bulletin boards without oversight by the School Board." *Id.* at 694. The court noted that the removed items were curricular, as opposed to the teacher's own speech because they "were constantly present 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." *Id.* at 698. Furthermore, the items were "plainly 'designed to impart particular knowledge' to the students in Lee's classroom," even though he taught Spanish, and the removed items had nothing to do with the Spanish language. *Id.* at 699. Accordingly, the court found that "the dispute over Lee's postings of the Removed Items is nothing more than an ordinary employment dispute," and therefore affirmed the trial court. *Id.* at 700; see also *Borden v. School Dist. of Tp. of East Brunswick*, 523 F.3d 153, 168-169 (3rd Cir. 2008) [a high school

coach praying silently with his interscholastic sports team has no First Amendment right to do so because his speech was not a matter of public concern].

Based upon the precedent of this Circuit, as well as the other Circuits, this Court should hold that Johnson, as a teacher, does not have First Amendment rights to display his banners because they are curricular and therefore do not touch on a matter of public concern.

3. Johnson's Banners Are Not Private Citizen Speech; Rather, He Is Speaking Pursuant to his Official Duties or As a Public Employee.

If this Court finds in Johnson's favor as to the first *Eng* factor, then second factor is whether Johnson was speaking as a private citizen or a public employee. The District Court impliedly found that Johnson was speaking as a private citizen, and erred by doing so.

a. Garcetti *is applicable to high school teacher speech*.

The Supreme Court recently addressed the "citizen" test in *Garcetti*, *supra*. In that case, an assistant district attorney wrote a memo to his supervisor recommending dismissal of a particular criminal case because the affidavit police used to obtain a critical search warrant was inaccurate. *Garcetti*, *supra*, 547 U.S. at 414. The assistant D.A. was criticized by his supervisors for writing the memo and demoted.

Id. at 415. He then sued his employer under 42 U.S.C. § 1983 for retaliation in violation of his First Amendment rights. *Id.*

The *Garcetti* court upheld the use of the *Pickering* test to determine the public employee's free speech rights in the workplace. *Garcetti*, 574 U.S. at 418.

Under the traditional *Pickering* test, a public employee's speech enjoys First Amendment protections if (1) the employee is speaking as citizen, (2) on a matter of public concern, and (3) the public entity has no adequate justification for treating the employee differently from any other member of the general public. *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S.Ct. 1951, 1958 (2006).

Garcetti, however, clarified the definition of "citizen" under the first prong of the *Pickering* test. *Id.* at 421. The Supreme Court explained that 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 421. Using that standard, the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Id.*

But *Garcetti* expressly left open the question of whether this new gloss on the *Pickering* test should be applied to the world of public academia, where there are different free speech concerns, such as academic freedom. *Id.* at 425. To that end, the majority opinion noted: "There is some argument that expression related to

academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.*

Like the Supreme Court, the Ninth Circuit also has not addressed whether *Garcetti* should apply to teaching (although *Garcetti* has been applied to one non-teacher school case, *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008), and in non-school public employee speech cases[4]). Therefore, *Garcetti's* application to a high school teacher's speech in the classroom is a novel question in the Ninth Circuit. If *Garcetti* applies to this case, and Johnson's banners consist of speech made pursuant to his official duties, as the School argues, then Johnson has no First Amendment right to display his banners, and the inquiry ends there.

The *Garcetti* gloss on *Pickering* should be applied to high school teachers, just as the Ninth Circuit has applied it in non-academia cases. The Supreme Court's concerns raised in *Garcetti* are not present here. Johnson is not writing for an

[4] See *Eng*, *supra*, 552 F.3d at 1071; *Huppert*, *supra*, 574 F.3d at 704; see also *Anthoine v. North Central Counties Consortium*, 605 F.3d 740, 745 (9th Cir. 2010).

academic journal or conducting research on behalf of an institution of higher learning. Rather, his speech is directed to high school students during the school day. Academic freedom is not at issue, particularly since Johnson teaches mathematics, a discipline completely unrelated to the banners' messages. Moreover, the Ninth Circuit has already held that a high school teacher speaks for the school when speaking to students during the school day, even on issues unrelated to course content. *Peloza, supra*, 37 F.3d at 522. *Peloza* therefore stands for the same notion as *Garcetti*, *i.e.*, that public employee speech made pursuant to official duties does not receive First Amendment protections.

b. *The Seventh Circuit has applied* Garcetti *to teacher classroom speech.*

The School urges this Court to apply *Garcetti* to teacher-speech cases where the teacher is speaking to students in the classroom setting, similar to the Seventh Circuit's analysis in *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477 (7th Cir. 2007). *Mayer* held that a teacher, while teaching students, is engaged in her official duties, and thus not afforded First Amendment protections in line with *Garcetti*. *Id.* at 480. There, the elementary-school teacher took a certain political stance in her class concerning the Iraq war. The teacher claimed that the school district did not renew her teaching contract because of her stance. *Id.* at 478. The

district court dismissed the teacher's complaint, and the Seventh Circuit affirmed, explaining that teachers may not introduce their own views on a particular subject, but "must stick to the prescribed curriculum—not only the prescribed subject matter, but also the prescribed perspective on that subject matter." *Id.* at 479. This is 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." *Id.* Accordingly, the Court concluded that the "Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials." *Id.* at 480.

c. Johnson's speech was made pursuant to official duties, and therefore is not afforded First Amendment protections.

Johnson's banners are both curricular in nature *and* speech made pursuant to his duties as a teacher. Had Johnson not been a teacher, then he would have no right to decorate a classroom. Under the School's policies and practices, only teachers—not others—have permission to display items in their respective classrooms, within certain limits. 3 ER 473-474; 475. The fact that Johnson's banners were not used to teach math does not change the fact that were displayed to students, who could attribute the messages to the School. *Peloza, supra*, 37 F.3d at 522. There was no evidence that Poway permitted non-teachers (or students not under faculty direction)

to display items on the walls in School classrooms. 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).

Moreover, the students in Johnson's class, who are obligated to be there, are subject to viewing the very large banners throughout class time. The banners are designed to impart information to the students. 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. 3 ER 497. So this case is *not* about a private citizen speaking in the classroom, it is about a school employee speaking to students and others on public school grounds during school hours. Accordingly, the District Court erred by not holding that Johnson's banners consist of speech made pursuant to his official duties, and thus not are not afforded First Amendment protections.

4. Even if the speech is deemed to be by a private citizen, then the Ninth Circuit's *Pickering*-style balancing analysis weighs in the School's favor.

If this Court finds that Johnson spoke as a private citizen, then the next applicable *Eng* factor is the fourth: whether the public employer's decision in

stopping the speech outweighs the employee's right to make that speech.[5] The answer is "yes": Johnson's interest in displaying banners advocating a connection between the United States and the Judeo-Christian religion is outweighed by the School's interest in avoiding the impression of advocacy of religion in the public schools, especially when that apparent religious advocacy is directed pointedly at students during class time.

The Ninth Circuit has traditionally applied a "slight variation" of the *Pickering* balancing test to cases involving religious speech made by a public employee in the workplace, which balances the employee's right to speak against the public employer's mission to be free of Establishment Clause entanglement. *Berry v. Department of Social Services*, 447 F.3d 642, 650 (9th Cir. 2006). This test was used in *Eng* with respect to the fourth factor in that case. *Eng*, *supra*, 552 F.3d at 1071.

a. Peloza *permits schools to restrict religious speech by teachers to students.*

The Ninth Circuit applied this test in *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir.1994). *Berry*, *supra*, 447 F.3d at 650 [noting that *Peloza* applied

[5] The third *Eng* factor is whether the school took an adverse employment action against the employee because of the speech. That element does not apply, because the School did not discipline nor reprimand Johnson. But the School did instruct Johnson to remove the banners.

this balancing test]. In *Peloza*, the teacher wanted to teach creationism, and wanted to refer to the theory of evolution as a religion. The school did not agree. Ultimately, the Court ruled that the "school district's interest in avoiding an Establishment Clause violation trumps Peloza's right to free speech." *Peloza* at 522. In balancing the respective parties' rights, the *Peloza* court recognized that, as a teacher in a public school, Peloza had a right to free speech, stating: "The school district's restriction on Peloza's ability to talk with students about religion during the school day is a restriction on his right of free speech." *Id.* But the court made it very clear that a teacher may not discuss religion during instructional time in a public school: "While at the high school, whether he is in the classroom or outside of it during contract time, Peloza 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." *Id*. The Court held that permitting Peloza to discuss religion during school time would violate the Establishment Clause: "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. Such speech would not have a secular purpose, would have the

primary effect of advancing religion, and would entangle the school with religion. In sum, it would flunk all three parts of the test articulated in *Lemon v. Kurtzman*, [citation omitted]." *Id*. Similarly, the School contends that Johnson's banners advocate his view of religion during the school day. Under *Peloza*, the balancing weighs in the School's favor.

b. *The* Berry *and* Tucker *cases reaffirmed use of the Pickering-style test for religious speech cases*.

The Ninth Circuit reaffirmed the use of this balancing test in a case involving religious speech of a public employee in *Berry, supra*. There, a county employee's primary duties were to assist unemployed and underemployed 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 employee sued, claiming, in part, that his

speech rights under the First Amendment were violated. *Id.* at 645. The district court granted summary judgment for the county department, and the Ninth Circuit affirmed.

The *Berry* court balanced the Department's fear of an Establishment Clause violation against the employee's right to free speech. "The Department . . . must run the gauntlet of either being sued for not respecting an employee's rights under the Free Exercise and Free Speech clauses of the First Amendment or being sued for violating the Establishment Clause of the First Amendment by appearing to endorse its employee's religious expression. The *Pickering* balancing test recognizes these important, but sometimes competing, concerns and allows a public employer to navigate a safe course." *Berry* at 649-650. The Court decided that the employee could not display items to clients or speak to clients about religion, because the employer's interest in avoiding an Establishment Clause violation (since the material could be viewed by members of the public) outweighed the employee's right to free speech. "Applying the *Pickering* test to the Department's restriction on Mr. Berry's speech with clients, we determine that the restriction is reasonable. The Supreme Court has reiterated that avoiding an Establishment Clause violation may be a compelling state interest." *Berry*, at 650.

Another case using this balancing test is *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204 (9th Cir. 1996). In *Tucker*, a public employee challenged a state

department's broad ban on two categories of speech: (1) religious advocacy by the employee, written or oral, in the workplace; and (2) storage or display of religious artifacts, information and materials. *Tucker*, *supra*, 97 F.3d at 1208-1209. Using the *Pickering*-style balancing test, the court first held that the employer could not prevent the employee from speaking with other employees to advocate religion. *Id.* at 1213. However, in reaching this conclusion the court specifically stated that the plaintiff was to be treated differently from school teachers because the plaintiff was not interacting with the public, where the public might construe a teacher's speech to be the government's speech: "A teacher appears to speak for the state when he or she teaches; therefore, the department may permissibly restrict such religious advocacy. [Citations]. Similarly, the department may, at least under some circumstances, prevent at least some of its employees from advocating religion in the course of making public speeches on education." *Id.*

The *Tucker* court next addressed whether the state's broad ban on display of religious items violated the First Amendment. The court noted that the state had a strong argument that permitting posting of religious material in the interior space of a building may give the appearance of government endorsement of that material. *Id.* at 1215. To that end, the court stated that "there is a legitimate state interest in preventing displays of religious objects that might suggest state endorsement of

religion. The state has a legitimate interest, for example, in preventing the posting of Crosses or Stars of David in the main hallways, by the elevators, or in the lobbies, and in other locations throughout its buildings. Such a symbol could give the impression of impermissible government support for religion." *Id.* at 1216. The *Tucker* court found a problem with the broad ban instituted by the state, however, because members of the public had no access to the plaintiff's office, and there were lesser means to control the speech instead of a flat ban of religious displays. *Id.* at 1215-1216.

c. *The common thread through* Peloza, Berry*, and* Tucker *is that where members of the public have access to the employee's religious speech, the public employer may restrict it.*

The only clear distinction between *Tucker* — were the employee was permitted to speak about religion and display religious materials — and *Peloza* and *Berry* — where the employee was *not* permitted to speak about religion or display religious materials — is in the identity of the people to whom the religious advocacy was directed. In *Tucker*, the employee did not have direct contact with clients; his speech and display were directed only to other employees. *Tucker* at 1213. In *Berry*, the employee was speaking and displaying his religious material directly to clients of the employer. *Berry* at 650-651. Similarly, in *Peloza*, the teacher was prohibited from

speaking directly to students and from teaching in class about religion. *Peloza* at 522. So, if Johnson's banners are directed to members of the public, including students, then the School's legitimate concerns that Johnson's banners may be viewed by the public/students as the government advocating religion in violation of the Establishment Clause.

d. *Johnson's banners were directed toward students*.

In the case at bar, the banners were directed at students and were not directed to teachers in other classrooms, nor to the administrators in their respective offices and sites. The banners, however, were clearly visible to any student attending Johnson's class. There is no evidence that the banners were seen by a School administrator until brought to the attention of Principal Kastner by a teacher at Westview High.

And students are required to come to class. They can be arrested if truant. Cal Educ. Code, § 48264. Students have diverse beliefs. They may be Christians or Jews, who have beliefs consistent with the banners, but some undoubtedly are Muslim, Buddhist, Scientologist, or Atheist, and might be troubled by those banners. Their rights are not inferior to Johnson's rights. Their rights should be given great consideration in this balancing equation.

e. *The banners advocated religious belief*.

These banners advocated a religious belief. The District Court erred in holding otherwise. It is no secret what Johnson was doing: He selected from among very few national historical documents only those phrases that referenced God, because he intended to advocate the belief that the United States is a Christian nation. As Associate Superintendent Chiment aptly described to Johnson: "The prominent display of these brief and narrow selections of text from documents and songs without the benefit of any context and of a motto, and which all include the word 'God' or 'Creator,' has the effect of using your influence as a teacher to promote a sectarian viewpoint. 3 ER 461.

The Ninth Circuit has instructed on the importance of "context" in the analysis of religious statement. *Newdow v. Rio Linda Union School Dist*., 597 F.3d 1007, 1019 (9th Cir. 2010) ("*Rio Linda*"). The context of these phrases is patriotic and religious, but with the purpose of advocating the religious concept. There is no other context. Around one banner, Johnson has placed pictures of landscapes, presumably to show that God has shed his grace on the United States. That is a religious context. Johnson clearly intended to connect the United States with God, for the purpose of advocating the idea that the United States believes in God; Johnson believes in God; so the students should believe in God, too. That is pure advocacy of religion.

f. *The display of Johnson's banners violates the Establishment Clause.*

The school is correct to fear an Establishment Clause violation if Johnson is permitted to display his banners, as they violate the both the "*Lemon*" and "endorsement" tests.

The *Lemon* test states that the speech (1) 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). Johnson's banners violate all three prongs. First, the banners do not have a secular purpose. 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. 3 ER 496-497. This is also 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. 3 ER 495. This emphasis does not have a secular purpose.

Second, the principal and primary effect of the banners is to advance religion. Each of the five phrases, standing alone, might not run afoul of the First Amendment due to the historical implications of the phrases. *See, e.g.*, *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) [national motto "In God We Trust" on currency does not violate Establishment Clause], but see *Rio Linda*, 597 F.3d at 1019, fn. 9 [phrase "One Nation Under God," standing alone, might violate the Establishment clause]. When all of the phrases are combined, however, they accumulatively *de-emphasize* the patriotic 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' combined message is less about Nation, and more about God. Thus, the primary effect is to advocate in favor of Christian religion.

Finally, Johnson's banners foster excessive government entanglement with religion, because he is a teacher speaking to students: "A teacher appears to speak for the state when he or she teaches; therefore, the department may permissibly restrict such religious advocacy." *Tucker*, supra, 97 F.3d at 1213 (9th Cir. 1996), citing *Peloza*, 37 F.3d at 522.

The banners' display also runs afoul of the "endorsement" test, which was first articulated by Justice O'Connor, and later adopted in *County of Allegheny v. ACLU*,

492 U.S. 573, 578-79 (1989). The endorsement test asks "whether the challenged governmental action has the purpose or effect of endorsing, favoring, or promoting religion, particularly if it has the effect of endorsing one religion over another." *Id*. at 593-94. Justice O'Connor was concerned with government action that made some people feel like outsiders. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

Here, the banners' effect on students was the Principal's primary concern. She was concerned because the phrases were "taken out of context and very large, they became a promotion of a personal viewpoint." 3 ER 385. She was concerned that some students may not share Johnson's viewpoint: "I asked him, 'If an Islamic student walks into your classroom and sees all of these phrases, they may feel" . . . "If a student walks in and sees this, they man feel like, Wow, I'm not welcome, or, I'm not gonna fit in this classroom. And they may feel bad." 3 ER 385. The Principal's concern is exactly parallel to Justice O'Connor's concern: that the government's message communicated endorsement of religion and exclusion of nonadherents. The School had the right to direct removal of the banners.

g. *Johnson's banners also violate the School's policies*.

An additional reason supporting the School's removal of the banners is that the display of the banners violates School Policy and Procedure. Under AP 3.11.2, teachers are expected "to refrain from using classroom teacher influence to promote partisan or sectarian viewpoints." 3 ER 465. Students also have "the right to form and express individual opinions on controversial issues without jeopardizing relations with teachers or others" under the policies. 3 ER 466. The District is certainly within its rights to remove the banners to ensure that the students' rights to have an opinion on religion does not jeopardize their class standing should the students wish to make their opinions known.

5. District Court erred by applying a forum-test.

The District Court found that a forum analysis applied to Johnson's display of the banners. 1 ER 12-14. The District Court erred primarily because this "is not a case involving the risk that a private individual's private speech might simply 'bear the imprimatur' of the school or be perceived by outside individuals as 'school-sponsored.'" *Downs*, *supra*, 228 F.3d at 1012. And *Downs* noted that where the school itself is the speaker, the analysis is not controlled by *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) or *Planned Parenthood v. Clark County Sch. Dist.*,

941 F.2d 817 (9th Cir. 1991). Here, Johnson is acting on behalf of the school, consistent with the analysis in *Peloza* and *Mayer*.

Moreover, the School did not intend to create a limited public forum. To create such a forum, the government must make an affirmative choice to open up its property for use as a public forum. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802-803 (1985). "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *U.S. v. American Library Ass'n, Inc.*, 539 U.S. 194, 206 (2003). The school's policies show that teachers may decorate their classroom, but that the School has the ultimate say.

Additionally, the Ninth Circuit has been very clear that a forum test does not apply to cases involving a public employee's religious speech in the workplace. For example, in *Tucker*, the court stated: "The interior walls of the offices of the Child Nutrition and Food Distribution Division are neither a public forum, nor a limited purpose public forum." *Tucker*, *supra*, 97 F.3d at 1214. This Circuit has also flatly rejected other tests. *Berry*, *supra*, 447 F.3d at 649-650 ["we adhere to our practice of applying a balancing test when confronted with constitutional challenges to restrictions on public employee speech in the workplace" and "[T]he *Pickering*

balancing approach applies regardless of the reason an employee believes his or her speech is constitutionally protected."].

Nor does *Tinker* control. *Tinker* involved the rights of students to speak on school grounds, not the rights of teachers. Moreover, "*Tinker* did not alter the test that the Supreme Court established to evaluate the speech of a public employee" in *Pickering* and *Connick*. See *Borden*, *supra*, 523 F.3d at 168, fn. 8.

For all of the above reasons, the School did not violate Johnson's free speech rights under the First Amendment by directing him to remove the banners.

C. Teacher Speech Protections Under the California Constitution Are Treated the Same as the Federal Constitution, So There Was No Violation.

Johnson's Fourth claim is his free speech claim under the California Constitution. "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 California constitutional protections are identical to the federal protections: "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.* Moreover, the court in *California Teachers Assn.* 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. Accordingly, the District Court erred by not granting summary judgment of the Fourth claim in the School's favor.

D. The School Did Not Violate the Establishment Clauses of Either the U.S. or California Constitution.

The District Court held that the School violated the Establishment Clause of both the United States and California constitutions by allegedly disapproving of Johnson's religion while advocating other religions and non-religion. 1 ER 26-29. The District Court erred in its holding because the School was doing nothing of the sort, and violated neither the *Lemon* test[6] nor the endorsement test, both discussed earlier. The School also did not violate the "coercion" test, which 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

[6] The *Lemon* test is 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).

establishes a state religion or religious faith, or tends to do so." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). None of the actions of the School coerced students to participate in religion or non-religion.

1. The School provided alternative materials containing the same language, but in context.

Contrary to the District Court's view, the School was not trying to eradicate the notion of God or religion from its classroom. 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. 3 ER 461, 528-530. Johnson had the option of displaying these items in lieu of his banners, but he chose not to because he did not "want to show agreement with the [school] district." 3 ER 498-499. These items, if posted in their context, would alleviate any Establishment Clause entanglement. The District Court should not have overlooked this evidence in its analysis.

2. The District Court failed to consider the size and context of items displayed in other classrooms.

The District Court discussed some displays in other classrooms which the District Court held showed that the School was advocating other religions/non-religions over Johnson's religion. These items included the so-called "Tibetan Prayer

Flags," a John Lennon poster, a poster of the Dalai Lama, and a poster of Mahatma Gandhi. Those items were located during discovery in this case. Johnson's declaration says that they were photographed in April 2009 during court-authorized inspection of classrooms. 2 ER 179, 182. There is no evidence that any of the Defendants knew about any of those items before that inspection and very little evidence of the context of the displays, with the exception of the Tibetan display.

The District Court's ruling fails to analyze the purpose for which these items were displayed, *e.g.*, whether a particular display was a student project or teacher decoration, and whether the classroom was for science, history, or other subject. The absence of that analysis was error.

Some of these items may have been displayed in a history class, with proper relevance and context. Certainly any study of modern Asian history would contain some reference to the Dalai Lama. Some of those items might have been put up by students in connection to some project. There is simply no evidence to show that context. Moreover, there is not any evidence that any individual Defendant knew about those items at all. The Defendants certainly cannot be held to have intended to discriminate on the basis of religion or speech if they did not know the content of those displays.

In its written decision, the District Court printed the lyrics of the song, "Imagine" (taken from a John Lennon poster) in the same-sized font as the description of Johnson's banners. But in reality, the type size was very different. 2 ER 202. A student would need to move very close to the poster to even be able to read the lyrics from that poster. Yet no student with normal vision seated at any desk in that classroom would fail to read the text of Johnson's banners from their seat. The difference in the size goes directly to the issue of advocacy. Moreover, in context, the song is an anti-war song, not an anti-religion song. Lennon was suggesting that war is often caused by disputes over countries and religions.

Similarly, the District Court analyzed some flags that were called "Tibetan Prayer Flags" as if there was some way for a student in the room to know that those flags were Tibetan, or about prayer, or anything else. The teacher called them "Tibetan Prayer Flags" in her deposition. 3 ER 405. She said the purpose for the display was related to teaching about fossils on the top of Mount Everest, because people climbing Mount Everest place such flags at the top. 3 ER405-406. They were not displayed to advocate the Buddhist religion. She said she was opposed to the advocacy of religion in the classroom. 3 ER 409. Moreover, the writing on them was written in Sanskrit, a language that few people are able to read, and no one was able to translate. 3 ER 405-406. None of those flags are identifiably "Tibetan," or

religious, without external explanation. See, 3 ER 405. On one of those many flags, near the top of the flag, was depicted a small seated figure, which appears to be Buddha, surrounded with writing in Sanskrit. 2 ER 205. There is nothing else observable about these flags that would identify them as Buddhist, and nothing that could possibly proselytize Buddhism as a religion. Standing alone, they do not advocate anything. In context, they are nothing more than decoration, but they can be used to discuss "the accomplishment of an amazing goal." 3 ER 406, p. 89:9.

The District Court apparently concluded that the display of a poster of Mahatma Gandhi was advocacy of the Hindu religion. 1 ER 5, 15, 27. But Gandhi is better known for nonviolent resistance to the British Empire than for his Hindu religion. Similarly, the District Court concluded that a poster of the Dalai Lama was about the religion of Buddhism rather than about resistance to oppression by Communist China against the former nation of Tibet. 1 ER 5. Similarly, a poster of Malcolm X is identified as a "Muslim minister" rather than a civil rights leader; every high school teaches 1960's American history, where both Martin Luther King and Malcolm X were prominent historical figures. In short, each of these posters depict people of influence on subjects other than religion, even though they may touch on religion. There is no context, nor any identification of the reason for the display, or the type of classroom they were displayed within.

But most importantly, these other items do not advocate religion, which is what the School's policy and regulation prohibits. 3 ER 465. The District Court ignored this policy completely. "The removal of materials from the classroom is acceptable when it is determined that the materials are being used in a manner that violates Establishment Clause guarantees. Thus, the Establishment Clause focuses on the manner of use to which materials are put; it does not focus on the content of the materials per se. For example, [] books about American Indian religion could be used in violation of the Establishment Clause if they were taught in a proselytizing manner. Because they were not so used, however, those books do not violate the Establishment Clause by the very existence of their content." *Roberts v. Madigan*, 921 F.2d 1047, 1055 (10th Cir. 1990). On the other hand, Johnson's banners were designed by him to advocate a particular religious belief associated with America. They were on display, and not sitting folded on a desk.

In short, the School was not advocating other religions or non-religion over Johnson's religion. The District Court erred in holding that the School violated the Establishment Clause.

E. The School Did Not Violate Equal Protection Clause.

To establish a claim under the Equal Protection Clause, Johnson must show that Defendants' actions resulted in him receiving disparate treatment compared to

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

Here, Defendants' actions did not impinge on any fundamental right of Johnson. He is free to hold his own religious beliefs. If he has a personal area in the classroom that is not accessible to students, he can keep religious items there. But when students or clients/parents are present, he does not hold speech rights with respect to speech made to them during the school day in his capacity as a teacher.

And, as explained above, the District was not trying to rid the classroom of all religious references, as the District Court presumed. Johnson was treated the same with respect to display of speech touching on religion as any other teacher.

Finally, the School has a legitimate state interest in ensuring that all points of view, and not one single viewpoint, are heard by the students in the classroom. The School felt that Johnson's banners did not comply with its policy prohibiting advocacy of a sectarian viewpoint, including religion. The School's decision was therefore narrowly tailored to achieve an important government interest. There was no Equal Protection violation, and the District Court erred in so holding.

F. The School Did Not Violate the "No Preference Clause" of the California Constitution.

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).

As explained in detail above, the School did not direct the removal of Johnson's banners with an eye to advancing one religion over another. On the

contrary, the School was concerned that Johnson himself was trying to advance his religion over non-religion and over other religions by hanging his banners. The intent of the school was to maintain neutrality concerning religion. Hence, the District Court erred in holding for Johnson on this claim also.

G. If the Court Finds A Constitutional Violation, Qualified Immunity Should Still Shield the Individual Defendants.

Qualified immunity shields public employees from liability for civil damages where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "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). The task is determining whether the preexisting law provided the defendants with "fair warning" that their conduct was unlawful. *Hope v. Pelzer*, 536 U.S. 730, 740 (2002).

In the case at bar, the District Court denied the individual Defendants' request for qualified immunity, and awarded damages against these school administrators and

elected school board members. The District Court found that "the law has been clearly established since *Tinker* that school teachers enjoy First Amendment rights inside the schoolhouse gates." 1 ER 31, citing *Morse v. Frederick*, 551 U.S. 393 (2007). The Court also found that "[i]t is also clearly established law that where free speech is permitted, the government may not discriminate based on the speaker's viewpoint." 1 ER 31.

1. Contrary to the District Court's opinion, the law is unsettled.

Contrary to District Court's holding, the law is not clearly established in favor of teacher speech in the classroom. In fact, the majority of the cases would point to a limitation on teachers' rights, and forbid school districts from displaying such banners. Even if Johnson's banners are entitled to constitutional protection, the individual defendants should be protected by qualified immunity because the law governing teacher-speech on the subject of religion in the classroom is not so well developed that a reasonable person would know the applicable rule. In fact, most reasonable people, upon review of all of the speech cases involving teachers, would conclude that the plainly established rule is that teachers cannot advocate religion in the classroom during instructional time.

The clear holding in *Peloza , supra,* would make any school administrator who was familiar with that case absolutely certain that he or she had a obligation to stop

a teacher from advocating about religion during the school day. *Peloza* — taken alone —should have been sufficient basis for the District Court to rule in favor of qualified immunity. The individual Defendants were justified in believing that teaching religious ideas during class time is a potential violation of the Establishment Clause, and that avoiding such violation overcomes any free-speech right of a classroom teacher. Most people familiar with the cases would reasonably conclude that Johnson's banners were improper advocacy of a religion, and impermissible in the classroom during class. Or at least they would say it was a close call — too close to hold individuals liable.

2. The School's administrators were not insensitive to Johnson's beliefs.

Just a couple of years before the events in this case, the Ninth Circuit ruled that the words "one Nation under God" in the Pledge of Allegiance were illegal when recited in the classroom. *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2005). After that event, another case was filed by Mr. Newdow, and subsequently the Ninth Circuit has ruled that the phrase "one Nation under God" is not a problem, in the context of the entire Pledge. *Rio Linda*, *supra*, 597 F.3d 1007, 1013-1014.

A reasonable person could be excused for believing that the phrase "one Nation under God," enlarged on the wall of a classroom, would take the phrase out of context

of the Pledge, and make it less than appropriate in the classroom. When placed on the wall—along with other phrases containing references to God — the context shifts, and the context becomes a message proclaiming the national endorsement of the Judeo-Christian religion. That shift in context argues strongly that the law is not clearly established, and the administrators could not have known the correct rule to apply.

And the school administrators in this case were not insensitive to Johnson's rights. The Associate Superintendent offered posters to Johnson placing each of the phrases in historical context. 3 ER 426. Johnson rejected the request to substitute those posters. *Id*. Like the majority opinion in *Rio Linda*, the school administration believed that a message's context is important.

This case also involves issues of the Establishment Clause that are not well-settled. As Justice Souter recently indicated in a concurrence, "The interaction between the 'government speech doctrine' and Establishment Clause principles has not, however, begun to be worked out." *Pleasant Grove City, Utah v. Summum*, __ U.S. __, 129 S.Ct. 1125, 1138 (2009).

The relationship between religion and the state is difficult for judges to determine. If appellate-court judges cannot agree, then the law is not settled, and school administrators cannot be held to know what the law is. Accordingly, if this

Court affirms the District Court with respect to Johnson's claims against the School District, then it still should reverse with respect to qualified immunity and have summary judgment entered in favor of the individual Defendants.

VIII. CONCLUSION

The School urges this Court to reverse the judgment of the District Court and to enter summary judgment in favor of the School and individual Defendants. If the Court finds a constitutional violation, then the Court should still enter summary judgment in favor of the individuals based upon qualified immunity.

Respectfully Submitted,

DATED: July 16, 2010

STUTZ ARTIANO SHINOFF & HOLTZ
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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits set forth at Ninth Circuit Rule 32-4 as determined by the word processing program used to generate the brief. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Paul V. Carelli IV
PAUL V. CARELLI, IV
Attorney for Appellants

STATEMENT OF RELATED CASES

Appellants are not aware of any related cases pending before the Court of Appeals.

9th Circuit Case Number(s) 10-55445

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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Re: ***Johnson v. Poway Unified School District, et al.***
USDC Case No.: 07-CV-00783-BEN (LSP)

Dear Mr. LiMandri and Mr. Muise:

Please be advised that the U.S. Court of Appeals for the Ninth Circuit has telephonically granted the Appellants Poway Unified School District, et al., a 14-day extension of time to file the Appellants' Opening Brief. Accordingly, the Opening Brief will be due on July 16, 2010. The Ninth Circuit clerk indicated during the telephone conversation that the Appellee's Brief will be due on August 16, 2010.

Should you have any questions or concerns about this or any other matter, please feel free to contact me at your earliest convenience.

Very truly yours,

STUTZ ARTIANO SHINOFF & HOLTZ
A Professional Corporation

Paul V. Carelli, IV

/rsr

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