NO. 10-55445

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

BRADLEY R. JOHNSON,
Plaintiff/Appellee

VS.

POWAY UNIFIED SCHOOL DISTRICT, ET AL.,
Defendants/Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
HON. ROGER T. BENITEZ
Civil Case No. 3:07-cv-00783-BEN-WVG

APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

In its decision granting summary judgment in favor of Plaintiff/Appellee Bradley Johnson ("Plaintiff"), the district court framed the ultimate question presented by this case as follows: "May a school district censor a high school teacher's expression because it refers to Judeo-Christian views while allowing other teachers to express views on a number of controversial subjects, including religion and anti-religion?" (R-66: Op. at 1; ER (Vol. 1) at 1). [1] The district court appropriately answered as follows: "On undisputed evidence, this Court holds that it may not." (R-66: Op. at 1; ER (Vol. 1) at 1). This court should affirm.

In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the U.S. Supreme Court stated, "If there is any fixed star in our constitutional constellation, it is that *no official*, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Id.* at 642 (emphasis added). In direct contravention, Defendants seek to prescribe what "shall be orthodox" in matters of opinion by permitting teachers to express personal, non-curricular messages that promote certain *favored* ideologies, religions, and partisan viewpoints on controversial political and social issues, while censoring certain *disfavored* viewpoints, such as Plaintiff's allegedly "Christian"

[1] All record citations in this brief are to the four volume excerpts of record ("ER") filed by Appellants. Appellants' ER contains the entire record of the relevant proceedings below.

viewpoint. As a result of Defendants' speech restriction, that "fixed star" in our constitutional constellation has been obscured and an official orthodoxy prescribed.

Indeed, it is undisputed that ***Defendants created the forum for the personal, non-curricular speech at issue here***. If Defendants wanted to close the forum, they could.[2] 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.

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 viewpoint. This court should decline the invitation and affirm the decision below.

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[2] This fact alone undermines the hyperbolic claims advanced by *Amici Curiae* National School Boards Association and California School Boards Association ("NSBA & CSBA") in their brief filed in support of Defendants. The district court's decision, which followed well-established First Amendment jurisprudence, does not "border on allowing teachers to determine the curriculum." (NSBA & CSBA Br. at 10). And this is not a case where the government "open[ed] a forum by accident." (NSBA & CSBA Br. at 11). As noted above, if Defendants wanted to close the forum tomorrow, they could. The fact that Defendants refuse—and NSBA & CSBA support that decision—shows that this case is not about education or the students. Rather, it is about school administrators (i.e., the government) wanting to retain the authority to prescribe what shall be orthodox in matters of opinion. As the U.S. Supreme Court stated long ago, "state-operated schools may not be enclaves of totalitarianism." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

STATEMENT OF THE ISSUES

I. Whether Defendants violated Plaintiff's right to freedom of speech protected by the United States and California Constitutions by censoring Plaintiff's personal, non-curricular speech in a forum they created for such speech based on Plaintiff's viewpoint.

II. Whether Defendants violated the Establishment Clause of the First Amendment to the United States Constitution and the Establishment and No Preference Clauses of the California Constitution by officially preferring the expression of certain religious and anti-religious views while censoring Plaintiff's speech because it expressed a "Judeo-Christian" view.

III. Whether Defendants violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by granting the use of a forum to teachers whose personal, non-curricular views Defendants find acceptable, but denying use of this forum to Plaintiff based on the viewpoint of his personal, non-curricular speech.

IV. Whether Defendants were entitled to qualified immunity in their individual capacities for violating Plaintiff's clearly established constitutional rights.

STATEMENT OF THE FACTS

Plaintiff is a public school math teacher at Westview High School in the Poway Unified School District (hereinafter "School District").[3] He has taught math in the School District for more than 30 years. During these 30 plus years, he has taught at 3 different high schools in the district, including Mt. Carmel High School (1977 to 1989), Rancho Bernardo High School (1990 to 2002), and now Westview High School (2003 to present). (R-44: Johnson Decl. at ¶ 3; ER (Vol. 2) at 179-80). Plaintiff has a strong reputation as a teacher; he continues to be one of the highest rated math teachers at Westview High School. (R-44: Johnson Decl. at ¶¶ 4, 36; ER (Vol. 2) at 180, 192; R-54: Chiment Dep. at 24-25; ER (Vol. 3) at 333; Kastner Dep. at 33; ER (Vol. 3) at 384).

The School District *believes* that public schools play an important role educating and guiding our youth through the marketplace of ideas and instilling national values. One method the School District uses to accomplish this task is to permit students to be exposed to the rich diversity of backgrounds and opinions

[3] At all relevant times, Defendants Jeff Mangum, Linda Vanderveen, Andrew Patapow, Todd Gutschow, and Penny Ranftle were members of the Board of Education for the School District; Defendant Dr. Donald A. Phillips was the Superintendent; Defendant William Chiment was the Assistant/Associate Superintendent; and Defendant Dawn Kastner was the Principal of Westview High School. All of the defendants approved the decision to remove Plaintiff's banners. (R-26: Answer at 2; ER (Vol. 2) at 110; R-54: Chiment Dep. at 130, 137-38; ER (Vol. 3) at 351-53; Kastner Dep. at 101-02, 172; ER (Vol. 3) at 391, 394).

held by its high school faculty. [4] (R-54: Chiment Dep. at 271-72; ER (Vol. 3) at 366).

Accordingly, for the past 30 plus years, the School District has adopted a policy, practice, and/or custom of permitting teachers to display in their classrooms various ***non-curricular*** messages and other items that reflect the individual teacher's personality, opinions, and values regarding a wide range of interests and subject matter. Consequently, for the past 30 plus years, the classroom walls have served and continue to serve as a forum for teachers to convey personal, non-curricular messages on subjects that interest them.[5] Indeed, 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

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[4] For example, in addition to creating a forum for the personal, non-curricular speech of its teachers, the School District permits its teachers to participate in the "day of silence"—a pro-gay rights activity—on School District property, during the school day, with the students so long as the teacher's participation does not disrupt the teaching of his or her classes. (R-54: Collins Dep. at 124-26, 140; ER (Vol. 3) at 309-11).

[5] (R-44-52: Johnson Decl. at ¶¶ 9, 11-15, Ex. A, Dep. Exs. 13-20, 24-26, 33, 35-36, 38-45, 47-69, 71-91, 93-96, 122, 135, 141-42, 148-49, 151-52, 155, 158-59, 161; ER (Vol. 2) at 181-87, 194-279; R-54: Collins Dep. at 38-42, 56, 79-82, 85-86, 88-89, 150-54, 162-63, 166-68; ER (Vol. 3) at 300-02, 304-06, 313-16; Chiment Dep. at 45, 57-58, 61-62, 82, 84-85, 128-29, 135-36, 141, 195-96, 199, 201-02, 211-17, 223-27, 230-31, 234-35, 273-74; ER (Vol. 3) at 338, 341-43, 346, 350, 352, 353, 356-58, 360-67; Kastner Dep. at 23-24, 67; ER (Vol. 3) at 381, 387).

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 meet at least that test***. The test they don't meet is the advocacy of a particular sectarian *viewpoint*." (R-54: Chiment Dep. at 128-29; ER (Vol. 3) at 350 (emphasis added); *see also* Chiment Dep. at 273; ER (Vol. 3) at 366 ("In a limited way we open the walls [to teacher expression that is not curriculum related.]")).

Pursuant to this long-standing School District policy, practice, and/or custom, teachers have displayed and continue to display in their classrooms such non-curricular materials as posters of rock bands and musicians;[6] a poster of the controversial song *Imagine* written by John Lennon;[7] posters of various

[6] Defendants permit teachers to display posters of *Nirvana*, Bruce Springsteen and the *E Street Band*, Bob Dylan, and *The Beatles*, among others. (R-44, 46, 47: Dep. Exs. 52, 53, 54, 55, 56; ER (Vol. 2) at 222-26).

[7] Defendants do not object to a teacher's posting of the anti-religion lyrics of *Imagine*, which are as follows:

> Imagine there's no Heaven, It's easy if you try, No hell below us, Above us only sky, Imagine all the people, Living for today; Imagine there's no countries, It isn't hard to do, Nothing to kill or die for, And no religion too, Imagine all the people, Living life in peace; You may say that I'm a dreamer, But I'm not the only one, I hope someday you'll join us, And the world will be as one; Imagine no possessions, I wonder if you can, No need for greed or hunger, A brotherhood of man, Imagine all the people, Sharing all the world; You may say that I'm a dreamer, But I'm not the only one, I hope someday you'll join us, And the world will live as one.

professional athletes and professional sports teams; family photographs; non-student artwork; posters and other items, such as bumper stickers, decals, and buttons, promoting and advocating a viewpoint on controversial social and political issues such as gay rights,[8] global warming and the environment,[9] animal research,[10]

(R-44: Johnson Decl. at ¶ 15, n.2, Ex. A, Dep. Ex. 20 (emphasis added); ER (Vol. 2) at 183-84, 202; R-54: Collins Dep. at 89-90; ER (Vol. 3) at 306-07; Chiment Dep. at 177-78; ER (Vol. 3) at 354-55).

[8] Defendants permit teachers to display the following: a "*Stop Hate Crimes*" poster created by the Human Rights Campaign (hereinafter "HRC" found at www.hrc.org), "the largest national lesbian, gay, bisexual and transgender civil rights organization"; a poster with the pro-gay HRC equal ("=") symbol; a Gay, Lesbian and Straight Education Network (hereinafter "GLSEN" found at www.glsen.org) "*Day of Silence*" poster, which promotes the pro-gay day of silence; a gay, lesbian, bi-sexual, transgendered ("LGBT") rainbow flag; decals of the HRC "equal" symbol; bumper stickers with the pro-gay political slogan, "*Equal Rights Are Not Special Rights*"; pro-gay "*I am an ally*" decals created by GLSEN; bumper stickers with the pro-gay slogan, "*Celebrate Diversity*," in rainbow colors; postings about pro-gay support groups and issues; a pro-gay poster with the large caption, "*Unfortunately, History Has Set the Record A Little Too Straight*," highlighting the "National Coming Out Day, October 11th," which, according to the science teacher who displays the poster, is "a day when all gay people are supposed to come out of the closet and let people know they exist so that they will have a real live person to know who they are hating or not," (R-54: Brickley Dep. at 73; ER (Vol. 3) at 403); a bumper sticker for EQCA (Equality California), a gay rights organization that opposed Proposition 8 in California; a bumper sticker that says, "*Hate is not a family value*," which the teacher posting it uses to convey "the fact that 'family values' is a term that the conservative right," which includes Fundamentalist Christians and Catholics, "has used to make people who have different sorts of families wrong," (R-54: Brickley Dep. at 114; ER (Vol. 3) at 408); HRC posters; AIDS posters; and buttons expressing pro-gay slogans such as "*Hate Free Zone*," "*Celebrate Diversity*," "*Ask Me Why I'm Silent*," and a pink triangle with "*Never Again*." (R-44, 51, 52: Dep. Exs. 13, 14, 15, 16, 17, 18, 19, 137, 138, 142, 161; ER (Vol. 2) at 195-201, 268, 269, 271, 279).

anti-war/peace,[11] the military,[12] and others.[13] (*See* n.5, *supra*). All of these expressive items were displayed as of April 2009, which is more than two years after Defendants ordered Plaintiff to remove his patriotic banners. (R-44: Johnson Decl. at ¶¶ 12-15; ER (Vol. 2) at 182-87).

Pursuant to this policy, practice, and/or custom, the School District has allowed teachers to display Tibetan prayer flags, which contain an image of Buddha.[14] These prayer flags are considered sacred, religious items by those who practice Buddhism.[15]

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[9] Defendants permit teachers to display a *Greenpeace* poster stating, "*Stop Global Warming*," and another poster stating, "*How Do You Like Your Environment? Regular or Extra Crispy . Avoid Products that Destroy the Ozone* ." (R-47, 52: Dep. Exs. 64, 158; ER (Vol. 2) at 234, 277).

[10] (R-47: Dep. Ex. 65; ER (Vol. 2) at 235).

[11] Defendants permit teachers to display the following: a poster with a large peace symbol; a display of a Lincoln penny with the inscription, "*The War Is Coming. Are You Ready*?"; a mock flag of the United States with a peace symbol located in the field of blue; a poster stating, "*war is not healthy for children and other things*," a bumper sticker stating, "*How many Iraqi children did we kill today?* "; and a poster stating, "*Every Minute the World Spends $700,000 on War While 30 Children Die of Hunger & Inadequate Health Care* ." (R-45, 51: Dep. Exs. 36, 38, 39, 40, 41, 43, 141; ER (Vol. 2) at 208-212, 214, 270).

[12] (R-45, 47: Dep. Exs. 42, 60; ER (Vol. 2) at 213, 230). One poster displayed by a teacher consists of a large banner (approximately 5 feet high and 10 feet in length) with a photograph of an aircraft carrier and the following caption, " *Life, Liberty and the Pursuit of All Who Threaten It*." (R-45: Dep. Ex. 42; ER (Vol. 2) at 213).

[13] For example, Defendants permit a teacher to display a poster advocating a viewpoint regarding the controversial issue of zero population growth. (R-51: Dep. Ex. 152; ER (Vol. 2) at 275).

[14] (*See* R-44: Johnson Decl. at ¶¶ 11, 15; ER (Vol. 2) at 181-84; Dep. Exs. 24-26, 148, 155; ER (Vol. 2) at 203-05, 272, 276; R-54: Collins Dep. at 94-95; ER (Vol.

Teachers have also displayed and continue to display nature pictures; inspirational messages on posters and banners; patriotic messages on posters, banners, and flags; movie posters; posters of famous religious leaders, such as Gandhi (Hindu),[16] the Dali Lama (Buddhist), and the controversial Malcolm X (the Nation of Islam/Islam); and items of particular political parties and/or candidates, including a campaign poster of candidate Obama, a *Newsweek* magazine cover of the candidates Obama and Biden; and a poster of the "Libertarian Party."[17] (*See* n.5, *supra*).

Permissible subject matter for this forum for non-curricular, personal speech include, *inter alia*, the foundations of our Nation, patriotic messages, inspirational messages, historical messages, and slogans that are praiseworthy of our Nation. (R-44: Johnson Decl. at ¶¶ 11-15, 38; ER (Vol. 2) at 181-87, 192; R-54: Collins Dep. at 38-40, 56, 155-56; ER (Vol. 3) at 300, 302, 314; Chiment Dep. at 45, 84-85, 135-36, 141, 215-17; ER (Vol. 3) at 338, 346, 352, 353, 361; Kastner Dep. at

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3) at 308; Chiment Dep. at 180-81; ER (Vol. 3) at 355). One teacher's Buddhist prayer flag display stretches 35 to 40 feet across her science classroom. (R-44: Johnson Decl. at ¶ 15, n.3; ER (Vol. 2) at 184; R-54: Brickley Dep. at 87; ER (Vol. 3) at 405).

[15] Buddhists believe that these flags impart a spiritual blessing upon those in the presence of the flags. (R-44: Johnson Decl. at ¶ 11; ER (Vol. 2) at 181-82; R-54: Brickley Dep. at 90; ER (Vol. 3) at 406).

[16] Defendants permit a posting of Gandhi 's "7 Deadly Social Sins." (R-46: Dep. Ex. 48; ER (Vol. 2) at 218).

[17] Defendants also permit the display of the Gadsden flag with the political slogan, "*Don't Tread on Me*." (R-47: Dep. Exs. 62, 63; ER (Vol. 2) at 232-33).

45; ER (Vol. 3) at 3 86). And, as Defe ndants admitted below, "[R]eligion is not a category of item s prohibited from classroom walls." (R-55: Defs.' P. & A. in Supp. of Mot. for Summ. J. at 7; ER (Vol. 3) at 426).

Pursuant to this School District po licy, practice, and/or custom, for approximately 25 years Plaintiff continuously displayed, without objection, various patriotic banners that reflect the history and heritage of our N ation.[18] Plaintiff had the banners made to order by a private company and purchased them with his own personal funds. The banners do not bel ong to t he School District; they are Plaintiff's personal items. (R-44: Johnson Decl. at ¶ 5; ER (Vol. 2) at 180).

Plaintiff's banners contain well-known historical, patriotic phrases and slogans central to our Nation's hi story and heritage, and they reflect the foundations of our Nation. The banners do not contain quot es or passages from Sacred Scripture or a ny other religious te xt. (R-44: Johnson Decl. at ¶¶ 6, 17-32; ER (Vol. 2) at 180, 188-91; R-52: Ex. B; ER (Vol. 2) at 280-87; R-54: Collins Dep. at 27-34; ER (Vol. 3) at 297-99; C himent Dep. at 36-37, 40-43, 46, 118-21; ER (Vol. 3) at 336-39, 349; Kastner Dep. at 158-59; ER (Vol. 3) at 393).

[18] During his 30 plus years of teaching in the School District, Plaintiff has had 7 different school pri ncipals, numerous sc hool board m embers, superintendents, assistant superintendents, over 4,000 stude nts and several thous and parents in his classrooms where the banners we re displayed. Pri or to the Fall of 2006, Plaintiff had not received one co mplaint from any School District ad ministrator, parent, or student about the banners. (R-44: Johnson Decl. at ¶ 33; ER (Vol. 2) at 191).

The classrooms in which Plaintiff's banners were displayed were assigned to him. His current classroom in Westview High School is his classroom for homeroom and academic classes. He also uses his classroom for non-curricular and extra-curricular activities. (R-44: Johnson Decl. at ¶ 7; ER (Vol. 2) at 180). As a matter of School District policy, practice, and/or custom, teachers are given discretion and control over the various non-curricular messages displayed on their classroom walls. For example, no teacher is permitted to display materials or messages on Plaintiff's classroom walls without his permission, and the School District does not direct the teachers' non-curricular displays; it is up to the individual teacher. (R-44: Johnson Decl. at ¶¶ 8, 9; ER (Vol. 2) at 180-81; R-54: Collins Dep. at 42-43, 57; ER (Vol. 3) at 301-02; Chiment Dep. at 64-65, 91, 134; ER (Vol. 3) at 343, 347, 352). Consequently, as Defendants admit, the School District does not endorse or promote the non-curricular messages displayed by the teachers. (R-44: Johnson Decl. at ¶¶ 5, 16; ER (Vol. 2) at 180, 188; R-54: Collins Dep. at 40-41; ER (Vol. 3) at 300; Chiment Dep. at 274, 279; ER (Vol. 3) at 367, 368). Thus, the teachers' displays do not constitute government speech.[19] (R-44:

[19] Defendant Chiment testified on behalf of the School District as follows:

> Q: You would agree, though, too, that these -- the posters that the teachers put up, the noncurriculum ones that might express their own personal interest, whether it be sports or it might be in environmental issues like the ones we saw --
> A: Yes.

Johnson Decl. at ¶¶ 5, 16; ER (Vol. 2) at 180 188; R-54: Collins Dep. at 40-41; ER (Vol. 3) at 300; Chiment Dep. at 274, 279; ER (Vol. 3) at 367, 368).

Plaintiff's banners contain the following historical, patriotic phrases: "In God We Trust," the official motto of the United States; [20] "One Nation Under God," the 1954 amendment to the Pledge of Allegiance; [21] "God Bless America," a patriotic song; [22] "God Shed His Grace On Thee," a line from "America the

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> Q: -- that those don't necessarily mean that the School District is endorsing those particular views or opinions? Isn't that true?
> A: Yes, that's true.

(R-54: Chiment Dep. at 274; ER (Vol. 3) at 367).

Mr. John Collins, Deputy Superintendent of the School District at the time, testified on behalf of the School District as follows:

> Q: * * * So just because a teacher may actually post something of a personal interest to them [on the classroom wall], that doesn't necessarily mean that it's the School District endorsing or promoting that teacher's particular interest. Isn't that fair to say?
> A: That is.

(R-54: Collins Dep. at 41; ER (Vol. 3) at 300).

[20] A law passed by Congress and signed by the President on July 30, 1956, approved a joint resolution of Congress that declared "In God we trust" the national motto of the United States. "In God We Trust" appears above the Speaker's Chair in the United States House of Representatives and above the main door of the United States Senate chamber. (R-44: Johnson Decl. at ¶¶ 22, 24; ER (Vol. 2) at 189).

[21] In 1942, Congress enacted the Pledge of Allegiance, which was amended in 1954 to officially include the phrase "under God." Students in the School District recite the Pledge of Allegiance on a daily basis. (R-44: Johnson Decl. at ¶ 27; ER (Vol. 2) at 190).

[22] "God Bless America" is an American patriotic song written by Irving Berlin in 1918 and later revised by him in 1938. It 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. (R-44: Johnson Decl. at ¶ 30; ER

Beautiful," a patriotic song;[23] and "All Men Are Created Equal, They Are Endowed By Their Creator," an excerpt from the preamble to the Declaration of Independence.[24] (R-44: Johnson Decl. at ¶¶ 6, 17-32; ER (Vol. 2) at 180, 188-91; R-52: Ex. B; ER (Vol. 2) at 280-87; R-54: Collins Dep. at 27-34; ER (Vol. 3) at 297-99; Chiment Dep. at 36-37, 40-43, 46, 118-21; ER (Vol. 3) at 336-39, 349; Kastner Dep. at 158-59; ER (Vol. 3) at 393). Consequently, the subject matter of Plaintiff's speech was permissible in this forum.[25]

Plaintiff's banners were not displayed pursuant to any of his official duties as a teacher. He did not use his banners during any classroom session or period of instruction. They were not discussed or studied. They caused no material disruption or disorder in his classroom or anywhere else in the school. They did

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(Vol. 2) at 190-91; R-54: Collins Dep. at 29-30; ER (Vol. 3) at 297-98; Chiment Dep. at 40; ER (Vol. 3) at 337). "God Bless America" is a phrase that is also commonly used in speeches by the President of the United States. (R-44: Johnson Decl. at ¶ 31; ER (Vol. 2) at 191; R-54: Collins Dep. at 30; ER (Vol. 3) at 298; Chiment Dep. at 40-41; ER (Vol. 3) at 337).

[23] "God Shed His Grace on Thee" is a verse from "America the Beautiful," an American patriotic song that is often played at public events. (R-44: Johnson Decl. at ¶ 32; ER (Vol. 2) at 191; R-54: Collins Dep. at 30; ER (Vol. 3) at 298).

[24] The preamble to the Declaration of Independence states as follows: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence is our Nation's founding document. (R-44: Johnson Decl. at ¶ 29; ER (Vol. 2) at 190).

[25] (R-44: Johnson Decl. at ¶¶ 11-15, 38; ER (Vol. 2) at 181-87, 192; R-54: Collins Dep. at 38-40, 56, 155-56; ER (Vol. 3) at 300, 302, 314; Chiment Dep. at 45, 84-85, 135-36, 141, 215-17; ER (Vol. 3) at 338, 346, 352, 353, 361; Kastner Dep. at 45; ER (Vol. 3) at 386).

not interfere with his teaching.[26] And they were not expressing a message on behalf of the School District. (R-44: Johnson Decl. at ¶¶ 5, 16, 36, 39; ER (Vol. 2) at 180, 188, 192; R-54: Collins Dep. at 40-41, 94, 125-26; ER (Vol. 3) at 300, 308, 310; Chiment Dep. at 93-95, 271-72, 274, 276, 279; ER (Vol. 3) at 347-48, 366-68; Dep. Ex. 6; ER (Vol. 3) at 372).

Plaintiff's long-standing practice of displaying his banners came to an abrupt end in January, 2007, when Defendants ordered Plaintiff to take them down.[27] Defendants directed Plaintiff to remove his banners because they believed that the banners were promoting a "Christian" or "Judeo/Christian" viewpoint. On behalf of the School District, Defendant Chiment sent a letter to Plaintiff explaining the order to remove the banners. In the letter, Defendant Chiment stated that

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[26] During his first two years as a probationary teacher, Plaintiff was evaluated 3 times each year. As a tenured teacher, Plaintiff is evaluated twice a year, every other year by the School District. Typically, the evaluation is performed by an assistant principal. As part of the evaluation, the administrator observes Plaintiff teaching in his classroom and evaluates whether or not his teaching and his classroom comport with School District standards and policies. None of Plaintiff's official evaluations over a 30-plus-year period ever indicated that his banners were impermissible, nor did any of Plaintiff's evaluators ever inform him that his banners were impermissible or that they disrupted or detracted from Plaintiff's teaching or the students' learning in any way. (R-44: Johnson Decl. at ¶ 34; ER (Vol. 2) at 191).

[27] Prior to the School District's order to remove the banners in 2007, the School District received no complaints about the banners from students, teachers, parents, or School Board members. The only complaint to the School District came from Defendant Kastner in the fall of 2006, and this complaint resulted in the removal of the banners. (R-44: Johnson Decl. at ¶¶ 5, 33, 34, 37; ER (Vol. 2) at 180, 191-92; R-54: Chiment Dep. at 34-36; ER (Vol. 3) at 336).

Plaintiff's banners conveyed an impermissible "sectarian viewpoint" and, more specifically, "a particular sectarian viewpoint." The "particular sectarian viewpoint" noted in the letter was referring to the viewpoint of "those religious groups who refer to a supreme being as God," such as Christians. Defendant Dawn Kastner, Plaintiff's principal at Westview High School, believed that Plaintiff's banners were impermissible because they expressed a "Christian" viewpoint. (R-44: Johnson Decl. at ¶¶ 37-39; ER (Vol. 2) at 192; R-54: Collins Dep. at 43-44; ER (Vol. 3) at 301; Chiment Dep. at 29-31, 130, 133, 278; ER (Vol. 3) at 334-35, 351, 368; Kastner Dep. at 44-45, 101-02, 137, 172; ER (Vol. 3) at 385-86, 391-92, 394; Dep. Ex. 6; ER (Vol. 3) at 372). Meanwhile, Defendants had no objection to a science teacher displaying a ***35- to 40-foot string*** of Tibetan *prayer* flags, which are sacred items that promote the Buddhist religion.[28] In fact, the science teacher who displays the prayer flags was not surprised that the flags contained sacred text and prayers of Buddhists, noting quite accurately that "there was a Buddhist picture on there." (R-54: Brickley Dep. at 90; ER (Vol. 3) at 406). Moreover, Defendants admit that these permissible prayer flags " ***are non-***

[28] (*See* R-44: Johnson Decl. at ¶¶ 11, 15, n.3; ER (Vol. 2) at 181-84; Dep. Exs. 24-26, 148, 155; ER (Vol. 2) at 203-05, 272, 276; R-54: Collins Dep. at 94-95; ER (Vol. 3) at 308; Chiment Dep. at 180-81; ER (Vol. 3) at 355; Brickley Dep. at 87, 90; ER (Vol. 3) at 405-06).

curricular personal items in nature," *similar to Plaintiff's banners*. (Defs.' P. & A. in Supp. of Mot. for Summ. J. at 19; ER (Vol. 3) at 438).

At the time Defendants directed Plaintiff to remove his banners, they had no evidence that the banners caused any material disruption or disorder in the School District.[29] Defendants' removal of Plaintiff's banners was not curriculum related; Plaintiff was teaching and continues to teach his assigned mathematics curriculum.[30] Defendants singled out Plaintiff for disfavored treatment because of the viewpoint expressed by his message. (R-44: Johnson Decl. at ¶¶ 16, 35-39; ER (Vol. 2) at 188, 192; R-54: Collins Dep. at 36-37, 43-44, 95; ER (Vol. 3) at 299, 301, 308: Chiment Dep. at 49-51, 93-95, 130, 133, 276, 278; ER (Vol. 3) at 339-

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[29] Moreover, Defendants had no evidence that Plaintiff was using his banners to proselytize. 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***.

(R-54: Chiment Dep. at 25; ER (Vol. 3) at 333) (emphasis added).

[30] Mr. Collins, testifying on behalf of the School District, admitted that Plaintiff's banners "were not part of the curriculum," and that "[t]he banners have not prevented [Plaintiff] from providing math instruction and fulfilling his responsibilities." (R-54: Collins Dep. at 94, 125-26; ER (Vol. 3) at 308, 310; *see also* Chiment Dep. at 93; ER (Vol. 3) at 347) (concurring that the banners were not part of the math curriculum taught by Plaintiff).

40, 347-48, 351, 367-68; Kastner Dep. at 44-45, 85-86, 101-02, 137; ER (Vol. 3) at 385-86, 390-92; Dep. Ex. 6; ER (Vol. 3) at 372). The decision to order Plaintiff to remove his banners was approved by all Defendants, including the Superintendent and the School Board. (*See* n.3, *supra*).

Had Plaintiff not complied with Defendants' order to remove his banners, Plaintiff would have been subject to some form of disciplinary action for insubordination. (R-44: Johnson Decl. at ¶ 41; ER (Vol. 2) at 193; R-54: Collins Dep. at 59; ER (Vol. 3) at 303).

SUMMARY OF THE ARGUMENT

The undisputed facts of this case compel the court to conduct a First Amendment forum analysis, similar to the analysis conducted by the district court. And based on well-established and controlling law, Defendants' viewpoint-based restriction of Plaintiff's speech violates his right to freedom of speech protected by the United States and California Constitutions. Indeed, should this court decide to engage in a balancing test, that balance also weighs in favor of protecting Plaintiff's speech.

By granting the use of a forum to teachers whose personal, non-curricular views Defendants find acceptable, but denying use of this forum to Plaintiff based on the viewpoint of his personal, non-curricular speech, Defendants violated not

only the First Amendment, but the Equal Protection Clause of the Fourteenth Amendment as well.

Finally, by favoring certain religious and anti-religious speech and disfavoring Plaintiff's alleged "Judeo-Christian" speech, Defendants violated the Establishment Clause of the United States Constitution and the Establishment and No Preference Clauses of the California Constitution.

Because Defendants violated clearly established constitutional rights, they do not enjoy qualified immunity in their individual capacities. Consequently, Plaintiff is entitled to nominal damages as well as declaratory and injunctive relief for the violation of his constitutional rights.

ARGUMENT

I. Introduction.

Defendants' entire argument is predicated upon a factual record that does not exist.[31] Defendants acknowledged below that "there are no material issues of fact." (R-60: Defs.' Reply to Pl.'s Opp'n to Mot. for Summ. J. at 1; ER (Vol. 4) at 693). Yet, they proceed to advance arguments before this court that find no factual support. Indeed, the undisputed facts, which are based almost entirely upon Defendants' testimony, demonstrate the following:

[31] The same can be said for the arguments advanced in the briefs filed by *Amici Curiae* NSBA & CSBA and *Amicus Curiae* Americans United for Separation of Church and State.

- The School District intentionally created a forum for the personal, non-curricular speech of its teachers;[32]

- Plaintiff displayed his banners in this forum for over 25 years without complaint;

- Plaintiff's banners are not part of the curriculum; the banners constitute personal, non-curricular speech.[33] In fact, Defendants made the following admission in their brief filed in support of their motion for summary judgment: "***The*** [***Tibetan prayer***] ***flags, like Johnson's banners, are non-***

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[32] Defendants complain that "[t]he District Court's ruling fails to analyze the purpose for which [all of the items in the record identified by Plaintiff as a result of the court-ordered inspection] were displayed, *e.g.*, whether a particular display was a student project or a teacher decoration, and whether the classroom was for science, history, or other subject. The absence of that analysis was error." (Defs.' Br. at 52). However, the alleged failing, if there is one, is not on the part of the district court; rather, this alleged failing is on the part of Defendants, who provided no evidence to dispute Plaintiff's claim that these items were displayed pursuant to the School District's policy of permitting teachers to display personal, non-curricular items. Indeed, a simple review of the record demonstrates that the items are personal and non-curricular in nature. It is too late in the day for Defendants to complain about the record below.

[33] No doubt realizing that they cannot win this appeal based on the record, Defendants make the unsupported claim that "Johnson's banners are both curricular in nature *and* speech made pursuant to his duties as a teacher." (Defs.' Br. at 34). However, the testimony provided on behalf of the School District flatly contradicts Defendants' claim. (R-54: Chiment Dep. at 128-29; ER (Vol. 3) at 350 (describing Plaintiff's banners as "non curricular and personal" speech); Collins Dep. at 94; ER (Vol. 3) at 308 (stating that the banners "were not part of the curriculum")).

curricular personal items in nature . . . ." (Defs.' P. & A. in Supp. of Mot. for Summ. J. at 19; ER (Vol. 3) at 438).

- Plaintiff's banners do not express a message on behalf of the School District. Consequently, Plaintiff's speech is private speech and not government speech, similar to the other personal, non-curricular speech that the School District permits;

- Permissible subject matter in the forum created by the School District include messages related to the foundations of our Nation, patriotic messages, inspirational messages, historical messages, slogans that are praiseworthy of our Nation, and religious messages, among others, including messages related to controversial subject matter such as gay rights, global warming, and war/anti-war;

- The message conveyed by Plaintiff's banners falls within a permissible subject matter for the forum created by the School District;

- Defendants' restriction on Plaintiff's speech was viewpoint-based; that is, Defendants restricted Plaintiff's speech because, according to them, Plaintiff's patriotic banners conveyed a "Judeo-Christian" viewpoint;

- Plaintiff's "Judeo-Christian" viewpoint was prohibited, while Defendants permitted speech expressing Buddhist and other religious messages, as well as anti-religious messages.

In their brief, Defendants cite to a School District policy that allegedly prohibits teachers from "using classroom teacher influence to promote partisan or sectarian viewpoints." (Defs.' Br. at 15). Yet, Defendants have no objection when teachers blatantly use their "classroom teacher influence to promote" gay rights (in fact, Defendants permit teachers to actively engage in a protest with students, during the school day, and on school property to promote such rights), global warming, anti-religious sentiments, Buddhism, among other "partisan or sectarian" viewpoints. This court, like the district court, should be troubled by Defendants' position. As the district court appropriately noted, "Ironically, while teachers in the Poway Unified School District encourage students to celebrate diversity and value thinking for one's self, Defendants apparently fear their students are incapable of dealing with diverse viewpoints that include God's place in American history and culture." (R-66: Op. at 5, n.1; ER (Vol. 1) at 5).

Based on these undisputed facts and in light of the controlling case law, this court should affirm the decision below.

II. Defendants Violated Plaintiff's First Amendment Right to Freedom of Speech.

A. Plaintiff's Speech Is Protected by the First Amendment.

The undisputed facts establish that Defendants created a forum for teachers to engage in personal, non-curricular speech. Defendants seek to avoid this inconvenient fact (and the controlling law) so as to keep this forum open for

favored opinions and viewpoints, while retaining the power to censor viewpoints they dislike. From a legal (and educational) perspective, Defendants' arguments are misguided.

Plaintiff, a public school teacher, does not "shed [his] constitutional rights to freedom of speech or expression at the schoolhouse gate." *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 . . . .").

And there can be no dispute that Plaintiff's banners constitute protected speech. *See Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("[S]ign displays . . . are protected by the First Amendment."); *United States v. Grace*, 461 U.S. 171, 176-77 (1983) (demonstrating with signs and banners constitutes protected speech under the First Amendment); *Brown v. California Dep't of Transp.*, 321 F.3d 1217 (9th Cir. 2003) (enjoining policy restricting the display of signs or banners on highway overpass fences, a nonpublic forum, under the First Amendment).

Moreover, Plaintiff's banners, which were displayed without objection for 25 years, did not disrupt the classroom nor materially interfere with the basic educational mission of the School District. *See Tinker*, 393 U.S. at 513 (holding that the "special characteristics of the school environment" permit restrictions on speech only so long as the speech "materially and substantially disrupt[s] the work and discipline of the school"); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (same).

Finally, there can be no dispute that Plaintiff's constitutional rights are implicated by Defendants' speech restriction. *See Perry Educ. Ass'n*, 460 U.S. at 44 ("There is no question that constitutional interests are implicated by denying [appellee] use of the interschool mail system."); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967) ("[T]he theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.").

In sum, Plaintiff's banners constitute protected speech. And Plaintiff has a First Amendment right to display his banners in the forum created by Defendants.

B. Defendants Created a Forum for Plaintiff's Speech.

There is no escaping the fact that this is a forum analysis case—not a *Pickering* balancing case—because Plaintiff is seeking to use government property (his classroom walls) for non-curricular, personal expression pursuant to a

longstanding School District policy, practice, and/or custom of permitting teachers to use this forum for such speech—a practice that the School District does not deny.[34]

However, Defendants invite this court to eschew a forum analysis in favor of a "balancing" test in which they have their fingers on the scale. This court should reject Defendants' invitation, which essentially strips Plaintiff of his fundamental rights and undermines the values protected by the First Amendment.

The U.S. Supreme Court "has adopted 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 other purposes*." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985) (emphasis added); *see Flint v. Dennison*, 488 F.3d 816, 828-30,

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[34] There are recognizable limits that the courts have upheld in a school setting. For example, the School District could prohibit speech that promotes illegal drug use, *see Morse,* 551 U.S. at 408-09, or that "materially and substantially disrupt[s] the work and discipline of the school," *Tinker*, 393 U.S. at 513, such as speech prohibited by an anti-harassment policy or speech that is sexually suggestive, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678 (1986). Under Supreme Court precedent, the School District could also restrict speech that "incite[s] to imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969), or speech that constitutes "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1941). None of these limitations apply to Plaintiff's patriotic expression. Moreover, as noted previously, the School District could simply close the forum to all non-curricular speech. Consequently, the suggestion that the district court's decision requires the School District to surrender its classrooms and its curriculum to the teachers is hyperbolic nonsense. *See generally* Br. of *Amici* NASB & CASB.

n.9 (9th Cir. 2007) (conducting a forum analysis in a case seeking review of a public school speech restriction); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1048 (9th Cir. 2003) ("To analyze his [First Amendment free speech] claim, we must first consider what type of forum the [School] District has created.").

Consequently, contrary to Defendants' arguments, to determine the extent of Plaintiff's free speech rights on School District property in light of the facts of this case, the court must engage in a First Amendment forum analysis. *Arizona Life Coal., Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008) ("The first step in assessing a First Amendment claim relating to private speech on government property is to identify the nature of the forum.") (internal quotations omitted); *see also Perry Educ. Ass'n*, 460 U.S. at 44 (applying a forum analysis in a case involving a public school speech restriction and noting that "[t]he First Amendment's guarantee of free speech applies . . . within the school and on sidewalks outside") (internal citation and punctuation omitted).

Defendants cite to *Berry v. Department of Soc. Serv.*, 447 F.3d 642 (9th Cir. 2006), to argue that the *Pickering* balancing test should apply to the facts of this case. (*See* Defs. Br. at 38-39). However, in *Berry* this Circuit applied a *forum analysis* to determine the constitutionality of the government's restriction on the *use of its facilities* for the plaintiff's speech (as opposed to the *Pickering* balancing

test the court applied to evaluate the restriction of plaintiff's speech when counseling clients of the department).

Thus, it would be error to accept Defendants' invitation to ignore controlling law, which compels a forum analysis under the facts of this case. *See Flint*, 488 F.3d at 828-30, n.9 (noting that it is error to not conduct a forum analysis and further noting that the U.S. Supreme Court has reinforced "the conclusion that we must analyze [the public school speech restriction at issue] within the confines of traditional forum analysis").

In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988), for example, the Court applied its forum analysis in the context of a public high school. The Court specifically noted that school facilities—such as the classroom walls in this case—could be deemed "public forums" for First Amendment purposes if school authorities "by policy or by practice" opened those facilities for use "by some segment of the public, such as student organizations"—or, as here, teachers. *Id.*; *see Perry Educ. Ass'n*, 460 U.S. at 37 (applying a forum analysis to determine the constitutionality of a speech restriction applied to the interschool mail system and teacher mailboxes in a public school district).

"Forum analysis has traditionally divided government property into three categories: public fora, designated public fora, and nonpublic fora." *Flint*, 488 F.3d at 830 (citation omitted). "Once the forum is identified, we determine

whether restrictions on speech are justified by the requisite standard." *Id.* "On one end of the fora spectrum lies the traditio nal public forum, 'places which by long tradition . . . have been devoted to assembly and debate.' Next on the spectrum is the so-called designated public forum, which exists '[w]hen the governm ent intentionally dedicates its property to expressive conduct.'" *Id.* (citations omitted). As the U.S. Supreme Court stated, " [A] public forum may be created by government designation of a place or channel of co mmunication for use by the public at large for assembly and speech, *for use by certain speakers* , or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802 (emphasis added). In a traditional or designated public forum , restrictions on speech are subject to strict scrutiny. *Flint*, 488 F.3d at 830.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), for exam ple, the Court held that a state university, which made its facilities generally available for the activities of registered student groups (sim ilar to this case, the university's facilities were not open to the general public), may not close its facilities to a student group based on the content of the group's speech. *Id.* at 264-65, 267, n.5. The Court stated, "Through its policy of acco mmodating their meetings, the University has created a forum generally open for use by st udent groups. Having done so, the Universit y has assumed an obl igation to justify it s discriminations and exclusions under applicable constitutional norms . . . ***even if it was not required to create the forum***

in the first place." *Id.* at 267-68 (emphasis added). The Court considered the forum to be a designated public forum, applied strict scrutiny, and struck down the regulation. *Id.* at 270 & 277.

In this case, the School District created a forum generally open "for use by certain speakers," thereby creating a forum for the "non-curricular, personal" speech of its teachers. And because Defendants singled out Plaintiff's expression for exclusion from this forum based not only on its content (which is impermissible), but its viewpoint (which is fatal), this court should affirm the decision below.

"At the opposite end of the forum spectrum is the nonpublic forum. The nonpublic forum is '[a]ny public property that is not by tradition or designation a forum for public communication.'" *Flint,* 488 F.3d at 830 (citations omitted). In a nonpublic forum, government restrictions are subjected to less-exacting judicial scrutiny. There a government may restrict free speech if it acts reasonably and does not suppress expression merely because public officials oppose the speaker's view. *Id.* (citations omitted).

This Circuit recognizes a "limited public forum" as a subcategory of the designated public forum. *See id.* at 830-31. A "limited public forum" is "a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics." *Id.* at 831. "***Once a government has opened a limited forum, it***

must respect the lawful boundaries it has itself set."[35] *Id.* at 831 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)) (internal quotations and punctuation omitted) (emphasis added). Accordingly, in a limited public forum "the [government] may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." *Flint*, 488 F.3d at 829 (citations and quotations omitted).

Here, the undisputed evidence shows that pursuant to a long-standing policy, practice, and/or custom, the School District created, at a minimum, a "limited public forum" that is open for use by teachers, including Plaintiff, to express a variety of messages, including personal, non-curricular messages. Pursuant to this policy, practice, and/or custom, teachers displayed and continue to display on their classroom walls messages that reflect the individual teacher's personality, opinions, and values with regard to a wide range of subject matter, including ***controversial*** social and political concerns. *See generally New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (concluding that the advertising space on the outside of buses was a public forum where the transit

[35] Certainly, as noted previously, if Defendants wanted to take the draconian step of removing all personal expressive items from the classroom walls, thereby closing the forum to <u>all</u> personal, non-curricular speech, it could do so. But once it has created this forum, it cannot pick and choose which messages are acceptable and which are not based on viewpoint.

authority permitted "political and other non-commercial advertising generally"); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) (concluding that the advertising space on a public bus system was a public forum and stating that "[a]cceptance of political and public-issue advertisements, which by their very nature generate conflict, signals a willingness on the part of the government to open the property to controversial speech"); *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) (same). Permissible subject matter in this forum include patriotic messages, historical messages, inspirational messages, religious messages, and messages regarding the foundations of our Nation, among others (such as gay rights, global warming, and anti-war messages). Pursuant to this policy, practice, and/or custom, teachers have discretion and control over the messages they wish to convey in this forum.

Thus, a forum analysis is the proper approach to take based on the facts of this case. And based on this analysis, the School District created, at a minimum, a limited public forum for the personal, non-curricular speech of its teachers. Thus, Defendants' viewpoint-based restriction of Plaintiff's speech cannot survive constitutional scrutiny.

C. Defendants' Speech Restriction Violates the First Amendment.

1. Defendants' Speech Restriction Is Viewpoint-Based.

Viewpoint discrimination is prohibited in all forums because it is an egregious form of content discrimination. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)). Pursuant to controlling case law, if certain 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." *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003). Viewpoint discrimination occurs when the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806.

Because Defendants singled out Plaintiff's speech based on his viewpoint, Defendants' speech restriction cannot survive constitutional scrutiny. *See also Rosenberger,* 515 U.S. at 819; *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 Center 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 public high school limited public forum "where restriction to the forum is based solely on . . . religious viewpoint, the restriction is invalid").

Indeed, "[r]estrictions on free expression in a nonpublic forum are constitutional only if the distinctions dr awn are (1) 'reasonable in light of the purpose served by the forum ' and (2) 'viewpoint neutral.'" *Brown v. California Dep't of Transp.*, 321 F.3d 1217, 1222 (9th Cir. 2003) (quoting *Cornelius*, 473 U.S. at 806); *Perry*, 460 U.S. at 46 (stati ng that speech restrictions in a nonpublic forum must be reasonable and viewpoint neutral)).

As noted previously, Defendants' sp eech restriction fails the viewpoint neutrality prong, and is thus unc onstitutional for that reason alone.[36] Nonetheless, it also fails the "reasonableness" prong.

2. Defendants' Speech Restriction Is Unreasonable.

The "reasonableness" prong "focuses on whether the lim itation is consistent with preserving the property for the purpose to which it is dedicated." *Brown,* 321 F.3d at 1222 (internal quotations and citation omitted). Here, Plaintiff's speech did not disrupt school work, it di d not cause m aterial disorder or interference in the classroom, and it did not interfere with his math instruction or his responsibilities as a teacher. Defendants' order to rem ove the banners was not curricul um related. Plaintiff's banners were not displayed as pa rt of his official duties as a teacher, nor

[36] This Circuit has also "incorporated 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases . . . ." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000) (citing *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 828 n. 19, 829-30 (9th Cir. 1991)).

were they part of his math curriculum, which he continues to teach today. The banners have never prevented Plaintiff from teaching his math curriculum, nor have they limited him in any way in the teaching of his classes. In fact, Plaintiff was and continues to be one of the highest rated math teachers at Westview High School.

Defendants cannot readily allow personal posters of rock bands and sports teams, personal posters promoting a particular viewpoint on controversial political issues such as gay rights or global warming, large (35' to 40') displays of sacred Tibetan prayer flags, and a host of other displays and personal viewpoints, but then prohibit Plaintiff's patriotic banners, which were displayed without objection for 25 years, without running afoul of the First Amendment.

In sum, whether the classroom walls are a "designated public forum," a "limited public forum," or a "nonpublic forum" it makes little difference. Defendants' viewpoint-based restriction on Plaintiff's speech violates the First Amendment.

III. *Pickering/Berry/Garcetti/Eng* Do Not Justify Defendants' Speech Restriction.

Defendants improperly eschew any forum analysis in favor of applying the "balancing test" set forth in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), *Berry v. Department of Soc. Serv.*, 447 F.3d 642 (9th Cir. 2006), and *Garcetti v.*

Ceballos, 547 U.S. 410 (2006). [37] Defendants also argue that the "five-part *Eng* test" set forth in *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009), which is little more than the application of the *Pickering* balancing test in the context of a retaliation case, should apply.[38] Not only is this analysis error, as noted previously, but these cases are inapplicable here because none of them address a situation in which the government opens a forum for certain expressive activity, but then prohibits a speaker from expressing an appropriate message in the forum based on his viewpoint, as in this case.

Indeed, this Circuit did not rely on the *Pickering* balancing test to reach its conclusion in *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000), a case involving teacher speech. While distinguishable on its facts, *Downs* demonstrates the constitutional violation at issue here. In *Downs*, the court upheld a school district's restriction on a teacher's ability to change the viewpoint expressed by the district on its "Gay and Lesbian Awareness" bulletin boards. The

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[37] The *Pickering* test essentially seeks to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick v. Myers*, 461 U.S. 138, 140 (1983) (quoting *Pickering*, 391 U.S. at 568).

[38] If this court is inclined to apply the *Pickering* balancing test and consider various factors in its analysis, the court should follow the approach taken by the district court in its alternative analysis of Plaintiff's free speech claim under *Pickering*. *See infra* note 40; (R-66: Op. at 22; ER (Vol. 1) at 22). Consideration of the facts of this case under *Pickering* yields the same result: Defendants violated Plaintiff's First Amendment right to freedom of speech.

court concluded that the bulletin boards in question were a nonpublic forum and that the speech in question was governme nt speech made pursuant to a specific school district policy related to the "G ay and Lesbian Awareness Month." The court stated, "We do not face an exam ple of the governm ent opening up a forum for either unlim ited or lim ited public discu ssion," and explicitly found that "[t]he bulletin boards served as an expressive vehicle for the school board's policy of 'Educating for Diversity.'" *Id*. at 1012. Accordingl y, the court he ld that the speech was government speech; therefore, viewpoint neutrality did not apply. *Id*.

Here, there is no dispute that the speech at issue is Plaintiff's personal, non-curricular speech, so viewpoint neutrality doe s apply. Indeed, at a mini mum, *Downs* compels this court to conduct a forum analysis. And based on the fact that Defendants' restriction was viewpoint based, *Downs* compels the court to affirm the decision below.

Similarly, as noted previously, Defendants' reliance on *Berry v. Department of Soc. Serv.*, 447 F.3d 642 (9t h Cir. 2006), is m isplaced. Defendants im properly criticize the district court for relying on forum analysis cases that they claim do not involve a public employer's li mitation on an *employee's* speech. However, *Berry*, which is an "emplo yee speech" case, di d use a forum anal ysis when deciding whether or not the em ployer's restriction on the use of its facilities for the

employee's speech violated the First Amendment.[39] *Id.* at 652-54. Because this case involves the restriction on Plaintiff's use of government facilities for his personal, non-curricular speech, *Berry* confirms that a forum analysis is proper.

Moreover, in its latest application of the *Pickering* test, the U.S. Supreme Court in *Garcetti* expressly stated that its analysis did not apply in a school setting. *Garcetti*, 547 U.S. at 425.

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[39] The court applied the *Pickering* balancing test "to the Department's restriction on Mr. Berry's speech with clients." *Berry*, 447 F.3d at 652-54. And with scant analysis, the court upheld the restriction on the plaintiff's "Happy Birthday Jesus" sign and the display of his Bible in the cubicle that he uses to counsel clients, claiming "that the Department's restrictions on the display of religious items are reasonable under the *Pickering* balancing test." *Id.* at 651. Consequently, the court treated the displays as an extension of the plaintiff's speech with the Department's clients.

Unlike the present case, in *Berry* there was no evidence or argument that the government created a forum for the cubicle displays. And the court considered the restriction to be one based on *subject matter*, not viewpoint. In this case, *Plaintiff's speech was personal, non-curricular speech*. His banners were displayed pursuant to a long-standing policy, practice, and/or custom of allowing teachers to express personal, non-curricular messages on their classroom walls—*a forum opened by Defendants for this purpose*. The banners were not displayed pursuant to any of his official duties as a teacher. He did not use them during any classroom session or period of instruction. They were not discussed or studied in any of his classes. They caused no material disruption or disorder in the school. They did not interfere with the teaching of his classes. They were not expressing a message on behalf of the School District. And Defendants' restriction was viewpoint based. Neither *Pickering* nor *Berry* apply to these facts. Moreover, as the district court properly noted, "The potential for an Establishment Clause issue was greater there, than here, as the employee in *Berry*, unlike Johnson, said he would share his faith and pray with agency customers." (R-66: Op. at 23; ER (Vol. 1) at 23).

In *Lee v. York County Sch. Divs.*, 484 F.3d 687 (4th Cir. 2007), a case that Defendants claim is "most on point," (Defs.' Br. at 28), the Fourth Circuit refused to apply *Garcetti* and instead applied *Pickering* in light of circuit precedent. Most important for purposes of this case is the fact that the Fourth Circuit noted that if the teacher's speech at issue was not curriculum related—that is, if the speech was personal and non-curricular as in this case—then school officials could not restrict the speech unless it "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school." *Lee*, 484 F.3d at 694, n.10 (quoting *Tinker*, 393 U.S. at 509). Moreover, in *Lee*, unlike in this case, the record did not overwhelmingly support the conclusion that the school district created a forum for the teacher's speech and that the school district's restriction was viewpoint based. In sum, *Lee* is of little help to Defendants.

Nevertheless, even if this court were to apply a *Pickering* balancing test to the facts of this case, Defendants' speech restriction would still violate the First Amendment.[40] The *only* justification offered by Defendants for the restriction is

[40] In addition to conducting a forum analysis, the district also conducted an analysis under *Pickering*, properly concluding that the balance tipped in favor of protecting Plaintiff's speech. (R-66: Op. at 22; ER (Vol. 1) at 22). In finding that the balance weighed in favor of Plaintiff, the district court noted that (1) there is no evidence that Plaintiff's working relationship with the School Board or principal deteriorated; rather, the record shows that Plaintiff's superiors were favorably impressed with the professional manner in which Plaintiff responded to their concerns; (2) the evidence clearly demonstrates that the banners had no effect on

that they believe the Establishment Clause requires it. This claim does not survive even modest scrutiny. As the district court properly observed: "That God places prominently in our Nation's history does not create an Establishment Clause violation requiring curettage and disinfectant for Johnson's public high school classroom walls. It is a matter of historical fact that our institutions and government actors have in past and present times given place to a supreme God." (R-66: Op. at 8; ER (Vol. 1) at 8).

Indeed, Defendants assert that the Constitution requires them to ban Plaintiff's personal *patriotic* speech, which Plaintiff expressed without complaint for 25 years,[41] because of its viewpoint, while a science teacher's Buddhist speech is acceptable.[42] This assertion is untenable and should be rejected. *See, e.g.,*

Plaintiff's performance of his daily duties in the classroom; in fact, Plaintiff is held in high regard for his performance as a math teacher; and (3) there is no evidence to suggest that Plaintiff's banners negatively affected the regular operations of the schools where Plaintiff taught; to the contrary, the undisputed evidence demonstrates that the banners caused no issues for over two decades. In sum, the balance weighs heavily in favor of protecting Plaintiff's speech. (R-66: Op. at 22-23; ER (Vol. 1) at 22-23) (citing factors set forth in *Nicholson v. Board of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858, 865 (9th Cir. 1982)).

[41] *See Van Orden v. Perry*, 545 U.S. 677, 699, 702 (2005) (Breyer, J., concurring) (finding the fact that the Ten Commandments monument was on display for 40 years without complaint "suggest[s] more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument" as promoting religion).

[42] Defendants make the outlandish claim that Plaintiff's patriotic messages are impermissible, but the 35- to 40-foot display of *sacred* Tibetan prayer flags by a science teacher are permissible because the prayer flags are decorative and can be

Widmar, 454 U.S. at 273 (rejecting Establishment Clause "defense" for speech restriction); *Rosenberger*, 515 U.S. at 841-42 (same); *Tucker v. California Dep't of Educ.*, 97 F.3d 1204, 1212-13 (9th Cir. 1996) (rejecting Establishment Clause "defense" for employee speech restriction). As discussed more fully below, Defendants' speech restriction, which disfavors "Judeo-Christian" speech, but favors Buddhist and anti-religion speech, *violates* the Establishment Clause.

At the end of the day, Defendants are not interested in balancing any interests or closely analyzing the significant First Amendment interests at stake. They simply—and incorrectly—label Plaintiff's speech as "religious" and then erroneously conclude that the First Amendment (Free Speech Clause) not only allows their viewpoint restriction, but it (Establishment Clause) requires it. *But see Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J.) (noting the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the

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used to discuss "the accomplishment of an amazing goal," like reaching Mt. Everest's summit. (Defs.' Br. at 54). But why is it that Plaintiff's banners are not similarly decorative? And why is it that Plaintiff's banners are incapable of inspiring people to be patriotic and to love their country? Moreover, it is insulting the way Defendants seek to minimize the religious nature of the Tibetan prayer flags and the role religion played in the lives and accomplishments of Mahatma Ghandi, Malcolm X, and Martin Luther King, while at the same time dismissing the historic nature of Plaintiff's banners. (Defs. Br. at 53-55). While Defendants may not like the fact that our Nation was founded by religious people, they can't change that fact by fiat.

Free Speech and Free Exercise Clauses protect"). But simply claiming that the Establishment Clause requires this speech restriction does not make it so. Indeed, it is time for the courts to put an end to this reflexive (and thinly veiled hostility toward Christianity) response by government officials to anything that is remotely related to (the Christian) religion. Defendants' reliance on this shopworn excuse to ban the display of Plaintiff's well-known, historic patriotic phrases is patently incorrect. *See A.C.L.U. v. Mercer County,* 432 F.3d 624, 638-39 (6th Cir. 2005) ("[T]he ACLU makes repeated reference to 'the separation of church and state.' This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state. Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion.") (citations omitted).

In fact, the School District itself could use some education regarding the First Amendment. As this Circuit stated in *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1055 (9th Cir. 2003), "We agree with the Seventh Circuit that the desirable approach is not for schools to throw up their hands because of the possible misconceptions about endorsement of religion, but that instead it is 'far better to teach students about the First Amendment, about the difference between private and public action, about why we tolerate divergent views. The school's proper response is to educate the audience rather than squelch the

speaker.'" (quoting *Hedges v. Wauconda Cmty. United Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993)) (internal punctuation omitted).

IV. Defendants' Restriction Violates the Establishment Clause.

Defendants' anemic evaluation of Plaintiff's Establishment Clause claim demonstrates a misapprehension of the material facts and relevant law; a misapprehension that evidently guided their illicit decision to ban Plaintiff's speech in the first instance.

In 1952, the U.S. Supreme Court acknowledged the following historical reality: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life. Examples of this historical acknowledgment include Executive Orders recognizing religiously grounded National Holidays, such as Christmas and Thanksgiving, Congress directing the President to proclaim a National Day of Prayer each year, and the printing on our currency of the national motto, "In God We Trust." As the Court acknowledged in *Lynch v. Donnelly*, 465 U.S. 668, 677-78 (1984):

> One cannot look at even this brief resume [of historical examples of public religious expression] without finding that our history is pervaded by expressions of religious beliefs. . . . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, as Justice Douglas observed, governmental action has "follow[ed] the

> best of our traditions" and "respect [ed] the religious nature of our people." (quoting *Zorach*, 343 U.S. at 314).

Recognition of the role of God in our Nation's history and heritage is consistently reflected in U.S. Supreme Court decisions. The Court has acknowledged, for example, that religion has been closely identified with our history and government, and that the history of man is inseparable from the history of religion. Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound. As Justice O'Connor observed, "It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35-36 (2004) (O'Connor, J., concurring).

Efforts to suppress this recognition and historical acknowledgment are the antithesis of the value of religious tolerance that underlies the United States and California Constitutions. And the classroom is peculiarly the "marketplace of ideas." As a result, the First Amendment does not tolerate governmental policies, practices, and/or customs that cast a pall of orthodoxy over the classroom, such as Defendants' restriction, which prohibits Plaintiff from displaying his banners based on the "particular sectarian viewpoint" conveyed by his patriotic speech.

A. Defendants' Restriction Disfavors Religion.

Throughout its decisions, the U.S. Supreme Court has consistently described the Establishment Clause as forbidding not only state action motivated by a desire to promote or "advance" religion, *see, e.g., County of Allegheny v. A.C.L.U.,* 492 U.S. 573, 592 (1989), but also actions that tend to "disapprove" of, "inhibit," or evince "hostility" toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); *Lynch*, 465 U.S. at 673; *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973).

As the Court noted in *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." Indeed, even *subtle departures* from neutrality are prohibited. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534 (1993).

In *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963), the Court stated, "We agree of course that the State may not establish a religion of secularism in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe." *Id.* at 225 (internal quotations and citation omitted). As Justice Breyer stated in his concurrence in *Van Orden v. Perry*, 545 U.S. 677, 699 (2005), "[T]he Establishment Clause does not compel the government to purge from the public

sphere all that in any way pa rtakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to prom ote the kind of social conflict the Establishment Clause seeks to avoid." *See also Church of the Lukumi Babalu Aye, Inc.,* 508 U.S. at 532 ("In our Esta blishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.").

Thus, a restriction t hat disfavors "re ligion in general"—or worse, one that disfavors "a *particular* sectarian viewpoint," such as the restriction at issue here—violates the neutrality mandated by the Establishment Clause.

B. Defendants' Restriction Disfavors a Particular Religion.

In addition to m andating neutrality toward religion in ge neral, the First Amendment also forbids hostility aimed at a specific faith (Christianity), particularly while favoring another (Buddhi sm). "The cleares t command of the Establishment Clause is tha t one reli gious denomination cannot be officially preferred over anot her." *Larson v. Val ente*, 456 U.S. 228, 244 (1982); s *ee also County of Allegheny*, 492 U.S. at 608-09 (requiri ng "'strict sc rutiny' of practices ***suggesting*** 'a denom inational preference'") (emphasis added); *Church of the Lukumi Babalu Aye, Inc,* 508 U.S. at 532 ("[The Establishm ent Clause] forbids an official purpose to disapprove of a parti cular religion."); *Epperson*, 393 U.S. at

103-04 (stating that the government " may not be hostile to any religion"); *Lynch*, 465 U.S. at 673 ("[The Constitution] forbids hostility toward any" religion.).

Remarkably, even though Plaintiff's speech expresses messages that have historical significance and contain no religious text, Defendants censored the speech because they claimed that the banners conveyed an impermissible "Christian" viewpoint (while permitting Buddhist *prayer* flags, no less). Leaving aside the inaccuracy of that claim,[43] Defendants violated the Establishment Clause by singling out Plaintiff's speech for disfavored treatment because they believed it conveyed "a particular sectarian viewpoint."

C. Defendants' Restriction Violates *Lemon* and Its Modifications.

Defendants' speech restriction, which disfavored "a particular sectarian viewpoint," violates the Establishment Clause as to its purpose and effect. And it creates an impermissible entanglement. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

1. The Purpose and Effect of Defendants' Restriction.

"The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether,

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[43] Plaintiff's banners contain historical, patriotic phrases and slogans central to our Nation's history and heritage; the banners do not contain passages from Sacred Scripture or other religious texts. *See, e.g., Lynch*, 465 U.S. at 677-78; *Elk Grove Unified Sch. Dist.*, 542 U.S. at 35-36 (O'Connor, J., concurring); (*see* also R-66: Op. at 8; ER (Vol. 1) at 8).

irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid." *See Lynch*, 465 U.S. at 690 (O'Connor J., concurring).

a. Impermissible Purpose.

"While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards,* 482 U.S. at 586-87. The secular purpose requirement "reminds government that when it acts it should do so without endorsing [or disapproving of] a particular religious belief or practice . . . ." *Wallace v. Jaffree*, 472 U.S. 38, 75-76 (1985). "The eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act." *McCreary County v. A.C.L.U.*, 545 U.S. 844, 862 (2005) (internal quotations omitted).

In this case, Defendants' stated purpose for their official act of removing Plaintiff's banners was to prohibit speech that, in their view, conveyed a "particular sectarian viewpoint," that being a "Christian" viewpoint. This purpose is not compelled by the Establishment Clause; rather, it is prohibited by it.

b. Impermissible Effect.

The "effect" of Defendants' restriction, regardless of Defendants' alleged "purpose" for enforcing it, conveys a message of disapproval of religion (and the Christian religion in particular) in violation of the Establishment Clause. *See Lynch*, 465 U.S. at 690 (O'Connor J., concurring) ("The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."). As the U.S. Supreme Court explained, when evaluating the effect of government action under the Establishment Clause, courts must ascertain whether the challenged action is "*sufficiently likely to be perceived*" as a disapproval of religion. *County of Allegheny*, 492 U.S. at 597 (citations omitted) (emphasis added); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307, n. 21 (2000) ("[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions."). The clear effect of the speech restriction is to show disapproval of religion in violation of the Establishment Clause.

2. Defendants' Restriction Fosters an Excessive Entanglement.

The third prong of the *Lemon* test asks whether the restriction at issue excessively entangles government with religion. *Lemon*, 403 U.S. at 612-13. In *Widmar v. Vincent,* the Court explained: "[T]he University would risk greater

'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.' Initially, the University would need to determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *Widmar,* 454 U.S. at 272, n.11 (internal quotations and citations omitted). Accordingly, Defendants' attempt to exclude speech expressing a "Christian" or "Judeo/Christian" viewpoint (while permitting "Buddhist" speech) creates "excessive entanglement" in violation of the Establishment Clause.

V. Defendants Violated the California Constitution.

A. State Free Speech Claim.

Article 1, section 2 of the California Constitution generally provides broader protection for the exercise of free speech rights than the First Amendment. *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899 (1979). However, federal law is typically followed for free speech claims arising in a school setting. *See California Teachers Ass'n v. Governing Bd. of San Diego Unified Sch. Dist.*, 45 Cal. App. 4th 1383, 1391 (1996) ("[W]e 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."). Thus, for the reasons stated with regard to

Plaintiff's First Amendment claim, Defendants have similarly violated the California Constitution.

B. California Establishment Clause and No Preference Clause Violations.

1. California Establishment Clause.

California courts generally adopt the federal Establishment Clause analysis when considering cases under the California Constitution's similar provision. *See Paulson v. Abdelnour*, 145 Cal. App. 4th 400, 420 (2006) ("The construction given by California courts to the establishment clause of article I, section 4, is guided by decisions of the United States Supreme Court."). Accordingly, the previous analysis under the federal Establishment Clause demonstrates why Defendants also violated the California Constitution.

2. California No Preference Clause.

This Circuit has interpreted the California No Preference Clause "to stand for the proposition that not only may a government body not prefer one religion over another, it may not *appear* to be acting preferentially." *Ellis v. City of La Mesa*, 990 F.2d 1518, 1524 (9th Cir. 1993) (citation and quotations omitted). In this case, it is evident that Defendants' restriction, which singled out "Christian" or "Judeo/Christian" speech for disfavored treatment while permitting speech conveying other religious views, including anti-religious views, violates California's No Preference Clause.

VI. Defendants' Viewpoint Restriction Violates the Equal Protection Clause.

The relevant principle of law was articulated in *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Mosley*, the Court struck down a city ordinance that prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. The Court stated, "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.* at 96; *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980). Here, Defendants opened a forum for teacher expression. Having maintained this forum for many decades, Defendants violated Plaintiff's rights when they prohibited his speech based on the viewpoint of his message, while permitting other teachers to continue their speech in the same forum unfettered.

VII. The Individual Defendants Do Not Enjoy Qualified Immunity.

As an initial matter, qualified immunity does not protect a defendant against claims for declaratory and injunctive relief. *County of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct [or] in an action against a municipality"); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) ("Qualified immunity . . . does not bar actions for declaratory or injunctive relief.").

Nonetheless, "[w]hen government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.'" *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citation omitted).

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court held that government officials are protected from personal liability for civil damages only so long as their conduct does not violate "'clearly established' statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. "This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640 (citation omitted); *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996) ("Absent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established. We also evaluate the likelihood that this circuit or the Supreme Court would have reached the same result."); *see also Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) ("[W]hen 'the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.") (citation omitted).

In their brief, Defendants make the truly remarkable claim that "[m]ost 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." (Defs.' Br. at 60). Yet, the irrefutable evidence shows that for 25 years Plaintiff displayed his banners without a single complaint. And during these 25 years, 7 different school principals, numerous school board members, superintendents, assistant superintendents, over 4,000 students and several thousand parents have been in his classrooms where the banners were displayed.

Indeed, Defendants' arguments are duplicitous. On one hand they claim that Plaintiff's banners were so large and the display of the words "God" and "Creator" were so prominent that "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." (Defs. Br. at 53). And on the other hand, Defendants claim that the banners were so discrete that their existence was not brought to the attention of Plaintiff's principal, Defendant Kastner, until the fall of 2006—25 years after they had been posted—when Defendant Kastner allegedly "wondered what they were talking about." (Defs.' Br. at 9; *see also* Defs. Br. at 42 (asserting that "[t]here 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")).

Furthermore, the School District was aware that a science teacher displayed Tibetan prayer flags in her classroom during the course of the controversy surrounding Plaintiff's *patriotic* banners; yet, no school official objected to the science teacher's *religious* display (then or now). Indeed, these prayer flags, as well as the numerous other documented items expressing "partisan or sectarian viewpoints," were still on display as late as April 2009, when Plaintiff conducted his court-ordered inspection of the district's high school classrooms.

In sum, Plaintiff's right to engage in his speech free from viewpoint discrimination was clearly established. Similarly, it was clearly established in January 2007, that the government may not prefer one religion over another (or anti-religion over religion) without running afoul of the United States and California Constitutions. Consequently, the individual defendants do not enjoy qualified immunity, and Plaintiff is entitled to nominal damages as a matter of law. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Floyd v. Laws*, 929 F.2d 1390 (9th Cir. 1991).

CONCLUSION

For the foregoing reasons, this court should affirm the district court's decision.

STATEMENT OF RELATED CASES

Plaintiff is not aware of any related cases pending in this court.

Respectfully submitted,

THOMAS MORE LAW CENTER

By: /s/ Robert J. Muise
Robert J. Muise, Esq.
Attorneys for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(c) and Circuit Rule 32-1, the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 13,743 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Robert J. Muise
Robert J. Muise, Esq.
Attorney for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users.

/s/ Robert J. Muise
Robert J. Muise, Esq.
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Richard Thompson
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August 9, 2010

VIA U.S. MAIL & EMAIL

Paul V. Carelli, IV
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San Diego, CA 92106-6113

Re: ***Bradley Johnson v. Poway Unified School District, et al.***
U.S. District Court Case No. 07-0783-BEN (NLS)
U.S. Court of Appeals Case No. 10-55445

Dear Mr. Carelli:

The clerk for the U.S. Court of Appeals for the Ninth Circuit granted Plaintiff-Appellee an extension of 14 days to file the answering brief (appellee's brief). That brief is now due on or before August 30, 2010. Consequently, per the clerk's instruction, your optional reply brief is due within 14 days of service of the appellee's brief.

Sincerely,

THOMAS MORE LAW CENTER

Robert J. Muise, Esq.*

Counsel for Plaintiff-Appellee