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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BRADLEY JOHNSON, Plaintiff, vs. POWAY UNIFIED SCHOOL DISTRICT, et al., Defendant.	CASE NO. 07cv783 BEN (LSP) ORDER DENYING MOTION TO DISMISS

Now before the Court is the Defendants' Motion to Dismiss Plaintiff's First Amended Complaint. Plaintiff Bradley Johnson's Complaint seeks relief for violations of his rights under the First Amendment of the U.S. Constitution and the under Article I, Sections 2 and 4 of the California Constitution. He seeks relief from the Poway Unified School District and from the individual Defendants sued in their official and individual capacities. Defendants move to dismiss each of the six claims for relief for failure to state a claim. Additionally, each of the individual Defendants seek dismissal based upon qualified immunity, and the School District asserts Eleventh Amendment immunity from suit. For the reasons that follow, the Motion to Dismiss is denied.

I. MOTION TO DISMISS STANDARD

The legal standard to be applied to a motion to dismiss is well known. In order to withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) the Complaint must provide a "short and plain statement of the claim showing that [he] is entitled to relief." FED. R.

CIV. P. 8(a)(2). This is not an onerous burden. "Specific facts are not necessary; the statement need only give the defendants fair notice of what . . . the claim is and the grounds upon which it rests." *Johnson, M.D. v. Riverside Helathcare System, LP*, 534 F.3d. 1116, 1122 (9th Cir. 2008) (quoting *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007)). Of course, the Complaint should set forth "enough facts to state a claim for relief that is plausible on its face." *Johnson, M.D.,* 534 F.3d at 1122 (quoting *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007)). The facts stated are not judged to be true or false at this stage. Instead, all well-pleaded factual allegations are accepted as true, as well as any reasonable inferences that may be drawn. *Johnson, M.D.,* 534 F.3d at 1122 (citing *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003)). In other words if, upon "viewing the totality of the alleged circumstances in the light most favorable to Johnson, the complaint puts forth 'enough facts to state a claim for relief that is plausible on its face,'" then "[o]ur notice pleading requirements do not require more." *Johnson, M.D.,* 534 F.3d at 1122 (quoting *Twombly*, 127 S.Ct. at 1974).

II. REQUEST FOR JUDICIAL NOTICE

It is also appropriate to address Defendants' Request for Judicial Notice of Documents before proceeding to the merits. Defendants request the Court take judicial notice of three exhibits. Johnson objects. The objection is well taken. Federal Rule of Evidence 201(b) provides that judicial notice must concern a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The first exhibit is a newspaper article (available on the internet) about the instant lawsuit and newspaper photograph depicting one of Johnson's two banners. Newspaper articles "have been held inadmissible hearsay as to their content." *Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir. 1991); *see also E.E.O.C. v. Peabody Western Coal Co.*, slip op., Case No. 01cv1050-PHX-MHM, 2006 WL 2816603 (D. Ariz Sept. 30, 2006) (declining to take judicial notice of newspaper articles on motion to dismiss); *but see Ritter v. Hughes Aircraft Co.*, 58 F.3d 454 458 (9th Cir. 1995) (taking judicial notice of newspaper article describing widespread layoffs at Hughes where fact of layoffs was generally known in Southern California and the objecting party

testified to the same in his deposition). In this case, the newspaper items do not meet either part of the Federal Rule of Evidence 201 tests. The request to take judicial notice of exhibit "A" is denied.

The second and third exhibits are isolated pages of school policy and procedure dated 1991. Exhibit "B" is titled "Poway Unified School District Board Policy" pertaining to "Challenge of Educational Materials and Teaching Controversial Issues." Exhibit "C" is titled "Poway Unified School District Administrative Procedure" pertaining to "The Teaching of Controversial Issues." It is not apparent whether these two documents represent Defendants' current policy and procedure nor what, if any, role the policy or procedure might have played in the events alleged in Johnson's First Amended Complaint. They are certainly unknown in the territory of the Southern District, and their accuracy cannot be determined. Both documents fail to meet the Federal Rule of Evidence 201 tests. Moreover, their relevance is far from clear as the Complaint does not allege that: (1) Johnson was engaged in the teaching of controversial issues; or (2) the Defendants acted pursuant to either policy. The Complaint alleges simply that Johnson taught mathematics. The Complaint also alleges that Johnson did not use the banners as part of his teaching, nor were the banners provided by the school district to be used in the curriculum. Accepting the allegations as true, as is done for purposes of a motion to dismiss, the exhibits would be irrelevant, even if judicially noticed. The request to take judicial notice of exhibits "B" and "C" is also denied.

III. FACTS

According to the First Amended Complaint, Plaintiff Bradley Johnson is a Christian. First Amended Complaint, ¶ 6. Johnson is employed as a public high school math teacher. *Id.* at ¶¶ 6 & 17. He has taught math to students in the Poway Unified School District for 30 years and is well respected. *Id.* He currently is teaching at Westview High School, a school within the Poway Unified School District. *Id.*

Defendant Poway Unified School District is a public school entity established pursuant to California law. *Id.* at ¶ 7. Defendant Kastner is the Principal of Westview High School. *Id.* at ¶ 15. Defendants Phillips and Chiment are the Superintendent and Assistant Superintendent, respectively, of the Poway Unified School District. *Id.* at ¶¶ 13 & 14. The remaining Defendants,

1 Mangum, Vanderveen, Patapow, Gutschow, and Ranftle, are members of the Board of Education
2 for the Poway Unified School District. *Id.* at ¶¶ 8-12.
3 At Westview High School, Johnson is assigned a particular classroom for his math classes.
4 *Id.* at ¶ 19. He is assigned the same classroom for his homeroom duties. *Id.* He uses the same
5 classroom for extra-curricular and non-curricular activities. *Id.*
6 Over the last 25 years, Johnson has continuously hung one or two banners on the wall of his
7 assigned classroom. *Id.* at ¶18. Johnson purchased and displayed the banners using his own
8 money. *Id.* Throughout the 25 years that the banners hung on the wall of Johnson's assigned
9 classroom, there were no objections to the presence or messages of the banners. *Id.*
10 Each banner is approximately seven feet long and two feet wide. *Id.* at ¶ 28. The banners
11 do not contain pictures or symbols. *Id.* The banners are colored red, white, and blue and set forth
12 famous phrases. *Id.* at ¶ 26. One banner contains the following four phrases: "In God We Trust,"
13 "One Nation Under God," "God Bless America," and "God Shed His Grace On Thee." *Id.* This
14 banner has hung in Johnson's classroom for 25 years.
15 The other banner includes the phrase: "All Men Are Created Equal, They Are Endowed By
16 Their Creator." *Id.* at ¶ 27. This banner has hung in Johnson's classroom for 17 years. *Id.*
17 Johnson hung the banners along with photographs of nature scenes and national parks and pictures
18 of his family. *Id.* at ¶ 25.
19 Johnson did not hang the banners pursuant to his official duties as a math teacher. *Id.* at
20 ¶ 23. Moreover, Johnson did not use the banners during any classroom sessions or periods of
21 instruction. *Id.* Rather, Johnson hung his banners pursuant to a long-standing Poway Unified
22 School District policy, practice, and custom of permitting teachers to display personal messages on
23 their classroom walls. *Id.*
24 As alleged in the First Amended Complaint, for at least 30 years, Poway Unified School
25 District has maintained a policy, practice, and custom of giving teachers, like Johnson, discretion
26 and control over the messages displayed on classroom walls. *Id.* at ¶ 20. According to Poway
27 Unified School District policy, practice, and custom all teachers are permitted to display in their
28 classrooms various messages and other items that reflect the individual teacher's personality,

opinions, and values, as well as messages relating to matters of political, social, or other similar concerns so long as these displays do not materially disrupt school work or cause substantial disorder or interference in the classroom. *Id.* Because of this policy, practice, and custom, the classroom walls serve as an expressive vehicle for teachers to convey non-curriculum related messages. *Id.*

Pursuant to the long standing policy, practice, and custom of the Poway Unified School District, other teachers have displayed and continue to display in their classrooms other kinds of non-educational and non-curricular materials such as:

- posters of rock bands such as Nirvana and The Clash
-posters of professional athletes
-travel posters
-family photographs
-non-student artwork and posters of artwork
-stuffed animal collections
-pictures of nature
-materials promoting the environment
-posters with Buddhist and Islamic messages
-Tibetan prayer flags

Id. at ¶ 22. The displayed items contain messages that express personal views, interests, or opinions of the teacher. *Id.* The teachers control the messages conveyed by their displays. *Id.*

Johnson's banners have caused no disruption or interference in his classroom or elsewhere in the school. *Id.* at ¶ 40. Likewise, the banners have not interfered with the basic education mission of the school district. *Id.* at ¶ 41.

In fact, over the 30 years Johnson has taught in the Poway Unified School District, Johnson received no complaints about the banners from the many individuals who have been inside his classroom including: seven different principals, numerous school board members, superintendents, and assistant superintendents, over 4,000 students and several thousand parents of students. *Id.* at ¶ 39.

On January 23, 2007, Westview High School Principal Kastner ordered Johnson to remove the banners, telling Johnson the banners were impermissible because they conveyed a Judeo-Christian viewpoint. *Id.* at ¶ 42. As alleged in the First Amended Complaint, Defendants singled out Johnson for discriminatory treatment because of the viewpoint of his message. *Id.* at ¶ 43. Defendants did not claim that Johnson's banners caused disruption or disorder in the school, or that they interfered with the curriculum. *Id.*

Johnson wants to display the banners in his classroom; however, Defendants have prohibited him from doing so. *Id.* at ¶ 51. Had Johnson not complied with Defendants' order to remove the banners, Johnson would have suffered adverse employment consequences. *Id.* at ¶ 58. As of the date of the First Amended Complaint, Johnson continues to teach his assigned mathematics curriculum. *Id.* at ¶ 56.

IV. ANALYSIS

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 512 (1969) (citations omitted).

Johnson asserts six claims for relief seeking declaratory and injunctive relief as well as nominal damages. Three of the claims rest on federal constitutional rights; three rest on similar state constitutional rights. Defendants move to dismiss all of the claims.

A. The Free Speech Claims

Johnson's First Claim for Relief is that the Defendants violated his First Amendment free speech rights protected by the U.S. Constitution. The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. Johnson's Fourth Claim for Relief is that Defendants similarly violated his free speech rights protected by the

California Constitution. California's Article 1, Section 2(a) reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. 1, § 2.

Defendants push forward three principal arguments for why Johnson's free speech claims should be dismissed for failure to state a claim. Before discussing these contentions it is worth noting that Johnson's two banners clearly constitute speech and that the speech has been squelched by Defendants. Defendants do not contest this, at least for purposes of the motion to dismiss.

What Defendants do argue is that Johnson has no free speech rights at all because he is a government employee, relying on *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). Additionally, they argue that Johnson's speech is curricular in nature, and since curricular, the Defendants have unfettered right to direct what shall or shall not be in the curriculum, relying on *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001); and *Lee v. York County Sch. Div.*, 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 387 (2007). Finally, Defendants argue that avoiding the fear of possible future lawsuits by others is a legitimate justification for curtailing Johnson's speech.

1. Public School Teacher Speech

Defendants first argue that Johnson is a government employee and that, as a government employee, he has no free speech rights while engaged in his official duties. As Defendants put it, "Johnson's banners do not enjoy First Amendment protections because Johnson is speaking as an educator, not a citizen"; "[b]ecause Johnson was a teacher, he had no First Amendment protections in his classroom." Defendants' Points and Authorities in Support of Motion to Dismiss, at 6 & 19.

This argument is squarely at odds with years of settled Supreme Court precedent. In *Tinker* 393 U.S. at 506, the Court observed: "[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. This has been the unmistakable holding of this Court for almost 50 years." In the forty years since, the Supreme Court has neither diminished the force of *Tinker* for teachers nor in any other way cabined the First Amendment speech of public school teachers. In fact, just last year the Court

reaffirmed *Tinker*'s pronouncement. *See Frederick v. Morse*, 127 S.Ct. 2618, 2626 (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.").

The Court has permitted limits on student speech in special circumstances. The Court would permit restriction of student speech that "materially and substantially interferes with the requirements of appropriate discipline. *Tinker,* 393 U.S. at 509. Student speech has been proscribed where it consists of an "elaborate, graphic, and explicit sexual metaphor." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 678 (1986). It may be banned where it "incite[s] to imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969). Student speech that promotes illegal drug use may be punished. *Frederick*, 127 S.Ct. at 2629. And student speech in an official school newspaper may be regulated if based on viewpoint neutral terms. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

However, the speech allegedly squelched by Defendants in this case is speech by Johnson, a teacher. In the secondary school setting there is a qualitative lop-sided difference between the two classes of speakers that must be respected. *See e.g.*, *Morse*, 127 S.Ct. at 2629 (Thomas, J., concurring) (describing history of American education where teachers had wide discretion to make rules and ensure student silence). Even if the permissible restrictions on student speech could justify restrictions on educator speech, none of the problematic situations calling for speech regulation exist in Johnson's classroom setting. Through his banners, Johnson is neither substantially disrupting classroom studies, nor advocating illegal drug use, nor inciting imminent lawless action, nor sending his own message out through the school newspaper. Thus, while mindful that situations may arise where a school teacher's First Amendment free speech may lawfully be curtailed, Supreme Court precedent cleanly undercuts Defendants's assertion that Johnson's speech receives no protection simply because he speaks as an educator.

The three decisions upon which Defendants rely do not undercut *Tinker*'s robust observation that teachers do not forfeit their constitutional free speech rights as a condition of employment. First, Defendants cite *Garcetti*, arguing that the First Amendment does not protect employee speech offered pursuant to their official duties. Defendants' Points and Authorities in

1 Support, at 6. However, *Garcetti* by its own terms does not extend to the public school setting.
2 *Garcetti* cautions, "[w]e need not, and for that reason do not, decide whether the analysis we
3 conduct today would apply in the same manner to a case involving speech related to scholarship or
4 teaching." 126 S.Ct. at 1962.
5 Without *Garcetti*'s support, Defendants turn to arguing that the balancing test from
6 *Pickering* and *Connick* should be applied, and if applied, would leave Johnson's speech
7 unprotected by the First Amendment. Applying the *Pickering* balancing test in the present context
8 is not useful. Doing so would depart from the First Amendment forum analysis described in
9 *Hazelwood* and applied by the Ninth Circuit Court of Appeals in school cases. *See e.g.*, *Truth v.*
10 *Kent School District*, 524 F.3d 957, 972 (9th Cir. 2008) (applying forum analysis); *Flint v.*
11 *Dennison*, 488 F.3d 816, 830 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 882 (2007) (applying forum
12 analysis); *Hills v. Scottsdale Unified School Dist. No. 48*, 329 F.3d 1044, 1048-50 (9th Cir. 2003),
13 *cert. denied*, 540 U.S. 1149 (2004) (applying forum analysis); *Downs*, 228 F.3d at 1009-11
14 (declining to apply forum analysis where speech at issue belongs to the school district).
15 *Pickering* addressed a public school teacher's speech that criticized his government
16 employer. The Court sought to balance the employee's interests as a citizen and the government
17 interest as employer in promoting efficiency of providing governmental services. In the end, the
18 Court reinforced the understanding that a teacher's speech continues to enjoy constitutional
19 protection even when the speech consists of public criticism of his school board. 391 U.S. at 568
20 ("To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may
21 constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy
22 as citizens to comment on matters of public interest in connection with the operation of the public
23 schools in which they work, it proceeds on a premise that has been unequivocally rejected in
24 numerous prior decisions of this Court."). *Connick* likewise addressed a district attorney's right to
25 engage in speech critical of her employer's internal staffing decisions. Even when *Connick* was
26 decided 25 years ago, it was settled law that, "a State cannot condition public employment on a
27 basis that infringes the employee's constitutionally protected interest in freedom of expression."
28 *Connick*, 461 U.S. at 142. (citations omitted). Johnson's classroom banners in this case do not fit

1 into the category of speech critical of his employer. Thus, the *Pickering/Connick* balancing test is
2 ill-fitted for contexts such as the one presented by this case.
3 Defendants brash argument that Johnson gave up his free speech rights by virtue of his
4 employment as a public high school teacher is at odds with *Tinker* and *Morse*. Upon concluding
5 that Johnson retains First Amendment speech rights as a public school teacher, a First Amendment
6 forum analysis is the next step.
7 **2. First Amendment Forum Analysis**
8 To determine the extent of free speech rights on government property such as Johnson's
9 classroom at Westview High School, the courts engage in a First Amendment forum analysis.
10 *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008) ("The first step in
11 assessing a First Amendment claim relating to private speech on government property is to identify
12 the nature of the forum."). "The Court has adopted a forum analysis as a means of determining
13 when the Government's interest in limiting the use of its property to its intended purpose outweighs
14 the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal*
15 *Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). According to the Ninth Circuit, "Government
16 regulation of speech in public spaces has historically been governed by the public forum doctrine.
17 *Pocatello Education Assn. v. Heideman*, 504 F.3d 1053, 128 (9th Cir. 2007), *cert. granted sub*
18 *nom.*, *Ysursa v. Pocatello Educ. Ass'n*, 128 S.Ct. 1762 (2008); *Hills v. Scottsdale Unified School*
19 *Dist. No. 48*, 329 F.3d 1044 (9th Cir. 2003) ("To analyze his [First Amendment free speech] claim,
20 we must first consider what type of forum the [school] District has created.").
21 "Forum analysis has traditionally divided government property into three categories: public
22 fora, designated public fora, and nonpublic fora. *Flint*, 488 F.3d at 830 (citation omitted). "Once
23 the forum is identified, we determine whether restrictions on speech are justified by the requisite
24 standard." *Id.* "On one end of the fora spectrum lies the traditional public forum, 'places which by
25 long tradition . . . have been devoted to assembly and debate.' Next on the spectrum is the so-called
26 designated public forum, which exists 'when the government intentionally dedicates its property to
27 expressive conduct.'" *Id.* (citations omitted). In a public or designated public forum, restrictions
28 on speech are subject to strict scrutiny. *Id.*

1 "At the opposite end of the fora spectrum is the non-public forum . . . . The non-public
2 forum is 'any public property that is not by tradition or designation a forum for public
3 communication.'" *Id.* (citations omitted). In a non-public forum government restrictions are
4 subjected to less-exacting judicial scrutiny. There a government may restrict free speech if it acts
5 reasonably and does not suppress expression merely because public officials oppose one speaker's
6 view. *Id.* (citations omitted).

7 To determine the type of forum applicable to Johnson's classroom wall, the nature of the
8 government property involved must be examined. Assuming the fact allegations in the First
9 Amended Complaint to be true, as one must for purposes of a motion to dismiss, Johnson's
10 classroom wall constitutes a *limited public forum* (a sub-category of a designated public forum)
11 because the Poway Unified School District has intentionally opened its property to expressive
12 conduct by its faculty. *Flint*, 488 F.3d at 831. This conclusion is based upon the allegation that
13 Defendants have a long-standing policy of permitting its teachers to express ideas on their
14 classroom walls. First Amendment Complaint, at ¶¶ 20-22. Defendants' policy grants its teachers
15 discretion and control over the messages displayed on their classroom walls. *Id.* Defendants'
16 policy permits teachers to display on their classroom walls messages and other items that reflect
17 the teacher's personality, opinions, and values, as well as political and social concerns. *Id.*
18 Defendants' policy permits teacher speech so long as the wall display does not materially disrupt
19 school work or cause substantial disorder or interference in the classroom. *Id.* As a result of the
20 Defendants' long-standing policy, a teacher's classroom walls serve as a limited public forum for a
21 teacher to convey and speak non-curriculum messages. *Id.*

22 "[O]nce a government has opened a limited forum, it must respect the lawful boundaries it
23 has itself set." *Flint*, 488 F.3d at 831 (quoting *Rosenberger v. Rector & Visitors of Univ. of*
24 *Virginia*, 515 U.S. 819, 829 (1993)). The Poway School District "may not exclude speech where
25 its distinction is not reasonable in light of the purposes served by the forum, nor may the
26 government discriminate against speech on the basis of its viewpoint." *Id.* (citations omitted).
27 Viewpoint neutrality requires that government actors not favor one message over another. When
28 "government has excluded perspectives on a subject matter otherwise permitted by the forum," the

government is discriminating on the basis of viewpoint. *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 912 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 143 (2007).

Here, the Poway Unified School District opened a *limited public forum* in which its teachers were permitted to exercise free speech. Johnson's speech included hanging the two banners he created. When Defendant Westview High School Principal Kastner ordered Johnson to remove the banners "because they conveyed a Judeo-Christian viewpoint," as alleged in the First Amended Complaint, Kastner was clearly squelching speech based upon the viewpoint of the speaker, and not pursuant to a content-neutral reason or the boundaries the Poway School District set for itself in opening the forum. 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), *cert. denied*, 541 U.S. 1043 (2004). The Supreme Court has been clear that 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; *see also Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 971 (9th Cir. 2002) (recognizing that "where the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint").

According to the First Amended Complaint, teachers other than Johnson have been permitted to use the classroom-wall forum to speak on a wide variety of secular and religious topics. First Amended Complaint, at ¶ 22. Topics permitted have included religious speech such as Buddhist messages, Islamic messages, and Tibetan prayer flags. *Id.* Yet, Johnson's speech has been singled out for suppression because of its perceived message (conveying a Judeo-Christian viewpoint[1]). By squelching Johnson's Judeo-Christian religious viewpoint while promoting or

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[1] The Court does not understand Johnson's banners as communicating a religious Judeo-Christian viewpoint. Rather, the banners communicate fundamental political messages and celebrate important American shared historical experiences. For example, one banner contains an excerpt from the Declaration of Independence, this Nation's most cherished symbol of liberty, observing the primary truth to be self-evident: "All men are created equal, they are endowed by their Creator." Another banner repeats the official motto of the United States: "In God We Trust." Even, Johnson's phrase, "God Bless America," which could be interpreted as an ecumenical patriotic prayer, is more well known as a popular American song title of the twentieth century written by Irving Berlin and performed most famously by Kate Smith – and known to countless sports fans from being played as a good luck charm for the Philadelphia Flyers ice hockey team in the 1970's and during New York

permitting Buddhist, Islamic, and Tibetan religious viewpoints, Defendants' acts clearly unjustifiably abridge Johnson's constitutional free speech rights. "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828.

In this sense, Johnson's case is similar to *Rosenberger*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) and *Good News Club v. Milford Central School*, 533 U.S. 98, 107-08 (2001). Each case involved viewpoint discrimination in a limited public forum. In *Rosenberger*, the Supreme Court found that by excluding funding to a student religious group solely because the religious group promoted a particular religious perspective, the university was discriminating in a limited public forum on the basis of that group's viewpoint. *Rosenberger*, 515 U.S. at 829-37. In *Lamb's Chapel*, a group desired to speak at a school facility on the issue of child rearing from a religious perspective. The school district denied access to speakers from using the school rooms for religious purposes. The Supreme Court unanimously held that the school district discriminated on the basis of viewpoint, and that the school district should have permitted speech from a religious perspective on subject matter permitted by the forum. *Lamb's Chapel*, 508 U.S. at 393. Similarly, in *Good News Club*, the Supreme Court found viewpoint discrimination where a public school excluded a Christian club from meeting on the school's grounds while permitting nonreligious groups to meet. *Good News Club*, 533 U.S. at 107-09. The Christian club simply sought to address a subject otherwise permitted in the limited public forum *Id.* at 109. In *Faith Center*, the Ninth Circuit reviewed these cases and drew a line between speech from a religious perspective (which was constitutionally protected in each of the limited public forums) and pure religious worship (which exceeded the boundaries of the forums). *Faith Center*, 480 F.3d at 913.

Whether described as speech from a religious perspective or speech about American history and culture, through display of his classroom banners, Johnson was simply exercising his free speech rights on subjects that were otherwise permitted in the limited public forum created by Defendants and in a manner that did not cause substantial disorder in the classroom. Thus,

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Yankees baseball games since the attacks of September 11, 2001. *See also, Seidman v. Paridise Valley Unified School Dist.*, 327 F.Supp.2d 1098, 1112 (D. Ariz. 2004) ("The phrase 'God Bless America,' has historic and patriotic significance."). Regardless of how this Court perceives Johnson's messages, Defendants acted based upon a perception that the messages conveyed a Judeo-Christian viewpoint.

Johnson has made out a clear claim for relief for an ongoing violation of his First Amendment free speech rights. *See, e.g., Kent School District*, 524 F.3d at 973 (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.").

3. Johnson's Speech is Not Curricular

Defendant also argue that Johnson's classroom wall banners are curricular speech. From this Defendants argue that if the banners are curricular speech, then the Poway Unified School District has absolute control over the curriculum and may dictate the content of what its teachers may or may not speak. To support this argument Defendants rely on *Downs*.

Downs applies to a much different context. In that case, a school district decided to set up bulletin boards in its schools upon which to post materials with the aim of "educating for diversity." 228 F.3d at 1012. The bulletin boards were supplied by the school district and erected in the school hallways. The materials to be posted on the bulletin boards were supplied by the school district, and because the school district had final authority over the content of the boards, all speech that occurred on the bulletin boards belonged to the school board and the school district. *Id.* The Ninth Circuit made clear that *Downs* involved only government speech in a nonpublic forum. *Id.* at 1013 and 1014-15. "We do not face an example of the government opening up a forum for either unlimited or limited public discussion. Instead, we face an example of the government opening up its own mouth." *Id.* at 1012. In that unique context, the court of appeals held that a teacher's free speech rights did not extend to postings on the diversity bulletin boards that harmed, rather than helped communicate the school district's own message. *Id.* at 1014. That is a far different case than Johnson's. Unlike *Downs*, it was Johnson who supplied the banners – not the school district. It was Johnson who selected the content of the banners – not the school district. It was Johnson who hung the banners inside his assigned school room. The school district did not erect the banners, and the banners were not erected outside the classroom in the school hallways. The Poway Unified School district created a *limited public forum* for teacher expression. Johnson was expressing his ideas in that forum in a manner that remarkably brought no complaints from students or parents or other teachers and school administrators for two decades. This was not a case of the school district electing to speak for itself on a particular topic as part of its selected

curriculum. *Downs* is inapposite.

Defendants also point to the Fourth Circuit decision in *Lee,* 484 F.3d 687, asserting that "speech by a teacher in a classroom, regardless of the label placed on it by anyone, is curricular in nature." Defendants' Points and Authorities, at 6. *Lee* is unpersuasive for several reasons. First, it applied a *Pickering/Connick* analysis to educator speech on a classroom bulletin board instead of using a First Amendment forum analysis, as the Ninth Circuit does. *Lee* explained that it applied *Pickering/Connick* rather than *Tinker* because it decided that the bulletin board postings were part of the school curriculum.

Second, *Lee*'s conclusion that the teacher's speech was curricular is unpersuasive. In that case, a high school teacher was assigned to teach Spanish. The Spanish teacher posted on a classroom bulletin board a National Day of Prayer poster and an article on White House staffers gathering for Bible study, among other things. The teacher maintained that he did not refer to the bulletin board items during instructional time. The school principal believed the items to be "irrelevant to the Spanish curricular objectives that Lee was obliged to follow within his class room." *Id.* at 691. Nevertheless, the Fourth Circuit defined broadly the concept of curricular speech and found the postings were, in fact, curricular in nature, although not related to teaching Spanish. *Id.* at 700. Thus, when the Spanish teacher posted materials unrelated to teaching Spanish, the school principal removed the materials as unrelated to the curriculum. The Fourth Circuit determined that the materials were curricular and therefore speech of the school rather than speech of the teacher. In that way, it found the speech to be unprotected by the First Amendment, which this Court sees as an unnecessarily cramped view.

Third, in arriving at its conclusion, the *Lee* court dealt with different facts in two significant respects. *Lee* found it significant that the classroom bulletin board was "school-owned and -controlled." In other words, the materials were "not posted on a private bulletin board owned by Lee." *Id.* at 699. In Johnson's class, in contrast, the banners were designed, created and paid for by Johnson, not the school. *Lee* also dealt with a school policy limiting teacher postings to material that related to the curriculum being taught. *Id.* at 690-91. In Johnson's school, the policy permitted a much broader swath of speech untethered to any particular curricular subject. Consequently, *Lee*'s conclusion that all teacher speech is curricular is not persuasive.

1 **4. Undifferentiated Fear of Future Establishment Clause Litigation**

2 Lastly, Defendants argue that removing Johnson's banners was justified in order to avoid
3 Establishment Clause lawsuits by "someone in the future." Defendants' Points and Authorities, at
4 10-11. Defendants offer little authority for their argument; case law suggests otherwise. *See*
5 *Morse*, at 2625-26 (a school's desire to avoid controversy, which might result from unpopular
6 viewpoints is not enough to justify banning "silent, passive expression of opinion, unaccompanied
7 by any disorder or disturbance."). They do note the *Downs* dicta that a teacher's citation to
8 passages from the Bible on the school's hallway bulletin board "might present Establishment
9 Clause problems." *Id.* (quoting *Downs*, 228 F.3d at 1015). Defendants then posit that cumulative
10 effect of the references to God on the banners might be seen as the school advancing one religion,
11 "the religion where God is the figurehead." *Id.* at 11. Defendants argument is both speculative and
12 imprecise. The messages on Johnson's banners do not describe or advance any particular religion.
13 The banners do not quote from the Holy Bible, or books of other particular religions such as the
14 Jewish Torah, the Islamic Koran, the Mormon Book of Mormon, the Buddhist Diamond Sutra, or
15 the Hindu Bhagavad-Gita. To argue that they advance an encompassing undifferentiated "religion
16 where God is the figurehead" makes some sense only in a citizenry where there are only two
17 beliefs: one acknowledging God; one denying God. Such is not the case. *See Arizona Life*
18 *Coalition*, 515 F.3d at 971 (It is an "insupportable assumption that all debate is bipolar and that
19 antireligious speech is the only response to religious speech. Our understanding of the complex
20 and multifaceted nature of public discourse has not embraced such a contrived description of the
21 marketplace of ideas.") (quoting *Rosenberger*, 515 U.S. at 823). Even through that lens, the
22 banners do not advocate for the existence of God. Instead, they highlight historic and patriotic
23 themes that in themselves have acknowledged God's existence. *Elk Grove Unified School Dist. v.*
24 *Newdow*, 542 U.S. 1, 34 (2004) (O'Connor, J., concurring) ("It is unsurprising that a Nation
25 founded by religious refugees and dedicated to religious freedom should find references to divinity
26 in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history
27 that sustains this Nation even today."); *Aronow v. U.S.*, 432 F.2d 242, 243 (9th Cir. 1970) ("It is
28 quite obvious that the national motto and the slogan on coinage and currency 'In God We Trust'
has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or

1 ceremonial character and bears no true resemblance to a governmental sponsorship of a religious
2 exercise.").
3 That God places prominently in our Nation's history does not create an Establishment
4 Clause problem requiring curettage and disinfectant of Johnson's classroom walls. It is a matter of
5 historical fact that our institutions and government actors have in past and present times given
6 place to a supreme God. "We are a religious people whose institutions presuppose a Supreme
7 Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The incidental government advancement
8 of religion is permissible. "Our precedents plainly contemplate that on occasion some
9 advancement of religion will result from government action." *Lynch v. Donnelly,* 465 U.S. 668,
10 683 (1984) (American history is replete with official invocation of Divine guidance in
11 pronouncements of Founding Fathers and government leaders). The Constitution "permits
12 government some latitude in recognizing and accommodating the central role religion plays in our
13 society . . . . Any approach less sensitive to our heritage would border on latent hostility toward
14 religion, as it would require government in all its multifaceted roles to acknowledge only the
15 secular, to the exclusion and so to the detriment of the religious." *County of Allegheny v. ACLU*,
16 492 U.S. 473, 657 (1989) (Kennedy, J., concurring and dissenting).
17 The language of *Lamb's Chapel*, 508 U.S. at 395, is equally appropriate in regard to the
18 Defendants unavailing justification argument in this case: "[w]e have no more trouble than did the
19 *Widmar* [*v. Vincent*, 454 U.S. 263 (1981)] Court in disposing of the claimed defense on the ground
20 that the posited fears of an Establishment Clause violation are unfounded . . . there would have
21 been no realistic danger that the community would think that the [School] District was endorsing
22 religion or any particular creed, and any benefit to religion or to the Church would have been no
23 more than incidental." In the case at bar, according to the allegations in the First Amended
24 Complaint, there is no realistic danger that the community would think that the Poway Unified
25 School District was endorsing any particular religion or any particular church or creed by
26 permitting Johnson's personal patriotic banners to remain on his classroom wall at the same time
27 as other teachers were permitted to display their own individual expressions on their assigned
28 classroom walls. *See also Hills*, 329 F.3d at 1055 ("We agree with the Seventh Circuit that the
desirable approach is not for schools to throw up their hands because of the possible misconception

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 Community United Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993)).[2]

Defendants' motion to dismiss Plaintiff's First Claim for Relief for the violation of freedom of speech under the First Amendment to the U.S. Constitution is denied. Because Defendants agree that Johnson's Fourth Claim for Relief under the California Constitution is determined by First Amendment jurisprudence, Defendant's motion to dismiss the Fourth Claim for Relief is also denied. *California Teachers Assn. v. Governing Board*, 45 Cal. App. 4th 1383, 1391 (1996); *see also San Leandro Teachers Ass'n v. Governing Bd. Of the San Leandro Unified School Dist.*, 154 Cal. App. 4th 866 (2007) (government restrictions on speech in nonpublic forum must be viewpoint neutral).

B. The Establishment Clause Claims

Johnson's Second and Sixth Claims for relief assert Defendants violated the Establishment Clause of the First Amendment and the California Constitution. Defendants move to dismiss both. Johnson's claim is simple: by squelching his speech and taking the position that "his banners were impermissible because they conveyed a 'Judeo-Christian' viewpoint," while at the same time permitting the speech of other teachers about Buddhist and Islamic religions to remain on classroom walls, Defendants are using the weight of government to prefer some religions while expressing hostility toward his own religion. This, of course, the Establishment Clause forbids. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963) ("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.'").

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[2] This would be a different case if, for example, it was the State of California requiring by statute that a copy of the Ten Commandments be displayed on Johnson's classroom wall. *See Stone v. Graham*, 449 U.S. 39. (1980) (per curiam) (striking down Kentucky statute requiring Ten Commandments be posted in every public school classroom as violating Establishment Clause).

Defendants argue that they were only enforcing religious neutrality. Defendants' Reply, at 6. The facts alleged in the First Amended Complaint paint a different picture. To recap, other teachers are permitted to display Buddhist messages, Tibetan prayer flags, and Islamic messages. First Amended Complaint, at ¶ 22. Such speech is obviously religious. At the same time, Defendant school principal Kastner "told Plaintiff that his banners were impermissible because they conveyed a 'Judeo-Christian' viewpoint." *Id.* at ¶ 42. As alleged, the facts state an unequivocal case of government hostility, not neutrality, towards what Defendants perceive to be the Judeo-Christian viewpoint.[3]

As the Ninth Circuit explained in another public school setting where the Establishment Clause was violated, "[t]he message of an open-forum policy is one of neutrality, not endorsement, while discriminating against religious groups would demonstrate hostility, not neutrality, toward religion." *Ceniceros v. Board of Trustees of the San Diego Unified Sch. Dist.*, 106 F.3d 878, 882 (9th Cir. 1997); *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 593 (1989) (Establishment Clause inquiry is whether the government "conveys or attempts to convey a message that religion or a particular religious belief is favored or preferred.") (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in part and concurring in judgment)).

Accepting as true for purposes of a motion to dismiss the allegations set forth in the First Amended Complaint, Johnson has successfully stated a valid Establishment Clause hostility claim by alleging that Defendants permit or favor Buddhist and Islamic speech by teachers but forbid or are hostile toward the Judeo-Christian speech of Johnson. Therefore, Defendants' motion to dismiss Plaintiff's Second Claim for Relief for violation of the Establishment Clause is denied.

Because Defendants agree that Johnson's Sixth Claim for Relief under the California Constitution is determined by First Amendment jurisprudence, Defendant's motion to dismiss the Sixth Claim for Relief is also denied. *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

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[3] Whether the messages on Johnson's banners convey a Jewish or Christian viewpoint, or neither, is a debatable issue. In some sense it depends on the message of the authors quoted or the interpretation of the reader. But, for purposes of stating a claim for relief for violation of the Establishment Clause, it is sufficient to allege that the government actor, school principal Kastner, perceived Johnson's expression to be religious and suppressed his speech for that reason.

guided by decisions of the United States Supreme Court.").

C. The State "No Preference" Clause Claim

Johnson's Fifth Claim for Relief asserts a claim solely under the California Constitution's No Preference Clause. Defendants move to dismiss, once again arguing that there are no facts pled which suggest the Defendants acted with preference for one religion over another. Defendants' Points and Authorities, at 17. Defendants' argument does not square with a plain reading of the First Amended Complaint.

The No Preference Clause reads: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." Cal.Const. art. I, § 4. "The California courts have interpreted the no preference clause to require that not only may a governmental body not prefer one religion over another, it also may not appear to be acting preferentially." *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204, 1214 (9th Cir. 1996) (citations omitted). While, the California Supreme Court has not had occasion to definitively construe the reach of the clause, (*see Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 788 (9th Cir. 2008)), since Johnson has adequately alleged that Defendants acted in a way that either prefers, or appears to prefer, Buddhist and Islamic viewpoints over Jewish and Christian viewpoints, he has successfully stated a claim for relief for violation of California's No Preference Clause. Defendants' motion to dismiss the Fifth Claim for Relief is denied.

D. The Equal Protection Claim

Johnson's remaining claim for relief is the Third Claim asserting a violation of the Equal Protection Clause of the Fourteenth Amendment. Defendants move to dismiss, still arguing that there are no facts pled which suggest the Defendants treated Johnson differently from other similarly situated teachers at the Westview High School. Defendants' Points and Authorities, at 16. As discussed previously, Defendants' argument does not square with a plain reading of the First Amended Complaint.

The Supreme Court teaches that "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 461-62

(1980). In *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972), the Court explains:

> Necessarily, then, under 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. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Reading Johnson's First Amended Complaint, the allegations are sufficient to make out a claim for relief that Defendants violated his rights under the Equal Protection Clause. Defendants opened up a forum for teacher expression. Having maintained the forum for decades, Defendants violated Johnson's rights when they acted to prohibit his speech and order his banners removed based on the content and viewpoint of what he was expressing while permitting other teacher speech to continue unfettered. Thus, Johnson's Equal Protection claim, the Third Claim for Relief, also survives Defendants' Motion to Dismiss.

E. Qualified Immunity

The individual Defendants argue that they are entitled to qualified immunity. Qualified immunity is an immunity from suit rather than a mere defense to liability. *Butler v. San Diego Dist. Attorney's Office*, 370 F.3d 956, 963 (9th Cir. 2004) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). "Thus, in the usual case where a defendant asserts an official immunity defense, the district court first decides whether the facts alleged in the complaint, assumed to be true, yield the conclusion that the defendant is entitled to immunity. This is the analysis under Rule 12(b)(6) on a motion to dismiss. *Id.* (citations omitted). If a plaintiff survives the motion to dismiss, he is entitled to enough discovery to permit the court to rule on a subsequent summary judgment motion. *Id.*

"Defendants are entitled to qualified immunity only if the law at the time of the alleged constitutional violation was not clearly established." *Flores v. Morgan Hill Unified School Dist.* 324 F.3d 1130, 1136-37 (9th Cir. 2003). "In order to find that the law was clearly established, however, we need not find a prior case with identical, or even materially similar, facts." *Id.* (citing

Hope v. Pelzer, 536 U.S. 730 (2002)). The task is determining "whether the preexisting law provided the defendants with fair warning that their conduct was unlawful." *Id.*

In this case, the law has been clearly established since *Tinker* that school teachers enjoy First Amendment rights inside the schoolhouse gates. It is also clearly established law that where free speech is permitted on government property, government may not discriminate based on the speakers' viewpoint. The school district and its administration apparently acted in conformity with these clearly established principles for *25* years. When Defendants suddenly changed course in 2007, as alleged in the First Amended Complaint, they did so in violation of clearly established federal and state constitutional law and with fair warning that their conduct was unlawful. Therefore, at least at the pleading stage of litigation, the individual Defendants are not entitled to qualified immunity from suit.

F. Eleventh Amendment Immunity

Because Poway Unified School District is considered an agency of the State of California, it argues that it is entitled to immunity from suit under the Eleventh Amendment to the U.S. Constitution. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 62 (1989); *Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 251 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) (school districts treated as state agencies). If Johnson were seeking money damages against the school district, the argument would be correct. However, Johnson is seeking declaratory and prospective injunctive relief alleging ongoing constitutional violations. As a result, the Eleventh Amendment does not immunize from suit either the school district or the individual defendants acting in their official capacities. *Pittman v. Oregon, Employment Dept.*, 509 F.3d 1065, 1071 (9th Cir. 2007) (citing *Ex Parte Young*, 209 U.S. 123, 156-57 (1908)); *Flint*, 488 F.3d at 825 (same).

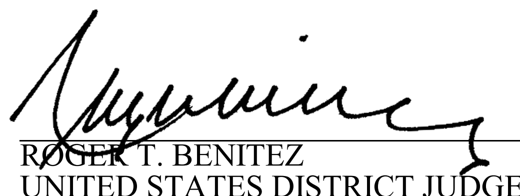
V. CONCLUSION

Public schools play an important role educating and guiding our youth through the marketplace of ideas and instilling national values. One method used by the Poway Unified School District to accomplish this task is to permit students to be exposed to the rich diversity of backgrounds and opinions held by high school faculty. In this way, the school district goes beyond the cramped view of selecting curriculum and hiring teacher speech to simply deliver the approved content of scholastic orthodoxy. By opening classroom walls to the non-disruptive expression of

all its teachers, the district provides students with a healthy exposure to the diverse ideas and opinions of its individual teachers, without necessarily endorsing or dictating adherence to the ideas expressed. By squelching only Johnson's patriotic expression, the school district does a disservice to the students of Westview High School and the federal and state constitutions do not permit such one-sided censorship.

Defendants' Motion to Dismiss is denied.

Dated: September 4, 2008.



ROGER T. BENITEZ
UNITED STATES DISTRICT JUDGE