No. _____

In the Supreme Court of the United States

BRADLEY JOHNSON,
Petitioner,
v.
POWAY UNIFIED SCHOOL DISTRICT, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the question of whether public school officials violate the United States Constitution by censoring a teacher's personal, non-curricular speech in a forum created by the school district for such speech based on the teacher's viewpoint.

At issue are two banners that Petitioner, a high school math teacher, displayed in his classroom for more than 25 years without complaint. The banners contain the following slogans: "In God We Trust," "One Nation Under God," "God Bless America," "God Shed His Grace On Thee," and "All Men Are Created Equal, They Are Endowed By Their Creator." In 2007, school officials ordered Petitioner to remove the banners because they conveyed a "Judeo-Christian" viewpoint.

1. Whether *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006), should apply in a case challenging a viewpoint restriction on a public school teacher's personal, non-curricular speech expressed in a limited public forum created by the school district.

2. Whether school officials violated the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment by restricting Petitioner's personal, non-curricular speech expressed in a limited public forum created by the school district based on Petitioner's viewpoint.

PARTIES TO THE PROCEEDING

The Petitioner is Bradley Johnson (hereinafter referred to as "Petitioner").

The Respondents are the Poway Unified School District; Jeff Mangum, Linda Vanderveen, Andrew Patapow, Todd Gutschow, and Penny Ranftle, all individually and in his or her official capacity as a Member of the Board of Education for the Poway Unified School District; Dr. Donald Phillips, individually and in his official capacity as Superintendent of the Poway Unified School District; William R. Chiment, individually and in his official capacity as Assistant Superintendent of the Poway Unified School District; and Dawn Kastner, individually and in her official capacity as Principal, Westview High School, Poway Unified School District (hereinafter collectively referred to as "School District" or "Respondents").

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JURISDICTION

The judgment of the court of appeals was entered on September 13, 2011. App. 43a-44a. A petition for rehearing and suggestion for rehearing *en banc* was denied on October 21, 2011. App. 102a-103a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment to the United States Constitution provides, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT

Pursuant to a longstanding School District policy of permitting teachers to express personal, non-curricular messages through the display of banners,

posters, flags, and other items and for more than 25 of those years, Petitioner, a high school math teacher, displayed in his classroom, without complaint, two such banners. The banners contain well-known, historic, and patriotic slogans, including "In God We Trust," "One Nation Under God," "God Bless America," "God Shed His Grace On Thee," and "All Men Are Created Equal, They Are Endowed By Their Creator." *See* App. 46a-47a (photographs of banners).

In 2007, Respondents ordered Petitioner to remove the banners because they allegedly conveyed an impermissible "Judeo-Christian" viewpoint.

In its opinion, the Ninth Circuit framed the issue on appeal as follows:

> We consider whether a public school district infringes the First Amendment liberties of one of its teachers when it orders him not to use his public position as a pulpit from which to preach his own views on the role of God in our Nation's history to the captive students in his mathematics classroom.[1]

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[1] Contrary to the panel's view, Petitioner never used "his public position as a pulpit" to "preach" to the students. Respondent William Chiment confirmed that fact, testifying on behalf of the School District as follows:

> Q: Anyone ever make any complaints that you're aware of that [Petitioner] would proselytize students impermissibly?
>
> A: No.

See also App. 87a ("The [Petitioner's] banners are not patently evangelical. They do not contain scripture from any holy text. There is no proselytizing language."). Indeed, in a footnote, the district court made the following relevant observation:

App. 4a.

The district court, which held that the School District did violate Petitioner's constitutional rights, framed the issue differently:

> 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?

App. 51a.

For the past 30 plus years, the School District had in place a policy of permitting teachers to display in their classrooms various non-curricular messages and other items that reflect the individual teacher's personality, opinions, viewpoints, 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 the expression of such opinions and viewpoints. As the district court concluded based on the undisputed record evidence:

> [Respondents] have a long-standing policy of permitting its teachers to express ideas on their

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> Ironically, while teachers in the Poway Unified School District encourage students to celebrate diversity and value thinking for one's self, [Respondents] apparently fear their students are incapable of dealing with diverse viewpoints that include God's place in American history and culture.

App. 58a, n.1.

> classroom walls. [Respondents'] policy grants its teachers discretion and control over the messages displayed on their classroom walls. [Respondents'] policy permits teachers to display on their classroom walls messages and other items that reflect the teacher's personality, opinions, and values, as well as political and social concerns. [Respondents'] policy permits teacher speech so long as the wall display does not materially disrupt school work or cause substantial disorder or interference in the classroom. As a result of the [Respondents'] long-standing policy, a teacher's classroom walls serve as a limited public forum for a teacher to convey non-curriculum messages.

App. 70a-71a.

The panel acknowledged this factual finding, stating, "[W]e agree with the district court that no genuine issue of material fact remains present in this case," but disagreed with the application of a forum analysis in favor of a "*Pickering*-based inquiry." App. 43a.

Pursuant to this long-standing policy, teachers have displayed and continue to display in their classrooms non-curricular, personal materials such as posters of rock bands and musicians; a poster of the controversial, anti-religion song *Imagine*, written by John Lennon; posters of various 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, global warming and the environment, animal research, anti-war/peace,[2] the military, zero population growth, and others. The School District allows teachers to display Tibetan prayer flags, which contain an image of Buddha.[3] These prayer flags are considered sacred, religious items by those who practice Buddhism. Teachers are permitted to display posters of famous religious leaders, such as Gandhi (Hindu), the Dali Lama (Buddhist), and the controversial Malcolm X (the Nation of Islam/Islam); and items of particular political parties or candidates, including a campaign poster of candidate Obama, a *Newsweek* magazine cover of the candidates Obama and Biden; a poster of the "Libertarian Party"; and the Gadsden flag with the political slogan, "Don't Tread on Me." *See* App. 55a-59a. All of these expressive items were displayed as of April 2009, which is more than two years after Respondents ordered Petitioner to remove his banners. And as Respondents acknowledged in their filings below, "[R]eligion is not a category of items prohibited from classroom walls."

For approximately 25 years, Petitioner continuously displayed, without a single objection or complaint, his patriotic banners. Petitioner had the banners made to order by a private company, and he purchased them with his own funds.

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[2] One example is a bumper sticker stating, "How many Iraqi children did we kill today?" App. 58a.

[3] One teacher's Buddhist prayer flag display stretches approximately 35 to 40 feet across her classroom. App. 56a.

Petitioner's banners contain phrases and slogans central to our Nation's history and heritage, and they reflect the foundations of our Nation. The banners do not contain quotes or passages from Sacred Scripture or any other religious text.

The classrooms in which Petitioner's banners were displayed were assigned to him. As a matter of policy, teachers are given discretion and control over the various non-curricular messages displayed on their classroom walls. No teacher is permitted to display materials or messages on Petitioner'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. As Respondents acknowledge, the School District does not endorse or promote the non-curricular messages displayed by the teachers.[4] Consequently, the

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[4] Respondent Chiment testified 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 . . . environmental issues like the ones we saw --
>
> A: Yes.
>
> Q: -- that those [non-curricular displays] don't necessarily mean that the School District is endorsing those particular views or opinions? Isn't that true?
>
> A: Yes, that's true.

Mr. John Collins, Deputy Superintendent at the time, testified 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

teachers' displays do not constitute government speech.

Petitioner'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. And they did not interfere with his teaching.[5]

In January 2007, Respondents ordered Petitioner to take down his banners because they allegedly conveyed an impermissible "Judeo/Christian" viewpoint.

REASONS FOR GRANTING THE PETITION

The question of how to address teacher speech cases continues to confound the lower courts. The two vastly different approaches taken by the district court and the Ninth Circuit in this case serve to illustrate the point. Indeed, the Ninth Circuit, the Fourth Circuit, and the Sixth Circuit have each adopted differing approaches to resolving such cases. As a consequence, there is no uniform application of First

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the School District endorsing or promoting that teacher's particular interest. Isn't that fair to say?
A: That is.
See also App. 59a, 64a, 78a.

[5] Deputy Superintendent Collins acknowledged that Petitioner's banners "were not part of the curriculum" and that "[t]he banners have not prevented [Petitioner] from providing math instruction and fulfilling his responsibilities." *See also* App. 55a.

Amendment principles for teacher speech cases, warranting review by this Court.

This petition, therefore, presents a question of exceptional importance regarding the proper application of First Amendment principles in the public school context, particularly where the record demonstrates that the School District created a forum for the personal, non-curricular speech of its teachers. Upon close inspection, the panel's decision conflicts with this Court's precedent, which requires the application of a forum analysis under the facts presented. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). Indeed, a forum analysis is the only way to properly safeguard important First Amendment freedoms when the government has chosen to create a forum for its employees to speak.

Thus, based on the panel's ruling, which is now the controlling law of the Ninth Circuit, the School District possesses the plenary authority to make viewpoint-based restrictions on the personal, non-curricular speech of its teachers. For example, school officials now have the authority to permit teachers to adorn their classroom walls with campaign posters promoting their favorite Democrat candidates for office (or view on their favorite political or social issue), while simultaneously prohibiting any teacher from posting political campaign posters promoting a Republican candidate (or the contrary view of the permitted political or social issue). However, as this Court stated in *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), "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. In direct contravention, Respondents now have the judicially-sanctioned authority 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 Petitioner's "Judeo-Christian" viewpoint. As a result, that "fixed star" in our constitutional constellation has been obscured and an official orthodoxy prescribed.

There is no dispute that Petitioner's constitutional rights are clearly implicated by Respondents' speech restriction. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 44 (1983) ("There is no question that constitutional interests are implicated by denying [appellee] use of the interschool mail system."). And in light of the record, these rights only have meaning if the reviewing court conducts a forum analysis.

The Ninth Circuit, however, eschewed a forum analysis in favor of applying an approach that follows *Pickering* and *Garcetti*. But this approach fails to account for the First Amendment issues at stake because Petitioner is seeking to use government property (his classroom walls) for non-curricular, personal expression pursuant to a longstanding School District policy of permitting teachers to use this forum for such speech. Indeed, this 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*, 473 U.S. at 800. Consequently, to determine the extent of Petitioner's free speech rights on School District property, the reviewing court must engage in a First Amendment forum analysis. *See Perry Educ. Ass'n*, 460 U.S. at 44.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, this Court held that a state university, which made its facilities generally available for the activities of registered student groups (similar 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. This Court stated, "Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed *an obligation to justify its 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).

Consequently, once the government has opened a limited forum, it must respect the lawful boundaries it has itself set.[6] One such "boundary" is that the

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[6] Certainly, if Respondents wanted to remove all personal expressive items from the classroom walls, thereby closing the forum to all personal, non-curricular speech, they could do so. Thus, Respondents are not required to surrender control over to the teachers. However, once Respondents create this forum, they

government may not discriminate against speech on the basis of its viewpoint. *Cornelius*, 473 U.S. at 806.

Here, pursuant to a long-standing policy, the School District created a limited public forum that is open for use by teachers, including Petitioner, to express a variety of messages, including personal, non-curricular messages. Pursuant to this policy, 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. Thus, a forum analysis is the proper approach to take. And based on this analysis, Respondents' viewpoint-based restriction cannot survive constitutional scrutiny.

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). If certain speech falls within an acceptable subject matter otherwise included in the forum, the government may not exclude it from the forum based on the viewpoint of the speaker. Thus, 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," as in this case. *Cornelius*, 473 U.S. at 806.

Because Respondents singled out Petitioner's speech based on his viewpoint, Respondents' speech

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cannot pick and choose based on viewpoint which messages are acceptable and which are not.

restriction cannot survive constitutional scrutiny. *Rosenberger*, 515 U.S. at 819; *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107-08 (2001).

Here, the Ninth Circuit rejected a forum analysis and applied the "balancing test" set forth in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). However, the panel never reached the point of balancing the respective parties' interests because it held, based on the second step of a five-part test set forth in *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009)—a step expressly derived from *Garcetti v. Ceballos*, 547 U.S. 410 (2006)—that Petitioner was speaking on behalf of the government as part of his official duties, thus ending any further inquiry. App. 23a-33a. As the panel concluded, "Because the speech at issue owes its existence to Johnson's position as a teacher, Poway acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire." App. 32a-33a (citing *Garcetti*, 547 U.S. 421-22). But *Pickering* and *Garcetti* are inapplicable here because these cases do not address a situation in which the government opened a forum for certain expressive activity (personal, non-curricular messages) by certain speakers (teachers), but then prohibited a qualified speaker from expressing an appropriate message in the forum based on his viewpoint.

Indeed, the panel acknowledged the fact that Petitioner's speech was not part of the curriculum or curricular in nature, *see* App. 25a, n.13, and expressly declined to "apply" what it described as "the curricular

speech doctrine," citing to *Lee v. York Cnty. Sch. Divs.*, 484 F.3d 687, 697 (4th Cir. 2007), *see* App. 23a, n.11.[7]

Moreover, upon reviewing the "content, form, and context" of Petitioner's speech, "as revealed by the whole record," pursuant to *Connick v. Myers*, 461 U.S. 138, 147-48 (1983), the Ninth Circuit concluded that the speech addressed a matter that was "unquestionably of inherent public concern." App. 20a-23a.

As this Court noted in *Connick*, when an employee's speech addresses a matter of public concern, the courts must closely scrutinize the reasons for suppressing the speech. *Id*. at 146 (observing that because "Myer's questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge"). This is so because "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick*, 461 U.S. at 145 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886. 913 (1982) & *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

Thus, the Ninth Circuit held that the government, in the form of school officials, has plenary authority over the speech of its teachers, including the authority to make viewpoint-based restrictions on that speech in a forum in which teachers are permitted to express

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[7] Similarly, the panel rejected the contention that *Garcetti*'s "academic freedom" exception applied to inquiries involving the speech of primary and secondary school teachers. App. 23a, n. 12.

personal, non-curricular opinions and viewpoints on a host of controversial political and social issues. This holding undermines fundamental First Amendment principles.

Moreover, the Ninth Circuit's approach conflicts with the approach taken by the Fourth Circuit in *Lee v. York Cnty. Sch. Divs.*, 484 F.3d 687 (4th Cir. 2007). In *Lee*, the Fourth Circuit refused to apply *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and instead applied *Pickering* in light of circuit precedent. As the Fourth Circuit stated, "The Supreme Court in *Garcetti* held that 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.' . . . The Court explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching." *Lee*, 484 F.3d at 694, n.11 (quoting and citing *Garcetti*, 547 U.S. at 701, 703) (citations omitted). The Fourth Circuit ultimately held that school officials did not violate the First Amendment because the teacher's "classroom postings do not constitute speech concerning a public matter, because they were of a curricular nature." *Id*. at 694. Thus, the Fourth Circuit holds as a matter of law that teacher speech that is "curricular in nature" is not speech that is "concerning a public matter." Therefore, school officials could restrict the speech without running afoul of the First Amendment.

In so ruling, however, the Fourth Circuit noted that if the teacher's speech was not curriculum related—that is, if it was personal and non-curricular as in the case of Petitioner's speech—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." *Id*. at 694, n.10 (quoting *Tinker*, 393 U.S. at 509).

In *Evans-Marshall v. Bd. of Educ*., 624 F.3d 332 (6th Cir. 2010), the Sixth Circuit adopted yet another approach to teacher speech cases, ultimately concluding along the lines similar to the Ninth Circuit. In *Evans-Marshall,* the plaintiff's contract was not renewed because she sought to teach as part of her assigned classroom instruction curricula material to which the school board objected. The Sixth Circuit ruled in favor of the school board, holding that "the First Amendment does not extend to the *in-class curricular speech* of teachers." *Id*. at 334 (emphasis added). In so ruling, the Sixth Circuit found that the teacher's "curricular speech" met the threshold requirement under *Connick v. Myers*, 461 U.S. 138 (1983), in that it touched upon a "matter of public concern." *Evans-Marshall,* 624 F.3d at 338-39. And upon applying the balancing test of *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), the court concluded that the teacher's interest in her "curricular speech" outweighed the school board's interest in promoting the efficiency of the public services it performs. *Evans-Marshall*, 624 F.3d at 339. The court ultimately concluded, however, that the school board should prevail because under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the teacher's "curricular speech" was made pursuant to her official duties *because she was teaching the curriculum*. *Evans-Marshall*, 624 F.3d at 340-41.

In sum, in the Ninth Circuit, school officials are permitted to impose a viewpoint-based restriction on

the personal, non-curricular speech of Petitioner even though his speech addressed a matter of public concern and it was made pursuant to a School District policy of permitting teachers to display in their classrooms various non-curricular messages that reflect the individual teacher's personality, opinions, viewpoints, and values regarding a wide range of interests and subject matter, including controversial social and political issues. In the Fourth Circuit, a teacher's curricular-related speech does not address a matter of public concern as a matter of law. Therefore, school officials have plenary authority to regulate this category of speech. However, a teacher's non-curricular speech, such as Petitioner's speech at issue here, is subject to the *Tinker* standard in that it cannot be restricted unless the government can show that it has caused or threatens to cause a material disruption in the school. In the Sixth Circuit, a teacher's speech may address a matter of public concern and the balancing of interests under *Pickering* may weigh in favor of protecting the speech. However, this analysis does not matter when the speech is curricular in nature because such speech is made pursuant to a teacher's official duties and may therefore be regulated however school officials deem appropriate under *Garcetti*.

In the final analysis, the Ninth Circuit should have conducted a forum analysis based on this Court's precedent and the overarching importance of preserving First Amendment liberties. Moreover, there is a clear lack of uniformity in the lower federal courts as to the application of *Pickering*, *Connick*, and *Garcetti* in the context of addressing whether a teacher's speech is constitutionally protected.

Consequently, review by this Court is appropriate. *See* Sup. Ct. R. 10(a) & (c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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