No. 10-1413

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MICHAEL S. ADAMS,

Plaintiff-Appellant,

v.

THE TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA-WILMINGTON—M. TERRY COFFEY, JEFF. D. ETHERIDGE, JR., CHARLES D. EVANS, LEE BREWER GARRETT, JOHN A. MCNEILL, JR., WENDY F. MURPHY, LINDA A. PEARCE, R. ALLEN RIPPY, SR., GEORGE M. TEAGUE, KRISTA S. TILLMAN, DENNIS T. WORLEY, and KATHERINE L. GURGAINUS; ROSEMARY DEPAOLO; DAVID P. CORDLE; KIMBERLY J. COOK; and DIANE LEVY,

Defendants-Appellees.

Appeal from the
United States District Court for the Eastern District of North Carolina
Case No. 7:07-cv-00064
The Honorable Malcolm J. Howard

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 10-1413 Caption: Michael S. Adams v. The Trustees of the University of N.C. Wilmington

Pursuant to FRAP 26.1 and Local Rule 26.1,

Michael S. Adams (name of party/amicus) who is Appellant (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on April 27, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ David A. French (signature) 04/27/2010 (date)

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant's Amended Complaint raises federal questions under the U.S. Constitution and 42 U.S.C. §1983. (J.A.21.) The District Court exercised original jurisdiction over those claims under 28 U.S.C. §§1331 (federal question jurisdiction) & 1343 (civil rights jurisdiction). It had authority to award damages under 28 U.S.C. §1343; declaratory relief under 28 U.S.C. §§2201-02; injunctive relief under 28 U.S.C. §1343 and 42 U.S.C. §1983; and costs and attorneys' fees under 42 U.S.C. §1988.

Plaintiff-Appellant Michael S. Adams ("Dr. Adams") is an associate professor of criminology at the University of North Carolina-Wilmington ("UNCW"), an institution in the University of North Carolina system. (J.A.21, 25-26, 251, 256-57.) Defendants-Appellees (collectively "UNCW Officials") are the trustees of UNCW; Rosemary DePaolo, Chancellor of UNCW; Dean David Cordle, Dean of the College of Arts and Sciences at UNCW; Dr. Kimberly Cook, Chair of the Department of Sociology and Criminal Justice at UNCW ("Department"); and Dr. Diane Levy, formerly the interim Chair of the Department and currently a professor in the Department. (J.A.3-7, 251-56.)

Appellate jurisdiction exists under 28 U.S.C. §1291. On March 15, 2010, the District Court granted UNCW's motion for summary judgment and entered a Judgment for UNCW Officials. (J.A.1391-92.) On April 9, 2010, Dr. Adams filed a timely Notice of Appeal from the March 15th Judgment, appealing the final order and judgment entered on that date. (J.A.1394.)

STATEMENT OF ISSUES

This appeal presents six primary issues:

1. Are opinion columns and speeches on matters of public concern published by a university faculty member in his private capacity protected by the First Amendment when published?

2. Does *Garcetti v. Ceballos*, 547 U.S. 410 (2006), apply to the speech of a public university faculty member if opinion columns and speeches on matters of public concern published in the faculty member's private capacity are later mentioned in a promotion application?

3. Did the lower court err by resolving material factual conflicts in UNCW Officials' favor and granting UNCW summary judgment on Dr. Adams' Title VII religious discrimination claims?

4. Did the lower court err by resolving material factual conflicts in UNCW Officials' favor and granting UNCW summary judgment on Dr. Adams' First Amendment viewpoint discrimination claims?

5. Did the lower court err by resolving material factual conflicts in UNCW Officials' favor and granting UNCW summary judgment on Dr. Adams' retaliation claims?

6. Did the lower court err by resolving material factual conflicts in

UNCW Officials' favor and granting UNCW summary judgment on Dr. Adams' equal protection claims?

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

The central question of this case is whether an accomplished teacher and scholar can be denied a promotion because his supervisors dislike his religious and political beliefs. Dr. Michael S. Adams, an associate professor of sociology and criminology at the University of North Carolina Wilmington ("UNCW"), excelled in every category of evaluation. An excellent teacher, he had received multiple university teaching awards and was consistently among the highest-rated professors in his Department. A prolific scholar, he had published more peer-reviewed articles than his current and previous Department chairs at equivalent points in their careers. Indeed, he had published more peer-reviewed articles than seven of his nine departmental colleagues when he applied for promotion. Dedicated to service, he had made scores of appearances in local and national venues, spent countless hours advising dozens of students and several student groups each semester, and won the prestigious Golden Seahawk Award for his exemplary campus leadership and service.

Yet despite this impressive record (equivalent accomplishments by other professors had *always* resulted in a promotion), Dr. Adams was

denied a promotion to full professor through an evaluation process shot through with ideological bias in which his colleagues expressed open hostility to his constitutionally protected political, cultural, and religious expression.

The lower court unfortunately sidestepped the considerable evidence of ideological and religious bias by ruling that Dr. Adams' opinion columns were *not protected* by the First Amendment. These columns—published over a period of years on a conservative website—were often critical of the University and University officials and expressed a conservative religious and political viewpoint. Dr. Adams' criticisms of UNCW had in fact reached an apex shortly before his promotion denial, and his colleagues expressly mentioned his critiques as justifying their decision to hold him back from further professional advancement.

As an unfortunate result of the District Court's ruling, the University's explicit ideological bias was placed beyond legal review, and undisputed evidence of data manipulation, policy violations, conflicts of interest, double standards, secret investigations, and outright hostility to Dr. Adams' religious conservatism were deemed no longer relevant to Dr. Adams' claims.

The cornerstone of the lower court's ruling was an erroneous reading of the Supreme Court's recent decision in *Garcetti*, 547 U.S. 410. In *Garcetti*, however, the Supreme Court explicitly reserved the question of whether its ruling limiting the free speech rights of public employees applied to university professors.

Ignoring this important reservation, the court below made two critical errors. First, it improperly considered Dr. Adams' private columns and speeches (for which he was paid by third parties) to be part of his "official" duties at UNCW; and second, it then held that *Garcetti* applied even to Dr. Adams' speech on matters of public concern. This appeal seeks a reversal of the first error or—failing that—recognition that the Supreme Court expressly reserved the applicability of *Garcetti* to professors because of the long and historically-recognized liberty of university professors within the university community, a place where the "essentiality of freedom ... is almost self evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

II. COURSE OF PROCEEDINGS.

On April 10, 2007, Dr. Adams filed suit (J.A.4), and on May 2, 2007, he filed his First Amended Verified Complaint. (J.A.6.) In both, he

raised claims under the First and Fourteenth Amendments and Title VII of the Civil Rights Act of 1964.

On June 18, 2007, UNCW Officials moved to dismiss. (J.A.11, 221-22.) On March 31, 2008, the District Court granted in part and denied in part this motion. (J.A.12.) It dismissed Dr. Adams' Title VII claims against UNCW Officials in their individual capacities, retaining the official capacity claims and all Dr. Adams' constitutional claims. (J.A.241-49.)

After discovery, UNCW Officials moved for summary judgment. (J.A.13, 285-87.)

III. DISPOSITION BELOW.

On March 15, 2010, the District Court granted UNCW Officials' motion for summary judgment. Regarding Dr. Adams' Title VII claims, the court below ruled that Dr. Adams did not provide direct evidence or satisfy the prima facie case for religious discrimination. (J.A.1377-83.) Regarding Dr. Adams' First Amendment claims, the court applied *Garcetti* and ruled that Dr. Adams' reference to his writings and speeches on his promotion application transformed them into part of his "official duties." (J.A.1383-86.) Consequently, adverse actions taken as a result of those columns or speeches could not qualify as "retaliation" as a matter of law.

The same day, the lower court entered a Judgment for UNCW Officials. (J.A.1391-93.) On April 9, 2010, Dr. Adams filed a timely notice of appeal. (J.A.1394.)

STATEMENT OF FACTS

I. DR. ADAMS, A DISTINGUISHED TEACHER AND SCHOLAR.

Throughout his career at UNCW, Dr. Adams has performed at the highest levels of teaching, scholarship, and service. From the beginning, he garnered an impressive collection of awards and accolades from a variety of UNCW officials.[1] For teaching, he received rave reviews from students, "outstanding" and "excellent" peer reviews, repeated awards, and consistent praise for being a "master," "gifted," "accomplished," and "natural" teacher. As a scholar, he amassed an "impressive" collection of refereed articles, resulting in peer reviews that steadily climbed to "outstanding," achieved the Department of Criminology and Sociology's (the "Department's") highest ratings, and received praise for such rapid accomplishments. For service, he received consistent applause for his work in the Department, the University, and the community, including community lectures, media appearances of all types, and periodic editorials. (J.A.28-31, 66-71, 73-74, 80-84.) From 1996 to 2000, the university honors piled up:

- Who's Who Among College Teachers in 1996 (J.A.30, 154);

[1] These officials include Drs. Stephen McNamee and Cecil Willis (former Department chairs) and Dr. Diane Levy.

- A nomination for the Chancellor's Teaching Award in 1996 (J.A.78);
- A special teaching stipend from the North Carolina state legislature in 1996 (J.A.78, 154);
- "Outstanding UNCW Professor Award" in 1998 (J.A.31, 73, 75-77, 154);
- Promotion to associate professor with tenure in 1998 (J.A.31, 78-79, 308);
- "Faculty Member of the Year Award" for 1999-2000 (J.A.31, 82, 154); and
- Who's Who Among College Teachers in 2000 (J.A.31, 154).

Without question, Mike Adams was a rising star in the UNCW sociology department.

II. DR. ADAMS EXPERIENCES ANIMOSITY, DISCRIMINATION, AND RETALIATION.

In 2000, Dr. Adams experienced an important personal change and became a Christian conservative (J.A.31-32, 299, 338-42), the only one in the Department (J.A.845). Previously an atheist and politically liberal, Dr. Adams' religious and political transformation over time translated into his writings and his personal expression. While this transformation did not cause immediate workplace issues, within a year Dr. Adams understood that he was facing a new workplace reality.

The first problems emerged in early 2001, when Dr. Adams cau-

tioned his colleagues against "interject[ing] political and religious bias into the hiring process." (J.A.762.) Dr. Lynne Snowden, a faculty colleague, responded by defending political discrimination in hiring decisions and then promptly removed him from the faculty email list for allegedly "campaigning for Bush." (J.A.845, 32.)

Later when he responded to a UNCW student who blamed the United States for the 9/11 terrorist attacks and forwarded her e-mail (as she requested) to some friends, UNCW's then-Provost John Cavanaugh permitted an investigation into his personal e-mails. (J.A.32-40, 85-110, 119.) The investigation led to Dr. Adams' appearance on *Hannity & Colmes* to discuss UNCW's actions (J.A.39, 111-18).

In November 2001, the workplace environment became dramatically worse as Dr. Snowden accused Dr. Adams and his colleague, Dr. Willis of "workplace terrorism" and a "hate crime" by claiming—without a shred of evidence (J.A.1168-70, 1177-78)—that they sprayed an "unknown gas" or "pepper spray" in her office. (J.A.39, 337-38, 1161-67, 1170-76, 1189-97, 1298-1301, 270.) While Dr. Willis was quickly exonerated, the felony accusation against Dr. Adams remained open for another five years (J.A.44, 144-46, 1303), thus becoming one of the "sto-

ries of the university." (J.A.1067.) Dr. Snowden also accused Dr. Adams multiple times of sexually harassing students, again without a shred of evidence. (J.A.450-54, 1155-59, 1180, 1187-97.)

Prompted in part by these negative actions, Dr. Adams published a brief column in 2002 criticizing UNCW and the Department of religious intolerance. (J.A.40, 121-23.) In September 2003, he began writing a regular column for Townhall.com, typically publishing columns twice-weekly. Townhall compensates Dr. Adams for his writing, and his columns focus primarily on campus culture and climate, but also address a wide range of topics including academic freedom, constitutional rights, discrimination, race, gender, homosexual conduct, feminism, Islamic extremism, religion, and morality. (J.A.846, 850-51; *see also* J.A.978-1001.) These columns often showcase his conservative religious beliefs. (J.A.299-301; *see also* J.A.978-1001.)

Even as Dr. Adams added "national columnist" to his CV, he continued to publish peer-reviewed scholarship at the same rate that he did before he wrote for Townhall.com (J.A.155-57) (exceeding his peers (J.A.972-75)), continued to receive excellent teaching evaluations from his students (J.A.977), and continued to serve the University commu-

nity through advising students and student organizations (J.A.31, 128-29, 132-33, 147-48, 162-65).

Dr. Adams' columns frustrated members of the Department, who took issue with his conservative views, often in crude terms. Though Dr. Willis had kept any political controversy out of annual evaluations, by April 2004, he instructed Dr. Adams not to discuss the columns at work because they made a secretary uncomfortable. (J.A.42). When Dr. Adams explained his upcoming absence from a dinner party due to a National Rifle Association dinner, Appellee Diane Levy (the new interim Department chair) mocked him saying: "Go on ... to your fascist pig meeting." (J.A.319-20, 1152-53.) Later, Dr. Snowden called Dr. Adams a "pathological liar" who was "mentally unbalanced" in the local paper (J.A.839), and Dr. Donna King derided him as a "wannabe right wing pundit." (J.A.840.) Dr. Levy reprimanded Dr. Adams for his columns, saying that he should change his "caustic" and "meanspirited" tone to be more "cerebral" like William F. Buckley. (J.A.43, 329-32, 345-46, 1125-29.)

Appellee Rosemary DePaolo and other high ranking University officials also grew frustrated with Dr. Adams' columns. (J.A.841, 983-84.) When members of the public asked whether Dr. Adams spoke for the

University, she stated clearly and unequivocally that he was speaking on his own and that his views were not the University's. (J.A.1074-76.) Then, she "prompt[ed]" the Faculty Senate to add "collegiality" to the promotion criteria because of the alleged "personal attacks" contained in Dr. Adams' columns (J.A.841), an initiative the Faculty Senate rejected (J.A.841, 843-44). Dr. Hosier mocked the columns as "wasting our time" (J.A.814), as "half truths" and "talk show" rhetoric that erodes collegiality (J.A.817), and predicted to Chancellor DePaolo that they would "die from a lack of 'weight.'" (J.A.816.)

By the summer of 2005, the institutional bias against Dr. Adams became far more pronounced. Dr. Levy gave him a poor 2004 annual evaluation,[2] stating that he was spending too much time focused on "political matters" and not enough on research (J.A.43, 142-43)—a judgment she made *without even examining his scholarly output* (J.A.1121-22; *see also* J.A.765). Had she done so, she would have discovered that his *eleven* career peer-reviewed publications to date—*five* of which he had produced since tenure (J.A.974)—almost doubled her *six* peer-reviewed publications at the equivalent stage of her career. (J.A.972.) In-

[2] This was Dr. Adams' first evaluation after publishing *Welcome to the Ivory Tower of Babel* in May 2004. (J.A.846.) This book contained several of his Townhall.com columns as well as new material detailing campus abuses.

deed, Dr. Adams' scholarly research output exceeded the vast majority of the Department's professors, with only two out of nine professors proving more productive. (J.A.972.) Dr. Levy also opined that his service to the Department and the University suffered because of his political activities. (J.A.43, 142, 1117-18.) But that same year, the Pandion Society—a society of the most exceptional UNCW students—granted him the "Golden Seahawk," a service award reserved for the "most outstanding leader among all individuals, departments, and organizations at UNCW." (J.A.165.)

In August 2005, Appellee Kimberly Cook replaced Dr. Levy as Department chair. Dr. Cook was not reluctant to express her own political and cultural views, at one point describing her ideal job candidate as "a lesbian with spiked hair and a dog collar." (J.A.43-44, 347-48.)

But when Dr. Adams addressed transgender issues in several of his columns, the Gender Mutiny Collective—an anarchist group from Chapel Hill (J.A.1286-87)—intimated that he might pass on "transphobia"[3] to his students. (J.A.1262-63; *see also* J.A.991-92.) Without receiving a single complaint from UNCW students and without even any knowledge of

[3] Defendant Cordle and Dr. LaGrange were not even certain of what this term means. (J.A.1059, 1093.)

the organization (J.A.1088-90), Chancellor DePaolo accepted the Gender Mutiny Collective's complaint at face value and ordered Dean Cordle and Dr. Cook to investigate whether Dr. Adams was "passing on transphobic views to students." (J.A.1262, 1082-86.) After a week-long investigation, involving Dr. Willis and Dr. Levy, Dr. Cook reported back that she had no evidence against Dr. Adams. (J.A.1500-01, 1264, 1272-73, 1276-79.)

Had Chancellor DePaolo fully examined Dr. Adams' teaching record, she would have found that he was one of the most highly rated teachers in the Department, scoring well above the Department average on student evaluations and sometimes with the highest scores in the Department. (J.A.66, 68, 70, 73, 80, 84, 977.) While often attracting the "highest course enrollment[numbers] among all of the [D]epartment's disciplines" (J.A.78; *accord* J.A.73), he also consistently maintained a "heavy caseload" of thirty or more student advisees (J.A.70; *accord* J.A.73, 80, 150), and every year was identified by graduating seniors as having made distinctive contributions to their success at UNCW (J.A.154).

In February 2006, Dr. Snowden *again* accused Dr. Adams of harassment without evidence. (J.A.1304-09, 1548-48.) Following this final false allegation, UNCW finally resolved her still-pending 2001 felony

accusation with the campus police finding them wholly unsupported. (J.A.44-45, 144-46, 274-75.)

III. DR. ADAMS IS DENIED PROMOTION TO FULL PROFESSOR.

In July 2006, Dr. Adams formally applied for promotion to full professor. (J.A.45, 149-74, 1200.) To be promoted, Dr. Adams needed to "have exhibited during [his] *career* distinguished accomplishment in teaching, a tangible record of research ..., and a significant record of service" (J.A.635 (emphasis added)), with the greatest emphasis on teaching, followed by research, and service as a distant third. (J.A.632, 1096-97, 547.) Notably, the faculty handbook does not limit the consideration of an applicant's "career" to only his career at the University, instead looking at the entire body of his work.

The *empirical* record of Dr. Adams' accomplishments was overwhelming. In the teaching category, his student evaluations were well above the Department average (J.A.977, 1095), and he had received multiple teaching awards and recognitions (*see supra* at 10-11; J.A.154), while simultaneously maintaining a "heavy caseload" of student advisees. (J.A.70, 73, 80, 150.) Regarding research, he had published more career peer-reviewed articles (eleven) than his current and previous de-

partment chairs and had published more peer-reviewed articles than seven of the nine members of the department—including Drs. Cook (eight) and Levy (six).[4] (J.A.972.) Likewise, only two Department colleagues topped Dr. Adams' five peer-reviewed publications since last promotion. (J.A.974.) In fact, **no professor with a similar number of peer-reviewed publications had ever been denied promotion at the Department level.** (J.A.847-48.) Regarding service, he had advised seven student organizations (J.A.164), and had served on twenty-seven University or Department committees (J.A.162-63), while making over 125 public appearances as a speaker, lecturer, debater, moderator, interviewee, guest, host, reviewer, and writer in various local and national venues such as newspapers, radio shows, television shows, universities, conferences, and organizational meetings. (J.A.166-74.) Thus, he had received the coveted "Golden Seahawk" for his exemplary service and leadership. (J.A.165.) Additionally, Dr. Adams' multiple columns and speeches on cultural, constitutional, and sociological issues constituted service to the wider community. (J.A.166-74.) This was

[4] Drs. McNamee and Willis told Dr. Adams that ten peer-reviewed—or refereed—publications would suffice for promotion to full professor. (J.A.24, 847-48.) Dr. Cook expects one publication every two years, with a rate of one per year exceeding the standard. (J.A.1414-17, 1265-66.) Dr. Levy merely looks for more than one publication since tenure. (J.A.1139-40.)

consistent with the Department practice of giving "service" credit to other professors for their own activism in discussing "popular culture" (J.A.783); "gender and media" (J.A.785); "women, work, and family" (J.A.786, 789, 795, 797, 928-29); "juvenile law" (J.A.811); school violence (J.A.916); "meritocracy" (J.A.803-04, 944); "criminal justice" (J.A.767, 769); "faith-based services" (J.A.773) and other topics in local public venues (J.A.771, 775, 793, 801, 807).

Significantly, several sources *outside* of his Department recognized Dr. Adams' accomplishments: students generated his SPOT scores (J.A.1095); his teaching awards/recognitions, with one exception,[5] were conferred by students, the Dean of Students' Office, and the state legislature (J.A.154)[6]; independent juries of editors reviewed and published his refereed journal articles (J.A.155-58); and an elite student society awarded his crowning service achievement, the Golden Seahawk (J.A.165).

In contrast, his *internal* Department peers' *subjective* evaluations of his work had been sliding. Despite his high student evaluations, his peers marked down his teaching without even watching him teach.

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[5] Dr. Willis nominated Dr. Adams for the Chancellor's teaching award in 1996. (J.A.78.)

[6] Teaching stipend (state legislature) (J.A.78); Outstanding Professor Award (the Greek community) (J.A.75, 82); and Faculty Member of the Year Award (Greek Affairs Review Committee and Office of the Dean of Students) (J.A.154).

(J.A.1094-95, 1425-27.) Despite his publishing scholarly articles at a rate exceeding all but two members of the Department, they down-graded his research. Despite his extensive work with students and in spite of the fact that his columns and speeches provided the public with the benefit of his considerable sociological expertise, members of the Department slighted his accomplishments while openly applauding the "activism" of more liberal members of the faculty. (J.A.767, 769, 771, 773, 775, 783, 785-86, 789, 793, 795, 797, 801, 803-04, 807, 811.)

This decline in internal evaluations coincided with Dr. Adams' increased public criticisms of UNCW officials. Just months before the promotion decision, Dr. Adams openly criticized UNCW and Chancellor DePaolo[7] for wasting tax dollars on rappers (J.A.985-86), exaggerating minority enrollment numbers (J.A.987-88), tolerating public obscenity and child pornography (J.A.989-90), entertaining the request of a transgendered professor to silence his views (J.A.991-92), lying about racial preference policies (J.A.993-94), engaging in religious discrimination (J.A.995-97), and silencing Christian opposition to homosexual activism (J.A.1000-01).

[7] Prior to his promotion denial, Dr. Adams criticized only *one member of the Department by name*: Dr. Snowden, who had falsely accused him of a felony. (J.A.449-56, 1477-78, 846, 1114-16.)

This criticism stirred up considerable hostility against Dr. Adams—hostility expressed in writing. Before meeting with the senior faculty about Dr. Adams' promotion application, Dr. Cook solicited remarks from his colleagues. (J.A.1408, 513.) Although Dr. Adams received positive reviews from several faculty members, others applied incorrect standards to minimize his research (J.A.723-25, 1232, 1235-41), misrepresented his accomplishments (*compare* J.A.723-25, 1227-32, 1235-41 *with* J.A.847, 972-75), and considered prohibited criteria (J.A.1235-40). Moreover, some members unleashed a storm of disparaging comments about Dr. Adams' public writings:

- Dr. Rice: "[Dr. Adams'] op-ed pieces ... can hardly be considered scholarly.... [H]e has resorted to what strikes me as an excessively puerile self-indulgence, in his columns in particular, in publicly denigrating not only his colleagues ... but also the discipline, department, and university that provide him his livelihood.... [H]e has also placed scholarship and research on a back burner and has instead turned to the cranking out of weekly pithy, self-validating, and largely ad hominem essay attacks published in decidedly anti-intellectual venues." (J.A.724-25.)

- Dr. Irwin: "... Welcome to the Ivory Tower of Babel [Dr. Adams' book] ... does not bring any scholarly data forward to the public and generally detracted from the scholarship at the department." (J.A.1235.)

- Dr. Irwin: "He is legalistic in his outlook...." (J.A.1236.)

- Dr. Levy: "He is asking to be promoted in Sociology [sic], not

public service or political commentary. His work should reflect that." (J.A.1232.)

- Dr. Michael Maume: "I wish that he would consider revising the tone of his statements regarding mainstream academic research." (J.A.1233.)

- Unknown: "Everything he has produced are opinion pieces, slander and vicious gossip like his *Ivory Tower of Babel*...." (J.A.1228.)

- Unknown: "His book, *Welcome to the Ivory Tower of Babel*, is ... heavily ideological.... I find many of the pieces to be offensive because they insult the department and university with partial truths, misrepresentations, and exaggerations." (J.A.1228.)

Next, Dr. Cook selected certain remarks and retyped them into a single document to direct the upcoming discussion with the senior faculty. (J.A.1227-31, 1408-09, 1491-92.) In doing so, she distorted the record by including predominantly negative comments, omitting positive comments, providing incorrect promotion standards, deflating Dr. Adams' publication numbers, and repeating statements she knew to be false. (J.A.1437-39; *see also* J.A.1002-24 (highlighting comments Dr. Cook selected)).

Dr. Snowden—the professor who had lodged multiple false complaints against Dr. Adams, including the incredible and false complaint that he had tear-gassed her office—could not attend the September 14 senior faculty meeting where Dr. Adams' promotion applications was to be discussed. (J.A.1184-85.) Despite the obvious conflict of interest in

her participation, the senior faculty unanimously voted to allow her to vote by proxy (J.A.1409-12, 1472-73, 1242), and Dr. Cook (who was fully aware of Dr. Snowden's false claims against Dr. Adams) personally cast this proxy against Dr. Adams. (J.A.1186, 1473.)

At the outset, the senior faculty were split "3 in favor, 2 opposed, and 4 ambivalent/unsure" (J.A.1227; 513-14), but by the meeting's end, the opposition to Dr. Adams turned into a 7-2 vote against promotion (J.A.515). In response to this vote, Dr. Cook rejected Dr. Adams' promotion application and announced this rejection in a *pro forma* memorandum the next morning. (J.A.45, 515, 1267.)

Soon after, she briefly wrote to Dr. Adams indicating that her decision reflected "an overwhelming consensus" from the senior faculty. (J.A.46, 181.) Dr. Adams pressed for further details. (J.A.45-46, 182-83, 1480.) On September 29, Dr. Cook responded with another memorandum stating that he was deficient in *all three areas*: teaching, research, and service. (J.A.46-47, 184-85, 1055-56.) This statement, however, flatly contradicted her internal communications with Dean Cordle. In a September 18 memorandum to Cordle—as well as the Provost and UNCW General Counsel—Dr. Cook explained that Dr. Adams' *teaching* and *ser-*

vice were adequate for promotion, but that his *research* was "inadequate." (J.A.1243-44.) She also restated to Dean Cordle the artificially deflated publication figures (discounting his publications by one) and relayed the faculty's concern over "the negative affects [sic] of [Adams'] service record…." (J.A.1243; *see also* J.A.1475-78, 1051-54.)

Regardless of the justification given—whether Dr. Cook believed Dr. Adams was deficient in all areas (as she told Dr. Adams) or merely deficient in one (as she told Dean Cordle)—the result was the same: For the first time in Department history, an associate professor was denied promotion to full professor at the Department level with a teaching, research, and service record like Dr. Adams'. And he was denied through a process where his ideological views were expressly mentioned as relevant, his personal writings on matters of public concern held against him, and colleagues with obvious conflicts of interest permitted to vote against him—by proxy.

SUMMARY OF ARGUMENT

Dr. Michael S. Adams spoke as a private citizen on matters of public concern and was denied a promotion as a result. When the court below held that Dr. Adams' speech in his columns, books, and public speeches was part of his "official duties," it committed reversible error. When it applied *Garcetti v. Ceballos* to Dr. Adams' columns, books, and speeches, it committed further reversible error.

Regarding Dr. Adams' Title VII and equal protection claims, the lower court found that Dr. Adams presented no evidence of religious discrimination. But in so finding, the lower court misapplied the applicable standard of review for summary judgment by failing to draw factual inferences in Dr. Adams' favor and mistakenly concluding that he was required to prove he was the only member of his protected class to receive unfavorable treatment.

This Court's de novo review (*see Love-Lane v. Martin*, 355 F.3d 766, 775 (4th Cir. 2004)) should result in a remand for a trial on the merits of Dr. Adams' First Amendment, Title VII, and equal protection claims.

ARGUMENT

I. UNCW OFFICIALS VIOLATED THE FIRST AMENDMENT BY RETALIATING AGAINST DR. ADAMS BECAUSE OF HIS CHRISTIAN AND CONSERVATIVE EXPRESSION.

"A public employer contravenes a public employee's First Amendment rights when it ... makes decisions relating to promotion ... based on the exercise of that employee's free speech rights." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 316 (4th Cir. 2006) (citations and quotations omitted). A public employee can establish such a violation by showing that: (1) he spoke as a private citizen on a matter of public concern; (2) his interest in the expression outweighed the employer's "interest in providing effective and efficient services to the public"; and (3) there was a sufficient causal nexus between the protected speech and the retaliatory employment action. *Id*. The first two prongs are questions of law, while the third is a question of fact. *See Love-Lane,* 355 F.3d at 776.

The District Court made a critical legal error by holding that Dr. Adams was not speaking as a private citizen when he published his columns and delivered his speeches. This threshold legal error permeated the entire decision and doomed Dr. Adams' claim before it could breathe. In doing so, the lower court left Dr. Adams—and potentially

all other professors who publish and speak in the public sphere—without remedy for UNCW's constitutional violations and subject to the ideological litmus tests of administrators and their peers.

A. DR. ADAMS' COLUMNS & PUBLICATIONS ARE PROTECTED BY THE FIRST AMENDMENT, AND THE DISTRICT COURT ERRED BY APPLYING *GARCETTI* TO HOLD OTHERWISE.

In *Garcetti*, the Supreme Court held, "[W]hen 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." *Garcetti*, 547 U.S. at 410. The District Court applied *Garcetti* to defeat Dr. Adams' retaliation claim at the outset by deeming his private columns, his public speeches, and his book, *Welcome to the Ivory Tower of Babel* (*Ivory Tower*)[8], speech pursuant to his "official duties." (J.A.1385-86.) In doing so, the court committed grave legal and factual errors.

1. DR. ADAMS' COLUMNS AND PUBLICATIONS CONSTITUTED HIS OWN PRIVATE SPEECH, FULLY PROTECTED BY THE FIRST AMENDMENT.

The *Garcetti* Court provided guidance as to when public employees

[8] MIKE S. ADAMS, WELCOME TO THE IVORY TOWER OF BABEL: CONFESSIONS OF A CONSERVATIVE COLLEGE PROFESSOR (2004).

make statements "pursuant to their official duties."[9] Speech *is* part of one's official duties when it:

- "owes its existence to a public employee's professional responsibilities";
- is "commissioned or created" by the employer;
- "[is] part of what [the employee] was employed to do";
- is a task the employee "was paid to perform"; and
- "ha[s] no relevant analogue to speech by citizens."

Garcetti, 547 U.S. at 421-24. None of those factors are in play here. Dr. Adams' Townhall.com columns did not "owe[] their existence" to UNCW nor were they "commissioned" by UNCW. In fact, *Townhall* pays him for his columns. (J.A.424.) UNCW does not. Moreover, UNCW officials publicly and repeatedly *disclaimed* any such connection:

- William A. Fleming, Assistant to the Chancellor and Director of Human Resources, to a member of the public: "Dr. Adams writes his columns for townhall.com outside the course and scope of his employment at UNCW." (J.A.1259.)
- Mr. Fleming to a member of the public: "[A]ll employees may identify themselves as working at UNCW, along with their job titles, on a given site and still express personal opinions on the same site ... as long as it is clear that they are speaking personally and not on behalf of the University." (J.A.1304-05.)

[9] The Court provided some guidance but not a "comprehensive framework" for this analysis because the petitioner conceded that his speech was pursuant to his employment duties. *Garcetti*, 547 U.S. at 424.

- Mr. Fleming: "I explained to Mr. Frazer that Dr. Adams was writing as a private citizen and the University was his employer but not an editor or supporter of his personal writings." (J.A.826.)

- Chancellor DePaolo: "[T]here were times when we would come out with a statement, for instance, that said the university supports Dr. Adams' First Amendment rights to—to express his views." (J.A.1074.)

- Dean Cordle to a member of the public: "Dr. Adams is entitled to his views, and he has the right to express them. It is fairly well established that when a university faculty member speaks (or writes) publicly, he or she is not presumed to be speaking for the university even if his/her affiliation with the university is acknowledged." (J.A.833.)

And these disclaimers—issued by no less than the Chancellor, the Director of Human Resources, and the Dean—are dispositive under University policy prohibiting faculty members from "represent[ing] themselves, without authorization, as spokespersons for [UNCW]." (J.A.59.) UNCW cannot have it both ways—disclaiming Dr. Adams' speech to the public, but then claiming his speech as its own to insulate itself from litigation.

The court below ruled, however, that merely noting that he was a columnist for Townhall.com in his promotion application and referencing his outside speeches transformed them into "official communications." According to the court below, Dr. Adams placed his supervisors in a constitutional catch-22: Ignore his columns and be sued, or eva-

luate his comments and be sued if the promotion is denied. (J.A.1386.)

Yet this dilemma is illusory. First, Dr. Adams did not submit his books, columns, or speeches for *content* evaluation. Instead, he merely noted in the "optional subcategor[y]" of the service section of the application that he wrote an online column at Townhall.com (J.A.163-64), listed his speaking engagements (J.A.166-74), and *mentioned Ivory Tower*[10] in the non-refereed "research" section (J.A.156.) He, like UNCW, did not consider them part of his job duties. They were activity *in addition* to his work at the University, not *pursuant* to his job as a teacher and scholar.

Critically, the evaluation process at the University mandated that UNCW Officials consider the work of Dr. Adams' entire "career," not just his career *at the University*. (J.A.635.) Thus, much like an applicant for a new job, Dr. Adams submitted information about the full breadth of his activities to demonstrate that he was a teacher, scholar, and public servant of the stature meriting the title "Professor."

In fact, UNCW Officials cannot contest that applications for full professor consider work inside and outside the University itself. Dr. Cook was hired as full professor and department chair based entirely on

[10] Indeed, Dr. Adams did not submit the actual book along with his application. (J.A.1441 ("[T]he book *Welcome to the Ivory Tower of Babel* … was not included in the documents that were submitted by Dr. Adams.").)

her work *outside* UNCW. (J.A.852-67.) (Work, incidentally, that included authoring far fewer peer-reviewed publications than Dr. Adams. (J.A.972.)) When Dr. Adams applied for the "job" of "professor" at UNCW, he gave the University the complete picture of all his accomplishments, public and private.

This act no more converted his opinion columns into "official" speech than would placing them in an initial employment application. UNCW pays Dr. Adams to teach (which his students believe he does better than most members of his Department), to research (and he has published more peer-reviewed works than seven of nine members of his Department), and to serve the University community (thereby earning the Golden Seahawk). Townhall.com pays him to write columns, his publisher pays him to write books, and various other entities pay him to give public speeches. All of these elements together constitute his "career."

2. EVEN IF DR. ADAMS' SPEECH WERE PART OF HIS "OFFICIAL DUTIES," THE DISTRICT COURT'S MISTAKEN READING OF *GARCETTI* STANDS AGAINST A LONG LINE OF SUPREME COURT PRECEDENT AFFIRMING THE CONSTITUTIONAL RIGHTS OF PROFESSORS.

The District Court's ruling, taken to its logical conclusion would signal the end of free speech for university professors. *Garcetti* clearly

leaves *no* constitutional protection for persons speaking pursuant to their official duties. *Garcetti*, 547 U.S. at 418 ("If [the employee did not speak as a citizen on a matter of public concern], the employee has no First Amendment cause of action based on his … employer's reaction to the speech.") But university professors are unique in that they "necessarily speak and write 'pursuant to ... official duties.'" *Id.* at 438 (Souter, J., dissenting). Indeed, the Supreme Court has repeatedly recognized the special role public school teachers—especially professors—play in our democratic system and the necessity of keeping them free:

> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.... They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.

Wieman v. Updegraff, 344 U.S. 183, 196-97 (1952) (Frankfurter, J. concurring). But under the lower court's ruling, any professor who fol-

lows this mission statement—and acts as a "priest of our democracy"—risks adverse job action. For without First Amendment protection, public universities would have unbridled discretion to penalize professors based on their viewpoint.

At the same time, however, if he fails to place his or her ideas within the stream of public and scholarly discourse, he may also be denied tenure or promotion for lack of scholarly contributions. Thus, the lower court requires professors to navigate between the Scylla of retaliation and the Charybdis of unemployment or underemployment. "Publish or perish" could become "publish *and* perish." If this became the law, a critical fount of knowledge and inquiry would be snuffed out at its source at the risk of losing our very way of life:

> Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy, 354 U.S. at 250.

Such a dilemma not only imperils our civilization, but it collides with the constitutional rights of professors. In 1967, the Supreme Court voided for vagueness a statute barring employment of any person who "'advocates, advises or teaches the doctrine' of forceful overthrow of gov-

ernment" because it could prohibit the employment of persons who "merely advocate the doctrine in the abstract," such as "a teacher who informs his class about the precepts of Marxism or the Declaration of Independence" or who "writ[es] articles" on the subject. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 599-600 (1967). The Court's concerns were amplified because the university conducted an "*annual review* of every teacher to determine whether any utterance or act of his, *inside the classroom or out*, came within the sanctions of the law." *Id.* at 602 (emphasis added). Such vagueness would "stifle 'that free play of the spirit which all teachers ought especially to cultivate and practice.'" *Id*. at 601.

> When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone...." For "(t)he threat of sanctions may deter ... almost as potently as the actual application of sanctions." The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

Id. at 604. The Court thus recognized that university professors, like Dr. Adams, have First Amendment rights over their *teaching and scholarship* (which are indisputably part of their "official duties") and that universities may not enforce policies that infringe upon these "precious

freedoms"—even while evaluating job performance. *Id.* at 603.

It is likely for this very reason that the Supreme Court expressly reserved the question of *Garcetti's* application to professors, stating:

> Justice SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech to a case involving speech related to scholarship or teaching.

Garcetti, 547 U.S. at 425. In fact, this circuit has followed the Supreme Court's lead and refused to apply *Garcetti* to speech by teachers pursuant to their official duties.[11] *See Lee v. York County Sch. Div.*, 484 F.3d 687, 695 n. 11 (4th Cir. 2007) ("The [*Garcetti*] Court explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching. Thus, we continue to apply the *Pickering*/*Connick* standard...."). And other courts have followed suit. *See Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, No. 3:03-cv-091, 2008 WL 2987174, *8 (S.D. Ohio July 30, 2008); *Johnson v. Poway Unified Sch. Dist.*, No. 07-cv-783, 2010 WL

[11] Even the District Court—in an earlier ruling—recognized that UNCW Officials sought to "extend" *Garcetti*. (J.A.243-44.)

768856, *7 (S.D. Cal. Feb. 25, 2010); *Sheldon v. Dhillon*, No. C-08-03438, 2009 WL 4282086, *3 (N.D. Cal. Nov. 25, 2009).

There is no real indication that the *Garcetti* Court intended to upset decades of precedent protecting professors' free speech and academic freedom. Thus, regardless of whether Dr. Adams' columns, books, and speeches were considered private or official expression, this Court should apply the *Pickering-Connick* standard.

B. DR. ADAMS SATISFIES THE *PICKERING-CONNICK* TEST FOR FIRST AMENDMENT RETALIATION.

1. DR. ADAMS SPOKE AS A CITIZEN ON MATTERS OF PUBLIC CONCERN.

Courts must look to the "content, form, and context of a given statement" to determine whether a public employee has spoken as a citizen on a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). A matter of public concern is one that touches upon "an issue of social, political, or other interest to a community." *Ridpath*, 447 F.3d at 316 (citations omitted); *accord Rankin v. McPherson*, 483 U.S. 378, 387 (1987). Speech will generally be considered a matter of public concern unless it falls within that "narrow spectrum" of speech that is purely of "personal concern," such as a "private personnel grievance." *Piver v.*

Pender County Bd. of Educ., 835 F.2d 1076, 1079 (4th Cir. 1987). Not surprisingly, the federal courts have found that such matters include topics ranging from academic freedom,[12] race discrimination,[13] and violations of civil rights,[14] to sex,[15] abortion,[16] homosexuality, and religion.[17]

The quintessential example of protected speech is the teacher who criticizes her public school's policies and reveals official misconduct. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 569-70 (1968). For example, a public school could not dismiss a teacher for sending a letter to the newspaper criticizing the school's misinformation about and mismanagement of public funds. *Id.* Similarly, this Court, in *Love-Lane,* invalidated a public school's decision to demote an administrator who openly criticized the school's racially discriminatory discipline policies. *Love-Lane*, 355 F.3d at 777, 782. And both the Su-

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[12] *Keyishian,* 385 U.S. at 603 ("[A]cademic freedom … is of transcendent value to all of us and not merely to the teachers concerned.").
[13] *Love-Lane*, 355 F.3d at 782 ("[P]rotesting race discrimination in a public school, [is] speaking out on a matter of public concern.").
[14] *Campbell v. Galloway*, 483 F.3d 258, 270 (4th Cir. 2007) (holding First Amendment protections not limited to conduct that violates Title VII).
[15] *Roth v. United States,* 354 U.S. 476, 487 (1957) (stating that "sex … is one of the vital problems of … public concern.").
[16] *Hennessy v. City of Melrose*, 194 F.3d 237, 246 (1st Cir. 1999) (holding that the appellants anti-abortion sentiments "clearly related to a subject of … public concern.").
[17] *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 257 (6th Cir. 2006) (ruling plaintiffs "speech on his religious views and on homosexuality are matters of public concern ....").

preme Court and this Court have uniformly upheld the rights of public school teachers to condemn the policies and misconduct of academic institutions. *See Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 412-13 (1979) (racial discrimination); *Perry v. Sinderman*, 408 U.S. 593, 594-95, 598 (1972) (college administration and policies); *Daulton v. Affeldt*, 678 F.2d 487, 491 (4th Cir. 1982) (same); *Saleh v. Upadhyay*, Nos. 99-2137, 99-2188, 00-1744, 2001 WL 585085, at **9 (4th Cir. May 31, 2001) (J.A.1336-37) (racial discrimination at state university); *Ridpath*, 447 F.3d at 317 (NCAA violations at state university).

Professor Adams unquestionably spoke on matters of public concern, as his columns and book addressed topics including academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality. (J.A.850-51.) And he directly criticized UNCW and academia in general for its financial mismanagement, religious discrimination, unconstitutional policies, and overall assault on academic freedom and traditional moral values.

The Townhall.com columns Dr. Adams wrote in the months preceding the promotion denial leave no doubt that he spoke on matters of public concern. In *The Coronation of the New Queen*, Dr. Adams criti-

cized the expensive installation ceremony for Chancellor DePaolo:

> Given the billion-dollar state budget deficit, many are questioning the wisdom of funding such a ceremony, which will cost around $100,000, after all is said and done. Instead of all the pomp and circumstance, many believe that our budget crisis calls for an administration that is less pompous and more circumspect in its use of public funds.

(J.A.978.) *Criminal Background Check for Dummies* criticizes UNCW's willingness to fund politics rather than student safety:

> In light of the fact that UNCW just paid $40,000 for Senator George Mitchell to speak for one hour, it is simply obscene to say that we can't afford to pay someone to do these background checks. Do we care more about politics than the lives of our students? If we can afford to pay a faculty member to pass out condoms on campus so that our women are having "safe sex," why not make sure that their partners weren't charged with rape and convicted of "crimes against nature." This is not very complicated. It is simply a matter of priorities.

(J.A.981.) The column, *Naked Men, Female Impersonators, and Alumni Donations*, satirizes UNCW's funding of an explicitly homosexual magazine through the eyes of theoretical alumni:

> We didn't see the previous issue of *Queer Notes*, which contained a picture of two naked men engaged in sodomy. But we saw enough to know that this is a serious university spending public funds on a diversity mission that benefits us all. That is why we intend to give UNC-Wonderland all of the financial support it deserves.
>
> Enclosed is a check to the university for $0.02. After reading the garbage you buy with my tax dollars, I just need to put in my two cents worth.

(J.A.984.) *Rosemary's Baby*—posted on March 24, 2006—chastizes Chancellor DePaolo's decision to host rappers Ludacris and Kanye West on campus due to their explicit, racist, and sexist lyrics.

> The last prominent black entertainer hired by UNCW was Ludacris who bragged about running over "b**ches and hos" in his "b**ch-and-ho-mobile." For the bargain price of $120,000 he also sang his classic ballad "move b**ch."

(J.A.985.) In this column, Dr. Adams expressed personal outrage at the selection of Kanye West because he mocked Christianity by appearing on a magazine cover as Jesus—complete with facial scars, a tunic, and a crown of thorns under the caption, "The Passion of Kanye West": "Taken at its worst, this is an absolute insult to Christians. That someone like West would portray his personal struggles with the torture endured by our Savior is as offensive as any Danish cartoon." (J.A.985.)

By May 2006, Dr. Adams' columns had gotten UNCW's complete attention. One column prompted two professors—one a transgendered professor named Leandra Vicci—to email the entire UNCW administration and Department encouraging them to denounce officially Dr. Adams' views on homosexual/transgendered issues. (J.A.1256-58.) Dr. Adams responded in the May 4 column, *The Old Rugged Crossdresser*:

> I am ... offended that anti-religious bigots are not honest about

> their agenda. They seek to immediately stigmatize anyone holding orthodox religious beliefs—those that do not affirm even the most depraved of "alternate lifestyles." And, ultimately, with total disregard for the Establishment Clause of the First Amendment, they seek official condemnation—preferably on university letterhead—of all religious views not in accordance with the philosophy of moral relativism.
>
> This latest attempt to get me in trouble with my so-called superiors shows what the leaders of the gay rights movement in America really want….
>
> They want our unconditional approval. And if we refuse to give it, they want our jobs.

(J.A.992.)

Two weeks later, an anarchist organization named the "Gender Mutiny Collective" emailed the entire UNCW administration and Department demanding a public statement condemning Dr. Adams' views as expressed in *The Old Rugged Crossdresser*, *O Awareness and Gender Identity*, *Perversity and Diversity at My Little University*, and *With Liberty and Comfort in Stalls*. (J.A.1262-63.) In response, Chancellor DePaolo ordered Dean Cordle and Dr. Cook to investigate Dr. Adams to ensure that no "transphobic" views were expressed in his classroom. (J.A.1262.)

While UNCW was secretly investigating Dr. Adams, he continued to call for honesty, transparency, and accountability at the University. On June 23, he accused UNCW and Chancellor DePaolo of misleading the

public regarding the University's racial preference policies. (J.A.993-94.) Three days later, he accused UNCW and Chancellor DePaolo of religious discrimination when they refused to allow a preacher on campus and warned a Christian student group to "curb their evangelical activities in accordance with the university's 'harassment' code." (J.A.995-97.) On July 17, Dr. Adams critiqued UNCW's "Great Expectations" program as "racist" for "reinforc[ing] notions of black intellectual inferiority." (J.A.998.) And on August 1, 2006, shortly after submitting his promotion application, he argued that universities like UNCW are engaged in a concerted effort to silence Christians from expressing loving opposition to homosexuality. (J.A.1000-01.) "It is also about our deeply held religious conviction that expressing opposition to homosexuality is love speech, not 'hate speech.'" (J.A.1000.)

Plainly, these columns touched on "issue[s] of social, political, or other interest to a community." *Ridpath*, 447 F.3d at 316 (citations omitted). And the consistent email response generated by Dr. Adams' columns (J.A.814-35, 1073-81) confirms the public's interest in his topics. *See Mills v. Steger,* No. 02-1153, 2003 WL 21089092, *6 (4th Cir. May 14, 2003) (J.A.1318) (An issue that engenders "several newspaper

articles and many phone calls and letters ... can hardly be considered a private matter of interest"); *accord City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004) ("[P]ublic concern is something that is a subject of legitimate news interest….")

The content, form, and context of Dr. Adams' speech confirm that he spoke as a citizen on matters of public concern.

2. DR. ADAMS' INTEREST IN FREE SPEECH OUTWEIGHS UNCW'S INTERESTS.

The *Pickering-Connick* test's second prong balances Dr. Adams' interest in his speech and the public's interest in receiving it[18] against the "University's interest in the efficient provision of public services." *Ridpath*, 447 F.3d at 317. "The government employer must make a stronger showing of the potential for inefficiency or disruption when the employee's speech involves a 'more substantial[]' matter of public concern." *Love-Lane*, 355 F.3d at 778. And this is even more difficult for universities as "the University community as a whole, is less likely to suffer a disruption in its provision of services as a result of a public conflict" than other public agencies. *Mills*, 2003 WL 21089092, at *6.

There has been no disruption whatsoever in the distribution of educa-

[18] *Garcetti*, 547 U.S. at 419.

tional services due to Dr. Adams' writings. And any disruption UNCW Officials concoct would have to be significant indeed given that Dr. Adams' columns focus extensively on matters of *substantial* public concern, including unconstitutional policies,[19] racial and religious discrimination,[20] and misconduct by public employees.[21] In fact, it is the very lack of the "efficient provision of public services" that Dr. Adams decries. There is simply no disruption noted in the record of this case, and whatever theoretical disruption might have occurred is overshadowed by the public interest in his topics and his right to express his opinions on them.

3. UNCW OFFICIALS DENIED DR. ADAMS' PROMOTION APPLICATION BECAUSE OF HIS PROTECTED EXPRESSION.

A plaintiff demonstrates a "causal relationship" by showing that his speech was a "substantial factor" in the decision to take the challenged retaliatory action. *See Love-Lane*, 355 F.3d at 776. This question of fact can only be decided on summary judgment "in those instances where there are no causal facts in dispute." *Id.* Thus, summary judgment can be defeated even where the causal evidence is "thin and cir-

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[19] Dr. Adams' allegations of *constitutional* violations are as great—if not greater—than the NCAA violations alleged in *Ridpath*. *Ridpath*, 447 F.3d at 317.

[20] *Love-Lane*, 355 F.3d at 779 (race discrimination is a "substantial issue of public concern").

[21] *Garcetti*, 547 U.S. 410, 425 ("Exposing governmental inefficiency and misconduct is a matter of considerable significance*").*

cumstantial." *Pike v. Osborne*, 301 F.3d 182, 185 (4th Cir. 2002). Dr. Adams' substantial evidence of causation easily meets this requirement.

The Fourth, Sixth, and Third Circuits have each addressed First Amendment retaliation, equal protection, and Title VII causation, respectively, in the education context. As the proof schemes for these claims are so similar,[22] these cases command the conclusion that Dr. Adams presented enough evidence to overcome summary judgment on causation.

In 2004, the Fourth Circuit reviewed plaintiff Decoma Love-Lane's First Amendment claim that her public school demoted her because she repeatedly spoke out against race discrimination. *See Love-Lane*, 355 F.3d at 768, 780. The district court granted summary judgment for the superintendent in his individual capacity, but the Fourth Circuit vacated the decision, finding genuine issues of material fact as to whether she was demoted in retaliation for her speech. *Id.* at 768. This Court noted several important facts: After her expression, (i) Love-Lane's evaluations declined sharply; (ii) her direct supervisor criticized her speech right before giving her a negative evaluation; and (iii) her su-

[22] *See Williams v. Cerberonics*, 871 F.2d 452, 455, 457 (4th Cir. 1989) (showing that First Amendment retaliation and Title VII claims follow same proof scheme); *Love-Lane*, 355 F.3d at 786 ("[Plaintiff] asserts her discrimination claims under three federal statutes, Title VII, 42 U.S.C. §1981, and 42 U.S.C. §1983 ... and the elements required to establish such a case are the same under all three statutes.").

perintendent—who had "attempted to discourage" her speech—endorsed the negative evaluation in ordering the demotion. *See id.* at 780-81. Each of these facts is present in this case.

Like Love-Lane, Dr. Adams initially received excellent evaluations from two different Department chairs from 1994-2003. (J.A.66-71, 73-74, 80-81, 83-84, 124-29.) But not long after simultaneously revealing his Christian faith and criticizing UNCW for religious intolerance in a July 2002 article (J.A.121-22), his annual evaluations began to decline even as the other empirical elements of his job performance (*e.g.*, number of peer-reviewed publications, student evaluations) remained substantially unchanged and higher than all but two of his peers. (J.A.972-75.) Although the decline did not set in immediately, the contrast from before he began speaking publicly and afterwards is quite stark. Beforehand, his chairs consistently praised him:

- Dr. McNamee: "Dr. Adams is an [sic] superb teacher, dedicated advisor, active scholar, and responsible department citizen." (J.A.69; *accord* J.A.71, 74.)
- Dr. Cecil L. Willis: "Dr. Adams is an enthusiastic, passionate, and talented instructor, an active scholar, and an involved departmental and university citizen. All indications are that he is one of the most skilled instructors in our department and in the university." (J.A.127; *accord* J.A.81, 84, 125, 129.)

After he began writing his columns, Dr. Adams' next two chairs—who each personally read his columns—summarized his accomplishments more dimly:

- Dr. Levy: "[In 2004, Dr. Adams'] service to the department is noted mostly by his absence.... His service efforts are clearly visible as a frequent contributor to the community and wider nation on political matters in his role as columnist for the Heritage Foundation.... Dr. Adams appears to have slowed his productivity as his efforts are directed elsewhere.[23] His service efforts take place almost exclusively outside the department and university, especially as a national political columnist and speaker." (J.A.142-43.)
- Dr. Cook: "Dr. Adams [sic] performance as a teacher is 'good' within the framework of established criteria.... Dr. Adams [sic] research productivity during 2005 [w]as 'good'.... Dr. Adams [sic] service contributions [were] 'good'.... Dr. Adams [sic] work performance is satisfactory in all areas of review." (J.A.147-48.)

Noticeably gone are the accolades praising Dr. Adams' teaching skills, research productivity (which exceeded their own (J.A.972)), and service.

This contrast was magnified in the declining peer evaluation scores of his teaching. While Dr. Adams' student evaluation scores (SPOT scores) remained consistently "excellent" and above the Department averages (J.A.977) (sometimes the highest in the Department (J.A.66, 68, 73)), his peer evaluations—*which did not include any actual classroom observations* (J.A.1094-95)—declined sharply after his 2002 article.

[23] Dr. Adams was actually publishing peer-reviewed articles at the same pace as before. (J.A.155-57.)

From 2003 to 2008, his average peer scores plummeted from 7.3 to 5.3—a 27.4% drop and below the Department average. (J.A.976.) Dr. Cook noticed this trend in her draft promotion denial: "[T]he discrepancies between the SPOTS [sic] scores and the peer evaluations generated some concern." (J.A.1243.) She was right to be concerned—the discrepancy demonstrates the yawning gap between the views of unbiased observers of Dr. Adams' actual classroom activities (the students) and his ideological opponents whose outside-of-class syllabi and class materials "evaluations" were colored by their dislike of his columns. (J.A.1094-95, 1425-27.) Thus, while all *external* indicators of Dr. Adams' teaching, research, and service remained high, the *internal* Department evaluations continued to decline as he spoke out. Not even Love-Lane faced an evaluation decline this stark.

Also like Love-Lane, Dr. Adams faced a supervisor—Dr. Levy—who "attempted to discourage" him from speaking. *Love-Lane*, 355 F.3d at 781. Following her negative annual evaluation of Dr. Adams, she told him to change his "caustic" and "meanspirited" tone to be more "cerebral" like William F. Buckley. (J.A.43, 330-32, 345-46, 1125-29.) She later voted against his promotion application. (J.A.1142-43.)

Moreover, Love-Lane's supervisor adopted a subordinate's negative evaluation after verbally chastising her for repeatedly vocalizing her opinions. *See Love-Lane*, 355 F.3d at 780-81. Similarly, Dr. Cook ratified the Department's promotion denial "consensus" after the Department openly ridiculed his columns that increasingly criticized UNCW. (J.A.1243-44.)

Dr. Adams' columns targeted UNCW in the months just prior to his promotion denial, as he openly criticized UNCW and Chancellor DePaolo for wasting tax dollars on rappers (Mar. 24, 2006), exaggerating minority enrollment numbers (Mar. 27, 2006), illegally tolerating obscenity and child pornography (Apr. 5, 2006), entertaining the request of a transgendered professor to silence his views (May 4, 2006), lying about racial preference policies (June 23, 2006), engaging in religious discrimination (June 26, 2006), instituting racist policies (June 17, 2006), and silencing Christian opposition to homosexual activism (Aug. 1, 2006). (J.A.985-1001.) And Dean Cordle, Dr. Cook, Dr. Levy, Chancellor DePaolo, and the senior faculty were keenly *aware* of Dr. Adams' writings *before* he applied for promotion as evidenced by their own admissions and their receipt of the email complaints referencing content from his columns. (J.A.1068-81, 1280-82, 1495-1500, 1256-61,

1130-38, 1293-96.) This awareness plus the close temporal proximity between these columns and the promotion denial (Sept. 15, 2006 (J.A.45)) raises a genuine issue of material fact regarding causation. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 501 (4th Cir. 2005). Combined with the Department's biased comments before, during, and after the process, this evidence is compelling.

Dr. Levy branded a National Rifle Association gathering Dr. Adams attended as a "fascist pig meeting" (J.A.319-21, 1152-53), Dr. King labeled him a "wannabe right wing pundit" (J.A.840), and Dr. Snowden accused him of "sabotage" when he lampooned the National Organization of Women (J.A.1304-09, 1548-49). Such comments intensified *during the promotion process*, as several of the senior faculty unleashed their hatred for Dr. Adams' opinions:

- Dr. Rice: "[Dr. Adams'] op-ed pieces ... can hardly be considered scholarly.... [H]e has also placed scholarship and research on a back burner and has instead turned to the cranking out of weekly pithy, self-validating, and largely ad hominem essay attacks published in decidedly anti-intellectual venues." (J.A.724-25.)

- Dr. Irwin: "... Welcome to the Ivory Tower of Babel ... does not bring any scholarly data forward to the public and generally detracted from the scholarship at the department." (J.A.1235.)

- Dr. Irwin: "He is legalistic in his outlook...." (J.A.1236.)

- Dr. Levy: "He is asking to be promoted in Sociology [sic], not public service or political commentary. His work should reflect that." (J.A.1232.)

- Unknown: "Everything he has produced are opinion pieces, slander and vicious gossip like his *Ivory Tower of Babel*...." (J.A.1228.)

- Unknown: "His book, *Welcome to the Ivory Tower of Babel*, is ... heavily ideological.... I find many of the pieces to be offensive because they insult the university with partial truths, misrepresentations, and exaggerations." (J.A.1228.)

It bears repeating that these comments were made about a professor who had published more peer-reviewed work than *seven of nine* members of the Department, including his current and previous Department chairs, and was consistently recognized by students—through awards and SPOT scores—as one of the best (if not *the* best) professors in the Department. (J.A.972-75, 977, 154.)

Amidst this avalanche of vitriol, Dr. Cook adopted the Department's promotion denial as "[her] own" (J.A.1243) and counted the alleged "negative affects [sic]" of his columns against him—essentially admitting that Dr. Adams' protected speech motivated the denial. (J.A.1243, 1476-77.)

In *Love-Lane*, the Fourth Circuit found very similar facts—a decision-maker ratifying increasingly negative evaluations amidst hostile comments—sufficient to defeat summary judgment because a "jury

could conclude that [plaintiff's] speech was a substantial factor in the decision to [take the adverse action]." *Love-Lane*, 355 F.3d at 781. The same is true here.

But Dr. Adams' evidence of discrimination goes deeper. It shows that Drs. Cook and Levy intentionally manipulated data, violated written policy, and applied double standards to derail his promotion. (*See supra* Statement of Facts Part III and *infra* at 54-60.) The Sixth and Third Circuits have both held that such evidence is probative of bias in the tenure/promotion context.

The Sixth Circuit upheld a jury verdict for a professor-plaintiff claiming that her current and previous department chairs denied her promotion and tenure based on her sex. *Gutzwiller v. Fenik*, 860 F.2d 1317, 1324-25 (6th Cir. 1988). The evidence revealed that the defendants: (i) held plaintiff to "higher standards of scholarship" than others; (ii) "diverg[ed] from the Department's published policy" on the evaluation process; (iii) provided "consistently negative interpretations" compared to those of outside evaluators; and (iv) the Department head attempted to "influenc[e] the opinions and votes" of others to vote against the plaintiff. *Id.* at 1325-27. This evidence was sufficient for a

jury to conclude that, "but for" the discriminatory actions of the two defendants, plaintiff would have been promoted. *Id.* at 1327.

Likewise, the Third Circuit reversed a district court's grant of J.N.O.V. on a jury's verdict for a professor-plaintiff who claimed he was denied tenure based on his race because defendants: (i) judged him based on criteria "not listed in any University document" and that had never been applied to other professors; (ii) refused to weigh the relevant criteria in accordance with University guidelines; (iii) mischaracterized and devalued the outside evaluations of his performance; and (iv) made statements that betrayed a discriminatory attitude which influenced the final decision. *See Roebuck v. Drexel Univ.*, 852 F.2d 715, 717, 729-33 (3d Cir. 1988). This evidence convinced the court that a jury could find the tenure denial was racially motivated. *See id.* at 734-35.

Thus, officials who manipulate data, violate published policy, and apply double standards during the tenure/promotion process can expect to face a jury trial. Because UNCW Officials violated this clear list of "don'ts" *in toto* with Dr. Adams, they too should expect a trial.

First, Dr. Cook influenced the outcome by doctoring the faculty members' pre-meeting comments into a single document used to direct the

promotion discussion. (J.A.1408-09, 1491-92, 1227-31.) She excluded comments favorable to Dr. Adams but included virtually all the negative ones. (*See* J.A.1002-24 (highlighting the faculty comments Dr. Cook selected).) She also included statements she knew were false (J.A.1438 ("Q: [I]s that a true statement that everything he produced are opinion pieces, slander, and vicious gossip? A: No.")) and which violated UNCW's evaluation criteria. (*See supra* at 18; *infra* at 55-60.) Finally, she *twice* included incorrect publication totals—"has only three pubs and one in press since 1998" (J.A.1003)—when he actually had five such publications. (J.A.847, 155-58.) This manipulation almost certainly transformed the close pre-meeting vote—"3 in favor, 2 opposed, and 4 ambivalent/unsure" (J.A.1002)—into a 7-2 vote against him. (J.A.514-15.)

Moreover, the Department applied "criteria" that violated written policy. The Department weighed teaching, research, and service "*equally*" (J.A.1485 (emphasis added)) even though UNCW policy places heavy weight on teaching as the "primary criterion," followed by research, and service as distant third. (J.A.635, 1096-97; *see also* J.A.547 ("Teaching: 60%, Research: 20%, Service: 10%.").) This especially handicapped Dr. Adams because his teaching awards, student advising

caseload, and student evaluations demonstrate that teaching is his greatest strength. (*See supra* at 10-11, 13-14, 18-20.)

And UNCW Officials allegedly concluded research was his "primary weakness." (J.A.1144-48, 1048-50; *accord* J.A.184.) But they *only* considered publications *since Dr. Adams' last promotion in 1998* (J.A.1468, 1242, 184, 1139, 724, 1232, 1235-41), when UNCW policy requires a consideration of the applicant's "cumulative performance" (J.A.649) "during [his] *career*" (J.A.635 (emphasis added)). Nevertheless, he should have been praised rather than discredited because, under either standard, *only two professors exceeded his productivity*. (J.A.972-75.)

Finally, UNCW Officials violated policy by weighing "collegiality" against him (J.A.1051-54, 1243-44, 1235-40), even though this criterion had been specifically rejected by the Faculty Senate. (J.A.841-43.)

UNCW Officials also applied transparently higher standards to Dr. Adams than others applying for full professor. Dr. Adams' eleven peer-reviewed journals since 1998 *exceeded* the stated production of the previous four Department chairs dating back to 1990. (J.A.847-48 (Drs. McNamee and Willis stated that ten peer-reviewed publications sufficed.); J.A.1198, 1265-66, 1414-17 (Dr. Cook says one publication

every two years meets the standard, while one every year exceeds it.);[24] J.A.1139-40 (Levy expects "more than one.").) History bears this out: ***since 1983, no Department member with ten refereed publications has been denied promotion to full professor at the Department level, except for Dr. Adams.*** (J.A.847-48.) Dr. Cook *said* research productivity was the "overriding concern" (J.A.184), but Dr. Adams had published more career refereed journals at application time than *all but two* of his Department colleagues (including the past four Department chairs). (J.A.972.) Notably, Dr. Cook, Dr. Levy, and Chancellor DePaolo had only eight, six, and four refereed publications, respectively, when they were promoted to full professor. Likewise, only two professors exceeded his peer-reviewed publications after tenure.[25] (J.A.974.)

UNCW Officials betrayed further evidence of double standards by penalizing Dr. Adams for co-authoring publications (*see, e.g.*, J.A.724, 1228-29, 1232, 1235, 1237-41), even though *all* of the current full professors had many such co-authored writings at the time of their

[24] The lower court believed she was referring only to "graduate status" or tenure. (J.A.1364 & n.6.) But Dr. Cook clarified in her deposition that this standard applied also to a "case for promotion beyond associate professor to full professor…." (J.A.1416-17.)

[25] This evidence refutes the lower court's assertion that Dr. Adams did not account for publications after tenure. (J.A.1382-83.)

promotions (J.A.973, 975). Indeed, Dr. Levy bragged about such joint accomplishments in her department annual report. (J.A.1289.) Yet, instead of praising Dr. Adams, whose *three* single authored works exceeded the Department of average of 2.1, he was penalized. (J.A.973.)

The District Court downplays this evidence, asserting that he overlooked the "quality" component of research. (J.A.1382-83.) But his publications were "peer-reviewed" (J.A.155-57), which, according to Dr. Cook, constitute the "'gold standard' for academic research." (J.A.509-10.) Thus, his scholarship, viewed in his favor met UNCW's standards for promotion.

Like *Gutzwiller* and *Roebuck*, Dr. Adams' promotion process was scarred by data manipulation, policy violations, and double standards, which is sufficient for a jury to conclude that "but for" the UNCW Officials' discriminatory actions, he would have been promoted. *See Roebuck*, 852 F.2d at 729-35; *Gutzwiller*, 860 F.2d at 1325-27.

But Dr. Adams' evidence of discrimination goes further as his promotion was stained by conflicts of interest and deception. Again, Drs. Cook and Levy and the senior faculty *unanimously*[26] allowed Dr. Snowden—who falsely charged Dr. Adams with a felony, accused him of harass-

[26] (J.A.1242, 1409-12, 1472-73.)

ment, and slandered him (J.A.21, 337-38, 449-56, 1161-67, 1170-76, 1298-1301, 1189-97, 270)—to vote by proxy. (J.A.1186, 1473.) Dr. Cook knew that Dr. Snowden had made these false charges (J.A.44-45, 144-46, 1548-49, 1304-09) and instead of remedying this glaring conflict of interest, she—as the Department Chair—*personally* cast the proxy against Dr. Adams. (J.A.1473.)

Dr. Cook then actively misled Dr. Adams when explaining the decision. (J.A.184-85, 1243-44.) For on September 18, she sent an email to the Provost, University Counsel, and Dean Cordle, explaining that he *met the promotion standards for teaching and service* and that these conclusions "accurately reflect[] the sentiments of the senior faculty and my own." (J.A.1243-44 ("[The teaching] record was adequate, though the discrepancies between the SPOTS scores and the peer evaluations generated some concern.... [The service] record was adequate, though concerns were raised regarding your lack of service to the university or to the scholarly community by way of professional associations with the discipline.") But her subsequent memo to Dr. Adams stated that he was *deficient in all three areas*. (J.A.184-85 ("The overriding concern regarding your record to date is in the area of scholarly research productivity....

While your teaching record is the strongest aspect of your application for promotion thus far, it does not satisfy [the promotion] standard.... Your service record to the university and to the academic disciplines ... is judged to be insufficient for promotion.").) When Dr. LaGrange heard Dr. Cook's explanation, he replied, "Bull s***! That's not the way we voted!" (J.A.389, 47; *see also* J.A.498 ("I did not believe that the sentiment of the group was that he was deficient in teaching, research, and service.").) Dr. Cook's deception is potent evidence for a jury to infer discriminatory bias. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

In sum, Dr. Adams challenges UNCW Officials' justifications for the promotion denial with evidence not only that his body of work met and exceeded the written (and historically-applied) promotion criteria but also with evidence that standards were raised, lies were told, policies were violated, and the process was fixed to derail his application. A reasonable jury could conclude that but for his protected expression, he would have been promoted.

C. THE DISTRICT COURT ERRED BY DEFERRING TO UNCW OFFICIALS' PLAINLY DISCRIMINATORY PROMOTION DECISION.

The lower court, however, refused to consider this evidence of bias, citing in part judicial reluctance to review professorial appointments due to the "subjective and scholarly judgments" involved. (J.A.1377, 1382-83, 1389.) But Dr. Adams introduced a formidable amount of evidence that UNCW Officials in fact considered his protected expression and religious viewpoint rather than forming a "subjective" "scholarly" judgment. Further, it is hardly the case that this Court provides a zone of comfort for unlawful discrimination in academic settings. This Court is vigilant where "the appointment or promotion was denied because of a discriminatory reason." *Jimenez v. Mary Washington Coll.*, 57 F.3d 369, 377 (4th Cir. 1995) (citations omitted). Indeed, "[f]ederal courts ... have never been hesitant to intervene on constitutional grounds in the hiring, discharge or promotion of public employees, including academic personnel, where the asserted claim is that the action taken was tainted by racial or sex discrimination or was intended to penalize for the exercise of First Amendment rights." *Clark v. Whiting*, 607 F.2d 634, 638-39 (4th Cir. 1979). The lower court abdicated its constitutional duties when it refused to follow this, the Third, and the Sixth Circuits when

presented with such strong evidence of discrimination.

II. UNCW OFFICIALS VIOLATED TITLE VII BY DISCRIMINATING AGAINST DR. ADAMS BASED ON HIS RELIGION.

Title VII prohibits employers from "discriminat[ing] against any individual with respect to … employment, because of such individual's ... religion....," 42 U.S.C. §2000e-2 (2007), which includes religious "beliefs"[27] and "viewpoint."[28] Such disparate treatment can be proven by direct or indirect evidence. Dr. Adams proffered both, and the court below erred when it ruled that he had not.

A. DR. ADAMS RAISES A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THERE IS DIRECT EVIDENCE OF RELIGIOUS DISCRIMINATION.

Dr. Adams may "avoid summary judgment" by producing evidence of "conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Rhoads v. F.D.I.C.*, 257 F.3d 373, 391-92 (4th Cir. 2001) (citations omitted). With one broad stroke, the lower court ruled that no such direct evidence existed. (J.A.1378.) But this was clearly in error.

Again, Dr. Adams openly spoke of his Christian faith (J.A.343, 355)

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[27] *Chalmers v. Tulon Co. of Richmond,* 101 F.3d 1012, 1017 (4th Cir. 1996).

[28] *E.E.O.C. v. News & Observer Publ'g Co.*, 180 F.Supp.2d 763, 770 (E.D.N.C. 2001) (entertaining claim that plaintiff was discriminated against due to the religious views he expressed in letter to the editor of newspaper).

and of UNCW's intolerance of Christianity in his columns and book. In a 2002 article (J.A.121-22), he exposed religious intolerance within his Department, and later, in *Ivory Tower*, he discussed his personal conversion to Christianity along with stories of religious persecution on university campuses.[29] In the months immediately prior to his promotion denial, his columns criticized UNCW for hosting a rapper who mocked Christ (J.A.985-86 (referring to Kanye West)), for barring a preacher from campus, and for threatening to sanction a Christian group for evangelizing (J.A.995-97). Additionally, he chastised two professors for encouraging UNCW to condemn his religious views (J.A.992 (stating that "anti-religious bigots" seek to "stigmatize anyone holding orthodox religious beliefs...")), and just before the denial, he explained that the Christian response to the homosexual agenda must include the message of God's love. (J.A.1000-01.) These and other writings, expressly identify Dr. Adams' faith and his religious beliefs and viewpoints. Thus, an attack on his beliefs and views *is* direct evidence of religious discrimination.

Moreover, the senior faculty directly assail these writings *during the promotion process* (*see supra* Argument I.B.3) and Dr. Cook ratified

[29] *See, e.g.*, ADAMS, *supra* note 8, at Introduction, 14-19, 61-63, 76-79, 111-15, 123-29.

these attacks (*see supra* Argument I.B.3) and added that Dr. Adams' writings produced "negative [e]ffects" that justified denying his promotion. (J.A.1243, 1476-77.) It is self-evident that such statements illustrate a discriminatory attitude that bears directly upon the promotion denial. *Rhoads,* 257 F.3d at 391-92. This direct evidence could convince a jury that UNCW Officials denied Dr. Adams' promotion because of his faith and religiously-based views.

B. DR. ADAMS RAISES A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THERE IS INDIRECT EVIDENCE OF RELIGIOUS DISCRIMINATION BASED ON DISPARATE TREATMENT.

A plaintiff shows indirect evidence of discrimination when he satisfies the familiar *McDonnell-Douglas* burden-shifting test. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *accord Chalmers*, 101 F.3d at 1017-18. First he must prove a prima facie case of discrimination by the preponderance of the evidence. If he succeeds, the burden shifts to the defendant to articulate a "legitimate nondiscriminatory reason" for its decision, and if the defendant does so, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the defendant's proffered reasons were pretextual. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Unless "no rational factfinder could conclude

that the [employer's job] action was discriminatory," "a prima facie case and evidence of pretext" is sufficient for a plaintiff to satisfy this test on summary judgment. *E.E.O.C. v. Sears Roebuck & Co.*, 243 F.3d 846, 854 (4th Cir. 2001) (citations omitted). Dr. Adams meets this standard.

1. DR. ADAMS RAISES A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER HE HAS ESTABLISHED A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION.

In a failure to promote context, plaintiff satisfies his prima facie case if (1) "he is a member of a protected group"; (2) "he applied for the position in question"; (3) "he was qualified for the position"; and (4) "he was rejected for the position ... under circumstances giving rise to an inference of unlawful discrimination."[30] *Alvarado v. Bd. of Trs. of Montgomery Cmty. Coll.*, 928 F.2d 118, 121 (4th Cir. 1991).

Dr. Adams meets the first two elements—as the District Court conceded (J.A.1379)[31]—because he is a "Christian conservative" (J.A.299) who applied for promotion to full professor. (J.A.149-74, 1419.)

The District Court assumed, without deciding, that Dr. Adams was

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[30] This prong is modified to fit the unique nature of academic employment, where there is not just one promotion position for which other faculty are competing. *See McDonnell-Douglas*, 411 U.S. at 802 n.13 (noting flexibility of test to adapt to differing Title VII applications). The Fourth Circuit has expressly approved such modifications. *See Alvarado*, 928 F.2d at 121.

[31] UNCW Officials conceded the same. (Defs.' Mem. in Support of Mot. for Summ. J. [Doc. 132] at 16.)

qualified for the position because he was a tenured professor. (J.A.1379-80.) But Dr. Adams goes further by showing that he fulfilled UNCW's promotion criteria. (J.A.635, 649.) Dr. Cook *admitted* that Dr. Adams had met the *teaching* and *service* criteria in her September 18 email (J.A.1243), and her subsequent attempts to say otherwise simply raise a genuine issue for trial. Furthermore, his student evaluations, high course enrollments, numerous teaching awards, extensive public appearances, and Golden Seahawk Award confirm his excellence in teaching and service. (*See supra* at 10-11, 13-14, 18-20.) And he satisfied the research component as he exceeded the scholarly output of virtually every member of his Department over the past twenty-five years. (*See* Argument I.B.3.)

Per the fourth element, Dr. Adams testifies that he is the *only* Christian conservative in his Department (J.A.845) and the *only* professor in the past twenty-five years to be denied the rank of full professor at the Department level with teaching awards and ten or more refereed publications on his application. (J.A.847-48.) This denial occurred soon after he published several columns defending the Christian faith—columns which Drs. Cook and Levy and the senior faculty directly addressed in the promotion denial. This evidence that Dr. Adams was singled out in

this manner raises an inference of unlawful discrimination.

2. DR. ADAMS RAISES A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER UNCW OFFICIALS' ASSERTED REASONS FOR NOT PROMOTING HIM WERE MERELY PRETEXTUAL.

"[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated." *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 214-15 (4th Cir. 2007) (citations omitted). Dr. Adams' evidence that UNCW Officials marred the promotion process by manipulating data, violating policy, applying unwritten double standards, abusing the process, and misrepresenting facts (*see supra* Argument I.B.3 (discussing *Love-Lane, Roebuck,* and *Gutzwiller*)) is probative of pretext and sufficient to raise a genuine issue of material fact. *See also Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 647 (4th Cir. 2002) (double standards in the promotion process); *Alvarado*, 928 F.2d at 122 (violation of university policies); *Monroe v. Burlington Indus., Inc.*, 784 F.2d 568, 572 (4th Cir. 1986) (lack of standards); *Dennis*, 290 F.3d at 646 (inconsistent explanations).

C. THE DISTRICT COURT'S TITLE VII RULING WAS FACTUALLY AND LEGALLY FLAWED.

The District Court, determined that Dr. Adams failed to establish a

prima facie case because he presented *no evidence* that he is the *only* "Christian conservative." (J.A.1380.) This is incorrect. Dr. Adams in fact testified that he is the only Christian conservative in the Department. (J.A.845.) But even if UNCW promoted other "Christian conservatives," such promotion would simply create a triable factual dispute. *See Lam v. Univ. of Haw.*, 40 F.3d 1551, 1561-62 (9th Cir. 1994) ("Law School's favorable treatment of other Asian women ... creates at most a genuine dispute as to a material factual question."); *accord Fisher v. Vassar Coll.*, 66 F.3d 379, 407 (2d Cir. 1995) ("[P]articipation of women in plaintiff's tenure review does not establish she was shielded from sex discrimination."); *Gutzwiller,* 860 F.2d at 1320-21 (jury verdict in favor of female professor was upheld even though tenure position had been denied in favor of another female professor).

The lower court then reasoned that he could not establish pretext by comparing his records with others. (J.A.1381-83.) But federal courts frequently use such comparative evidence, which is in fact a powerful indicator of pretext. *See Fisher,* 66 F.3d at 393-94 (holding that it was appropriate to compare plaintiff's record with those of other faculty.)

And the Court's footnote, ruling that Dr. Cook, as the ultimate deci-

sion-maker, was not affected by any Departmental bias (J.A.1382 n.11)—a statement that improperly and sweepingly resolves all factual inferences in Dr. Cook's favor—contradicts both her statement that the Department's decision was "[her] own" (J.A.1243) and the law. *Roebuck,* 852 F.2d at 727 (bias at any stage of the academic promotion process is sufficient to sustain liability under Title VII).

III. UNCW OFFICIALS VIOLATED THE EQUAL PROTECTION CLAUSE BY DISCRIMINATING AGAINST DR. ADAMS BASED ON HIS RELIGION AND SPEECH.

"The Equal Protection Clause … commands that ... all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Thus, classifications that target a suspect class—like religion—or affect a fundamental right will stand only if they are narrowly tailored to further a compelling government interest. *Plyler v. Doe*, 457 U.S. 202, 216-18 (1982).

Dr. Adams can also prove an equal protection violation by using the *McDonnell-Douglas* framework. *See Love-Lane*, 355 F.3d at 786; *supra* Argument II.B. Dr. Adams has raised a genuine issue as to whether he was discriminated against based on his religion in violation of the Equal Protection Clause. UNCW Officials also illegally discriminated against him

by penalizing him based on the conservative, religious viewpoint of his columns, books, and speeches, while crediting other Department faculty for similar activities with left-leaning viewpoints. (*See supra* at 19-20.)

CONCLUSION

When he applied for promotion to full professor, Dr. Adams had higher teaching evaluations, higher course enrollment numbers, a greater number of teaching awards than the majority of his Department, had published more peer-reviewed scholarship than seven of nine members of the Department (and more than either his current or previous department chairs), and had rendered considerable service to the University and to the wider community. Indeed, *no one with equivalent credentials had ever been denied promotion to full professor in the Department*. Yet Dr. Adams was also a vocal critic of the University and of the dominant ideology in academia and a vocal proponent of his religious beliefs. Because of this protected expression, he was denied a promotion in spite of his ample qualifications. It was erroneous for the court below to hold otherwise, and thus, Dr. Adams respectfully requests that this Court reverse the decision of the District Court granting summary judgment to the Defendants-Appellees.

Respectfully submitted this 28th day of June, 2010.

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REQUEST FOR ORAL ARGUMENT

Because of the important issues presented in this appeal, Plaintiff-Appellant respectfully requests oral argument pursuant to FED. R. APP. P. 34 and Fourth Circuit Rule 34(a).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 13,792 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in fourteen point Century Schoolbook font.

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Date: 28 June 2010.

CERTIFICATE OF SERVICE

Pursuant to FED. R. APP. P. 31 and Fourth Circuit Rule 31(d), I hereby certify that on June 28, 2010, eight paper copies of the foregoing brief and six paper copies of the accompanying joint appendix were sent via United Parcel Service Second Day Air, postage prepaid, to the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit, a digital copy of the brief was uploaded to the Court's website, and two paper copies of the brief and paper copy of the joint appendix were mailed to counsel for Defendants-Appellees by United Parcel Service Second Day Air, postage prepaid, at the following address:

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Respectfully submitted, this the 28th day of June, 2010.

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Not Reported in F.Supp.2d, 2008 WL 2987174 (S.D.Ohio)
(Cite as: 2008 WL 2987174 (S.D.Ohio))

United States District Court,
S.D. Ohio,
Western Division.
Shelley EVANS-MARSHALL, Plaintiff,
v.
BOARD OF EDUCATION OF TIPP CITY EXEMPTED VILLAGE SCHOOL DISTRICT, et al., Defendants.
No. 3:03cv091.

July 30, 2008.

Joanne Jocha Ervin, Dayton, OH, for Plaintiff.

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DECISION AND ENTRY SUSTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. # 38); JUDGMENT TO BE ENTERED ON BEHALF OF DEFENDANTS AND AGAINST PLAINTIFF; TERMINATION ENTRY

WALTER HERBERT RICE, District Judge.

***1** Plaintiff Shelley Evans-Marshall was formerly employed as a public school teacher at Tippecanoe High School ("Tipp High School"), by Defendant Board of Education of Tipp City Exempted Village School District ("Tipp City Board of Education" or "Board"). Evans-Marshall brings suit against the Tipp City Board of Education, as well as against Defendants Charles W. Wray ("Wray" or "Principal"), Principal of Tipp High School, and John T. Zigler ("Zigler" or "Superintendent"), Superintendent of the Tipp City Exempted Village School District ("School District" or "District"). Doc. # 1. Suit is brought against Wray and Zigler only in their individual capacities. *Id.*

The gravamen of Evans-Marshall's complaint is that the Defendants wrongfully terminated her employment, in retaliation for her exercise of her First Amendment right to make curricular choices, while teaching at Tipp High School. *Id.* The Defendants move for summary judgment arguing that Evans-Marshall has not set forth a genuine issue of material fact as to the elements of her First Amendment claim and that, even if she has, they have sufficiently alleged that the Board would not have renewed her teaching contract even in the absence of the protected First Amendment conduct. Doc. # 38. Further, the Defendants argue that Wray and Zigler are entitled to summary judgment, on the basis of qualified immunity. *Id.*

Earlier in these proceedings, the Defendants filed a Motion to Dismiss. Doc. # 3. The Court overruled that Motion, finding that the Plaintiff had pled sufficient facts which could, should they be proven by a preponderance of evidence at trial, sustain a verdict in favor of the Plaintiff. Doc. # 12. The legal analysis in that Decision was based largely on the Sixth Circuit's decision in *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir .2001). *Id.* The Defendants appealed. The Sixth Circuit affirmed, also based in large part on its previous *Cockrel* decision, along with the Supreme Court case law that was the underpinning for that case. FN1 *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223 (6th Cir.2005). FN2

FN1. The opinion for the Court was written by Judge Cole. *Evans-Marshall v. Board of Education*, 428 F.3d 223 (6th Cir.2005). Judge Sutton wrote a concurrence, wherein he concurred in the First Amendment decision, as necessitated by binding Sixth Circuit precedent (primarily as expressed in *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1048 (6th Cir.2001)), but opined that the Sixth Circuit "should re-examine its First Amendment jurisprudence in the context of in-

class curricular speech," based on a study of the evolving case law of the Supreme Court and other Circuits, in this and related areas (there has yet to be a Supreme Court case directly on point involving teacher in-class curricular speech). *Evans-Marshall,* 428 F.3d at 234. Judge Zatkoff (sitting by designation from the Eastern District of Michigan) wrote separately, concurring in part and dissenting in part. *Id.* at 238-40. Judge Zatkoff concurred with Judge Cole's First Amendment decision, "which faithfully applies this circuit's precedent in [*Cockrel*]," while concurring with Judge Sutton's concurrence, "which calls for a re-examination of this circuit's First Amendment jurisprudence regarding in-class curricular speech." *Id.* at 238. Judge Zatkoff dissented, however, with the determination regarding qualified immunity, finding no "clearly established" standard for determining a constitutional violation. *Id.* at 238-40.

FN2. As to other proceedings between these parties, Evans-Marshall also brought suit in state court, arguing that the Board had not properly evaluated her performance and did not properly conduct the hearing to determine whether to overturn the Board's previous decision not to renew her contract, in contravention of both the Board's internal policies and Ohio law. *Evans-Marshall v. Bd. of Educ.,* 2003 Ohio App. LEXIS 4496 (Ohio 2nd App. Dist. Sept. 19, 2003). The trial court affirmed the Board's decision and Ohio's Second Appellate District affirmed. *Id.*

The Court will now consider the Defendants' Motion for Summary Judgment, based on the more developed record that is before it. In so doing, the Court will analyze the Supreme Court's recent First Amendment decision in *Garcetti v. Ceballos,* 547 U.S. 410, 126 S.Ct. 1951 (2006), which was decided after the Sixth Circuit's previous decision in this case, to see how, if at all, the *Garcetti* decision impacts Sixth Circuit precedent in this area. To the extent necessary, the Court will then move to a discussion of the individual Defendants' entitlement to qualified immunity.

I. SUMMARY JUDGMENT STANDARD

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U .S. 317, 322 (1986). The moving party,

> ***2** always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Id. at 323; *see also Boretti v. Wiscomb,* 930 F.2d 1150, 1156 (6th Cir.1991). "Once the moving party has met its initial burden, the nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial." *Talley v. Bravo Pitino Rest., Ltd.,* 61 F.3d 1241, 1245 (6th Cir.1995); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations, it is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex,* 477 U.S. at 324. "The plaintiff must present more than a scintilla of evidence in support of his position; the evidence must be such that a

jury could reasonably find for the plaintiff." *Mich. Prot. & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 341 (6th Cir.1994).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56©. Summary judgment shall be denied "[i]f there are ... 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.' " *Hancock v. Dodson*, 958 F.2d 1367, 1374 (6th Cir.1992) (citation omitted). In determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in favor of that party. *Anderson*, 477 U.S. at 255. If the parties present conflicting evidence, a court may not decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. 10A Wright, Miller & Kane, Federal Practice and Procedure Civil 3d § 2726 (1998).

In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), "[a] district court is not ... obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir.1989), *cert. denied*, 494 U.S. 1091 (1990); *see also L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561 (7th Cir.1993); *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 n. 7 (5th Cir.1992), *cert. denied*, 506 U.S. 832 (1992) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment...."). Thus, a court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

II. FACTS [FN3]

FN3. Since this case comes before the Court on the Defendants' Motion for Summary Judgment, the Court sets forth the facts and circumstances giving rise to such Motion in the manner most favorable to the Plaintiff, as the party against whom the Motion is directed. *Servo Kinetics, Inc. v. Tokyo Precision Instruments*, 475 F.3d 783, 790 (6th Cir.2007).

***3** The Tipp Board originally hired Evans-Marshall pursuant to a one-year contract, as a language arts teacher at Tipp High School and as an advisor for the high school's literary magazine, for the 2000-2001 academic year. Doc. # 31, Ex. C, pt. 3 at 14-15 (2000-2001 Contract). That school year passed without incident, with Evans-Marshall receiving primarily favorable comments from Principal Wray, on both her written "observations" and "evaluations." Doc. # 31, Ex. C, pt. 1 at 22-34 (2000-2001 Written Observations and Evaluations). The School Board, thus, renewed her contract for the 2001-2002 school year. Doc. # 32, Attach. # 1 (Zigler Dep.) at 15.

In the fall of 2001, as she had done the previous year, Evans-Marshall choose to supplement her ninth grade English class textbook with a book entitled *Siddhartha*.[FN4] Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 25. This book had originally been purchased by the School District and was made available to teachers as an optional text.[FN5] Doc. # 32, Attach. # 1 (Zigler Dep.) at 16-17. Also, in conjunction with a study of the book *Fahrenheit 451* (a book about government censorship), Evans-Marshall had presented her ninth grade English class with an assignment concerning the American Library Association's list of the 100 most chal-

lenged books in the United States, during which some of the students elected to read a book off of that list entitled *Heather Has Two Mommies,* about homosexual family relationships. Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 76-78.

> FN4. The themes of *Siddhartha* include spirituality, Buddhism, romantic relationships, personal growth and family relationships. Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 101.
>
> FN5. Siddhartha was purchased by the school district in 1985 and was originally part of the social studies curriculum. Doc. # 32, Attach. # 1 (Zigler Dep.) at 18, 30.

At the Tipp Board meeting held on October 22, 2001 ("October Board meeting"), approximately four or five community members voiced disapproval of the content of some of the materials that were being taught in the junior and senior high schools, including *Siddhartha* and the discussions involving the 100 most challenged books. Doc. # 32, Attach. # 1 (Zigler Dep.) at 19-25, 70. At that meeting and in response to Evans-Marshall being named as the teacher who had assigned *Siddhartha*, a Board member explained that that book (and at least one other book being discussed, which is not related to this case) had been purchased by the District, so their selection had nothing to do with the individual teachers who had assigned them. *Id.* at 16-17, 25. The Superintendent also explained that parents could request an alternative assignment, if they objected to any book that was assigned to their children. *Id* . at 23.

The following day, Principal Wray convened a meeting of the English faculty at the high school, during which he told Evans-Marshall that she was on the "hot seat" for parent complaints about teaching *Siddhartha.* Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 64. Approximately two weeks later, the Principal conducted his first formal "observation" of the Plaintiff for that school year and gave her all favorable comments. Doc. # 31, Ex. C, pt. 2 at 5 (Nov. 13, 2001, Teacher Observation Log).

***4** In response to the parental complaint about the *Heather* book, the Principal asked Evans-Marshall to choose a different book from the 100 most challenged book list, which she did. Doc. # 33, Attach. # 1 (Wray Dep.) at 70-73. As to *Siddhartha,* Evans-Marshall continued to teach that book. According to her, however, Principal Wray told her that he objected to her selection of that book, as well as to the classroom discussions that went along with teaching the themes of the book.[FN6] Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 64-65; 74-75; 100-01.

> FN6. In contrast, Principal Wray testifies that he encouraged Evans-Marshall on a couple of occasions to continue teaching the book. Doc. # 33, Attach. # 1 (Wray Dep.) at 92-93. At some point in time, Evans-Marshall approached Superintendent Zigler, because she felt that the Principal was unfairly monitoring her teaching methods, based on his displeasure with her teaching *Siddhartha.* The Superintendent testifies that he assured her that was not the case. Doc. # 32, Attach. # 1 (Zigler Dep.) at 75.

> At the hearing, at which the Board affirmed the decision not to renew Evans-Marshall's contract, the transcript indicates that the Board member who concluded the hearing and presented the non-renewal decision stated as follows:
>
> When we received the recommendation from the administration not to renew Ms. Evans-Marshall's contract, we didn't rubberstamp that request. It was a difficult decision precisely because we knew that that decision would be interpreted as being because of the reading material and class assignments that Mrs. Evans-Marshall used. And we did not want that to be the case.

> We were concerned that this decision may have an effect on the teachers and make them hesitant to assign works of literature to our students that are challenging and raise complex issues.
>
> And I personally believe that *Siddhartha* is a great work of literature. It's from a Nobel Prize winning author and I support the use of that book in the classroom as does our administration. That is why we ... gave Superintendent Zigler strict instructions to inform [the] English department of our support of that particular book and the importance of exposing students to books that expand their minds and challenge ideas that may not otherwise be addressed.
>
> Doc. # 37, Attach. # 3 at 50 (Tr. of Bd. Mtg., pt. 2, May 13, 2002).

On November 26, 2001, the School Board convened another meeting ("November Board meeting"), during which much discussion ensued about the appropriateness of certain books, in the junior and senior high classrooms and libraries. Doc. # 37, Ex. # 1 (Nov. 26, 2001, Bd. Mtg. DVD; filed manually). The primary focus of the parents' concerns during that meeting, which lasted 1 hour and 50 minutes, was the accelerated reader list, which was a part of the junior high school library replenishment system. *Id.* Although the Board immediately decided to remove some of the junior high *library books* that were objected to, it reiterated its intent to retain *textbooks* that had been approved of and purchased by the Board and also re-explained its policy on parents requesting alternative *textbooks*, if they objected. *Id.* Despite the general focus on the junior high school library books, one parent of a ninth grade student specifically mentioned *Siddhartha*, complaining that she had requested an alternative assignment for her daughter, but that the alternative book was too elementary,[FN7] that her daughter felt as if she had been punished for seeking an alternative assignment, and that the assignment for the alternative book was incomprehensible to both the student and the parent. *Id.*

> FN7. Evans-Marshall assigned an alternative book that was appropriate for 9-12 year old readers, whereas ninth grade student are typically 14-15 years old. *See* Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 30.

At some time, an office aide making photo-copies made the Principal aware that Evans-Marshall was making available to the juniors and seniors in her creative writing class two student-authored articles (among others), to use as writing samples in the event they needed them. Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 87, 125-26. One of the articles portrayed a graphic, first-hand description of a rape and the other article described the first-hand accounts of a murderer, including his slaying of a priest, along with the destruction of various religious symbols, such as the "decapitation" of a crucifix. Doc. # 33, Ex. A. Upon the Principal's discovery of these materials, which he considered to be inappropriate for high school instruction, a heated discussion ensued between the Principal and Evans-Marshall, during which she stated something to the effect of, "I suppose anything I want copied, I have to run through Daddy to get checked." Doc. # 33, Attach. # 1 (Wray Dep.) at 77-80.

Beginning with the written "observation" the Principal made of Evans-Marshall's class on December 13, 2001, the relationship between the two of them began showing outward signs of contentiousness. On his written "observation log" for that visit, two of the six comments the Principal made were critical. In particular, he noted that "any material containing graphic violence, sexual themes, profanity, suicide, drugs and alcohol need[s] to be discussed with your department chairs before being used in class." Doc. # 31, Ex. C, pt. 2 at 6 (Teacher Observation Log, dtd. Dec. 13, 2001). By the end of that school year, the Principal recommended to the Superintendent that Evans-Marshall's teaching contract not be renewed. Doc. # 31, Ex. C, pt. 1 at 9-13

(Perf. Eval, dtd. March 21, 2002). The Superintendent accepted the non-renewal recommendation and the Board eventually approved it. Doc. # 32, Attach. # 1 (Zigler Dep.) at 93-97 (as to Superintendent); Doc. # 32, Ex. D at 24-26 (Bd.Minutes, dtd.Mar.25, 2002) (as to Board). The Board later affirmed its decision at a special Board meeting, the purpose of which was to have a statutory hearing on Evans-Marshall's non-renewal, in accordance with Ohio statutory law.[FN8]

FN8. The reason given by the District for not renewing Evans-Marshall's contract was that she refused to communicate with the administration and refused to be a team player. Doc. # 37, Attach. # 3 at 51 (Tr. of Bd. Mtg., pt. 2, May 13, 2002). Evans-Marshall, on the other hand, contended that the decision was in retaliation for her curricular choices. Doc. # 37, Attach. # 2 at 6-7 (Tr. of Bd. Mtg., pt. 1, May 13, 2002).

III. PLAINTIFF'S *PRIMA FACIE* CASE OF FIRST AMENDMENT RETALIATION

A. *Pre-Garcetti Sixth Circuit First Amendment Precedent*

***5** In its previous opinion in this case, the Sixth Circuit set forth a road-map as to the pre-*Garcetti* (and perhaps the post-*Garcetti* ?) approach to First Amendment cases pertaining to in-class teacher speech. Therein, the Court explained that, in order to establish a *prima facie* case of First Amendment retaliation, a public school teacher must allege:

> (1) that [she] was engaged in a constitutionally protected activity;
>
> (2) that the defendant's adverse action caused [her] to suffer an injury that would likely chill a person of ordinary firmness from continuing in that activity; and
>
> (3) that the adverse action was motivated at least in part as a response to the exercise of [her] constitutional rights.

Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 228 (6th Cir.2005) (quoting *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir.2001)). The Court will now provide a brief discussion of each of these elements.

1. *Whether a Plaintiff was Engaged in Constitutionally Protected Activity*

The first element of a plaintiff's *prima facie* case is the only one that is possibly impacted by the recent Supreme Court decision in *Garcetti.* The impact, if any, of that decision, will be explained later in this Opinion. For purposes of the present discussion, the Court will focus on Supreme Court and Sixth Circuit guidance prior to *Garcetti.*

In order to establish that a plaintiff was engaged in a constitutionally protected activity, a court must first determine whether the plaintiff's activity constituted "speech" within the meaning of the First Amendment. *Evans-Marshall,* 428 F.3d at 229 (citing *Cockrel,* 270 F.3d at 1048). If so, the court moves to a two-part analysis, deciding first whether the plaintiff "was disciplined for speech that was directed toward an issue of public concern" (it is this step to which *Garcetti* potentially pertains) and then whether the plaintiff's "interest in speaking as [she] did outweighed the [school's] interest in regulating [her] speech." *Id.* (quoting *Cockrel,* 270 F.3d at 1050 and *Hardy v. Jefferson Cmty. College,* 260 F.3d 671, 678 (6th Cir.2001)).

This approach has been referred to as the Pickering-Connick balancing test, in that it was first announced by the Supreme Court in *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731 (1968), and later refined in *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684 (1983). In *Pickering,* the Supreme Court explained that a balance must be struck between "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in

promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. In *Connick*, the Court instructed that courts must first determine whether "a public employee speaks ... as a citizen upon matters of public concern [or] as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147. If the employee is speaking as an employee upon matters only of personal interest, such speech is generally not afforded First Amendment protection, whereas if she is speaking as a citizen upon matters of public concern, it is. *See id.*

2. *Whether a Defendant's Adverse Action Caused Plaintiff to Suffer Injury that would Likely Chill a Person of Ordinary Firmness from Continuing in Activity*

***6** The second element of a plaintiff's *prima facie* case requires a showing that the defendant's adverse action caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing in that activity. *Evans-Marshall*, 428 F.3d at 228. The Sixth Circuit has held that non-renewal of a teaching contract is "an injury that would likely chill a person of ordinary firmness from continuing in [the] activity." *Id.* at 232 (quoting *Cockrel*, 270 F.3d at 1055).

3. *Whether Adverse Action was Motivated at Least in Part as Response to Exercise of Constitutional Rights*

The final element of a First Amendment retaliation claim requires a plaintiff to show that the adverse action taken against her was motivated at least in part as a response to the exercise of her constitutional rights. *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 228 (6th Cir.2005). The Sixth Circuit instructs that "the nonmoving party may not rely on the mere fact that an adverse employment action followed speech that the employer would have liked to prevent. Rather, the employee must link the speech in question to the defendant's decision to dismiss her." *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1055 (6th Cir.2001) (quoting *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir.1997)). "In other words," the Court continues, "to survive defendants' motion for summary judgment, [the plaintiff] must present sufficient evidence to allow a reasonable factfinder to conclude, by a preponderance of the evidence, that her speech, at least in part, motivated the defendants to discharge her." *Id.* (citing *Bailey*, 106 F.3d at 145).

B. *Impact of Garcetti on Sixth Circuit Precedent*

In *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006), the plaintiff, Ceballos, was a deputy district attorney. The controversy began when Ceballos examined an affidavit that had been prepared to obtain a search warrant in a criminal case and determined that there were serious misrepresentations thereon. *Id* . at 413-14. He then wrote a memorandum to his supervisors, recommending that the case be dismissed, due to the erroneously prepared affidavit. *Id.* at 414. The supervisor nevertheless proceeded with the prosecution of the case. *Id.* Ceballos ultimately brought suit alleging that he had been subjected to retaliatory employment actions (i.e., reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse and denial of a promotion) as a result of preparing the memorandum. *Id.* at 414-15.

The Supreme Court framed the issue before it as being "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties." *Id.* at 413. In resolving this issue, the Court initially looked at its earlier decisions in *Pickering* and *Connick* and highlighted the two inquiries that guide courts in the interpretation of the constitutional protections accorded to public employee speech.

> ***7** The first [inquiry] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the

> employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.

Id. at 418 (citing *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731 (1968) and *Connick v. Myers*, 461 U .S. 138, 147, 103 S.Ct. 1684 (1983)). The Court then went on to explain that "this consideration reflects the importance of the relationship between the speaker's expressions and employment." *Id.* "A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Id.*

The Court ultimately determined that the controlling factor in these cases is whether public employees' expressions are made pursuant to their duties as employees, holding 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." *Id.* at 421. Finding that Ceballos, in that case, wrote his memorandum because "that is part of what he, as a ... deputy, was employed to do," the Court concluded that his speech was not entitled to First Amendment protection. *Id.* at 421-22.

In Justice Souter's dissenting opinion, one of the concerns expressed was the breadth of the majority's holding, specifically as it might apply to certain academic freedom cases.[FN9]

> FN9. The majority opinion was written by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito. There were three separate dissenting opinions-one by Justice Stevens, one by Justices Souter and Ginsburg, and one by Justice Breyer.

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a *public university professor*, and I have to hope that today's majority does not mean to imperil First Amendment protection of *academic freedom in public colleges and universities*, whose teachers necessarily speak and write "pursuant to ... official duties."
Id. at 712 (emphasis added) (quoting and citing *Grutter v. Bollinger*, 539 U.S. 306, 329, 123 S.Ct. 2325 (2003); *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203 (1957) (explanatory parentheticals omitted)). In response to this concern, the majority concluded its opinion with the following caveat:

> Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value.... There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to *scholarship or teaching.*

***8** *Id.* at 425 (emphasis added). It is important to note that while Justice Souter's concerns were specifically directed to the university setting (focusing on the teachings of "public university professors" and academic freedoms found in "public colleges and universities"), the majority's language is far broader in that it pertains to "speech related to scholarship or teaching."

C. *Application of Legal Standards to Present Case*

As just explained, in *Garcetti*, the Supreme Court refined the first phase of the Pickering-Connick analysis (whether the employee was disciplined for speech that was made as a citizen and directed toward an issue of public concern) by directing the focus to whether the public employee made the statement pursuant to his official duties. *Garcetti*, 547 U.S. at 421-22; *see also Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 542 (6th Cir.2007) (noting that *Garcetti* clarified the "as a citizen" part of this analysis). The question before this Court, then, is whether *Garcetti* is applicable to the facts of the present case. If so, the resolution of this case will be an easy one, in that it is hard to imagine how a public high school teacher's curricular speech is not made "pursuant to her official duties," since that is precisely what she is employed to do. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir.), *cert. denied*, 128 S.Ct. 160 (2007) (holding that school boards hire teachers specifically for their curricular speech).

The only two Circuits to have addressed this issue so far have been the Seventh and the Fourth Circuits. The Seventh Circuit determined that *Garcetti* applies in the context of the classroom speech of K-12 public school teachers, while the Fourth Circuit determined that it did not. *Contrast Mayer*, 474 F.3d 477 (7th Cir.2007) [FN10] (finding that "*Garcetti* applie[d] directly," based on Seventh Circuit precedent that held that public school students, who are a captive audience, should not be subjected to teachers' idiosyncratic perspectives; rather, elected school boards should make policies about teaching contentious issues) *with Lee v.. York County Sch. Div.*, 484 F.3d 687, 695 n. 11 (4th Cir.), *cert. denied*, 128 S.Ct. 387 (2007) (continuing to apply traditional Pickering-Connick approach, because the Supreme Court did not "explicitly ... decide whether [the *Garcetti]* analysis would apply in the same manner to a case involving speech related to teaching"); *see also Pittman v. Cuyahoga Valley Career Ctr.*, 451 F.Supp.2d 905, 929 (N.D.Ohio 2006) (refusing to resolve the question of the applicability of *Garcetti* to public school teacher case and concluding that the case was resolved the same under both *Garcetti* and traditional Pickering-Connick analysis).

> FN10. *See also Samuelson v. Laporte Cmty. Sch. Corp.*, 526 F.3d 1046, 1052 (7th Cir.2008) (in a prior restraint case, holding that speech which was covered by a policy that required that concerns regarding teachers' job responsibilities be addressed through the chain of command was grounded in the public employee's professional duties and therefore not protected by the First Amendment).

Based on the explicit caveat in the majority opinion of *Garcetti* that the Court's decision therein did not necessarily apply "in the same manner to a case involving speech related to scholarship or teaching," *Garcetti*, 547 U.S. at 425, this Court agrees with the Fourth Circuit that it is not clear that *Garcetti* necessarily applies to the facts of this case.[FN11] Thus, absent Sixth Circuit or further Supreme Court guidance to the contrary, this Court will continue to apply the traditional Pickering-Connick approach to cases involving in-class speech by primary and secondary public school teachers.

> FN11. The Defendants argue that the Supreme Court has already concluded that the concept of "academic freedom" does not apply to elementary and secondary education. Doc. # 44 at 8 (citing *Edwards v. Aguillard*, 482 U.S. 578, 586 n. 6, 107 S.Ct. 2573 (1987) and *Illinois ex rel. McCollum v. Bd. of Ed.*, 333 U.S. 203, 231, 68 S.Ct. 461 (1948)). While this may be true, the *Garcetti* Court's caveat applied to "case[s] involving speech related to *scholarship or teaching,"* which this Court understands to be considerably broader than cases involving "academic freedom."

***9** The Court, therefore, returns to the elements of a traditional *prima facie* case of First Amendment retaliation, as set forth in the original Sixth Circuit

decision in this case, in order to decide if there is a genuine issue of material fact as to any of those elements.

Before beginning this analysis, the Court will first distill the lengthy arguments made by the parties, in order to hone in on which "speech" is actually in dispute. An initial reading of the Complaint indicated that the speech in question apparently consisted of the Plaintiff's teaching of the books *Siddhartha, Fahrenheit* 451 and *To Kill a Mockingbird,* and the viewing of the movie *Romeo and Juliet.* Doc. # 1 ¶¶ 17, 20. A review of the briefs submitted in support of and in opposition to the Defendants' Motion for Summary Judgment, however, indicates that the disputed speech actually consists of the books *Siddhartha* and *Heather Has Two Mommies,* the *Romeo and Juliet* movie and the two student-authored stories.[FN12]

FN12. As to *Fahrenheit 415* (a book about government censorship), the Plaintiff does not allege that the Defendants disapproved of the fact that she taught that book. Rather, the Plaintiff asserts that the disapproval was focused on her method of teaching the theme of that book, to include, in particular, the teaching of *Heather Has Two Mommies,* a book on the list of the 100 most challenged books. *See* Doc. # 41 (Pl.'s Mem. Opp'n) at 11, 30; Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 100-01.

Other than the Plaintiff's initial statement in her Complaint that she taught the book *To Kill a Mockingbird,* there are no facts alleged either in the Complaint or in the summary judgment briefs regarding this book.

1. *Whether Plaintiff was Engaged in Constitutionally Protected Activity*

The Sixth Circuit previously determined that the Plaintiff's conduct, in this case, constituted "speech," because the disputed materials (as indicated in the Complaint) were "clearly protected by the First Amendment." *Evans-Marshall,* 428 F.3d at 230. Further, Sixth Circuit precedent "establishes that the assignment by a public school teacher of protected material is itself 'speech' within the meaning of the First Amendment." *Id.* (citing *Cockrel,* 270 F.3d at 1049). The parties do not argue this point, in their summary judgment memoranda. In accordance with the Sixth Circuit's previous determination, as published works, the *Heather* book, like *Siddhartha* and *Romeo and Juliet,* would be considered speech. *See Evans-Marshall,* 428 F.3d at 230 (citing *Metzger v. Pearcy,* 393 F.2d 202, 204 (7th Cir.1968) for the proposition that movies and books "are protected by the constitutional guarantees of freedom of speech and press"). Likewise, the two student-authored stories would be considered speech, under both Supreme Court and Sixth Circuit precedent. *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 273, 108 S.Ct. 562 (1988) (considering student articles submitted for publication in school newspaper as "speech"); *Curry v. Hensiner,* 513 F.3d 570, 577 (6th Cir.Mich.2008) (considering candy cane pipe-cleaner ornament, made by elementary school student, to be "speech"). Having found that all of the disputed materials are "speech," the Court will now turn to the two parts of the Pickering-Connick balancing test: whether the speech was directed toward an issue of public concern and whether the Plaintiff's interest in speaking as she did outweighed the Defendants' interest in disciplining her for such speech.

a. *Speech Directed Toward Issue of Public Concern*

In determining whether the Plaintiff was disciplined for speech that was directed toward an issue of public concern,[FN13] the previous Sixth Circuit opinion in this case, while addressing *Siddhartha* and *Romeo & Juliet,* drew the inference that the Plaintiff taught the main themes of these works and concluded that such content is clearly a matter of public concern. *Evans-Marshall,* 428 F.3d at

230-31. In so concluding, the Court cited *Hardy v. Jefferson Cmty. College,* 260 F.3d 671, 679 (6th Cir.2001), for the proposition that "race, gender, and power conflicts in our society" are "matters of overwhelming public concern" (these themes were portrayed in *To Kill a Mockingbird*, the teaching of which is no longer a matter of dispute herein) and added that the main themes of the other materials (spirituality, in *Siddhartha,* and the intersection of love and politics, in *Romeo and Juliet*) were similarly matters of public concern. *Evans-Marshall,* 428 F.3d at 231.

> FN13. To reiterate, the Sixth Circuit's traditional approach is to focus here on whether the speech "touched on a matter of public concern," whereas the *Garcetti* approach is to focus on "whether public employees' expressions are made pursuant to their duties as employees." *Garcetti,* 547 U.S. at 421; *Evans-Marshall,* 428 F.3d at 230.

***10** The Defendants do not contest this determination, in their memoranda supporting their Motion for Summary Judgment (rather, they argue that the Court should rule in their favor, as a result of the application of the second part of the Pickering-Connick test, as described below). *See* Doc. # 38 at 30-34; Doc. # 44 at 11. On this point, the Plaintiff argues that the controversial themes (homosexuality, drug abuse, rape, religious killing and destruction of religious objects) in the materials she assigned, including the *Heather* book and the writing samples of the two students, were topics of local, national and international concern, as evidenced by reading daily reports in the media. Doc. # 41 at 32-34.

The facts of this case indicate that the Plaintiff did teach the major themes of *Siddhartha* and *Romeo & Juliet,* as assumed by the Appellate Court. Thus, the Court is left with the Sixth Circuit's previous holding, as to the teaching of these materials being directed toward issues of public concern. The only additional facts to consider, on this point, are the teachings of the *Heather* book (dealing with homosexual families) and the two student-authored stories (pertaining to rape and the murder of a priest/ destruction of religious materials). Viewing these themes in the same vein as the Appellate Court viewed the themes of the other materials leads to the conclusion that these additional materials also pertain to matters of public concern, it being hard to distinguish homosexuality, rape and religious violence from the other themes, as they all receive prime exposure in the media's coverage of today's local and world events. Thus, the Court concludes that the Plaintiff's speech touched on matters of public concern.

b. *Whether Plaintiff's Interest in Speaking as She Did Outweighed Defendants' Interest in Disciplining Her for Such Speech*

Having decided that the speech in question was directed toward issues of public concern, the Court now turns to the second part of the Pickering-Connick analysis-whether the Plaintiff's interest in speaking as she did outweighed the Board's interest in disciplining her for such speech. In the *Evans-Marshall* appellate decision, the Sixth Circuit determined that it was premature, at the motion to dismiss stage of the litigation, to consider the Defendants' alleged interests, as espoused on brief. *Evans-Marshall,* 428 F.3d at 231-32. The Court also pointed out its precedent regarding disciplining a teacher's controversial speech, when that speech had received prior approval from the school district. In general, the Sixth Circuit's previous cases establish that courts should not afford much weight to a school's alleged interest in disciplining a teacher, if the school previously approved the speech in question and then later took action as a result of a public outcry related to the same. *Cockrel v. Shelby County Sch. Dist.,* 270 F.3d 1036, 1054 (6th Cir.2001); *Stachura v. Truszkowski,* 763 F.2d 211, 214-15 (6th Cir.1985), *rev'd on other grounds,* 477 U.S. 299, 106 S.Ct. 2537 (1986). Because there was an indication of such a fact pattern, in the present Complaint, the Court refused to grant the Defend-

ants' Motion to Dismiss, on this point. *Evans-Marshall*, 428 F.3d at 232 (noting that the three novels and the movie, the teachings of which the Complaint indicated were the reasons for the Plaintiff's dismissal, had been purchased and approved of by the Board).

i. *Defendants' Interest in Disciplining Plaintiff for her Speech*

***11** In order to conduct the balancing test in question, the Court must presume that the Defendants decided not to renew the Plaintiff's contract, at least in part, because of her teachings of said materials. At the outset, the Court notes that the Defendants emphatically deny that they disciplined the Plaintiff as a result of such speech. Doc. # 38 at 30-34. Recognizing that the Court will assume these facts for purposes of conducting the balancing test, however, the Defendants argue, in general, that case law recognizes that school boards have considerable leeway in regulating classroom speech, in order to accommodate legitimate pedagogical concerns, and more specifically, have the ability to select and require adherence to a school board's stated curriculum. Doc. # 38 at 31-32 (citing, among others, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 U.S. 562 (1988) (noting that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (student speech case)); [FN14] *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S.Ct. 2573 (1987) (holding that "[s]tates and local school boards are generally afforded considerable discretion in operating public schools" (establishment clause case)); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir.1998) (finding that school board had legitimate academic interest in promoting generally acceptable social standards and, thus, could punish teacher for allowing profanity in student works (case involving teacher's First Amendment rights to allow student profanity in classroom written and video work)) [FN15]; *Webster v. New Lenox School Dist. No. 122*, 917 F.2d 1004 (7th Cir.1990) (finding that state had compelling interest in selection of and requiring adherence to suitable curriculum and that individual teachers did not have right to make such curriculum choices (teacher classroom speech case)).

FN14. There is a difference in analyzing student speech cases and teacher speech cases. Furthermore, there is a difference in analyzing different types of student speech cases. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562 (1988) (in cases involving educators' authority over school-sponsored speech, question is whether restrictions imposed are reasonably related to legitimate pedagogical concerns); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-513, 89 S.Ct. 733 (1969) (in cases involving student speech that simply happens to occur on school premises, standard is whether the speech causes a material disruption or invades another's rights).

FN15. In *Lacks*, a case with similar facts to the present case, the plaintiff high school English teacher permitted her students to use profanity in their presentation of student-authored short plays and permitted a student to read aloud his poem "which contained profanity and graphic descriptions of oral sex," and was subsequently fired for doing so. *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718 (8th Cir.1998). In determining that the school district did not violate the teacher's First Amendment rights, the Eighth Circuit pointed out that the school board in question in that case, in its opinion terminating the teacher's employment,

> wrote that the purpose of the board's disciplinary policies is "to establish, to foster, and to reflect the norms and standards of the community its

serves....” Allowing one student to call another a “fucking bitch” and a “whore” in front of the rest of the class, and allowing a student to read aloud a poem that describes sexual encounters in the most graphic detail, as the students did in Lacks's classroom, hardly promotes these shared social standards. We consider the matter too plain for argument.

Id. at 724. In reaching its conclusion, the Appellate Court cited three Supreme Court cases, to wit:

The Supreme Court has written that public education “ ‘must inculcate the habits and manner of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.’ “ *Bethel Sch. Dist. v. Fraser,* 478 U.S. 675, 681, 106 S.Ct. 3159 (1986) (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)). While students in public schools do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506, 89 S.Ct. 733 (1969), students' First Amendment rights “in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.” *Fraser,* 478 U.S. at 681 . Accordingly, the Supreme Court has held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 273, 108 S.Ct. 562 (1988).

Id.

As to the Tipp Board of Education's specific interest in not renewing the Plaintiff's contract, the Defendants point to, among other things, the provision in the Ohio Revised Code that gives local school boards the responsibility of prescribing school curricula and the Tipp City Board of Education policy that similarly provides as follows: “Legal responsibility for adoption of curriculum resides with the Board of Education.” Doc. # 38 at 32 (citing Ohio Rev.Code Ann. § 3313.60 FN16 and Doc. # 37, Attach. # 1 (Tipp Board Policy on Curriculum Adoption) at 9). The Defendants also point out that the elected School Board is accountable to the public for the education of the community's school children, whereas individual school teachers are not. *Id.* The thrust of the Defendants' argument here is that the Board is legally responsible for selecting its curriculum and is accountable to the community for so doing and, thus, its interest in controlling the curricular choices of its individual teachers outweighs the Plaintiff's claimed right to assign materials of her choosing.

FN16. In pertinent part, Section 3313.60 provides as follows: “The board of education of each city and exempted village school district ... shall prescribe a curriculum for all schools under [its] control.” Ohio Rev.Code. Ann. § 3313.60(A).

***12** The Defendants also argue that the actions complained of as retaliation were simply the result of the Defendants performing their required duties as administrators of their school system and that the they had an interest in properly administering such. For example, the Defendants point to the fact that Board policy specifically assigns the principal the role of conferring with teachers as to the advisability of teaching certain controversial issues. FN17 Doc. # 37, Attach. # 1 at 23 (Tipp Board Policy re. Teaching about Controversial Issues). It is also the principal's job to conduct periodic observations of

teachers and to make suggestions for improvements. Doc. # 38 at 33 (citing *Evans-Marshall v. Bd. of Educ.*, 2003 Ohio App. LEXIS 4496, *10 (Ohio 2nd App. Dist. Sept. 19, 2003), and Ohio Rev.Code Ann. § 3319 .111).[FN18]

FN17. After setting forth several guidelines for teachers to follow in determining whether inclusion of controversial materials in teaching assignments is appropriate, the pertinent portion of the Policy provides as follows: "A teacher who is in doubt about the advisability of discussing certain issues in the classroom should confer with the principal as to the appropriateness of doing so. If discussion of an issue is not approved by the building principal, the teacher may refer the issue to the Superintendent." Doc. # 37, Attach. # 1 at 23.

FN18. As recognized by Ohio's Second District Appellate Court in the earlier case in state court, involving these parties, the Ohio Revised Code states that a "limited contract teacher[ ] should receive a written report documenting her evaluation. The written report must include 'specific recommendations regarding any improvements needed in the performance of the teacher being evaluated and regarding the means by which the teacher may obtain assistance in making such improvements.' " *Evans-Marshall v. Bd. of Educ.*, 2003 Ohio App. LEXIS 4496, * 10 (Ohio 2nd App. Dist. Sept. 19, 2003) (quoting Ohio Rev.Code Ann. § 3319.111(B)(3)).

In opposition to the Defendants' arguments, the Plaintiff states that although it is true that the Board has authority to set its curriculum, it delegated the day-to-day implementation of the specifics of curricular choices to the individual teachers. Doc. # 41 at 34-37. In support of this statement, the Plaintiff points to the Board's Policy, which provides that it "delegates to the professional personnel of the District authority for the selection of instructional and library materials." [FN19] Doc. # 37, Attach. # 1 at 16 (Tipp Board Policy re. Instructional Materials). The Plaintiff also states that it was the practice in the District for the Board to adopt a textbook for each course and then to allow the teachers to supplement the textbook with materials of their choosing, in order to achieve the general goals and objectives of each course. Doc. # 32, Attach. # 1 (Zigler Dep.) at 79; Doc. # 36, Attach. # 1 (Bishop Dep.) at 30, 60.

FN19. The entirety of the context of that statement, from the Board Policy provides as follows:

> As the governing body of the District, the Tipp City Exempted Village Board of Education is legally responsible for the selection of instructional materials. Since the Board is a policy-making body, it delegates to the professional personnel of the District authority for the selection of instructional and library materials.
>
> Materials for school classrooms and school libraries will be selected by the appropriate professional personnel *in consultation with the Superintendent, faculty and other sources as needed.* Final decision on purchase will rest with the Superintendent, subject to official adoption by the Board in the case of textbooks.
>
> The Board believes that it is the responsibility of the District:
>
> 1. to provide materials that will enrich and support the curriculum, taking into consideration the varied interests, abilities and *maturity levels* of the students served;
>
> 2. to provide materials that will stimulate growth in factual knowledge, literary ap-

> preciation, aesthetic values and *ethical standards; ...*
>
> The above principles ... will serve as a guide in the selection of all instructional [materials].
>
> Doc. # 37, Attach. # 1 at 16 (emphasis added).

The Plaintiff also argues that the School District expected controversial issues to be included in the curriculum, as evidenced by the Board's Policy that states that "[o]nly through the study of [some controversial issues] will youth develop the abilities needed for citizenship in our democracy." FN20 Doc. # 37, Attach. # 1 at 387 (Tipp Board Policy re. Teaching Controversial Issues).

> FN20. In context, that statement reads as follows:
>
> Most of the Tipp City Exempted Village School District curriculum is composed of established truths and accepted values, but it also includes controversial issues. The public schools include the study of some important unsolved problems that involve controversial issues. Only through the study of such issues will youth develop the abilities needed for citizenship in our democracy.
>
> Doc. # 37, Attach. # 1 at 387. The Policy goes on to provide that teachers will use certain criteria for determining the appropriateness of issues for consideration as part of the curriculum, to include whether the issues are in "the range, knowledge, maturity and competence of the students." *Id.*

ii. *Plaintiff's Interest in Speaking as She Did*

The Plaintiff does not clearly articulate her "interests in speaking as she did," so, in order to conduct the necessary balancing test, it is left to the Court to piece together what appears to be her interest in teaching the disputed materials. FN21 Upon a review of the Rule 56 materials on the record that are offered in support of the general arguments made in the Plaintiff's brief, the Court concludes that the Plaintiff seems to be asserting that she had an unequivocal right to select materials to supplement the Board-chosen textbooks for each of her classes and the methods for teaching the same. Doc. # 1 (Compl.) ¶ 32 ("A central tenet of academic freedom is the ability of the teacher to select books and methods of instruction for use in the classroom without interference from public officials."). In particular, the Plaintiff implies that she had the right to teach controversial topics of her choosing, apparently in the manner she wanted and without interference from school officials. Doc. # 41 at 32-33 (citing Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 95, in support of the statement that "Plaintiff believe[s] that students have the right to learn to express themselves well on any topic and that she, as an instructor, has a vested interest in empowering her students to do so.") FN22

> FN21. In the section of the Plaintiff's Memorandum in Opposition entitled "Plaintiff's Interest in Speech Outweighed the School District's Interest in Regulating Plaintiff's Speech," the Plaintiff does not articulate any "interest" she had in teaching the disputed materials; rather, the entirety of her argument is devoted to assertions of why the Defendants' stated interests in regulating the Plaintiff's speech are improper. *See* Doc. # 41 at 34-37. The arguments presented here are ones that the Court has gleaned from other portions of the Plaintiff's Memorandum, supporting evidentiary materials and the Complaint.
>
> FN22. With regard to the *Heather* book, the Plaintiff's brief provides that "*Heather* dealt with alternative families, a pertinent contemporary issue that Plaintiff felt should be debated." Doc. # 41 at 31 (citing

Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 116)).

> As to the two student-authored articles in question, the Plaintiff implies that she had an interest in teaching the students in her college preparatory American literature class about "media literacy," by "helping them distinguish gratuitous sex or violence-which they met in the media every day-and sex or violence which is presented in an artistic form in pursuit of a theme." *Id.* at 25 (citing Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 92, 121-25)).

***13** In support of these views, the Plaintiff points to the fact, as highlighted above, that the Tipp Board had an open-ended curriculum that focused on the skills students needed to learn each year, while allowing the teachers the latitude to supplement the textbooks with other materials of their choosing. Doc. # 32, Attach. # 1 (Zigler Dep .) at 78-79; Doc. # 36, Attach. # 1 (Bishop Dep.) at 30. The Plaintiff also points to the Board's policy that gives students certain "rights" in the study of controversial materials, to wit:

> 1. the right to study any controversial issue that has political, economic, or social significance and concern, of which (*at the student's level*) he should begin to have an opinion;
>
> 2. the right to have free access to all relevant information, including the materials that circulate freely in the community;
>
> 3. the right to study under competent instruction in an atmosphere free from bias and prejudice and
>
> 4. the right to form and express his own opinions on controversial issues without thereby jeopardizing relations with his teachers or the school.

Doc. # 37, Attach. # 1 at 387 (Tipp Board Policy on Teaching about Controversial Issues) (emphasis added).

iii. *Balancing of Interests*

In sum, the Defendants argue that they have an interest in controlling their teachers' curricular choices, because the Board of Education is accountable for the District's curriculum in the eyes of Ohio statutory law and internal policy, as well as being generally accountable for such to its constituents in the community. The Defendants also argue that they have an interest in the day-to-day administration of the District (*e.g.*, conferring with teachers as to the advisability of teaching certain matters and proposing ways, in general, in which teachers might make improvements). The Plaintiff, on the other hand, asserts that she has an interest in supplementing the prescribed classroom textbooks with the materials and methods of instruction that she chooses, in accordance with various Board policies.

Upon consideration of these stated interests, the Court concludes, notwithstanding the issue of whether the Board pre-approved the teaching of certain materials (the concern highlighted by the Sixth Circuit in *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1053-54 (6th Cir.2001)), which will be addressed forthwith, that the Board's interest in regulating the Plaintiff's selection of instructional materials and methods of instruction far outweighed the Plaintiff's right to use whatever supplemental materials and methods she chose. While the Board's regular practice might have been to allow its teachers the latitude to select supplemental materials and incorporate instructional methods of their choosing, this does not give a teacher the "right" to do so, if the administrators or the Board do not approve of such selections. For example, a Spanish teacher should not have the "right" to supplement his Spanish textbook with instructional materials on how to speak Japanese, if the administrators do not approve. Or, a trigonometry teacher who decides that mathematical basics are "passe" should not have the "right" to implement a supplemental new-wave method of teaching

mathematics, if the Board does not concur. The Court sees little difference in directing an English teacher as to the kinds of supplemental materials and methods she may or may not use, in order to achieve the curricular goals that the Board is ultimately responsible for establishing and implementing, for any given course.[FN23]

FN23. Although neither the Supreme Court nor the Sixth Circuit has directly addressed the balance between a public primary or secondary school district's interest in dictating the curricular speech of its teachers with a teacher's interest in independently choosing such curriculum, without the factual component of preapproval of the speech in question, this holding is in concert with both Supreme Court and Sixth Circuit decisions on similar issues, as well as with other appellate courts that have directly addressed the issue. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 108 S.Ct. 562 (1988) (recognizing, in student speech case, that "[t]he determination of what manner of speech in the classroom ... is inappropriate properly rests with the school board ...." (internal quotation omitted)); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1054 (6th Cir.2001) (in teacher speech case, involving preapproval of disputed speech, stating that, "[w]hile ordinarily we would give substantial weight to the government employer's concerns of workplace efficiency, harmony, and discipline in conducting our balancing of the employee's and employer's competing interests, we cannot allow these concerns to tilt the Pickering scale in favor of the government, absent other evidence, when the disruptive consequences of the employee speech can be traced back to the government's express decision permitting the employee to engage in that speech"); *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir.1985), *rev'd on other grounds*, 477 U.S. 299, 106 S.Ct. 2537 (1986) (same general holding, on similar facts).

Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir.1976), involved a suit brought by high school students against the school board and administrators claiming a violation of their First Amendment rights because, among other things, the Board had not approved of certain textbooks for inclusion in the curriculum, which had been requested by the faculty. In ruling against the plaintiffs, on this point, the Court stated,

> Clearly, discretion as to the selection of textbooks must be lodged somewhere and we can find no federal constitutional prohibition which prevents its being lodged in school board officials who are elected representatives of the people. To the extent that this suit concerns a question as to whether the school faculty may make its professional choices of textbooks prevail over the considered decision of the Board of Education empowered by state law to make such decisions, we affirm the decision of the District Judge in dismissing that portion of plaintiffs' complaint. In short, we find no federal constitutional violation in this Board's exercise of curriculum and textbook control as empowered by the Ohio statute.

Id. at 579-80; *see also Lee v. York County Sch. Div.*, 484 F.3d 687, 695 (4th Cir.), *cert. denied*, 128 S.Ct. 387 (2007) (concluding that "public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and ... a school board's ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums"); *Mayer v. Monroe*

> *County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir.), *cert. denied*,*128* S.Ct. 160 (2007) ("[T]hose authorities charged by state law with curriculum development [may] require the obedience of subordinate employees, including the classroom teacher." (internal quotation omitted)); *Edwards v. California Univ.*, 156 F.3d 488, 491 n. 1 (3d Cir.1998) (recognizing that "public school teachers must abide by school policy or dictates when choosing their curriculum [and] ... that a public school teacher's in class conduct is not protected by the First Amendment (internal quotation omitted)); *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11 th Cir.1991) (holding that "where the in-class speech of a teacher is concerned, the school has an interest ... in scrutinizing expressions that the public might reasonably perceive to bear its imprimatur" (internal quotation omitted)).

***14** Furthermore, while the Board's policy might have outlined certain students' "rights" with regard to the study of controversial topics, those "rights" were tempered with the proviso that such instruction be age appropriate. If a teacher and an administrator or a school board differ in what they believe falls within the range of "age appropriate" teaching materials, the board's determination (or the determination of its chosen administrators) should control, for it is the board that is ultimately responsible for the education of the students, not the teacher.[FN24]

> FN24. On this point, the Seventh Circuit recently provided the following commentary:
>
> > Majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination; elected school boards are tempted to support majority positions about religious or patriotic subjects especially. But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers. At least the board's views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues.... The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials.
>
> *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 480-81 (7th Cir.), *cert. denied* 128 S.Ct. 160 (2007). In the present case, the issue is not whether the Plaintiff was expressing her own viewpoints about the subject matters in question (homosexuality, rape, violence, etc.), but whether teaching such subjects should be part of the curriculum to the extent the Plaintiff was including them. The Court finds very little difference in regulating a teacher's spoken personal viewpoints about certain subjects and her choice of supplemental materials or methods of instruction about teaching certain subjects. In either instance, the elected board of education should have the ultimate say as to whether the "speech" is both age appropriate and well-suited to the overall school curriculum.

Thus, as long as the materials do not otherwise fall within the "pre-approved materials" caution, as noted by the Sixth Circuit in the previous decision in this case and in *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1053-54 (6th Cir.2001), the Pickering-Connick balance weighs in favor of the Defendants and the granting of the Defendants' Motion for Summary Judgment is warranted.

When conducting the Pickering-Connick balancing test in *Cockrel*, the case upon which a good portion of the previous Appellate Court decision in this case was based, the Sixth Circuit balanced the

school system's interest in workplace efficiency, harmony, and discipline against the teacher's interest in teaching her students about industrial hemp.[FN25] *Cockrel*, 270 F.3d at 1053-54. Although the Court determined that both of the parties' interests were important and recognizable, it ultimately concluded that the scale tipped in favor of the plaintiff, finding that it would be unfair to discipline the teacher for the disruptive consequences of her industrial hemp presentations when the school district had given her permission for such speech. *Id.* at 1054-55.

> FN25. Hemp is a plant that produces both marijuana and fibers that can be used to make various goods, such as paper and clothes. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1042 (6th Cir.2001). At the time of the *Cockrel* case, hemp was an illegal substance in Kentucky, although controversy surrounded the banning of this substance, because of the environmental benefit of using the industrial components of the hemp fibers as an alternative to the use of trees. *Id.* at 1042-43. The Court concluded that the teacher's speech concerning the use of industrial hemp "substantially involved matters of significant public concern in Kentucky." *Id.* at 1053.

Thus, the Court, in this case, must determine whether any of the "speech" in dispute was pre-approved by the Defendants and, if so, what effect that has on the Pickering-Connick balance. As to three of the five materials in dispute-the *Heather* book and the two student-authored stories-there is no dispute that the school district *did not* give prior permission for the Plaintiff to present these to her class. Thus, the Defendants were justified in disciplining her for such speech, to the extent they did, as a result of the Pickering-Connick balancing test.

The fourth item in question is the *Romeo and Juliet* video. The facts indicate that the school had given teachers general permission to show videos rated PG-13 and that this movie was rated PG-13. Doc. # 32, Ex. B at 20 (Video Rating Policy). The only objection the Plaintiff indicates with regard to this video is that she was required to omit a portion of the movie that contained nudity, when she showed it to her ninth grade English class.[FN26] Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 122 (explaining that she felt it important to show the nudity, so the students might be able to distinguish between the gratuitous display of nudity and art). While the general "preapproval" to show PG-13 videos would seem to indicate that this video would fall within the *Cockrel* rubric, the Court is reluctant to jump to that conclusion based on these alleged facts. The Plaintiff does not imply that her contract was not renewed because she chose to show the *Romeo and Juliet* video (that implication is made about the teaching of the other four materials, but not this video). Rather, the Plaintiff only complains that she was restricted from showing the entirety of the video. The Court does not read the *Cockrel* decision so broadly as to apply to these facts. Had the Board disciplined the Plaintiff after she showed the pre-approved video, *Cockrel* would apply. Instead, the administration regulated a portion of the "speech" prior to the Plaintiff's presentation of the same-a prior restriction rather than a later disciplinary measure. Reverting back to the previous analysis, the Court concludes that the Plaintiff had no "right" to show the entirety of the video simply because it fell within the general preapproval of all PG-13 videos. If the Board or its administrators felt it appropriate to excise certain parts of the video, because, for example it contained age inappropriate nudity, they had an interest in doing so that outweighed any interest the teacher had in presenting it. Thus, the Defendants were justified in restricting the Plaintiff's speech on this matter.

> FN26. The Plaintiff also points out that the principal questioned her about the rating of the video, after she showed it to her students. Doc. # 41 at 19, 31. It is unclear what the Plaintiff is implying by highlighting this point. The Court concludes that it was well within the province of a school

> principal to inquire of a teacher as to the rating of a video that she showed to her class, particularly in light of the fact that PG-13 videos had been pre-approved for viewing, but videos with more mature ratings had not. Since the Plaintiff does not expound on the importance of this fact, the Court will disregard it in drawing its conclusions herein.

***15** Finally, the Court turns to the Plaintiff's teaching of the book *Siddhartha.* Without a doubt, the Defendants gave the Plaintiff permission to teach this book, in that the District had purchased quantities of such several years before and made it available to teachers as an optional text. Therefore, based on the Sixth Circuit's instruction in *Cockrel,* the Court will not tip the scales in favor of the Defendants' stated interests in selecting and requiring adherence to its curriculum and efficiently administering the District, when it previously gave the Plaintiff permission to teach this book and then later allegedly disciplined her for so doing.

In sum, then, at this point in the analysis, the Court concludes that the Defendants' request for summary judgment is well taken, as to the Plaintiff's assertions that the Defendants disciplined her for exercising her First Amendment rights, with regard to the teaching of *Heather Has Two Mommies,* the student-authored story about the rape, the student-authored story about the murder of the priest and the desecration of the crucifix, and the *Romeo and Juliet* video. However, the Plaintiff has satisfied the first element of her *prima facie* case, by demonstrating that she was engaged in constitutionally protected activity, as to her allegations pertaining to her teaching of the book *Siddhartha.* Therefore, the Court will now proceed with the remaining steps of the *prima facie* analysis, with regard to the Plaintiff's assertions regarding that book.

2. *Whether Defendants' Adverse Action Caused Plaintiff to Suffer Injury that would likely Chill Person of Ordinary Firmness from Continuing in Activity*

As was previously indicated, the Sixth Circuit has held that non-renewal of a teaching contract is "an injury that would likely chill a person of ordinary firmness from continuing in [the] activity." *Evans-Marshall,* 428 F.3d at 232 (quoting *Cockrel,* 270 F.3d at 1055). Thus, the Plaintiff has satisfied the second step of her *prima facie* case of First Amendment retaliation and the Court will turn to an analysis of the final step.

3. *Whether Plaintiff's Non-Renewal was Motivated at Least in Part as Response to Her Exercise of Constitutional Rights*

In order to satisfy the third element of her *prima facie* case, the Plaintiff must not rely simply on the fact that the non-renewal decision was made after she taught *Siddhartha,* but rather a preponderance of the evidence must link her teaching of that book with the Board's decision. *Cockrel,* 270 F.3d at 1055 (quotation omitted). Stated another way, the third element requires the Plaintiff to demonstrate that there is a "causal connection" between her teaching *Siddhartha* and her non-renewal. *Arnett v.. Myers,* 281 F.3d 552, 560 (6th Cir.2002).

The Plaintiff has not concisely framed an argument in support of the third element of her *prima facie* case, so the Court will attempt to discern whether she has set forth sufficient evidence in support of the general arguments scattered throughout her brief, to create a genuine issue of material fact as to this issue.[FN27] Some of the facts that the Plaintiff alleges are tied to her teaching of *Siddhartha* have no link to that book except the temporal proximity of the events and, thus, are insufficient to support her argument.[FN28] *E.g.,* Doc. # 41 at 3 (alleging that she received low marks on her performance evaluations after the public controversy ensued about various books); 8-9 (asserting that her relationship with Wray deteriorated after October Board meeting), 20 (suggesting that Plaintiff's lesson plans were not an issue until after the

Siddhartha controversy). Some of the facts, however, possibly link the Plaintiff's teaching of *Siddhartha* to the Defendants' decision to not renew her teaching contract, to wit: Principal Wray stated at an English faculty meeting, immediately after the October Board meeting, that the Plaintiff was "on the hot seat" for parental complaints about *Siddhartha* and, further, according to the Plaintiff's testimony, Wray told her that he objected to her selection of *Siddhartha*, as well as to the discussions that went along with teaching the themes of that book.[FN29] Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 64-65; 74-75, 100-01.

FN27. The first 27 pages of the Plaintiff's brief (Doc. # 41) contain a detailed explanation of the facts. The remaining 13 pages comprise her argument, wherein she ends her discussion of her *prima facie* case after the section devoted to whether her non-renewal would chill future expression, skipping the third step, to wit: whether the alleged adverse employment action was motivated at least in part as a response to the exercise of her constitutional rights. *See id.* at 37.

FN28. The Plaintiff also seems to be arguing that she was singled out by the Principal for unnecessary criticism and monitoring. For example, she argues that the Principal unfairly criticized her alternative book assignment selection for *Siddhartha* (which was a book appropriate for 9-12 year olds, whereas her ninth grade students were primarily 14-15 years old), as being too elementary. Doc. # 41 at 10. The Plaintiff also argues that Wray instructed her to check with a superior before using any potentially controversial materials in the future and that such a requirement was not imposed on other members of the English department faculty. *Id.* at 12. Because these facts would arguably support a claim of improperly *regulating* First Amendment speech (a claim that the Plaintiff has not made in her Complaint), rather than supporting her claim that the Board did not renew her contract for the exercise of protected speech, the Court will not consider them in its analysis here.

FN29. As to Wray objecting to her teaching *Siddhartha*, as well as to her method of teaching that book, the Plaintiff testified as follows:

> *Plaintiff:* [Wray] verbally told me that ... he didn't like that I had done the [100 most challenged book project]. He didn't like that I had chosen *Siddartha.* He doesn't like the discussions that go along with the themes in all of those books going on in class, and that he intended to reign it in.
>
> *Counsel:* What discussions did he object to?
>
> *Plaintiff:* Which book do you want to talk about?
>
> *Counsel:* Pick one.
>
> *Plaintiff:* All right. Well, *Siddartha*, you're discussing issues of spirituality, Buddhism, romantic relationships, personal growth, familial relationships. We had discussions about all of that going on in class. Parents and Charles Wray objected.
>
> *Id.* (Evans-Marshall Dep.) at 100-01.

***16** In response, the Defendants argue that, as to the "hot seat" comment, the Plaintiff has presented no evidence to suggest that Wray was upset with her when he made this comment; rather, the public concern expressed at the October Board meeting had placed Plaintiff on the "hot seat" and the principal's comment was one of fact, not animosity. Doc. # 44 at 3. In further support of this conclusion,

the Defendants point out that Wray conducted an official written "observation" of the Plaintiff two weeks after the October Board meeting, in which he made no reference to the *Siddhartha* controversy and reflected only positive comments about the Plaintiff. Doc. # 31, Ex. C, pt. 2 at 5 (Nov. 13, 2001, Teacher Observation Log). Furthermore, despite the Plaintiff's allegations to the contrary, neither the Plaintiff nor the *Siddhartha* book were a point of any significant discussion at the November Board meeting; rather that meeting primarily focused on disgruntled parents' concerns over several junior high school library books.[FN30] Doc. # 37, Ex. # 1 (Nov. 26, 2001 Bd. Mtg. DVD; filed manually).[FN31] It was not until mid-December that Wray was first critical of the Plaintiff, in his second "observation" of her for that school year and for reasons unrelated to *Siddhartha.* Doc. # 1 ¶ 17.

FN30. In the Complaint, the Plaintiff alleges as follows:

> At the November 26, 2001, Board meeting, approximately 100 parents were in attendance to protest the presence of materials in classes and school libraries that the parents thought obscene.... At the meeting, parents presented a petition of 500 signatures calling for decency in education. The focus of the parents' concern was subject matter presented in Plaintiff's classes.
>
> Doc. # 1 ¶ 16.

FN31. The Defendants have filed manually with the Court a DVD of the November Board meeting. The Court has watched the entirety of this DVD and agrees with the Defendants' contention that this Board meeting was primarily focused on the junior high library book controversy. Only one parent made specific reference to the *Siddhartha* book, but not to the Plaintiff by name. This parent's main complaint was with the alternative book that had been assigned when requested, as being too elementary, that her daughter felt as if she had been punished for seeking an alternative assignment, and that the assignment for the alternative book was incomprehensible to both the student and the parent.

The Defendants further point to the fact that, contrary to the Plaintiff's unfounded assertions,[FN32] the administration consistently supported the Plaintiff's teaching of *Siddhartha,* as evidenced by Superintendent Zigler's comment at the October Board meeting noting that since the book was purchased by the District, its selection had nothing to do with an individual teacher. Doc. # 32, Attach. # 1 (Zigler Dep.) at 16-17. At that meeting and the November Board meeting, the Board also made it clear that it did not intend to pull the book from the curriculum, but offered parents the option of requesting an alternative reading assignment, if they desired. *Id.* at 23, 35, 67. The Defendants also point out that when questioned as to whether he or anyone else in the administration was aggravated with the Plaintiff for having made the *Siddhartha* assignment, Superintendent Zigler replied,

FN32. As support for her assertion that Principal Wray told her that he did not support her choice of *Siddhartha,* nor her teaching methodologies therefor, the Plaintiff offers her own deposition testimony. See Doc. # 31, Attach. # 1 (Evans-Marshall Dep.) at 64-65; 74-75; 100-01.

> Not at all.... [T]hese are our books, we've purchased these. I had a bigger issue with the middle school book that was brought up [at the Board meeting].... [W]hat did we miss here that we couldn't make a better selection of more appropriate reading material for middle school kids? There are many books out there. But *Siddhartha* had been in the district for years.

Id. at 68. Furthermore, at least one other teacher had taught the book in previous years, apparently without incident. Doc. # 33, Attach. # 1 (Wray

Dep.) at 53.

The Defendants continue their argument by pointing out that the Plaintiff's position is geared toward the principal's apparent stance on the *Siddhartha* assignment and controversy, but the Superintendent and the Board had to concur in the non-renewal decision and the Plaintiff has offered no evidence to indicate that their concurrence in that decision was in any way motivated by that curricular choice. *See* Doc. # 32, Attach. # 1 (Zigler Dep.) at 90-94 (stating that it was his understanding that Wray's nonrenewal recommendation was not in any way motivated by Plaintiff's curricular decisions).

***17** Upon consideration of the evidence pointed to by each of the parties, the Court concludes that the Plaintiff has not set forth a preponderance of the evidence that links her teaching of *Siddhartha* with the Board's decision to not renew her contract.[FN33] *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1055 (6th Cir.2001) ("[T]o survive defendants' motion for summary judgment, [the plaintiff] must present sufficient evidence to allow a reasonable factfinder to conclude, by a preponderance of the evidence, that her speech, at least in part, motivated the defendants to discharge her."). On the contrary, the evidence leans decidedly the other way, in indicating that the non-renewal decision was in no way motivated by the Plaintiff's teaching of *Siddhartha.*

> FN33. This is another way of saying that the Court has construed the evidence most strongly in favor of the Plaintiff and has concluded that there is no genuine issue of material fact, as to this issue.

Because the Plaintiff has not set forth a genuine issue of material fact as to her *prima facie* case of First Amendment retaliation, the Defendants' Motion for Summary Judgment (Doc. # 38) is SUSTAINED. Based on the Court's decision herein, it is unnecessary for the Court to address the issue of qualified immunity.

IV. CONCLUSION

The Defendants' Motion for Summary Judgment (Doc. # 38) is SUSTAINED. Judgment is to be entered on behalf of the Defendants and against the Plaintiff.

The above captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

S.D.Ohio,2008.
Evans-Marshall v. Board of Educ. of Tipp City Exempted Village School Dist.
Not Reported in F.Supp.2d, 2008 WL 2987174 (S.D.Ohio)

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Slip Copy, 2009 WL 4282086 (N.D.Cal.), 30 IER Cases 32
(Cite as: 2009 WL 4282086 (N.D.Cal.))

Only the Westlaw citation is currently available.

United States District Court, N.D. California,
San Jose Division.
June SHELDON, Plaintiff,
v.
BILBIR DHILLON, Maria Fuentes, Autumn Gutierrez, Richard Hobbs, Ronald J. Lind, Randy Okamura, And Richard Tanaka, in their individual and official capacities; Rosa G. Perez, in her individual and official capacities; Anita L. Morris, in her individual and official capacities; Michael L. Burke, in his individual and official capacities; Leandra Martin, in her individual and official capacities, Defendants.
No. C-08-03438 RMW.
Docket No. 26.

Nov. 25, 2009.

Benjamin Wyman Bull, David Jonathan Hacker, Kevin Trent Snider, Matthew Brown McReynolds, Nathan Wesley Kellum, Travis Christopher Barham , David French, for Plaintiff.

Louis A. Leone, Katherine A. Alberts, Kathleen Darmagnac, for Defendants.

ORDER ON DEFENDANTS' MOTION TO DISMISS

RONALD M. WHYTE, District Judge.

***1** Plaintiff June Sheldon ("Sheldon") brings this action under 28 U.S.C. § 1983 against the trustees of San Jose/Evergreen Community College District ("the District") and other District administrators (collectively "defendants") alleging violations of her rights under the First and Fourteenth Amendments to the Constitution. Defendants move to dismiss her claims, arguing that: (1) Sheldon's in-class speech was not protected by the First Amendment; (2) an equal protection claim cannot lie on the basis of a class of one in public employment; (3) as an at-will employee, Sheldon had no constitutional property interest in her employment; and (4) the District, nonetheless, afforded Sheldon due process. Sheldon opposes the motion to dismiss. For the reasons stated below, the court denies defendants' motion to dismiss as to plaintiff's first and second claims based upon alleged violations of the First Amendment and grants it as to plaintiff's third and fourth claims predicated upon alleged violations of the Fourteenth Amendment.

I. BACKGROUND

Sheldon received her bachelor's degree in molecular biology in 1975 and a master's degree in biology in 1978, both from San Jose State University. Between 1986 and 1993, she taught chemistry and biology in the Division of Math, Science, and Engineering at Evergreen Valley College, one of the two community colleges operated by the District. In 2004, she began teaching biology and microbiology at the other District-operated location, San Jose Community College ("SJCC"). During the Summer 2007 semester, Sheldon taught a course entitled Human Heredity. Around August 2, 2007, she received notice of a student complaint arising out of the class discussion on June 12, 2007 of Mendelian inheritance and the biological basis for homosexuality. After an internal investigation, on December 18, 2007 defendant Anita Morris, the District's Vice-Chancellor of Human Resources, sent Sheldon a letter informing her that the offer she had received to teach in the Spring semester was withdrawn, that she was removed form the adjunct seniority rehire preference list and that her employment was terminated as of that date, subject to final approval by the District Board of Trustees. Thereafter, the District approved the adverse action.

The facts of what actually occurred during the June 21, 2007 class are in significant dispute. However,

at the motion to dismiss stage, the court assumes that the facts alleged in the complaint are true. *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 930 (9th Cir.2008). What follows is Sheldon's version of what happened during the class and the investigation that followed as alleged in her complaint.

Sheldon's lecture on June 21, 2007 covered Mendelian inheritance, based on material in Chapter 4 of the course textbook, HUMAN GENETICS: CONCEPTS AND APPLICATIONS, by Ricki Lewis. Complaint ¶¶ 26-27. The class began with a short quiz concerning the previous day's material. *Id.* at ¶ 27. After the quiz a student asked Sheldon how heredity affects homosexual behavior in males and females. *Id.* at ¶ 28. That question was based on a quiz question, the material in the textbook, and Sheldon's previous discussion of the topic. *Id.* According to the complaint, Sheldon "answered the student's question by noting the complexity of the issue, providing a genetic example mentioned in the textbook, and referring students to the perspective of a German scientist." *Id.* at ¶ 29. Sheldon also noted that the German scientist (whose name, she later recalled, is Dr. Gunter Dörner) had "found a correlation between maternal stress, maternal androgens, and male sexual orientation at birth." *Id.* at ¶ 30. Sheldon also stated that she was unaware of Dr. Därner's finding a similar correlation for female sexual orientation. *Id.* She also mentioned that Dr. Därner's views were only one set of theories in the "nature versus nurture" debate. *Id.* Finally, Sheldon briefly described what the students would learn later in the course, that "homosexual behavior may be influenced by both genes and the environment." *Id.* at ¶ 32.

***2** In early August, defendant Leandra Martin ("Martin"), Dean of SJCC's Division of Math and Science e-mailed Sheldon regarding a student complaint. *Id.* at ¶ 36. On September 6, 2007, Sheldon met with Martin and others to discuss the complaint. *Id.* at ¶ 63. At that meeting, she was given a copy of the student complaint, which was neither signed nor dated. *Id.* at ¶ 65. The student's complaint states that during the June 21, 2007 class, Sheldon made "offensive and unscientific" statements, including that there "aren't any real lesbians" and that "there are hardly any gay men in the Middle East because the women are treated very nicely." Complaint Ex. 8. Around September 10, 2007, Sheldon received an e-mail recounting some of the events of the meeting, and noting that Sheldon would meet with full-time biology faculty to discuss some of the issues raised in the complaint. *Id.* at ¶ 74. Sheldon did agree at the meeting to confer with the biology faculty and discuss the topic of mainstream scientific thought. *Id.* at ¶ 75.

On October 19, 2007, Martin sent Sheldon an e-mail offering her a teaching assignment for the Spring 2008 semester, without mentioning the student complaint. *Id.* at ¶ 81. Sheldon responded to the e-mail and accepted the class assignment. *Id.* at ¶ 82. As a result of that teaching assignment, Sheldon determined that she would not need to seek alternate employment. *Id.* at ¶ 82.

On December 6, 2007, Martin issued a letter stating that she had investigated the allegations in the student complaint. *Id.* at ¶ 83. The letter also stated that Martin had spoken with Sheldon, as well as some members of SJCC's biology faculty regarding the statements attributed to Sheldon in the complaint. *Id.* at ¶ 86. Martin also wrote that she had concluded that Sheldon was teaching misinformation as science, and that the statements were grievous enough to warrant withdrawing her course assignments for the spring semester. *Id.* at ¶ 89.

On December 18, 2007, defendant Anita Morris, Vice Chancellor of Human Resources for SJCC, sent Sheldon a letter stating that because of the student complaint, Sheldon had been removed from teaching status. The letter also stated that District had the right to terminate any adjunct employee without cause, and that Sheldon was "hereby terminated, subject to final approval of the Board of Trustees." *Id.* at ¶ 100. After some additional correspondence, the Board of Trustees approved the

termination of Sheldon's employment on February 12, 2008. *Id.* at ¶¶ 101-12.

On July 16, 2008, Sheldon filed a complaint alleging violations of her First and Fourteenth Amendment rights under the Constitution. Her first cause of action is for retaliation in violation of the First Amendment and claims that defendants terminated her employment based on her First Amendment protected answer to a student's in-class question. Complaint ¶¶ 137-41. Her second cause of action claims that defendants deprived her of First Amendment rights by discriminating against her protected speech based on its content and viewpoint. Sheldon's third and fourth causes of action allege violations of the Fourteenth Amendment's guarantees of equal protection and due process, respectively. Defendants move to dismiss all of Sheldon's claims. The court will consider each in turn.

II. ANALYSIS

A. First Amendment Retaliation

***3** Sheldon's First Amendment claim presents the question of what constitutional protection, if any, is afforded to classroom instruction.

Defendants rely heavily on *Garcetti v. Ceballos,* 547 U.S. 410 (2006), which they contend compels a determination that a public school teacher's classroom instruction does not constitute protected speech within the meaning of the First Amendment because when engaging in classroom instruction, the teacher is performing her duties as a public employee and is not speaking as a private citizen.

The speech at issue in *Garcetti* was a memorandum in which Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office, described his concerns about possible "serious misrepresentations" in an affidavit used to obtain a search warrant. 547 U.S. at 413-415. After submitting the memorandum to his superiors, Ceballos asserted that he was subject to adverse employment actions in retaliation for engaging in speech protected by the First Amendment. The district court granted a motion for summary judgment in favor of Ceballos's supervisors in the District Attorney's office and the County on the basis of qualified and sovereign immunity, respectively. The Ninth Circuit reversed and remanded, holding that neither the individual nor the county defendants were immune and that, under existing Ninth Circuit law as set forth in *Roth v. Veteran's Administration of the United States,* 856 F.2d 1401 (9th Cir.1988), Ceballos' speech was protected, for summary judgment purposes, by the First Amendment. *Ceballos v. Garcetti,* 361 F.3d 1168, 1180 (9th Cir.2004). The Supreme Court reversed and clarified prior case law that the only speech that is protected is speech offered in the speaker's citizen capacity, as opposed to in his or her capacity as an employee. The Court 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 employee discipline." *Garcetti,* 547 U.S. at 421.

The Court, however, expressly reserved the question of whether its holding extends to scholarship or teaching-related speech. The majority opinion notes:

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

Id. at 425. Thus, Garcetti by its express terms does not address the context squarely presented here: the First Amendment's application to teaching-related speech. For that reason, defendants' heavy reliance on *Garcetti* is misplaced. *See Lee v. York County Sch. Div.,* 484 F.3d 687, 695 n. 11 (4th Cir.2007)

(recognizing that *Garcetti* explicitly did not decide whether its public employee speech analysis would apply in the same manner to speech related to teaching, thus applying existing circuit law).

***4** Acknowledging that the Ninth Circuit has not determined the scope of the First Amendment's application to classroom teaching, plaintiff urges the court to follow the case law of other circuits, specifically the Sixth Circuit and the Second Circuit have recognized that the First Amendment protects a teacher's classroom speech. *Evans-Marshall v. Board of Educ. of the Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223 (6th Cir.2005) (applying *Pickering-Connick* [FN1] balancing test to determine whether teacher's classroom speech was protected, and affirming denial of motion to dismiss First Amendment retaliation claim); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036 (6th Cir.2002) (recognizing that classroom speech touching on a matter of public concern is constitutionally protected); *Hardy v. Jefferson Comty. Coll. and KY Comty. and Technical Coll. Sys.*, 260 F.3d 671 (6th Cir.2001) (college instructor's in-class speech relating to matters of public concern is constitutionally protected); *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 598 (2d Cir.1990) (finding college officials not entitled to qualified immunity because punishment of professor based on classroom discourse would violate the First Amendment).

> FN1. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

In light of the *Garcetti* Court's reluctance to apply its public-employee speech rule in the context of academic instruction, the court must apply the existing legal framework for analyzing teacher's instructional speech. The Ninth Circuit has previously recognized that teachers have First Amendment rights regarding their classroom speech, albeit without defining the precise contours of those rights. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 972 (9th Cir.1996); *see also Cal. Teachers Assn. v. State Bd. of Educ.*, 271 F.3d 1141, 1148 (9th Cir.2001) (recognizing that neither the Ninth Circuit nor the Supreme Court had "definitively resolved whether and to what extent a teacher's instructional speech is protected by the First Amendment"). In *Cal. Teachers Assn.*, the Ninth Circuit assumed both that instructional speech deserves some First Amendment protection and that regulation of such speech is subject to the test set forth by the Supreme Court in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), a case involving regulations on student speech. 271 F.3d at 1148-49. The court noted that several tests have been applied by the various circuits, but cited with approval case law applying *Hazelwood* in the context of a teacher's instructional speech. *Id.* at 1149 n. 6. Under this standard, a teacher's instructional speech is protected by the First Amendment, and if the defendants acted in retaliation for her instructional speech, those rights will have been violated unless the defendants' conduct was reasonably related to legitimate pedagogical concerns. *Id.* at 1149, citing *Hazelwood*, 484 US. at 273.

As noted, the precise contours of the First Amendments' application in the context of a college professor's instructional speech are ill-defined and are not easily determined at the motion to dismiss stage. Too many facts remain to be discovered and developed before the parties and the court may dispositively address whether plaintiff's rights under the First Amendment were violated by the defendants' actions. The court cannot determine, at the pleadings stage, whether the defendants' actions were reasonably related to legitimate pedagogical concerns. To the extent that the defendants took action against plaintiff because of her instructional speech to her class, and assuming without deciding at this stage of the proceedings that the instructional speech was within the parameters of the approved curriculum and within academic norms-i.e., that the defendants actions were not reasonably related to legitimate pedagogical concerns-then the complaint has stated a claim for relief under 42 U.S.C. § 1983. Therefore, the motion to dismiss the first claim is denied.

B. First Amendment Viewpoint Discrimination

***5** Defendants argue that Sheldon's First Amendment claim for viewpoint discrimination does not state a claim for the same reason as her retaliation claim. The court's analysis of the first claim essentially addresses the second claim also. Therefore, the motion to dismiss the second claim is denied.

C. Fourteenth Amendment Equal Protection

Sheldon's equal protection claim is apparently based on the alleged individual mistreatment of her. *See* Complaint ¶¶ 147-51. Defendants argue that this is an equal protection claim in the public employment context based on a class of one, which is foreclosed by *Engquist v. Oregon Dept. of Agriculture*, 128 S.Ct. 2146 (2008). Plaintiff raises no written opposition to this argument, and the court finds that her claim is indeed barred by *Engquist*. The motion to dismiss the third claim for relief is granted.

D. Fourteenth Amendment Due Process

Sheldon's fourth claim alleges that SJCC denied her due process of law in terminating her employment. Defendants move to dismiss, arguing that: (1) as an at-will employee Sheldon had no constitutionally cognizable property right in her employment; and (2) she was afforded due process before being terminated.

In order to have a constitutional property interest in a particular benefit, a person "must have more than an abstract need or desire for it ... [a person] must have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). A constitutionally sufficient claim of entitlement, furthermore, must stem from "an independent source such as state-law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* In California, public employment is held by statute, not contract. *Miller v. State of California*, 18 Cal.3d 808, 813 (Cal.1977). Sheldon qualifies as a temporary employee under Cal. Educ.Code § 87482.5, and therefore could be terminated at SJCC's discretion under Cal. Educ.Code § 87665. Under California law, Sheldon therefore had no constitutional property interest in her employment, and no due process claim lies for her termination. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283 (1977); *Portman v. County of Santa Clara*, 995 F.2d 808, 905 (9th Cir.1993).[FN2] Therefore, Sheldon's fourth claim for relief fails.

> FN2. Even though Sheldon could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire her, she may nonetheless establish a claim to reinstatement if the decision not to rehire her was made by reason of her exercise of constitutionally protected First Amendment freedoms. *Mt. Healthy*, 429 U.S. at 283-84.

III. ORDER

For the reasons stated above, the court:

(1) denies defendants' motion to dismiss as to plaintiffs' first and second claims based upon the alleged violation of her First Amendment rights; and

(2) grants defendants' motion to dismiss as to plaintiffs' third claim based upon the alleged violation of her equal protection rights under the Fourteenth Amendment and her fourth claim asserting deprivation of due process under the Fourteenth Amendment. The dismissals are with prejudice as any attempt to amend would be futile.

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Slip Copy, 2010 WL 768856 (S.D.Cal.)
(Cite as: 2010 WL 768856 (S.D.Cal.))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. California.
Bradley JOHNSON, Plaintiff,
v.
POWAY UNIFIED SCHOOL DISTRICT, et al., Defendants.
No. 07cv783 BEN (NLS).

Feb. 25, 2010.

Charles Salvatore Limandri, Law Offices of Charles S. Limandri, Rancho Santa Fe, CA, Robert J. Muise, Ann Arbor, MI, for Plaintiff.

Jack M. Sleeth, Jr., Paul Vincent Carelli, IV, Stutz Artiano Shinoff and Holtz, San Diego, CA, for Defendants.

DECISION GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT and DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ROGER T. BENITEZ, District Judge.

***1** 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? On undisputed evidence, this Court holds that it may not.

Courts should not quickly intervene in the daily operation of schools and school systems, for that task is committed primarily to local school boards. However, in the proper case, federal courts "have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). " 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' " *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)). Because it has been clear for over 90 years that teachers do not lose their constitutional rights inside the schoolhouse gate, and that government may not squelch one viewpoint while favoring another, the Poway Unified School District violated Plaintiff's rights when it insisted that Plaintiff remove his two classroom banners.

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. Fostering diversity, however, does not mean bleaching out historical religious expression or mainstream morality. By squelching only Johnson's patriotic and religious classroom banners, while permitting other diverse religious and anti-religious classroom displays, the school district does a disservice to the students of Westview High School and the federal and state constitutions do not permit this one-sided censorship.

The case is before the Court on cross-motions for summary judgment. The Plaintiff is a high school math teacher, Bradley Johnson. Johnson's Amended Complaint seeks summary judgment on his claims under the First Amendment of the U.S. Constitution and under Article I, Sections 2 and 4 of the California Constitution. He seeks a court order requiring

the school district to permit re-hanging of the banners. He does not seek money damages (other than nominal damages). The Defendants are the Poway Unified School District, the Principal of Westview High School (where Johnson teaches), the Superintendent and Assistant Superintendent, and the members of the district board of education. The individual Defendants are sued in their official and individual capacities.

***2** For the reasons that follow, summary judgment is granted in favor of Plaintiff and against the several Defendants.

I. MOTION FOR SUMMARY JUDGMENT STANDARD

The legal standards to be applied to a motion for summary judgment are well known. Summary judgment is appropriate where the record demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Farrakhan v. Gregoire*, 590 F.3d 989, 1003-04 (9th Cir.2010).

II. FACTS

The facts are largely undisputed.

Johnson is employed as a public high school math teacher. He has taught math to students in the Poway Unified School District for 30 years and is he is a well-respected teacher. He currently is teaching at Westview High School, a school within the Poway Unified School District. Defendant Poway Unified School District is a public school entity established pursuant to California law. Defendant Kastner is the Principal of Westview High School. Defendants Phillips and Chiment are the Superintendent and Assistant Superintendent, respectively, of the Poway Unified School District. The remaining Defendants, Mangum, Vanderveen, Patapow, Gutschow, and Ranftle, are members of the Board of Education for the Poway Unified School District.

At Westview High School, Johnson is assigned a particular classroom for his math classes. He uses the same classroom for extra-curricular and non-curricular activities. Over the last two decades, Johnson has continuously hung banners on the wall of his assigned classrooms. Johnson purchased and displayed the banners using his own money. Throughout the many years that the banners hung on the wall of Johnson's assigned classroom, there were no objections to the presence or messages of the banners from students, parents, or school administrators-until January 23, 2007. *See* Exhibit D, Defendants' Exhibit List in Support of Motion for Summary Judgment (hereinafter "Defs' Ex. List") (letter from school district to Johnson regarding reasons for removal of banners).

Each banner is approximately seven feet wide and two feet tall. The banners have no pictures or symbols but are striped in red, white, and blue and set forth famous national phrases. One banner contains the following four phrases: "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace On Thee." This banner has hung in Johnson's assigned classrooms for 25 years.

The second banner quotes from the Declaration of Independence, "All Men Are Created Equal, They Are Endowed By Their Creator." "Creator" is in all uppercase letters. This banner has hung in Johnson's classroom for 17 years. The banners occupy wall space with numerous photographs of nature scenes, national parks, and posters of calculus solutions.

It is undisputed that Johnson did not hang the banners as part of the curriculum he teaches, nor did he use the banners during any classroom sessions or periods of instruction. Rather, Johnson hung his banners pursuant to a long-standing Poway Unified School District policy, practice, and custom of per-

mitting teachers to display personal messages on their classroom walls.

***3** For at least the three decades Johnson has taught, Poway Unified School District has maintained a policy, practice, and custom of giving teachers discretion and control over the messages displayed on their assigned classroom walls. Teachers are permitted to display in their classrooms various messages and items that reflect the individual teacher's personality, opinions, and values, as well as messages relating to matters of political, social, and religious concerns so long as these displays do not materially disrupt school work or cause substantial disorder or interference in the classroom. Because of this policy, practice, and custom, teachers have used their classroom walls as an expressive vehicle to convey non-curriculum related messages.

Other teachers at the four high schools in the Poway Unified School District, including Westview High School, display in their classrooms non-educational and non-curricular messages such as:

-a 35 to 40-foot long string of Tibetan prayer flags with writings in Sanskrit and images of Buddha. Ex. 24-26, Plaintiff's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment (hereinafter "Ex. ___, PUMF"); Dep. of Brickley at 87:8-18, Ex. 5, PUMF.

-a large poster of John Lennon and the lyrics to the song "Imagine":

> 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 that someday you'll join us, And the world will be as one ...
>
> Ex. 24, PUMF (emphasis added).

-a poster of Hindu leader, Mahatma Gandhi. Ex. 47, PUMF.

-a poster of Hindu leader, Mahatma Gandhi's "7 Social Sins":

> Politics without principle
>
> Wealth without work
>
> Commerce without morality
>
> Pleasure without conscience
>
> Education without character
>
> Science without humanity
>
> Worship without sacrifice. Ex. 48, PUMF.

-a poster of Buddhist leader, the Dali Lama. Ex. 49, PUMF.

-a poster that says: "The hottest places in hell are reserved for those who in times of great moral crisis, maintain their neutrality." Ex. 151, PUMF.

-posters of Muslim minister, Malcolm X. Ex. 50-51, PUMF.

-a Greenpeace poster that says: "Stop Global Warming." Ex. 64, PUMF.

-posters of rock bands Nirvana, Bruce Springsteen, and the Beatles. Ex. 52-56, PUMF.

-posters of professional athletes and sports teams. Ex. 74-80, PUMF.

-a poster of the movie "Monty Python's Quest for the Holy Grail." Ex. 86, PUMF.

-"Day of Silence" posters. Ex. 15, PUMF.

-bumper stickers that say: “Equal Rights *Are Not* Special Rights,” “Dare to Think for Yourself,” and “Celebrate Diversity.” [FN1] Ex. 16, PUMF.

> FN1. 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.

-a Libertarian Party poster. Ex. 35, PUMF.

***4** -a poster with a large peace sign and the word “peace” in several languages. Ex. 37, PUMF.

-a mock American flag with a peace sign replacing the 50 stars and appearing to be six feet wide and four feet tall. Ex. 39, PUMF.

-an anti-war poster that asks: “How many Iraqi children did we kill today?” Ex. 41, PUMF.

-a pro-defense poster of a Navy aircraft carrier that says: “Life, Liberty and the Pursuit of All Who Threaten it” and appearing to be seven feet wide and four feet tall. Ex. 42, PUMF.

-posters of civil rights advocate Martin Luther King, Jr. Ex. 45 & 47, PUMF.

-a large poster that says: “Zero Population Growth.” Ex. 152, PUMF.

-a large poster of an American flag with the motto: “United We Stand.” Ex. 57, PUMF.

-a large poster of an American flag that says: “... life, liberty, and the pursuit of happiness.” Ex. 58, PUMF.

-flags with the historical political motto: “Don't tread on me.” Ex. 62 & 63, PUMF.

-non-student artwork. Ex. 81, PUMF.

-life-sized cartoon characters. Ex. 89 & 93, PUMF.

-photographs and inspirational sayings. Ex. 69-73, PUMF.

Teachers control the messages conveyed by their classroom displays. Johnson's banners have caused no disruption or interference in his classroom or elsewhere in the school. Likewise, the banners have not interfered with the basic educational mission of the school district.

In fact, over the 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.

Sometime in the fall of 2006, another math teacher, who may have disagreed with Johnson over pedagogy, asked Westview High School Principal Kastner why the banners were permitted. Kastner took time considering the matter and sought direction from district administrators. Assistant Superintendent Chiment was assigned the task of investigating the banners and reporting to the school board. The full school board approved the decision to order Johnson to remove his classroom banners. Chiment testified that none of the individual phrases on the banners would be a problem, rather it was the combined influence that “over-emphasized” God. Chiment also testified that the problem was that the phrases were taken out of their original contexts. Chiment directed that a full copy of the Declaration of Independence and pictures of U.S. coins be delivered to Johnson so that Johnson could place them on the wall instead of his banners. Johnson declined. Johnson offered to post for display the full texts from which each of the banner phrases came, around the banners. Chiment disapproved. Dep. of Chiment at 134:24 to 135:6, Ex. E, and Dep. of Johnson at 128:7 to 133:21, Ex. F, Defs' Ex. List.

***5** On January 23, 2007, Kastner ordered Johnson to remove the banners, telling Johnson the banners were impermissible because they conveyed a Judeo-Christian viewpoint. Dep. of Kastner at 137:13-21, Ex. 4, PUMF; Dep. of Chiment at 278:10-13, Ex. 3, PUMF. Defendants singled out Johnson for discriminatory treatment because of the viewpoint of his message. Deputy Superintendent, Dr. John P. Collins, testified about the policy permitting high school teachers to display personal messages. Dep. of Collins, Ex. 2, PUMF. Collins stated that neither the display of Tibetan prayer flags nor the display of the lyrics of Lennon's "Imagine" appeared to violate the Poway Unified School District's policy on posting controversial issues. *Id.* at 90:1 to 95:25. Posters of the Dalai Lama, Mahatma Ghandi, and Ghandi's "Seven Deadly Sins" are also permissible under the policy. Dep. of Chiment at 205:11 to 208:7, Ex. 3, PUMF. Defendants did not claim that Johnson's banners caused disruption or disorder in the school, or that they interfered with the curriculum. Dep. of Chiment at 49:23 to 51:14 & 276:12-25, Ex. 3, PUMF; Dep. of Kastner at 85:2 to 86:11, Ex. 4, PUMF.

Johnson wants to display the banners in his classroom; however, Defendants have prohibited him from doing so. Had Johnson not complied with Defendants' order to remove the banners, Johnson would have suffered adverse employment consequences. Johnson continues to teach his assigned mathematics curriculum.

III. ANALYSIS

"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 Indep. Cmty. School Dist.*, 393 U.S. 503, 512, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

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.

A. THE FREE SPEECH CLAIMS

Johnson moves for summary judgment on his First Claim for Relief, that the Defendants violated his First Amendment free speech rights protected by the United States Constitution. The First Amendment states: "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. Similarly, Johnson's Fourth Claim for Relief is that Defendants violated his free speech rights protected by the California Constitution. Article 1, Section 2(a) of the California Constitution 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.

***6** Before discussing these contentions it is worth noting that Johnson's two banners clearly constitute speech. *Hill v. Colorado*, 530 F.3d 703, 715 (2000) (sign displays are protected by the First Amendment). Moreover, there is no dispute that Johnson's speech has been squelched by the Defendants in that Johnson was ordered to remove the banners and that Johnson has complied with that directive. Defendants agree that public school teachers have First Amendment rights and that the banners constitute speech for purposes of the First Amendment. On the other hand, Defendants do not agree about when or where a high school teacher may exercise his or her First Amendment rights.

1. The Constitution Permits Latitude in Recognizing Religion

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. "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 96 L.Ed. 954 (1952). As the Supreme Court has acknowledged, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Van Orden v. Perry*, 545 U.S. 677, 686, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)).

The incidental government advancement of religion is permissible. Government speech "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. 690. "Our precedents plainly contemplate that on occasion some advancement of religion will result from government action." *Lynch*, 465 U.S. at 683 (American history is replete with official invocation of Divine guidance in pronouncements of Founding Fathers and government leaders). "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. Eradicating such references would sever ties to a history that sustains this Nation even today." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 35-36, 124 S.Ct. 2301, 159 L.Ed.2d 98 (O'Connor, J., concurring). The Constitution "permits government some latitude in recognizing and accommodating the central role religion plays in our society.... Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious." *County of Allegheny v. ACLU*, 492 U.S. 573, 657, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (Kennedy, J., concurring and dissenting).

In the case at bar, according to the undisputed evidence presented, the Poway Unified School District ran afoul of the First Amendment. One justification was that the district feared violating the Establishment Clause. The fear was not justified. There is no realistic danger that an observer would think that the Poway Unified School District was endorsing a particular religion or a particular church or creed by permitting Johnson's personal patriotic banners to remain on his classroom wall. Any perceived endorsement of a single religion is dispelled by the fact that other teachers are also permitted to display other religious messages and anti-religious messages on classroom walls.

***7** *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), is applicable here: "[w]e have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded ... there would have been no realistic danger that the community would think that the [school] District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental."

2. Public School Teacher Speech

Public school teachers are unique speakers.[FN2] Teachers are hired for their expertise and ability to speak and convey knowledge to their students. Yet, not all of their time during the school day involves delivering curriculum. And sometimes, while delivering curriculum, they express opinions that are personal and not as speech transmitted from the government. In *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), the Supreme Court leaves open the question whether a government employee-speech paradigm applies to teaching, noting, "[w]e need not ... decide whether

the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." 547 U.S. at 425. It may be that the selection of school curriculum is government speech. *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003, 1016 (9th Cir.2000), *cert. denied*, 532 U.S. 994, 121 S.Ct. 1653, 149 L.Ed.2d 636 (2001). But to assert that because Johnson was a teacher, he had no First Amendment protections in his classroom for his own speech would ignore a half-century of other Supreme Court precedent.

> FN2. "To regard teachers-in our entire educational system, from the primary grades to the university-as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government."
>
> *Wieman v. Updegraff*, 344 U.S. 183, 196-97, 73 S.Ct. 215, 97 L.Ed. 216 (1952) (Frankfurter, J., concurring).

a. *Teachers Maintain Free Speech Rights at School*

In 1969, the Supreme 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." *Tinker* 393 U.S. at 506 (emphasis added). In the forty years since *Tinker*, the Supreme Court has neither diminished the force of *Tinker's* observation, nor in any other way cabined the First Amendment speech of public school teachers. In fact, the Court recently reaffirmed *Tinker* 's pronouncement. *See Morse v. Frederick*, 551 U.S. 393, 403, 127 S.Ct. 2618, 168 L.Ed.2d 290 (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.") (emphasis added).

b. *Student Speech Has Required Some Restrictions*

The Court has permitted limits on student speech. For example, it is permissible to restrict student speech that "materially and substantially interfere[s]" 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, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). It may be banned where it "incite[s] to imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Student speech that promotes illegal drug use may be silenced. *Morse*, 551 U.S. at 410. And student speech in an official school newspaper may be regulated, so long as it is regulated on viewpoint neutral terms. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).

c. *Teachers Enjoy Greater Freedom of Speech*

***8** However, the speech silenced by Defendants in this case is speech by Johnson, a teacher. In the school setting there is a qualitative lop-sided difference between the two classes of speakers (students vs. teachers). *Bethel School Dist.*, 478 U.S. at 682 ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."); *Morse*, 551 U.S. at 410-11 (Thomas, J., concurring) (describing history of American education where teachers had wide discretion to make rules and ensure student silence). Four decades ago, the Supreme Court brushed aside the thought that teachers lose free speech rights. "It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees." *Epperson*, 393 U.S. at 107 (citation omitted) (holding public school teacher maintained First Amendment right to communicate in the classroom his disagreement with state's required curriculum on evolution). "[W]e do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom." *Tinker*, 393 U.S. at 513.

The decisions upon which Defendants rely do not undercut *Tinker* 's robust observation that teachers do not forfeit their constitutional free speech rights while at school. Since Johnson retains First Amendment speech rights as a public school teacher, a First Amendment forum analysis is the next step.

3. First Amendment Forum Analysis

To determine the extent that free speech rights may be exercised on government property at Westview High School, this Court engages in a First Amendment forum analysis. *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir.2008), *cert. denied*, --- U.S. ----, 129 S.Ct. 56, 172 L.Ed.2d 24 (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."). "The 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 Def. & Educ. Fund, Inc.* ., 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Hills v. Scottsdale Unified School Dist. No. 48*, 329 F.3d 1044, 1048 (9th Cir.2003), *cert. denied*, 540 U.S. 1149, 124 S.Ct. 1146, 157 L.Ed.2d 1042 (2004) (To analyze First Amendment free speech claim, courts first consider what type of forum the school District has created).

Contrary to Defendants' assertions, the *Pickering* balancing test for government employee speech is the wrong test to apply in the present context. FN3 Applying a balancing test departs from the First Amendment forum analysis described in *Hazelwood* and typically applied by the Ninth Circuit in school speech cases. *See e.g.*, *Truth v. Kent School Dist.*, 542 F.3d 634, 648-49 (9th Cir.2008) (applying forum analysis), *cert. denied*, --- U.S. ----, 129 S.Ct. 2889, --- L.Ed.2d ---- (2009); *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir.2007), *cert. denied*, --- U.S. ----, 128 S.Ct. 882, 169 L.Ed.2d 726 (2007) (applying forum analysis); *Hills*, 329 F.3d at 1048-50 (applying forum analysis); *but see Downs*, 228 F.3d at 1009-11 (declining to apply forum analysis because curricular speech at issue belonged to the school district).

> FN3. *See also Pleasant Grove City, Utah v. Summum*, ---U.S. ----, ----, 129 S.Ct. 1125, 1139, 172 L.Ed.2d 853 (2009) (Stevens, J., concurring) ("To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit.").

a. *Three Forum Categories*

***9** "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 traditional 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 'when the government intentionally dedicates its property to expressive conduct.' " *Id.* (citations omitted). In a public or designated public forum, restrictions on speech are subject to strict scrutiny. *Id.*

"At the opposite end of the fora spectrum is the non-public forum. The non-public forum is 'any public property that is not by tradition or designation a forum for public communication.' " *Id* . (citations omitted). In a non-public 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 one speaker's view. *Id.* (citations omitted).

b. *The Classroom Walls of Poway's Westview High School Constitute a Limited Public Forum for Faculty Speech*

To determine the type of forum applicable to Johnson's classroom wall, the nature of the government property involved must be examined. Judging from the undisputed facts presented, Johnson's classroom walls constitute what is best described as a *limited public forum* (a sub-category of a designated public forum) because the Poway Unified School District has intentionally opened its high schools to expressive conduct by its faculty on non-curricular subjects. *Flint,* 488 F.3d at 831. "[A] government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove,* 129 S.Ct. at 1132. This conclusion is based upon undisputed facts that Defendants have a long-standing policy of permitting its teachers to express ideas on their classroom walls. Defendants' policy grants its teachers discretion and control over the messages displayed on their classroom walls. Defendants' 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. Defendants' 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 Defendants' long-standing policy, a teacher's classroom walls serve as a limited public forum for a teacher to convey non-curriculum messages.

c. *Speech Restrictions Must be Viewpoint Neutral*

When a forum for speech is created, such as at Poway's Westview High School, government regulation of speech must be viewpoint neutral. "[O]nce a government has opened a limited forum, it must respect the lawful boundaries it has itself set." *Flint,* 488 F.3d at 831 (quoting *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1993)). A school district "may not exclude speech where its distinction is not reasonable in light of the purposes served by the forum, nor may the government discriminate against speech on the basis of its viewpoint." *Id.* (citations omitted); *see also Pleasant Grove,* 129 S.Ct. at 1132 ("In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral"). Viewpoint neutrality requires that a school administration not favor one speaker's message over another. When "government has excluded perspectives on a subject matter otherwise permitted by the forum," the government is discriminating on the basis of viewpoint. *Faith Ctr. Church Evangelistic Ministries v. Glover,* 480 F.3d 891, 912 (9th Cir.2007), *cert. denied,* 552 U.S. 822, 128 S.Ct. 143, 169 L.Ed.2d 30 (2007).

***10** Here, the Poway Unified School District opened a *limited public forum* in which its teachers were permitted to exercise free speech. According to Deputy Superintendent, John P. Collins, teachers are allowed to express themselves through the posting of banners and posters and flags and other items on the classroom walls. Dep. of Collins at 38-40, Ex. 2, PUMF. By designing, buying, hanging, and maintaining the two banners, Johnson was engaged in First Amendment expression-speech otherwise permitted by the district policy. When Defendant Westview High School Principal Kastner ordered Johnson to remove the banners, she and the school district were silencing speech. When Principal Kastner ordered Johnson to remove the banners "because they conveyed a Judeo-Christian viewpoint," Kastner was impermissibly squelching speech based upon the viewpoint of the speaker. The undisputed facts show that Kastner's decision was not made pursuant to a content-neutral reason nor within the boundaries the school district had 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, 124 S.Ct. 2175, 158 L.Ed.2d 732 (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 . Judge Fletcher distills *Cornelius* as 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." *Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 971 (9th Cir.2002) .

Teachers other than Johnson have been permitted to use the classroom wall forum to speak on a wide variety of secular and religious topics. Topics permitted on classroom walls have included religious speech from a Buddhist viewpoint in the form of Tibetan prayer flags with writings in Sanskrit and an image of Buddha. Other permitted religious speech includes the Hindu viewpoint in the form of posters of Gandhi and the Hindu "seven social sins." Anti-religious speech is also permitted on classroom walls in the form of a poster with lyrics of John Lennon's song "Imagine" ("Imagine there's no Heaven, it's easy if you try, no hell below us, above us only sky ... nothing to kill or die for, and no religion, too...."). Pro-war and anti-war topics have been permitted on classroom walls. Nationalistic and global messages find room on walls. Other patriotic posters remain in place. Some of the speech in the form of posters are small. Many of the posters are large. The display of Tibetan prayer flags spans the 35-40 foot width of a classroom. Faculty speech is not confined to a particular physical space such as on a bulletin board or file cabinet.

d. *Johnson's Speech Was Squelched Because of its Viewpoint*

***11** Only Johnson's speech has been singled out for suppression because of its message. "In cases where restriction to the forum is based solely on the group's religious viewpoint, the restriction is invalid." *Truth,* 542 F.3d at 650. School Principal Kastner told Johnson the banners had to be removed because they conveyed a "Judeo-Christian viewpoint." School District Assistant Superintendent Chiment followed up Kastner's order with a letter explaining that the banners had to be removed from the classroom because they conveyed "a particular sectarian viewpoint." Deputy Superintendent Collins testified that Chiment's decision and letter to Johnson were discussed with the school district Superintendent at a school district cabinet meeting and that all school officials in attendance agreed with the decision. Dep. of Collins at 58:3-59:3, Ex. 2, PUMF.

The banners communicate the existence of God in our nation's history and culture. The banners com-

municate fundamental national historical messages. They celebrate important shared American historical experiences. One banner contains an excerpt from the Declaration of Independence, this Nation's most cherished symbol of liberty, observing: "All men are created equal, they are endowed by their Creator" with unalienable rights. Another banner repeats the official motto adopted by the Congress of the United States: "In God We Trust." The phrase, "God Bless America," is often spoken by Presidents of the United States, as was the case recently on January 27, 2010 where President Barack H. Obama concluded his State of the Nation address with "God bless you, and God Bless America." "God Bless America" is also a well known popular American song title of the twentieth century, written by Irving Berlin and performed most famously by Kate Smith. It is routinely sung by sports fans during the seventh inning stretch at New York Yankees baseball games since the attacks of September 11, 2001. *See also, Seidman v. Paradise Valley Unified School Dist.*, 327 F.Supp.2d 1098, 1112 (D.Ariz.2004) ("The phrase 'God Bless America,' has historic and patriotic significance."). "God shed His grace on thee" comes from the popular patriotic song and century-old poem by Katharine Lee Bates: "America, the Beautiful," a piece most recently sung at the Super Bowl football game on February 7, 2010. The phrase, "One Nation Under God," is part of the Pledge of Allegiance. The Pledge is recited every morning in the Poway Unified School District. Dep. of Collins at 28:8-16, Ex. 2, PUMF.

Each phrase, by itself, is an acceptable message for Johnson's classroom, according to Principal Kastner. In fact, each individual phrase was not only permitted as a message, each individual phrase was an encouraged message, in the Principal's view. Kastner testified in her deposition that: "[t]he issue was never these phrases in isolation, and these phrases were all not only permitted but encouraged.... It's taking them out of context that was the issue." Dep. of Kastner at page 91:7-11, Ex. N, Defendants' Supplemental Exhibits in Support of Opposition to Plaintiff's Motion for Summary Judgment.

***12** Whether correctly understood as simply historic and patriotic expressions [FN4] or non-proselytizing religious sayings, Defendants acted based upon their perception that the message conveyed a Judeo-Christian viewpoint. By squelching Johnson's patriotic and religious viewpoint while permitting speech promoting Buddhist, Hindu, and anti-religious viewpoints, Defendants clearly abridged Johnson's constitutional free speech rights. "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828; *R.A. V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint.).

> FN4. While invalidating a state-prescribed official prayer for students, the Supreme Court saw no First Amendment problem with requiring public school children to recite the Declaration of Independence with its references to God or sing anthems which include professions of faith in a Supreme Being-describing recitations as "patriotic or ceremonial occasions." *See Engel v. Vitale*, 370 U.S. 421, 435 n. 21, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) ("There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Diety or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions....").

In this sense, Johnson's case is similar to the de-

cisions of *Rosenberger*, *Lamb's Chapel*, and *Good News Club v. Milford Central School*, 533 U.S. 98, 107-08, 121 S.Ct. 2093, 150 L.Ed.2d 151 (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 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 a subject 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 at the same time permitting non-religious 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 exercising his free speech rights on subjects that were otherwise permitted in the limited public forum created by Defendants. "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Tinker*, 393 U.S. at 511. Consequently, Johnson has proved a clear ongoing violation of his First Amendment free speech and free exercise rights. *See, e.g.*, *Truth*, 542 F.3d at 650 (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.").

4. Fear of Future Establishment Clause Entanglement

***13** In the case at bar, according to the undisputed evidence presented, the Poway Unified School District ran afoul of the First Amendment. One justification was that the district feared violating the Establishment Clause. The fear was not justified. There is no realistic danger that an observer would think the Poway Unified School District was endorsing a particular religion or a particular church or creed by permitting Johnson's personal patriotic banners to remain on his classroom wall. Any perceived endorsement of a single religion is dispelled by the fact that other teachers are also permitted to display other religious messages and anti-religious messages on classroom walls. "*Widmar v. Vincent*, *Board of Education v. Mergens*, and *Lamb's Chapel*, all reject arguments that, in order to avoid the appearance of sponsorship, a school may restrict religious speech." *Hedges v. Wauconda Cmty. Utd. School Dist. No. 118*, 9 F.3d 1295, 1298 (7th Cir.1993) (citations omitted).

Defendants then posit that the cumulative effect of the references to God on the banners might be seen as the school advancing one religion. Defendants argument is both speculative and imprecise. The messages on Johnson's banners do not describe or advance any particular religion. The banners do not quote from the Christian Bible, or books of other particular religions such as the Jewish Torah, the Islamic Koran, the Latter Day Saints Book of Mormon, the Buddhist Diamond Sutra, or the Hindu Bhagavad-Gita. To argue that the banners advance an encompassing undifferentiated religion with God

as the figurehead makes sense only in a citizenry where there are only two beliefs: one acknowledging God; one denying God. Such is not the case. *See Arizona Life Coalition*, 515 F.3d at 971 (It is an "insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas.") (quoting *Rosenberger*, 515 U.S. at 831).

Through the Establishment Clause lens, the banners do not evangelistically advocate for the existence of God. Instead, they highlight historic and patriotic themes that in themselves have acknowledged God's existence. *Elk Grove*, 542 U.S. at 34 (O'Connor, J., concurring) ("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. Eradicating such references would sever ties to a history that sustains this Nation even today."); *Aronow v. U.S.*, 432 F.2d 242, 243 (9th Cir.1970) ("It is 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 ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise."). One teacher's banners that direct attention to the multiple places God may be found in our country's history, does not evidence an Establishment Clause violation. Consequently, the Defendants' explanation and justification for removing Plaintiff's speech for fear of violating the Establishment Clause is unconvincing-especially among the cacophony of other First Amendment speech which remains in the high school classrooms.[FN5] *Cf. Hills*, 329 F.3d at 1053 (school district failed to demonstrate that the Establishment Clause would be violated). Ultimately, "the school district here can dispel any 'mistaken inference of endorsement' by making it clear to students that ... private speech is not the speech of the school." *Prince v. Jacoby*, 303 F.3d 1074, 1094 (9th Cir.2002) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 251, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion) (school's fear of endorsing private religious speech is largely self-imposed because school has control over impressions its gives to secondary school students).

FN5. Our diversity is one of our strengths. It is laudable that the Defendants have created a forum for faculty speech. Our high school students are well served by encouraging them to enter the marketplace of ideas and become wise consumers. A democratic society must "of course, include tolerance of divergent political and religious views." *Bethel School Dist.*, 478 U.S. at 681. One way a school district can be confident that it is not endorsing religion is to permit speech and then educate students about the dangers of restricting speech. The Seventh Circuit noted:

> What means do schools have at their disposal to fulfil this obligation? The principal method is for administrators to avoid endorsing religious views by their own words or deeds; a prudent administrator also might disclaim endorsement of private views expressed in the schools. This combination discharges the school's obligation to be neutral toward religious sentiment. Just as a school may remain politically neutral by reminding pupils and parents that it does not adopt the views of students who wear political buttons in the halls or public officials who tout their party's achievements in the auditorium, so a school may remain religiously neutral by reminding pupils and parents that it does not adopt the views of students who pass out religious literature before school. It must refrain from promoting the distribution of such literature but can remain neutral by treat-

> ing religious speech the same way it treats political speech. *Wauconda Cmty. Utd. School Dist.*, 9 F.3d at 1299.
>
> The Ninth Circuit agrees. "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.' " *Hills*, 329 F.3d at 1055 (quoting *Wauconda Cmty. Utd. School Dist.*, 9 F.3d at 1299).

5. Pickering or Tinker-Government Speech or Individual Speech?

***14** Defendants adopt the alternate argument that Johnson gave up his free speech rights by virtue of his employment as a public high school teacher. The argument is at odds with *Epperson*, *Tinker* and *Morse*. Nevertheless, Defendants argue that Johnson's free speech rights may be abridged because he is a government employee, and because a teacher is also a government employee, a government speech test from *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), should be used rather than *Tinker's* First Amendment forum analysis. It is true that the Free Speech Clause does not apply to the government's own speech. *Pleasant Grove*, 129 S.Ct. at 1131. Where a government employee is speaking while doing his or her government job, it is sometimes characterized as the government's own speech. *Garcetti*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689. But not all speech by a government employee is government speech. A government employee may be engaged in his or her own private speech while on government property. Consequently, while "government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property." *Pleasant Grove*, 129 S.Ct. at 1132. Thus, "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech." *Id.*

Defendants argue that the balancing test from *Pickering* should be applied, and if applied, would leave Johnson's speech unprotected by the First Amendment. *Pickering* addressed a public school teacher's speech that criticized his government employer. In that situation, the Court sought to balance the employee's interests as a citizen against the government interest as employer in promoting efficiency of providing governmental services. It is significant that, in the end, *Pickering* reinforces the understanding that a teacher's speech enjoys constitutional protection. *Pickering*, 391 U.S. at 568 ("To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court."). All of the decisions of the Supreme Court touching on the subject acknowledge a teacher's right to engage in protected speech. No Supreme court decision holds to the contrary. Therefore, Defendants' position that the *Pickering* balancing test applies and justifies silencing Johnson's speech, finds no traction in Supreme Court case law.

a. *Even Pickering Balancing Tips in Favor of Plaintif's Banners*

i. The Ninth Circuit *Nicholson* Case

Though Defendants do not cite it, the Ninth Circuit did look to *Pickering* in a teacher's wrongful discharge suit. *See Nicholson v. Bd. of Educ. Torrance Unified School Dist.*, 682 F.2d 858 (9th Cir.1982).

In that case, Nicholson was hired as a probationary high school journalism teacher. The probationary period was filled with disputes with the administration over articles published in the school newspaper, failures to comply with record-keeping requirements, and instances where he permitted students to violate school rules. The school did not rehire Nicholson and he sued. *Id.* at 861-62. Nicholson claimed that he was not rehired because of his exercise of free speech rights. In that context, the court of appeals looked to *Pickering*, writing, "[t]he question whether a school teacher's speech is constitutionally protected expression requires balancing. *Id.* at 865 (quoting *Pickering*, 391 U.S. at 568). The court of appeals focused on three factors drawn from *Pickering*. One factor was whether the speech affected the teacher's working relationships with the school board and his immediate superiors. *Id.* A second factor was whether the teacher's expression "impeded the teacher's proper performance of his daily duties in the classroom." *Id.* The third factor looked at whether the teacher's expression "interfered with the regular operation of the school generally." *Id.*

***15** Johnson's banners easily pass this three-factor test. Concerning the first factor, there is no evidence that working relationships with the school board or the principal deteriorated. In fact, testimony indicated that his superiors were favorably impressed with the professional manner in which Johnson responded to administration concerns over the banners. *See* Chiment Letter dated Jan. 23, 2007, Ex. D, Defs' Ex. List ("Let me first say that I am pleased with the professional manner in which you are dealing with these directions.") The second factor asks about the performance of daily duties in the classroom. Here the evidence clearly demonstrates that the banners had no effect on the performance of Johnson's daily duties in the classroom. In fact, Johnson has been held in high regard for his performance of daily duties teaching math while his banners were displayed. The final factor looks at whether the speech in question interfered with the regular operation of the school generally. Again, there was no evidence offered to suggest the banners negatively affected the regular operation of the schools where Johnson taught. To the contrary, the undisputed evidence demonstrated that the school administration had no issue with the display of Johnson's banners for two decades. Thus, even applying the *Pickering* test, as understood by *Nicholson*, the Court would find Johnson's banner display to be constitutionally protected.

ii. The Ninth Circuit *Berry* Case

Defendants also assert that *Berry v. Dept. of Social Servs.*, 447 F.3d 642 (9th Cir.2006), provides the better roadmap. *Berry* is not a teacher case. *Berry* dealt with a worker who would speak with unemployed citizens making the transition out of welfare. At issue was an agency restriction on discussing religion with citizens served by the agency and displaying religious items in worker cubicles. *Id.* at 646. Mr. Berry desired to speak with citizens at the agency, to share his faith and pray. *Id.* The court applied a modified *Pickering* balancing test. *Berry* balanced the employee's right to engage in First Amendment religious speech against the government employer's need to avoid a violation of the Establishment Clause. *Id.* at 650-51. In that speech context, the Ninth Circuit found that the balance tipped in the government agency's favor. 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. *Id.* In contrast, the classroom banners do not contain Johnson's own prayers or a statement of his own religious faith. Nor does the record indicate that Johnson prays with students during class time.

Berry also addressed the government-employer's right to restrict the employee's right to decorate his cubicle with religious items. Mr. Berry wanted to display a Bible and a "Happy Birthday Jesus" sign at his cubicle. Relying on its earlier decision in *Tucker v. California Dept. of Educ.*, 97 F.3d 1204 (9th Cir.1996), *Berry* again found the balance

tipped in favor of the agency and its ban on religious decorations. 447 F.3d at 651-52.

iii. The Ninth Circuit *Tucker* Case

***16** In contrast to *Berry*, in *Tucker* the Ninth Circuit used a forum analysis, rather than a balancing test, in analyzing a First Amendment challenge to a complete ban on the display of religious materials. The issue involved the display of religious messages on the walls of the offices and employee cubicles at the California state department of education. *Tucker*, 97 F.3d at 1214-15. *Tucker* struck down the government ban on displays. As Judge Reinhardt said, "[w]e conclude that it is not reasonable to allow employees to post materials around the office on all sorts of subjects, and forbid only the posting of religious information and materials." *Id.* at 1215. The prohibition was an impermissible restriction on speech because "its sole target" was religious speech. *Id.* Even otherwise reasonable restrictions on speech in a non-public forum must be viewpoint neutral. *Id.*

In language equally applicable to the classrooms of Westview High School, *Tucker* observed, "[r]easonable persons are not likely to consider all of the information posted on bulletin boards or walls in government buildings to be government-sponsored or endorsed. Certainly a total ban on posting religious information of any kind is an unreasonable means of obviating such a concern." *Id.*

In the case at hand, the ban on Johnson's banners is an unreasonable restriction on constitutionally protected teacher speech because, as was the case in *Tucker*, the school district ban is not viewpoint neutral. Principal Kastner did not ban all teacher classroom wall displays. Kastner did not ban only religious displays-a restriction that by itself would be suspect under *Tucker*. Instead, Kastner banned Johnson's banner display because of its particular religious perspective. At the same time, Kastner permitted on other classroom walls: (1) the 35-40 foot long Tibetan prayer flag display and its representation of Buddha; (2) the Gandhi seven social sins poster; and (3) the Lennon "Imagine" anti-religious song poster. These types of viewpoint and content-based restrictions on First Amendment speech do not pass even minimal Constitutional screening.

iv. The Ninth Circuit *Peloza* Case

Defendants argue that a public school district may prevent a teacher from engaging in evangelical speech on a school campus if necessary to avoid an Establishment Clause violation, relying on *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir.1994). The argument does not apply to the facts here. Unlike in *Peloza*, there is no evidence Johnson was evangelizing during instructional time. *Peloza* recognized a permissible limit on free speech where a school district directed a teacher "to refrain from any attempt to convert students to Christianity or initiating conversations about [his] religious beliefs during instructional time." *Peloza*, 37 F.3d at 522. The *Peloza* context is significantly different than the silent display of banners context. The difference is further amplified by the milieu of teacher expression on classroom walls found in Johnson's school. The Plaintiff's banners are not patently evangelical. They do not contain scripture from any holy text. There is no proselytizing language. Although the word "God" appears several times, it is in its historically employed context. In view of the much different context, *Peloza* sheds little light for the First Amendment issues at play here.

b. *Johnson's Speech is Not Curricular*

***17** Defendants 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. Any support for this argument would come

from the Ninth Circuit decision in *Downs*. But *Downs* also arises from 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. *Downs* involved only government speech in a nonpublic forum. *Id.* at 1013. "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 particular context, *Downs* held that a teacher's free speech rights did not extend to postings on the diversity bulletin boards. *Id.* at 1014.

That is a different case than the one presented here. Unlike the teacher in *Downs*, Johnson supplied the banners-not the school district. Johnson selected the content of the banners-not the school district. Johnson hung the banners inside his assigned classroom. 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 topic as part of its selected curriculum. *Downs* is inapposite.

To sum up, it is axiomatic that the school district may not regulate speech based on the message it conveys. *Rosenberger*, 515 U.S. at 828 (citations omitted). From this principle follows the precept that for private speech or expression, government regulation may not favor one speaker over another. *Id.* Where there has been discrimination against private speech because of its message, it is presumed to be unconstitutional. *Id.* In cases where a school targets the particular views taken by a speaker on a subject, the First Amendment violation is all the more blatant. *Id.* at 829. "Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* These principles forbid a school district from exercising viewpoint discrimination, even when the limited public forum is one of its own creation. *Id.* Here, the Poway Unified School District engaged in viewpoint discrimination when it required Johnson to remove his banners, and thus violated his First Amendment free speech rights.

***18** In conclusion, there being no genuine issues of material fact, Plaintiff is entitled to summary judgment on his First Claim for Relief under the federal First Amendment to the United States Constitution.

Johnson's Fourth Claim for Relief under the California Constitution is likewise determined by First Amendment jurisprudence. Therefore, Plaintiff's motion for summary judgment on the Fourth Claim for Relief is also granted. *San Leandro Teachers Ass'n v. Governing Bd. of the San Leandro Unified School Dist.*, 46 Cal.4th 822, 95 Cal.Rptr.3d 164, 209 P.3d 73 (Cal.2009) (applying both federal First Amendment analysis to interpret state's liberty of speech clause in public school speech forum, and alternatively observing that protections granted by California's Constitution are broader).

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. Johnson's claim is simple: by squelching his classroom banners because they conveyed a Judeo-Christian viewpoint, while at the same time permitting the classroom displays of other teachers about Buddhist and Hindu religions, Defendants are using the weight of government to prefer other 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, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). Likewise, silencing religious speech while permitting speech that is anti-religious (*i.e.*, the lyrics to Lennon's "Imagine") also violates the Establishment Clause. *School Dist. of Abington Twp., v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (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.' ").

Defendants suggest that they were maintaining religious neutrality. The undisputed facts paint a different picture. To recap, other teachers are permitted to display Buddhist messages and an image of Buddha, large Tibetan prayer flags displays, Hindu messages, and anti-religious messages. Such speech is obviously religious. At the same time, Johnson's banners, with their Judeo-Christian viewpoint, are no longer permitted. The undisputed evidence demonstrates an absence of government neutrality: disfavor towards Johnson's Judeo-Christian viewpoint and favor toward other religious viewpoints and viewpoints hostile towards religion.

The given reason was the sectarian viewpoint expressed by Johnson's banners. At oral argument, counsel for defendants offered different explanations for ordering the banners to be taken down. It was argued that it was the large size of the banners that is the problem. Yet, there are other large displays on classroom walls. The Tibetan prayer flags reach 35-40 feet across another classroom. It was then argued that it is the repetitive inclusion of the word "God" in the phrases on the banners that might make an Islamic student uncomfortable. Principal Kastner said that she asked Johnson, "[i]f an Islamic student walks into your classroom and sees all of these phrases ... they may feel like, Wow, I'm not welcome, or, I'm not gonna fit in this classroom. And they may feel bad." Dep. of Kastner at 44:4-11, Ex. F, Defs' Ex. List.

***19** Of course, student comfort is not a Constitutional test. "After all, much political and religious speech might be perceived as offensive to some." *Morse*, 551 U.S. at 409. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. More to the point, an imaginary Islamic student FN6 is not entitled to a heckler's veto on a teacher's passive, popular or unpopular expression about God's place in the history of the United States. *See Morse*, 551 U.S. at 402-404 (a school's desire to avoid controversy, which might result from unpopular viewpoints is not enough to justify banning, "silent, passive expression of opinion, unaccompanied by any disorder or disturbance.").

FN6. There was no actual complaint from an Islamic student or any other student.

Even if the Defendants were applying some sort of student-discomfort test, they would have to apply the test equally. Yet, school district administrators did not ask, for example, whether a Muslim student might feel uncomfortable sitting in a classroom with the anti-religious lyrics from "Imagine" FN7 on a classroom wall poster. Did the principal ask whether a Jewish or Christian student might feel uncomfortable sitting under a string of Tibetan prayer flags inscribed with Sanskrit and an image of Buddha? The undisputed evidence supports a finding of unconstitutional selective protectionism: "protecting" students from Johnson's "Judeo-Christian" viewpoint while tolerating, if not endorsing, other religious and anti-religious viewpoints.

FN7. See *Pleasant Grove*, 129 S.Ct. at 1135 & n. 2.

It was also argued that no district administrator noticed Johnson's banners until 2006-07. Yet, the undisputed evidence is that Johnson's banners were large and on display in his classrooms for two decades. The assertion is patently untenable.

Finally, defense counsel argued that the Tibetan *prayer* flags are just "decorative." They are not a religious display because the Sanskrit was not translated, the image of Buddha was small, and Buddhism is not a religion but a philosophy of life. The argument is a transparent pretext. For example, the U.S. State Department estimates that in China alone there are more than 100 million Buddhists, making Buddhism one of the largest organized religions. FN8 The image of Buddha may be small, but it is a recognizable religious image, nonetheless. Finally, the fact that a student may not know how to translate from Sanskrit to English, does not change the inferential religious significance of the *prayer* flags.

> FN8. U.S. Department of State, International Religion Freedom Report 2006, China, available at www.state.gov/g/drl/rls/irf/2006/71338.htm last viewed on February 25, 2010.
>
> > The teacher with the Tibetan *prayer* flag display said that she did not "have any idea" what the Sanskrit writing meant, but admitted that she would not be surprised to learn that the *prayer* flags contain sacred text and prayers of Buddhists. Dep. of Brickley at 89:4 to 90:20, Ex. J, Defs' Ex. List.

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." *Ceniceros v. Bd. of Trustees of the San Diego Unified School Dist.*, 106 F.3d 878, 882 (9th Cir.1997). "[D]iscriminating against religious groups would demonstrate hostility, not neutrality, toward religion." *Id.; County of Allegheny*, 492 U.S. at 593 (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."). Here, Johnson has successfully proven an Establishment Clause claim by demonstrating that Defendants are not neutral toward teachers' religious displays. Defendants' endorsement of Buddhist, Hindu, and anti-religious speech by some teachers while silencing the Judeo-Christian speech of Johnson, violates the Establishment Clause.

***20** Therefore, Plaintiff's motion for summary judgment is granted on the Second Claim for Relief for violation of the federal Establishment Clause of the United States Constitution. Because Johnson's Sixth Claim for Relief under the California Constitution is determined by federal First Amendment jurisprudence, Plaintiff's motion for summary judgment on the Sixth Claim for Relief is also granted. *Paulson v. Abdelnour*, 145 Cal.App.4th 400, 420, 51 Cal.Rptr.3d 575 (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.").

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. 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*, 97 F.3d at 1214 (citations omitted). While, the California Supreme Court has not definitively construed the reach of the clause, (*see Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 788 (9th Cir.2008), *reh'g en banc denied*, 551 F.3d 891 (2008)), since Johnson has adequately demonstrated through undisputed facts that Defendants acted in a way that either prefers,

or appears to prefer, Buddhist, Hindu, and anti-religious viewpoints over Johnson's Judeo-Christian viewpoint, he has successfully proven the claimed violation of California's No Preference Clause. Thus, Plaintiff's motion for summary judgment on the Fifth Claim for Relief is granted.

D. THE EQUAL PROTECTION CLAUSE CLAIM

Johnson's remaining claim for relief is the Third Claim asserting a violation of the Equal Protection Clause of the Fourteenth Amendment. 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, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). In *Police Department v. Mosley*, 408 U.S. 92, 95-96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (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.

***21** As to the Third Claim for Relief, there are no genuine issues of material fact. Plaintiff has proven his claim 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 at the same time permitting other teacher speech from a variety of other viewpoints to continue unfettered. Thus, on the Equal Protection claim, Plaintiff is entitled to summary judgment.

E. QUALIFIED IMMUNITY

The individual Defendants argue that they are entitled to qualified immunity. A school official is entitled to qualified immunity where clearly established law does not show that the action taken violates federal Constitutional rights. *Safford Unified School Dist. No. 1 v. Redding*, --- U.S. ----, ----, 129 S.Ct. 2633, 2643, 174 L.Ed.2d 354 (2009). "To be established clearly, however, there is no need that the very action in question [has] previously been held unlawful." *Id.* (citation omitted). In fact, "the easiest cases don't even arise." *Id.* (citation omitted). School officials "can still be on notice that their conduct violates established law in novel factual circumstances." *Id.* (citation omitted). The task is determining whether the preexisting law provided the defendants with "fair warning" that their conduct was unlawful. *Hope v. Pelzer*, 536 U.S. 730, 740, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

In this case, the law has been clearly established since *Tinker* that school teachers enjoy First Amendment rights inside the schoolhouse gates. *Morse*, 551 U.S. at 396. It is also clearly established law that where free speech is permitted, the government may not discriminate based on the speaker's viewpoint. *Rosenberger*, 515 U.S. at 828-29 (citations omitted); *see also Citizens United v. Fed. Election Comm'n*, No. 08-205, --- U.S. ----, 2010 WL 183856, *19 (Jan. 21, 2010) ("[T]he First Amendment stands against attempts to disfavor certain subjects or viewpoints."). Finally, as Justice

Souter wrote, it is clearly established that in matters of religion, "the First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU*, 545 U.S. 844, 860, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (citations omitted).

The school district and its administration apparently acted in conformity with these established principles for two decades. When Defendants suddenly changed course in 2007, a course they continue on today, they did so in violation of clearly established federal and state constitutional law and with fair warning that their conduct was unlawful. The individual Defendants are not entitled to qualified immunity from suit.

IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Because the undisputed material facts demonstrate that Plaintiff is entitled to judgment of each of his claims for relief, Defendants' cross-motion for summary judgment is denied.

V. CONCLUSION

***22** Plaintiff's motion for summary judgment is granted as to all claims for relief; Defendants' motion for summary judgment is denied as to all claims for relief. Plaintiff is entitled to a declaration that Defendants have violated Plaintiff's individual rights protected by the First and Fourteenth Amendments to the United States Constitution, and Article I, §§ 2 and 4 of the California Constitution.

Plaintiff is entitled to nominal damages in the amount of $10 per individual Defendant. Plaintiff is entitled to an award of reasonable attorney's fees and costs.

Defendants are ordered to permit Johnson to immediately re-display, in his assigned classroom, the two banners at issue in this case.

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