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Uneven “Neutrality”: Dual Standards and the Establishment Clause in *Johnson v. Poway*

I. INTRODUCTION

“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?”¹ In 2010, a federal district court held that a school district may not.² In 2011, the Ninth Circuit held otherwise.³

The case that produced these contrary rulings, *Johnson v. Poway Unified School District*, involved a high school teacher’s claim that the school district he worked for had violated the Free Speech and Establishment Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The school district had ordered the teacher to remove two banners from his classroom wall because they contained references to God while allowing other teachers to exhibit noncurricular classroom displays, many of which featured religious themes and other potentially controversial subject matter.

The Establishment Clause requires government neutrality toward religion,⁴ but the Ninth Circuit focused on potential problems with the teacher’s display and justifications for other similar displays. This resulted in content-based religious discrimination rather than the neutrality the Establishment Clause requires. For that reason, *Johnson* was wrongly decided and should be overturned.

This Note will proceed as follows. Part II provides a brief overview of Establishment Clause jurisprudence as it relates to government-sponsored religious displays. Part III summarizes *Johnson v. Poway*, including the facts of the case, the district court opinion, and the Ninth Circuit’s reversal. Part IV analyzes the Ninth Circuit’s de-

1. *Johnson v. Poway Unified Sch. Dist.*, No. 07cv783 BEN (NLS), 2010 WL 768856, at *1 (S.D. Cal. Feb. 25, 2010) [hereinafter Johnson I].

2. *Id.*

3. *See Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 957 (9th Cir. 2011) [hereinafter Johnson II].

4. *See infra* note 7.

cision, discussing the similarities between two displays involved in the case, the different standards applied to each display, and how these dual standards brought about a discriminatory result. Part V concludes that the Ninth Circuit's ruling is problematic because it potentially discriminates against specific religious viewpoints, thus violating the First Amendment.

II. THE ESTABLISHMENT CLAUSE AND RELIGIOUS DISPLAYS

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion."⁵ This clause applies to the states under the Fourteenth Amendment.⁶ Since the 1980s, the Supreme Court has interpreted the Establishment Clause to require religious neutrality rather than strict separation of church and state.⁷ Simply put, "government must not take sides between particular religions or denominations, or between belief or unbelief."⁸

Establishment Clause cases, which often involve challenges to government-sponsored religious displays, have been fairly inconsistent⁹ because of the Supreme Court's inability to articulate a test that yields fair and predictable results.¹⁰ In 1971, the Supreme Court attempted to establish such a test.¹¹ Under what has become known as the *Lemon* test, government actions touching on religion must 1) "have a secular legislative purpose," 2) have a "primary effect . . .

5. U.S. CONST. amend. I.

6. *See* *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

7. Frederick Mark Gedicks, *Undoing Neutrality? From Church-State Separation to Judeo-Christian Tolerance*, 46 WILLAMETTE L. REV. 691, 695 (2010).

8. *Id.*

9. *See, e.g.*, *Salazar v. Buono*, 130 S. Ct. 1803, 1811 (2010) (permitting a legislative land transfer to a private party to preserve a previously enjoined Latin cross on federal land); *McCreary Cnty. v. ACLU*, 545 U.S. 844, 881 (2005) (finding a display of the Ten Commandments in a county courthouse unconstitutional); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (finding a display of the Ten Commandments on state capitol grounds constitutional); *County of Allegheny v. ACLU*, 492 U.S. 573, 579 (1989) (finding a nativity scene at the county courthouse unconstitutional and a menorah constitutional); *Lynch v. Donnelly*, 465 U.S. 668, 671–72 (1984) (finding a nativity scene constitutional as part of a municipal Christmas display).

10. *See, e.g.*, RonNell Andersen Jones, *Pick Your Poison: Private Speech, Government Speech, and the Special Problem of Religious Displays*, 2010 BYU L. REV. 2045, 2045–46 (2010).

11. *See* *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

that neither advances nor inhibits religion,” and 3) “not foster ‘an excessive government entanglement with religion.’”¹²

Then, in a 1984 concurrence, Justice O’Connor proposed what has become known as the endorsement test,¹³ which the Court adopted as “the standard by which future religious display cases should be judged.”¹⁴ The endorsement test is essentially a modified *Lemon* test, combining the purpose and effect prongs and eliminating the entanglement prong.¹⁵ Under the endorsement test, a government-sponsored religious display violates the Establishment Clause if it “has the effect of endorsing religion”¹⁶—either because the government “subjectively intends to endorse or disapprove religion,” although its actions may not actually have that effect, or because government action is “reasonably understood to endorse or disapprove religion,” although such an effect may not have been intended.¹⁷

III. *JOHNSON V. POWAY*

Although the dispute in *Johnson v. Poway* centers on religious displays, it is not a typical religious monument case. Rather than addressing a more blatant incident of government appropriation of re-

12. *Id.* (citing *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)). The *Lemon* test has been criticized, sometimes vigorously. *See, e.g.*, *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again.”); *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (“The three-part test has simply not provided adequate standards for deciding Establishment Clause cases.”); Josh Blackman, *This Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Statute’s Secular Purpose*, 20 GEO. MASON U. C.R. L.J. 351, 357–58 (2010). Nevertheless, the Court continues to apply the test. *See McCreary Cnty.*, 545 U.S. at 859–65. Justice Scalia cynically suggests that the *Lemon* test owes its staying power to its usefulness in arriving at conclusions the Court prefers. *See Lamb’s Chapel*, 508 U.S. at 399 (Scalia, J., concurring) (“When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely.”) (citations omitted).

13. *See Lynch v. Donnelly*, 465 U.S. 668, 688–690 (1984) (O’Connor, J., concurring); Susanna Dokupil, “*Thou Shalt Not Bear False Witness*”: “*Sham*” Secular Purposes in Ten Commandments Displays, 28 HARV. J.L. & PUB. POL’Y 609, 620–21 (2005).

14. Dokupil, *supra* note 13, at 621. *See also Allegheny*, 492 U.S. at 597.

15. 328 AM. JUR. 2D *Constitutional Law* § 438 (2011).

16. *Allegheny*, 492 U.S. at 595.

17. *See* FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE* 73 (1995).

ligious symbols,¹⁸ such as a municipality displaying a nativity,¹⁹ *Johnson* concerns a school district's decision to prevent a high school math teacher from maintaining a display on his classroom walls despite a district-wide policy of allowing teachers to display non-curricular messages of their choice.

A. Factual Background

The plaintiff, Bradley Johnson, was a high school math teacher and faculty sponsor of a student Christian club²⁰ and had taught in the Poway School District in San Diego, California, since 1977.²¹ Five years after he began teaching, Johnson hung a red, white, and blue banner on his classroom wall that measured seven feet by two feet and featured four phrases: "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace On Thee."²² Eight years later, Johnson hung a second banner—similar to the first in size and appearance—that contained the following quote from the Declaration of Independence: "All Men Are Created Equal, They Are Endowed By Their Creator."²³ On this second banner, the word *creator* was given its own line, on which it was printed in capital letters approximately twice the size of the other text.²⁴

Johnson placed both banners in his classroom in accordance with the school district's policy of allowing 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 . . . so long as the wall display does not materially disrupt school work or cause substantial disorder or interference in the classroom."²⁵ Under this policy, teachers throughout the district used their classroom walls to display posters, banners, bumper stickers and

18. See Gedicks, *supra* note 7, at 696.

19. See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 881 (2005); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

20. See *Johnson II*, 658 F.3d 954, 958 (9th Cir. 2011).

21. *Id.*; *HS Teacher Told to Remove 'God' Banners by Federal Court*, 10NEWS.COM (Sept. 14, 2011), <http://www.10news.com/news/29181371/detail.html>.

22. *Johnson II*, 658 F.3d at 958; *Johnson I*, No. 07cv783 BEN (NLS), 2010 WL 768856, at *2 (S.D. Cal. Feb. 5, 2010).

23. *Johnson I*, 2010 WL 768856, at *2.

24. *Johnson II*, 658 F.3d at 958.

25. *Johnson I*, 2010 WL 768856, at *9.

other items with cultural, political, and religious messages.²⁶ In this environment, Johnson displayed his banners “in some form or another” without objection until 2006.²⁷

Johnson began teaching at a new high school within the district in 2003.²⁸ In 2006, a colleague asked the school principal about the banners in Johnson’s classroom.²⁹ The principal visited Johnson’s classroom, where she saw the banners, apparently for the first time, and was “surprised” and “overwhelmed” by what she saw.³⁰ She later testified that while the phrases on Johnson’s banners were “not problematic at all” when read alone or in context, she was concerned that Johnson’s presentation promoted a religious viewpoint that might make some students uncomfortable.³¹

The principal consulted with the assistant superintendent, who investigated the banners and reported to the school board.³² The school board ordered Johnson to remove the banners because the phrases they displayed had a “combined influence that ‘over-emphasized’ God.”³³ The principal suggested that Johnson modify his display by providing additional context (for example, by displaying the entire Declaration of Independence rather than just the parts that refer to God).³⁴ Johnson refused,³⁵ and in January 2007, the assistant superintendent ordered Johnson to remove the banners.³⁶ Johnson complied with the orders.³⁷

26. *Id.* at *3–4 (providing an extensive list of displays found on teachers’ walls throughout the school district, including the following displays with explicitly or arguably religious elements: Tibetan prayer flags, a John Lennon poster with lyrics to the song “Imagine,” a poster of Mahatma Gandhi (a “Hindu leader”) and a poster of Gandhi’s “7 Social Sins,” a poster of the Dalai Lama (a “Buddhist leader”), a poster referring to hell, and a poster of Malcolm X (a “Muslim minister”).

27. *See id.* at *4; *Johnson II*, 658 F.3d at 959.

28. *Johnson II*, 658 F.3d at 958.

29. *Id.* The district court opinion implies that the colleague had hostile motives, noting that he “may have disagreed with Johnson over pedagogy.” *See Johnson I*, 2010 WL 768856, at *4.

30. *Johnson II*, 658 F.3d at 958.

31. *Id.*

32. *Johnson I*, 2010 WL 768856, at *4.

33. *Id.*

34. *Johnson II*, 658 F.3d at 958–59.

35. *Id.* at 959.

36. *Johnson I*, 2010 WL 768856, at *4–5.

37. *Johnson II*, 658 F.3d at 959.

B. The District Court Opinion

After removing his banners, Johnson sued the school district in federal court,³⁸ claiming violations of the Constitution's Free Speech Clause,³⁹ Establishment Clause,⁴⁰ and Equal Protection Clause,⁴¹ as well as corresponding sections of the California state constitution.⁴² The district court granted summary judgment in favor of Johnson on all claims.

In its opinion, the district court concentrated primarily on Johnson's free speech claims.⁴³ Focusing on the school district's policy of allowing teachers to "express ideas on their classroom walls," the court held that the district's policy had created a "limited public forum."⁴⁴ Therefore, only "viewpoint neutral" regulation of speech was permissible.⁴⁵ Noting that the school district allowed other teachers to use their classroom walls to express opinions "on a wide variety of secular and religious topics,"⁴⁶ the court concluded that the school district had "singled out [Johnson's speech] for suppression because of its [Judeo-Christian] message," thereby violating Johnson's First Amendment right to free speech.⁴⁷

Regarding Johnson's Establishment Clause claim, the district court held that the school district's policies were "not neutral toward teachers' religious displays."⁴⁸ Specifically, the school district had violated the Establishment Clause through the "endorsement of Buddhist, Hindu, and anti-religious speech by some teachers while silencing the Judeo-Christian speech of Johnson."⁴⁹

Finally, the court held that the school district violated Johnson's rights to equal protection by limiting his speech "based on the content and viewpoint of what he was expressing—while at the same

38. *Id.*

39. *Johnson I*, 2010 WL 768856, at *5.

40. *Id.* at *5, *18.

41. *Id.* at *5, *20.

42. *Id.* at *5.

43. *See id.* at *5–18.

44. *Id.* at *9.

45. *Id.*

46. *Id.* at *10. Other teachers hung banners and posters involving Buddhism, Hinduism, and "anti-religious speech." *Id.*

47. *Id.* at *10–11.

48. *Id.* at *19.

49. *Id.*

time permitting other teacher speech from a variety of other viewpoints”⁵⁰

C. The Ninth Circuit’s Reversal

On appeal, the Ninth Circuit reversed the district court on all points.⁵¹ First, the Ninth Circuit concluded that because Johnson’s claim involved a government restriction on speech by a government employee, the district court incorrectly applied a “forum-based analysis.”⁵² Instead, the Ninth Circuit concluded that Johnson’s claim failed because he “spoke as an employee, not as a citizen.”⁵³ Because Johnson spoke as an employee, his speech was government speech rather than private speech. Consequently, because the First Amendment does not restrict government regulation of government speech, the court held that the school district “acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire.”⁵⁴

The court then considered Johnson’s claims under the Establishment Clause, which, unlike the Free Speech Clause, does apply to government speech.⁵⁵ The court treated Johnson’s claim as two related claims: first, that the school district had allegedly shown hostility to Judeo-Christian beliefs by ordering Johnson to remove his banners, and second, that the school district had supposedly endorsed other religious beliefs by allowing other teachers to maintain

50. *Id.* at *21.

51. Johnson II, 658 F.3d 954, 958 (9th Cir. 2011).

52. *Id.* at 961.

53. *Id.* at 964. The Ninth Circuit based its conclusion on a five-step *Pickering* analysis:

(1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff’s protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

Id. at 961 (quoting Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009)). However, having concluded that Johnson spoke as a public employee, the court ended the analysis without addressing the final three factors. *Id.* at 964.

54. *Id.* at 970.

55. *Id.*

their displays.⁵⁶ Examining each claim separately, the court concluded that the school district had not violated the Establishment Clause.⁵⁷

First, the court concluded that the school district did not violate the Establishment Clause by ordering the removal of Johnson's banners because, as government speech, the banners "would raise at least the possibility of an Establishment Clause claim" against the school.⁵⁸ By removing the banners, the school district was pursuing a valid secular purpose of avoiding Establishment Clause violations and maintaining religious neutrality.⁵⁹

Second, the Court concluded that the other displays with religious elements merely had "some religious connotation."⁶⁰ Because the other displays were not used to "endorse or inhibit religion," the district did not violate the Establishment Clause by permitting them.⁶¹

Regarding Johnson's equal protection claim, the court held that "[b]ecause Johnson had no individual right to speak for the government," he had no claim.⁶² Therefore, the Ninth Circuit determined that none of Johnson's constitutional claims succeeded.

IV. ANALYSIS

The correctness of the Ninth Circuit's holding that there was no Free Speech Clause issue because Johnson's banners were government speech is beyond the scope of this Note.⁶³ But even accepting the court's Free Speech Clause conclusion as correct, *Johnson* was

56. *Id.* at 971.

57. *Id.* at 974.

58. *Id.* at 973.

59. *See id.* at 971.

60. *Id.* at 973.

61. The Court specifically mentioned posters of Gandhi, the Dalai Lama, and Malcolm X; a poster with the lyrics to John Lennon's song "Imagine"; and a string of Tibetan prayer flags. *Id.*

62. *Id.* at 975.

63. At least one First Amendment scholar disagrees with the Ninth Circuit's conclusion. See Eugene Volokh, *A Rare First Amendment Victory for a Public School Teacher Complaining About Restrictions on In-School Speech*, VOLOKH CONSPIRACY (Feb. 26, 2010, 6:39 PM), <http://volokh.com/2010/02/26/a-rare-first-amendment-victory-for-a-public-school-teacher-complaining-about-restrictions-on-in-school-speech> ("[T]he highly unusual policy of the school district . . . probably does create a designated public forum for the teachers' own messages."). The court's holding on Johnson's equal protection claim rests on the Free Speech Clause conclusion.

decided incorrectly. Johnson should have prevailed on the strength of his religious discrimination claim. By ordering Johnson to remove his banners from his classroom while allowing other teachers to maintain their displays, Poway School District violated the Establishment Clause of the First Amendment.

The issue in *Johnson* was not the constitutionality of either Johnson's display or the displays of other teachers. Rather, it was the constitutionality of Poway School District's treatment of these displays. The Ninth Circuit erroneously divided Johnson's Establishment Clause claim into two separate claims and ignored the combined effect of Poway School District's actions. Instead, the court applied one standard to Johnson's banners and another standard to other displays throughout the school district, thus failing to enforce the ideal of neutrality that the Establishment Clause requires. Had the Ninth Circuit applied the same standard to the school district's treatment of all of the exhibits, the result would have been uniform and constitutional. Instead, the court applied different standards which produced inconsistent results that a reasonable observer could interpret as hostility to one religion and preference to others. This renders the school district's actions unconstitutional regardless of whether the district intended that effect.

To best illustrate the court's error, this section will focus on the court's treatment of two displays: Johnson's banners and the Tibetan prayer flags. Part A describes the similarities between the two displays, reinforcing the conclusion that the court had no reason for judging the two displays by different standards. Part B argues that the prayer flags raised the same potential threat of an Establishment Clause violation that Johnson's banners did. Part C argues that Johnson's banners were no more coercive than the prayer flags.

A. Comparing Classroom Displays

The Ninth Circuit concluded that Johnson's banners plainly conveyed a religious message.⁶⁴ In contrast, "an objective observer could [not] conclude that the [prayer] flags were displayed for a religious purpose."⁶⁵ However, the distinction between the two displays

64. See *Johnson II*, 658 F.3d at 965.

65. *Id.* at 974.

was negligible⁶⁶ because both displays contained plainly religious elements and both had plausible secular reasons for their displays.

Johnson's banners undeniably contained religious elements—they explicitly referred to God five times. But references to God do not change the fact that the text has secular origins.⁶⁷ The religious elements of Johnson's banners do not invalidate Johnson's claim that the banners are patriotic and “highlight the religious heritage and nature of our nation.”⁶⁸

The teacher who displayed the prayer flags testified that the flags were associated with climbing Mount Everest and represented “accomplishing ‘an amazing goal.’”⁶⁹ But her use of the flags to “stimulate the interest of her students” when discussing fossils near Mount Everest⁷⁰ does not change the fact that the prayer flags are religious artifacts.⁷¹ Tibetan prayer flags are physical manifestations of prayers,⁷² and the flags on display in the classroom are printed with images of Buddha.⁷³

One important difference between the two displays is that one represents a majority religion and the other a minority religion. But this difference does not warrant judicial application of different standards to evaluate their permissibility under the Establishment Clause.

66. The most obvious similarities between the displays are physical. *See* Johnson I, No. 07cv783 BEN (NLS), 2010 WL 768856, at *18. Johnson's banners and the prayer flags are both large and prominently displayed in their respective classrooms. Johnson's two banners each measure approximately seven feet by two feet and hung on the walls of Johnson's classroom. *Johnson II*, 658 F.3d at 958. The string of Tibetan prayer flags “span[ned] the 35–40 foot width of a classroom.” *Johnson I*, 2010 WL 768856, at *10.

67. *Id.* at *2 (noting that Johnson's first banner features “famous national phrases” and that “[t]he second banner quotes from the Declaration of Independence”).

68. *Johnson II*, 658 F.3d at 960.

69. *Id.* at 974.

70. *Id.* at 973–74.

71. *See Johnson I*, 2010 WL 768856, at *19.

72. Donald S. Lopez, Jr., *A Prayer Flag for Tara*, in RELIGIONS OF TIBET IN PRACTICE 548 (Donald S. Lopez, Jr. ed., 1997) (“The wind is said to carry the benefits beseeched by the prayer imprinted on the fluttering flag, both to the person who flies the flag and to all beings in the region.”).

73. *Johnson I*, 2010 WL 768856 at *3. One could argue that most students would not recognize the flags as prayer flags and therefore would not consider them religious displays. One could just as easily argue that most students would recognize the historical context of the statements on Johnson's banners and therefore not consider the banners religious displays. Furthermore, it seems likely that even if the typical American teenager would not recognize the prayer flags as religious relics, he or she would recognize the images of Buddha as religious symbols.

Establishment of a minority religion is no more constitutional than establishment of a majority religion.⁷⁴

B. Removing Displays as an Act of Hostility

The Ninth Circuit incorrectly rejected the argument that the school district’s removal of Johnson’s banners conveyed hostility toward Christianity. Viewed in isolation, the removal of the banners does not convey hostility. But by permitting other teachers to maintain exhibits featuring other religious traditions, the school district’s actions have the appearance of singling out Christianity for negative treatment.

Addressing Johnson’s claim, the Ninth Circuit held that Poway’s order to remove Johnson’s banners satisfied the *Lemon* test and thus did not violate the Establishment Clause.⁷⁵ First, the court identified Johnson’s banners as a potential violation of the Establishment Clause and held that the school district therefore had a valid secular purpose in ordering their removal.⁷⁶ Next, the court reasoned that by attempting to avoid Establishment Clause claims, the school district was “maintain[ing] the very neutrality the Clause requires” Therefore, the school district’s action “neither has a primary effect of advancing or inhibiting religion nor excessively entangles government with religion.”⁷⁷

The question of whether Poway School District violated the Establishment Clause by removing Johnson’s banners depends on if the school district risked a potential Establishment Clause claim by allowing Johnson’s banners to remain. The court held that it did, but did not explain how it arrived at this conclusion.⁷⁸ The court noted only that the phrases on Johnson’s banners, “*as organized and displayed . . . convey[ed] a religious message,*”⁷⁹ and that government speech regarding religion violates the Establishment Clause only when it “turns *stigmatic* or *coercive*.”⁸⁰ Because the Ninth Circuit offers no additional clarification, it appears—whether this is the case or

74. See *infra* note 84 and accompanying text.

75. *Johnson II*, 658 F.3d at 972.

76. *Id.*

77. *Id.*

78. *Id.* at 973.

79. *Id.* at 965.

80. *Id.* at 972.

not—that the court found Johnson’s banners to be “stigmatic or coercive” simply because they were calculated to “convey a religious message.”⁸¹

Under this standard, the Tibetan prayer flags also raise a potential Establishment Clause issue. Unlike Johnson’s banners, prayer flags do not present secular material in a way that conveys a religious message. Rather, they present religious material displayed for a secular purpose.⁸² But Establishment Clause jurisprudence suggests that “any display of an overtly religious symbol, such as the Ten Commandments or a Latin cross, seems to trigger the suspicion that the purpose is not secular.”⁸³ Although the public may not equate Tibetan prayer flags with religious symbols as they would the Ten Commandments or a cross, it seems reasonable to conclude that a typical high school student would recognize the images of Buddha on the flag as religious symbols. And while the symbols may be those of a minority religion, there is no reason to think that such a display cannot convey a religious message and violate the Establishment Clause.⁸⁴

The Ninth Circuit cited its decision in *Vasquez v. Los Angeles County*⁸⁵ to support the conclusion that Poway did not violate the Establishment Clause by ordering the removal of Johnson’s banners.⁸⁶ However, *Vasquez* does not necessarily support the removal of the banners. In that case, a city employee argued that Los Angeles showed hostility to Christianity by removing an image of a cross, said to represent the California missions, from its city seal.⁸⁷ Although the court in *Vasquez* upheld the removal of the cross from the seal, it did not address what would happen if the city had removed one religious symbol while allowing other religious symbols to remain.⁸⁸ The

81. *Id.*

82. The secular purpose in this instance—“to stimulate scientific interest,” *id.* at 974—more closely resembles the secular purpose of Johnson’s display than it does a clearly valid secular purpose such as the use of the Bible in an English literature class. See *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring).

83. Dokupil, *supra* note 13, at 630.

84. See *County of Allegheny v. ACLU*, 492 U.S. 573, 634 (1989) (O’Connor, J., concurring) (rejecting the contention “that it would be implausible for the city to endorse a faith adhered to by a minority of the citizenry”).

85. 487 F.3d 1246 (9th Cir. 2007).

86. *Johnson II*, 658 F.3d at 970–71.

87. *Vasquez*, 487 F.3d at 1247–48.

88. See *id.* at 1248.

Ninth Circuit correctly relied on *Vasquez* to conclude that removal of a religious symbol is not a per se demonstration of hostility to religion. However, the court failed to take the necessary step of addressing the facts in *Johnson*, in which the government removed symbols of one religion while allowing symbols of other religions to remain. Specifically, the court failed to recognize that a reasonable observer would likely conclude that this selective removal of one religious symbol is an act of hostility.

C. Permitting Displays as an Act of Endorsement

The Ninth Circuit also failed to consider that allowing other religious exhibits to remain would likely be interpreted as an unconstitutional endorsement of religion. The court began its response to Johnson’s claim that the district had endorsed other religions by allowing other teachers to maintain their religious and antireligious messages⁸⁹ by stating that “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”⁹⁰ Although the court conceded that many displays throughout the school district, including the prayer flags, “have some religious connotation,”⁹¹ it was quick to assert that there was no indication that these displays were “used to endorse or inhibit religion.”⁹²

To arrive at this conclusion regarding the prayer flags, the court noted that (1) the teacher who displayed the flags claimed to be unaware of their religious meaning, (2) none of the teacher’s students had ever identified the flags as religious, and (3) the teacher had a secular purpose for displaying the flags.⁹³ Based on these facts, the court held that “[t]hough the flags may . . . represent the Buddhist faith, their use by the school district has nothing to do with their religious connotation. Instead, the evidence in this case demonstrates that the school district uses the flags to stimulate interest in science and scientific discovery without any mention of religion.”⁹⁴ The

89. For a list of these other displays, see *supra* note 25 and accompanying text.

90. *Johnson II*, 658 F.3d at 973 (alteration in original) (quoting *Johnson I*, No. 07cv783 BEN (NLS), 2010 WL 768856, at *6 (S.D. Cal. Feb. 25, 2010) (internal quotation marks omitted)).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 974.

court reasoned that the context of the display further supported this conclusion by neutralizing any religious message.⁹⁵

Of course, Johnson's display is permissible under similar reasoning. Johnson knew that his banners had religious significance;⁹⁶ however, the court explicitly stated that a teacher's intent was not dispositive.⁹⁷ Neither the district court nor the Ninth Circuit indicated that any of Johnson's students had identified the banners as religious. (In fact, the record states that Johnson displayed his banners for twenty years with no complaints.)⁹⁸ Any coercive effect that the banners may have had on students is purely speculative.

Additionally, Johnson had a secular purpose for displaying his banners.⁹⁹ The context of the statements on Johnson's display provides further evidence of their secular purpose. Students exposed to Johnson's banners would almost certainly be aware of the secular origins of their text: even a student who did not know the statements could be found in the Declaration of Independence, on currency, or in well-known patriotic songs could not possibly ignore the fact that one of the phrases was taken from the Pledge of Allegiance, which the school's students recite every day.¹⁰⁰ It seems inconsistent to claim that the words "under God" are not coercive when the school directs the students to recite them,¹⁰¹ and yet they become coercive when hung silently on a classroom wall. And, as the district court noted, any potential coercion behind Johnson's banner would be further offset by "the cacophony of other First Amendment speech which remains in the high school classrooms."¹⁰²

Just as it correctly held that Poway School District could order the removal of Johnson's banners without violating the Establish-

95. *Id.*

96. *See id.* at 959.

97. *See id.* at 974 ("[B]ecause the speech is the government's, Brickley's purpose is not dispositive.").

98. Johnson I, No. 07cv783 BEN (NLS), 2010 WL 768856, at *17 (S.D. Cal. Feb. 25, 2010).

99. *See Johnson II*, 658 F.3d at 959.

100. POWAY UNIFIED SCH. DIST., ANNUAL NOTIFICATION OF PARENTS'/STUDENTS' RIGHTS 3 (2010), available at http://www.powayusd.com/enrollment/10-11FORMS/English/Annual_Notification_%20ParentStuRights_ENG_10_11Final.pdf.

101. Although district policy allows students to opt out of reciting the Pledge, those who do so will still likely hear the offending words every morning. *See id.*

102. *Johnson I*, 2010 WL 768856 at *13.

ment Clause,¹⁰³ the court correctly held that the school district could allow the prayer flags and other displays to remain in classrooms without violating the clause. However, the court failed to address the reasons for allowing these displays to remain while at the same time ordering the removal of Johnson’s banners.

V. CONCLUSION

By itself, the Ninth Circuit’s holding that Poway School District was justified in removing Johnson’s banners is not problematic. Neither is the court’s holding that the prayer flags and other displays were permissible. But considered together, the two holdings raise serious concerns of religious discrimination. A reasonable observer could certainly interpret these actions as displaying hostility to Johnson’s Christian message while endorsing other religious messages, even if the school district did not intend such an effect.¹⁰⁴

The Ninth Circuit’s decision to allow Poway to selectively permit religious displays is not unprecedented.¹⁰⁵ But the relevant decision was clearly based on key distinctions between the physical settings of the displays rather than their underlying messages.¹⁰⁶ In *Johnson*, there were no such distinctions—both the banners and the prayer flags were similarly displayed and in similar settings.¹⁰⁷

Currently, the Supreme Court’s jurisprudence does not provide clear standards for lower courts to apply in religious display cases.¹⁰⁸ But the Court has unambiguously required government neutrality in matters of religion.¹⁰⁹ In future cases, a court could reasonably interpret Supreme Court precedent to allow either a restrictive or a permissive approach to these cases. But whichever approach a court chooses, the neutrality standard requires that the court apply the same standard to all displays that it considers. In *Johnson*, the Ninth

103. *See supra* Part IV.B.

104. *See supra* note 17 and accompanying text.

105. In *County of Allegheny v. ACLU*, the Supreme Court upheld the display of an eighteen-foot menorah while finding a nativity scene unconstitutional. 492 U.S. 573 (1989).

106. The menorah was displayed outside and next to a forty-five-foot Christmas tree; in contrast, the nativity scene was displayed alone and in a prominent location inside the courthouse. *Id.* at 580–82.

107. *See supra* notes 64–66 and accompanying text.

108. *See supra* note 9 and accompanying text.

109. *Board of Educ. v. Grumet*, 512 U.S. 687, 696 (1994).

Circuit failed to do so; therefore, *Johnson* was wrongly decided and should be overruled.

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