FIRST AMENDMENT — FREE SPEECH IN SCHOOLS — NINTH CIRCUIT HOLDS THAT TEACHER SPEECH IN SCHOOL-RELATED SETTINGS IS NECESSARILY GOVERNMENT SPEECH. — *Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011).

Free speech jurisprudence in the last two decades has built toward an impasse between two approaches: public forum doctrine, which prohibits the government from discriminating against private speech on the basis of viewpoint, and government speech doctrine, which exempts expressions of the government's own viewpoints from First Amendment scrutiny.[1] As several decisions by the Roberts Court have expanded the scope of the latter doctrine,[2] critics have lamented that broad judicial findings of government speech risk throwing individual free speech rights into jeopardy.[3] Recently, in *Johnson v. Poway Unified School District*,[4] the Ninth Circuit exemplified this concern by holding that speech by teachers around students in school-related settings necessarily constitutes government speech and merits no First Amendment protection.[5] The court's unnecessary expansion of government speech to virtually all teacher-student communications illustrates how the doctrine's convenience as an alternative to the complications of public forum analysis has led courts to apply it in a way that prioritizes the virtues of administrability and judicial nonintervention over free speech interests.

For over thirty years, the Poway Unified School District maintained a policy of allowing teachers to decorate their classrooms with messages reflecting their personalities and values, so long as the messages did not materially disrupt the school's operation.[6] For twenty-five years, math teacher Bradley Johnson decorated his classroom with

---

[1] *See* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1381 (2001) (noting that the Supreme Court is "stuck in an endless circle . . . between government speech and the public forum"); Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 72 (2004) (describing "a collision course" between aspects of the two doctrines).

[2] *See, e.g.*, Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1129 (2009) (applying government speech doctrine to privately donated monuments in public parks); Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (extending the doctrine to statements made by public employees "pursuant to their official duties").

[3] *See, e.g.*, Bezanson & Buss, *supra* note 1, at 1381 ("[T]he use of speech by government is expanding and taking new forms, which presents heightened risks that the government may displace or monopolize private speech . . . ."); Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 698 (2011) ("Government speech . . . [often] directly *regulates* individual private speakers — either forbidding them to express viewpoints they support or compelling them to express viewpoints they do not support.").

[4] 658 F.3d 954 (9th Cir. 2011).

[5] *Id.* at 968.

[6] Johnson v. Poway Unified Sch. Dist., No. 07cv783 BEN (NLS), 2010 WL 768856, at *3 (S.D. Cal. Feb. 25, 2010).

either one or two banners featuring religious phrases, each seven feet wide and two feet high.[7] After Johnson's new principal saw the displays in 2006, the school board ordered Johnson to remove the banners on the ground that they conveyed a Judeo-Christian viewpoint that might intimidate students of other religions.[8] Administrators did not take issue with arguably religious decorations displayed by other teachers, including posters of the Dalai Lama and Tibetan prayer flags.[9] Johnson filed suit, arguing that the removal of his banners violated his right to free speech, conveyed hostility toward Christianity in violation of the Establishment Clause, and denied him equal protection under the Fourteenth Amendment.[10]

The District Court for the Southern District of California granted Johnson summary judgment on all counts.[11] Noting that the Supreme Court had long since established that teachers retain free speech rights on school grounds,[12] the court conducted a traditional public forum analysis[13] to hold that the school district's policy had created a "limited public forum" for private teacher expression in which viewpoint-based speech regulations were prohibited.[14] Under *Rosenberger v. Rector & Visitors of University of Virginia*,[15] in which the Supreme Court held that religious speech constituted a protected "viewpoint" for the purposes of a limited forum,[16] the school was barred from removing Johnson's banners.[17] The district court rejected Poway's argument that the avowedly noncurricular banners were government speech unprotected by the First Amendment[18] and dismissed as speculative Poway's claim that it had attempted to avoid an Establishment Clause violation.[19] Furthermore, the court held that the school's removal of Johnson's

---

[7] *Id.* at *2. The phrases included "One Nation Under God," "God Shed His Grace On Thee," and "All Men Are Created Equal, They Are Endowed By Their CREATOR." *Id.*

[8] *Johnson*, 658 F.3d at 958–59. Johnson refused to display a smaller version of the banners or to include more historical context for the quotations. *Id.*

[9] *Id.* at 959–60.

[10] *Id.* Johnson also brought parallel state claims under the California Constitution. *Id.* at 959.

[11] *Johnson*, 2010 WL 768856, at *1–2.

[12] *Id.* at *7 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[13] Public forum doctrine holds that the government's ability to regulate private speech on government-owned property varies according to the type of expressive forum the government establishes on that property. The type of forum is determined by factors such as the historical use of the space for private expression and personal qualifications for access. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44–49 (1983).

[14] *Johnson*, 2010 WL 768856, at *9 (noting the school's intent to give instructors "discretion and control" over any nondisruptive messages). A limited public forum is an expressive forum open only to specific categories of participants. *Perry*, 460 U.S. at 46–49.

[15] 515 U.S. 819 (1995).

[16] *Id.* at 831.

[17] *Johnson*, 2010 WL 768856, at *12.

[18] *Id.* at *14–17.

[19] *Id.* at *13.

banners, in the face of its continuing approval of Buddhist and Hindu displays, demonstrated hostility to Christianity in violation of the Establishment Clause.[20] Finally, the court concluded that the school's prohibition of Johnson's speech violated his rights to equal protection.[21]

The Ninth Circuit reversed. Writing for the panel, Judge Tallman[22] agreed that teachers do not automatically relinquish their free speech rights on school property.[23] Yet he concluded that public forum analysis was inappropriate in this case.[24] Because teachers are government employees, Johnson's right to display his banner was governed by the Supreme Court's analysis of employee speech in *Pickering v. Board of Education*.[25] Since Johnson displayed his banners in his classroom during school hours, Judge Tallman held that Johnson expressed himself within the ordinary scope of his employment[26] and consequently spoke on behalf of the government.[27] Emphasizing the unique authority wielded by instructors over impressionable pupils, Judge Tallman stated that, as a rule, "teachers *necessarily* act as teachers . . . when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official."[28] Yet he noted that a finding of government speech does not require that all three of these conditions be met,[29] and that both discussions with students after class and conversational breaks from curricular instruction properly qualify.[30] In this case, because Johnson hung his banners inside a classroom before a captive audience of students,[31] he did not merit free speech protection.[32]

---

[20] *Id.* at *18–19. The court also held that Johnson's successful free speech and Establishment Clause claims satisfied his state claims, *id.* at *20, and that the defendants were not entitled to qualified immunity, *id.* at *21.

[21] *Id.* at *20–21.

[22] Judge Tallman was joined by Judges Silverman and Clifton.

[23] *Johnson*, 658 F.3d at 962–63.

[24] *Id.* at 961.

[25] 391 U.S. 563 (1968); *see Johnson*, 658 F.3d at 961–64. As applied by the Ninth Circuit, the *Pickering* test sequentially asks: (1) "whether the plaintiff spoke on a matter of public concern"; (2) whether he spoke as a citizen or as an employee; (3) whether his protected speech motivated an adverse action; (4) whether the state had sufficient justification for its action; and (5) whether the state would have taken the action absent the protected speech. *Johnson*, 658 F.3d at 961 (quoting Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009)). Failure to satisfy any one prong defeats the First Amendment claim. *Id.* at 961–62.

[26] *Johnson*, 658 F.3d at 966–67.

[27] *Id.* at 970. Because the government has a right to choose the content of its own speech, individuals speaking on the government's behalf have no First Amendment right to contradict its viewpoint in the course of service. *See* Rust v. Sullivan, 500 U.S. 173, 198–200 (1991).

[28] *Johnson*, 658 F.3d at 968.

[29] *Id.* at 968 n.15.

[30] *Id.* at 967–68.

[31] *Id.* at 968. The court emphasized that Johnson's access to the room and students depended entirely on his employment. *Id.*

[32] *Id.* at 970.

Turning to the Establishment Clause claim, the Ninth Circuit refuted the claim that the school's order conveyed an impermissible message of hostility toward Judeo-Christian speech.[33] Applying the tripartite test announced in *Lemon v. Kurtzman*,[34] the court argued that Poway's order did not violate the Establishment Clause because the school's aim — avoiding an Establishment Clause violation of its own — constituted a valid secular purpose, did not have a primary effect of inhibiting religion, and did not cause excessive government entanglement with religion.[35] Furthermore, the school's preservation of the Tibetan prayer flags and other posters did not endorse alternate religions to the detriment of Judeo-Christian belief. As the flags both were intended to and in fact served to stimulate scientific interest, and as the posters at most connoted rather than endorsed a religion, neither ran afoul of the Establishment Clause.[36]

The Ninth Circuit's preference for government speech doctrine over public forum analysis is understandable under the facts of this case. In light of school officials' repeated concerns that Johnson's aggressive banners might communicate an unwelcoming message to non-Christian pupils,[37] the court may reasonably have wished to defer to the school's removal order. Since Poway's policy on wall displays plausibly created a limited public forum for teacher speech, which would have required the court to protect Johnson's potentially divisive speech under *Rosenberger*,[38] the court needed to find that Johnson's displays constituted government speech to be able to uphold the school's decision. Yet instead of following the Supreme Court's example of applying a fact-specific government speech analysis in borderline public forum cases, the *Johnson* court unnecessarily broadened government speech doctrine by extending it to virtually all teacher expression around students. *Johnson* can be understood as an attempt to avoid trapping schools in a restrictive public forum framework and to ward off continual judicial oversight of school operations. Nevertheless, it illustrates how the utility of government speech doctrine as an escape hatch from the difficulties of public forum analysis risks leading courts to prioritize administrability and judicial nonintervention over the freedom of speech in applying the doctrine.

---

[33] *Id.* at 970–74.

[34] 403 U.S. 602, 612–13 (1971).

[35] *Johnson*, 658 F.3d at 973–74.

[36] *Id.* at 973–74. Because Johnson had no right to speak on behalf of the government, the court concluded, Poway's suppression of his speech did not violate equal protection. *Id.* at 975.

[37] Although the district court noted that Johnson's banners caused no substantial disruption, *see* Johnson v. Poway Unified Sch. Dist., No. 07cv783 BEN (NLS), 2010 WL 768856, at *4 (S.D. Cal. Feb. 25, 2010), the Ninth Circuit emphasized school officials' fear that the banners might discomfit students who did not share his religious views, *Johnson*, 658 F.3d at 959.

[38] *See Johnson*, 2010 WL 768856, at *9–12.

The breadth of *Johnson*'s holding effectively denies First Amendment rights to teachers speaking with students in school-related settings. While the court formally imposed some limits on its holding, asking whether teachers speak among students, at a school-related activity, and in a capacity "reasonably view[ed] as official,"[39] its immediate caveat that not all three conditions need be present suggests that any teacher speech around students in school-related settings can constitute government speech.[40] If, as the court noted, discussions after the end of a class period, discursive breaks from curricular instruction,[41] and wall space specifically reserved for personal messages from teachers[42] all constitute government speech, few instances of teacher speech around a student would ever merit protection. *Johnson* expands the scope of government speech beyond the prior holdings that it cites in its support,[43] which applied the doctrine only to the narrowly delimited circumstances of teachers engaging in curricular instruction[44] or speaking in furtherance of an identified school message.[45] No binding precedent has suggested that educators surrender free speech rights in their interactions with students where the state has not already prescribed a specific and contrary message.[46]

The Ninth Circuit could have echoed Supreme Court precedent and resolved the case more narrowly, classifying Johnson's banners as government speech because a reasonable observer might have interpreted them as conveying an official message. In *Pleasant Grove City v. Summum*,[47] the Supreme Court held that privately donated monuments in a public park — a quintessential public forum — constituted government speech because the government exercised approval power over their placement[48] and because their permanence led observers to

---

39 *Johnson*, 658 F.3d at 968 (citations omitted).

40 *See id.* at 968 n.15.

41 *See id.* at 967–68 & n.14.

42 *See id.* at 968.

43 *See id.*

44 *See* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007) (holding that teachers have no free speech rights over their curricular speech); Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1212–13 (9th Cir. 1996) (stating same in dicta); *cf.* Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 522 (9th Cir. 1994) (suggesting, outside the government speech context, that teachers only act in their capacity as teachers during and immediately after class time).

45 *See* Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1016–17 (9th Cir. 2000) (holding that a bulletin board mounted pursuant to a school's pro-diversity policy constituted government speech).

46 While the Supreme Court has held that statements made by public employees "pursuant to their official duties" qualify as government speech, Garcetti v. Ceballos, 547 U.S. 410, 421 (2006), it noted that its broad holding might not apply to educational speech, *id.* at 425. *But see* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 342–44 (6th Cir. 2010) (suggesting that precedent for educational free speech rights might be limited to the post-secondary level).

47 129 S. Ct. 1125 (2009).

48 *Id.* at 1134.

"reasonably . . . interpret them as conveying some message" from the government.[49] Numerous commentators have advocated formalizing the Court's reasonable observer approach as a valuable limit on the government speech exception.[50] Indeed, *Johnson*'s own condition that teachers speak in a capacity "reasonably viewed as official" suggests precisely such a reasonable observer standard. Considering the court's attention to the intimidating size of Johnson's banners[51] and given the banners' lasting affixation to school property, the court could have found that Johnson's displays constituted government speech because, as in *Summum*, their prominence created a reasonable impression that they conveyed an official message from the school.[52] Giving bite to the court's own reasonable observer standard would have allowed Poway to remove Johnson's banners while preserving some First Amendment protections for more self-evidently personal teacher speech.[53]

Yet perhaps the reason that the *Johnson* court so promptly dismissed its own reasonable observer standard is that the standard's apparent virtue — its fact-intensive, individualized holdings — contravenes the interests in administrability and judicial noninterference that make the government speech doctrine attractive to courts in the first place. In many ways, the growing centrality of the government speech doctrine in First Amendment jurisprudence may be explained as an attempt to remedy the shortcomings of public forum analysis. For decades, the Supreme Court's splintering public forum framework — especially the nebulous "limited public forum" — has created a confusing and often incoherent framework for lower courts, which struggle to classify forums and to decide which standards of review apply within them.[54] Exacerbating this ambiguity, the Court's holding in *Rosen-*

---

[49] *Id.* at 1133–34.

[50] *See, e.g.*, Bezanson & Buss, *supra* note 1, at 1510; Carl G. DeNigris, Comment, *When Leviathan Speaks: Reining in the Government-Speech Doctrine Through a New and Restrictive Approach*, 60 AM. U. L. REV. 133, 159 (2010); *cf.* Dolan, *supra* note 1, at 74 (suggesting an "appearance of endorsement" standard for government speech); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 599 (2008) (suggesting a requirement that onlookers attribute the speech to the government). At least one Justice has endorsed a reasonable observer test. *See Summum*, 129 U.S. at 1142 (Souter, J., concurring in the judgment) ("[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech . . . .").

[51] *See Johnson*, 658 F.3d at 958.

[52] With respect to the Supreme Court's inquiry into the government's "final approval authority" over donated monuments, *Summum*, 129 S. Ct. at 1134 (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–61 (2005)) (internal quotation marks omitted), Poway's removal order suggests that the school retained a power of approval over teachers' decorations.

[53] *See* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1006 (2005); ("[T]he audience may understand that the entity is a part of the government . . . but may nevertheless assume that the entity speaks . . . on its own account . . . .").

[54] *See* Bezanson & Buss, *supra* note 1, at 1404 (noting the "slipperiness" of the multiple forums as legal categories); Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2141–42

berger, barring regulations against religious speech as viewpoint-based discrimination,[55] blurred previously operable distinctions between permissible content-based and impermissible viewpoint-based discrimination[56] and truncated the possibilities of often-desirable speech regulations.[57] As commentators have suggested, the recent importation of government speech into apparently public forum cases like *Summum* may be seen as an attempt to avoid both *Rosenberger*'s often-impractical limits on speech regulations in public forums[58] and the complexities of forum analysis generally.[59]

Undercutting its own proposed reasonable observer standard, *Johnson*'s broad application of government speech preserves and expands the utility of the doctrine as an elegant alternative to post-*Rosenberger* public forum analysis. First, by broadly characterizing all teacher speech around students as government speech, the *Johnson* holding allows school officials to prohibit potentially offensive teacher speech without the threat of the *Rosenberger* straightjacket. Second, by foreclosing a fact-intensive analysis of which teacher utterances in which circumstances convey a school message,[60] the holding keeps neat and versatile a doctrine that provides courts with an attractive analytic alternative to the complexity of public forum analysis.[61] Finally, by expanding government speech doctrine to a wide swath of teacher speech beyond that at issue in the case, the holding excuses

---

(2009) ("[O]ne of the greatest failings of forum analysis [is] the substantial confusion that arises from the nebulous middle category of forum.").

55 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830–31 (1995).

56 *See* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1988 (2011) (noting that *Rosenberger* "blurs the line between viewpoint and content neutrality"); Luba L. Shur, Note, *Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake to Rest*, 81 VA. L. REV. 1665, 1720 (1995) (arguing that the case "gives rise to further incoherence" in First Amendment doctrine).

57 *See* Ben Brown, Comment, *A Jeffersonian Nightmare: The Supreme Court Launches a Confused Attack on the Establishment Clause* — Rosenberger v. Rector and Visitors of University of Virginia*, 115 S. Ct. 2510 (1995)*, 31 HARV. C.R.-C.L. L. REV. 257, 257 (1996) (noting that *Rosenberger* goes "farther than any previous decision toward eroding the . . . Establishment Clause").

58 *See, e.g.*, Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1138 (2009) (noting that applying public forum analysis to privately donated monuments would lead governments to refuse all donations and effectively close their forums altogether to avoid a proliferation of unwanted expression).

59 *See* Note, *supra* note 54, at 2152 (suggesting that the Court adopted a "broad understanding" of government speech in *Summum* as a "means of evading the nebulous standards that apply in the middle forum"); Timothy Zick, Summum*, the Vocality of Public Places, and the Public Forum*, 2010 B.Y.U. L. REV. 2203, 2234 (noting that *Summum* may "tempt[]" lower courts to avoid "notoriously messy" public forum analysis by turning to government speech doctrine).

60 *Cf.* DeNigris, *supra* note 50, at 136 ("[T]he distinction between government speech and private speech is not as clear as it may seem . . . .").

61 To the extent that commentators have noted that government speech doctrine itself is complex and often inconsistently applied, *e.g.*, *id.* at 137; Note, *supra* note 54, at 2154, *Johnson*'s broad application crucially not only extends the doctrine to a greater number of First Amendment cases but also simplifies its framework.

courts from continual oversight of school board decisions with every new fact pattern.[62] While the breadth of *Johnson*'s definition of government speech might be novel, its effect of widely curtailing free speech rights for teachers on school grounds is thus the natural outgrowth of the judicial turn to government speech as an escape from the limitations of public forum analysis in difficult First Amendment cases.

The Ninth Circuit was right to hold that teachers in public schools often act as government agents beyond the confines of their formal curriculum, and right to recognize, too, that contemporary public forum analysis imposes unrealistic and often unwise restrictions on government actors. Yet as the troubling repercussions of *Johnson*'s opinion demonstrate, the blunt expansion of government speech presents a problematic remedy to these acknowledged shortcomings. As critics have noted, by excluding an entire arena of speech regulations from judicial scrutiny, the categorical application of government speech doctrine to new classes of individual-initiated speech imperils constitutional protections for private expression.[63] *Johnson* illustrates how courts' increasing reliance on the government speech exception to the First Amendment has prioritized administrability and judicial nonintervention over the protection of individual First Amendment rights themselves. Ultimately, if the public forum framework emerging after *Rosenberger* presents an impractical standard for First Amendment claims, it may be time for courts to reformulate that framework rather than to avoid the problem altogether by expanding the government speech doctrine.

---

[62] *Cf.* Garcetti v. Ceballos, 547 U.S. 410, 423 (2006) (preferring a broader government speech standard to avoid "commit[ting] state and federal courts to a new, permanent, and intrusive role" in overseeing government operations). Holding that the specific configuration of Johnson's permanent banners rendered them government speech would have left unresolved whether a school could order a teacher to remove, for example, a smaller banner or a poster only intermittently posted on school walls.

[63] Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 731 (2011) (noting that government speech doctrine "opens the door for the government to engage in viewpoint discrimination, which otherwise would be clearly unconstitutional"); Barry P. McDonald, *The Emerging Oversimplifications of the Government Speech Doctrine: From Substantive Content to a "Jurisprudence of Labels*," 2010 B.Y.U. L. REV. 2071, 2095 (predicting that government speech doctrine "will result in a substantial diminishment in free speech protections for private speakers"); *Developments in the Law — State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1293 (2010) ("Expansion of the government speech doctrine therefore threatens to erode constitutional protections by allowing the government to discriminate based on viewpoint in an increasingly wide range of circumstances.").