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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STEPHEN J. WILLIAMS, Plaintiff, vs. PATRICIA VIDMAR, Principal of Stevens Creek School, WILLIAM BRAGG, Superintendent of Cupertino Union School District, PEARL CHENG, BEN LIAO, JOSEPHINE LUCEY, GARY MCCUE, GEORGE TYSON, Board members of Cupertino Union School District, in their official capacities only, Defendants.	No. 5:04-CV-4946 JW PVT **NOTICE OF DEFENDANTS PATRICIA VIDMAR, WILLIAM BRAGG, PEARL CHENG, BEN LIAO, JOSEPHINE LUCEY, GARY MCCUE AND GEORGE TYSON'S MOTION TO DISMISS COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [Fed. Rules Civ. Proc., rule 12(b)(6)]** Date: March 28, 2005 Time: 9:00 a.m. Courtroom: 8, 4th Floor: Judge: Hon. James Ware

TO: PLAINTIFF AND HIS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on March 28, 2005, at 9:00 a.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at 280 South First Street, San Jose, California, defendants Patricia Vidmar, William Bragg, Pearl Cheng, Ben Liao, Josephine Lucey, Gary McCue, and George Tyson ("Defendants") will and hereby do

move the Court to dismiss this action pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure because plaintiff's complaint fails to state a claim upon which relief can be granted. This motion is brought on the grounds that: (1) plaintiff's constitutional claim based on alleged violation of the Equal Protection Clause fails because he has not identified a class of similarly situated teachers at Stevens Creek School; (2) plaintiff's constitutional claim based on alleged violation of the First Amendment Right to Free Speech fails because public school teachers are mouthpieces for the State, and when the State is the speaker, it may make content-based choices on its speech; furthermore, the principal's concern for potential Establishment Clause violations trumps plaintiff's alleged free speech rights; (3) plaintiff's constitutional claim alleging vagueness in defendants' "practice and policy" fails because plaintiff pursued and received notice of the District's expectations involving his classroom speech even where none is required, as school officials may restrict speech before publication; (4) plaintiff's constitutional claim for defendants' alleged violation of the First Amendment Establishment Clause fails because a public school may not endorse a religious viewpoint; (5) all of the defendants are entitled to qualified immunity; and (6) Ms. Vidmar's conduct is immunized pursuant to California Government Code section 820.2

This motion will be based upon this notice and the memorandum of points and authorities; the pleadings, records, and files herein; and upon such other evidence, oral and documentary, as may be presented at the hearing.

ISSUES TO BE DECIDED

The issues to be decided in this motion under Rule 12(b)(6) include a challenge to the sufficiency of each of the substantive claims of defendants' constitutional violations contained in plaintiff's complaint. More specifically, the issues to be decided include whether the allegations in the complaint are sufficient to state a cause of action under: (1) the Equal Protection clause of the federal Constitution; (2) the First Amendment of the federal Constitution prohibiting the abridgment of the freedom of speech; (3) the Establishment Clause of the federal Constitution's First Amendment; and (4) the Free

Exercise Clause of the federal Constitution's First Amendment.

STATEMENT OF FACTS

Plaintiff's amended Verified Complaint For Declaratory and Injunctive Relief ("Complaint") brought by plaintiff STEPHEN WILLIAMS ("plaintiff"), alleges that defendants discriminated against plaintiff when Ms. Vidmar, the school's principal, reviewed and subsequently restricted supplemental handouts plaintiff intended to distribute to his 5th grade American History students. Plaintiff alleges that Ms. Vidmar's actions violated his First Amendment right to free speech. Since the supplemental materials plaintiff intended to distribute were obviously and admittedly Christian in content, plaintiff also alleges Ms. Vidmar violated the Establishment Clause (¶ 151) as well as his right to freely practice his religion. (¶¶ 147, 149-150.) Lastly, plaintiff alleges that he was not allowed to use supplemental handouts that were of a religious nature because he is an orthodox Christian. (¶¶ 1, 76, 121-122, 129, 140, 142, 148.)

Plaintiff alleges that before the action on which this complaint is based, Ms. Vidmar approached plaintiff regarding the religious nature of two of his classroom discussions. In one case, plaintiff explained he responded to a student question regarding the words "under God" in the Pledge of Allegiance. Rather than simply answer the question, plaintiff "facilitated a short discussion among the students." (¶ 30.) In the other case, plaintiff told his students that a Christian is "someone who follows the teachings of Jesus Christ." (¶ 36.) Plaintiff alleges that after each of these incidents, Ms. Vidmar did a spot check to make sure plaintiff's classroom discussions referencing religion were appropriate.

After being approached twice by Ms. Vidmar that his classroom discussions might be inappropriately religious in nature, plaintiff decided to be proactive and volunteered to submit proposed lessons to Ms. Vidmar. (¶¶ 46, 50-51.) In one case, Ms. Vidmar was invited to observe a lesson on "myth and fact" about the more secular holiday, Thanksgiving. (¶¶ 50-52.) In another case, plaintiff showed Ms. Vidmar an assignment sheet with proposed activities to supplement a C.S. Lewis novel the class was reading. Of

the nine assignment choices, one directed students to explain the Christian allegory in C.S. Lewis's work. Plaintiff acknowledges that Ms. Vidmar gave the go ahead on its distribution. (¶¶ 44-49.) There were, however, occasions where Ms. Vidmar did not approve of plaintiff's religiously oriented lesson plans. For some reason, even though plaintiff is an American History teacher, he proposed to teach a lesson on Easter which he had found on the internet. Ms. Vidmar directed plaintiff to not teach a lesson on Easter. In addition, Ms. Vidmar raised concerns about plaintiff being insensitive to the diverse religious community in his classroom. (¶¶ 55-59.) "Guidelines for Teaching About Religion" states that "the school may expose students to a diversity of religious views, but may not impose any particular view." (Appendix C of Exhibit "A", pg. 206.)

Plaintiff does not allege that before May 11, 2004, he was required to submit his classroom materials to Ms. Vidmar. On two occasions, plaintiff did not proactively submit his religiously oriented lesson plans for Ms. Vidmar's approval. In one case, plaintiff's students participated in a common holiday season activity where students study the diverse religious celebrations that take place in the winter time. Plaintiff did not receive any complaints. (¶¶ 53-54.) On another occasion, May 6, 2004, plaintiff sent home a handout explaining the history of the National Day of Prayer and the text of President George W. Bush's proclamation of a Day of Prayer. This time, plaintiff did receive a complaint. (¶¶ 60-62.) It was immediately after receiving this complaint that Ms. Vidmar sent plaintiff a memorandum explaining that henceforth she required an opportunity to preview all materials plaintiff planned to send home. (¶ 63.)

Plaintiff alleges that shortly after the May 11 memorandum, he believed his students were experiencing confusion about the "separation of church and state." To remedy this problem, plaintiff on May 14, 2004, proposed to distribute ten handouts about the American founder's religious beliefs. These ten handouts were to be covered in 45 minutes. (¶¶ 65-70.) Some of these religious documents were by unknown authors. Ms. Vidmar rejected his proposal to distribute these documents. Four days later, on May 18, 2004, plaintiff

proposed to teach a lesson on how the American Founder's religious beliefs influenced our government's formation. Ms. Vidmar rejected these documents because in her opinion they were "of a religious nature and … not appropriate to be used with [plaintiff's] fifth grade students because the district honors separation of church and state." (¶ 77.)

On May 19, 2004, plaintiff was directed to submit his weekly lesson plans to Ms. Vidmar for the remainder of the year. At a May 27, 2004, meeting, plaintiff was told to "cease seeking Christian materials to present as supplementary materials and resources" for his lesson plans. Plaintiff was also informed that failure to do so could lead to disciplinary action. (¶ 80.) Plaintiff responded to Ms. Vidmar's exhortation that he should cease seeking Christian materials by stating he never actually distributed any of these materials except for the one on which he had received the parental complaint. (¶ 82.)

Plaintiff's complaint, therefore, details four incidents taking place in the Spring of 2004 involving his supplemental handouts. Of these four, Ms. Vidmar rejected three of them as being impermissibly religious in nature for the public school classroom and/or not age appropriate. The supplemental handout Ms. Vidmar did not preview received a parental complaint. It is not surprising, then, that when plaintiff returned to his classroom in the fall of 2004, Ms. Vidmar provided him with a packet of curriculum-related supplemental materials for use in his classroom. Plaintiff was instructed not to deviate from this packet.

Plaintiff alleges that all the supplemental handouts he had chosen for distribution are curriculum-related. Plaintiff includes the Grade Five content standards for the "History-Social Science Framework" in an effort to demonstrate this. The content standards call for discussion about the religious heritage of the United States, stating at page 64:

> "Whenever possible, events should be seen through the eyes of participants such as explorers, American Indians, colonists, free blacks and slaves, or pioneers. The narrative for the year must reflect the experiences of different racial, religious, and ethnic groups."

Plaintiff also exhibits individual standard strands for Grade Five. Of these nine standard strands (5.1 through 5.9), 5.4 requires students to "understand the political,

religious, social, and economic institutions that evolved in the colonial era." Within this particular strand, subpart 5.4.2 explains that students should be able to "describe the religious aspects of the earlier colonies," and then lists "Puritanism, Anglicanism, Catholicism, and Quakerism." Subpart 5.4.3, on page 72, directs teachers to teach about The First Great Awakening including how this period in history "marked a shift in religious ideas, practices, and allegiances in the colonial period" and how The First Great Awakening lead to "the growth of religious toleration, and [the] free exercise of religion."

The State standards require students to learn about the diversity of cultures that have contributed to the founding of the United States. (Exhibit "A", pg. 69.) Additionally, students are expected to "identify and interpret the multiple causes and effects of historical events." (Exhibit "A", pg. 75.) At Paragraph 90, plaintiff alleges he "does not emphasize religion in his classroom." This is only true to the extent plaintiff does not emphasize religion or religions in general in his classroom. Rather, he emphasizes orthodox Christianity in his classroom.

INTRODUCTION

Plaintiff alleges that in response to Ms. Vidmar's concern about his discussing religion in the classroom, he became proactive and voluntarily submitted religiously oriented lesson plans and supplemental handouts for Ms. Vidmar's review. In some cases, she deemed the lessons acceptable. In other cases, she felt plaintiff's proposed materials were inappropriate for fifth graders in a public school classroom, and she informed plaintiff they could not be used with his lessons. One handout was not previewed by Ms. Vidmar and received a parental complaint. After this, Ms. Vidmar required plaintiff to submit his supplemental handouts in advance. Twice within a four day period, Ms. Vidmar rejected plaintiff's supplemental handouts as being too religious in nature. According to the plaintiff, many of the handouts rejected by Ms. Vidmar were technically "source" documents written by America's founding fathers. One month after school had started again in the fall, Ms. Vidmar prepared a packet of supplemental materials and told plaintiff that if he deviated

from these prescribed handouts in his classroom, he could be disciplined. Plaintiff alleges that Ms. Vidmar's prepublication restriction on his proposed lesson plans discriminated against him, violated his right to free speech and free exercise of religion, and violated the Establishment Clause of the federal Constitution. Plaintiff has not alleged a similarly situated class of teachers, nor has he alleged, therefore, how he has been treated differently than teachers in the similarly situated class. As a teacher, plaintiff is a speaker for the State, and when the State is the speaker, it may restrict speech pursuant to its content based choices. Plaintiff's claim that defendants' "practice and policy excludes his religious expression" (¶ 147) during instructional time does not allege a violation of the Establishment Clause. Finally, even if plaintiff could show that Ms. Vidmar or any defendant violated his constitutional rights, their conduct is protected by qualified immunity and discretionary immunity.

ARGUMENT

I
PLAINTIFF'S FEDERAL CONSTITUTIONAL CLAIM BASED ON ALLEGED VIOLATION OF THE EQUAL PROTECTION CLAUSE MUST FAIL BECAUSE PLAINTIFF HAS NOT IDENTIFIED A CLASS OF SIMILARLY SITUATED TEACHERS AT STEVENS CREEK SCHOOL.

Plaintiff alleges that Ms. Vidmar rejected and eventually prescribed his choice of supplemental handouts for his classroom. Plaintiff also alleges that other similarly situated teachers are allowed to supplement their lessons with religiously-oriented materials without subjecting them to Ms. Vidmar's prepublication review and approval. (¶¶ 126-127.) As a result of this, plaintiff alleges he is treated differently than other teachers. (¶ 129.)

When proceeding on an Equal Protection claim, identifying the similarly situated class is vital because "discrimination cannot exist in a vacuum; it can only be found in the unequal treatment of people in similar circumstances." (*Attorney General* v*. Irish People, Inc*. 684 F.2d 928, 946 (D.C. Cir. 1982).) While plaintiff has alleged unequal treatment, he has not identified a group of similarly situated teachers who were treated differently in similar circumstances. Plaintiff's equal protection claim, therefore, cannot go forward until

he identifies these similarly situated teachers. "Once the plaintiff establishes governmental classification, it is necessary to identify a "similarly situated" class against which the plaintiff's case can be compared." (*Freeman v. City of Santa Ana*, 68 F.3d 1180 at 1187 (emphasis added).)

Plaintiff has not identified other teachers to whom he may compare, e.g., teachers who propose to distribute the same handouts as the plaintiff, or teachers who received a parental complaint about his handouts but whose classroom materials are not scrutinized. By failing to identify other teachers at Stevens Creek School whose classroom materials are not scrutinized based on either one of these factors (the handouts themselves or the parental complaints), plaintiff has failed to identify a class of similarly situated teachers. As such, his claim for violation of the Equal Protection clause must fail.

II

PLAINTIFF'S FEDERAL CONSTITUTIONAL CLAIM BASED ON ALLEGED VIOLATION OF THE FIRST AMENDMENT RIGHT TO FREE SPEECH MUST FAIL BECAUSE PUBLIC SCHOOL TEACHERS ARE MOUTHPIECES FOR THE STATE, AND WHEN THE STATE IS THE SPEAKER, IT MAY MAKE CONTENT-BASED CHOICES ON ITS SPEECH; FURTHERMORE, THE PRINCIPAL'S CONCERN FOR POTENTIAL ESTABLISHMENT CLAUSE VIOLATIONS TRUMPS PLAINTIFF'S ALLEGED FREE SPEECH RIGHTS.

School districts and its officials may impose content based restrictions on its teachers because "when the State is the speaker, it may make content-based choices." (*Rosenberger* v. *Rector and Visitors of the University of Virginia* (1995) 515 U.S. 819, 833.) Thus, "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." (*Hazelwood School District* v. *Kuhlmeier* (1988) 484 U.S. 260, 267.)

Clearly, then, as expressed in *California Teachers Association* ("*CTA*") v. *Davis* 63 F.Supp.2d 945 (N.D. Cal., 1999) at page 954:

> "Teachers do not have a First Amendment right to determine what curriculum will be taught in the classroom. This is especially true if the teacher's curriculum of choice is in contravention of specific school policies or dictates."

CTA underscores plaintiff's main misconception: that he has a First Amendment right to determine what curriculum will be presented in his classroom. (¶¶ 43, 110-112.) In CTA, teachers protested Proposition 227, a law that required classroom instruction to be in English. The teachers argued that this statute impermissibly regulated their classroom speech. The court, however, explained that the determination was not theirs to make. "Teachers do not have a First Amendment right to be free of regulations which tell them to follow a method of instruction or a curriculum." (CTA, supra, 63 F. Supp.2d at 954.) In short, not only can teachers be told what they will teach, but they can be told how they will teach it.

"When the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." (Rosenberger, supra, 515 U.S., at 833.) The facts and reasoning in *Hazelwood* are instructive on this point. In *Hazelwood*, the principal previewed the school's newspaper and demanded prior to publication that two inappropriate articles be stricken. While acknowledging that students were not without some First Amendment rights, the court explained that censoring a student newspaper was permissible as long as the limitations were "reasonably related to legitimate pedagogical concerns." (Hazelwood, supra, 484 U.S. at 273.) The principal was allowed to place content-based restrictions on the newspaper prior to publication because his actions concerned the school's "basic educational mission." (Id. at 266.)

In effect, *Hazelwood* holds that materials to be distributed among the school populace can be previewed for appropriateness and restricted if they are judged to be outside curricular goals, concerns, or as noted in *Rosenberger*, outside a particular policy the school as government speaker promotes. Indeed, as *Rosenberger* acknowledged at page 833:

> "when the [school] determines the content of the education it provides, it is the [school] that is speaking, and we have permitted the government to regulate the content of what it is or is not expressed when it is the speaker …"

Accordingly, as the school principal Ms. Vidmar is expected to "preview" a teacher's work when necessary, and where the teacher is not meeting state and District expectations, she is expected to redirect him to that end. By analogy, no one would question the plaintiff's obligation, as a teacher, to preview a student's oral presentation to make sure the student's words and gestures are congruent with district policies and that the information is accurate and pursuant to classroom goals. And no one would question plaintiff's obligation to restrict a student's presentation beforehand if as a teacher he believes it falls short of state and District standards.

The holdings in *Hazelwood* and *CTA* are based on the principle that a school cannot be forced to bear what it considers inappropriate speech as its imprimatur. This includes speech that would be permissible in many other contexts. Particularly demonstrative on this point is *Cohen v. California* (1971) 403 U.S. 15. In *Cohen*, the plaintiff was arrested for wearing a jacket bearing the epithet: "Fuck the draft" in a Los Angeles County court house. The court held that this speech was permissible because, in the main, it was not thrust upon unsuspecting, captive viewers. People could avoid being offended by looking away. However, it is clear that students and staff members alike could be disciplined for wearing *Cohen*'s infamous jacket to school. The phrase that was deemed protected speech in *Cohen* is clearly subject to regulation once it is put in a classroom context. To conclude the point concisely, "a school need not tolerate … speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school." (*Hazelwood*, *supra*, 484 U.S. at 266.)

Since school speech takes place in a nonpublic forum, not only can teachers be told what they are supposed to teach, they can be disciplined if what they say in the classroom is outside the curricular area. In *Ward* v. *Hickey* 996 F.2d 448 (1st Cir. 1993) a teacher was denied tenure because she led her class in a discussion about aborting Down Syndrome babies. In *Debro* v. *San Leandro School District* U.S Dist. LEXIS 17388 (N.D. Cal., 2001) a teacher received a letter of reprimand because he departed from classroom curriculum to

discuss tolerance for gays and lesbians. The Court acknowledged that the teacher's efforts were laudable, but he was on his own when his speech was not directed toward ensuring that students "learn whatever lessons [an] activity is designed to teach." (*Debro*, *supra*, LEXIS 17388 at 9, (citing *Hazelwood*, *supra*, 484 U.S. 271).) Thus, a school district and its officials have "absolute discretion in matters of *curriculum* by reliance on their duty to inculcate community values." (*Board of Education* v. *Pico* (1982) 457 U.S. 853, 871.)

That Ms. Vidmar's preview and restriction of plaintiff's supplemental handouts were directed toward avoiding a potential Establishment Clause violation should make it easier to justify her actions. Clearly, defendants had the right to control plaintiff's curricular choices even where potential entanglement with religion was not an issue. However, since the plaintiff's supplemental handouts were decidedly religious in nature, it should be noted that the First Amendment prohibits the establishment of religion before it prohibits the abridgment of speech. It is therefore understandable why constitutional concerns about the state entangling itself in religion overrides concerns about the state protecting an individual's right to free speech.

Peloza v. *Capistrano Unified School District* 37 F.3d 517 (9th Cir. 1994) involved a biology teacher who wanted to give equal instructional time to evolutionism and creationism. The Court held that the teacher could, in fact, be prohibited from discussing religion throughout the contractual school day. The Court acknowledged that this violated the teacher's speech rights, but determined that "the school district's interest in avoiding an Establishment Clause violation trumps Peloza's right to free speech." (*Id*. at 522.) The court provided a dispositive passage on why administrators must be vigilant about teachers discussing religion at school:

> "While at the high school, whether he is in the classroom or outside of it during contract time, [the teacher] is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. <u>His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is</u>

> substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment."

(*Peloza*, *supra*, 37 F.3d 522 (emphasis added).)

Ms. Vidmar's concerns would obviously be magnified compared to the high school principal. Plaintiff teaches 5th graders, students much more impressionable than high school students and therefore much more susceptible to embrace plaintiff's religious viewpoint. Even more debilitating to plaintiff, *Peloza* limits a teacher's religiously oriented speech outside specific instructional time. In other words, to protect itself from an Establishment Clause violation, the school could restrain a teacher's interaction with students at recess, lunch, or in the hallway between classes. This restraint of speech goes significantly beyond what the plaintiff is complaining of where, as already discussed, the school may absolutely control teacher speech during actual instructional time. The fact that plaintiff's free speech claim relates to speech of a religious nature in the classroom makes plaintiff's constitutional claim untenable.

III
PLAINTIFF'S FEDERAL CONSTITUTIONAL CLAIM ALLEGING VAGUENESS IN DEFENDANT'S "PRACTICE AND POLICY" FAILS BECAUSE PLAINTIFF'S COMPLAINT DEMONSTRATES HE PURSUED AND RECEIVED NOTICE OF THE DISTRICT'S EXPECTATIONS INVOLVING HIS CLASSROOM SPEECH EVEN WHERE NONE IS REQUIRED, AS SCHOOL OFFICIALS RETAIN A RIGHT TO RESTRICT SPEECH PRIOR TO PUBLICATION.

Plaintiff alleges that the "policy and practice" used to limit his lesson plans "do not give notice to what conduct is prohibited." (¶ 141.) Contradictorily, plaintiff pleads in paragraph 148 that "the defendants' policy requires that school officials systematically and regularly scrutinize historical documents … to determine whether the officials consider the documents to have religious content that the officials consider impermissible within their school …" (emphasis added). In addition, plaintiff voluntarily sought Ms. Vidmar's preview of what he believed might be questionable handouts and lesson plans. Whenever Ms. Vidmar rejected one of plaintiff's proposals, that rejection was accompanied by an explanation of why she was doing so. Undoubtedly, all of this qualifies as prepublication

notice. Moreover, as cases on school speech reveal, prepublication notice is more a courtesy to the speaker, as opposed to a requirement.

Plaintiff alleges that "defendants' policy and practice vest unfettered discretion in school officials to control teacher speech based on its content and viewpoint …" (¶ 142.) As discussed in section II, teachers are the State's mouthpiece and as such, their speech can be controlled. As teachers are subject to content based restrictions when it comes to classroom speech, it follows that teachers also have a "First Amendment right … to know what conduct is proscribed." (*Ward*, *supra*, 996 F.2d at 454.) In order for teachers to be disciplined for inappropriate speech, they must have notice of what is inappropriate for them to discuss. However, the body of law on this issue is inapplicable to the present case because the limitation on plaintiff was proactive rather than reactive, i.e., plaintiff was told what conduct / curriculum was proscribed.

In *Ward*, a biology teacher who discussed aborting Down syndrome fetuses was denied tenure. In *Debro*, the teacher hitting on controversial social topics received a letter of reprimand. And in *Cohen* v. *San Bernardino Valley College* 92 F.3d 968 (9th Cir. 1996) the teacher reading his students articles from *Hustler* and *Playboy* magazines was referred to attendance at sexual harassment seminars and submission to formal evaluation procedures. In each of these cases, the school had to show the teacher had notice before each could be punished. Plaintiff's case is different because he has not pleaded that he has been punished without prior notice. He only states that the principal previewed his lesson plans, and then restricted their use before distribution. This preview served as plaintiff's notice that school officials determined his supplemental materials inappropriate for classroom use. Plaintiff's contention that he should receive notice before receiving notice is illogical.

Rather than requiring two warning shots, as plaintiff claims, other cases hold that when it comes to prepublication restraint, an administrator does not need to give any notice. In *Hazelwood*, the principal was allowed to exercise prepublication control over a student

newspaper without a specific policy because forcing the school to have such a prepublication policy would put an undue strain on the teacher's ability to effectively educate, and a principal's ability to effectively manage. As *Ward* put so succinctly, "We do not hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers." (*Ward*, *supra*, 996 F.2d at 454.) All the written rules that would need to be in place at Stevens Creek School to head off any potential concerns about impermissible curriculum would hamstring all efforts of all teachers to educate students about any subject matter, including the influence any religion has had in any culture's history. In the case of classroom speech, the lack of specific prepublication policies protects plaintiff's academic freedom rather than restrains it.

Ms. Vidmar was trying to stop a situation before a staff member or her school had a problem by advising plaintiff that his materials were outside the appropriate curricular area. Plaintiff had specific notice that his speech would be impermissible in the classroom. The fact that plaintiff sought out Ms. Vidmar to review particular materials illustrates his awareness that he was in danger of violating the Establishment Clause (and his awareness that she was entitled to review his proposed handouts). The state may control curricular matters, and Ms. Vidmar's actions protected plaintiff from wandering outside one of the state's most stringent standards: maintaining the secular disposition of public education.

IV
PLAINTIFF'S FEDERAL CONSTITUTIONAL CLAIM FOR DEFENDANT'S ALLEGED VIOLATION OF THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE FAILS BECAUSE A PUBLIC SCHOOL MAY NOT ENDORSE A RELIGION.

At the outset, it should be noted that it is not necessary to show plaintiff's supplemental handouts placed Stevens Creek School in danger of violating the Establishment Clause. Regardless of what plaintiff alleges in his pleading, the issue here is curricular control, not the fact that his supplemental handouts have a religious bent. Even if plaintiff's handouts were age appropriate and wholly secular in nature, defendants are able to make curricular choices for their schools that are not subject to judicial oversight.

The fact that plaintiff's proposed supplemental materials were of a decidedly religious nature adds an extra hurdle to his claim for relief. The court should be on heightened notice when plaintiff claims in his complaint that he does not proselytize in the classroom, yet pleads that by "limiting his religious expression," defendant has violated the Establishment Clause of the federal Constitution. The substance of plaintiff's Establishment Clause violation argument reads as though he is pleading for the right to freely practice his religion through his classroom materials. He alleges that his religious expression should not be restricted and that defendants are hostile toward religion. In short, plaintiff claims to have been prohibited from exercising his purported "right" of religion in his classroom because defendants exercised control over and restricted the religious materials he wanted his students to read.

It is interesting to note that if plaintiff's handouts had been distributed in his classroom, it is questionable whether the District could successfully defend an Establishment Clause challenge. The test is articulated in *Lemon* v. *Kurtzman* (1971) 403. U.S. 602, 612-13. The statute, policy, or action:

> (1) Must have a secular purpose; (2) must, as its primary effect, neither advance nor inhibit religion; and (3) must not foster an excessive government entanglement with religions.

The action under review in the case at bar involves the plaintiff's proposed supplemental handouts. Seemingly, a case where a 5th grade teacher might be taken by his impressionable audience to endorse a particular religious viewpoint would fail to pass this test. This might be especially so where the teacher has specially selected the handouts in lieu of the "official" text book. To the extent a teacher can be mistaken for endorsing a religious point of view, that action fails the *Lemon* test.

Plaintiff may contend that the supplemental handouts are merely historical truth rather than religious. However, by alleging that Ms. Vidmar excludes his religious expression when she restricts these handouts, plaintiff gives a clearer picture of what he is trying to accomplish; to wit, a pretext for conveying plaintiff's religious expression. Even if

the plaintiff's motive is genuinely pedagogical, *Peloza*, *supra,* holds that the school is not a forum for a public school teacher to endorse a religious viewpoint. The Establishment Clause is clear. Plaintiff cannot present information on religion in a way that his students will not be able to unequivocally distinguish between the classroom lectern and the church pulpit.

Moreover, plaintiff has not alleged how Ms. Vidmar's preview and subsequent restriction of his teaching materials "has a coercive effect that operates against the [plaintiff's] practice of his or her religion." (*Grove* v. *Mead School District*, 753 F.2d 1528, 1533.) Clearly, plaintiff cannot be allowed to practice his religion where this practice could be entangled with a state function such as public education. Nowhere in the complaint has plaintiff alleged how he has been improperly prohibited from practicing his faith. In order to show that this limitation impedes plaintiff's religious practice, he must demonstrate:

> (1) The extent of the burden upon the exercise of religion, (2) the existence of a compelling state interest justifying that burden, and (3) the extent to which accommodation of the complainant would impede the state's objectives.

(*Grove*, *supra*, 753 F.2d at 1533.)

Limiting a teacher's lesson plans does not burden his religious practice. Rather, it is an appropriate function of the "State speaker." Plaintiff's complaint demonstrates he has not been burdened by this permissible content restriction at all. He is not hindered from being an orthodox Christian, practicing the tenets of his faith, or even occasionally teaching lessons about the origin of various religions, including his own. (¶ 53.) Plaintiff has not alleged that defendants have precluded plaintiff from being a Christian or from freely practicing his religious beliefs (in an allowable forum). Even if limiting his religious handouts for a secular setting is a burden on plaintiff's religious practice, Ms. Vidmar is properly exercising her discretion in her role as a speaker for the state. To this end, accommodating the plaintiff's religious practice in this area would impede a clear state objective of retaining the secular posture of public education.

V
AS PUBLIC ENTITY EMPLOYEES, DEFENDANTS ARE ENTITLED TO ASSERT QUALIFIED IMMUNITY AS A DEFENSE.

In a Ninth Circuit case, *Guam Society of Obstetricians and Gynecologists* v *Ada* 962 F.2d 1366 (9th Cir. 1992), plaintiffs sued the governor of Guam for injunctive relief over a recently passed anti-abortion statute. The plaintiffs claimed that the statute undermined *Roe* v. *Wade*. The defendant maintained that as a state official, he was immune from a Section 1983 suit because he was not a person under the statute. However, since the plaintiffs were not suing a government official for money damages, but rather for injunctive relief, the court determined that the application of Section 1983 should be different. "Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under Section 1983 because 'official-capacity actions for prospective relief are not treated as actions against the state.'" (*Id*. at 1371 (Quoting *Will* v. *Michigan Department of State Police* (1989) 491 U.S. 58, 71 n.10).) Defendants in this cause of action should be sued in their individual capacities, not in their official capacities.

In so far as defendants, as public entity employees, could be sued in their individual capacities, they are entitled to assert qualified immunity as a defense. *Wood* v. *Strickland*, 420 U.S. 308, 318 (1975). Plaintiff's allegation that Ms. Vidmar violated his constitutional rights is based on his claim that Ms. Vidmar improperly previewed and restricted his classroom supplements. "[T]he central purpose of affording public officials qualified immunity from suit is to protect them from 'undue interference with their duties and from potentially disabling threats of liability.'" *Elder v. Holloway,* 510 U.S. 510, 514 (1994) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982)). Whether a public official is entitled to qualified immunity is a question of law and, because the immunity is an immunity from suit rather than a mere defense to liability, the court should resolve the immunity issue at the earliest possible stage. *See Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity is not conditioned on the subjective good faith of the official and, where it applies, it bars liability as fully as absolute immunity.

See Anderson v. Creighton, 483 U.S. 635, 638 (1987); Harlow, 457 U.S. at 819.

The United States Supreme Court has held that "governmental officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow*, 457 U.S. at 818. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." (*Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).).

Even if plaintiff's right had been violated, he must still show that (1) "the constitutional right at stake was clearly established at the time of the alleged violation" and (2) "an objectively reasonable government actor would have known that his or her conduct violated the plaintiff's constitutional right." (*Brown* v. *Li*, 308 F.3d 939, 948-949 (9th Cir., 2002).)

In *Cohen* v. *San Bernardino Valley College*, *supra*, the court was asked to decide "what scope of First Amendment protection is to be given a public college professor's classroom speech." (*Id*. at 971.) The plaintiff professor was disciplined after receiving a student complaint that his classroom speech was sexually harassing. This teacher read excerpts from *Hustler* and *Playboy* magazines, used profanity, vulgarity, and challenged students with his confrontational style. Significantly, the court noted at page 971 that:

> Neither the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor's classroom speech. We decline to define today the precise contours of protection the First Amendment provides the classroom speech of college professors because we conclude that the Policy's terms were unconstitutionally vague as applied to [the teacher] in this case.

While the court was able to reason that there was no basis to discipline this particular professor because the policy he allegedly violated was not "narrowly drawn to address only the specific evil at hand" (*Cohen*, supra, at 972), it could not find liability against school officials because "the legal issues in this case are not readily discernable and the appropriate conclusion to each is not so clear that the officials should have known that their actions violated [the professor's] rights." (*Id*. at 973.)

Since *Cohen*, no other court in the Ninth Circuit has ruled on this issue.[1] If in fact an administrator who exacts control over a teacher's curricular choices in a public school classroom violates that teacher's constitutional rights, it cannot be said that a "clearly established constitutional right" was violated, as no clear determination of that teacher's right has been made. Ms. Vidmar would have been operating under the assumption that her actions as an administrator were proper.

This case implicitly deals with the reasonableness of Ms. Vidmar's actions. Plaintiff will need to demonstrate that in the present case, "the contours of [his] right [are] sufficiently clear that a reasonable official would understand that what [she] is doing violates that right." (*Saucier* v. *Katz* (2001) 533 U.S. 194, 202 (citing *Anderson* v. *Creighton* (1987) 483 U.S. 635, 640).) *Cohen*, therefore, continues to be instructive on defendants' qualified immunity. In *Cohen*, school officials were investigating whether the professor had departed from appropriate classroom instruction and subjected his students to sexually harassing behavior pursuant to a school policy. Even though the ultimate holding in the case was that this policy was impermissibly vague, where the plaintiff could not meet his "burden to prove that the right that the [officials] violated was clearly established at the time of the alleged misconduct" the court had no choice but to hold their actions shielded by qualified immunity. (*Cohen*, *supra*, 92 F.3d at 973.)

In this case, Ms. Vidmar had a plethora of reasons to believe that her actions were done with a view to uphold the law rather than violate plaintiff's rights. As in *Cohen*, her investigation into plaintiff's classroom activities was prompted by a complaint, in this case, regarding the religiosity of one plaintiff's handouts. Like the school officials in *Cohen*, once the substance of the complaint had been realized, Ms. Vidmar acted to take care of that

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[1] *Debro*, *supra*, though unpublished, came to the same conclusion when it applied the qualified immunity test. Thus, two courts in this jurisdiction have declined to rule that there is a clearly established constitutional right regarding classroom speech.

problem only. Her course is less restrictive than the *Cohen* officials because plaintiff was not disciplined. Rather, his complaint amounts to an allegation that Ms. Vidmar anticipated a problem as opposed to reacting to one. Undoubtedly, Ms. Vidmar's response to a parental concern and subsequent action to take care of it was reasonable.

Even if plaintiff can show Ms. Vidmar violated his constitutional rights (and he cannot) the law establishing these rights was not clear at the time of Ms. Vidmar's actions. In spite of the law's potential lack of clarity, Ms. Vidmar's actions as the school's principal were perfectly reasonable. Qualified immunity should operate as a complete bar to plaintiff's claim against Ms. Vidmar, as well as the other individual defendants.

VI
AS A PUBLIC ENTITY EMPLOYEE, MS. VIDMAR IS ENTITLED TO ASSERT DISCRETIONARY IMMUNITY PURSUANT TO GOVERNMENT CODE SECTION 820.2 AS A DEFENSE.

California Government Code section 820.2 provides that:

> "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

This statute generally affords a public employee personal immunity when he is sued for exercising his discretion or judgment within the scope his authority. Immunity is absolute and protects officials notwithstanding malice or other sinister motives. Indeed, the Tort Claims Act governs all public entities and their employees and covers all non-contractual bases of compensable damages or injuries that might be actionable between private persons. (*Caldwell* v. *Montoya* (1995) 10 Cal.4th 972, 976, 985.)

As was noted in *Nicole M.*, *supra*, 964 F. Supp. at 1389-1390:

> "Generally speaking, a discretionary act is one which requires the exercise of judgment or choice. Discretion has also been defined as meaning equitable decision of what is just and proper under the circumstances. Decisions by a school principal or superintendent to impose discipline on students and conduct investigations of complaints necessarily require the exercise judgment or choice, and accordingly are discretionary, rather than ministerial, acts."

Ms. Vidmar's act of reviewing plaintiff's supplemental handouts in response to a parental complaint and subsequently deciding to restrict them clearly involved judgment calls and discretionary acts for which she is absolutely immune from suit. Accordingly, section 820.2 should act as a complete bar to plaintiff's claims.

It is clear that in responding to past parental complaints, Ms. Vidmar's actions pertained to discretionary functions. In *Nicole M., supra,* at 1389-1390, the court held, "Decisions by a school principal or superintendent to impose discipline on students and conduct investigations of complaints necessarily require the exercise of judgment or choice and accordingly are discretionary, rather than ministerial, acts."

CONCLUSION

For the forgoing reasons, defendants respectfully request that this court dismiss plaintiff's Verified Complaint for Declaratory and Injunctive Relief and Damages.

DATED:

NEEDHAM, DAVIS, KIRWAN & YOUNG, LLP

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