

No. 07-16194

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRITTANY McCOMB, and MARIANNA McCOMB, by her best friend,  
CONSTANCE J. McCOMB,**

**Plaintiffs-Appellees,**

**v.**

**GRETCHEN CREHAN, ROY THOMPSON, and CHRISTOPHER  
SEFCHECK, individually and in their official capacities as employees of  
Foothill High School, and the Clark County School District, a political  
subdivision of the State of Nevada, and WALT RULFFES, in his official  
capacity as Superintendent of the Clark County School District, a political  
subdivision of the State of Nevada, et al.,**

**Defendants-Appellants.**

**Appeal From the United States District Court  
District of Nevada  
Honorable Robert C. Jones**

**CASE NO. 2:06-CV-00852-RCJ-PAL**

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**Dated: March 9, 2009**

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## **JURISDICTIONAL STATEMENT**

Plaintiffs filed their initial complaint in the United States District Court for the District of Nevada on July 13, 2006.<sup>1</sup> Defendants filed a pre-answer motion to dismiss under Rule 12(b)(6) invoking, among other things, qualified immunity for the individual defendants, Thompson, Crehan and Sefcheck (the “School Officials”). *Id.* (ER 114-15). At oral argument on December 18, 2006, the District Court denied the School Officials’ motion because discovery was required to determine their entitlement to qualified immunity.<sup>2</sup> On January 9, 2007, the District Court entered the Order (the “January Order”), and the School Officials did not appeal it. *See* the January Order (AX 1-2); Docket Sheet (ER 115-16). On December 21, 2006, Plaintiffs served its First Amended Complaint (“Compl.”) naming one additional defendant in his official capacity only, along with other ministerial amendments. *See, generally*, Compl. (ER 1-27); Docket Sheet (ER 117). The School Officials nonetheless filed a second motion to

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<sup>1</sup> *See* Civil Court Docket for Case # 2:06-cv-00852-RCJ-PAL (“Docket Sheet”) (Defendants’-Appellants’ Excerpts of Record (“ER”) 114).

<sup>2</sup> *See* Official Transcript of December 18, 2006 Oral Arguments Before the District Court of Nevada (“Hearing Transcript”) (Plaintiffs’-Appellees’ Excerpts of Record (“AX”) 181-82).

dismiss, substantially similar to the first motion to dismiss.<sup>3</sup> On June 18, 2007, the District Court issued an Order (the “June Order”) summarily denying the second motion to dismiss because it was “virtually identical to the initial motion” and “raises arguments that have already been briefed, discussed at oral argument, and ultimately rejected by the Court. Discovery is ongoing.” (AX 3-4).

On June 28, 2007, the School Officials filed a Notice of Interlocutory Appeal (the “Notice of Appeal”) of the June Order, including and incorporating by reference the January Order, which, the School Officials claim, contains the Court’s “independent analysis of the issues” for this Court to review, but which in fact reaffirmed the basis of the Court’s previous decision on qualified immunity. *See* Notice of Appeal (ER 101-03); Hearing Transcript (AX 181-82).

### **STATEMENT OF THE ISSUES PRESENTED**

Whether this Court has jurisdiction under Fed. R. App. P. 4(a) to address this interlocutory appeal.

Whether the District Court erred in denying the School Officials’ qualified immunity defenses at this stage in the litigation. R. Civ. P.

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<sup>3</sup> *See* Docket Sheet (ER 117); *See also* blacklined comparison of Defendants’ first motion to dismiss to with their second motion to dismiss (AX 95-125).

12(b)(6) and Fed. R. Civ. P. 8(a).

### **SUMMARY OF THE FACTS**

Brittany McComb was one of three class of 2006 valedictorians of Foothill High School (“Foothill”), selected to give a commencement speech at the school’s annual commencement ceremony held at the “Orleans Arena” in “The Orleans Hotel & Casino” in Las Vegas, Nevada. *See* Graduation Program (AX 20-33); Compl. at ¶ 25 (ER 8).<sup>4</sup> On June 15, 2006, as Brittany delivered her speech, she was silenced in front of 400 of her peers simply because she mentioned the importance of her Christian faith in her success in high school.<sup>5</sup> At the same time, School Officials permitted another valedictorian to invoke her religious beliefs repeatedly in her speech. *See* Compl. at ¶ 64C.

Well-settled law under the First and Fourteenth Amendments forbids

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<sup>4</sup> Brittany’s mother, Constance J. McComb, and her sister, Marianna McComb, are also plaintiffs in this case. Constance and Marianna were both deprived of the right to hear Brittany’s speech in a public forum and each joined in the suit because of that deprivation and the potential future discrimination against religious speech in future commencement exercises at Foothill. *See* Compl. at ¶¶ 3A, 4 (ER 3).

<sup>5</sup> *See* Compl. at ¶¶ 62-63 (ER 13); *See also*, 2 DVD Videos of the Graduation (ER 55 & AX 6).

such discrimination and censorship. Title II of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a et seq., likewise prohibits such discrimination on the basis of religion in a place of public accommodation. With this appeal, however, the School Officials attempt to avoid liability for their actions by short circuiting discovery and the proper development of the record concerning their viewpoint discrimination in this case.

**A. Defendants’ Violated Plaintiffs’ Constitutional Rights**

Foothill’s selection of valedictorian speakers was based solely upon the students’ grade-point average and no other factors. Compl. at ¶¶ 17-18 (ER 6). When invited to speak, Defendant Thompson, Foothill’s acting Assistant Principal, provided each valedictorian with a document entitled “Commencement Speech Suggestions.”<sup>6</sup> These “suggestions” ranged from the procedural (“[l]imited to 200 words”; “length: 1-2 minutes”), to the substantive:

- Use “imagery and metaphorical comparison;”
- “Interject HOPE”;
- “OMIT thank you ...”;
- include “[t]hings that bind us to one another”;

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<sup>6</sup> See Commencement Speech Suggestions AX 18-19; *see also* Compl. at ¶¶ 20, 20A (ER 6).

- “[r]eflect over past experiences and lessons learned”;
- “say things that come from the heart.”

(AX 18-19).

The School officials did not encourage or forbid speakers to include or exclude religious content from their speeches. *Id.*; Compl. at ¶ 27 (ER 8-9).

Brittany followed the School Officials’ “suggestions” to the letter. Her draft speech, entitled “Filling that Void,” used “imagery and metaphorical comparison,” “interject[ed] hope,” “[r]eflect[ed] over past experiences and lessons learned” at Foothill and spoke “from the heart” about the emptiness she experienced from accomplishments, achievements, and failures in her early high school years, and the fulfillment and satisfaction she later came to experience in something greater than herself, namely, in God’s love, and Christ.<sup>7</sup> To Brittany, any remarks about her success and formative experiences in high school would be dissembling without reference to the changes she experienced with her relationship to God. Compl. at ¶ 30 (ER 9). Similar to the speeches by the Salutatorian, the other Valedictorians and, indeed, the Principal and Member of the District’s Board of Trustees, Brittany’s speech fit within the School District’s

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<sup>7</sup> See Brittany’s Draft of Commencement Speech (“Draft Speech”) (AX 34-36); Compl. at ¶¶ 28-30 (ER 9).

“suggestions,” and was a personal statement about the lessons that she learned during her odyssey at Foothill, and how those experiences affected her life and her future.<sup>8</sup>

Although Brittany’s speech as drafted identified a few words from the Bible, her comments cannot reasonably be interpreted as prayer or proselytizing. Her language was casual, not reverent; she even joked that others might find her beliefs “strange[],” “crazy or extravagant.” *See* Draft Speech (AX 36). Even though the draft suggested the sense of self worth and personal satisfaction she had experienced in high school could be shared, the words were not worshipful or pushy, but clever, metaphorically identifying the source of her success in high school (“this block fits”). *Id.* (AX 35-36). She wrote primarily from the first person about what “worked for her.” *Id.* A casual reader of Brittany’s draft speech could not reasonably have believed the school was sponsoring her religious views; instead Brittany’s words were explicitly and forthrightly the views of a young, vibrant Straight-A student explaining her view of the foundations of her success. *See Id.*

The school requested Brittany to submit her speech for review by Defendant Thompson, and she did so. Compl. at ¶¶ 34-35 (ER 9). To

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<sup>8</sup> *See* Draft Speech (AX 34-36); Compl. at ¶¶ 29-30, 64C (ER 9, 15).

Brittany's surprise, the speech was returned to her heavily-edited.<sup>9</sup> Substantial passages were crossed out, and annotated with "IDENTIFIES A PARTICULAR RELIGION". "DEITY"; and "PROSELYTIZING." Compl. at ¶ 41 (ER 10); Draft Speech (AX 35-36). Defendants Crehan and Thompson informed Brittany that she could not deliver the speech she had written because of its "religious references," including the mention of Jesus Christ.<sup>10</sup>

Although Brittany and her mother (and attorney) made numerous attempts to meet with school representatives to discuss the content of the speech and clarify the basis for their censorship, school officials never responded. *Id.* at ¶¶ 48-52 (ER 11). On June 15, 2006, the day of Brittany's commencement, Defendant Sefcheck, a teacher, approached Brittany and told her that he had been instructed to cut off the microphone if her speech deviated from the edited version approved by the school. *Id.* at ¶¶ 57-59 (ER 12).

Brittany chose to deliver the original version of her speech, which reflected who she was as a person and what she had been asked to do. *Id.* at ¶¶ 61-62 (ER 13). The moment Brittany began to speak the words School

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<sup>9</sup> See Draft Speech (AX 35-36); Compl. at ¶¶ 40-41 (ER 10).

<sup>10</sup> Compl. at ¶¶ 38, 41-42, 60, 80 (ER 10, 11, 12-13, 18).

Officials previously had decided to censor, Defendant Sefcheck turned off the microphone. *Id.* at ¶ 62 (ER 13). No defendant or other school official attempted to give a disclaimer to the audience prior to the commencement speeches making clear that the views of the speakers were not endorsed by the school district. *See id.* at ¶¶ 56-66 (ER 12-16).

After censoring Brittany’s speech mentioning her Christian faith, School Officials permitted other students to speak without interference about *their own* religious beliefs. Compl. at ¶ 64C (ER 14-15). Janelle Oehler, another Valedictorian, described how a deity, her “Heavenly Father,” and “prayer” played an extremely important role in her life. *Id.* (ER 14). Using the metaphor of a balanced meal, Oehler shared with the audience the following:

And, of course, our meal is never started without prayer. My Heavenly Father plays an extremely important role in my life. I am confident that I would not be standing before you today if I had not included Him in my life. He is the One who truly understands our individual needs. He is always there to listen, to lead, to guide, *and to give me strength I need to keep, when I need and to give me strength* that I need to keep on going when I no longer believe I can, I would be nothing without Him. Find your inspiration. Living with the hope for a brighter future will make significant difference in our lives, provide us with true inner happiness and personal success, If we strive to be more motivated by inspiration, we will find

ourselves more satisfied, as if we had enjoyed a complete balanced and nutritional spaghetti dinner.

*Id.*<sup>11</sup> Mary Beth Scow, Member of the District’s Board of Trustees, offered a speech which quoted a “Chinese proverb,” and Defendant Crehan chose in her speech an inspirational charge that did not include any “religious references.”<sup>12</sup>

In contrast, Brittany’s admittedly Christian viewpoint were starkly, abruptly and humiliatingly silenced as she delivered them to an audience of hundreds of fellow students and their parents and friends. Compl. at ¶¶ 64F, 65 (ER 15).

**B. Defendants Were Aware That Their Conduct Violated Clearly Established Law**

The School Officials knew that by attempting to edit Brittany’s speech, by intimidating and attempting to coerce Brittany not to express her personal religious viewpoint, and by publicly censoring and humiliating Brittany, they violated not only clearly established school district regulations, but personal liberties protected by the First and Fourteenth Amendments of the United States Constitution. *See* Compl. at ¶ 66 (ER 16).

*First*, Clark County School District regulations required the School

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<sup>11</sup> *See also* Excerpts of 2006 Commencement Speeches (“Commencement Excerpts”) (AX 38).

<sup>12</sup> Compl. at ¶ 64C (ER 14-15); Commencement Excerpts (AX 39).

Officials to permit Brittany to address her classmates and their families in her own words. Specifically, Clark County School District Administrative Regulation 6113.2, *Sectarianism, Religious Free Speech and Religious Holidays* (“Regulation 6113.2”), which was in effect when Brittany gave her speech, provides as follows:

(III) Student initiated non-school sponsored religious speech is acceptable in the public schools in the same manner as other free speech.

(IV) School officials may not mandate or organize prayer at graduation or other extracurricular activities or select speakers for such events in a manner that favors religious speech such as prayer. *Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and, therefore, may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech is not school sponsored.*

Regulation 6113.2 §§ (III) & (IV) (AX 8) (emphasis added). District regulations are “specific details and procedures” that govern “the details of District operations,” and therefore bind the School Officials. *See* District

Regulation 0101 (AX [ ]; Compl. at ¶¶ 23, 24 (ER 7-8)).<sup>13</sup>

Indeed, Regulation 6113.2 was crafted specifically to conform to the certification requirements of the federal Elementary and Secondary Education Act of 1965 (“ESEA”), as amended by the No Child Left Behind Act of 2001, 20 U.S.C. § 6301, *et. seq.*(2001). The Clark County School District, cannot receive federal funding under the ESEA unless it certifies annually that it has “no policy” that “prevents, or otherwise denies participation in, constitutionally protected prayer ... as detailed in guidance” required to be issued under the Act.<sup>14</sup> The District must certify, among other things, that its regulations:

- prohibit school officials from mandating or organizing prayer at graduation, or “selecting speakers for such events in a manner that favors religious speech as prayer” (*Id.*) (AX 17);
- contain “genuinely neutral, evenhanded criteria” for selecting students or other private graduation speakers, and

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<sup>13</sup> As the School Officials argued below in their reply brief, this Court may take judicial notice of matters of public record. *See* Defendants’ Reply Brief to Plaintiffs’ Opposition to Motion to Dismiss, at 7, n. 2; *See also Lee v. County of Los Angeles*, 250 F.3d 668 (9<sup>th</sup> Cir. 2001). The entire set of the District’s regulations can be located at: <http://www.ccsd.net/directory/pol-reg/pdf/index.pdf>. District Regulations 6113.2 and 0101 can be found at AX [ ] and [ ], respectively.

<sup>14</sup> *See* 20 U.S.C. § 9524; Guidance on *Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, Dept. of Education, 68 Fed. Reg. No. 40 (AX 10-17) (“Guidance”).

allow the speaker to “retain control over the content of their expression” (*Id.*) (AX 16);

- prohibit graduation speeches from being restricted based upon “religious (or anti religious) content.” (*Id.*) (AX 17);
- allow the LEA to make “appropriate, neutral disclaimers to clarify that any such speech (whether religious or nonreligious) is the speaker’s and not the school’s,” in order to avoid any “mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school.” (*Id.*) (AX 17).

The stated purpose of the Guidance was to “set forth the responsibilities of [state educational agencies] and LEAs with respect to Section 9524 of the ESEA.” (*Id.*; AX 11).

Thus, the District’s own regulations -- promulgated to implement federal law -- required School Officials to use neutral criteria in selecting student to speak at graduation ceremonies and prohibited them from exerting control over or restricting the content of the students’ expression based upon its religious or anti-religious content.

*Second*, Regulation 6113.2 was enacted to restrict School Officials from engaging in the exact conduct that occurred in this case, because of the District’s concerns that such conduct would result in the precise constitutional violation that Plaintiffs now claim. (*See id.*) Specifically, Regulation 6113.2 at one time expressly permitted School Officials to

control the content of student speeches.<sup>15</sup> In September 1991, however, the Nevada Attorney General concluded that this provision “does not pass constitutional muster.” (*Id.* at \*3). The Attorney General reasoned that “the rule in the Ninth Circuit is clear,” namely, that “school sponsorship of a religious message” may occur where a school district “exercises control over the invocation by placing restrictions on its content and broadcasting it.” (*Id.* at \*2-3).<sup>16</sup> Because Regulation 6113.2 at that time expressly allowed School Officials to “advise and counsel” on the content of a students’ speech, the regulation “open[ed] the door to Clark County School District’s entanglement in the student’s forced choice between attending their own graduation and offending their consciences.” (*Id.* at \*3). The offending provision was deleted in April 1993, over eighteen months after concerns were raised about its constitutionality.<sup>17</sup> The District described the new regulation in a pleading as follows:

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<sup>15</sup> See Nev. Atty. Gen. Op. No. 2001-27, 2001 Nev. Op. Atty. Gen. 27, 2001 WL 1660129, at \*1 (Sept. 26, 2001 Nev. A.G.) (the “AG Opinion”).

<sup>16</sup> The authority supporting the Nevada Attorney General’s conclusion included this Court’s opinion in *Cole v. Oroville Union High School District*, 228 F.3d 2092 (9<sup>th</sup> Cir. 2000), *cert den.* 532 U.S. 905 (2001). See AG Opinion at 2.

<sup>17</sup> See *Opening Brief, Jane Doe, et al. v. Clark County School District*, Docket No. 2:03 CV 00257, 2003 WL 24265199, at \*3 (filed in D. Nev. May 22, 2003) (the “District Brief”).

The thrust of the regulation is completely aligned with the concept of free speech by stating content will not be restricted if the graduation speaker retains primary control of the speech ... [and] simply attempts to set forth the principle that private speech will not be censored by the District, even for religious content.

*(Id.)*

*Third*, the District recognized that exerting control over even religious speeches was unnecessary to protect against an Establishment Clause violation, because a neutral disclaimer could have resolved any appearance of state sponsorship of a speaker's message: "[I]f a principal gave permission for the valedictorian to say whatever they wanted at a graduation, then whatever the student said would not be a result of school sponsorship or district sponsorship. It would be free speech and not subject to censorship."<sup>18</sup> The District's Board of Trustees in enacting the current version of Regulation 6113.2 was advised by their General Counsel that the "administration does review the comments that are going to be made by student speakers at graduations," and that "once the administration reviews

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<sup>18</sup> The Clark County School District Board Minutes from February 27, 2003 Meeting ("District Minutes"), at [\_\_\_\_]. The District Minutes also are publicly available, and can be located at [http://www.ccsd.net/directory/trustees/agenda/archive/2003/022703/Minutes 022703.pdf](http://www.ccsd.net/directory/trustees/agenda/archive/2003/022703/Minutes%20022703.pdf) (last downloaded on January 14, 2008).

the comments, it becomes school or district sponsorship.”<sup>19</sup> *Id.* Nonetheless, the board was advised that “[w]hat a student says for a particular success they might have had is probably going to fall in the area of free speech and going to be allowed ... .” (*Id.*) And the policy as adopted provided for a neutral disclaimer to eliminate all doubt as to school sponsorship of the speech in question. (Regulation 6113.2 (AX 8)).<sup>20</sup>

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<sup>19</sup> The District’s General Counsel is Carl William Hoffman, Esq., who represents Defendants in this action, and who argued Defendants’ motion to dismiss before the District Court. *See id.*

<sup>20</sup> The School Officials selectively mischaracterize allegations from the Complaint, attempting to suggest that the Complaint acknowledges that the school system had plenary control over graduation and the content of Brittany’s speech. *See* Defendants’ Opening Brief (“Opening Brief”) at 4-6. However, they ignore the numerous allegations of the Complaint establishing that (1) school district regulations expressly required that student graduation speakers selected on a neutral basis retain *primary* control over the content of their expression, (2) such speech therefore could not be viewed as having the school system’s endorsement, and (3) if there were any doubt about endorsement, that school officials could make it clear through a disclaimer. Compl. at ¶¶ 23, 64F, 70, 74, 95 (ER 7, 15-17, 21). The School Officials also ignore allegations that the commencement speeches were prepared by the student valedictorians, not school officials (*id.* at ¶¶19-20) (ER 6), that members of the public and the audience attending the commencement understood and knew that students are chosen by neutral criteria and that they speak not as spokespersons for the school, but as private individuals (*id.* at ¶¶ 21-22) (ER 7), and that such commencement speeches are not “endorsed” by the school system (*id.* at ¶ 22) (ER 7). Finally, the Defendants would have this Court ignore (and point to no factual allegations in the Complaint or exhibits that justify) the well-pled facts alleging discrimination against certain viewpoints within the graduation ceremony at Foothill, as well as in and among commencement

Footnote continued on next page

Notwithstanding the history and involvement of Regulation 6113.2, School Officials took multiple actions as outlined in the Complaint to intimidate Brittany and to control the content of her speech, including the ultimate act of censorship by silencing her when she attempted to deliver her speech. (*See, generally*, Compl. (ER 1-27)).

### **SUMMARY OF THE ARGUMENT**

The Court lacks jurisdiction over the January Order, which denied the School Officials’ qualified immunity defenses, because they failed to timely notice an interlocutory appeal. This Court should also reject interlocutory review of the June Order, which refused to address the School Officials’ qualified immunity defenses based upon the law of the case doctrine, which similarly bars the School Officials from seeking a third “bite at the apple” in this Court.

The School Officials’ qualified immunity defenses should be rejected, particularly at this stage of the litigation.

*First*, Plaintiffs have alleged facts showing that School Officials disregarded binding school district regulations, enacted under authority of federal law, by censoring and silencing Brittany’s speech. Because School

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exercises and other assemblies at other high schools in the Clark County School District. *See* Compl. at ¶¶ 64A-64F, 72A, 73 (ER 13-15, 17).

Officials silenced Brittney's speech based upon its Christian content and viewpoints, but allowed other student speakers to express different religious content and viewpoints, it is not beyond doubt that School Officials violated Plaintiffs' constitutional rights under the First and Fourteenth Amendments.

*Second*, the history and evolution of the school district regulations show that School Officials were aware that their conduct violated clearly-established constitutional rights. Although the school regulation at one time permitted School Officials to control the content of student graduation speeches, that provision was removed in April 1993, based upon advice of counsel and the Attorney General that it was unconstitutional.

When the school district amended the regulation to prohibit School Officials from controlling the content of student graduation speeches, the school district stated its belief and understanding that the regulation appropriately balanced concerns of state sponsorship of religion and state discrimination against religious viewpoints, by mandating that students control the content of their own graduation speeches, by prohibiting School Officials from censoring such speeches even for religious content, and by allowing the school to issue a neutral disclaimer, if required. Nonetheless, School Officials disregarded the regulation, and censored and silenced Brittany's graduation speech based upon its Christian content and viewpoint,

yet allowed other graduation speakers to express different religious content and viewpoints. Thus, School Officials engaged in the precise conduct that the school district believed was unconstitutional and which the school district's regulation was amended to prohibit. Given this history, School Officials could not have reasonably or mistakenly believed that disregarding the regulation would have no effect upon Plaintiffs' constitutional rights.

*Third*, the District Court appropriately denied the School Officials' motion to dismiss and reserved decision on Defendants' qualified immunity defenses until after discovery had commenced. Although School Officials seek to justify their conduct as protection against "proselytizing" and a violation of the Establishment Clause, which is an inherently fact-based determination inappropriate for disposition prior to discovery, as the District Court properly ruled.

The District Court's Orders should be affirmed in their entirety, and the School Officials' interlocutory appeal should be rejected.

## ARGUMENT

### I. THIS INTERLOCUTORY APPEAL IS PROCEDURALLY IMPROPER AND MUST BE DISMISSED

For reasons briefly set forth below, and as more extensively discussed in the Plaintiffs' separate Motion to Dismiss for Lack of Jurisdiction and Reply Memorandum previously filed in this Court, this Court should dismiss the School Officials' appeal.

*First*, the School Officials noticed this appeal from the wrong Order. In their Notice of Appeal, School Officials ostensibly appeal from the District Court's June Order, and seek to raise the issue whether the School Officials are entitled to qualified immunity. (Notice of Appeal (ER 102)). But the June Order does not address that issue. (*See* AX 3-4). Only the January Order addresses the School Officials' qualified immunity defenses, and that Order was issued by the District Court over five months before this appeal was noticed. (AX 1-2). Because School Officials never noticed an appeal of the January Order, this Court lacks jurisdiction to review that Order.<sup>21</sup>

In apparent recognition of this error, the School Officials attempt to incorporate the January Order by reference in their notice of appeal from the

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<sup>21</sup> *See* Fed. R. App. P. 4(a)(1)(A); *Bird v. Reese*, 875 F.2d 256, 256 (9th Cir. 1989).

June Order, but concede, as they must, that the January Order reflects the Court's "independent analysis of the issues" raised on this appeal. (Notice of Appeal (ER 102)). Rule 4 cannot be avoided through slight of hand or seemingly artful pleading. Defendants are simply out of time.

*Second*, the June Order does not address any issue School Officials seek to raise on this appeal. (AX 3-4). The School Officials' second motion cannot be justified by reference to Plaintiffs' Amended Complaint, because that complaint changed neither the premise of their motion nor the premise of the Court's ruling, as the June Order plainly states. (*Id.*) Indeed, the June Order more appropriately can be viewed as denying the School Officials' second motion to dismiss as barred under the doctrine of law of the case. (*See Hydrick*, 500 F.3d at 985 (the law of the case doctrine precludes a court from reexamining an issue "decided explicitly or by necessary implication" by the same court, or a higher court, in the same case")). The June Order similarly provides that School Officials improperly reasserted in their second motion arguments that "have already been briefed, discussed at oral argument, and ultimately rejected by the court." (AX 4). If the School Officials' second motion to dismiss was an impermissible "second bite at the apple" under the law of the case doctrine, Defendants attempt to seek yet another bite at the apple in this Court would similarly be barred. (*See*

*Hydrick*, 500 F.3d at 985).

Finally, the School Officials' reliance upon *Knox v. Southwest Airlines*, 124 F.3d 1103 (9th Cir. 1997) is misplaced. Although this Court in *Knox*, permitted a defendant to take an interlocutory appeal "from each denial of successive motions" on qualified immunity, the Court held that this determination depends upon the "nature of the order[s]" appealed from. (124 F.3d at 1103). To be sure, a defendant may appeal from an order denying qualified immunity more than once: after a motion to dismiss and after a motion for summary judgment. (See *Behrens v. Pelletier*, 516 U.S. 299 (1996)). And, in *Knox*, the defendant was granted leave to appeal from successive motions denying *summary judgment* based on different factual records. (See *Knox*, 124 F.3d at 1103). But, as discussed in Plaintiffs' separate briefing, there is a significant qualitative difference between deciding a qualified immunity appeal on a summary judgment disposition (where there is a record to decide the case) and on a motion to dismiss (where the record provides little, if any, basis for decision). *Knox* should not be extended to this case, where the School Officials failed to timely appeal an order denying qualified immunity on an initial motion to dismiss, but thereafter seek interlocutory review of that issue by filing an identical motion to dismiss and appealing the order that refused to address the motion.

*Phillips v. Montgomery County*, 24 F.3d 736 (5th Cir. 1994), is a strikingly similar case in point. There, as here, the District Court denied the defendants’ motion to dismiss on qualified immunity grounds. *Id.* at 737. There, similar to the present case, plaintiffs filed an amended complaint that was “identical to the [previous] complaint except that one plaintiff had been eliminated and two new ones had been added.” (*Id.*) There, as here, defendants filed a second motion to dismiss. (*Id.*) When the District Court again denied the motion “[b]ecause defendants ha[d] not provided any new grounds to dismiss,” defendant noticed an appeal of the District Court’s second order. (*Id.*) Because the Notice of Appeal was not filed within 30 days of the original Order, the Fifth Circuit dismissed the appeal. (*Id.* at 737). The Court explained: “[D]efendants may not fail to appeal an order denying them immunity and then restart the 30-day clock by refileing the same motion.” (*Id.* (internal quotations and citations omitted)). A second motion, the Court concluded, does not interrupt the 30-day period to appeal “where the second motion raises substantially the same grounds as urged in the earlier motion.” (*Id.* at 738).<sup>22</sup>

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<sup>22</sup> See also *Armstrong v. Texas State Board of Barber Examiners*, 30 F.3d 643, 643 (5th Cir. 1994) (holding that an additional motion to dismiss an amended complaint brought before the start of discovery will not restart the clock since such a motion “is primarily a vehicle to test the sufficiency of

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This rule makes sense on practical grounds and from the standpoint of judicial economy. As the Eighth Circuit has explained:

If we were forced to entertain appeals . . . whenever a defendant had unsuccessfully sought reconsideration, the district court’s trial calendar would be bemired; Rule 4(a)(1) would be stripped of all meaning; the uncertain business of qualified immunity would be made measurably more problematic; and a dilatory defendant would receive not only his allotted bite at the apple, but an invitation to gnaw at will.

(*Taylor v. Cater*, 960 F.2d 763, 764 (8th Cir. 1992)). The School Officials’ appeal should be rejected outright.

## **II. DEFENDANTS’ QUALIFIED IMMUNITY DEFENSES SHOULD BE REJECTED**

Even if the Court were to address the merits of this appeal, the School Officials’ qualified immunity defense should be rejected. An analysis of

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pleadings as to qualified immunity”). The First, Eighth and Eleventh Circuits have similarly rejected attempts by appellants to evade the 30-day time limit by filing and “appealing” motions substantively identical to those already rejected by the trial court. See *Pruett v. Choctaw County, Ala.*, 9 F.3d 96, 96 (11th Cir. 1993) (holding that defendants could not appeal from the District Court’s denial of a second motion since “the district court did not . . . take any steps indicating that it had reopened the immunity issue [but] [r]ather . . . determined that there was no cause to revisit its previously entered order”); *Taylor v. Cater*, 960 F.2d 763, 764 (8th Cir. 1992) (holding that a defendant may not “repeatedly file the same motion with a district court thereby starting a new clock running for the purposes of appeal”); *Fisichelli v. Town of Methuen*, 884, F.2d 17, 19 (1st Cir. 1989) (holding that defendants may not restart the clock by filing a second, identical motion).

qualified immunity defense requires consideration of the following factors: (1) whether a right that has been violated; (2) whether that right was so "clearly established" at the time of the incident that a reasonable official would have been aware that the conduct violated constitutional bounds; and (3) whether a reasonable public official could have believed that the alleged conduct was lawful. (*Hydrick*, 500 F.3d at 985).

This Circuit reviews an order granting or denying a motion to dismiss based on qualified immunity *de novo*. (*Id.*) This Court has been "cautious not to eviscerate the notice pleading standard in suits where qualified immunity is at issue." (*Id.*) The liberal pleading standard of Rule 8(a) "applies to all civil actions," including Plaintiffs' claims under 28 U.S.C. § 1983. (*Swierkiewicz v. Soreman*, 534 U.S. 506, 514-15 (2002)).<sup>23</sup> Thus, "technical forms of pleading" are not required; Plaintiffs' need only make a "short and plain statement" of their claims, and this Court should construe the complaint "to do substantial justice." (*Hydrick*, 500 F.3d at 985 (citing Rule 8(a)(2))). All allegations of material fact "are accepted as true and should be construed in the light most favorable to Plaintiffs," and a "complaint should not be dismissed unless it appears beyond doubt that the

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<sup>23</sup> *The only "limited exceptions" to Rule 8's liberal pleading requirements are contained in Rule 9, which are inapplicable here. See id.*

plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” (*Id.*; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2002)).

**C. Plaintiffs Have Adequately Alleged Violations Of Their Constitutional Rights**

Plaintiffs have alleged serious -- and intentional -- violations of their constitutional rights which have long been recognized as readily applicable to educational settings. In *Rosenberger*, the Supreme Court held that in deciding whether a plaintiff was discriminated against based on his or her speech, a court must determine whether the School Officials’ censorship was a content-based restriction which was reasonable given the rules governing the forum, or viewpoint discrimination directed at the speaker's specific motivating ideology, opinion, or perspective that otherwise would have been permitted under the rules of the forum. (*Rosenberger*, 515 U.S. at 828, 832). The holding in *Rosenberger* reflects decisions in several significant cases, before and after *Rosenberger*, recognizing well-settled proscriptions against viewpoint discrimination in educational institutions.<sup>24</sup> By censoring the

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<sup>24</sup> See *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 49 (1983) ( holding access to a school mail system cannot be denied “because public officials oppose the speaker's view.”); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-93 (1993) (prohibiting viewpoint discrimination in granting access to use of public

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content of Brittany’s speech, and silencing her particular viewpoint premised on her faith, while simultaneously permitting the religious views of other speakers to be expressed, School Officials have engaged in unreasonable content-based discrimination as well as impermissible viewpoint discrimination.

The Clark County School District, has enacted Regulation 6113.2, which *requires* School Officials to permit religious content and viewpoints to be expressed during commencement exercises, and expressly *prohibits* School Officials from controlling or restricting the content of student speeches. (Regulation 6113.2 (AX 8)). Regulation 6113.2 establishes clear rules governing speech occurring in the forum at issue: where, as here, the student speaker is selected on the basis of neutral criteria, the speaker must retain “primary control over the content of their expression,” and that expression “cannot be restricted because of its religious or (anti-religious) content.” (*Id.*) The School Officials were required to “respect the lawful boundaries” of the forum created by the District. (*Rosenberger*, 515 U.S. at 829).

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school facilities.); *Good News Club v. Milford School District*, 533 U.S. 98, 111-12 (2001) (finding the school district engaged in viewpoint discrimination when it excluded the Club from the afterschool forum”).

The School Officials instead ignored the Regulation, and censored the content of Brittany's proposed graduation speech, specifically directing the content she could and could not address -- and demanding to review, edit and approve her speech. (Compl. at ¶¶ 32-45, 56-66 (ER 9-16)). The School Officials admitted that they censored and deleted passages of Brittany's proposed speech referring to Brittany's religious belief in "A PARTICULAR RELIGION" or "DEITY." because of their "religious references." (*Id.* at ¶¶ 41-42 (ER 10)).

The School Officials can hardly contend that their content-based edits of Brittany's speech were reasonable, as it is undisputable that their conduct violated Regulation 6113.2, that Brittany was a member of the class of person's protected by the Regulation, and that her speech as written was encompassed within the rules the District itself created. (*See* Compl. at ¶¶ 32-45, 56-66 (ER 9-16)). Although "a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum ... or if he is not a member of the class of speakers for whose especial benefit the forum was created ..., the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." (*Lamb's Chapel*, 508 U.S. at 394). The School Officials did not "respect the lawful

boundaries” of the forum created by the District, and instead arbitrarily interfered with Brittany’s student-initiated speech, rather than disclaim endorsement of that speech, as the Regulations required. (*See* Regulation 6113.2 (AX 8); *Rosenberger*, 515 U.S. at 829).

The School Officials conduct was clearly intentional. Although School Officials censored the religious content and viewpoints expressed in Brittany’s speech, they at the same time allowed others to express very evident religious viewpoints. (Compl. at ¶ 64C (ER 14)). One student referenced a deity, “My Heavenly Father,” “the One”, and spoke about the importance of a Supreme Being in her life. She credited the Supreme Being for her achievements and said that the Supreme Being was always a part of her life. She said:

He is the one who truly understands our needs. . . .  
Find your inspiration. Living with the hope for a  
brighter future will make significant difference in  
our lives, provide us with true inner happiness and  
personal success, If we strive to be more  
motivated by inspiration, we will find ourselves  
more satisfied. . . .

(*Id.*)

The fact that this student was properly permitted to speak, but Brittany was not raises the specter that School Officials targeted “not the subject matter, but particular views taken by speakers on a subject,” in this case

Brittany’s particularly Christian viewpoint. (*Id.* at ¶¶ 38, 64C (ER 10, 14)). As indicated above, it is well-settled law that a school may not “discriminate against speech on the basis of its viewpoint.”<sup>25</sup> The School Officials’ conduct clearly violated the First Amendment.

The School Officials’ conduct also violated the Equal Protection Clause, which requires a showing only of (1) discriminatory effect on account of the government action and (2) invidious discriminatory intent or purpose “by reference to criteria such as race, sex, religion, or ancestry which have been determined improper bases for differentiation.” (*De La Cruz v. Tormey*, 582 F.2d 45, 49, 51 (9th Cir. 1978)).

Brittany has suffered a discriminatory effect as a result of government action. Even though she had earned the right to speak with her fellow valedictorians, she was denied the right to do so because of her religious views. (Compl. at ¶¶ 32-45 (ER 9-10)). Yet School Officials did not edit or censor the speech of Brittany’s fellow valedictorian, Janelle Ohler, even though Ms. Ohler’s speech contained repeated references to a deity in her speech. (*Id.* at ¶ 64C (ER 14)). These kinds of distinctions between and among classes of speech, and speakers, in school settings violate the Equal

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<sup>25</sup> *Id.* (citing *Lamb’s Chapel*, 508 U.S. at 392-93; *see also*, *Perry Education Assn. v. Perry Local Educators’ Assn.*, *supra*; *Good News Club v. Milford School District*, *supra*).

Protection Clause. (See *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), *Grayned v. City of Rockford* 8212 5106, 408 U.S. 104 (1972).)<sup>26</sup>

Were these allegations proven, the School Officials’ constitutional violations “would not be beyond doubt.” (*Hydrick*, 500 F.3d at 985). Government regulation of speech based upon “the specific motivating ideology or the opinion or perspective of the speaker” has been recognized as one of the most “egregious form[s] of content discrimination.” (See *Perry*, 460 U.S. at 46). And although the standard the Court should apply in determining whether the School Officials’ actions violated the Fourteenth Amendment will depend on the facts developed in discovery, even assuming the Court employs the least scrutinizing “rational basis” test, Defendants egregious First Amendment violations cannot be justified.

**D. The Rights Defendants Violated Were Clearly Established**

The determination of whether a right is clearly established for purposes of qualified immunity requires a highly fact-specific inquiry into whether the officials could “have reasonably but mistakenly believed that

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<sup>26</sup> Exactly what standard the Court should apply in determining whether the School *Officials’* actions pass Constitutional scrutiny will be dependent on the development of the factual record. But even assuming the Court employs the least scrutinizing standard, the “rational basis” test, the School Officials will not prevail, given that their actions have violated the First Amendment.

his or her conduct did not violate a clearly established constitutional right."<sup>27</sup>

This Court has made it perfectly clear that the “clearly established” law for purposes of qualified immunity “need not be set out in decisional law.” (*Alexander v. Perrill*, 916 F.2d 1392 (9th Cir. 1990)). Rather, when public officials “have their duties clearly established by regulations and policies that they are legally required to follow,” those regulations alone may be sufficient. (*Id.*) Here, the School Officials appear to have either intentionally disregarded or selectively applied Regulation 6113.2, which was aimed at controlling the constitutionality of their conduct in this precise factual scenario. (Compl. at ¶¶ 23 (ER 7-8)). “[R]easonably competent public officials should know the law governing [their] conduct.” (*Hydrick*, 500 F.3d at 985). The School Officials could not act reasonably by ignoring District regulations.

More to the point, it was no doubt *clearly established* at the time of the relevant events that the School Officials could not engage in the type of viewpoint discrimination practiced in this case. Plaintiffs “need not establish that the School Officials’ ‘behavior had been previously declared unconstitutional.” (*Hydrick*, 500 F.3d at 989 (quoting *Blueford v. Prunty*,

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<sup>27</sup> *Hydrick* 500 F.3d at 985; *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001); *see also Alford v. Haner*, 333 F.3d 972, 977 (9th Cir. 2003).

108 F.3d 251, 254 (9th Cir.1997)). Rather, if binding authority indicates that “*the disputed right existed, even if no case had specifically so declared,*” the School Officials would be on notice of the right. (*Id.* at 255 (emphasis added)).

The Supreme Court has made clear on numerous occasions that the selective censorship of religious messages is viewpoint discrimination, and an “egregious form of content discrimination” against speech. (*Rosenberger*, 515 U.S. at 829). The censorship or exclusion of such speech in school settings is a plain violation of the First Amendment. (*See Good News Club*, 533 U.S. at 111-12; *Lamb’s Chapel*, 508 U.S. at 394; *Hills*, 329 F.3d at 1050-51).<sup>28</sup> Similarly, in *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2001), the Ninth Circuit recognized that the prohibitions on viewpoint discrimination apply to student speech on school property, and held that a public school’s denial of equal access and resources to a student club because of its religious message violated the First Amendment’s prohibition

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<sup>28</sup> Decisions of the highest court of a state are also relevant to the issue of whether the law is well-established for purposes of qualified immunity. *Owens ex. rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004). At the time of Brittany's graduation, the parameters of unlawful viewpoint discrimination had been well- articulated by the Nevada Supreme Court and applied to Nevada education institutions under the First Amendment and Article I, Section 9 of the Nevada Constitution. *See University Sys. v. Nevadans for Sound Gov't*, 120 Nev. Adv. Op. No. 81 (NV 11/10/2004), 120 Nev. Adv. Op. No. 81 (NV, 2004).

on viewpoint discrimination.

In making determinations whether a right is clearly established, this Court also “may draw [on] clearly established law from other circuits.” (*Hydrick*, 500 F.3d at 991). Indeed, other Circuit Courts have clearly recognized that the Establishment Clause does not compel censorship of religious references in graduation speeches. In *Adler v. Duval County School Bd.*, 250 F.3d 1330 (11th Cir. 2001), a school’s policy allowing student remarks before graduation did not violate the Establishment Clause where the policy did not invite or encourage religious remarks by students and the remarks were written and delivered by a student. (*Id.* at 1333). The Court rejected the argument that the school’s role in providing a vehicle for a graduation message by itself transformed the student’s private speech into state-sponsored speech.<sup>29</sup>

Finally, the School Officials could not have reasonably but mistakenly believed that their conduct did not violate the constitution. (*See Hydrick* 500 F.3d at 985). The District was advised years ago by the Nevada Attorney General that exerting control over the religious content of student graduation speeches was unconstitutional, and that the “rule in the Ninth Circuit”

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<sup>29</sup> *Id.* See also, *Doe v. Sch. Dist. of the City of Norfolk*, 340 F.3d 605 (8th Cir. 2003); *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000).

prohibiting such conduct “is clear.”<sup>30</sup> The Regulation was amended to prohibit the precise conduct that occurred in this case, and contains provisions identical to clear federal guidance issued under Section 9524 of the ESEA. (AX 10-17). The District’s General Counsel, who represents the School Officials here, previously advised the District that, under Regulation 6113.2, “if a principal gave permission for the valedictorian to say whatever they wanted at a graduation, then whatever the student said would not be a result of school sponsorship or district sponsorship. It would be free speech and not subject to censorship.”<sup>31</sup> Plaintiffs’ respectfully suggest that their rights could not have been made any clearer.

**E. The Defendants Censorship Was Not Justified**

The School Officials assert that they were motivated by a desire to avoid violating the Establishment Clause. (Opening Brief at 10). But the District’s Regulation was facially neutral, struck an appropriate balance between preventing government endorsement of religion yet permitting students to express their views, and was designed to *avoid* entanglement of the school district with religious views. (*See* Regulation 6113.2 (AX 8)). It also provided for an express remedy, not an arbitrary “pull of the plug,” but

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<sup>30</sup> *See* AG Opinion, 2001 WL 1660129, at \*1 (Sept. 26, 2001).

<sup>31</sup> Board Minutes at \_\_\_\_\_.

a disclaimer. (*Id.*) Moreover, the very rationale underlying the District’s regulation was specifically endorsed by the Court in *Rosenberger*: “We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” (515 U.S. at 839).

Indeed, by violating the District’s Regulation, the School Officials did precisely what *Rosenberger* forbids: “More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.” (*Id.*) By failing to follow their own Regulations, the School Officials relegated to themselves the decisions as to what religious views students would or would not be permitted to express. That is inconsistent with the letter and the spirit of the First Amendment and the rule of law.<sup>32</sup>

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<sup>32</sup> The School Officials intimate that because they referred Brittany to the District’s attorney, they are absolved from liability. (See Defendants’ Opening Brief at 30-31). Nothing in the Complaint or any other record before the Court establishes that the decision to edit and ultimately censor the speech was made by legal counsel. Even assuming that counsel may have advised certain actions, School Officials are not excused from the consequences of their own actions or otherwise automatically entitled to

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The School Officials also argue that their censorship was justified to prevent “proselytizing.” (Opening Brief at 8). That argument is pretext, and similar arguments have been rejected, where, as here, the forum rules are neutral and expressly permit religious content and viewpoints to be aired:

The District also submits that it justifiably denied use of its property to a “radical” church for the purpose of proselytizing, since to do so would lead to threats of public unrest and even violence ... There is nothing in the record to support such a justification, which in any event would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject the District otherwise opens to discussion on District property.

(*Lamb’s Chapel*, 508 U.S. at 396.)<sup>33</sup> Similarly, in *Adler v. Duval County School Bd.*, 250 F.3d 1330 (11th Cir. 2001), a school’s policy allowing student remarks before graduation did not violate the Establishment Clause

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immunity for those actions. *See Nunez v. Davis*, 169 F.3d 1222, 1230 (9th Cir. 1999).

<sup>33</sup> The School Officials’ assertion that Brittany’s speech was “proselytizing” is courthouse conversion that bears little relationship to what is alleged to have occurred. Of the three censored portions of her speech, only one was marked by the school as “proselytizing” the other sections were censored because they referred to a “DEITY” and “IDENTIFI[ED] A PARTICULAR RELIGION.” *See* Draft Speech (AX 35-36). Moreover, this argument ignores allegations that the School Officials admitted to Brittany that their censorship was based upon “religious content” -- not proselytizing. Compl. at ¶¶ 38, 42 (ER 10). In addition, by censoring Brittany’s speech, the School Officials completely ignored the provisions of Regulation 6113.2, but inexplicably took a “hands-off” approach to similar language in the speech of another graduation speaker. *Id.* at ¶ 64C (ER 14).

where the policy did not invite or encourage religious remarks by students and the remarks were written and delivered by a student. (*Id.* at 1333). The Court rejected the argument that the school’s role in providing a vehicle for a graduation message by itself transformed the student’s private speech into state-sponsored speech. (*Id.*) Where a school’s policy is facially neutral (and actually adhered to) there should be no Establishment Clause violation based upon a student’s speech.<sup>34</sup>

The School Officials also contend that this Court’s decisions in *Cole*, and in *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979 (9th Cir. 2003), cert den. 540 U.S. 817 (2003), establish that there is no constitutional violation in this case. Those cases are entirely inapposite, both factually and procedurally.

*First*, both *Cole* and *Lassonde* involved school policies expressly authorizing the schools to *control* the speeches at issue by placing restrictions on their content. (*See Cole* 228 F.3d at 1102 (school policy

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<sup>34</sup> *See Doe v. Sch. Dist. of the City of Norfolk*, 340 F.3d 605 (8th Cir. 2003) (school board member’s delivery of the Lord’s Prayer at a graduation ceremony did not violate the Establishment Clause where he was qualified to speak under long-standing policy, had access to the podium on the basis of neutral criteria, and gave his remarks as a private citizen, not on behalf of the school district); *see also Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (vacating district court injunction on prayer and religious speech in graduation ceremonies, holding that not “all religious speech is inherently coercive at a school event.”)

authorized school district to exert “plenary control”); *Lassonde*, 320 F.3d at 984 (same)). Of course, when a school’s policy permits it to choose between the content of different speeches, the concern about government sponsorship of religious views espoused in particular speeches becomes more stark. The District’s Regulation 6113.2, on the other hand, *prohibited* School Officials from controlling the content of speeches. (Regulation 6113.2 (AX 8)). Indeed, in the District’s own words (taken from another litigation), the “thrust of the regulation” when it was amended, was to “completely align [it] with the concept of free speech by stating content will not be restricted if the graduation speaker retains primary control of the speech ... and the principle that private speech will not be censored by the District, even for religious content.” (See District Brief, 2003 WL 24265199, at \*3).

*Second*, in neither *Cole* nor *Lassonde* was there any indication that some students were permitted to express their religious views but others were not. (See, generally, *Cole*, 228 F.3d 2092; *Lassonde*, 320 F.3d 979). Yet that issue is at the heart of this case, raising the critical question of whether School Officials deliberately favored certain religious views over others.<sup>35</sup> Nothing of the sort was at issue in *Cole* and *Lassonde*. (*Id.*)

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<sup>35</sup> The disclaimer discussed in *Lassonde* was proposed by the student, whereas in this case, the Clark County regulation expressly provided for a  
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Notably, the District itself has admitted (in another litigation) that neither *Cole* nor *Lassonde* “address[ed] a policy similar to Regulation 6113.2.” (See District Brief, 2003 WL 24265199, at \*3). Indeed, the District has affirmatively argued that Regulation 6113.2 is perfectly consistent with *Cole* and *Lassonde*, because those cases involved “school administration exercis[ing] control over the student speeches/invocations through a review process and retain[ing] final authority over content,” something which Regulation 6113.2 affirmatively prohibits. (*Id.*)

*Third*, virtually every qualified immunity case cited by Defendants was decided upon motions for summary judgment after the development of a full factual record -- including *Cole* and *Lassonde*.<sup>36</sup> As a result, in most

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disclaimer as part of its implementation of an official policy permitting student-initiated speech at graduation, and distancing the school district from any implied endorsement of the content of a student speech. See *Lassonde*, 320 F.3d at 981; Regulation 6113.2 (AX 8).

<sup>36</sup>Of the approximately 23 cases cited by the School District on the issue of qualified immunity, only 2 addressed the issue on a motion to dismiss. In one, *Kwai Fun*, 373 F.3d at 952, this Court explicitly noted its hesitancy to decide the issue on a motion to dismiss. In the other, *Crawford-El v. Britton*, 523 U.S. 574 (1998), the Supreme Court explicitly denounced any rule imposing heightened pleading requirements in qualified immunity cases, as this subsequently acknowledged in *Galbraith*, 307 F.3d at 1125. (“[i]n light of *Crawford-El*, nearly all of the Circuits have now disapproved any heightened pleading standard in cases other than those governed by Rule 9(b).”). Although the District Court in *Cole* at one point granted the qualified immunity defense on a motion to dismiss, the issue was not

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cases the Court could engage in the fact-intensive inquiry required by Supreme Court precedents and evaluate the evidence of the defendants' motivations, the defendants' awareness and attempts to comply with their own regulations, and the differences, if any, between the various speeches.<sup>37</sup> Having had full opportunities for discovery, the plaintiffs in *Lassonde* and other cases could not complain that they were not permitted to explore their theories of constitutional violations.<sup>38</sup>

Here, the School Officials would have this Court limit itself to mere parsing of selected portions of Brittany's speech for "first person" references.<sup>39</sup> But "no exact formula can dictate a resolution to such fact-

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appealed until after the complaint was amended, new plaintiffs had developed a factual record, and the qualified immunity defense was again decided on summary judgment. (*See Cole*, 228 F.3d at 1097, 1100). Defendants in *Cole* may have been prescient of this Court's advice in *Kwai Fun*, that a decision to appeal qualified immunity after the denial of a motion to dismiss "may not be a wise one." 373 F.3d at 952.

<sup>37</sup> *Rosenberger*, 515 U.S. at 848 (resolution of the affirmative defense "depends upon the hard task of judging-shifting through the details and determining whether the challenged program offends the Establishment Clause"); *Lee*, 506 U.S. at 598 (The Establishment Clause determination "is necessarily one of line-drawing").

<sup>38</sup> As mentioned above, the plaintiffs in *Cole* presented the special circumstance where the school, through its policy, affirmatively *endorsed* the prayer. No such scenario exists in the case at hand.

<sup>39</sup> The School Officials contend that Brittany's speech is damned by its alleged lack of "first person" references (such as "I," "me," and "my") and

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intensive cases.” (*Van Orden v. Perry*, 545 U.S 677, 700 (2005) (Breyer, J. concurring)). First Amendment Establishment Clause jurisprudence “depends on the hard task of judge-shifting through the details. . . . require[ing] courts to draw lines, sometimes quite fine, based on the particular facts of each case.” (*Rosenberger v. Rectors and Visitors of University of Virginia*, 515 U.S. 819, 847 (1995) (O’Conner, J., concurring)). The only graduation speech case decided by the U. S. Supreme Court --- one involving state-prescribed prayer --- makes clear that the Establishment Clause inquiry requires a “delicate and fact-intensive” inquiry where the law “is of necessity one of line-drawing.” (*Lee v.*

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the use of 24 “collective” references to “you,” “our,” “us” and “we.” Brief p. 22. This argument only exposes an elemental flaw in the School Officials’ understanding of grammar. “English distinguishes three grammatical persons: The personal pronouns *I* (singular) and *we* (plural) are in the **first person**. The personal pronoun *you* is in the **second person**. It refers to the addressee. . . . *He, she, it, and they* are in the **third person**.” See Wikipedia, “Grammatical Person,” [http://en.wikipedia.org/wiki/Grammatical\\_person](http://en.wikipedia.org/wiki/Grammatical_person). Properly analyzed, Brittany’ speech contains 55 “first person” references, singular and plural (43 singular and 12 plural) and *only* 15 “second person” references, three of which are from the quotation of the prophet Jeremiah that God has good plans for “you.” In the censored portion, there are 17 “first person” references and 11 “second person” references, the latter including two first person references and three second person references in Jeremiah’s charge.

*Weisman*, 505 U.S. 577, 597 (1992)).<sup>40</sup>

The District Court recognized the need for this inquiry. There are too many unanswered questions to resolve this case at the pleadings stage. Why did the District not follow its own Regulation? Does the District still certify that they comply with the regulation, and receive federal funding, despite their apparent rejection of the Regulation? Why did the Defendants previously advise a Court that their Regulation was consistent with *Cole* and *Lassonde* and yet now say it is not? Why did Defendants single out Brittany's religious message while not editing the religious content of other

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<sup>40</sup> For example, Defendant Sefcheck claims that he is entitled to qualified immunity because he was simply following directions and was not involved in the censorship of the speech. Opening Brief at 32. The circumstances of his involvement are, however, not entirely known. In particular, the discrimination in this case did not occur on public property, but in a rented convention center that was part of a Las Vegas casino. Compl. at ¶ 13 (ER 6). The Complaint alleges violations by Does and Roe Corporations. Compl. at ¶ 8 (ER 6). The Complaint does not identify whether the rental agreement with the school district put control of the sound system with Sefcheck or an arena employee, or whether Sefcheck was instructed by school officials, or by employees of the arena, to interfere with Brittany's speech. Compl. at ¶¶ 57-59 (ER 12). Wholly apart from these circumstances, however, the central issue is whether Sefcheck's caused a constitutional violation, and that has been alleged. Clearly Sefcheck caused the Plaintiffs' speech to be censored because he turned off her microphone and prevented the audience from hearing her remarks. Compl. at ¶ 62 (ER 13). The fact that he did so on the District's directions does not insulate him from liability. See *California Attys. For Crim. Justice v. Butts*, 195 F.3d 1039, 1049 (9th Cir. 1999) (the fact that city may have trained their police to violate the rights of individuals does not provide any defense for officers where the conduct violated clearly established constitutional rights).

speeches? What criteria did the District use in censoring her speech? Why did School administrators and counsel refuse to discuss the issues surrounding the censorship with Brittany and her mother after repeated inquiries? Why didn't the District simply issue a disclaimer as its policy provides? And who authorized and effected the censorship? Some of these unanswered questions were raised by the District Court as questions requiring answers under Supreme Court precedents. (*See* Hearing Transcript (AX 173-74)).

As the School Officials concede in their brief, “deciding the issue of qualified immunity ... requires the Court to examine the merits of Plaintiffs’ constitutional claims.” (Opening Brief at 33). Yet, because of the School District’s pre-existing policy and positions, as well as the facts presented, the answers to these questions mean the difference between constitutionally permissible and constitutionally impermissible conduct under well-settled law.

There is no risk that the School Officials’ qualified immunity defense “will be effectively unreviewable on appeal from the final judgment.” (*Id.*) The School Officials will have another opportunity to raise the qualified immunity defense on summary judgment. (*See Beherens v. Pelletier*, 516 U.S. 299, 306 (1996) (qualified immunity can be raised “at successive

stages” of the litigation)). Although the School Officials will be subjected to discovery before that time, qualified immunity “is a right to immunity from certain claims, not from litigation in general.” (*Id.* at 312).

Defendants could have waited to move to dismiss the Amended Complaint until after some limited discovery was conducted into the factual issues that were troubling the District Court and hindering it from making a final judgment on qualified immunity.<sup>41</sup> (*See* ER [ ], District Court Transcript, at p. 57-58.) Defendants instead immediately appealed and moved to stay discovery. (ER [ ]).

The validity of this strategic decision should be carefully questioned. *See, e.g., Kwai Fun*, (raising the immunity defense on a motion to dismiss “is not a wise choice in every case”). As this Court recently noted, when government actors move to dismiss on qualified immunity grounds, the Court is placed in the “difficult position of ‘deciding far reaching constitutional questions on a non-existent factual record.’” (*Hydrick*, 500 F.3d at 985 (quoting *Kwai Fun Wong v. United States*, 373 F.3d 952 (9th Cir.2004))). Although the School District may have been motivated to save

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<sup>41</sup> For example, during oral argument, the District Court questioned why School Officials did not follow Regulation 6113.2, and was clearly concerned that the School Officials were intentionally disregarding that controlling regulation with the intent to “to censor content based upon religion.” (ER [ ], District Court Transcript, at p. 18).

costs of litigation, there is also a risk that the School District was motivated to conceal discovery of the full extent of the alleged constitutional violations, or the existence of other potentially liable parties who have not yet been identified. (*See, e.g., Hydrick*, 500 F.3d at 985).

Indeed, the School Officials here argue that “[a]dditional discovery is not necessary,” and claim that the factual record is complete. (*See* Opening Brief, pp. 14-15 (emphasis supplied). That statement is simply false. Discovery is stayed. The only “discovery” to date consists of the documents that the School Officials attached to their briefs in the District Court, which were volunteered and are self-serving.<sup>42</sup> Evaluating the merits of a qualified immunity defense, based upon information hand-picked by the government, only increases the risk that the defense will be abused.

The School Officials should not be permitted to prevent discovery into the facts necessary to make a principled decision in this case. The District’s Court’s decisions were proper in all respects, and should be affirmed by this Court.

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<sup>42</sup> More than that, the memorandum attached to their briefing in the District Court (ER 98), raises even more questions about the District’s willful disregard for existing and established regulations. This Court has rejected similar attempts by government officials to evade enforceable regulations by citing unenforceable memoranda. *See Perill*, 916 F.3d at 1397 (rejecting qualified immunity defense where government official argued that duties under enforceable regulations were not clearly established in light of “a memorandum” issued by “Central Office.”).

## CONCLUSION

For reasons stated above and in the briefing before the District Court, Plaintiffs respectfully request this Court to deny Defendants' Interlocutory Appeal from the Motion to Dismiss.

Dated: January 25, 2008

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND FILING**

I hereby certify that a true and correct copy of the foregoing ANSWERING BRIEF OF PLAINTIFFS-APPELLEES, on this \_\_\_ day of January, 2008, served by Overnight Federal Express, postage prepaid, on the following:

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and that the foregoing was filed with the Court pursuant to Federal Rule of Appellate Procedure 25(a)(2)(B) by sending on this day the original and fifteen (15) true and correct copies of the foregoing to the Court by Overnight Federal Express, postage prepaid, to the following address:

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