

Nos. 09-56689, 09-56690

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**C.F., a minor, by and through his parents BILL FARNAN and TERESA
FARNAN;**

Plaintiff-Appellant-Cross-Appellee

v.

**CAPISTRANO UNIFIED SCHOOL DISTRICT; DR. JAMES CORBETT,
individually and in his official capacity as an employee of Capistrano Unified
School District; and DOES 1 through 20, inclusive;**

Defendants-Appellees-Cross-Appellants

and

**CALIFORNIA TEACHERS ASSOCIATION/NEA; and CAPISTRANO
UNIFIED EDUCATION ASSOCIATION;**

Intervenor-Defendants-Appellees.

**On Appeal from the United States District Court
For the Central District of California**

**BRIEF *AMICUS CURIAE* OF
THE NATIONAL LEGAL FOUNDATION,
in support of Plaintiffs–Appellants-Cross-Appellees
Urging Reversal in No. 09-56689**

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a 501(c)(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts. The NLF, as a public interest law firm, has an interest, on behalf of its constituents and supporters, and in particular those in California, in arguing on behalf of people of faith. The NLF believes that the Establishment Clause is a critical element of our freedoms, protecting the most basic element of freedom—our personal beliefs about life and its purpose. The NLF vigorously opposes efforts to erode the broad Constitutional protection of Americans’ religious beliefs.

This Brief is filed pursuant to consent of all parties except Capistrano Unified School District and Dr. Corbett in his official capacity and pursuant to the accompanying motion.

SUMMARY OF ARGUMENT

This Brief expands upon two arguments made by the Plaintiff-Appellant-Cross-Appellee (hereinafter “C.F.”): (1) the court below erred in granting qualified immunity when the constitutional right was clearly established; and (2) the court below improperly applied the second prong of the *Lemon* test, in which

the court must gauge the primary effect of Dr. Corbett's speech on his high school students. As a result of this error, the court below improperly excluded several additional Establishment Clause violations.

Qualified immunity is only appropriate when a government official's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *DiRuzza v. County of Tehama*, 206 F.3d 1304, 1313 (9th Cir. 2000) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). By applying an inaccurate measure of what constitutes "clearly established" rights, the court below incorrectly granted qualified immunity to a government actor, Dr. Corbett, who engaged in the flagrant violation of a clearly established constitutional right recognizable to any reasonable person.

In this case, the injustice of the grant of qualified immunity is amplified when one considers the number of times that Dr. Corbett actually violated the Establishment Clause. The court below applied flawed reasoning to eliminate all but one of Dr. Corbett's inflammatory and hostile comments. An accurate analysis under valid precedent reveals multiple Establishment Clause violations, which preclude the grant of qualified immunity.

ARGUMENT

I. THE COURT BELOW EMPLOYED FLAWED REASONING WHEN GRANTING QUALIFIED IMMUNITY DESPITE DR. CORBETT'S VIOLATION OF A CLEARLY ESTABLISHED RIGHT—ONCE IS ENOUGH.

In order to clearly establish that an action is unlawful, it is “not [necessary that] the very action in question has previously been held unlawful.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Despite this, the court below erroneously granted qualified immunity primarily because no prior cases have held that similarly hostile classroom statements violated the Establishment Clause. *C.F. v. Capistrano Unified School District*, 656 F. Supp. 2d 1190, 1205 (C.D. Cal. 2009) (*Capistrano III*).

A. *C.F.*'s right was clearly established.

For purposes of qualified immunity, a right is clearly established when “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Graves v. City of Coeur d’Alene*, 339 F.3d 828, 846 (9th Cir. 2003), *abrogated in part on unrelated grounds by Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177 (2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Long-standing Supreme Court precedent describes the government’s obligation—and even, specifically, public schools’ obligation—under the Establishment Clause to remain neutral towards religion. *School District of Abington Township v.*

Schempp, 374 U.S. 203, 225 (1963) (“[T]he State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’”) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (describing “the established principle that the government must pursue a course of complete neutrality toward religion.”).¹ When defining the contours of the Establishment Clause, the Supreme Court has said that “[w]e sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.” *Zorach v. Clauson*, 343 U.S. at 313.

C.F. provided the court below with many examples of Dr. Corbett’s anti-religious classroom statements, none of which display impartiality or an attitude that allows religious students to “flourish.” Nevertheless, the court below demonstrated great reluctance to find any Establishment Clause violations among Dr. Corbett’s long list of offensive statements. The court below did, however, correctly hold that one statement, Dr. Corbett’s characterization of Judeo-Christian beliefs as “propaganda[a]” and “superstitious nonsense” (the “Peloza Comment”), was so egregious that it violated the clearly established contours of the

¹ Several Supreme Court Justices have vigorously challenged the constitutionality of a principal of complete neutrality. See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 885-900 (2005) (Scalia, J., Rehnquist, C.J., and Thomas, J., dissenting). There is no dispute, however, that the Establishment Clause prohibits hostility

Establishment Clause that prohibit hostility to religion. *C.F. v. Capistrano Unified School District*, 615 F. Supp. 2d 1137, 1146 (C.D. Cal. 2009) (*Capistrano I*).

B. Qualified immunity does not require a prior identical case to establish a constitutional violation by government speakers when the right is clearly established.

The court below held that the Pelozo Comment violated the Establishment Clause because it had no discernable secular purpose. In addition, although the court below did not reach this point, the primary effect of the Pelozo Comment was most likely one of hostility against the Judeo-Christian belief in creation.² Despite the grossness of Dr. Corbett's violation of a clearly established Establishment Clause right, in *Capistrano III* the court below strained to find a reason why Dr. Corbett should nonetheless be entitled to qualified immunity. The court below improperly settled on the rationale that because "[t]he parties have not presented any cases in which a constitutional violation was found based on one or even a few hostile or disapproving statements in the classroom," Dr. Corbett should receive qualified immunity. *Capistrano III*, 656 F. Supp. 2d at 1205.

Qualified immunity does not, however, require a prior case of "hostile or disapproving statements in the classroom." *Id.* Instead, qualified immunity merely requires that the law clearly establishes that a public schoolteacher cannot express

² Because the court below held that the Pelozo Comment had no secular purpose and therefore violated the Establishment Clause, consideration of the statement's primary effect was unnecessary.

hostility towards religion. As discussed in Part I.A., above, it has been established in the law for more than fifty years that a public schoolteacher cannot affirmatively oppose or show hostility to religion. *See Sch. Dist. of Abington Twp.*, 374 U.S. at 225 (concerning classroom activities); *Zorach*, 343 U.S. at 313-14 (discussing the contours of the Establishment Clause in the classroom). “If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.” *Harlow*, 457 U.S. at 818-19. “The matching of fact patterns demands only a level of particularity such ‘that a reasonable official would understand that what he is doing violates th[e] right.’” *Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008) (citations omitted).

The court below bolstered its flawed conclusion that cases involving hostile classroom statements are necessary to clearly establish a right with a misapplication of this Court’s cautionary instruction in *Dible v. City of Chandler*, 515 F.3d 918 (9th Cir. 2008). *Capistrano III*, 656 F. Supp. 2d at 1205-06. In *Dible*, this Court quoted its own precedent regarding whether government officials’ speech is constitutionally protected, saying that “such [*free speech*] claims will rarely, if ever, be sufficiently ‘clearly established’ to preclude qualified immunity.” *Dible*, 515 F.3d at 930. This case is not, however, a question of whether Dr. Corbett’s speech was constitutionally protected under the free speech provisions of

the First Amendment. Rather, it is a question of whether it was clearly established that Dr. Corbett's hostile speech violated the Establishment Clause. As a result, the court below erred by misapplying this Court's free speech precedent to the Establishment Clause question presented in this case. There is no requirement for a prior case of hostile classroom statements when the contours of the Establishment Clause clearly establish that hostility to religion is impermissible.

II. EVEN IF MULTIPLE VIOLATIONS OF A CLEARLY ESTABLISHED RIGHT ARE REQUIRED TO PRECLUDE QUALIFIED IMMUNITY, THE COURT BELOW ERRED IN HOLDING THAT ONLY ONE INCIDENT VIOLATED C.F.'S CONSTITUTIONAL RIGHTS.

A. The district court's reasoning relied on a vacated decision that can no longer be cited as authority.

Despite allegations of numerous hostile statements against Christianity as well as other religions,³ the court below held that only one of Dr. Corbett's inflammatory and antagonistic statements, the Pelozo Comment, violated the Establishment Clause. The court explained its dismissal of Dr. Corbett's other openly hostile comments by relying on the since-vacated opinion of *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 567

³ Dr. Corbett's statements themselves are not in dispute—the statements are contained in “Farnan's Statement of Uncontroverted Facts.” The only question regarding Dr. Corbett's statements is whether they had a primary effect of hostility towards religion.

F.3d 595 (9th Cir. 2009), *vacated* 586 F.3d 1166 (9th Cir. 2009). *Capistrano III*, 656 F. Supp. 2d at 1204.

Applying the novel reasoning of *Catholic League*, which can no longer be cited as authority, 9th Cir. R. 35-3 advisory committee's notes to Rules 35-1 to 35-3(3), the court below effectively altered the three-pronged "*Lemon* test," articulated by the Supreme Court nearly forty years ago in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Capistrano III*, 656 F. Supp. 2d at 1204. In *Lemon*, the Supreme Court set out three prongs to identify an Establishment Clause violation. First, the government action "must have a secular legislative purpose." *Lemon*, 403 U.S. at 612. Second, the "principal or primary effect [of the government action] must be one that neither advances nor inhibits religion." *Id.* Third, the government action "must not foster 'an excessive government entanglement with religion.'" *Id.* at 613 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)). An action that fails to meet any one of these three tests violates the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

Catholic League's flawed analysis reduces *Lemon* to a two-pronged test by nullifying the second prong of the *Lemon* test. Under the rationale of the vacated *Catholic League* opinion, as long as a statement serves a secular purpose, it may be harsh or hostile to religion.

Although the primary effect of an action is often the same as its purpose, this is not always the case—especially in the context of a high school classroom. Moreover, *Lemon* distinguished between purpose and primary effect, setting out each as a separate consideration to identify an Establishment Clause. The court below, however, relying on *Catholic League*, effectively combined the first two prongs of the *Lemon* test and erroneously concluded that wherever it could discern a secular purpose, it could also presume a neutral effect. As a result, the court below did not independently consider the primary effect of Dr. Corbett’s statements.

B. Secular purpose does not automatically equate to a non-hostile primary effect, especially in a high school classroom.

The court below attributed a secular classroom “purpose of teaching European history and deductive reasoning” to nearly all of Dr. Corbett’s litany of hostile comments. *Capistrano I*, 615 F. Supp. 2d at 1146. Despite the tenuous connection between many of Dr. Corbett’s comments and the stated curriculum, your *Amicus* will not quibble with the district court’s assessment that a possible secular purpose existed for all but one statement.⁴

⁴ Your *Amicus* agrees with the multitude of courts that have criticized the *Lemon* test. See, e.g., *McCreary*, 545 U.S. at 902 (Scalia, J., Rehnquist, C.J., Thomas, J., and Kennedy, J., dissenting) (“As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. . . . I have urged that *Lemon*'s purpose prong be abandoned . . .”). Nevertheless, “[d]espite repeated criticisms

But the second prong of *Lemon* does require the court to objectively consider the primary effect of each statement. And, as the court below correctly noted, “[i]n applying the *Lemon* test to a situation involving the public schools, the Court ““must do so mindful of the particular concerns that arise in the context of public elementary and secondary schools.””” *Capistrano I*, 615 F. Supp. 2d at 1149 n.11 (quoting *Smith v. Board of School Commissioners*, 827 F.2d 684, 689 (11th Cir. 1987), quoting *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987)). Despite noting this standard, however, the court below failed to consider the particular concerns of a high school classroom.

The primary effect of Dr. Corbett’s comments might plausibly be neutral in an adult education class or even a college classroom. But in a high school setting, particularly among fifteen- and sixteen-year-old students, the primary effect will be very different than among adults. “The State exerts great authority and coercive power . . . because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.” *Edwards*, 482 U.S. at 584. In a high school classroom setting, evaluation of a statement’s primary effect requires “particular care [as] many of the citizens perceiving the governmental message are children in their formative years.” *School District of the City of Grand Rapids v.*

from various flanks, “[t]he *Lemon* test remains the benchmark to gauge whether a particular government activity violates the Establishment Clause.” *Newdow v. Rio Linda Union School District*, 579 F.3d 1007, 1076 (9th Cir. 2010) (Reinhardt, J., dissenting) (quoting *Access Fund v. USDA*, 499 F.3d 1036, 1042 (9th Cir. 2007)).

Ball, 473 U.S. 373, 390 (1985) (overruled on another point by *Agnostini v. Felton*, 521 U.S. 203 (1997)).

In order for many of Dr. Corbett's inflammatory statements to meet the second *Lemon* requirement of a primarily neutral effect, the court below dispassionately considered Dr. Corbett's overall classroom purpose, connected several dots to explain the statement's purpose, and then concluded that his high school students were likely to have calmly and rationally done the same analysis in the midst of a heated classroom presentation. *Capistrano I*, 615 F. Supp. 2d at 1149-53. By doing so, the court below attributed remarkable maturity and focus to Dr. Corbett's high school students, treating them no differently than any mature adult listening to a colleague. In this way, the court below applied an incorrect standard of a reasonable adult observer, rather than a high school student, in assessing the primary effect of Dr. Corbett's high school classroom comments.

C. The Pelozo Comment is not the only hostile statement; there are several additional Establishment Clause violations.

It is, of course, unreasonable to require a classroom teacher to cautiously tailor every statement to ensure that no student finds it offensive. But "the pervasive influence exercised by the public schools over the children who attend them . . . makes scrupulous compliance with the establishment clause in the public schools particularly vital." *Smith*, 827 F.2d at 689-90 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968)). Accordingly, it is reasonable to require a

teacher to conform his or her lesson plans to the U.S. Constitution. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (“we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.”). Over and over, Dr. Corbett chose to interrupt his curriculum with irrelevant statements that vilified and ridiculed religion. Dr. Corbett’s personal commentary was much more than a few unfortunate off-the-cuff comments. Rather, Dr. Corbett engaged in a pattern of teaching hostility towards religion. The court below erred in holding that only one of Dr. Corbett’s comments violated the Establishment Clause.

For example, Dr. Corbett allegedly chose to explain the resistance to Joseph II’s reforms with his “Jesus glasses” discourse. *Capistrano I*, 615 F. Supp. 2d at 1149 (citing Farnan’s Ex. A, p. 24). Dr. Corbett’s “Jesus glasses” phrase is unquestionably memorable. Spoken in a high school classroom, together with Dr. Corbett’s hostile attitude and embellishments, it is quite likely to have the primary effect of becoming part of a high school student’s lunchroom lexicon, used to deride others’ religious beliefs. The court below erred in holding that the primary effect of Dr. Corbett’s “Jesus glasses” comment was merely to demonstrate “how religion can be used as a manipulative tool.” *Id.*

Similarly, in Dr. Corbett's diatribe referred to by the court below as

"Scientific Reasoning and the Bible," Dr. Corbett stated the following:

Um, see, people believed before the scientific revolution that the Bible was literal and that anything that happened, God did it. They didn't understand. They didn't have the scientific method. They didn't approach truth. . . . They believe the Bible literally. . . . So, you know, understand that we have this sort of mindless centric notion, right? . . . think how humbling it's going to be, you know, when all these people who have been talking about Adam and Eve and creation and all of this stuff for all that time when eventually something happens, and they find out that there are people on another planet, six billion light years away, who don't look like us, worshiping huge geckos. . . . Aristotle . . . argued that, you know there sort of has to be a God. Of course that's nonsense. I mean, that's what you call deductive reasoning, you know. [Arguing for creation is f]aulty logic. Very faulty logic. . . . Your call as to which one of those notions is scientific and which one is magic. . . . I mean, all I'm saying is that, you know, the people who want to make [a creation argument], there is as much evidence that God did it as there is that there is a gigantic spaghetti monster living behind the moon who did it. Therefore, no creation, unless you invoke magic. . . . Scientifically, [creationism] is nonsense.

Id. at 1151-52 (citing Farnan's Ex. D, pp. 71-75, 81).

Although any reasonable observer of any age in any setting would infer religious disapproval from these comments, the court below held that Dr. Corbett's offensive comments did not have the primary effect of advancing or inhibiting religion. *Id.* at 1151-53. The court below based its holding on its own—and very different—interpretation of Dr. Corbett's comments, which was that:

[P]eople once believed that the sun did not move in the sky because of a literal interpretation of the Bible. [Dr. Corbett] then suggested that we have learned through scientific study that the sun does move through space. He also explained that people once thought we were literally in the center of the Earth . . . He stated that 'they didn't approach truth,' indicating that Corbett

believes that the ‘truth’ is that the sun is a moving object and that Jerusalem is not in the center of the Earth. . . . Similarly, he suggested that someday certain religious groups may be ‘humbled’ to discovery (sic) that we are not in the center of the universe.

Id. at 1152. The court below improperly held that the latter set of comments, which bear little resemblance to Dr. Corbett’s actual statements, “had the primary effect of describing the secularization in thinking over time due to increasing belief in scientific principles.” *Id.*

The court below erred by failing to consider the facts before it. Instead, the court below analyzed reasonable comments that Dr. Corbett could have made, but chose not to. Dr. Corbett’s actual “Scientific Reasoning and the Bible” comments surely had the primary effect of expressing hostility towards religion.

CONCLUSION

Dr. Corbett’s pattern of classroom hostility towards religion, demonstrated by multiple comments that are before the Court, constitutes at least one violation—if not multiple violations—of the clearly established contours of the Establishment Clause. Qualified immunity should be reserved for government actors who must operate in uncharted waters and unwittingly violate citizens’ rights. The classroom is not uncharted water and the Establishment Clause is not an obscure law with no established contours.

In fact, the National Education Association (NEA) has provided clear guidance in its teacher resources. Its pamphlet, *A Teacher’s Guide to Religion in*

the Public Schools, responds to the question of “How should I teach about religion?” by quoting from guidance issued by seventeen religious and educational organizations. The NEA instructs teachers in the following way:

- The school may *expose* students to a diversity of religious views, but may not *impose* any particular view.
- The school *educates* about all religions; it does not *promote* or *denigrate* religion.
- The school *informs* students about various beliefs; it does not seek to *conform* students to any particular belief.

. . . [P]ublic-school teachers are required by the First Amendment to teach about religion fairly and objectively, neither promoting nor denigrating religion in general or specific religious groups in particular.

First Amendment Center, *A Teacher’s Guide to Religion in the Public Schools* 3

(National Education Association, 2008 reprint of 2004 rev. ed.), *available at*

<http://www.nea.org/home/38133.htm> (emphasis in original). Despite this clear and

helpful explanation, which the NEA has made available to all teachers, Dr. Corbett

imposes his own view of religious hostility, *denigrates* students’ religious beliefs,

and seeks to *conform* his students to his own anti-religious views. Dr. Corbett’s

actions, whether individually or taken as a whole, violate the clearly-established

Constitutional right to be free from religious hostility.

For the foregoing reasons, and for additional reasons stated in the Appellants’ Brief, the judgment of the district court should be reversed (1) in its

grant of qualified immunity and (2) in its conclusion of only a single Establishment Clause violation.

Respectfully submitted,
this 17th day of June 2010

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,736 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in fourteen-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2010, I have electronically filed the foregoing Brief *Amicus Curiae* of The National Legal Foundation in the case of *C.F. al. v. Capistrano Unified School District, et al.*, Nos. 09-56689, 09-56690 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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