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12 UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
14 SOUTHERN DIVISION

15 **CHAD FARNAN**, a minor, by and through
16 his parents **BILL FARNAN** and **TERESA**
17 **FARNAN**;

18 Plaintiffs,

19 vs.

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

25 Defendants.

Case No.: SACV07-1434 JVS (ANX)

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR LEAVE TO
FILE AN AMENDED ANSWER AND
MEMORANDUM OF POINTS AN
AUTHORITIES IN SUPPORT THEREOF**

Date: July 13, 2009
Time: 1:30 p.m.
Dept: 10C
Judge: James V. Selna

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1 **ARGUMENT**

2 The threshold question presented by Defendants’ Motion for Leave to File an
3 Amended Answer (“Motion”) is whether it is even possible for Defendants to raise an
4 affirmative defense, qualified immunity, which has not been raised at any point during
5 lengthy litigation. Defendants’ failure to acknowledge the existence of this question or
6 to provide this Court with any legal authority stating that the defense has not been lost
7 is telling. Plaintiffs have addressed Defendants’ inability to raise qualified immunity at
8 this stage in the litigation in both Plaintiffs’ Supplemental Briefing Pursuant to Order
9 dated June 1, 2009 and Plaintiffs’ Opposition to Defendants’ concurrently filed Motion
10 that improperly seeks a “post summary judgment order” from this Court as to
11 Dr. Corbett’s qualified immunity. As a result, Plaintiffs will not restate the entirety of
12 those arguments but will refer this Court to the aforementioned briefing prior to its
13 consideration of whether Defendants can satisfy the standard for leave to amend the
14 complaint at such a late stage of the litigation.

15 Additionally, the Defendants’ delay in seeking to amend their Answer and their
16 failure to argue qualified immunity are significant, both in terms of procedure and
17 because it is relevant in determining whether this Court should grant leave to amend at
18 this time. Defendants cite *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074
19 (9th Cir. 1990), for the proposition that “a mere delay in seeking leave to amend is not a
20 sufficient basis for denying a motion to amend.” (Motion 7, lns. 7-11.) Defendants fail
21 to provide a complete picture of this case, however, the analysis of which is far broader
22 than Defendants indicate. *Morongo* does not provide a basis for this Court to grant
23 Defendants’ Motion for Leave to Amend. In *Morongo*, the court actually denied the
24 plaintiff the right to amend on the basis that “new claims set forth in the amended
25 complaint would have greatly altered the nature of the litigation and would have
26 required defendants to have undertaken, at a late hour, an entirely new course of
27 defense.” *Morongo*, 893 F.2d at 1079. The court further stated that “[t]he delay of
28 nearly two years, while not alone enough to support denial, [was] nevertheless

1 relevant.” *Id.* As the *Morongo* court stated, the fact that eighteen-months has passed
2 since this litigation began is relevant to this Court’s decision as to whether qualified
3 immunity can be asserted for the first time at this stage of the litigation and whether to
4 deny Defendant’s Motion for Leave to Amend. Defendants’ delay should be taken into
5 consideration in light of the substantial prejudice it would cause to Plaintiffs.

6 Should this Court find that qualified immunity has not been waived altogether,
7 however, this Court still should not grant Defendants’ Motion for Leave to Amend the
8 Answer (hereinafter “Motion for Leave to Amend”) and allow Defendants to raise
9 qualified immunity as an affirmative defense. Under Rule 15(a), an affirmative defense
10 may be added to an answer by consent of the opposing party or leave of the court. Fed.
11 R. Civ. P., Rule 15(a). In deciding whether to grant leave to amend, courts balance a
12 number of factors to determine when “justice so requires” leave to amend. Fed. R. Civ.
13 P., Rule 15; 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal
14 Practice & Procedure § 1487. In the Ninth Circuit, as elsewhere, “[f]ive factors are
15 taken into account to assess the propriety of a motion for leave to amend: bad faith,
16 undue delay, prejudice to the opposing party, futility, and whether the plaintiff has
17 previously amended the complaint.” *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir.
18 2004) (citing *Nunes v. Ashcroft*, 348 F. 3d 815, 818 (9th Cir. 2003)).

19 **I. Defendants Should Not Be Granted Leave to Amend Their Answer Because**
20 **the Amendment Is Sought in Bad Faith.**

21 The first paragraph of Defendants’ argument reveals the flaw in Defendants’
22 analysis – a flaw that is woven throughout their briefing and is intrinsic in the
23 arguments they now assert. Citing to *U.S. v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)
24 for the proposition that leave to amend should be granted with liberality, Defendants
25 state the following: “[C]ourts should be guided by the policy favoring decision on the
26 merits ‘rather than on the pleadings or technicalities.’” (Motion, p. 6, lns. 9-14.).
27 Plaintiffs wholeheartedly agree. Failing to plead qualified immunity does not, however,
28 involve “pleadings or technicalities.”

1 On May 1, 2009, this Court ruled that Dr. Corbett violated the Establishment
2 Clause. Defendants now seek leave to amend the Answer to add an affirmative defense
3 that was never asserted prior to the ruling on the merits. Defendants' briefs rely on case
4 law supporting leave to amend a pleading after an early dismissal due to a procedural
5 technicality in order to obtain a ruling on the merits. There is no procedural technicality
6 here. Defendants' reliance is therefore misplaced. Defendants requested a ruling on the
7 merits in the form of a motion for summary judgment, and opposed the same from
8 Plaintiff, and now wish to unwind the clock and seek leave to amend. That is neither
9 the purpose nor the intent behind the case law upon which Defendant relies.
10 Defendants' Motion is sought in bad faith.

11 As noted by Defendants, "[i]n determining whether an amendment is sought in
12 bad faith, courts have inquired whether the party seeking amendment has previously
13 engaged in dilatory tactics and have evaluated the value of the proposed amendment."
14 (Motion p. 7, Ins. 13-18 (citing *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789,
15 799 (9th Cir. 2001).) Here, there is absolutely no value to the proposed amendment at
16 this stage in the litigation and, despite providing the above-mentioned cite, Defendants
17 do not even attempt to state the value of the proposed amendment. Generally speaking,
18 both Plaintiffs and Defendants agree that the qualified immunity defense "shield[s]
19 [government agents] from liability for civil damages" *Harlow v. Fitzgerald*, 457
20 U.S. 800, 818 (1982); *see also* Motion, p. 8, Ins. 1-6 . Plaintiffs seek only nominal
21 damages, and both Plaintiffs and Defendants have incurred the expense of litigation.
22 Defendants' amendment is completely void of value, both to Plaintiffs and Defendants
23 themselves, and is sought in bad faith following this Court's ruling on the merits.

24 Regarding their eleventh-hour assertion of the affirmative defense, Defendants
25 contend that this Court's May 1, 2009 ruling on the Party's Motions for Summary
26 Judgment "rendered the qualified immunity defense available to Defendants for the first
27 time in this litigation." (Motion, p. 7, Ins. 26-27.) According to Defendants, it was at
28 this time that this Court "determined the first prong of the [qualified immunity] inquiry,

1 i.e. Dr. Corbett violated the Establishment Clause when he made the single statement
2 during one lecture that creationism was ‘religious, superstitious nonsense.’” (Motion p.
3 9, Ins. 3-5.) This determination, said Defendants, “triggered . . . the possibility of a
4 qualified immunity defense.” (*Id.*) As is true with several of Defendants’ arguments
5 made in this Motion and the concurrently filed “Motion for Determination,” Defendants
6 fail to provide any legal authority that even remotely provides precedent for such a
7 statement. As Defendants later note, Intervenors understood that qualified immunity
8 was a possible defense upon the filing of their Answer. (Motion p. 10.) That fact
9 demonstrates that Plaintiffs’ Complaint had clearly raised the possibility of such a
10 defense, which is always, at minimum, a possibility where a lawsuit is filed against a
11 state entity in federal court.

12 Further, Defendants argue that a determination of whether Dr. Corbett violated
13 the Establishment Clause is somehow relevant to this Court’s determination to grant
14 leave to amend. It is not, however, one of the prongs a court is required to look into
15 when making the inquiry as to whether Defendants are entitled to qualified immunity.
16 Defendants base their assertion on a faulty interpretation of the standard for determining
17 whether a public official is entitled to qualified immunity. The qualified immunity
18 defense “‘requires a two-part inquiry: (1) [w]as the law governing the state official’s
19 conduct clearly established [and] (2) [u]nder that law could a reasonable state official
20 have believed his conduct was lawful” *Jeffers v. Gomez*, 267 F.3d 895, 910 (9th Cir.
21 2001) (citing *Browning v. Vernon*, 44 F.3d 818, 822 (9th Cir. 1995). The relevant
22 inquiry for the first prong of qualified immunity is (1) whether the facts alleged or
23 shown by the plaintiff make out a violation of a constitutional right, and (2) if so,
24 whether that right was “‘clearly established’ at the time of the defendant's alleged
25 misconduct.” *Pearson v. Callahan*, 129 S. Ct. 808, 811 (2009) (citing *Saucier v. Katz*,
26 533 U.S. 194, 194 (2001)).

27 It is quite obvious from Plaintiffs’ First Amended Complaint that the one and
28 only cause of action Plaintiffs asserted was that Dr. Corbett had violated the

1 Establishment Clause while teaching his Fall 2007 Advanced Placement European
2 History class. The facts alleged by Plaintiff clearly established a violation of a
3 constitutional right. Even so, affirmative defenses do not require a determination that a
4 law was violated before they must be asserted. Further, as is fully addressed in
5 Plaintiffs' Opposition to Defendants' concurrently filed "Motion for Determination,"
6 this right was clearly established at the time of Defendants' misconduct.

7 Defendants' entire argument is premised on their irrelevant and incorrect
8 assertion that this Court's ruling that one statement violated the Establishment Clause
9 was a novel ruling by this Court, which thereby rendered an affirmative defense,
10 qualified immunity, applicable for the first time. To support this premise, however,
11 Defendants take a myriad of Plaintiffs' quotes out of context in order to support their
12 assertion that in order for this Court to find an Establishment Clause violation, Dr.
13 Corbett must have made incessant and continual comments displaying his disapproval
14 of Christianity. Although Plaintiffs continue in their contention that this did occur in
15 Dr. Corbett's classroom, this is not the standard that has been established by the
16 Supreme Court or the standard that was set forth by Plaintiffs. Instead, Plaintiffs
17 consistently asserted that an Establishment Clause violation occurs when a government
18 actor conveys a message of disapproval of religion. Moreover, Defendants should have
19 asserted qualified immunity as an affirmative defense in their Motion to Dismiss or, at
20 minimum, in the Answer. As Defendants well know, despite their inclusion of a
21 plethora of quotes found in documents drafted throughout the entirety of the eighteen-
22 month litigation, the Motion to Dismiss was filed following the filing of the First
23 Amended Complaint, and their Answer was filed following the First Amended
24 Complaint and Opposition to Motion to Dismiss. In other words, seven of the nine
25 quotes relied upon by Defendants are not even relevant to Defendants' argument as
26 discovery had not commenced and the cross-motions for summary judgment had not yet
27 been filed. (Motion, pp. 3-5.)

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1 Finally, Defendants' assertion that a court had not yet ruled that a single
2 statement made by a teacher could violate the Establishment Clause is irrelevant to the
3 inquiry of whether a public official is entitled to qualified immunity. The law does not
4 require that this Court's final ruling be clearly established, but that Plaintiffs'
5 allegations, as stated in their complaint, show that Defendants' conduct was in violation
6 of a constitutional right that was clearly established. This is at least partially due to the
7 fact that the law does not even contemplate the assertion of qualified immunity after the
8 Court has made a ruling on the merits. Defendants' statement that that "if Farnan's
9 contentions were accepted as true, it did not appear that a viable qualified immunity
10 defense existed" is contrary to Defendants' statement that "case law did exist in 2007
11 that would seem to support Farnan's claim" and, more importantly, is contrary to the
12 law. (Motion 9, Ins. 14-19.)

13 Based on the aforementioned information, Defendants' assertion that this Court's
14 May 1, 2009 ruling rendered the qualified immunity defense available to Defendants for
15 the first time lacks any and all merit. Defendants did not raise the defense of qualified
16 immunity in their Answer, Motion to Dismiss, Motion for Summary Judgment, or
17 Opposition to Plaintiffs' Motion for Summary Judgment. They have not provided even
18 one justifiable reason for their failure to argue qualified immunity as an affirmative
19 defense during the pretrial proceedings and prior to a ruling on the merits. Defendants'
20 leave to amend the Answer is sought in bad faith, and defendants should not be granted
21 leave to amend their Answer.

22 **II. Defendants Should Not Be Granted Leave to Amend Their Answer Because**
23 **the Amendment Is Futile.**

24 Defendants' argue that the amendment of their Answer is not futile and that "an
25 argument could be made that a request for leave to amend made *prior* to the Court's
26 May 1, 2009 ruling most likely would have been considered legally tenuous in light of
27 Farnan's allegations up until that time." (Motion, p. 10, Ins. 8-11. Defendants'
28 statement that "an argument could be made" to this effect is evidence of the absurdity of

1 this contention, as even the Defendants themselves don't actually commit to this
2 argument. Clearly, Defendants could have made a request for leave to amend their
3 answer prior to this Court's May 1, 2009 ruling and, more importantly, should have
4 asserted the qualified immunity defense at one of many opportunities throughout the
5 litigation. Defendants seek leave to amend their Answer after a final ruling has been
6 issued in this case. This in and of itself is evidence of the futility of this Motion. The
7 privilege of qualified immunity "is 'an immunity *from suit* rather than a mere defense to
8 liability." *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1138 (D. Col. 2001) (emphasis
9 added). After eighteen months of litigation and countless hours of discovery and
10 depositions (on both sides of the lawsuit), this Court has ruled on the dispositive cross-
11 motions and issued a ruling on the merits in Plaintiffs' favor. It is absurd then for
12 Defendants to argue now, at this point in the litigation, that they should be immune
13 "from suit." *Id.* Further, Defendants' make this argument without providing any legal
14 authority to support their contention that qualified immunity can be used merely as a
15 defense to liability and nothing else. Finally, Defendants would gain nothing from
16 asserting qualified immunity in the face of nominal damages and an injunction;
17 conversely, Plaintiffs' would be substantially prejudiced.

18 Defendants' allowing the case to be fully litigated for approximately eighteen
19 months only to argue qualified immunity following a final ruling on the merits is an
20 injustice to Plaintiffs and would further be futile in light of the type of damages sought
21 by Plaintiffs. Therefore, this Court should not grant Defendants leave to amend their
22 Answer because such an amendment would be futile.

23 **III. Defendants Should Not Be Granted Leave to Amend Their Answer Because**
24 **The Amendment Will Cause Undue Prejudice.**

25 According to courts and commentators, prejudice is the most important, and the
26 most oft used, reason to deny leave to amend. *See Jackson v. Bank of Haw.*, 902 F.2d
27 1385, 1387 (9th Cir. 1990); 6 Charles Alan Wright, Arther R. Miller & Mary Kay
28 Kane, *Federal Practice & Procedure* § 1487 (2d ed. 1990). In considering prejudice,

1 courts generally look to see what hardship the moving party will endure if leave is not
2 granted, the reason the moving party failed to include the material in the original
3 pleading, and the injustice that would result to the party opposing the motion. 6 Charles
4 Alan Wright, Arther R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1487
5 (2nd ed. 1990).

6 Here, because Plaintiffs are seeking only nominal damages, the hardship
7 Defendants will endure if leave is not granted is virtually non-existent. Furthermore,
8 this case involves a single cause of action for violation of the Establishment Clause
9 against a School District official and the School District itself. There is therefore no
10 justifiable reason for Defendants’ failure to assert the defense at one of multiple
11 opportunities at earlier stages in the litigation. Finally, the injustice that would result to
12 Plaintiffs if leave to amend is granted at this time is significant. As discussed above,
13 both parties have engaged in significant discovery and filed numerous motions.
14 “Prejudice and undue delay are inherent in an amendment asserted after the close of
15 discovery and after dispositive motions have been filed, briefed, and decided.”
16 *Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999). Allowing the case to
17 be fully litigated for approximately eighteen months only to grant immunity at the tail
18 end of the case would be an injustice to Plaintiffs. *Id.*; *see also*, *Solomon v. N. Am. Life*
19 *& Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) (motion “on the eve of the
20 discovery deadline” properly denied because it would have required reopening
21 discovery, thus delaying proceedings).

22 Defendants contend that the amendment of their Answer will not cause undue
23 prejudice to Plaintiffs because the Union Intervenors asserted this affirmative defense
24 on Dr. Corbett’s behalf. (Motion 11, Ins. 1-3.) Defendants claim that “based on Union
25 Intervenors’ assertion of the affirmative defense, Dr. Corbett already is entitled to a
26 determination of qualified immunity” and for that reason “Defendants . . . bring this
27 motion in an abundance of caution.” (Motion 11, Ins. 2-4.) This statement is
28 disingenuous at best. To begin with, the Union Intervenors cannot assert an affirmative

1 defense on behalf of another party, Defendant Dr. Corbett. *See Harlow v. Fitzgerald*,
2 457 U.S. 800, 815 (1982) (“Qualified or ‘good faith’ immunity is an affirmative defense
3 that *must be pleaded by a defendant official.*”) (emphasis added) (citing *Gomez v.*
4 *Toledo*, 446 U.S. 635 (1980)). Additionally, Dr. Corbett is not entitled to a
5 “determination of qualified immunity” simply because the Union Intervenors pleaded it
6 in their Answer. This ignores the fact that it was not pleaded by Defendant Dr. Corbett
7 himself. Most importantly, however, affirmative defenses that are pleaded in the
8 answer and never argued are lost. *See Peterson v. Highland Music, Inc.*, 140 F.3d 1313,
9 1318 (9th Cir. 1998) (“Most defenses . . . may be waived as the result of course of
10 conduct during litigation. [I]f a defendant were to engage in ‘sandbagging’ by raising
11 the issue . . . on a motion to dismiss, deliberately refraining from pursuing it any farther
12 when his motion is denied in the hopes of receiving a favorable disposition on the
13 merits, and then raising the issue again . . . only if he were unhappy with the district
14 court’s ultimate decision, then we would not hesitate to find that the defendant had
15 waived [the defense.]”); *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1071, 1073 (C.D.
16 Cal. 2003) (“Defendants were given an opportunity to litigate the personal jurisdiction
17 issues before the Court addressed the merits of the pending motion. Defendants simply
18 refused to do so.”); *see also, Yeldell v. Tutt*, 913 F.2d 533, 538-39 (8th Cir. 1990)
19 (holding that defendants did not successfully “preserve[] their right” to raise an
20 affirmative defense by raising it in their answer but failing to reassert it at any point
21 thereafter and, specifically, that “[a]sserting a jurisdictional defect in the answer did not
22 ‘preserve the defense in perpetuity’” (citation omitted)). If Dr. Corbett is entitled to a
23 “determination of qualified immunity” simply because it was pleaded in Union
24 Intervenors’ Answer, then it follows that he would also be entitled as a matter of course
25 to numerous defenses that were pled in the same Answer but never argued throughout
26 the litigation. Such defenses include estoppel and exhaustion of administrative
27 remedies. Defendants’ argument would indicate that, “in the abundance of caution,”
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1 they could seek leave to amend the Answer to add estoppel and be entitled to a
2 determination following a ruling on the merits.

3 Defendants additionally appear to argue that Union Intervenors' inclusion of
4 qualified immunity in their Answer placed Plaintiffs on notice that Defendants could
5 also assert the defense and, therefore, Plaintiffs would not be prejudiced if Defendants
6 now amend their Answer to include this defense. (Motion 10, Ins. 22-23.) While it is
7 true that Plaintiffs have known that Defendants could have asserted the defense of
8 qualified immunity in their Answer, Motion to Dismiss, Opposition to Plaintiffs'
9 Motion for Summary Judgment, Defendants' Motion for Summary Judgment, or at any
10 time during the pretrial proceedings, Plaintiff was not and could not have been aware
11 that Defendants would attempt to raise the affirmative defense after the close of
12 discovery and after the dispositive motions have been filed, briefed, and ruled upon.
13 Allowing the case to be fully litigated for approximately eighteen months only to grant
14 immunity at the tail end of the case would be an injustice to Plaintiffs for which
15 "notice" in the form of another party's assertion of the defense would not be not
16 sufficient justification. More significantly, Defendants cite no legal authority to support
17 their proposition that providing notice in an Answer in any way even lessens the
18 prejudice incurred by Plaintiffs as a result of Defendants' actions. *See Campbell v.*
19 *Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999) ("Prejudice and undue delay are
20 inherent in an amendment asserted after the close of discovery and after dispositive
21 motions have been filed, briefed, and decided.").

22 Defendants should not be granted leave to amend their answer because the
23 amendment sought is unduly prejudicial to Plaintiffs.

24 **IV. Defendants Should Not Be Granted Leave to Amend Their Answer Because**
25 **the Amendment Will Cause Undue Delay.**

26 Defendants' arguments regarding the undue delay caused by a possible
27 amendment to their Answer this late in the litigation do not fully address the appropriate
28 concerns based on the applicable legal authority. The simple fact that this Court

1 allowed Defendants to brief this issue at the same time other more relevant issues were
2 being addressed by this Court does not establish that no undue delay will occur. Undue
3 delay concerns not only the delay in proceeding forward with the case, but “whether
4 appellants unduly delayed in filing their motion.” See, *Jackson v. Bank of Haw.*, 902 F.
5 3d 836, 1387-88 (9th Cir. 1990). Furthermore, “whether the moving party knew or
6 should have known the facts and theories raised by the amendment in the original
7 pleading” is relevant to the inquiry of whether a party has unduly delayed in filing their
8 motion. *Id.* (citing *E.E.O.C. v. Boeing Co.*, 843 F.2d 1213, 1222 (9th Cir.), cert.
9 denied, 488 U.S. 889, 109 S.Ct. 222, 102 L.Ed.2d 212 (1988); *Jordan v. County of Los*
10 *Angeles*, 669 F.2d 1311, 1324 (9th Cir.), vacated on other grounds, 459 U.S. 810
11 (1982).

12 In the matter presently before this Court, Defendants have unduly delayed raising
13 the issues of the proposed additional affirmative defense. From the start of this case
14 Defendants knew, or should have known, all of the facts and theories raised by this new
15 claim of qualified immunity. Defendants had ample opportunity to raise this issue and
16 yet chose to remain silent. Qualified immunity could have been asserted in the Answer,
17 in Defendants’ Motion to Dismiss, in his Opposition to Plaintiffs’ Motion for Summary
18 Judgment, and in Defendants’ Motion for Summary Judgment. At each of these points
19 in time, Defendants knew all of the same facts that they know now, and their failure to
20 raise qualified immunity until this point thus constitutes undue delay and forecloses
21 leave to amend.

22 Finally, Defendants argue that should this Court grant Defendants’ Motion for
23 Leave to Amend, this would expedite this case. “If Farnan’s claim is barred by the
24 defense, the issue can be resolved now and the necessity of a trial or further
25 consideration regarding injunctive relief or damages will be obviated.” (Motion, p. 12,
26 Ins. 8-10.) Defendants, however, fail to realized that “a defense of qualified immunity
27 is not available for prospective injunctive relief.” *Vance v. Barrett*, 345 F.3d 1083, 1091
28 (9th Cir. 2003) (citing *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518,

1 527 (9th Cir.1989) (“Qualified immunity is an affirmative defense to damage liability; it
2 does not bar actions for declaratory or injunctive relief.”). Therefore, contrary to
3 Defendants assertions, injunctive relief will remain an issue to be determined this Court.
4 This Court should deny Defendants’ Motion for Leave to Amend both because of
5 Defendants long and unfounded delay in filing their motion and because an amendment
6 would further delay this litigation.

7 **CONCLUSION**

8 For the foregoing reasons, this Court should deny Defendants’ Motion for Leave
9 to Amend because the request is sought in bad faith, is futile and prejudicial to
10 Plaintiffs, and is untimely. Furthermore, if Defendants are granted leave to amend their
11 Answer, this would cause undue prejudice and undue delay to Plaintiffs.

12 DATED: June 15, 2009

ADVOCATES FOR FAITH & FREEDOM

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