

APPEAL Docket Nos. 09-56689 & 09-56690

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

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

Plaintiffs — Appellants — Cross Appellees

vs.

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

CALIFORNIA TEACHERS ASSOCIATION/NEA; AND CAPISTRANO
UNIFIED EDUCATION ASSOCIATION,

Intervenors — Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CASE NO. SACV-07-1434 JVS (ANX)

**INTERVENORS — APPELLEES' REPLY BRIEF TO APPELLANT'S
THIRD BRIEF ON CROSS APPEAL**

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INTRODUCTION

In his Third Brief (“FTB”) on Cross Appeal, Farnan fails to address the facts in this case, instead making unfounded generalizations about the record to support his plea for judicial intervention into the classroom. Farnan ignores the standards of the Advanced Placement European History course, suggesting that Dr. Corbett should have avoided classroom discussion about the role of religion in contemporary American culture and politics. *See, e.g.* FTB, p. 30 [“It is not necessary, however, for the Defendants to express condemnation of religious thoughts or institutions in order to teach objective facts in history.”] Dr. Corbett’s job is to prepare students to take an Advanced Placement essay test demonstrating an ability to relate the forces at play in modern European History to contemporary events and controversies. The development of scientific methodologies and secular political structures in a world that had been tightly controlled by religious authorities and biblical literalism is a key story in European History. Christian fundamentalists’ efforts to contest the teaching of evolution in public schools, examples at times used by Dr. Corbett in class discussions and lectures, exemplify how the forces that shaped European History remain vibrant in contemporary America.

Farnan cannot show that the neutrality demanded by the Establishment Clause requires teachers refrain from discussing controversial subjects, highlighting logical

weaknesses and deceptive devices in the arguments of political partisans, or using personal experiences to demonstrate points and develop rapport with students. Nor can that neutrality require individual teachers clear every incidental comment uttered throughout a long day of teaching under the *Lemon* analysis. That Farnan perceives as “hostility” provocative discussion topics and the presentation of sociological and political facts that conflict with his religious and political views is not evidence of an Establishment Clause violation. A reasonable high school student in an AP European History course would have recognized that Dr. Corbett’s statements had a predominantly secular purpose and a primarily secular effect. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

ARGUMENT

I. Corbett Did Not Violate the Establishment Clause

Farnan dismisses the efforts of Defendants and Intervenors to provide the Court with the context for specific statements Farnan claims as evidence of hostility to religion. “[T]he majority of Corbett’s statements are so egregious that there is no ‘context’ within which they could be put in order to make them constitutionally viable.” FTB, p. 15. Farnan assures the Court that he has not “mischaracterized or taken out of context” Dr. Corbett’s statements [p. 14], yet his brief is replete with

mischaracterizations and lack of context. For example, Farnan claims [p. 12] that Dr. Corbett taught that Aristotle promoted *nonsense* when he argued that there has to be a God. Dr. Corbett was explaining flaws in Aristotle's deductive reasoning, not criticizing belief in God. Such statements do not refute the existence of God, but controvert fundamentalist demands that religious texts be accepted as providing scientific as well as religious truth.

In that same paragraph, Farnan turns Dr. Corbett's positive allusion to the New Testament (Matthew 23:5), sharing his personal belief that people should not pray publicly like the Pharisees, into an example of hostility to religion. Farnan deletes the sentence immediately following the quoted comment: "I think if they come to God, they should come to him in private." A sentence that assumes God's existence cannot be anti-religious. Nor was Dr. Corbett telling students this was his "only" religious belief: It was one belief he would share. Farnan's E.R. 7, p. 142; FTB, p. 12. The District Court came to this same conclusion. *C.F. v. Capistrano U.S.D.*, 615 F.Supp.2d 1137, 1145 [fn 6].

Context is central in Establishment Clause analysis. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680. In applying the *Lemon* analysis, Justice Souter noted, "[T]he world is not made brand new every morning. . . ; they

want an absent minded objective, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show.” *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 866 (2005). In *Grove*, the Ninth Circuit concluded the “witchcraft” aspects of The Learning Tree in the context of the entire series and other curriculum materials. *Grove v. Mead School District*, 753 F.2d 1528, 1534. [“The Learning Tree, however, was included in a group of religiously neutral books in a review of English literature, as a comment on an American subculture. Its use does not constitute establishment of religion or anti-religion.”] “The issue is not whether The Learning Tree embodies anti-Christian elements; I have assumed, arguendo, that it does. Instead, the issue is whether its selection and retention by school officials ‘communicat[es] a message of government endorsement’ of those elements.” *Grove*, p. 1539 [concurrency].

Neutrality does not compel government to ignore scientific and historical realities, nor compel teachers to treat religious views like factually based science and history. To do so would require a curriculum tailored to particular religious sects and belief systems in violation of the Establishment Clause. *Epperson v. State of Ark.*, 393 U.S. 97, 113 (1968).

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A. Incidental Comments That Are Supportive or Critical of Religion Do Not Violate the Establishment Clause

Neutrality does not bar teachers' personal views or incidental comments that approve or disapprove of the political positions of religious organizations, nor pointing out logical fallacies and distortions of facts in the arguments advanced by religious or secular advocates past and present. Incidental benefits and harms to religion do not violate the Establishment Clause. "*A de minimis* religious gesture does not, by itself, create an Establishment Clause problem." *Chaudhuri v. State of Tenn.* 130 F.3d 232, 237 (6th Cir. 1997). "The prayers were no more than a "tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* As Supreme Court justices noted, "[O]n occasion some advancement of religion will result from government action." *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). The Constitution "permits government some latitude in recognizing and accommodating the central role religion plays in our society Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious." *County of Allegheny v. ACLU*, 492 U.S. 473, 657 (1989) (Kennedy, J., concurring and dissenting). Just as references to the religious beliefs of our Founding Fathers do not violate the Establishment

Clause, neutrality acknowledges the skeptical and iconoclastic beliefs of American historical and cultural figures, including Mark Twain.

B. The Lemon Test

“[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.” *Lynch*, 465 U.S. at 679. “After *Lynch*, the opinion in *Lemon* is best understood as reflecting factors which may be central to any establishment clause analysis, rather than as articulating a single invariable test.” *Grove, supra* at 1537 [fn 13]. Farnan, however, urges this Court to apply *Lemon* in a invariable and unrealistic manner to isolated statements of an individual teacher, without regard to context or the impact of this litigation on our educational system. To Farnan, “The very simple question that needs to be answered is: did Corbett express disapproval of religion in his public high school classroom, thereby expressing hostility and violating the Establishment Clause? . . . No lengthy discussion about academic freedom, context, European history curriculum, or the supposedly horrible results of applying the law in answering the question above will change what the transcripts and audio recordings prove Corbett said in that classroom.” FTB, pp. 32 - 33.

Applying *Lemon* to the facts in this case requires keeping in mind the purposes

of the Establishment Clause and the purposes of public education to create a citizenry able to reason and think critically. As stated in Intervenor's Answer to the FAC, the California Constitution prohibits "any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly in any of the common schools of this State." Cal. Const. Article IX, section 8. "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement." Cal. Const. Article IX, section 1. Dr. Corbett's adherence to these Constitutional directives does not evidence hostility to religion.

1. Secular Purpose Prong

Farnan argues that Defendants and Interveners would engage in "judicial psychoanalysis" of Dr. Corbett's comments. FTB, p. 23. Happily, no couch is needed because Dr. Corbett's secular purposes are explicit in materials he gave students prior to the school year, and in his statements encouraging students to express any views for which they could provide support. Secular purpose is also evident in the context of the statements cited by Farnan.

Under *Lemon*, a challenged governmental action must have a secular purpose

that is genuine and “not merely secondary to a religious objective.” *McCreary*, 545 U.S. 844, 864, 125 S.Ct. 2722, 2735. Though Farnan would infer a primarily anti-religious purpose from Dr. Corbett’s tone and choice of topics, the record clearly shows that his classroom lectures and statements were predominantly secular and consistent with the secular purposes stated in the AP Euro standards and classroom rules. Having taught this course for more than ten years in a conservative community, garnering few if any complaints, Dr. Corbett is owed deference here. *Id.* at 866.

Certainly it is easier to demonstrate valid secular purposes for statutes adopted by legislative bodies or curriculum adopted by a school board, where documentation makes the purpose explicit, as for the general AP European History standards and classroom guidelines, than for each comment made by a teacher in the course of a day. That argues for providing greater leeway for the government actor’s proffered secular purpose, not less, and for assessing purpose in light of all relevant facts.

The Pelosa comment made in the context of a teacher responding to a student request was 1) deeply personal to Dr. Corbett as a defendant in that lawsuit; 2) part of the history of the Capistrano School District; and 3) instructive of the contemporary legal and cultural confrontation between fundamentalism and science in public schools. While discerning which secular purpose predominates may be difficult, the fact that it was secular and not anti-religious, is evident. The immediate

context of the presentation and the broader context of the course demonstrate that Dr. Corbett's comment was directed not at "religion" or a belief in divine creation, but at Peloza's attempt to inject non-scientific beliefs into a biology course. The District Court erred in determining that this comment, seen in isolation, expressed hostility to religion without any valid secular purpose, and Farnan errs in seeing it as part of a pattern of hostility. Intervenors urge the Court to reverse the finding of the District Court.

2. Secular Effect Prong

Farnan correctly notes that *Lemon* requires that the "principal or primary effect" of challenged government conduct neither advance nor inhibit religion [*Lemon*, 403 U.S. at 612] and that inquiry is conducted from the perspective of a reasonable observer who is both informed and reasonable. *Am. Family Ass'n, Inc.*, 277 F.3d at 1122.

Farnan attempts to distinguish the facts here from *American Family Ass'n*, claiming incredibly that "only one 'theme'" ran through Dr. Corbett's statements, "an unconstitutional disapproval of religion." To the contrary, even the statements which Farnan quoted in his First Amended Complaint dealt with a wide variety of topics covering everything from Viagra to the separation of church and state, but appear to

be unified only insofar as they offended Farnan politically. The transcripts show that the only consistent theme running through his course was Dr. Corbett's effort to illuminate his students about the forces at work in European History and their relationship to forces still operating in contemporary America so that students would develop logical thinking skills and be successful on the AP test.

Farnan also attempts to distinguish the facts in this case from *Brown v. Woodland Hills*, 27 F.3d 1373 (1994), claiming that the comments that Dr. Corbett made about religion during class were not curricular, whereas *Brown* considered an adopted curriculum. FTB at 29. While Intervenors believe that the *Pelozo* comment can be analyzed as non-curricular free speech in the context of a class discussion, almost all the comments cited as offensive by Farnan were obviously curricular. Even the *Pelozo* comment is curricular, as noted above, in that Dr. Corbett's presentation dealt with the curricular topics about contemporary public education that he tied elsewhere to the events in European History. The means by which government creates a secular effect cannot be dictated by the subjective reactions of the adherents of particular religious doctrines. "[O]nce the state is free to use a secular means of attaining a goal, it is not required to use an alternative secular means that is less likely to be associated with religion." *Brown*, at 27 F.3d 1382 [citing *Lynch*, at 465 U.S. at 681 n. 7. Nor can Farnan's demand that the Court infer hostility

to religion from Dr. Corbett's tone or choice of subjects be endorsed. That one can infer disapproval of religious beliefs "cannot objectively be construed as the primary focus or effect . . ." *Vernon*, 27 F.3d at 1398-99.

This Circuit has also appreciated that certain pedagogical activities pose greater risk of Establishment Clause violations than others. "In *Grove*, the Court recognized that "actual participation in 'ritual' poses a greater risk of violating the Establishment Clause than merely discussing or thinking about religious texts." *Brown*, 27 F.3d 1373 at 1380 [discussing *Grove*, 753 F.2d 1528]. In this case, given the context of teacher comments during class discussion, what Farnan contends is non-curricular speech, the age and sophistication of the students in an AP European History classroom, and the reminders from Dr. Corbett that all reasoned opinions are welcome in class, the danger of students understanding his words to be official School District policy is minimal. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion). *Chaudhuri*, 130 F.3d at 237.

Because the primary effect of Dr. Corbett's comments during discussions, including the Pelozza comment, would not be understood by reasonable observers to be hostility by government towards religion, Intervenor's urge the Court to reverse the District Court's determination about the Pelozza comment and sustain the District

Court's correct ruling that the remainder of Dr. Corbett's comments did not violate the effect element of the *Lemon* analysis.

3. Dr. Corbett's Teaching Did Not Foster Excessive Entanglement with Religion

The third element of the *Lemon* analysis asks whether the challenged practice fosters an excessive entanglement of the state with religion. *Lemon*, 403 U.S. at 612. Among the factors to consider are "the character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615, 91 S.Ct. at 2112; *Brown*, 27 F.3d. at 1383. "Political divisiveness" is considered when there is a direct government subsidy involved, and in the Ninth Circuit, entanglement cannot be established by divisiveness alone. *Id.*

Farnan argues that Dr. Corbett's "continual and incessant" statements "effectively served to foster 'an excessive government entanglement with religion.'" FTB, p. 30. The District Court rejected this contention. *C.F. v. Capistrano USD*, 615 F.Supp.2d 1137, 1154. Farnan compares the instant case to *Widmar v. Vincent*, 454 U.S. 263, 272 (1981) where the Supreme Court determined that governmental scrutiny of student meetings for prohibited religious content created unconstitutional

entanglement with religion. In this case it is Farnan, not the Defendants, who seek to impose governmental scrutiny of speech, and the remedies sought by Farnan in his FAC are the ones which pose the danger of entanglement. The actual speech giving rise to this lawsuit involves no scrutiny or entanglement in the *Lemon* sense, though because of the subject matter of AP European History and demands of the test to consider contemporary religious controversies, religion is entwined with the government action. As Farnan agrees, however, by itself that poses no constitutional problem, since many Supreme Court and Ninth Circuit cases have acknowledged that approaching religious materials for scholarly and other non-religious purposes does not violate the Establishment Clause. *School District of Abington v. Schempp*, 374 U.S. 203, 225 (1963).

II. The District Court's Qualified Immunity Rulings Were Correct

A. The District Court Did Not Abuse Its Discretion in Allowing Amendment of the Rule 16 Scheduling Order

In his first brief, Farnan did not challenge the District Court's finding that Defendants had established good cause to modify the Rule 16(b) scheduling order to allow Defendants to seek leave to amend their answer and move for a qualified immunity determination. In response to Dr. Corbett's contention that the District Court's ruling on this issue was correct, Farnan now asserts, wrongly, that the District

Court abused its discretion in allowing the amendment.

The District Court had considerable discretion to grant the motion to amend. *See Corbett Second Br.*, pp. 41-43; *see also Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992) (district court decisions regarding pretrial orders will not be disturbed absent “clear abuse of discretion”) (quotation and citation omitted). The District Court’s Order found Dr. Corbett had demonstrated good cause for amending the scheduling order to allow him to seek leave to amend his complaint. ER 2, pp. 5-16. Defendants moved promptly and diligently to amend the scheduling order. The amendment had no meaningful impact on the litigation schedule or case management, and it caused no prejudice to Farnan’s ability to obtain a full and fair hearing on his legal claim.

Farnan contends that the facts of this case are “similar” to the facts in *Johnson v. Mammoth Recreations*. Yet in *Johnson*, unlike here, the plaintiff filed a belated motion to amend the scheduling order to allow him to add a defendant, even though the existing defendant had repeatedly advised plaintiff that he had named the wrong party and needed to substitute a different defendant. The *Johnson* plaintiff completely ignored the defendant’s warnings and discovery responses, and he failed to identify a single reason for not having heeded “clear and repeated signals that not all the necessary parties had been named in the complaint.” *Id.* at 609. No such

deliberate and wholly unexplained disregard is present here.

Also, unlike *Johnson*, here the Defendants were not *required* to seek amendment of the scheduling order to amend their answer because 1) Intervenors had already asserted the qualified immunity defense on Dr. Corbett's behalf, and 2) Farnan suffered no prejudice as a result of Defendants presenting the defense for adjudication.¹ As Intervenors explained in our second brief, and as the District Court correctly found, Intervenors had standing to raise qualified immunity on behalf of our member, Dr. Corbett. *See* Intervenors Second Br., pp. 45, 47; ER 2, pp. 25-26. Intervenors satisfied associational standing requirements set forth in cases such as *Warth v. Seldin*, 422 U.S. 490, 511 (1975) and *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Further, California law broadly grants standing to labor organizations representing public school employees to litigate members' claims. *See* Cal. Gov. Code §3543.8

In any event, Defendants *did* seek leave to allow Dr. Corbett to amend his answer. Farnan was on notice at the outset of litigation that qualified immunity was at issue in the case due to Intervenors's Answer. Farnan was neither surprised nor prejudiced by Defendants' presentation of this defense. Further, the District Court

¹ Intervenors do not dispute that Defendants were obligated to seek amendment of the scheduling order for the separate purpose of obtaining leave to move for a qualified immunity determination after the dispositive motion deadline.

correctly found that litigating the merits of the defense on the heels of the May 2009 summary judgment ruling comported with the underlying case-management purposes of Rule 16(b) because it “created no meaningful issues of case management and has not impaired the efficient adjudication of the action.” ER 2, p. 16 (footnote omitted). The District Court did not abuse its discretion in allowing the amendment.

B. The District Court Did Not Abuse Its Discretion in Allowing Dr. Corbett and the School District to Amend Their Answer

1. Plaintiff Fails to Rebut that Amending the Answer Was Not Even Necessary

As Intervenors discussed in our second brief (*see* Intervenors Second Br., pp. 45-47), and directly above, Dr. Corbett was not required to amend his answer under Rule 15(a) to assert qualified immunity because Intervenors had standing to raise the defense on his behalf in our Answer. Farnan fails to address or rebut this argument.

The Ninth Circuit recognizes that affirmative defenses, including qualified immunity, may be raised for the first time at the summary judgment stage even *without* amending one’s answer to include the defense, so long as presenting the defense causes no prejudice to the opposing party. *See Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993). Farnan suffered no prejudice as a result of Defendants

presenting the qualified immunity issue for adjudication, yet another reason why Dr. Corbett was not required to seek leave to amend his answer. *See id.* Nevertheless, Dr. Corbett took the precautionary step of seeking leave to amend to include the qualified immunity defense.

2. The Amendment Was Not Made in Bad Faith

Farnan's efforts to characterize the District Court's thoughtful decision to allow amendment of the answer as an abuse of discretion, notwithstanding Rule 15(a)'s extremely liberal amendment policies, are unconvincing.

Farnan still offers no reason for claiming the amendment was sought in "bad faith" other than his assertion that Dr. Corbett was trying to "avoid" having to pay attorneys' fees. A public official does not exercise "bad faith" by raising a defense that furthers important public policies and affords him a protection recognized by law. *See* *Intervenors Second Br.*, pp. 49-50. Neither logic nor caselaw supports his position. Dr. Corbett did not exercise "bad faith" merely by seeking a ruling on a defense that Defendants believe to be meritorious, and Farnan's unsupported argument to the contrary should be rejected.²

² Farnan contends that *Intervenors* misread the Ninth Circuit's decision in *Owens v. Kaiser Found'n. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001), but that is not accurate. In noting that substantial evidence existed to explain defendant's

3. No Undue Delay Occurred

Farnan cites *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802 (9th Cir. 1988), to support his claim of undue delay, but that case supports Defendants' argument that no undue delay occurred. First, *McGlinchy* recognizes that "[r]epeated failure to cure deficiencies by amendments previously allowed" is another factor in the Rule 15(a) analysis. *Id.* at 809; *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). But Defendants had never sought leave to amend their answer prior to seeking the amendment at issue, and thus they had no prior opportunities to modify their defenses via previous pleading amendments. *See* *Intervenors Second Br.*, p.51 n.10. In *McGlinchy*, by contrast, after the original trial date had been vacated, the parties were seeking yet a third opportunity to amend the pleading. *McGlinchy*, 845 F.2d at 810. Farnan asserts that Dr. Corbett had opportunities to raise qualified immunity in his motion to dismiss and in the initial motion for summary judgment, but the "previous

delay in amending the answer, the *Owens* Court was specifically addressing and rejecting plaintiffs' argument that defendant had "failed 'to offer a plausible explanation'" for its delay. *See Owens*, 244 F.3d at 712. Further, the Court found that defense counsel had offered a "credible explanation" for the delay and that no evidence existed to show that defendant had delayed raising the defense for the purpose of forcing plaintiffs to incur unnecessary litigation expenses. *Id.* Here, too, Defendants offered a credible reason for Dr. Corbett's delay; no evidence of improper motive exists; and Defendants moved for leave to amend the answer immediately after the summary judgment ruling made clear that the defense applied.

amendment” factor under Rule 15(a) refers specifically to a party’s repeated failure to cure deficiencies when previously amending a complaint or answer. *See id.* Dr. Corbett had never amended his answer prior to seeking the amendment at issue.

Second, in *McGlinchy*, the plaintiffs asserted that they learned of new claims during discovery, but they waited six months – and until after the original discovery deadline and the vacating of the original trial date – to seek leave to amend their complaint a third time. *Id.* at 809. Contrary to Farnan’s assertion, *McGlinchy* did not “impose” an “objective standard” for evaluating undue delay. The *McGlinchy* Court noted that the plaintiffs should have been aware of one of the two claims they sought to add at the outset of litigation because it was so similar to one of their original claims. *Id.* But the Court proceeded to find that the six-month delay in seeking amendment was undue under those circumstances. *Id.* Here, of course, the May 2009 summary judgment ruling prompted the motion for leave to amend the answer, and Dr. Corbett filed that motion shortly after the summary judgment ruling. No unjustified delay occurred.

Farnan claims that asserting qualified immunity should be a “knee-jerk reaction” in any Section 1983 case involving a public official. However, the frequent applicability of qualified immunity in such cases does not mean that public entities and officials must raise the defense in their initial answers or forever forego the

defense. Absent prejudice, public officials can raise qualified immunity for the first time at summary judgment even when their answer does *not* include the defense and they have not sought leave to amend their answer to assert it. *Camarillo*, 998 F.2d at 639.

4. The Amendment Was Not Futile

In his third brief, Farnan largely re-hashes his meritless argument that Dr. Corbett “waived” the qualified immunity defense. Further, Farnan fails to offer any explanation as to how discovery and summary judgment could have been avoided if Dr. Corbett had asserted qualified immunity in his original answer. Farnan cannot credibly claim (and he has not claimed) that Defendants would have prevailed on a motion to dismiss on the basis of qualified immunity; indeed, even at this stage of litigation, based on a fully developed factual record, Farnan persists in contending that Dr. Corbett is not entitled to qualified immunity. Qualified immunity does not only provide immunity from suit; it provides an important defense to liability. That defense is meritorious in this case, even assuming Farnan has shown the Establishment Clause was violated. Thus, Dr. Corbett’s motion to amend the answer was not futile.

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5. The Amendment Caused No Undue Prejudice

In asserting undue prejudice, Farnan fails to address what is an inconvenient truth: Intervenors had raised a qualified immunity defense in their answer, and thus Farnan was on notice from the outset of the litigation that qualified immunity was at issue. Farnan also fails to dispute that discovery and summary judgment motions would have been required even if Dr. Corbett also had asserted qualified immunity is his original answer; and he fails to dispute that the amendment required no additional discovery and had no meaningful impact on case management. *See* ER 2, pp.10-11, 15, 18. Farnan was not unfairly deprived of a full and efficient opportunity to present his claim. Nor did he suffer any other type of undue prejudice within the meaning of Rule 15(a).³

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³ At page 46 of his third brief, Farnan cites a highly distinguishable case, *Heimbaugh v. City and County of San Francisco*, 977 F.2d 589, 1992 WL 276472 (9th Cir. 1992), which appears to be unpublished. In that case, the Court found that the district court did not abuse its discretion in denying leave to amend a complaint where plaintiff's lawsuit was clearly barred by res judicata as a result of a prior lawsuit and where it would have been unduly prejudicial to force the defendant to incur the time and expense of litigating the case for a second time. As discussed, raising qualified immunity in the instant case had *no* meaningful impact on the time and expense required by Farnan to litigate his claim, and Farnan has offered no evidence or argument to the contrary.

C. Dr. Corbett Did Not Waive Qualified Immunity

Because no undue prejudice resulted from Defendants' presentation of the qualified immunity defense, Dr. Corbett would not have waived the defense even if he had not sought to amend his answer. *Camarillo*, 998 F.2d at 639; *see also Owens*, 244 F.3d at 713. But Dr. Corbett did seek and obtain leave to amend his answer and the scheduling order; and Farnan cites no legal authority holding that Dr. Corbett had unequivocally waived the defense – and thus was prohibited from seeking leave to amend – simply because the District Court had already considered whether Plaintiff proved a constitutional violation. Further, Farnan fails to dispute that the qualified immunity defense was not waived because Intervenors had expressly raised the defense.

D. Dr. Corbett Is Entitled to Qualified Immunity

Farnan has not satisfied his burden to prove that the constitutional right at issue was clearly established under the precise circumstances of this case. *See Fogel v. Collins*, 531 F.3d 824, 833-34 (9th Cir. 2008) (qualified immunity focuses on “precise circumstances of a particular case,” preexisting law, and whether all reasonable officers would have concluded that conduct violated the Constitution); *see also DiRuzza v. County of Tehama*, 206 F.3d 1304, 1314 (9th Cir. 2000) (plaintiff has

burden to prove particular right at issue was clearly established). Farnan relies on conclusory and broad statements about the constitutional right he alleges was violated, but the clearly-established inquiry is fact-intensive and requires a specific assessment of whether all reasonable teachers in Dr. Corbett's position would have known that the Pelozo remark violated the First Amendment. *Fogel*, 531 F.3d at 833-34.

It is *not* sufficient to broadly assert, that it was "clearly established" that public officials "may not show . . . disapproval of religion." FTB, p.58. Such an assertion is no more determinative than generally asserting that the Establishment Clause prohibits the endorsement of religion. Plaintiff must show that, based on preexisting law involving a parallel or comparable fact pattern, it would have been readily apparent to a reasonable AP Euro History teacher that Dr. Corbett's particular statement (or statements) violated the Establishment Clause. *Fogel*, 531 F.3d at 833. But Farnan fails to cite a single case (and Defendants know of none) with remotely similar facts. Moreover, as Defendants have explained, Establishment Clause cases are highly contextual; courts frequently state that no fixed or categorical rules help guide the detailed contextual inquiry that is required; and the law that existed would have reasonably led a teacher in Dr. Corbett's position to believe that he was acting

lawfully. See Intervenor's Second Br., pp.60-62.⁴

Contrary to Farnan's implication, Defendants are *not* contending that the clearly-established inquiry could never be satisfied in any Establishment Clause case. *See* FTB, p.58. Rather, Defendants are correctly describing the nature of Establishment Clause jurisprudence and maintaining that Farnan has not satisfied the inquiry in the context of this particular case. Farnan neither disputes nor addresses the fact that his counsel publicly described the District Court's May 1, 2009 decision as a "first-of-its-kind" ruling and "constitutionally unique." SER 117, p.10.

Finally, Defendants do *not* "acknowledge" that qualified immunity would not apply if the Court were to find that multiple statements made by Dr. Corbett violated the Establishment Clause. *See* FTB, p.56. Defendants contend that Dr. Corbett did not violate the Establishment Clause at any point, and contend that even if Farnan were correct that multiple statements violated the Establishment Clause or somehow

⁴ Farnan makes the wholly untenable assertion that while Fourth Amendment jurisprudence "is rife with inconsistencies and case-by-case analyses" and other constitutional provisions protect general rights, Establishment Clause jurisprudence is predictable and involves "a very specific right" with "far more narrow" contours. FTB, pp.44, 57. But the prohibition on the establishment of religion is no more "narrow" than other constitutional rights, and courts themselves regularly note the challenges in applying the *Lemon* test and the absence of fixed rules to guide the analysis. And regardless of the breadth of the right at issue in relation to other rights, the fact of the matter is that no comparable prior law existed to make clear whether Dr. Corbett's lecture statements violated the First Amendment. *Lemon v. Kurtzman* 403 U.S. 602, 612 (1971).

created “an unconstitutionally hostile environment,” Dr. Corbett would still be entitled to qualified immunity because no law existed to clearly establish such a violation, whether the statements are considered individually or cumulatively. *See* Intervenor Second Br., p.62 n.12.

III. Plaintiff’s Request for Declaratory Relief Is Moot and, Moreover, Was Correctly Denied As Lacking Merit

A. Plaintiff Concedes that His Claim for Declaratory Relief Is Moot

Intervenor previously explained that Farnan’s request for declaratory relief is moot. In response, Farnan concedes that he graduated from high school and that his request for declaratory relief is moot under longstanding legal authority. *See* FTB, pp.61-62; *see also* *Craig v. Boren*, 429 U.S. 190, 192 (1976); *Nurre v. Whitehead*, 580 F.3d 1087, 1099 (9th Cir. 2009); *Cole v. Oroville Union High Schl. Dist.*, 228 F.3d 1092,1098-99 (9th Cir. 2000); *Bauchman v. West High Schl.*, 132 F.3d 542, 548 (10th Cir. 1997); *Sample v. Johnson*, 771 F.2d 1335, 1339-43 (9th Cir. 1985).

B. No Exception to Mootness Applies

Because Farnan’s request for declaratory relief is moot, he no longer has standing to pursue such relief, and his request should be denied on that ground alone.

Farnan strains to avoid this obvious result by a meritless argument for an exception to the mootness doctrine. Farnan appears to contend that the exception to the mootness doctrine for “capable of repetition, yet evading review” applies. However, as Farnan acknowledges, one of the required factors for that rare exception is a reasonable likelihood that *the same plaintiff* will be subjected to the same action again. *See Spencer v. Kemna*, 523 U.S. 1, 17-18 (1998); *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974); *Sample v. Johnson*, 771 F.2d 1335, 1338-39 (9th Cir. 1985). Here, there is zero likelihood that Farnan will return to high school. The “capable of repetition, yet evading review” exception does not apply after a plaintiff has graduated from high school, as the Ninth Circuit has squarely held. *Cole*, 228 F.3d at 1098.

Farnan also appears to urge this Court to “create” a new exception to the mootness doctrine – or perhaps to expand the “capable of repetition, yet evading review” exception – based on the fact that school districts in California are considered state agencies for purposes of sovereign immunity under the Eleventh Amendment (largely because of the nature of the State’s school funding system). *See FTB*, p.62. As an initial matter, this Court is bound by United States Supreme Court and prior Ninth Circuit authority (including an en banc decision) holding that no exception to the mootness doctrine applies when a student plaintiff is not likely to be subjected

again to the conduct about which he or she complains. *DeFunis*, 416 U.S. at 319-20; *Cole*, 228 F.3d at 1098; *see also Doe v. Madison Schl. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (en banc).

In addition, this jurisdictional rule applies in federal courts throughout the nation, and Farnan is simply wrong to assert that students in California are the only plaintiffs whose equitable claims are likely to become moot upon graduation. *See DeFunis*, 416 U.S. at 319-20; *Doe*, 177 F.3d at 798 (Idaho student's claims for equitable relief became moot upon graduation); *Bauchman*, 132 F.3d at 546, 548-49 (Tenth Circuit decision finding Utah student's claims for declaratory and injunctive relief moot). Farnan cites no authority for his erroneous contention that equitable claims brought by California students in federal court are "continually mooted out" at some higher rate than such claims brought by students in other states. In fact, a plaintiff's graduation moots out equitable claims against a school district just as surely as it moots out equitable claims against individual defendants.⁵ *See Bauchman*, 132 F.3d at 548-49. And, as this case demonstrates, even if a California plaintiff's equitable claims become moot, the liability and damages claims against

⁵ Farnan moved voluntarily to dismiss the Capistrano Unified School District from this case on appeal. If Farnan had not done so and the District had remained a defendant, Farnan's claim for declaratory relief against the District would also be moot.

state actors remain alive, and a plaintiff like Farnan may continue to pursue those claims through all levels of appellate review. The constitutional question and damages claims in such cases do not “evade review.”

No exception to the mootness doctrine applies, and Farnan’s invitation to create new exceptions to the doctrine lacks a sound basis in law or logic. Article III jurisdiction over Farnan’s claim for declaratory relief is absent, and, therefore, the claim must be rejected.

C. Even If Not Moot, The District Court Correctly Denied Declaratory Relief

Even if Plaintiff’s request for declaratory relief were not moot, the District Court’s decision to deny the request was correct.⁶

Farnan disputes whether a district court’s decision to deny declaratory relief should be reviewed de novo or for abuse of discretion. Intervenors read the Supreme Court’s decision in *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995), somewhat differently than Plaintiff. While the *Wilton* Court clearly held that a district court’s discretionary decision to exercise jurisdiction over a declaratory judgment claim

⁶ On appeal, Farnan does not specify the nature of the declaration that he seeks. Before the District Court, he sought a declaration that defendants’ “policy or practice of acting with hostility toward religion and favoring irreligion over religion violates the First Amendment.” ER 3, p.54 n.7.

should be reviewed for abuse of discretion, the Court also rejected an argument that appellate review of “decisions to grant (or to refrain from granting) declaratory relief” should be reviewed de novo. *Id.* at 289 (parenthetical in original). The *Wilton* Court discussed at length the uniquely discretionary nature of the declaratory judgment remedy, and it found that facts bearing on the usefulness of that remedy “are peculiarly within” the grasp of district courts. *Id.* at 286-89. Post-*Wilton* cases in this Circuit are somewhat inconsistent in identifying the appropriate standard of appellate review. See *Wagner v. Professional Engineers in Cal. Gov’t.*, 354 F.3d 1036, 1040, 1050-51 (9th Cir. 2004) (mentioning de novo review before discussing the merits, but expressly analyzing district court’s refusal to issue a declaratory judgment under abuse of discretion standard); *Kam-Ko Bio-Pharm Trading Co. v. Mayne Pharma (USA) Inc.*, 560 F.3d 935, 939 (9th Cir. 2009) (noting that “we review a district court’s denial of declaratory relief under Rule 57 . . . for abuse of discretion”). However, *Wilton* indicates that district courts have substantial discretion in awarding or denying declaratory relief and, therefore, that declaratory relief decisions are most appropriately reviewed under the abuse of discretion standard.

In any event, the District Court’s decision should be upheld under either standard of review. As Dr. Corbett and Intervenors explained, the District Court correctly concluded that a declaratory judgment would serve no useful purpose

because Farnan would not take a class from Dr. Corbett in the future and because the Court had already formalized its constitutional findings in a published order. ER 3, p.55. Further, Farnan did not pursue his claim as a class action, and no persons are before the Court who stand to benefit from equitable relief. Farnan makes no effort to refute these key facts. Thus, even assuming that the claim for declaratory relief is not moot and that Farnan proved a constitutional violation, the District Court's denial of declaratory relief was sound and should be affirmed.

CONCLUSION

The District Court's conclusion that the Pelozo comment violated the Establishment Clause was erroneous and should be reversed. In all other respects, the District Court's decisions should be affirmed.

As elegantly stated by the Supreme Court, "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard." *Schempp*, 374 U.S. at 1574. There is nothing that Dr. Corbett has said that breaches the required neutrality of government or threatens the religion of church,

home and the citadel of the individual heart and mind. The statements which offend Farnan pertain to areas where religious institutions have themselves sought to do battle with science and the secular world. Farnan is offended that a government actor calls attention to this battle and defends the mission of public education by engaging students to consider these issues. Neutrality does not require that teachers institutions allow themselves to be bullied and silenced by persons who seek to undermine secular education. The Intervenors respectfully ask the Court to reject Farnan's attempt to use the Establishment Clause to undermine its very purpose.

Dated: September 27, 2010 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is in compliance with Federal Appellate Rule of Procedure 28.1(e)(2) as follows:

1. The type-volume limitations are met to which the text of this brief contains 6,946 words as counted by Corel WordPerfect, the program used to generate this brief.

2. The typeface and the type style requirements of are met using Corel WordPerfect's proportionally spaced typeface in fourteen-point Times New Roman.

Dated: September 27, 2010 CALIFORNIA TEACHERS ASSOCIATION

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CERTIFICATE OF SERVICE

I am employed with the California Teachers Association — Legal Services Department in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 11745 East Telegraph Road, Santa Fe Springs, California 90670.

On September 27, 2010, I served the foregoing document described as **INTERVENORS — APPELLEES' REPLY BRIEF TO APPELLANT'S THIRD BRIEF ON CROSS APPEAL**, on the interested parties in this action.

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Executed on September 27, 2010, at Santa Fe Springs, California

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