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**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT**

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LOWER COURT INFORMATION

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JURISDICTION		DISTRICT COURT DISPOSITION	
FEDERAL	APPELLATE	TYPE OF JUDGMENT / ORDER APPEALED	RELIEF
<input type="checkbox"/> FEDERAL QUESTION	<input type="checkbox"/> FINAL DECISION OF DISTRICT COURT	<input type="checkbox"/> DEFAULT JUDGMENT	<input type="checkbox"/> DAMAGES: SOUGHT \$ _____ AWARDED \$ _____
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<input type="checkbox"/> OTHER (SPECIFY)	<input type="checkbox"/> INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY):	<input type="checkbox"/> SUMMARY JUDGMENT	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED
	<input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> JUDGMENT / COURT DECISION	<input type="checkbox"/> ATTORNEY FEES: SOUGHT \$ _____ AWARDED \$ _____ <input type="checkbox"/> PENDING
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CERTIFICATION OF COUNSEL**I CERTIFY THAT:**

1. COPIES OF ORDER / JUDGMENT APPEALED FROM ARE ATTACHED. (Judgment and Order Granting Summary Judgment)
2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2
3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.
4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.

/s/ J. Craig Johnson

Signature

J. Craig Johnson, TENNER JOHNSON LLP

October 26, 2009

Date

COUNSEL WHO COMPLETED THIS FORM

NAME:

FIRM:

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Effective 7/1/2000

ATTACHMENT TO CIVIL APPEALS DOCKETING STATEMENT
FULL TITLE OF CASE – Nos. 09-56690, 90-56689; D.C. No. 8:07-cv-1434-JVS-AN

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

Plaintiff – Appellant - Cross-Appellee,

v.

DR. JAMES CORBETT, individually and in his official capacity as an employee of Capistrano Unified School District,

Defendant – Appellee – Cross-Appellant,

and

CAPISTRANO UNIFIED SCHOOL DISTRICT,

Defendant,

and

CALIFORNIA TEACHERS ASSOCIATION/NEA; CAPISTRANO UNIFIED EDUCATION ASSOCIATION,

Movants.

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6 Attorneys for Defendants CAPISTRANO UNIFIED SCHOOL
7 DISTRICT and DR. JAMES CORBETT

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 CHAD FARNAN, a minor, by and
12 through his parents BILL FARNAN and
13 TERESA FARNAN,

14 Plaintiffs,

15 v.

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

22 Defendants.

23 CALIFORNIA TEACHERS
24 ASSOCIATION/NEA; and
25 CAPISTRANO UNIFIED EDUCATION
26 ASSOCIATION,

27 Union Intervenors/Defendants.

CASE NO.: SACV07-1434-JVS (ANx)

JUDGMENT

28 This Court, having on May 1, 2009, granted the motion for summary judgment brought by Plaintiffs Chad Farnan, a minor, by and through his parents Bill Farnan and Teresa Farnan, against Defendant Dr. James Corbett with respect to the "Peloza statement" only; and

WOODRUFF, SPRADLIN
& SMART
ATTORNEYS AT LAW
COSTA MESA

1 This Court, having on May 1, 2009, granted the motions for summary judgment
2 brought by Defendants Capistrano Unified School District and Dr. James Corbett and
3 Union Intervenors/Defendants California Teachers Association/NEA and Capistrano
4 Unified Education Association against Plaintiffs Chad Farnan, a minor, by and
5 through his parents Bill Farnan and Teresa Farnan, with respect to all other statements
6 and with respect to Defendant Capistrano Unified School District's liability; and

7 This Court, having on September 15, 2009, granted the motion of Defendants
8 Capistrano Unified School District and Dr. James Corbett to amend the scheduling
9 order and to file an amended answer to assert the qualified immunity defense on Dr.
10 Corbett's behalf, and also granted the motion for qualified immunity in Dr. Corbett's
11 favor;

12 NOW, THEREFORE,

13 IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Chad Farnan
14 shall take nothing by way of his complaint against Defendants Capistrano Unified
15 School District and Dr. James Corbett and Union Intervenors/Defendants California
16 Teachers Association/NEA and Capistrano Unified Education Association.
17 Defendants Capistrano Unified School District and Dr. James Corbett and Union
18 Intervenors/Defendants California Teachers Association/NEA and Capistrano Unified
19 Education Association may apply to the Court for their costs of suit and attorney's
20 fees, Fed. R. Civ. P. 54(d)(1), L.R. 54-3, 42 U.S.C. § 1988, the entitlement to which
21 the Court shall separately determine.

22
23 DATED: September 24, 2009



HONORABLE JAMES V. SELNA,
UNITED STATES DISTRICT COURT
JUDGE

WOODRUFF SPRADLIN
& SMART
ATTORNEYS AT LAW
COSTA MESA



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO: SACV 07-1434 JVS (ANx)

C. F., *et al.*,

Plaintiffs,

FINAL ORDER RE MOTIONS FOR
SUMMARY JUDGMENT OR
SUMMARY ADJUDICATION

v.

CAPISTRANO UNIFIED SCHOOL
DISTRICT, *et al.*,

Defendants.

I. BACKGROUND

Plaintiff C.F., by and through his parents Bill Farnan and Teresa Farnan, (collectively, “Farnan”), asserts a claim for relief for violation of his First Amendment rights by the Capistrano Unified School District (“District”) and Dr. James C. Corbett (“Corbett”) (collectively, “School Defendants”). On April 28, 2008, this Court granted a motion allowing the California Teachers Association

1 (“CTA”) and Capistrano Unified Education Association (“CUEA”),
2 (collectively, “Unions”), to intervene as defendants in the action. (Docket No. 29.)
3 Farnan asserts that his rights under the Establishment Clause have been violated by
4 a practice and policy hostile toward religion and favoring irreligion over religion.
5 (First Amended Complaint (“FAC”) ¶¶ 22, 25.) At the focus of the dispute are
6 remarks made by Corbett in his Advanced Placement European History class. (*Id.*
7 at ¶¶ 14-15.)

8
9 Farnan, the School Defendants, and the Unions have filed separate cross-
10 motions for summary judgment pursuant to Federal Rule of Civil Procedure 56.¹
11 All motions are opposed.

12 II. LEGAL STANDARD

13
14 Summary judgment is appropriate only where the record, read in the light
15 most favorable to the non-moving party, indicates that “there is no genuine issue as
16 to any material fact and . . . the movant is entitled to judgment as a matter of law.”
17 Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).
18 Material facts are those necessary to the proof or defense of a claim, and are
19 determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477
20 U.S. 242, 248 (1986). A factual issue is genuine “if the evidence is such that a
21

22 ¹ The Unions have specified that they are moving for summary adjudication
23 in the alternative. In addition, despite the School Defendants’ argument, the Court
24 finds that Farnan’s motion was filed in a timely manner. (*See School Defendants’*
25 *Opp.* p. 5.) Farnan filed the motion on March 9, 2009, which was Farnan’s last day
26 to file the motion. (Docket No. 47.)
27

1 reasonable jury could return a verdict for the nonmoving party.” Id. In deciding a
2 motion for summary judgment, “[t]he evidence of the non-movant is to be
3 believed, and all justifiable inferences are to be drawn in his favor.” Id. at 255.

4
5 The burden initially is on the moving party to demonstrate an absence of a
6 genuine issue of material fact. Celotex, 477 U.S. at 323. “However, if the
7 nonmoving party bears the burden of proof on an issue at trial, the moving party
8 need not produce affirmative evidence of an absence of fact to satisfy its burden.”
9 In re Brazier Forest Prod., Inc., 921 F.2d 221, 223 (9th Cir. 1990). Rather, it “may
10 simply point to the absence of evidence to support the nonmoving party’s case.”
11 Id. If and only if the moving party meets its burden, then the non-moving party
12 must produce enough evidence to rebut the moving party’s claim and create a
13 genuine issue of material fact. Celotex, 477 U.S. at 322-23. If the non-moving
14 party meets this burden, then the motion will be denied. Nissan Fire & Marine Ins.
15 Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000).

16 Where the parties have made cross-motions for summary judgment, the
17 Court must consider each motion on its own merits. Fair Hous. Council v.
18 Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001). The Court will consider each
19 party’s evidentiary showing, regardless of which motion the evidence was tendered
20 under. Id. at 1137.

21 22 III. DISCUSSION

23
24 The United States Constitution prohibits any law “respecting an
25 establishment of religion.” U.S. Const. Amend. I. The parties agree that the
26 appropriate test for determining whether Corbett’s statements were permissible
27 under the Establishment Clause is found in Lemon v. Kurtzman, 403 U.S. 602

1 (1971). (See Farnan’s Mot. p. 14.; Unions’ Mot. p. 3; School Defendants’ Mot. p.
2 11.) There, the Supreme Court established a three-pronged standard in its review
3 of Pennsylvania and Rhode Island statutes:

4
5 First, the statute must have a secular legislative purpose; second, its
6 principal or primary effect must be one that neither advances nor
7 inhibits religion; finally, the statute must not foster an excessive
8 government entanglement with religion.

9
10 Lemon, 403 U.S. at 612-13 (internal quotation marks and citations omitted).
11 Permissible conduct must satisfy all three requirements. Edwards v. Aguillard, 482
12 U.S. 578, 583 (1987); Vernon v. City of Los Angeles, 27 F.3d 1385, 1396-97 (9th
13 Cir. 1994).

14 Here, Farnan contends that Corbett violated the Establishment Clause by
15 making comments hostile to religion and to Christianity in particular.² (Farnan’s
16

17
18 ² Farnan also refers to the concept of a “religion of secularism” at various
19 points in his motion. (See e.g., Farnan’s Mot. p. 20.) The Supreme Court has
20 found that “the State may not establish a ‘religion of secularism’ in the sense of
21 affirmatively opposing or showing hostility to religion.” School Dist. of Abington
22 Tp., Pa. v. Schempp, 374 U.S. 203, 225 (1963). This is simply another way of
23 saying that the state may not affirmatively show hostility to religion. To the extent
24 that Farnan is arguing that Corbett may not put forth secular ideas because he
25 would be creating a “secular religion,” Farnan’s argument fails. The Ninth Circuit
26 has found that “neither the Supreme Court, nor this circuit, has ever held that
27

1 Mot. p. 1.) “Although Lemon is most frequently invoked in cases involving
2 alleged governmental preferences to religion, the test also ‘accommodates the
3 analysis of a claim brought under a hostility to religion theory.’” Vasquez v. Los
4 Angeles (“LA”) County, 487 F.3d 1246, 1255 (9th Cir. 2007) (quoting Am. Family
5 Ass’n, Inc. v. City and County of San Francisco, 277 F.3d 1114, 1121 (9th Cir.
6 2002)). There is no question that “[t]he government neutrality required under the
7 Establishment Clause is . . . violated as much by government disapproval of
8 religion as it is by government approval of religion.” Vernon, 27 F.3d at 1396.
9 Thus, the Court must apply the Lemon test to determine whether Corbett made
10 statements in class that were improperly hostile to or disapproving of religion in
11 general, or of Christianity in particular.

12 A. Separating the Grain from the Chaff

13
14 Farnan quotes Corbett on a wide range of topics, only some of which
15 intersect the First Amendment. In this Section, the Court isolates those statements
16 which clearly do not violate the Establishment Clause before turning to the Lemon
17 analysis.³

18
19 _____
20 evolutionism or secular humanism are ‘religions’ for Establishment Clause
21 purposes.” Pelozza v. Capistrano Unified School District, 37 F.3d 517, 521 (9th
22 Cir. 1994).

23
24
25 ³ The Court will refer to all of Corbett’s alleged statements from the
26 recordings simply as Corbett’s statements throughout this motion for the sake of
27 simplicity. The Court recognizes that the School Defendants claim that some of

1 A statement by a government official does not violate the Establishment
2 Clause merely because a particular religious group may find the official's position
3 incorrect or offensive. Such a finding would require a teacher to tailor his
4 comments so as not to offend or disagree with any religious group. This would be
5 unworkable given the number of different religious viewpoints on various issues.
6 This would also be directly contrary to the fundamental principles of Establishment
7 Clause jurisprudence because it would require a teacher to attempt to teach in
8 accordance with certain religious principles.

9
10 Well-established case law also reinforces this point. In Smith v. Board of
11 School Comm'rs of Mobile County, 827 F.2d 684, 693 (11th Cir. 1987), the court
12 held that the fact that certain religious individuals found some of the material in
13 school textbooks offensive was not "sufficient to render use of th[e] material in the
14 public schools a violation of the establishment clause." The court further noted
15 that:

16 [G]iven the diversity of religious views in this country, if the standard
17 were merely inconsistency with the beliefs of a particular religion
18 there would be very little that could be taught in the public schools.
19 As Justice Jackson has stated: Authorities list 256 separate and
20 substantial religious bodies to exist in the . . . United States. . . . If we
21 are to eliminate everything that is objectionable to any of these
22 warring sects or inconsistent with any of their doctrines, we will leave
23 public education in shreds. Nothing but educational confusion and a
24 discrediting of the public school system can result

25
26 _____
27 references to the modern world.

1 Id. at 693 n.10 (quoting McCullum v. Board of Ed., 333 U.S. 203, 235 (1948)
2 (Jackson, J., concurring)) (emphasis supplied).

3
4 Likewise, in Epperson v. State of Ark., 393 U.S. 97, 89 (1968), the Supreme
5 Court struck down Arkansas statutes forbidding the teaching of evolution in public
6 schools and in colleges and universities, finding that the statutes violated the
7 Establishment Clause. The Court found that the statutes were unconstitutional
8 even if they merely prohibited teachers from stating that the theory of evolution is
9 true. Id. at 102-03. This was so even though the theory was contrary “to the belief
10 of some that the Book of Genesis must be the exclusive source of doctrine as to the
11 origin of man.” Id. at 107. The Court found that “[t]here is and can be no doubt
12 that the First Amendment does not permit the State to require that teaching and
13 learning must be tailored to the principles or prohibitions of any religious sect or
14 dogma.” Id. at 106 (emphasis supplied). The Court also noted that “the state has
15 no legitimate interest in protecting any or all religions from views distasteful to
16 them.” Id. at 107 (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505
17 (1952)).

18 Thus, Corbett’s in-class opinions on various social or political issues not
19 touching upon religion do not violate the Establishment Clause, regardless of
20 whether those of a particular religious faith might disagree with or find his
21 statements offensive. Therefore, any of Corbett’s statements which do not touch
22 upon or mention religion satisfy the Lemon test and do not violate the
23 Establishment Clause.

24 25 2. Statements or Opinions Touching Upon Religion

26
27 The Court finds that several of Corbett’s statements in the record which do
28

1 touch upon or mention religion are clearly not in violation of the Establishment
2 Clause, nor do they shed light on the nature of other statements. For example,
3 Farnan points to the following statements that Corbett made during the fall 2007
4 semester:

5
6 What do you think of somebody who thinks it's necessary to lie in
7 order to make a religious point? . . . And um, this kid is in the class,
8 and, as I say, a Christian fundamentalist kid who wanted to be a
9 minister. . . . And, um, he was actually set on going – I mean, if your
10 parents go there, please, you know, don't be too insulted. But he
11 wanted to go to Biola, which is the Bible Institute of Los Angeles, and
12 truly, as far as colleges go, it's the – it is the college which George
13 Bush is being assigned to (inaudible), and it is the college that has no
14 academic integrity whatsoever. And it is a fundamentalist Christian
15 school. I think, a college that has basically one book.

16 (Mot. pp. 5-6; Farnan's Ex. B, pp. 36-38.)
17

18 After listening to the recording and reviewing the transcript, the Court notes
19 that Farnan leaves out the following important statements from the above
20 discussion. Corbett stated that the “kid who wanted to be a minister” (the
21 “student”) was “absolutely brilliant.” (Farnan's Ex. B, p. 36.) Corbett also stated
22 that, in response to his question about whether it is necessary to lie to make a
23 religious point, the student gave an answer that almost caused Corbett to tear up
24 because “it was so dead on.” (Id. at 38.) Corbett stated that he knew the answer
25 would be right because he knew the student was a Christian fundamentalist. (Id.)
26 The student stated, “I don't think the message of Jesus Christ needs any help from
27 liars.” (Id.) Corbett then explained on the recording that he said, “Yeah, right.

1 You figured it out, you know, who-hoo.” (Id.) These statements are respectful
2 and, if anything, approving of the Christian student and his religious views.

3
4 In addition, after stating that he thought Biola had no “academic integrity,”
5 Corbett explained that he and another faculty member, Tandary, who was a
6 minister and a fundamentalist Christian, “conspired” to try to prevent the student
7 from going to Biola. (Id.) Corbett then stated that if the student went to a
8 Christian theology seminary or Harvard, then he would be “truly educated.” (Id.)
9 In context, Corbett makes clear that he does not hold Biola in high regard because
10 of his view of its academics, and not because it is a Christian fundamentalist
11 school. No reasonable juror could find otherwise given that Corbett speaks highly
12 of attending a Christian theology seminary in the same conversation.

13
14 Similarly, Corbett’s statements regarding the Boy Scouts satisfy the Lemon
15 test and do not violate the Establishment Clause. Corbett stated:

16 Now, the Boy Scouts have said, unless you’re willing to love God,
17 and unless you’re willing to – unless you’re not gay, um – they are
18 saying, being gay excludes you. Not believing God or not professing
19 a belief in God also excludes you . . . But you see, until they started
20 these rules, Boy Scouts used to – or Boy Scout troops usually met at
21 schools, and places like that, parks, government buildings. They can’t
22 do that anymore. They can’t do that anymore, because now they are,
23 in their own mind, a homophobic and a racist organization. It’s that
24 simple. . . . It’s call[ed] separation of church and state. The Boy
25 Scouts can’t have it both ways. If they want to be an exclusive,
26 Christian organization or an exclusive, God-fearing organization, then
27 they can’t receive any more support from the state, and shouldn’t.

1
2 (Farnan’s Mot. p. 3; Farnan’s Ex. A, p. 4 (emphasis supplied).)
3

4 Here, Corbett is expressing his disapproval of what he perceives to be a
5 violation of separation of church and state.⁵ Corbett’s statements endorsing the
6 principle of separation of church and state do not indicate hostility towards
7 religion. Having the utmost respect for religion and a strong belief in separation of
8 church and state are not mutually exclusive. The Supreme Court has held that the
9 separation of church and state mandated by the First Amendment “rests upon the
10 premise that both religion and government can best work to achieve their lofty
11 aims if each is left free from the other within its respective sphere. . . . [T]he First
12 Amendment ha[s] erected a wall between Church and State which must be kept
13 high and impregnable.” McCullum, 333 U.S. at 212. Corbett cannot be found to
14 violate the Establishment Clause for endorsing a principle set forth by the Supreme
15 Court or for voicing his opinion that the Boy Scouts have violated this principle.

16 Moreover, Corbett’s statements referring to the Boy Scouts as a
17 “homophobic and racist organization” do not violate the Establishment Clause. In
18 American Family Association, Inc., 277 F.3d at 1118, the Ninth Circuit found that
19 a local government’s formal disapproval of an advertising campaign sponsored by
20 religious groups did not violate the Establishment Clause. The advertising
21

22 ⁵ Likewise, in his statement excerpted on page 10 of Farnan’s motion,
23 paragraph (n), Corbett is primarily discussing his view that religious groups should
24 not be exempt from paying taxes. This is not necessarily hostile to religion and is
25 more properly construed as further discussion of Corbett’s views on separation of
26 church and state.
27

1 campaign espoused the view that “homosexuality is a sin and that homosexuals
2 could change their sexual orientation.” Id. The San Francisco Board of
3 Supervisors sent a letter to the plaintiffs stating, in part, that at least one supervisor
4 “denounces your hateful rhetoric against gays, lesbians, and transgendered people.”
5 Id. The court reasoned that the documents, read as a whole, were “primarily
6 geared toward promoting equality for gays and discouraging violence against
7 them.” Id. Thus, government officials may attempt to promote tolerance and
8 equality by criticizing perceived intolerance and discrimination without violating
9 the Establishment Clause. To hold otherwise would lead to absurd results. Here,
10 the Court finds that Corbett’s statements regarding the Boy Scouts’ policies are
11 primarily geared toward espousing tolerance and non-discrimination, as well as
12 separation of church and state. Therefore, Corbett’s statements regarding the Boy
13 Scouts do not violate the Establishment Clause.⁶

14
15 Having resolved the more clear-cut issues above, the Court now turns to
16 examine the primary statements at issue in this case. These statements require the
17 Court to look more closely at the three-pronged Lemon test. Permissible conduct
18 must satisfy all three requirements. Edwards, 482 U.S. at 583; Vernon, 27 F.3d at
19 1396-97.

20
21 ⁶ Similarly, the Court also finds that Corbett’s statements pointed out in
22 Farnan’s motion, pp. 8-9, ¶¶ i, j, & l, do not violate the Establishment Clause or
23 give weight to Farnan’s argument. These statements primarily espouse separation
24 of church and state. In addition, the Court notes that Corbett’s statement about his
25 “one religious belief” appears to be, at least in part, respectful of religion given that
26 Corbett is telling the students that he has at least one religious belief.
27

1 the Lemon test.⁷

2
3 1. Secular Purpose

4
5 The first prong of the Lemon test is satisfied if the challenged action has a
6 secular purpose. Lemon, 403 U.S. at 612-13. The Ninth Circuit has stated that
7 “[a] practice will stumble on the purpose prong ‘only if it is motivated wholly by
8 an impermissible purpose.’” Am. Family Ass’n, Inc., 277 F.3d at 1121. The court
9 in American Family Association also recognized that in Vernon, the court
10 acknowledged “precedent that any secular purpose suffices, but not[ed] that [the
11 Ninth Circuit panel] believes [the] Supreme Court test is really that the ‘actual’ or
12 ‘primary’ purpose must be secular.” Id. (citing Vernon, 27 F.3d at 1397). In
13 addition, “[w]hile we must ‘distinguish a sham secular purpose from a sincere
14 one,’ we should also be ‘reluctant to attribute unconstitutional motives to the
15 [government].’” Vasquez, 487 F.3d at 1255 (citing Am. Family Ass’n, 277 F.3d at
16 1121; McCreary County, Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844,
17 864 (2005); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000); Mueller
18 v. Allen, 463 U.S. 388, 394-95 (1983)). “Unless it seems to be a sham, moreover,
19 the government’s assertion of a legitimate secular purpose is entitled to deference.
20 We must be cautious about attributing unconstitutional motives to state officials.”
21 Chaudhuri v. State of Tenn., 130 F.3d 232, 236 (9th Cir. 1997).
22

23 ⁷ Although the Court addresses Corbett’s statements individually throughout
24 this opinion, the Court finds that the outcome does not change when each statement
25 is viewed in light of the other statements, or when all the statements are viewed
26 together.
27

1 Farnan argues that Corbett’s “only purpose in making these statements is to
2 make sure that the students who sit before him as a captive audience understand
3 that religion is irrational.” (Farnan’s Mot. p. 15.) The Unions respond that
4 Corbett’s statements were made for the purpose of teaching European history and
5 deductive reasoning. (Unions’ Opp. pp. 6-7.)

6
7 *The Pelozo Comment*

8
9 The Court turns first to Corbett’s statement regarding John Pelozo
10 (“Pelozo”). (Farnan’s Ex. I, pp. 222-25.) This statement presents the closest
11 question for the Court in assessing secular purpose. Pelozo apparently brought suit
12 against Corbett because Corbett was the advisor to a student newspaper which ran
13 an article suggesting that Pelozo was teaching religion rather than science in his
14 classroom. (*Id.*) Corbett explained to his class that Pelozo, a teacher, “was not
15 telling the kids [Pelozo’s students] the scientific truth about evolution.” (*Id.*)
16 Corbett also told his students that, in response to a request to give Pelozo space in
17 the newspaper to present his point of view, Corbett stated, “I will not leave John
18 Pelozo alone to propagandize kids with this religious, superstitious nonsense.”
19 (*Id.*) One could argue that Corbett meant that Pelozo should not be presenting his
20 religious ideas to students or that Pelozo was presenting faulty science to the
21 students. But there is more to the statement: Corbett states an unequivocal belief
22 that creationism is “superstitious nonsense.” The Court cannot discern a legitimate
23 secular purpose in this statement, even when considered in context. The statement
24 therefore constitutes improper disapproval of religion in violation of the
25 Establishment Clause.

26 *The Mark Twain Quote*

1 Corbett’s quotation of Mark Twain also requires close scrutiny. Corbett
2 stated, “What was it that Mark Twain said? ‘Religion was invented when the first
3 con man met the first fool.’” (Farnan’s Ex. D, p. 75.) The remark comes as part
4 of a historical discussion of the tension between religion and science. Corbett
5 contrasted science’s continuing search for “rational” explanations when one
6 explanation proves insufficient as opposed to stopping the inquiry in favor of
7 “magic.” (Id.) Notwithstanding the biting nature of Twain’s observations, and
8 this one in particular, it illustrates a turn to the non-rational when man cannot, or is
9 unable, to develop a rational solution.⁸ Moreover, it is not clear that Corbett was
10 espousing Twain’s view rather than merely quoting it. In context, the Court cannot
11 say that the primary purpose of the quote was to disparage, and thus it does not
12 violate the First Amendment.

13 After careful review of the other statements at issue in the case, and in light
14 of the standard that deference should be given to the government’s assertion of a
15 legitimate secular purpose, the Court finds that Corbett’s primary purpose in
16 making the remaining statements at issue was to teach the students about European
17 history, current world events, and deductive reasoning in preparation for the AP
18 European history exam.

19
20 *“Jesus Glasses.”*
21

22 For example, in one of Corbett’s lectures he stated, “when you put on your
23 Jesus glasses, you can’t see the truth.” (Farnan’s Ex. A, p. 25.) However, this
24 statement was made in the context of a discussion about how certain peasants did

25
26 ⁸ The Court uses the term “rational” here only to mean that which can be
27 tested by generally accepted scientific principles.

1 not support Joseph II's reforms for religious reasons, even though the reforms were
2 in the peasants' best political and economic interests. (Id. at 24-25.) Corbett also
3 seemed to be making a general point that people sometimes make choices that are
4 against their best interests for religious reasons and that religion has and can be
5 used as a manipulative tool. (Id.) He further suggested that in order to create
6 social change and "overturn long-held traditions overnight without causing chaos"
7 you need to first work to gather support for your position. (Id. at 25.)

8
9 The "Jesus glasses" phrase, standing alone, could be read as a general
10 assertion that all people who believe in Jesus cannot see the truth. However, given
11 the context of the discussion and given that "[w]e must be cautious about
12 attributing unconstitutional motives to state officials," the Court declines to
13 attribute such an overly-broad and improper purpose to the phrase for purposes of
14 this motion. See Chaudhuri, 130 F.3d at 236. One cannot say that Corbett's
15 primary purpose here was to criticize Christianity or religion. The Court finds that,
16 given the context, Corbett's primary purpose was to illustrate the specific historical
17 point regarding the peasants in the discussion and to make the general point that
18 religion can cause people to make political choices which are not in their best
19 interest. Although the Court offers no opinion on the validity of these concepts,
20 the Court notes that these views are not necessarily hostile to religion and are
21 relevant concepts for discussion in an AP European history course.⁹

22 ⁹ Farnan concedes that the recommended topics set forth by the College
23 Board include "the development of changes in religious thought and institutions
24 and changes in elite and popular culture, such as the development of new attitudes
25 toward religion, the family, work, and ritual." (Farnan's Reply p. 7.) This
26 presumably includes the effect that religion has had over social and political
27

1 On this prong, therefore, the Court finds that Farnan is entitled to summary
2 adjudication against Corbett with respect to the Peloza statement.¹⁰ The School
3 Defendants and the Unions are entitled to summary adjudication on all other
4 statements.

5
6 2. Primary Effect

7
8 The second prong of the Lemon test is satisfied if the principal or primary
9 effect of the challenged action is one that neither advances nor inhibits religion.
10 Lemon, 403 U.S. at 612-13. “A government practice has the effect of
11 impermissibly advancing or disapproving of religion if it is ‘sufficiently likely to
12 be perceived by adherents of the controlling denominations as an endorsement, and
13 by the non-adherents as a disapproval, of their individual religious choices.’”
14 Brown v. Woodland Joint Unified School Dist., 27 F.3d 1373, 1378 (9th Cir. 1994)
15 (citing School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985)). “We
16 conduct this inquiry from the perspective of a ‘reasonable observer,’ who is both
17 informed and reasonable.” Am. Family Ass’n, Inc., 277 F.3d at 1121. This is an
18 objective, not a subjective, standard. Brown, 27 F.3d at 1379. The Ninth Circuit
19 has explained that “[p]eople may take offense at all manner of religious as well as
20 nonreligious messages. If an Establishment Clause violation arose each time a
21 student believed that a school practice either advanced or disapproved of a religion,
22 school curricula would be reduced to the lowest common denominator, permitting
23 each student to become a ‘curriculum review committee’ unto himself or herself.”
24 Id.

25
26 choices.

27 ¹⁰ The Court discusses the District’s liability in a separate section below.

1 In Vasquez, the Ninth Circuit recently addressed an alleged violation of the
2 Establishment Clause in a hostility to religion context. Vasquez, 487 F.3d at 1246.
3 The court noted that “we have little guidance concerning what constitutes a
4 primary effect of inhibiting religion” but that the most instructive cases in the
5 Ninth Circuit were Vernon and American Family Association. Id. at 1256. In
6 Vernon, the city investigated a police officer’s religious beliefs in order to
7 determine if he was performing his duties in violation of the Establishment Clause.
8 Vernon, 27 F.3d at 1397. The officer claimed that the investigation had the
9 primary effect of inhibiting or disapproving of his religion. Id. at 1390. The court
10 held that:

11 Notwithstanding the fact that one may infer possible city disapproval
12 of [plaintiff’s] religious beliefs from the direction of the investigation,
13 this cannot objectively be construed as the primary focus or effect of
14 the investigation. The primary purpose of the government action was
15 the investigation of any possible impermissible or illegal on-duty
16 conduct of [plaintiff]. [The investigation could not] reasonably be
17 construed to send as its primary message the disapproval of
18 [plaintiff’s] religious beliefs.

19
20 Id. at 1398-99.

21
22 Likewise, in American Family Association, the court held that a resolution
23 condemning anti-gay advertisements put forth by a religious group, when “read in
24 context as a whole, [was] primarily geared toward promoting equality for gays and
25 discouraging violence against them . . . a reasonable, objective observer would
26 view the primary effect of [the resolution] as encouraging equal rights for gays and
27 discouraging hate crimes, and any statements from which disapproval can be

1 inferred only incidental and ancillary.” Am. Family Ass’n, Inc., 277 F.3d at 1122-
2 23 (emphasis supplied). Finally, in Vasquez, the court found that a reasonable
3 observer would not perceive the primary effect of removing the cross from the LA
4 County Seal as one of hostility towards religion. Vasquez, 487 F.3d at 1257.

5
6 Thus, the question here is whether, when looking at the context as a whole, a
7 reasonable observer would perceive the primary effect of Corbett’s statements as
8 disapproving of religion in general or of Christianity in particular.¹¹ Put another
9 way, the Court must consider whether it would be objectively reasonable for
10 Corbett’s statements to be construed as sending primarily a message of

11
12 ¹¹In Brown, the Ninth Circuit considered the “vulnerable nature” of
13 elementary school children, finding that the appropriate test was “whether an
14 objective observer in the position of an elementary school student would perceive a
15 message of . . . disapproval of Christianity.” Brown, 27 F.3d at 1378-79.
16 Similarly, the Eleventh Circuit has found that “[i]n applying the Lemon test to a
17 situation involving the public schools, the Court ‘must do so mindful of the
18 particular concerns that arise in the context of public elementary and secondary
19 schools.’” Smith, 827 F.2d at 689 (citation omitted). Although Brown referred
20 only to elementary school students, this Court will take into account that the
21 present case involves high school students taking an AP course when applying the
22 “reasonable observer” test. The Court also notes that whether C.F. voluntarily took
23 the course or not is irrelevant to the Establishment Clause claim. In Brown, the
24 court explained that “the opportunity to opt out does not cure any potential
25 constitutional violation.” Brown, 27 F.3d at 1380 n.5.
26
27
28

1 disapproval. Although the Court has carefully reviewed and considered all the
2 relevant statements in the record in reaching a decision on this motion, the Court
3 will only address certain statements in this written opinion, focusing on those
4 statements referred to in Farnan’s motion and in Farnan’s Statement of
5 Uncontroverted Facts (“SUF”).

6
7 *The Pelozza Comment*

8
9 The Court turns first to Corbett’s statement regarding Pelozza discussed
10 above. (See Farnan’s Ex. I, pp. 222-25.) The Court finds that Corbett’s statement
11 primarily sends a message of disapproval of religion or creationism. As discussed
12 above, Corbett states an unequivocal belief that creationism is “superstitious
13 nonsense.” Corbett could have criticized Pelozza for teaching religious views in
14 class without disparaging those views.

15
16 *The Mark Twain Quote*

17
18 Next, the Court considers the Mark Twain quote. Corbett stated, “What was
19 it that Mark Twain said? Religion was invented when the first con man met the
20 first fool.” (Farnan’s Ex. D, p. 75.) When read in context, the primary effect of
21 the comment was not to disapprove of religion. A reasonable observer would not
22 assume that Corbett was endorsing Twain’s view of religion.

23
24 The primary effect of the balance of the statements relied upon by Farnan is
25 not to disapprove of religion.

26
27 *“Jesus Glasses.”*

1 First, the Court turns to the “Jesus glasses” phrase. As discussed above, this
2 phrase, standing alone, could be read as a general assertion disapproving of
3 Christianity. Even if one could infer disapproval of religion or Christianity,
4 however, the comment only violates the Establishment Clause if the disapproval
5 can be objectively construed as the primary focus or effect of the statement, read in
6 context.

7
8 Here, the “Jesus glasses” comment is one sentence or phrase in the middle of
9 a larger discussion about how religion may affect political choices and how it can
10 be used as a manipulative tool. Corbett was explaining that certain peasants did
11 not support Joseph II’s reforms for religious reasons, even though the reforms were
12 in the peasants’ best political and economic interests. Corbett also seemed to make
13 a general point that people sometimes make choices that are against their best
14 interests for religious reasons and that religion has and can be used as a
15 manipulative tool.

16 This context suggests that the phrase was primarily focused on and would be
17 reasonably interpreted as primarily illustrating the specific historical point
18 regarding the peasants and Corbett’s point that religion can be misused. Similarly,
19 it appears that Corbett’s referral to religion as “irrational” had the primary effect of
20 demonstrating how religion can be used as a manipulative tool.¹² (See Farnan’s
21 Ex. A, p. 24.) It is not improper for an AP European History teacher to discuss
22

23 ¹² The Court notes that the term “irrational” is sometimes used to mean,
24 simply, that which cannot be proven by generally accepted scientific methods, and
25 does not necessarily mean “crazy” or “absurd,” as it often does in common
26 parlance.
27

1 how religion can intersect with social and political choices.

2
3 *Connection Between Religion and Morality.*

4
5 The Court turns to Corbett’s comments regarding the connection between
6 religion and morality. Corbett made the following statement:

7
8 Here’s another interesting thing that just kind of – I’m not implying
9 causality. I’m just using correlation. People in Europe who are least
10 likely to go to church . . . are the Swedes. The people in the
11 industrialized world most likely to go to church are the Americans.
12 America has the highest crime rate of all industrialized nations, and
13 Sweden has the lowest. The next time somebody tells you religion is
14 connected with morality, you might want to ask them about that.

15 (Id. at 5.)

16
17 These statements cannot be reasonably construed as primarily disapproving of
18 religion. Corbett explicitly states that he is not drawing a causal connection but
19 merely pointing out a correlation. The statement that there is a correlation between
20 church attendance and crime rates is an interesting sociological fact appropriate for
21 a college level discussion and seems to only suggest disapproval of religion by way
22 of speculation or inference.¹³

23
24
25 ¹³ Whether Corbett’s statements discussed throughout this opinion are
26 factually true or not is irrelevant to the Court’s analysis here and the Court does not
27 opine on whether the statements are factually true.

1 So we know what rehabilitation works and that punishment doesn't,
2 and yet we go on punishing. It really has a lot to do with these same
3 culture wars we're talking about. This whole Biblical notion: Sinners
4 need to be punished. And so you get massively more Draconian
5 punishment in the South where religion is much more central to
6 society than you do anyplace else. And, of course, the Southerners get
7 really upset, as what they see as lenient behavior in the North. You
8 know, we're going to solve this problem. Except, guess what? What
9 part of the country has the highest murder rate? The South. What part
10 of the country has the highest rape rate? The South. What part of the
11 country has the highest (inaudible) church attendance? The South.
12 Oh, wait a minute. You mean there is not a correlation between these
13 things? No, there isn't. Um, in fact, there is an inverse correlation.
14 In those places where people go to church the least, the crime was the
15 most. And that's not just Sweden and the United States. That's
16 Pennsylvania and Georgia.

17 (Id. at 23.)

18
19 A reasonable observer would view the above statements as being primarily geared
20 towards expressing the view that rehabilitation works and punishment does not.
21 The Court recognizes that Corbett suggested his disapproval of religions or
22 religious views that support punishment and argued that religious societies that
23 focus on punishment do not effectively deter crime. Corbett was stating a
24 correlation between religion and a particular political view and then taking issue
25 with that political stance. The statements from which disapproval can be inferred
26 are only incidental and ancillary, however, to Corbett's primary political point
27 regarding crime and punishment.

1 something happens, and they find out that there are people on another
2 planet, six billion light years away, who don't look like us, worshipping
3 huge geckos. . . . You have (inaudible) people who are deep believers
4 and find out that maybe we're not so important. Aristotle was a
5 physicist. He said, 'no movement without movers.' And he argued
6 that, you know there sort of has to be a God. Of course that's
7 nonsense. I mean, that's what you call deductive reasoning, you
8 know. And you hear it all the time with people who say, 'Well, if all
9 of this stuff that makes up the universe is here, something must have
10 created it.' Faulty logic. Very faulty logic.

11 [T]he other possibility is it's always been here. Those are the two
12 possibilities: it [the universe] was created out of nothing or it's always
13 been here. Your call as to which one of those notions is scientific and
14 which one is magic. [Inaudible] the spaghetti monster behind the
15 moon. I mean, all I'm saying is that, you know, the people who want
16 to make the argument that God did it, there is as much evidence that
17 God did it as there is that there is a gigantic spaghetti monster living
18 behind the moon who did it.

19
20 Therefore, no creation, unless you invoke magic. Science doesn't
21 invoke magic. If we can't explain something, we do not uphold that
22 position. It's not, ooh, then magic. That's not the way we work.

23
24 Contrast that with creationists. They never try to disprove
25 creationism. They're all running around trying to prove it. That's
26 deduction. It's not science. Scientifically, it's nonsense.

1 (Farnan’s Ex. D, pp. 71-75, 81.)

2
3 Even if one could infer religious disapproval from the above comments, a
4 reasonable observer would find that the primary effect of Corbett’s statements
5 above was to distinguish generally accepted scientific reasoning from religious
6 belief and to illustrate a historical shift from religious to scientific thinking. For
7 example, in the first paragraph above, Corbett explained that people once believed
8 that the sun did not move in the sky because of a literal interpretation of the Bible.
9 He then suggested that we have learned through scientific study that the sun does
10 move through space. He also explained that people once thought we were literally
11 in the center of the Earth and were unaware that the Western Hemisphere existed.
12 He stated that “they didn’t approach truth,” indicating that Corbett believes that the
13 “truth” is that the sun is a moving object and that Jerusalem is not in the center of
14 the Earth.¹⁵

15 In Epperson, 393 U.S. at 102-03, the Supreme Court struck down statutes
16 forbidding the teaching of evolution in public schools, stating that the statutes were
17 unconstitutional even if they merely prohibited teachers from stating that the
18 theory of evolution is true. This was so even though the theory was contrary “to
19 the belief of some that the Book of Genesis must be the exclusive source of
20 doctrine as to the origin of man.” Id. at 107. Here, Corbett not only indicated that
21 the scientific principles were true, but also affirmatively suggested that the literal
22 interpretation of the Bible was not true. This goes one step beyond Epperson and
23 could be construed as expressing affirmative disapproval of religious beliefs.
24 Examining the full context of the discussion, however, a reasonable observer

25
26 ¹⁵ Similarly, he suggested that someday certain religious groups may be
27 “humbled” to discovery that we are not in the center of the universe.

1 would find that the statements had the primary effect of describing the
2 secularization in thinking over time due to increasing belief in scientific principles.

3
4 In the next three paragraphs quoted above, Corbett discussed the difference
5 between scientific reasoning and logical deduction and religious belief or faith.
6 Again, although one could possibly infer that Corbett was advocating generally
7 accepted scientific reasoning over religious belief or faith, a reasonable observer
8 would not find that this was the primary effect of the discussion. For example, in
9 discussing creationism, Corbett stated that “[s]cientifically, it’s nonsense.” Corbett
10 did not say that he thinks creationism is nonsense but that generally accepted
11 scientific principles do not logically lead to the theory of creationism. The Court
12 recognizes, however, that common sense dictates that people of a certain religious
13 faith may be offended by a comparison of their religion to “magic” and that this
14 could be construed as being derogatory. Nevertheless, the Court cannot find that
15 the primary effect of the lecture was to disapprove of religion.

16 Accordingly, the Court grants summary adjudication on the primary effect
17 prong of the Lemon test against Corbett with regard to Pelozza statement and in
18 favor of the School Defendants and the Unions with regard to all other statements.

19
20 3. Excessive Entanglement

21
22 The third prong of the Lemon test is satisfied if the challenged action does
23 not foster an excessive government entanglement with religion. Lemon, 403 U.S.
24 at 612-13.

25
26 Farnan correctly points out that “one of the factors we examine in
27 determining whether excessive entanglement has occurred is whether the

1 challenged governmental action caused citizens to divide along political lines.”
2 Farnan Mot. p. 18; Vasquez, 487 F.3d at 1258. Courts have found, however, that
3 “[t]he political divisiveness doctrine generally is applied only in cases involving
4 direct government subsidies to sectarian institutions.” Brown, 27 F.3d at 1383; see
5 also Vernon, 27 F.3d at 1401, citing Lynch, 465 U.S. at 684 (O’Connor, J.,
6 concurring) (stating that the entanglement inquiry seems to be applied mainly in
7 cases involving direct financial subsidies paid to parochial schools or to teachers in
8 parochial schools). This is not such a case. Therefore, the Court finds that the
9 political divisiveness doctrine does not demonstrate excessive entanglement.¹⁶

10
11 Farnan also argues that Corbett made statements in violation of the
12 Establishment Clause which were continual and incessant and the School District
13 “did nothing to lessen them.” (Farnan’s Mot. p. 18.) This Court agrees that the
14 excessive entanglement prong generally requires some degree of ongoing
15 entanglement. In Vernon, for example, the Ninth Circuit found no excessive
16 entanglement, explaining that the “plaintiff has presented no evidence at all to

17
18 ¹⁶ In addition, in American Family Association, the court explained that
19 “[p]olitical divisiveness, however, has never been relied upon as an independent
20 ground for holding a government practice unconstitutional.” Am. Family Ass’n,
21 Inc., 277 F.3d at 1123 (internal citations quotations omitted). The court further
22 explained that if a government statement or action involving a controversial issue
23 “were enough to create an Establishment Clause violation on entanglement
24 grounds, government bodies would be at risk any time they took an action that
25 affected potentially religious issues, including abortion, alcohol use, other sexual
26 issues, etc.” Id.

1 suggest that the challenged government action will be ongoing and continuous.”
2 Vernon, 27 F.3d at 1400. The court cited Walz v. Tax Commission of New York,
3 397 U.S. 664, 674-75 (1970), which stated that “the questions are whether the
4 involvement is excessive, and whether it is a continuing one calling for official and
5 continuing surveillance.” In Brown, the court found no excessive entanglement,
6 noting that “no future monitoring” would be necessary. Brown, 27 F.3d at 1384.

7
8 As discussed above, this Court has only found the Pelozza statement violative
9 of the First Amendment. Farnan might argue, however, that the deposition
10 testimony of Ryan Correll (“Correll”) demonstrates a pattern of continued
11 statements which are hostile to religion. Correll testified that he took Corbett’s AP
12 Art History class in 2002-2003. (Correll Depo., Farnan’s Ex. S, p. 9.) Correll
13 testified that Corbett stated “all you Christians can go to hell” during a class
14 period. (Id. at 32-33.) Correll further claimed that the statement was made in the
15 context of Corbett discussing “Christians and evangelism and, you know, people
16 trying to push their views on him . . . and his response to that.” (Id. at 33.)

17 The Court first notes that any statements made in the AP Art History class
18 are not themselves actionable in this case because Farnan, as the plaintiff in this
19 action, does not have standing as to those alleged statements. In Vasquez, the
20 Ninth Circuit explained that the plaintiffs in another case “had standing because
21 they were directly affected by the laws and practices against which their
22 complaints [were] directed.” Vasquez, 487 F.3d at 1251 (citation and internal
23 quotations omitted). Here, Farnan was not directly affected by Corbett’s alleged
24 statements made to an Art History class in 2002-2003.

25
26 However, even if one finds Correll’s testimony credible, that testimony
27 when combined with the Pelozza statement is not sufficient to demonstrate ongoing,
28

1 excessive entanglement.

2
3 Accordingly, this Court grants summary adjudication in favor of the School
4 Defendants and the Unions with respect to the excessive entanglement prong of the
5 Lemon test.

6
7 C. The District's Liability

8
9 Although the Court has found that one of Corbett's statements does not
10 satisfy the first and second prongs of the Lemon test, it does not necessarily follow
11 that the District is liable. The parties spend little time discussing the District's
12 liability in their briefs. Farnan contends that the District failed to take action to
13 prevent Corbett from making anti-religious statements. (Farnan's Opp. p. 9.) In
14 the FAC, Farnan alleges that the District's continued employment of Corbett
15 "convey[s] a governmental message that students holding religious beliefs are
16 outsiders and are not full members of the community." (FAC ¶ 24.) However,
17 Farnan has not presented sufficient evidence that the District conveyed such a
18 message. Nor has Farnan demonstrated that the District is liable pursuant to 42
19 U.S.C. § 1983.

20 Farnan has produced almost no evidence that the District was aware, prior to
21 this action, that Corbett made any statements hostile to religion. Tom Ressler
22 ("Ressler"), the Principal at Capistrano Valley High School in 2007, testified that
23 there was at least one complaint against Corbett by a parent which Ressler believed
24 was lodged prior to this action. (Ressler Depo. 26-29.) Ressler stated that there
25 could have been more complaints but he could not remember them. (Id.) Ressler
26 did not testify, however, that the complaint had any connection to religion. (Id.)
27 He merely explained that the complaint had to do with "the content of the class."

1 (Id.) In addition, Ressler explained that he believed that the complaint came
2 shortly before the filing of this lawsuit, stating that “[i]t was pretty close.” (Id.)
3 Given that there is no evidence that this complaint pertained to religion and that the
4 complaint apparently came shortly before the lawsuit was filed, the Court finds that
5 it is not sufficient to demonstrate that the District knew of any anti-religious
6 comments or that the District had time to take appropriate action prior to the filing
7 of the lawsuit.

8
9 Farnan also points to the Declaration of Lynley Rosa (“Rosa”), whose son
10 was enrolled in Corbett’s AP European History class during the fall of 2007.
11 (Rosa Decl. ¶ 4.) Rosa declares that she spoke to her son’s guidance counselor,
12 expressing concerns regarding statements made by Corbett. (Id. at ¶ 6.) She was
13 concerned because her son had told her that Corbett made statements “that
14 reflected hostile attitudes concerning conservatives and Republicans.”¹⁷ (Id. at ¶
15 5.)

16 The failure to respond to the above complaints, one of which was not
17 necessarily related to religion, is simply not sufficient to show that the District
18 conveyed a message hostile to religion or failed to satisfy the three prongs of the
19 Lemon test. This is particularly true given that the Court has found that only one
20

21 ¹⁷ This is not hearsay because Rosa’s testimony is offered to demonstrate
22 that Rosa complained to the school about Corbett’s comments and not as evidence
23 that Corbett actually made the statements. See Fed. R. Evid. 801. Rosa’s
24 testimony about the guidance counselor’s responsive comments, however, is
25 hearsay because Rosa is testifying as to what the counselor said to prove the truth
26 of the statements. See id.; Rosa Decl. ¶ 6.

1 statement did not satisfy the Lemon test. Thus, the District did not directly violate
2 the Establishment Clause.

3
4 Nor can the District be held vicariously liable for Corbett's statement
5 regarding Pelozo under 42 U.S.C. § 1983. "Liability under section 1983 arises
6 only upon a showing of personal participation by the defendant. There is no
7 respondeat superior liability under section 1983." Taylor v. List, 880 F.2d 1040,
8 1045 (9th Cir. 1989) (citations omitted). In addition "[a] supervisor is only liable
9 for constitutional violations of his subordinates if the supervisor participated in or
10 directed the violations, or knew of the violations and failed to act to prevent them."
11 Id. Rosa's complaint to the guidance counselor is not sufficient evidence that the
12 District knew of comments hostile to religion.

13
14 Although the School Defendants and the Unions did not directly argue the
15 above legal points regarding the District's liability, the Court finds that the relevant
16 facts and legal issues have been adequately ventilated. See Cool Fuel, Inc. v.
17 Connett, 685 F.2d 309, 311-12 (9th Cir. 1982). Thus, the Court grants summary
18 judgment in favor of the District.

19 IV. CONCLUSION

20
21 For the foregoing reasons, Farnan's motion for summary judgment is
22 granted against Corbett with respect to the Pelozo statement. The School
23 Defendant and the Unions' motions are granted with respect to all other statements
24 and with respect to the District's liability.¹⁸

25
26 ¹⁸ The Court need not address the Unions' Request for Judicial Notice. The
27 Unions submitted a copy of the CollegeBoard AP, European History Course

1
2
3 Afterword
4

5 This case reflects the tension between the constitutional rights of a student
6 and the demands of higher education as reflected in the Advanced Placement
7 European History course in which Farnan enrolled. It also reflects a tension
8 between Farnan’s deeply-held religious beliefs and the need for government,
9 particularly schools, to carry out their duties free of the strictures of any particular
10 religious or philosophical belief system. The Constitution recognizes both sides of
11 the equation.

12 AP courses encourage and test critical thinking. (Spradlin Decl. Ex. A, pp.
13 12, 19, 21 & passim; pagination per exhibit.) That necessarily involves conflict:
14 historical conflicts of many types, including conflicts between religion and
15

16
17 _____
18 Description in conjunction with the Declaration of Michael Hersh (“Hersh”).
19 (Hersh Decl. ¶ 2, Ex. 1.) Although the Declaration is not sworn and does not refer
20 to the penalty of perjury, the Court will nevertheless consider the Course
21 Description as evidence. In addition, the Court need not address the School
22 Defendants’ Objections to Plaintiff’s Evidence because the Court did not rely on
23 the evidence objected to in reaching this decision. Finally, the Court sustains
24 Farnan’s Objection to Defendants’ Reply to Plaintiff’s Response to Defendants’
25 SUF. Local Rules 56-1 and 56-2 do not authorize a party to submit a Reply to the
26 opposing party’s SUF.
27

1 government or competing philosophical belief systems,¹⁹ and conflicts in the
2 classroom as teachers and students work through those historical conflicts,
3 bringing their own thoughts and analysis to bear. Intellectual development
4 requires discussion and critique of a wide range of views. The Court's ruling today
5 reflects the constitutionally-permissible need for expansive discussion even if a
6 given topic may be offensive to a particular religion or if a particular religion takes
7 one side of a historical debate.

8
9 The decision also reflects that there are boundaries. In this case, the Court
10 has found that a single statement transgresses Farnan's First Amendment rights.
11 To entertain an exception for conduct that might be characterized as isolated or de
12 minimis undermines the basic right in issue: to be free of a government that
13 directly expresses disapproval of religion. The Supreme Court's comments with
14 regard to governmental promotion of religion apply with equal force where the
15 government disapproves of religion:

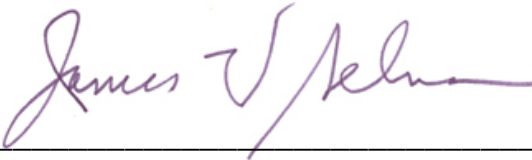
16 [I]t is no defense to urge that the religious practices here may be
17 relatively minor encroachments on the First Amendment. The breach
18 of neutrality that is today a trickling stream may all too soon become a
19 raging torrent and, in the words of Madison, 'it is proper to take alarm
20 at the first experiment on our liberties.'

21
22 ¹⁹ E.g., changes in religious thought and institutions; secularization of
23 learning and culture; changes in elite and popular culture, such as the development
24 of new attitudes toward religion, family, and work; changing definitions and
25 attitudes toward social groups, classes, races, and ethnicities. (Spradlin Decl., Ex.
26 A, pp. 12-13; pagination per exhibit.)
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2 School Dist. of Abington, 374 U.S. at 225; see also Elk Grove Unified School Dist.
3 v. Newdow, 542 U.S. 1, 36-37 (2004) (O’Connor, J., concurring) (explaining that
4 “[t]here are no de minimis violations of the Constitution”); Lee v. Weisman, 505
5 U.S. 577, 594 (1992).²⁰

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7 The ruling today protects Farnan, but also protects teachers like Corbett in
8 carrying out their teaching duties.

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10 DATED: May 1, 2009

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13 JAMES V. SELNA
14 UNITED STATES DISTRICT JUDGE

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²⁰ Village Church v. Village of Long Grove, 468 F.3d 975, 995 (7th Cir.
24 2006), is not to the contrary. The Seventh Circuit merely held that the third Lemon
25 prong, excessive entanglement, must be more than de minimis. However, to pass
26 muster under Lemon, conduct must satisfy each prong of the test. Here it does not.
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12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

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

18 Plaintiff,

19 v.

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

23
24 Defendants.

25 CALIFORNIA TEACHERS
26 ASSOCIATION/NEA; and CAPISTRANO
UNIFIED EDUCATION ASSOCIATION,

27 Union Intervenors/Defendants.
28

CASE NO.: SACV07-1434-JVS (ANx)

**REPRESENTATION STATEMENT OF
DEFENDANT DR. JAMES CORBETT**

1 The undersigned represent DR. JAMES CORBETT, defendant and appellee in this matter,
2 and no other party. The following is a list of all of the parties to the action and the information
3 regarding their respective counsel. *See* F.R.A.P. 12(b); *see also* Ninth Circuit Rule 3-2(b).

4 **Plaintiff CHAD FARNAN, a minor,**
5 **by and through his parents, BILL FARNAN and TERESA FARNAN**

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28 **CAPISTRANO UNIFIED EDUCATION ASSOCIATION**

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DATED: October 26, 2009

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DATED: October 26, 2009

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CERTIFICATE OF SERVICE

I, J. Craig Johnson, hereby certify that on October 26, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record. Furthermore, I served the foregoing to all counsel of record by electronic mail.

DATED: October 26, 2009

TENNER JOHNSON LLP

By: /s/ J. Craig Johnson
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